

# Corporations, Contracts, and the Misguiding Contradictions of Conservatism

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## I. INTRODUCTION: SYMPTOMS OF THE MODERN MALADY

Chip was struck by the broad similarities between black-market Lithuania and free-market America. In both countries, wealth was concentrated in the hands of a few; any meaningful distinction between private and public sectors had disappeared; captains of commerce lived in a ceaseless anxiety that drove them to expand their empires ruthlessly; ordinary citizens lived in ceaseless fear of being fired and ceaseless confusion about which powerful private interest owned which formerly public institution on any given day; and the economy was fueled largely by the elite's insatiable demand for luxury.

Jonathan Franzen, *The Corrections*<sup>1</sup>

Jonathan Franzen's description of modern life resonates profoundly as a portrait of the muddled convergence of political, legal, and economic forces in free-market America. The situation causes me pervasive unease, "ceaseless anxiety," in Chip Lambert's terminology,<sup>2</sup> regarding its effect on the ability of ordinary citizens to ac-

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<sup>1</sup> JONATHAN FRANZEN, *THE CORRECTIONS* 443-44 (2001).

<sup>2</sup> Chip is not the only Lambert so affected. Gary Lambert's every thought and feeling, even about his wife and children, comes to him in market-metaphor terms. For example, one Sunday afternoon, as Gary Lambert enters his new darkroom to engage in his new hobby, "[h]e had a spring in his step, an agreeable awareness of his above-average height and his late-summer suntan. His resentment of his wife, Caroline, was moderate and well contained. Declines led advances in key indices of paranoia (e.g., his persistent suspicion that Caroline and his two older sons were mocking him), and his seasonally adjusted assessment of life's futility and brevity was consistent with the overall robustness of his mental economy." *Id.* at 139-40. The

cess their legal system and to control their political and economic destinies.<sup>3</sup> What are the causes of our sense of alienation from the institutions that are supposed to exist to serve us? My thought is this: the modern conservative<sup>4</sup> agenda, which has steered national policy, academic discourse, and judicial decision-making in the areas of corporation, contract, and consumer law for two decades, crushes the potential of individuals to assert their interests and to act collectively as a countervailing power<sup>5</sup> to the self-serving, self-perpetuating corporate institutions that govern modern life.

Consider the following case studies, the details of which will be discussed throughout this Article:

**THE CORPORATE SIDE:** Examination of two cases on the corporate side reveals the sharp divergence between private and public interest, starkly visible when the curtain of unbridled corporate prerogative is lifted. Both cases concern publicly-held firms that began as energy companies whose CEOs envisioned broad expansion and unlimited wealth creation. The cases run parallel to this point, but diverge at the juncture at which, in one case, the transparency mandated by regulation opens a window on the decision-making of management and its effect on shareholder and consumer welfare, causing regulators to intervene.

*Unregulated business:* The first case, which concerns unregulated business run amok, could be drawn from any of a dozen recent instances of large, publicly-owned corporations whose CEOs and upper

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novel's title is itself a bright, multifaceted metaphor that derives one of its meanings from what financial markets do when they fall out of balance.

<sup>3</sup> *But see* Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 898 (1995) (book review).

As a societal decisionmaking norm, the economic freedom to pursue wealth does more than just expand the economic pie. A legal system that pursues wealth maximization [through freedom of contract] necessarily allows individuals to pursue the accumulation of wealth. Economic liberty, in turn, is a necessary concomitant of personal liberty. . . . [T]he modern public corporation has become a powerful engine for focusing the efforts of individuals to maintain the requisite sphere of economic liberty.

*Id.* (paragraph structure omitted).

<sup>4</sup> As George Nash noted, there is no "compact definition of conservatism" and yet there exist "alignments" which can be identified and described with accuracy. GEORGE H. NASH, *THE CONSERVATIVE INTELLECTUAL MOVEMENT IN AMERICA SINCE 1945*, at xiii (1976). For a cogent discussion of the difficulties of defining conservatism, see Jerry Z. Muller, *Introduction to CONSERVATISM: AN ANTHOLOGY OF SOCIAL AND POLITICAL THOUGHT FROM DAVID HUME TO THE PRESENT* (Jerry Z. Muller ed., 1997) [hereinafter CONSERVATISM].

<sup>5</sup> The term "countervailing power" was coined in JOHN KENNETH GALBRAITH, *AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER* 111 (rev. ed. 1956).

management have engaged in self-dealing, conflicts of interest, and fraud, right under the noses of their internal governing boards, while an underfunded<sup>6</sup> Securities and Exchange Commission stood idly by. But the best example to illustrate the themes of this Article is Enron, because as a powerful and successful lobbyist for deregulation of the energy market,<sup>7</sup> the company virtually defined laissez-faire ideology in the 1980s and 1990s.<sup>8</sup>

In its thirteen-year existence, Enron seemed uniquely capable of bedazzling politicians, policy-makers, banks, accountants, law firms, analysts, and investors with its blend of cutting-edge business strategy,<sup>9</sup> huge amounts of capital,<sup>10</sup> and good old-fashioned influence-peddling. Because Enron's demise caused devastating financial losses throughout the global economy,<sup>11</sup> it stands as its own compelling ar-

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<sup>6</sup> Critics of both political parties say the SEC was underfunded for years. Chuck Neubauer, *Bush to Request SEC Budget Hike*, L.A. TIMES, Jan. 12, 2003, at 18. In November 2002, the House Republican leadership passed a continuing resolution providing roughly \$300 million less in SEC funding than the \$776 million authorized by the Sarbanes-Oxley Act. *Frank Set to Provide Combative Voice at Financial Services*, NAT'L JOURNAL'S CONG. DAILY, Nov. 14, 2002. The 2002 fiscal year budget was \$438 million. Neubauer, *supra*. The Senate Appropriations Committee approved \$750 million in fiscal 2003 for the SEC, but the House Appropriations Committee took no action in 2002. As of March 24, 2003, Congress still had not passed spending for most of the 2003 budget, including the SEC's funds; the administration has requested \$568 million. *Id.* The SEC proposed a budget of \$841.5 million for fiscal 2004, but Congress cut it by \$30 million because the agency had not hired new employees quickly enough. *Cut Proposed for SEC Budget; Hiring Delays Are Cited for the Reduction*, L.A. TIMES, Dec. 2, 2003, at C4. The Bush Administration's fiscal 2005 budget proposes \$893 million for the SEC, double the 2002 budget. Kathleen Day, *Budget Plan Includes More for SEC, Mortgage Overseer*, WASH. POST, Feb. 3, 2004, at E1.

<sup>7</sup> See Kurt Eichenwald, *Audacious Climb to Success Ended in a Dizzying Plunge*, N.Y. TIMES, Jan. 13, 2002, at A1 ("Beginning in the early 1990's, Enron pursued its campaign for energy deregulation by hiring dozens of Washington's most influential lobbyists and showering Democrats and Republicans on Capitol Hill with large campaign contributions.").

<sup>8</sup> See Robert Kuttner, *Enron: A Powerful Blow to Market Fundamentalists*, BUS. WK., Feb. 4, 2002, at 20 ("Enron epitomized an entire philosophy about the supposed self-cleansing nature of markets.").

<sup>9</sup> The Enron business model rested on the belief that ideas that make millions in one commodity could be transferred to another, with the same lucrative result. Eichenwald, *supra* note 7. Enron thus expanded its natural gas business to include electricity, steel, weather, wood pulp, advertising, insurance, and internet commodities, becoming one of the biggest e-commerce companies in the world. *Id.*

<sup>10</sup> By 1995, Enron controlled one-fifth of the North American natural gas market. *Id.* In its "golden years," its annual revenues reached \$100 billion. *Id.* By the end of 1999, Enron had become the seventh largest company on the Fortune 500 list. Bethany McLean, *Why Enron Went Bust*, FORTUNE, Dec. 24, 2001, at 58.

<sup>11</sup> Enron's collapse was felt far from Washington. In Japan, for example, "the company's woes triggered billions of dollars of withdrawals from money market funds that had invested heavily in Enron stock. In India, a deal to sell a huge power plant that was built as part of the company's expanding overseas empire has fallen

gument for ex ante regulation,<sup>12</sup> both private and public,<sup>13</sup> of publicly-held companies.<sup>14</sup>

Several aspects of the Enron case illustrate the themes of this Article. First, the company's relentless, manic drive for growth caused its decision-makers, from top management on down, to lose sight of the corporate mission, the interests of the shareholders, and, ultimately, its reason for existing in the first place, its customers.<sup>15</sup> Although entirely predictable, given the unchecked self-interest behind Enron's rapid expansion, its demise appeared, superficially, to take Washington politicians by surprise, prompting them to pass hastily

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apart." Eichenwald, *supra* note 7.

<sup>12</sup> Ex ante regulation occurs prospectively, when government promulgates a regulatory scheme to promote economic, equitable, or social aims. Joseph P. Tomain, *Networking Industries Gov. Reg.*, 48 U. KAN. L. REV. 829, 831 (2000) [hereinafter *Networking*]. More broadly, "[e]x ante analysis is a form of prospective or policy argumentation. The primary question posed is: What will the effects of a rule or decision be? Ex ante analysis is contrasted with ex post analysis which attempts to resolve a past dispute between parties." Joseph P. Tomain, *Contract Compensation in Nonmarket Transactions*, 46 U. PITT. L. REV. 867, 877 n.27 (1985).

<sup>13</sup> Of the two forms of corporate governance regulation promulgated recently, the private form, including the New York Stock Exchange and NASDAQ standards, more directly and effectively addresses the root problem of corporate malfeasance by emphasizing self-control and self-governance rather than external governance. See *infra* notes 230-49 and accompanying text.

<sup>14</sup> For example, here is a breakdown of Enron-caused losses in a small sampling of pension funds:

Entity	Loss in millions
Florida state board of administration	\$335
University of California regents	\$144
Georgia state pension fund	\$127
Ohio state pension fund	\$114
New York City pension fund	\$109
Other institutions	\$447

Leslie Wayne, *Enron's Many Strands: Fallout*, N.Y. TIMES, Jan. 27, 2002, at A32.

<sup>15</sup> Greed, favoritism, cover-ups, and unethical practices created a culture of "anything goes."

The multi-layered system of checks-and-balances . . . completely broke down. Executives of public companies have legal and moral responsibilities to produce honest books and records. . . . Outside auditors are supposed to make sure that a company's financial reports not only meet the letter of accounting rules but also give investors and lenders a fair and accurate picture of what's going on. . . . [L]enders are supposed to make sure borrowers are creditworthy. . . . Wall Street analysts are supposed to dig through company numbers to divine what's really happening. . . . Regulators didn't regulate, Enron's board of directors didn't direct.

Allan Sloan, *Who Killed Enron?*, NEWSWEEK, Jan. 21, 2002, at 18.

drafted legislation to address symptoms of a deeper, culturally-rooted disease.<sup>16</sup> Arrogance and greed had handily overwhelmed what, according to conservative theory, is supposed to be the prime motivator of corporate conduct—shareholder primacy.<sup>17</sup>

Another aspect of the Enron debacle deserving attention is the message it communicates respecting the critical role of both private and public regulation in promoting and sustaining healthy economies. On many levels, the Enron case served as a laboratory for American conservative economic and political theories, which had been developing since the 1960s.<sup>18</sup> Enron bought deregulation, then exploited the weaknesses the absence of those rules created. Appealing to the “rational self-interest” of all with whom it dealt, management created a rotating “garden” of fruitful conflicts of interest to be harvested when ripe. Enron and similar recent corporate “meltdowns” suggest several observations:

- modern conservatives’ claims that deregulation and pro-merger Efficiency Doctrine is good for the economy generally and consumers in particular are contradicted by both the lessons of history and an abundance of fresh evidence, and work to undermine the core values conservatives profess to hold dear;
- when corporations focus on their continued existence, rather than on the reason for their existence, excessive profit motive comes to dominate the corporate mission, and fair treatment of shareholders, employees, and consumers becomes, at most, a peripheral afterthought.

*Regulated business:* The second illustrative case on the corporate side provides a revealing glimpse behind the scenes of a publicly-held company whose management attempted, in the lexicon of Chip Lambert, ruthlessly to build an empire. In this case, however, the company’s ambitious CEO faced unexpected hurdles in the form of a statutorily-created consumer organization [CURB]<sup>19</sup> and a state corporation commission that took its job seriously.

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<sup>16</sup> Although greed and corruption “have always lingered at the edges of Corporate America . . . [the] ‘extreme greed at the top is new,’” according to management expert Peter Drucker. Gary Strauss, *How Did Business Get So Darn Dirty?*, USA TODAY, June 12, 2002, at 1B.

<sup>17</sup> See *infra* notes 250-97 and accompanying text.

<sup>18</sup> See *infra* notes 88-133 and accompanying text.

<sup>19</sup> The Kansas Citizens Utility Ratepayer Board (“CURB”) consists of five members appointed by the governor and employs a consumer counsel. KAN. STAT. ANN. § 66-1222(a) (2002). CURB’s counsel is empowered to represent residential and small commercial ratepayers before the commission, initiate actions before the commission, and intervene in formal complaints affecting ratepayers. *Id.* § 66-1223.

In 1995, a midwestern company hired an ambitious “new economy” takeover expert, a Wall Street Golden Boy,<sup>20</sup> to transform it from a financially stable utility concern, Western Resources, Inc., into an aggressive engine of acquisition in order to position it for an increasingly competitive deregulated energy market. The CEO’s Enron-esque vision included simultaneous aggression on dual fronts: expand the energy holdings and diversify into unregulated industries<sup>21</sup> in an effort to position the company for the transition into a deregulated future.

Despite the efforts of the hard-driving new CEO, the company’s efforts to diversify hit a series of snags, as the state corporation commission held hearings on a proposed merger with a neighboring utility company, acquisitions of various unregulated concerns, and a complicated restructuring proposal.<sup>22</sup> The state corporation commission focused on a single statutorily-defined issue:<sup>23</sup> whether the planned merger would be in the public interest. Annoyed by the detailed public investigations, a company official announced that the company would “not tolerate additional financial restrictions placed on our company . . . .”<sup>24</sup> By law, however, the company had no

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<sup>20</sup> David C. Wittig came to Western Resources as a vice president in 1995 from Salomon Brothers in New York, where he had been co-head of mergers and acquisitions. *Western Resources’ Wittig Finds Kansas Like Wall Street*, BLOOMBERG NEWS, May 10, 1996 [hereinafter *Wall St.*]. Wittig, a Kansas native and graduate of the University of Kansas, had served as a poster boy for the takeover mania of the 1980s, having been featured on the cover of *Fortune* magazine in 1986. *Id.* Despite his Kansas roots, Wittig was regarded, suspiciously, as a New York export by Kansans, one of whom referred to him bitterly as “the wheeler-dealer whiz kid from back East.” Virgil J. Hallauer, Letter to the Editor, TOPEKA CAP.-J., Feb. 5, 2002.

<sup>21</sup> The strategy was to acquire deregulated home services businesses, which have a natural link to the provision of utilities, such as electricity, so that both could be distributed through the same system. Charles V. Bagli, *ADT vs. Chase: Testing Limits of Bank’s Role in Takeovers*, N.Y. TIMES, Feb. 22, 1997, at A35.

<sup>22</sup> See Jim McLean, *KCC Bars Western Restructuring*, TOPEKA CAP.-J., Oct. 4, 2001, at A7; Jim McLean, *Groups Spar Over Western Restructuring*, TOPEKA CAP.-J., June 27, 2001, at A1; Jim McLean, *Hearing Tests Western*, TOPEKA CAP.-J., May 29, 2001, at A1; Jim McLean, *Western Merger Collapses; KCPL Cites Stock Price, Ends Deal*, TOPEKA CAP.-J., Jan. 4, 2000, at A1; Jim McLean, *Graves’ Touch Felt in Western Negotiations*, TOPEKA CAP.-J., May 24, 1999; Associated Press, *Second Consultant: Utility Merger Would Be Bad for Customers*, TOPEKA CAP.-J., May 14, 1999. See generally Docket 01-WSRE-949-GIE, Western Resources, Inc. d/b/a Westar Energy [hereinafter *2001 Docket*], available at <http://kcc.state.ks.us/docket/cal.html?history=closed&fiscal=2000> (last visited Mar. 31, 2004).

<sup>23</sup> See KAN. STAT. ANN. §§ 66-101 to -1,238 (2002). The statutory scheme grants broad authority to the Kansas Corporation Commission to “supervise and control the electric utility companies” of the state. *Id.* § 66-101; see *Restructuring Watch: Kansas Commission Probes Merger’s Retail Market Power*, ELEC. J., Dec. 1997.

<sup>24</sup> *Kansas Regulators Examine Merger Deal*, THE ENERGY REP., Aug. 9, 1999.

choice.

In the end, the corporation commission denied the company authority to restructure.<sup>25</sup> The commission characterized the proposal as an attempt to shift equity from the solvent utilities businesses to the insolvent deregulated businesses, which would, in effect, impose the debt burden on energy buyers.<sup>26</sup> The commission's exhaustive analysis of the company's proposed transactions from the perspective of the ultimate consumers of its services, individual and industrial purchasers,<sup>27</sup> starkly illuminated the divergence of the interests at stake. Western asserted that it had to expand rapidly to remain competitive in the new market;<sup>28</sup> the Commission disagreed, finding that the company was already over-earning, making ill-advised business decisions, and measurably harming consumer interests.<sup>29</sup> The com-

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<sup>25</sup> On May 22, 2001, the Kansas Corporation Commission issued an order stating that an allocation agreement between Western and its wholly owned subsidiary, Westar Industries, Inc., was contrary to the public interest and enjoined Western from taking any action that would increase the company's debt. See Supplemental Order, May 22, 2001, *2001 Docket, supra* note 22, at 7-8, available at <http://www.kcc.state.ks.us/scan/200105/20010522140205.pdf> (last visited Mar. 31, 2004).

<sup>26</sup> See Order for Western Resources to Permanently Halt Restructuring and Affirming the May 22, 2001 Order, July 20, 2001, *2001 Docket, supra* note 22, at 10-13 [hereinafter July 20, 2001 Order] (finding the proposed split-off of the regulated from unregulated businesses would have direct effect of placing Westar debt on the electric businesses and diminish the value of Western Resources, thus affecting ratepayers adversely), available at <http://www.kcc.state.ks.us/scan/200107/20010720164834.pdf> (last visited Mar. 31, 2004).

<sup>27</sup> Interveners in the case included the City of Wichita, a school district, Goodyear Tire Co., and Kansas Industrial Consumers. See, e.g., Petition for Intervention by the Goodyear Tire & Rubber Company, *2001 Docket, supra* note 22 (filed June 4, 2001), available at <http://www.kcc.state.ks.us/scan/200106/20010604154321.pdf> (last visited Mar. 31, 2004); Petition for Intervention by Kansas Industrial Consumers, *2001 Docket, supra* note 22 (filed May 29, 2001), available at <http://www.kcc.state.ks.us/scan/200105/20010530101119.pdf> (last visited Mar. 31, 2004); Petition to Intervene by Unified School District No. 259, *2001 Docket, supra* note 22 (filed May 25, 2001), available at <http://www.kcc.state.ks.us/scan/200105/20010529104346.pdf> (last visited Mar. 31, 2004); Petition for Leave to Intervene by the City of Wichita, *2001 Docket, supra* note 22 (filed May 22, 2001), available at <http://www.kcc.state.ks.us/scan/200105/20010522101753.pdf> (last visited Mar. 31, 2004).

<sup>28</sup> See Jim McLean, *Western's Boss Warns of Crisis*, TOPEKA CAP-J., May 17, 2001, at A1.

<sup>29</sup> See July 20, 2001 Order, *supra* note 26.

<sup>30</sup> See Robert Frank & Rebecca Smith, *Power Outage: Highflying CEO Brings Scandal to Topeka's Westar*, WALL ST. J., Feb. 21, 2003, at A1. CURB forced Western Resources to produce its logs for the company's fleet of planes. Though the logs were not made public, the popular perception was that Western's executives were "jetting around at ratepayers' expense." Bernard Condon, *Image Problem: Dealmaker David Wittig Returned to Kansas as a Hero. No More.*, FORBES, July 9, 2001, at 66. "Are customers paying for multi-million dollar salaries, mansions, and corporate jets?" asked

pany did not bolster its case when in the midst of plummeting stock prices its executives were drawing multi-million dollar salaries, jetting across the country in newly-purchased aircraft, and generally appearing to live the high life on the backs of the energy-using public.<sup>30</sup>

When considered alongside the Enron case, this case suggests the following themes:

- although the “public interest”<sup>31</sup> is currently not a popular

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Wichita’s mayor Bob Knight. *Id.* Western’s CEO received total compensation in 1999 of \$8.1 million, and in 2000, \$3.8 million, plus a generous golden parachute. *Is Western Resources Another Enron?*, THE ELEC. DAILY, Feb. 19, 2002.

<sup>31</sup> I am defining public interest as an interest held commonly by a substantial percentage of citizens. It does not make much difference whether such a commonly-held interest is viewed as an aggregation of individual interests or as a concept of “general welfare,” distinct from aggregated individual interests. See Cheryl D. Block, *Overt and Covert Bailouts: Developing a Public Bailout Policy*, 67 IND. L.J. 951, 993-99 (1992). Provision of necessities such as electricity at affordable prices is a “public interest” under either definition. The point is that individual interests must be compiled, analyzed, and represented in some manner, as against aggregated private interests in corporate form. See generally GLENDON SCHUBERT, THE PUBLIC INTEREST: A CRITIQUE OF THE THEORY OF A POLITICAL CONCEPT (1960); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

The United States Supreme Court has recognized as being “affected with a public interest” diverse businesses such as restaurants, urban housing, inns, carriers, telephone companies, drug stores, hospitals, gas and electricity providers, and businesses involving patented processes. See *Bell v. Maryland*, 378 U.S. 226, 253-55 (1964); *Lombard v. Louisiana*, 373 U.S. 267, 275-78 (1963) (Douglas, J., concurring); *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 815 (1945).

<sup>32</sup> As Robert Kuttner observes:

for three decades now, the dominant strain of economics from the University of Chicago has been teaching gullible undergraduates and journalists that there is no such thing as the public interest. Efficient outcomes are just the aggregation of selfish private interests, and government’s main job is to get out of the way.

Kuttner, *supra* note 8. To some extent, of course, law is like fashion, subject to popular currents. See Robert A. Hillman, “*The New Conservatism*” in *Contract Law and the Process of Legal Change*, 40 B.C. L. REV. 879, 886-87 (1999) (arguing that capacity of common law to reflect changes in public opinion demonstrates a healthy legal system).

<sup>33</sup> Today’s legal scholars, particularly in the corporate law area, challenge the usefulness of the concept of “the public interest.” As Helen A. Gartan noted in *Regulatory Scholarship in the Law School*, 51 RUTGERS L. REV. 911 (1992),

the standard scholarly critique of regulation [is that it is] either obsolescent or economically irrational. . . . The standard critique posits that most regulation is not a public-regarding response to market failure but a deliberate interference with efficiently functioning markets. Why then is regulation enacted? Legislators may have mistakenly believed that they were serving the public interest, but most legal scholars view regulation more darkly, treating it as the product of successful rent-seeking by special interest groups who use the political process to profit from regulatory-induced market failure.

*Id.* at 913.

concept,<sup>32</sup> legally<sup>33</sup> or culturally, it exists without regard to popularity or recognition and, despite conservatives' unproven yet fervently asserted claims to the contrary, it does not somehow take care of itself in a free, unregulated marketplace;

- internal corporate governance structures, most notably corporate boards, frequently fail to govern at all, leaving executives unaccountable, management decisions unreviewed,<sup>34</sup> and corporate conduct out of control;<sup>35</sup> and
- when an external, objective body investigates facts surrounding corporate behavior, the truth emerges—corporate maneuvers often are not about “better business” or fostering healthy competition; they are not even about shareholder benefit; rather, they are about amassing wealth and power for corporate management, only secondarily about shareholder concerns, and infrequently, if at all, concerned with consumers, the constituency that ultimately supports corporations' existence.

**THE CONSUMER SIDE:** This third case is fungible to the extent it mirrors a myriad of others<sup>36</sup> in which a small, non-consumer plaintiff

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<sup>34</sup> For a discussion of recent reforms in this area, see *infra* notes 230-32 and accompanying text.

<sup>35</sup> Frank Meyer's phrase for the phenomenon was “laissez-faire anarchy.” FRANK S. MEYER, IN DEFENSE OF FREEDOM AND RELATED ESSAYS 6 (1996). Meyer did not endorse the concept that unfettered capitalism would lead to that result. He used the term in an essay titled *Collectivism Rebaptized* in which he accused the New Conservatives of the 1950s of joining collectivists and statist in promoting the “welfare society.” *Id.* at 3-13. Meyer considered an unregulated economic system—as opposed to the Keynesian model of a state-controlled system—a necessary element for preservation of freedom. *Id.* at 137.

<sup>36</sup> As Professor Stewart Macaulay succinctly sums up the position of the smaller plaintiff in recent years, whereas once law students “believed that a lawyer, armed only with reason, can champion the weak and overcome the powerful,” now “the hill is steeper and harder to climb.” Stewart Macaulay, *Almost Everything I Did Want to Know About Contract Litigation: A Comment on Galanter*, 2001 WIS. L. REV. 629, 635-36.

<sup>37</sup> See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97-98 (1974) [hereinafter Galanter, *The Haves*] (stating that repeat players are actors “who are engaged in many similar litigations over time,” such as insurance companies and prosecutors, who have low stakes in any one case and the resources to pursue their long run interests). Professor Galanter now divides the players into the “uphill cluster,” defined as cases brought by individuals against organizations, and the “downhill cluster,” defined as cases typically brought by plaintiff organizations against organizational or individual defendants. Marc Galanter, *Contract in Court; or Almost Everything You May or May Not Want to Know About Contract Litigation*, 2001 WIS. L. REV. 577, 592-93.

attempts to press a claim for economic damages against a large, repeat-player corporation<sup>37</sup> that has unilaterally injected a boilerplate form “contract” into the transaction. Notably, the case involves an independent, small businessman, a nostalgic symbol to traditional political conservatives<sup>38</sup>—a farmer—who goes head-to-multi-head with an international corporation in a battle over a defective farm implement.<sup>39</sup>

In *Limestone Farms*, a farmer acquired a new John Deere planter for his farm. The dealership represented the planter as new and suitable for the farmer’s particular needs, and told the farmer that the planter carried a good manufacturer’s warranty from Deere & Com-

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<sup>38</sup> The following exchange at a 1999 GOP debate in Iowa epitomizes conservative nostalgia regarding the family farm:

BROKAW: [A]s so much of the American economy is moving to the economy of scale these days—we used to [have] mom-and-pop shoe stores and men’s clothing stores on main streets and little drug stores, now we’ve got Costco and Wal-Mart and all the other big stores—why should the family farm . . . be any more protected than the corner drug store or the mom-and-pop store, or the little grocery store that we used to find on Main Street?

ALAN KEYES: It has actually been the case since the republic was founded, that the family farm, from Jefferson all the way forward, has been understood as one of the bedrock sources of the moral character of this nation, of the sense of the combination of individuality and commitment to community; the ability to shoulder hard work, at the same time that you value the achievements of individuals in the context of their contribution to family and community. . . . That sense of individualism that also knows how to dedicate itself to the good of others, has been born and has been nurtured and has been sustained in America’s family farming sector. We lose the family farm, and we lose the nursery of America’s moral character. We can’t afford that. And I think we therefore have a stake that goes beyond money. It goes beyond food. . . . It’s a question of America’s moral decency.

*The Iowa Debate* (Dec. 13, 1999), at <http://www.gwu.edu/~action/primdeb/primdeb1213t.html> (last visited Mar. 31, 2004). *But see* Jim Chen, *The American Ideology*, 48 VAND. L. REV. 809 (1995) (stating that modern farmers deserve to experience the lessons of the free marketplace after having been supported by government subsidies for decades).

<sup>39</sup> *See* *Limestone Farms, Inc. v. Deere & Co.*, 29 P.3d 457 (Kan. 2001). In the interests of full disclosure, it should be noted that the author was plaintiffs’ counsel in the case.

<sup>40</sup> Brief for Appellant at 5-6, 8, *Limestone Farms*, 29 P.3d 457 (No. 00-85278A) [hereinafter Brief]. Thus the seller expressly warranted the planter. An express warranty is created by “[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain.” KAN. STAT. ANN. § 84-2-313(a) (1996) (codifying U.C.C. § 2-313(a)). Additionally, “[a]ny description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.” U.C.C. § 2-313(b) (2002).

pany.<sup>40</sup> When the farmer took the planter to the field, it proved immediately and disastrously defective.<sup>41</sup> As a result of two hydraulic deficiencies, it failed to inject seed beneath the soil, instead dropping it on the surface of the ground.<sup>42</sup> Over the next two months, covering as best he could, the farmer repeatedly attempted, unsuccessfully, to get assistance from the dealership and the manufacturer. When the manufacturer's corporate representatives eventually showed up at the farm, they were overheard laughingly referring to farmers as "stupid."<sup>43</sup> As a result of the planter's serious defects, the farmer suffered incidental<sup>44</sup> and consequential damages<sup>45</sup> of half a million dollars.<sup>46</sup>

Relying on pertinent UCC provisions, the farmer and his farm company brought suit against the dealer and manufacturer, alleging breach of express warranties<sup>47</sup> and failure of the essential purpose of the warranty.<sup>48</sup> Based on the terms of a boilerplate purchase order, which the manufacturer required the dealership to use, but which the farmer never saw, the state trial court granted summary judgment to the defendants.<sup>49</sup> Calling upon formalist privity requirements and

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<sup>41</sup> Brief, *supra* note 40, at at 12.

<sup>42</sup> *Id.* at 11-12.

<sup>43</sup> *Id.* at 23.

<sup>44</sup> The Uniform Commercial Code ("UCC") defines incidental damages as "expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach." U.C.C. § 2-715(1) (2002).

<sup>45</sup> Consequential damages include "any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise." *Id.* § 2-715(2)(a).

<sup>46</sup> Brief, *supra* note 40, at 24.

<sup>47</sup> *See id.* at 1.

<sup>48</sup> *See* KAN. STAT. ANN. § 84-2-719(b)(2) (1996).

<sup>49</sup> The farmer and his land lessor had agreed the latter would pay for the planter initially, and the farmer would repay the lessor the full purchase price within a month or two, as soon as his LLC was formed and could do business, which the farmer did two months later. Brief, *supra* note 40, at 3, 9-10. The dealership's owner, who fully understood the purchase arrangement, visited the lessor's representative to pick up the check for the planter, and had the representative sign the purchase order, the boilerplate terms of which directly contradicted representations made to the farmer. *Id.* at 5-6, 8.

<sup>50</sup> The court's approach contravenes the policy behind the UCC, which encourages courts to look beyond the four corners of sales documents to understand the true intent of the parties involved in a transaction. *See* U.C.C. § 2-202 (codified at KAN. STAT. ANN. § 84-2-202 (1996)) (stipulating that written agreements may be explained or supplemented by oral evidence regarding course of dealing or course of performance). Reversing the common law, the UCC establishes a presumption that a writing is not integrated. *Id.* cmt. 2. The course of actual performance of an agreement is deemed the best indication of what the parties intended the writing to

four-corners contract principles, the court refused to consider the actual terms of the negotiation,<sup>50</sup> leaving the farmer to absorb the economic losses. The court of appeals affirmed.<sup>51</sup> The farmer's case illustrates the following:

- despite conservatives' claims to the contrary, when economic power is concentrated in large corporations, the free marketplace, driven by Efficiency Doctrine, does not protect consumer rights;
- individuals and groups could serve as effective countervailing forces against corporate overreaching, but cannot presently do so because the law, influenced by conservative theory, disfavors them.

Examining these cases and their themes along the way, this Article seeks to explore the negative impact of modern American conservatism on corporation, contract, and consumer law over the last two decades. It differs from other recent scholarship in that it does not start from the premise that the root of the recent corporate crises is the inadequacy of the securities laws, although those inadequacies certainly have been demonstrated. Rather, it posits that conservatives' enthrallment with laissez-faire ideology has steered the development and application of doctrine in these three substantive areas, which profoundly affects the legal relationships among actors from the retail counter to the corporate boardroom. This dynamic results, paradoxically, in a diminution of individual economic freedom, the power of self-determination, and institutional accountability, values conservatives claim they want to promote.

First, the Article summarizes the history of American conservatism, emphasizing how political expedience and the allure of personal profit has turned a traditional philosophy on its head in this arena. This section concludes that many modern conservatives appear to have abandoned bedrock conservative principles in service of an economic model that subverts their professed values, including virtue, the fair treatment of individuals according to merit, and the primacy of individuals over institutions. Their principal explanation for this apparent contradiction between belief and conduct—that such values are appropriately and sufficiently nurtured in intermediate institutions, such as community, schools, churches, and “even . . . the internet”<sup>52</sup>—is not only unconvincing, but also at the very root of

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mean. *Id.*

<sup>51</sup> *Limestone Farms*, 29 P.3d at 462.

<sup>52</sup> Bainbridge, *supra* note 3, at 877.

current corporate and economic crises. To borrow an attitude from former President Ronald Reagan, it is necessary to examine and verify such claims.<sup>53</sup>

Next, the Article examines the contradiction between the modern conservative ideal of “unrestrained capitalism” and the actual consequences of this relentless push by conservatives towards a mythical state of deregulation, which seems to have thrust its prime movers into a fiscal and moral backwater—a place where conservatives insist they do not want to be. This section concludes that the laissez-faire ideal is grounded in an attractive, but pernicious fantasy. Pure laissez-faire has never actually existed and consequently must be recognized as a nostalgic and retrogressive myth. This romanticized conservative model threatens to weaken further our economy and, threaded as it is through both broad policy and specific legal developments, tends to promote an elitist society in direct contradiction to core principles of democracy.

The remainder of the Article analyzes the effect of the last two decades of conservative influence on the three areas of the law mentioned above, focusing on how conservative dominance in each area has worked to strip power from individuals and repose it in unaccountable institutions. Recent corporate scandals have concentrated attention on certain aspects of corporate governance, resulting in salutary reform efforts that are superficial, in part because of this deeper problem I perceive—the contradictions of modern conservatism, which have permeated the law and culture beyond the politically prominent problem of corporate governance. I conclude that these misleading contradictions in modern conservatism must be recognized and resolved in order to restore health to the legal system and the economy.

## II. A BRIEF HISTORY OF AMERICAN CONSERVATISM

Conservatism is not monolithic, of course, but it is divisible into distinct movements and schools of thought. While political conservatism has roots reaching back to ancient philosophers such as Plato

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<sup>53</sup> President Reagan used the phrase “doveryai no proveryai” (“trust but verify”) in the context of arms negotiations with the Soviet Union. *The Summit*, N.Y. TIMES, Dec. 9, 1987, at A21 (transcribing remarks of President Reagan and General Secretary Mikhail Gorbachev during signing of treaty pledging the removal of Soviet and American medium- and short-range nuclear missiles from Europe), cited in Philip R. Principe, *Secret Codes, Military Hospitals, and the Law of Armed Conflict: Could Military Medical Facilities’ Use of Encrypted Communications Subject Them to Attack Under International Law?*, 24 U. ARK. LITTLE ROCK L. REV. 727, 750 (2002).

and Cicero,<sup>54</sup> and links along the way to Hobbes,<sup>55</sup> Hume,<sup>56</sup> Burke,<sup>57</sup> and Tocqueville,<sup>58</sup> the focus here is on American conservatism.

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<sup>54</sup> Traditional conservatives of the twentieth century adopted beliefs of Plato, Aristotle, and Cicero, grounded in “rational natural law and emphasiz[ing] the duties of man.” NASH, *supra* note 4, at 62. Through rigorous textualism, Leo Strauss reinvigorated the study of natural law and the duties of man, directly challenging Thomas Hobbes’ and the “moderns’” emphasis on natural rights. *Id.* at 63.

<sup>55</sup> One of the major contributions made to modern conservatism by Thomas Hobbes, seventeenth century English author of *Leviathan*, is his central assertion that human beings are by nature self-serving creatures who are motivated to surrender their liberty to the authority of the state out of fear of being dominated by those same impulses in others. In *Leviathan*, Hobbes posited that war resulted from competition for wealth; the need for physical safety; and the desire for personal glory. THOMAS HOBBS, *LEVIATHAN* (J.M. Dent & Sons 1973) (1651). Hobbes contended that without a common power to control these impulses man would be in a constant state of battle:

Whatsoever therefore is consequent to a time of Warre, where every man is Enemy to every man; the same is consequent to the time, wherein men live without other security, than what their own strength, and their own invention shall furnish them withall. In such condition, there is no place for Industry; because the fruit thereof is uncertain: and consequently no Culture of the Earth, no Navigation, nor use of the commodities that may be imported by Sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continually feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short.

*Id.* at 64-65.

<sup>56</sup> David Hume, a champion of commerce, believed that it was futile to attempt to ground justice on the “laws of nature,” independent of a source other than their proven utility. See CONSERVATISM, *supra* note 4, at 41 n.4 (providing editorial commentary on DAVID HUME, *Of Justice*, in AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS (1751)). Like Burke, Hume believed in the necessity of political elites:

The persons, who first attain this distinction by the consent, tacit or express, of the people, must be endowed with superior personal qualities of valour, force, integrity, or prudence, which command respect and confidence: and after government is established, a regard to birth, rank, and station has a mighty influence over men, and enforces the decrees of the magistrate. The prince or leader exclaims against every disorder, which disturbs his society. . . . Habit soon consolidates what other principles of human nature had imperfectly founded; and men, once accustomed to obedience, never think of departing from that path, in which they and their ancestors have constantly trod, and to which they are confined by so many urgent and visible motives.

DAVID HUME, *Of the Origin of Government*, in ESSAYS MORAL, POLITICAL AND LITERARY (1777), reprinted in CONSERVATISM, *supra*, at 49.

<sup>57</sup> Englishman Edmund Burke believed in deriving guidance and inspiration not from reason, but “from the tested traditions of nature and Holy Scripture.” CHARLES W. DUNN & J. DAVID WOODARD, *THE CONSERVATIVE TRADITION IN AMERICA* 27 (1996). To Burke, “ideas of religion and government are closely connected.” *Id.* at 28.

<sup>58</sup> Alexis de Toqueville, an aristocratic Frenchman who came to the United States in 1831, influenced American postwar conservatives when his 1835 work *Democracy in*

During much of the nineteenth century, classical liberalism, then merely called liberalism, dominated American politics. Although initially imported from Europe,<sup>59</sup> American nineteenth century classical liberalism was founded upon a belief in independence and self-determination, and an aversion to centralized power.<sup>60</sup> The Declaration of Independence, Constitution, and Bill of Rights all rest on these principles, creating a system of government characterized by divided power and multiple checks and constraints. Classical liberals resolutely defended religious freedom, individual liberties, and unlimited opportunity for economic expansion.<sup>61</sup> They respected the prerogatives attending the ownership of private property and perceived history in terms of material progress.<sup>62</sup> Their ideal presupposed the value of fulfillment through work, family, friends, and a “dense network of voluntary associations”<sup>63</sup> in the private sphere.

Nineteenth century liberals would become twentieth century conservatives. But at the beginning of the twentieth century, the two political forces, classical liberalism and conservatism, were separate. On the one hand, belief in Jeffersonian individualism reached its nadir.<sup>64</sup> At the same time, American industry and finance were booming; states were revising their incorporation laws to expand corporate autonomy; and “corporate capitalism” was born.<sup>65</sup> By the 1920s, economic conservatives, representing the business class, dominated American political thought.<sup>66</sup> With the onset of the Great Depression, as economic conditions called for government intervention, the nar-

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*America* was reissued in 1945. Like Burke, Toqueville believed in the religious foundation of strong government, including American democracy—that by regulating the customs of communities and domestic life, religion (in Toqueville’s case, specifically Christianity) effectively regulated the state. *See id.* at 132. He wrote, famously, “Do what you may, there is no true power among men except in the free union of their will; and patriotism and religion are the only two motives in the world that can long urge all the people toward the same end.” *Id.* at 45.

<sup>59</sup> Among the first groups that can be identified as liberal were the Dutch, who after decades of struggle won their independence from Spain and set up the United Provinces, a decentralized state with no king and little federal power. Ralph Raico, *The Rise, Fall, and Renaissance of Classical Liberalism, Part I*, FREEDOM DAILY (1992), available at <http://www.fff.org/freedom/0892c.asp> (last visited Mar. 31, 2004). Working an “economic miracle,” the United Provinces “established a legal system based solidly on the rule of law and the sanctity of property and contract.” *Id.*

<sup>60</sup> SCOTT R. BOWMAN, *THE MODERN CORPORATION AND AMERICAN POLITICAL THOUGHT: LAW, POWER, AND IDEOLOGY* 6 (1996).

<sup>61</sup> *Id.* at 6-7.

<sup>62</sup> *Id.* at 7.

<sup>63</sup> Raico, *supra* note 59.

<sup>64</sup> NASH, *supra* note 4, at 14 (quoting ROBERT CRUNDON, *THE MIND AND ART OF ALBERT J. NOCK* 179 (1964)).

<sup>65</sup> BOWMAN, *supra* note 60, at 37.

<sup>66</sup> DUNN & WOODARD, *supra* note 57, at 102.

row, exclusionary conservatism dominated by business interests fell out of favor.<sup>67</sup> Following his election as president in 1933, Franklin Roosevelt ushered in a variety of welfare programs.<sup>68</sup> As World War II came to an end, conservatism again gained force, now dressed in new clothing. The post-War conservative movement was organized in reaction to what its members perceived as the alarmingly statist trend manifested in widespread support for the New Deal, the Fair Deal, and other post-war economic “planning” programs.<sup>69</sup>

The first identifiable group of conservatives to emerge post-war consisted of a new breed of classical liberals who endeavored to steer America’s political development away from government intervention and back toward the “abandoned road” of individualism.<sup>70</sup> They counted among their ranks Austrian economists<sup>71</sup> Friedrich Hayek<sup>72</sup>

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<sup>67</sup> See *id.*

<sup>68</sup> *Id.*

<sup>69</sup> NASH, *supra* note 4, at xiii, 5-6, 22-23. Among the most vehement anti-statists of the postwar era were Frank Chodorov and Ludwig von Mises. Chodorov, who revived *The Freeman* (founded originally by Albert Jay Nock), was a “militant individualist,” who agreed with Nock’s proposition that “the State is our enemy,” its administrators and beneficiaries a “professional criminal class.” *Id.* at 16-17. Austrian born Mises, a libertarian, believed that lasting peace could occur only “under perfect capitalism.” *Id.* at 11. For Mises, the main issue in postwar America was “whether or not man should give away freedom, private initiative, and individual responsibility and surrender to the guardianship of a gigantic apparatus of compulsion and coercion, the socialist state.” *Id.* at 12. He warned against every citizen becoming “a subordinate clerk in a bureau.” *Id.*

<sup>70</sup> FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 17 (2d ed. 1956).

<sup>71</sup> The “Austrian School” of economics, while associated in modern times with Ludwig von Mises and Friedrich Hayek, actually began in the fifteenth century, when the Late Scholastics, followers of St. Thomas Aquinas, postulated the existence of “economic law,” consisting of “forces of cause and effect that operate similarly” to other natural laws. Ludwig von Mises Institute, *What Is “Austrian Economics?”*, at <http://www.mises.org/austrian.asp#> (last visited Mar. 31, 2004). “Over the course of several generations, they discovered and explained the laws of supply and demand, the cause of inflation, the operation of foreign exchange rates, and the subjective nature of economic value.” *Id.* Like their American émigré descendants, they advocated property rights, and freedom to contract and trade, while opposing taxes, price controls, and regulations that inhibited enterprise. *Id.*

<sup>72</sup> The influence of Austrian-born Friedrich Hayek deserves special attention, for he brought to the development of twentieth century American conservatism a combination of a libertarian viewpoint and an interest in economic theory that set the stage for the ascendancy, three decades later, of a pro-corporate political agenda. Hayek and the Austrian School of economics favored free markets over centrally-planned economies, which they termed “collectivist systems,” primarily because, practically speaking, effective planning of large economies was beyond the ability of central planners. Carl T. Bogus, *Symposium: Rational Actors or Rational Fools? The Implications of Psychology for Products Liability, Introduction*, 6 ROGER WILLIAMS U. L. REV. 1, 2 (2000). Hayek argued that a “market” is best understood as a combination of individuals whose wants and needs are of infinite variety; no one planning agency can possibly anticipate and plan to fulfill such disparate and varying demand. *Id.* at 1.

and Ludwig von Mises;<sup>73</sup> professors of the nascent Chicago School of economics, including Frank Knight and Henry C. Simmons, who would become mentors to Milton Friedman;<sup>74</sup> and the young William F. Buckley, Jr.<sup>75</sup> They identified themselves variously as libertarians, classical liberals, or neo-liberals,<sup>76</sup> but irrespective of nomenclature, they united in the fear that the predilection toward rationalistic “planning” of economic activity was a step down the road toward socialism, even Naziism.<sup>77</sup> Like nineteenth century classical liberals, they believed in economic freedom, minimal government, the importance of private property, rolling back the welfare state, and decentralization of political power.<sup>78</sup>

Another strand of intellectuals, represented by European refugees such as Leo Strauss, was also analyzing the changes brought about by the war and refining philosophical and political objections to the “hysterical optimism”<sup>79</sup> driving the prevailing orthodoxy favoring government intervention.<sup>80</sup> In an attempt to distinguish themselves from the old-style, pro-business Republicanism of the 1920s, they called themselves “traditionalists” or “new conservatives.”<sup>81</sup> These individuals were more serious than the libertarian faction about reviving the European tradition of conservatism, based on Christian and classical natural law concepts. They objected to the libertarian emphasis on modernity and individual Lockean “rights” at the expense of the notion of “the primacy of obligation,” which fixed man’s “moral duties in a civil society.”<sup>82</sup> One of their most eloquent

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Hayek’s theories caught the attention of a professor at the University of Chicago, whose press published his *The Road to Serfdom*. *Id.* at 2. Later, Hayek helped secure substantial funding for a center at Chicago for the study of free markets, with the stipulation that it be tied to the law school, and the field of law and economics was born. *Id.*

<sup>73</sup> Despite their common opposition to left-wing socialist politics, Friedrich Hayek and Ludwig von Mises represented distinct wings of the classical liberal movement. The movement divided along the question of the desirable extent of government involvement in the market system. Mises believed passionately in freedom from government interference in markets, while Hayek rejected pure laissez-faire and favored government action to maintain the rule of law and “design” of the free market. NASH, *supra* note 4, at 32-33.

<sup>74</sup> *Id.* at 284.

<sup>75</sup> While initially aligned with the libertarian faction, Buckley had a “foot in both camps.” *Id.* at 81.

<sup>76</sup> *Id.* at xiii, 26, 36.

<sup>77</sup> *Id.* at 5-6, 12, 20.

<sup>78</sup> *Id.* at 171.

<sup>79</sup> RICHARD M. WEAVER, *IDEAS HAVE CONSEQUENCES* 129 (1948).

<sup>80</sup> NASH, *supra* note 4, at 41 (quoting WEAVER, *supra* note 79, at 129).

<sup>81</sup> *Id.* at 76-77.

<sup>82</sup> *Id.* at 165.

representatives, Russell Kirk, set forth six philosophical canons, including a belief in divinity and a corresponding conviction that political problems are religious and moral problems; an appreciation for the variety and mystery of traditional life; and the certitude that freedom and ownership of property were inseparably intertwined.<sup>83</sup>

For a time, it seemed as if these two quite different interpretations of conservatism might cause a permanent rift in the young movement. But the two groups shared a sense of isolation from mainstream political thought, as well as an almost desperate determination to achieve philosophical cohesion. A number of factors helped mid-century conservative thought to coalesce. One was William F. Buckley, Jr.'s founding of the magazine *National Review*, whose objective, Buckley claimed, would be "to revitalize the conservative position" and to "influence the opinion makers" of the nation.<sup>84</sup> Another galvanizing force was communism, which triggered in the post-war right a pervasive apprehension that the West was engaged in a monumental struggle with an aggressive and unyielding enemy.<sup>85</sup> Yet another influence toward unification came in the writings of Frank Meyer, who believed that beneath the "cacophony"<sup>86</sup> characterizing the conservative movement of the late 1950s and early 1960s, there lay a foundation of shared principle.<sup>87</sup>

In the 1960s and 1970s, still another group of intellectuals joined the conservative movement. Calling themselves neo-conservatives,<sup>88</sup> they separated from the Democratic Party in disgust over what they perceived as the unpatriotic sentiments and excessively permissive conduct of progressive and radical political activists of the era.<sup>89</sup> Led by Irving Kristol,<sup>90</sup> Nathan Glazer,<sup>91</sup> and Norman

<sup>83</sup> RUSSELL KIRK, *THE CONSERVATIVE MIND: FROM BURKE TO SANTAYANA* 7-8 (1956).

<sup>84</sup> NASH, *supra* note 4, at 148.

<sup>85</sup> *Id.* at xiii.

<sup>86</sup> ALLEN GUTTMANN, *THE CONSERVATIVE TRADITION IN AMERICA* 163 (1967).

<sup>87</sup> NASH, *supra* note 4, at 174.

<sup>88</sup> As described by Irving Kristol, one of the movement's founders, neoconservatives were "liberals who were mugged by reality." Irving Kristol, *Neoconservative Guru to America's New Order*, *MACLEAN'S*, Jan. 19, 1981, at 9. Originally members of the Democratic Party and committed to the New Deal, the "neocons" were appalled by the social chaos and radical politics of the New Left. Although committed to laissez-faire capitalism, they rejected libertarianism, because, as Kristol argued, "human nature cries out for something more than freedom. This something is moral direction, and the libertarian compass leaves private ethics up to the individual, a situation which neoconservatives believe has left capitalism vulnerable to moral anarchy." Grant Havers & Mark Wexler, *Is U.S. Neoconservatism Dead?*, at <http://www.lsus.edu/la/journals/ideology/contents/neoconservatism.htm> (last visited Mar. 31, 2004).

<sup>89</sup> *See supra* note 88.

<sup>90</sup> A self-described "cheerful conservative," Irving Kristol had been a Trotskyist at City College of New York and was greatly influenced by Leo Strauss. IRVING KRISTOL,

Podhoretz,<sup>92</sup> these “mild conservatives”<sup>93</sup> strongly supported the concept of a self-regulating economy, but, unlike other conservatives of the era, recognized the need and inevitability of federal government programs such as social security and welfare.<sup>94</sup> They rejected what they perceived as the elitist tendencies and negativity of their counterparts in the other schools of conservatism.<sup>95</sup> They were “conservative” economically, but more “liberal” with respect to fundamental social programs.

Due in part to the influence of the European Christian tradition, a tension grew between conservatives’ belief in a laissez-faire economy based on ownership of private property, on the one hand, and a pro-spiritual, anti-materialist theme, on the other. Leo Strauss, a classical political philosopher and leading intellectual of the 1950s, vehemently opposed what he termed the “Machiavellian principles” of self-interest and greed.<sup>96</sup> Russell Kirk, whose *The Conservative Mind*<sup>97</sup> served as a catalyst for post-war traditional conservatism,<sup>98</sup> scorned not only big government, but also the numbing effects of industrial soci-

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NEOCONSERVATISM: THE AUTOBIOGRAPHY OF AN IDEA 6, 12, 40 (1995). Kristol became an editor at the American Jewish Committee’s publication *Commentary*, and there he met Nathan Glazer. *Id.* at 15-17. He became increasingly critical of the “Left’s predisposition to see Communists as . . . a wayward extremity of the Left, ultimately redeemable by therapeutic strategies.” *Id.* at 25. Along with Daniel Bell, Kristol founded *The Public Interest*, which later became associated with the neo-conservative movement. *Id.* at 29-31. In the 1960s, Kristol wrote, the “student rebellion and the rise of the counterculture, with its messianic expectations and its apocalyptic fears,” taught him that he had been a cultural conservative all along. *Id.* at 31.

<sup>91</sup> Nathan Glazer was a veteran of 1950s political uprisings at Harvard and Berkeley. NASH, *supra* note 4, at 321. In 1971, Glazer wrote an article entitled *The Limits of Social Policy*, in which he commented that “the breakdown of traditional modes of behavior is the chief cause of our social problems” and “some important part of the solution of our social problems lies in . . . traditional restraints.” *Id.*

<sup>92</sup> Like Glazer, Podhoretz had been a political liberal in the 1950s but later, similarly disillusioned, Podhoretz became the editor of *Commentary*, a journal seen by many as a rival to the radical *New York Review of Books*. NASH, *supra* note 4, at 327. Podhoretz and his colleagues, once “humanistic,” by the 1970s displayed “utter contempt for liberal values.” *Id.*

<sup>93</sup> In an essay written in 1970, Nathan Glazer posed the rhetorical question: How does a radical, a mild radical, it is true, but still one who felt closer to radical than liberal writers and politicians in the late 1960s, end up a conservative, a *mild conservative*, but still closer to those who call themselves conservative than to those who call themselves liberal in early 1970?

NATHAN GLAZER, REMEMBERING THE ANSWERS: ESSAYS ON THE AMERICAN STUDENT REVOLT 3 (1970), *quoted in* NASH, *supra* note 4, at 321-22 (emphasis added).

<sup>94</sup> Havers & Wexler, *supra* note 88.

<sup>95</sup> *Id.*

<sup>96</sup> DUNN & WOODARD, *supra* note 57, at 28.

<sup>97</sup> RUSSELL KIRK, THE CONSERVATIVE MIND (1953).

<sup>98</sup> NASH, *supra* note 4, at 69.

ety.<sup>99</sup> Kirk, who had worked for a “soulless corporation,”<sup>100</sup> insisted that “[c]onservatism is something more than mere solicitude for tidy incomes.”<sup>101</sup> Peter Viereck, author of the influential *Conservatism Revisited*,<sup>102</sup> emphasized ethics and a reverence for the individual human soul over the material fruits of capitalism.<sup>103</sup> Viereck’s conservatism, he insisted, had “nothing to do with rootless, ‘cash nexus,’ selfish, laissez-faire individualism.”<sup>104</sup> These conservatives supported a free market because they believed it an essential feature of a decentralized political system focused on local autonomy and limited government intervention in citizens’ lives.<sup>105</sup> A recurring theme in this conservatism was a longing for and belief in transcendental values over transient “materialist” and “scientistic” experience and relativism.<sup>106</sup>

The conservative political movement gained great popular momentum in the late 1970s,<sup>107</sup> in the shadow of President Carter’s weak economic record, and openly flowered during the 1980s during President Ronald Reagan’s two Republican administrations. In the early 1980s, a second generation of “new conservatism” showed up on Wall Street and in Washington, dressed in a Burberry trench coat and yellow power tie, carrying a briefcase full of get-rich schemes and es-

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<sup>99</sup> *Id.* at 69-70.

<sup>100</sup> *Id.* at 81.

<sup>101</sup> RUSSELL KIRK, A PROGRAM FOR CONSERVATIVES 23 (1954), *quoted in* NASH, *supra* note 4, at 81.

<sup>102</sup> PETER VIERECK, CONSERVATISM REVISITED (1949).

<sup>103</sup> NASH, *supra* note 4, at 66, 81.

<sup>104</sup> *Id.* at 81 (quoting PETER VIERECK, SHAME AND GLORY OF THE INTELLECTUALS 248, 251 (1953)).

<sup>105</sup> For example, Russell Kirk described his emerging conservative outlook and priorities as follows:

We must have slow but democratic decisions, sound local government, diffusion of property-owning, taxation as direct as possible, preservation of civil liberties, payment of debts by the generation incurring them, prevention of the rise of class antipathies, a stable and extensive agriculture, as little governing by the government as practicable, and, above all, stimulation of self-reliance.

*Id.* at 70.

<sup>106</sup> Friedrich Hayek was one conservative who blamed “scientism” for twentieth century totalitarianism. Hayek believed that the “fallacious application of the methods of the natural sciences to the moral and social sciences” was at the root of “scientistic hubris” responsible in turn for the concept of inherently collectivist “economic planning.” NASH, *supra* note 4, at 362.

<sup>107</sup> Some observers date the birth of modern “market fundamentalism” earlier. For example, Professor Benjamin Barber observes that the instruments of democracy have failed because they have “been weakened by three decades of market fundamentalism, privatization ideology and resentment of government.” Benjamin R. Barber, *A Failure of Democracy, Not Capitalism*, N.Y. TIMES, July 29, 2002, at A19.

pousing a powerful dislike of economic regulation.<sup>108</sup> Responding to criticisms that traditional conservatives lacked a positive agenda, the Republican Party called for a return to past values, back to America's greatness, to "a mythical time of strength," respect, and self-reliance.<sup>109</sup> One irony of this period is that while the conservatives' idolized political leader, Ronald Reagan, spoke an evocative language of the past,<sup>110</sup> his leadership, and his alignment with conservative economists, helped thrust politics,<sup>111</sup> the economy, and conservatism itself into a new era.<sup>112</sup>

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<sup>108</sup> Ronald Reagan represented a return to the "traditional ideals" of personal responsibility and accountability and smaller government, and a conservatism that reposed faith in private and local initiatives over federal control. DUNN & WOODARD, *supra* note 57, at 6, 13.

<sup>109</sup> Havers & Wexler, *supra* note 88, at 6-7.

<sup>110</sup> DUNN & WOODARD, *supra* note 57, at 6, 13.

<sup>111</sup> One of the best examples of how the Reagan Revolution changed the political landscape is the way it changed Democrats from populists to "new Democrats," blurring the line between the new parties. See Rupert Cornwell, *Bankrupt Democrats*, THE INDEP. Aug. 26, 1996, at 13 (observing an "astonishing role reversal" between the two major parties, in that "Democrats are champions of the status quo and the darlings of Wall Street, while Republicans, touting child tax credits and a 15 per cent across-the-board tax cut for all, sound more populist than their opponents ever did."). See generally Matthew B. Stein, *Something Wicked This Way Comes, Constitutional Transformation and the Growing Power of the Supreme Court*, 71 FORDHAM L. REV. 579, 608-11 (providing a helpful summary of the Reagan Revolution, Gingrich Revolution, and Bill Clinton's election).

<sup>112</sup> As Frank Meyer, a leader in post-World War II American conservatism, might have explained, this phenomenon, uncritical reverence of the past, is, in effect, acquiescence to revolution. In arguing for a "conscious conservatism," Meyer emphasized that in order for conservatism to remain vibrant, and to maintain its reverence of human existence, it had to do more than

appeal simply and uncomplicatedly to the past. . . . Today's conservatism cannot simply affirm. It must select and adjudge. It is conservative because in its selection and in its judgment it bases itself upon the accumulated wisdom of mankind over millennia, because it accepts the limits upon the irresponsible play of untrammelled reason which the unchanging values exhibited by that wisdom dictates. But it is, it has to be, not acceptance of what lies before it in the contemporary world, but challenge. . . . To accept is to be not conservative but acquiescent to revolution.

MEYER, *supra* note 35, at 20.

*Conservative Schizophrenia*<sup>113</sup>

A thorough examination of the changes in political conservatism in the last two decades of the twentieth century is beyond the scope of this analysis, but some of the relevant ones include:

- the deeply-rooted romance with individualism and self-determination lost its blush, waned, and was replaced by an unabashed love affair with “bigness”<sup>114</sup> and power;<sup>115</sup>
- considerations of morality and traditionalism, while still paid lip service by conservatives, gave way to an apparent

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<sup>113</sup> Other writers have used the term “schizophrenia” in connection with conservative thought. For example, Arthur Schlesinger, Jr., called the conservatism of the 1950s the “politics of nostalgia,” accusing the new right of misapplying the concepts of Burkean conservatism, which was merely “the ethical afterglow” of feudalism, to a society characterized by a “nonaristocratic, dynamic, progressive” business structure. NASH, *supra* note 4, at 137. Russell Kirk, Schlesinger implied, was “schizophrenic” in trying to fuse Burkean concepts with American laissez-faire. *Id.* at 137-38.

<sup>114</sup> Concerns with the expanding size of corporations—“bigness”—existed early in the twentieth century. “Although everyone was concerned about bigness, no consensus existed on whether size was an evil per se, or only when utilized for ‘unfair’ advantage.” Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1216-17 (1986).

<sup>115</sup> Not all conservatives embrace the value of efficient production above all other values. In fact, anxiety that “the cultural effects of the market will erode” traditional values is “the most consistent tension within conservative social and political thought.” Muller, *supra* note 4, at 19. A number of modern conservative writers have weighed in on the unfortunate, unintended consequences of out-of-control capitalism, citing such effects as splintered families and the destruction of tight-knit communities. For example, in an interview with Dinesh D’Souza, Professor Gertrude Himmelfarb observed that America’s economic and technological gains have extracted steep costs, stating that while “[e]conomically, our society is better off[,] . . . in many ways we are a much poorer society than we used to be. There are other forms of poverty than economic poverty.” DINESH D’SOUZA, *THE VIRTUE OF PROSPERITY: FINDING VALUES IN AN AGE OF TECHNO-AFFLUENCE* 40 (2000). Conservative commentator George Will has averred that capitalism challenges conservative beliefs because it “undermines traditional social structures and values.” GEORGE WILL, *THE PURSUIT OF VIRTUE AND OTHER TORY NOTIONS* 6 (1982). In DANIEL BELL, *THE CULTURAL CONTRADICTIONS OF CAPITALISM* 21-22, 70-74 (1976), author Daniel Bell explored the irony resulting from capitalism’s success: a hedonistic culture whose values undermine the “Protestant ethic” of industry and thrift that produced it. In a similar vein, David Bosworth posits that rampant consumerism, in addition to being a “destroyer of maturity and [an] endless generator of new psychic needs,” yields the ethic of the “Efficient Producer,” according to which parenting and home life occur in step with the “grimly anxious pace of the post-modern workplace,” causing family relations to be “stripped of wonder, curiosity, and improvisational fun.” David Bosworth, *The Spirit of Capitalism*, 2000, PUB. INT., Winter 2000, at 24. The result is that we are squeezed between “demands for perfect efficiency and unending appetite,” living “an impoverished definition of human life.” *Id.* at 25-26.

On the inverse relationship between wealth accumulation and contentment, see ROBERT E. LANE, *THE LOSS OF HAPPINESS IN MARKET DEMOCRACIES* (2000).

“religion” of soulless “market analysis,” based on a bible written by pro-business efficiency<sup>116</sup> wonks and market fundamentalists;<sup>117</sup> and,

- the emphasis on local control and decision-making was overwhelmed by burgeoning economic federalization.<sup>118</sup>

The “large corporation,” steadily growing since the turn of the century, became the “mega-corporation,” as the Republican administrations of Presidents Ronald Reagan and George H.W. Bush,<sup>119</sup> in

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<sup>116</sup> Efficiency can be defined in many ways. Generally, efficiency in law is a tendency to minimize waste. Hon. Stephen F. Williams, *What is the “Law” in Law and Economics*, 21 HARV. J.L. & PUB. POL’Y 39, 39 (1997). It can also be defined in the “Kaldor-Hicks . . . sense, in which a policy change is said to be efficient . . . if the winners gain more from the change than the losers lose.” WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 16 (1987). Efficiency also has been equated to Pareto superiority, in which no parties are losers. Anthony T. Kronman, *Wealth Maximization as a Normative Principle*, 9 J. LEGAL STUD. 227, 227 (1980).

Galbraith called the obsession of economists with efficiency a “near fetish,” though in the beginning, there was a strong humanitarian basis for this preoccupation. Until the nineteenth century, grinding poverty had at all times and in nearly all places been the fate of all but a minority of mankind. For the relief of this poverty, nothing could be quite so important as to get more production from existing manpower and resources.

GALBRAITH, *supra* note 5, at 24.

<sup>117</sup> “Market fundamentalism” as used herein denotes a political/economic philosophy emphasizing the goal of pure laissez-faire, driven by a belief in the transcendent value of efficiency. See Kuttner, *supra* note 8 (discussing the confluence of the Chicago School’s belief that “efficient outcomes are just the aggregation of selfish private interests” and Enron, which “epitomized an entire philosophy about the supposed self-cleansing of markets”); George Soros, *The Crisis of Global Capitalism: Open Society Endangered* (Dec. 10, 1998) (equating the term with laissez faire but preferring to use “market fundamentalism because laissez faire is a French expression and most market fundamentalists don’t speak French”), at <http://www.geocities.com/ecocorner/intelarea/g6.html> (last visited Mar. 31, 2004). The term is synonymous with “the First Way,” or “the traditional Adam Smith, laissez-faire approach of minimalist government intervention for the unimpaired operation of the free market in a capitalist society.” Raymond J. Friel, *Blair’s Third Way-Thatcher’s Enduring Legacy*, 48 U. KAN. L. REV. 861, 861, 883-84 (2000) (defining the “Second Way” as the failed “opposite extreme,” involving maximum government control to benefit the greater good of society, and the “Third Way”—represented by the views of Bill Clinton and Tony Blair—as “reduction in governmental interference to the amount appropriate to satisfy the needs of society”).

<sup>118</sup> See Kingman Brewster, Jr., *The Corporation and Economic Federalism*, in *THE CORPORATION IN MODERN SOCIETY* 72 (Edward S. Mason, ed. 1959) [hereinafter *MODERN SOCIETY*].

<sup>119</sup> The effects of these two presidents’ policies will be felt for years to come. Reagan and Bush filled two-thirds of the nation’s federal judgeships, which was the greatest retooling of the federal courts since Franklin Roosevelt’s presidency. The Reagan and Bush Administrations tried to transform the judiciary’s ideology by appointing individuals who, among other traits, doubted the efficacy of government intervention in the market

efforts to aid American firms in global competition,<sup>120</sup> loosened restrictions on mergers,<sup>121</sup> thereby accelerating restructuring of markets through combination. Led by the Chicago School's economic the-

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. . . . The impact of Reagan/Bush judicial selection will endure well into the [twenty-first century]. To some courtwatchers, this prospect is ominous. In assessing what he terms "conservative court-packing," Professor Herman Schwartz states that "in order to favor business, Reagan judges Robert Bork, Richard Posner, Frank Easterbrook and other right-wing antitrust specialists have encouraged judicial interpretations of the antitrust and other regulatory laws that conflict with the clear congressional intent."

William E. Kovacic, *Judicial Appointments and the Future of Antitrust Policy*, 7 SPG ANTITRUST 8, 8 (1993) (paragraph structure omitted).

<sup>120</sup> Steve Lohr of the *New York Times* described the force driving this shift: [It is] the new economics of global competition, stagnating productivity, slow growth and high inflation. With strong foreign competitors, especially Japan and West Germany, now grabbing big shares of such domestic markets as autos, steel, electronics, and chemicals, it is becoming clear that national boundaries no longer define the real competitive market in many industries. Thus traditional antitrust measures of economic concentration in home markets no longer seem to apply.

Steve Lohr, *Antitrust: Big Business Breathes Easier*, N.Y. TIMES, Feb. 15, 1981, at C2. More recently, Sakakibara Eisuke, Japan's Vice Minister of Finance for International Affairs, described "the post Thatcher-Reagan dominance of market fundamentalism with the rapidly advancing globalization that has engulfed the entire world, including emerging countries" and posed the question "whether the surge of market fundamentalism during the last two decades or so would prove to be as unsustainable as the laissez-faire of the gold standard period." Sakakibara Eisuke, *The End of Market Fundamentalism*, ASIaweek, Feb. 5, 1999, available at <http://www.asiaweek.com/asiaweek/99/0205/feat8.html> (last visited Mar. 31, 2004).

<sup>121</sup> Influenced by conservative economic theory emanating from the Chicago School, as well as Judge Robert H. Bork's *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978), President Reagan made several key appointments designed to cut back on traditional antitrust enforcement, including William F. Baxter, as Associate Attorney General in the Antitrust Division of the Justice Department, and James C. Miller III, Chairman of the Federal Trade Commission. Stuart Auerbach, *A Conservative Economist Will Get FTC Nomination*, WASH. POST, Sept. 18, 1982, at D10. Another key appointment was John S.R. Shad as chairman of the Securities and Exchange Commission. Robert Pear, *Clarifying Some Mixed Signals on Antitrust Law*, N.Y. TIMES, July 19, 1981, at D4.

Before his appointment to the Justice Department, William Baxter was a law professor at Stanford. He promised to "turn back the clock" on antitrust enforcement. Howard Kurtz, *Justice Shifts Antitrust Responsibilities*, WASH. POST, Dec. 11, 1986, at D9. His replacement in 1985, Douglas H. Ginsburg, strongly believed in market self-correction and complete deregulation. Todd S. Purdum, *Nominee Not Expected to Alter Antitrust Unit*, N.Y. TIMES, July 19, 1985, at D2.

James C. Miller III was the first chairman in the "history of the FTC to ask Congress to curb his agency's power." Auerbach, *supra*. He sought to limit the agency's authority to act on behalf of consumers in the "areas of unfair and deceptive advertising." *Id.* Miller had a "single-minded determination to undo . . . the very foundation of antitrust and consumer protection law laid down by Congress." *Champion of the Free Market: James Clifford Miller 3d*, N.Y. TIMES, July 20, 1985, at A7 (internal quotation marks omitted).

ory,<sup>122</sup> the Reagan Administration took antitrust enforcement “back to the basics”<sup>123</sup> by deciding not to oppose vertical restraints on trade and to oppose horizontal restraints only when they measurably affected efficiency. Reagan’s first attorney general, William French Smith, declared that “bigness in business does not necessarily mean badness . . . [;] efficient forms should not be hobbled under the guise of antitrust enforcement.”<sup>124</sup> At the same time, the Department of Justice instituted antitrust suits against city governments, poverty lawyers, and labor unions, insisting that classic economic doctrine required antitrust enforcement in all areas of economic activity.<sup>125</sup>

Meanwhile, the individual and small business took a back seat to corporate interests.<sup>126</sup> The consumer movement of the 1960s and

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<sup>122</sup> The theories of the influential Chicago School and its derivative schools of thought are familiar. See generally Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979). In 1962, Milton Friedman revived the argument that free market capitalism is essential to a free society. See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (2d ed. 1982). Invoking “liberalism” in its nineteenth century sense, Friedman argued that efficiency was valuable primarily “as a means to maximize individual freedom.” Carolyn B. Kuhl, *Introduction: Law, Economics, and Social Conservatism*, 21 HARV. J.L. & PUB. POL’Y 55, 57 (1997). Friedman perceived two routes to efficiency, the totalitarian state or voluntary exchanges between people; he believed that the latter was preferable because it did not interfere with freedom. *Id.*

Professor Lawrence Anthony Sullivan of the University of California at Berkeley stated that the Reagan Administration’s decision not to challenge vertical restraints under the Sherman Act represented “a decision not to enforce a well-established area of the law.” Pear, *supra* note 121. As Sullivan put it, the Administration was “trying to turn antitrust law into applied Chicago School economic theory and, in doing so, [has] drastically oversimplified many problems.” *Id.* Under this policy, corporate size did not matter, so long as efficiency prevailed, even though “antitrust enforcement along economic lines . . . incorporates large doses of hunch, faith and intuition.” *Mergers’ Meaning: Good or Greed?*, WASH. POST, July 19, 1981, at F1.

<sup>123</sup> Pear, *supra* note 121.

<sup>124</sup> *Id.*

<sup>125</sup> Michael Isikoff, “Chicago School” Catches a Taxi: FTC Shifting Antitrust Activity from Big Business to Novel Areas, WASH. POST, June 17, 1984, at G1. As Isikoff reported, the FTC had approved Texaco’s purchase of Getty Oil and Standard Oil’s acquisition of Gulf Oil while at the same time:

- suing cities for regulating taxis;
- instituting suits against a small D.C. lawyer’s group representing the poor for engaging in a two-week strike to pressure the city for higher fees;
- investigating forty state regulatory boards for such actions as restricting advertising by professionals;
- investigating the Screen Actors Guild and the American Federation of Television and Radio Artists for trying to keep non-union actors out of advertisements.

<sup>126</sup> Consumers, in particular, fell to the bottom of the ladder. Ronald Reagan appointed Terrence M. Scanlon Chairman of the Consumer Product Safety Commission. Scanlon stated that his policy was to avoid conflict with business by seeking to reach agreements. Other commissioners identified him as an “incompetent deregulation”

1970s<sup>127</sup> had already waned, and the Reagan Administration's "green light" to combination brought bad news for smaller commercial parties.<sup>128</sup> Accused by conservatives of lacking intellectual rigor, antitrust enforcers, once motivated in part by the sense that fair competition required the continued existence of smaller businesses,<sup>129</sup> abandoned that notion completely, in favor of the ideal of efficiency.<sup>130</sup> In the

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lator." Irvin Molotsky, *A Case of Memorandums at Ten Pages*, N.Y. TIMES, Mar. 30, 1985, at A8.

<sup>127</sup> As noted in HOWARD J. ALPERIN & ROLAND F. CHASE, CONSUMER LAW: SALES PRACTICES AND CREDIT REGULATION § 101, at 128 (1986), throughout the twentieth century, until the 1960s, courts were "notorious[ly] . . . insensitiv[e] to consumer interests." In 1968, with passage of the Federal Truth in Lending Act, Congress began fashioning statutory protections and remedies in areas long calling for attention. *Id.* The broad acceptance of the UCC led consumer activists in the 1960s and 1970s "to propose . . . model laws to regulate consumer sales transactions." *Id.* § 102, at 130. Among model acts proposed were the Uniform Consumer Sales Practices Act; the Uniform Deceptive Trade Practices Act; the Unfair Trade Practice and Consumer Protection Law; and various versions of "consumer fraud acts." *Id.* §§ 102-107, at 130-37. For an interesting history of earlier phases of the consumer movement, see Martha Chamallas, *The Disappearing Consumer, Cognitive Bias and Tort Law*, 6 ROGER WILLIAMS U. L. REV. 9 (2000).

<sup>128</sup> See Macaulay, *supra* note 36, at 636. Regarding cases selected for his and Marc Galanter's contracts casebook, Professor Macaulay writes:

. . . [W]e emphasize the counterrevolution that began when Chief Justice Rose Bird and two of her colleagues were voted off the California court. We stress that the hill is steeper and harder to climb. Much the same can be said about the consumer protection cases that we offer. Those from the era of Ralph Nader and the consumer movement find plaintiffs successfully climbing the mountain. More recent decisions that we give students in a supplement involve plaintiffs attacking rent-to-own with hidden high interest rates. These plaintiffs tend to lose. The book over and over stresses cost barriers to litigation.

*Id.*

<sup>129</sup> See Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 50 HASTINGS L.J. 871, 907-08 (1999) (footnotes omitted).

[In debating the Sherman Act], Congress also expressed concern for preserving business opportunities for small firms. The opportunity to compete has been viewed as particularly important for small entrepreneurs, perhaps because of their vulnerability to predatory activities. . . . Judicial statements of congressional intention to assist small businesses have been frequent. Courts have even occasionally viewed congressional interest in protecting small businesses as overriding its consumer-oriented goals.

*Id.*

<sup>130</sup> See William J. Baer & David A. Balto, *Public Choice: Do Politics Corrupt Antitrust Enforcement? The Politics of Federal Antitrust Enforcement*, 23 HARV. J.L. & PUB. POL'Y 113, 120 (1999) (footnotes omitted).

Federal antitrust enforcement has changed considerably since the early 1970s. The main shift in focus has been that rigorous economic analysis of markets and competition has become the norm for both the agencies and the courts. Scholarly research, much of it initiated by the

ensuing era of mergers and takeovers, the layers of complex bureaucracy in corporate America increasingly rivaled those in government, which seemed to illustrate prophetic metaphors made earlier in the twentieth century<sup>131</sup> by such scholars as Arthur Selwyn Miller<sup>132</sup> that compared the modern corporation to a private or quasi-government.<sup>133</sup>

By this time, the political term “liberalism” had lost its association with libertarianism and had taken on a new connotation stemming from its link to the “counter-culture,” the social and political phenomenon that engendered neo-conservatism.<sup>134</sup> Moreover, conservatism had distanced itself from its once-central belief in the primacy of individual rights and liberties. To the new conservatives, the “person” that seemingly had come to assume the most importance and possess the greatest rights was the large corporation.

*The Ascendancy of Materialism as a Conservative Value*

Perhaps the most puzzling contradiction arising from the modern conservative message is the emphasis on morality, temperance, and traditionalism versus the prevailing preoccupation with evaluating both public and private actions in microeconomic terms, which are explicitly divorced from deeper evaluative judgments. Under this scheme, moral leadership properly is confined to community and “intermediary” social institutions,<sup>135</sup> whereas in business, economic fundamentalism—the goal of pure laissez-faire—rules. Consequently, and predictably, unbridled greed and self-interest drive the economic sector,<sup>136</sup> and, unfortunately, the morality and ethics purportedly

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“Chicago School,” exposed the inconsistencies and sloppiness of some prior antitrust thinking. Today, courts and antitrust enforcers rely much less on structural presumptions and more on the consumer welfare standard of anticompetitive harm. A case will not be filed unless there is a compelling anticompetitive justification. The result is a body of law that relies on certain core principles of neoclassical economic theory and that has widespread political support.

*Id.*

<sup>131</sup> Brewster, *supra* note 118, at 72.

<sup>132</sup> See, e.g., ARTHUR SELWYN MILLER, *THE MODERN CORPORATE STATE: PRIVATE GOVERNMENTS AND THE AMERICAN CONSTITUTION* (1976).

<sup>133</sup> *Id.*

<sup>134</sup> See *supra* notes 88-95 and accompanying text.

<sup>135</sup> See, e.g., Bainbridge, *supra* note 3, at 877.

<sup>136</sup> “There is always greed and misconduct in the business world,” notes Seth Taube, formerly an enforcement chief with the SEC and now head of the securities litigation practice at the law firm of McCarter & English, “[b]ut in today’s society, more people tend to believe they can get away with it.” Strauss, *supra* note 16. Peter Drucker agrees: “That extreme greed at the top is new . . .” *Id.*

<sup>137</sup> The Institute for America’s Future published a report estimating that the col-

taught and practiced in social institutions inadequately temper the devastation wrought in the marketplace. The rest of society pays the price<sup>137</sup> for this schizophrenic compartmentalization.

In addition to their allegiance to a laissez-faire ideal, conservatives traditionally have united in the conviction that human character develops best on a foundation of hard work, sacrifice, and self-denial.<sup>138</sup> They have sought to ensure survival of traditional culture, values, and morality.<sup>139</sup> Philosophically, they have stood against the crass materialism of American culture and lamented the ways in which capitalism has undermined the morals that once gave American society a stable foundation.

But reservations about the consequences of unregulated capitalism, articulated by both old and new conservatives,<sup>140</sup> have not found their way into public policy or political reality. Riding the popular wave of Efficiency Doctrine and market fundamentalism, corporate interests have displaced certain strands of conservative

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lapse of twelve large corporations resulted in a loss in the value of individual retirement accounts of over \$175 billion, a combined loss in stock value of \$309 billion, and a loss of over 87,000 jobs. The loss in state public pension funds was at least \$6.44 billion. American Family Voices, *The Cost of Corporate Recklessness* (study on file with the author).

<sup>138</sup> Conservative Daniel Bell explains that Adam Smith's brand of capitalism meant being parsimonious and frugal. BELL, *supra* note 115, at 69. He writes, "early in the development of capitalism, the unrestrained economic impulse was held in check by Puritan restraint and the Protestant ethic" of virtue, hard work, and the building of a "character structure." *Id.* at 20-21. Human character needs this structure, according to traditional conservatism's touchstone principles, including the "realist" recognition that human nature is frail, imperfect, and selfish, subject to corruption, even animalistic in its pursuit of self-interest. See JOHN KEKES, A CASE FOR CONSERVATISM 41-42 (1998). Kekes claims that conservatives are skeptical about the prospect of changing the human character, thus the human condition. *Id.* Conservative thinking, he writes, has been called the "politics of imperfection." *Id.* The adherents to this theory recognize not just a human propensity for evil, for this is just a manifestation of a more pervasive contingency, a complex mix of genetic and social factors which give rise to expression and manifestations of evil, over which human beings and the political institutions which they create have little control. *Id.*

<sup>139</sup> Edmund Burke believed that society was a contract between generations, "a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born." EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 61 (L.G. Mitchell ed., 1993).

<sup>140</sup> See, e.g., KRISTOL, *supra* note 90, at 211-12; *supra* notes 76-106 and accompanying text; *supra* note 115 and accompanying text.

<sup>141</sup> For example, at one point management of Western Resources threatened to pull out of Kansas if regulators did not act favorably on a merger proposal. A spokesperson for the company said, "The fact that customers are likely to benefit from \$7 billion in cost savings is rarely discussed . . . Consumers need to understand the magnitude of the cost savings involved here." Jim McLean, *Western Threatens to Leave*, TOPEKA CAP.-J., Aug. 4, 1999. The projected savings never materialized; the merger collapsed under the pressure of Western's falling stock prices.

thought with more simplistic and profitable messages. One such message, repeatedly asserted in the Western Resources case,<sup>141</sup> goes like this: *Large corporations are good for you. You need them, because they make the products and services you require and desire more accessible and affordable (it's economies of scale, stupid). This merger/friendly acquisition/hostile takeover we propose will increase efficiency so you will have more choice, more freedom as consumers. Your lives will improve if the deal goes through.* Corporate representatives and their cheerleaders cast these propositions in altruistic terms, like seasoned politicians, as if they were merely responding to public need and would not have worked so tirelessly to consummate the transaction if they did not care deeply about the small players of the world, their beloved constituents.

If these sorts of claims proved true, then proponents of unregulated big business could claim the high ground. A broad spectrum of goals would be satisfied, including economic efficiency, fair pricing, and consumer benefit. But the Reagan Revolution and conservative interpretation of antitrust law, political and economic dominance by huge corporate conglomerates, and the watering down of consumer protection considered together raise questions respecting where modern political conservatives stand on issues that once comprised core tenets of the conservative outlook. These tenets include the economic independence of the individual, local control rather than federalization of the economy,<sup>142</sup> and spirituality over materialism. Is

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<sup>142</sup> See Brewster, *supra* note 118, at 72-84.

<sup>143</sup> Conservative Dinesh D'Souza writes gushingly of the phenomenon of techno-affluence:

I have mentioned, but neglected to discuss, the most obvious new aspect of the new economy: money! Being filthy rich is fashionable again. As late as the 1980s, it was okay to have a lot of money as long as you inherited it or built it up over many years. Old money was better than new money. . . . But now prejudice against self-made wealth has completely evaporated. Now new money is better than old money, because it means that you actually earned it. . . . New money means that it has to be on display and out in the open, which wasn't the case before. . . . The insides of these homes are sumptuous: chandeliers bedazzle, a marble floor adorns the entryway, some sort of art and wine collection is mandatory, hand-painted murals and walk-in playhouses are nice touches for the child's room, and the sheets in the master guest bedrooms are Egyptian cotton and cost in the range of \$2,000 for a set. A little imagination is always appreciated: Limited chairman Leslie Wexner has a dining table that after meals descends into a subterranean kitchen, where the staff can clear the plates.

DINESH D'SOUZA, *THE VIRTUE OF PROSPERITY: FINDING VALUES IN AN AGE OF TECHNO-AFFLUENCE* 10, 14 (2000) (paragraph structure omitted). D'Souza's theme is that the traditional distinction between conservatives and liberals has given way to a new distinction based on attitudes toward the "new economy" and material wealth. *Id.* at 28-29. He labels those in favor of unlimited wealth acquisition as the Party of Yeah and

there any place in today's economic picture for the re-emergence of conditions that promote traditional conservative values?

In the realm of public policy, when conservatives face a choice between backing up conservative non-economic ideology—the survival of traditional culture, the promotion of non-materialist values—or furthering the economic agenda, they seem to choose the latter, and there now exists an entire jurisprudential framework—law and economics—to support why. Fundamentalist economic theory, which emphasizes efficiency to the exclusion of other values, spilled over from academia to politics in the 1980s and continues to drive conservative political dialogue and policy. One of the results is an obsessively consumerist culture,<sup>143</sup> in which acquisition of material wealth is treated as a measure of one's patriotism—a value directly at odds with the traditional conservative belief in spiritualism over materialism.

Market fundamentalists proffer many reasons to support the goal of economic efficiency through untempered growth: (1) because capitalism has proven the best economic system available, its engines are to be treated with deference;<sup>144</sup> (2) in order to compete globally, American corporations must combine to become sufficiently large and powerful to control market share internationally;<sup>145</sup> (3) growth ordinarily increases efficiency, and efficiency, rather than wealth distribution, is the primary goal of antitrust regulation;<sup>146</sup> and (4) the

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those who are skeptical about the new economy, the Party of Nay. *Id.*

<sup>144</sup> Abundant expressions of this belief exist both in popular media and in classic works. For example, in a speech on corporate responsibility, Earnie Davenport, Chairman and CEO of Eastman Chemical Company, wanted to get the message out that “that capitalism is the best system in the world for maximizing the value of technology, for maximizing the value of knowledge, and for maximizing the value of the human mind and spirit.” Earnie Davenport, *Unleashing the Power of the Human Mind and Spirit: The Promise of Capitalism*, EXECUTIVE SPEECHES, Feb. 1, 1997, at 28. Ludwig von Mises contended that “all intermediate forms of social organization were ‘un-availing,’ and that socialism too was ultimately ‘unworkable’”; therefore “capitalism is the only feasible system of social organization based on the division of labor.” John Bellamy Foster, *Contradictions in the Universalization of Capitalism*, MONTHLY REV., Apr. 1, 1999, at 29. See generally MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962); ADAM SMITH, WEALTH OF NATIONS (Prometheus Books 1991) (1776); James Ottavio Castagnera, *Groping Toward Utopia: Capitalism, Utopia, and Rawls' Theory of Public Policy*, 11 J. TRANSNAT'L L. & POL'Y 297 (2002).

<sup>145</sup> BOWMAN, *supra* note 60, at 168-71 (arguing that Reagan-Bush pro-merger policies marked “a more-or-less permanent transition in antitrust philosophy designed to accommodate the global integration of . . . markets”).

<sup>146</sup> See, e.g., BORK, *supra* note 121, at 6.

<sup>147</sup> Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, at F33. Friedman argued that corporations had no business trying to divine what constitutes “public interest” and that they could serve society best by pursuit of private profit. *Id.*; cf. William Graham Sumner, *The Concentration of Wealth: Its Economic Justification*, in SOCIAL DARWINISM: SELECTED ESSAYS OF WILLIAM

corporation's only legitimate goal is profit maximization, and profits increase with size.<sup>147</sup>

Legitimate as these objectives might be, conservatives must recognize, in accord with the principles of prudence and intergenerational responsibility, that they should not be pursued at the exclusion of broader goals or with a focus solely on the short-term. That approach contravenes the traditional conservative trust in existing arrangements and suspicion of change. Traditionally, conservatives have believed that human experience teaches new generations what has worked and what has failed and that the lessons of the past are transmitted to the future in the form of prevailing conditions, which are presumptively superior to speculative revision of those conditions.<sup>148</sup> In the admittedly laudable effort to maintain American dominance, and in their related allegiance to Efficiency Doctrine, modern conservatives have recently appeared willing to sacrifice the very conditions that promote cornerstone conservative values, such as preservation of local communities over nationalization,<sup>149</sup> economic

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GRAHAM SUMNER 151-52 (1963). Sumner wrote:

Industry may be republican; it never can be democratic, so long as men differ in productive power and in industrial virtue. In our time joint stock companies, which are in form republican, are drifting over into oligarchies or monarchies because one of a few get greater efficiency of control and greater vigor of administration. They direct the enterprise in a way which produces more, or more economically. This is the purpose for which the organization exists and success in it outweighs everything else.

*Id.*

<sup>148</sup> John Kekes observes that conservatives are motivated by enjoyment of valued conditions and the fear of losing those conditions, and believe that continued existence of conditions argues for their inherent value. KEKES, *supra* note 138, at 6-9. Russell Kirk concluded that change must be based on experience, history and tradition, rather than arising from prescriptive rules. DUNN & WOODARD, *supra* note 57, at 29. "Raymond English sees conservatives as clinging to the known and accustomed" and, in politics, stressing the value of tradition and authority. *Id.* at 33. Ronald Lora views conservatives as desiring "to preserve custom and opposing change" that might disrupt it. *Id.* Clinton Rossiter holds that conservatives oppose substantial societal change and "seek to defend personal acquisitions, value community, and subscribe to principles designed to justify the established order." *Id.*

<sup>149</sup> William Peterman remarks that the linkage of empowerment and local control only occurs among progressive advocates of community-based economic development. He argues that empowerment is actually an amorphous term that has different meanings depending on one's political orientation: For conservatives it means "ownership"; for liberals it means "access to government"; and for progressives it means "community control." WILLIAM PETERMAN, NEIGHBORHOOD PLANNING AND COMMUNITY-BASED DEVELOPMENT: THE POTENTIAL AND LIMITS OF GRASSROOTS ACTION 37 (2000).

<sup>150</sup> *But see* KEKES, *supra* note 138, at 36-37 (arguing that putting individual autonomy first raises serious problems).

self-determination, individualism,<sup>150</sup> and anti-materialism.

### III. MODERN CONSERVATIVES' MISGUIDED SUPPORT OF CORPORATE POWER AND THE CONSEQUENTIAL DIMINUTION IN INDIVIDUAL POWER

#### *The Laissez-Faire Myth*

Despite evidence that rules help temper the negative effects of corporate overreaching on other segments of society, modern conservatives argue that a healthy, productive economy results from free markets and minimal or no government regulation.<sup>151</sup> Two conflicting forces appear to drive this view: nostalgia for a mythical past in which individuals controlled their economic destinies without government interference, and fear of a future in which America may lose global marketplace supremacy and therefore political dominance.

Conservatives who oppose economic regulation adhere to what they perceive to be the competitive model envisioned by Adam Smith,<sup>152</sup> in which the economy self-regulates on the basis of supply and demand, and consumers act as rational maximizers of their per-

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<sup>151</sup> See, e.g., DUNN & WOODARD, *supra* note 57, at 56 ("Along with the sanctity of private property, most conservatives adhere to the view that laissez-faire capitalism is the best economic system."); NASH, *supra* note 4, at 13, 245. *But cf.* KRISTOL, *supra* note 90, at 211-12 (believing that although the founding fathers intended the United States to be "capitalist," both they and Adam Smith "would have been perplexed by the kind of capitalism we have in 1978.").

<sup>152</sup> Adam Smith posited that economic activity was co-extensive with the sphere of freedom, and that the pursuit of self-interest, when subject to the laws of the marketplace, yielded efficient and socially beneficial results, whereas government, which was subject to artificial human laws, was naturally coercive. BOWMAN, *supra* note 60, at 7. See generally SMITH, *supra* note 144.

<sup>153</sup> Professor Paul Stephen Dempsey explains market theory as follows: Capitalists, by investing in the means of production . . . satiate consumer demands for goods and services. Consumers, acting as rational maximizers of their own personal interests, cast dollar votes of approval by the purchase of goods and services they desire most, thereby rewarding entrepreneurs who satisfy their wants. Profits provide a motivation for entrepreneurs to seek out and satisfy these consumer desires. . . . Under this theory, the community's interest is best served by allowing competitive market forces to determine prices, for in a fully competitive environment pricing approaches marginal costs, or the costs to society of the next additional unit of production. Scarce resources are distributed by the 'invisible hands' of the market system to their highest valued use. Classic economic theory embraces the premise that optimum efficiency is achieved when the world's resources are allocated in a way that maximizes the welfare of consumers, as measured by their preferences in the marketplace.

Paul Stephen Dempsey, *Market Failure and Regulatory Failure as Catalysts for Political Change: The Choice Between Imperfect Regulation and Imperfect Competition*, 46 WASH. & LEE L. REV. 1, 11 (1989).

sonal interests. Classical economic theory<sup>153</sup> certainly possesses logic and appeal: society is an aggregate of individuals; individuals, driven by ego, act out of rational self-interest, and thus can best determine the most expedient means to self-enrichment. Individuals acting rationally in pursuit of self-interest reap the optimal benefit for themselves and society. The theory operates symmetrically, from consumer to producer, and from producer to consumer. In order to maximize his self-interest, the producer must please the consumer; the seller's interest in repeat business and reputation will mold his conduct to conform with consumer benefit.<sup>154</sup> In order to enrich himself, the consumer will select the products best suiting his needs. But this model of "perfect competition" rests on a "carefully circumscribed set of assumptions," among them, that consumers possess perfect information, no single producer has market power, and distribution of wealth is irrelevant.<sup>155</sup> Unfortunately, none of these assumptions is firmly grounded in real world practice.

History teaches that regulation to correct free market imperfections is essential. As Vermont Royster described:

[R]egulation to protect consumers is almost as old as civilization itself. Tourists to the ruins of Pompeii see an early version of the bureau of weights and measures, a place where the townsfolk could go to be sure they weren't cheated by the local tradesmen. Unfortunately, a little larceny is too common in the human species.

So regulation in some form or other is one of the prices we

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<sup>154</sup> Some commentators claim concern for reputation still keeps companies in line. *E.g.*, Eric A. Posner, *A Theory of Contract Law Under Conditions of Radical Judicial Error*, 94 NW. U. L. REV. 749, 755 (2000) ("Parties to a contract are almost never anonymous. In almost all contracts, one party or both parties care deeply about their reputations"; and "Most retailers offer warranties and honor them because they fear damage to their reputation.").

But John C. Coffee, Jr., *Guarding the Gatekeepers*, N.Y. TIMES, May 13, 2002, at A17, writes with respect to the policing power of concern for reputation, in a broader context:

These ongoing cases [of corporate and auditor fraud] reveal the fallacy of a concept that had become enshrined in judicial orthodoxy by the early 1990's: the idea that it would be irrational for professional gatekeepers to engage in fraud because they are pledging their reputations, built over years of decades, in vouching for the financial statements or management strategies of their clients. Since the gatekeeper serves many clients, according to this theory, it would not sacrifice its reputation to please any single client.

*Id.*

<sup>155</sup> Dempsey, *supra* note 153, at 11.

<sup>156</sup> Vermont Royster, 'Regulation' Isn't a Dirty Word, WALL ST. J., Sept. 9, 1987, at A32.

pay for our complex civilization. And the more complicated society becomes, the more need for some watching over its many parts. We shouldn't forget that a great deal of the regulation we encounter today in business or in our personal lives arose from a recognized need in the past.<sup>156</sup>

Even in the nineteenth century, which conservatives cite as an example of functioning *laissez-faire*,<sup>157</sup> adherents to a market-controlled economy themselves admitted that government intervention was necessary to protect businesses from "excessively competitive" practices.<sup>158</sup> Although in the decades before the Civil War, tensions existed among various business interests, including producers, warehousemen, provisioners, and other middlemen, after the war, the level of political and economic unrest grew to a new level of intensity.<sup>159</sup> Rail transportation dramatically altered the economic landscape. As a consequence of westward expansion, the economic interdependency of the various commercial players in the chain from producer to consumer grew, was recognized, and resulted in "vicious struggles" among the rail carriers,<sup>160</sup> who "were anything but staunch advocates" of pure competition.<sup>161</sup> "In this boiling cauldron of self-interest," the largest commercial parties—the railroads—were the strongest supporters of government intervention.<sup>162</sup>

Thus, rather than rejecting government intervention in unequivocal support of pure *laissez-faire*, the large commercial entities

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<sup>157</sup> See Deborah A. Ballam, *The Evolution of the Government-Business Relationship in the United States: Colonial Times to Present*, 31 AM. BUS. L.J. 553, 580 (1994) ("One of the myths of U.S. history is that governments followed a *laissez-faire* approach to business in the nineteenth-century. In fact the governments, at all levels, during this development period were extremely active in business affairs.").

<sup>158</sup> Rabin, *supra* note 114, at 1192.

<sup>159</sup> *Id.* at 1194.

<sup>160</sup> *Id.* at 1198.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 1199-1200.

<sup>163</sup> Commentators naturally vary in their descriptions of the American regulatory eras. For example, Professor Paul Stephen Dempsey describes three eras of regulatory proliferation, designated Origins of Economic and Antitrust Regulation (1897-1914); The Great Depression and the New Deal (the 1930s); and The New Frontier and Great Society (1960s and 1970s). Dempsey, *supra* note 153, at 13-14. Professor Deborah A. Ballam, after describing the early nineteenth century as "hotbeds of regulatory activity," also describes three phases of federal government regulation of business: Phase I (1877-1917): Establishing the Role of Government; Phase II (1917-1945): Implementing the Approach of Regulation to Business; and Phase III (1945-present): The New Regulation. Ballam, *supra* note 157, at 598-637. Professor Robert Rabin adopts a slightly different approach, perceiving clear eras of regulation in the latter half of the nineteenth century, and labels his seven periods Populist, Progressive, World War I, New Deal, post-New Deal, Great Society, and Public Interest. Rabin, *supra* note 114, at 1191.

of the late nineteenth century stimulated the first of several waves of federal regulation<sup>163</sup> designed to correct the harmful public effects of market imperfections. Federal regulatory reform began in 1887 with Congress's creation of the Interstate Commerce Commission, whose purpose was to address monopoly abuses by the railroads.<sup>164</sup> A second period of reform came in the Great Depression with the increased regulation of public interest industries, such as transportation and energy, and the creation of federal agencies designed to regulate business, including the Federal Power Commission ("FPC"), the Securities and Exchange Commission ("SEC"),<sup>165</sup> and the National Labor Relations Board ("NLRB").<sup>166</sup> Another discrete era of regulation occurred in the 1960s and 1970s, as policymakers responded to a wide variety of environmental and safety concerns that the private sector had not addressed.<sup>167</sup> Each of the three cycles of regulatory activity in the twentieth century occurred as a response to the inability of the market to satisfy public policy imperatives, which are not furthered naturally in the marketplace.<sup>168</sup>

Unfortunately, regulation has not been unequivocally positive for consumers either. The reality is that carefully tailored and administered regulation and recent deregulation of "infrastructure industries," such as communications, transportation, and energy, have *both*

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<sup>164</sup> Dempsey, *supra* note 153, at 13.

<sup>165</sup> Congress established the Securities and Exchange Commission in 1934 to enforce newly passed securities laws, including the Securities Act of 1933 and the Securities Exchange Act of 1934. *Creation of the SEC*, U.S. Securities and Exchange Comm'n Official Site, at <http://www.sec.gov/about/whatwedo.shtml#create> (last visited Mar. 31, 2004). The 1933 Act had two basic objectives, to require that investors received financial and other significant information concerning securities being offered for public sale; and to prohibit deceit, misrepresentations, and other fraud in the sale of securities. *Id.* The 1934 Act created the SEC, authorizing it to register, regulate, and oversee brokerage firms, transfer agents, and clearing agencies as well as the nation's securities self-regulatory organizations ("SROs"), such as the New York Stock Exchange, the American Stock Exchange, and the National Association of Securities Dealers, which operates the NASDAQ. *The Laws That Govern the Securities Industry*, *id.* The 1934 Act also prohibits certain types of conduct in the markets and provides the Commission with disciplinary power over regulated entities. *Id.*

<sup>166</sup> Dempsey, *supra* note 153, at 13-14.

<sup>167</sup> *Id.* at 14.

<sup>168</sup> *Id.*

<sup>169</sup> BOWMAN, *supra* note 60, at 140-41 (stating that external constraints on the exercise of corporate power stabilize power relationships; thus, regulation is not necessarily antithetical to the interests of those being regulated); NASH, *supra* note 4, at 275-76 (quoting Yale Brozen, *The Untruth of the Obvious*, in *REPUBLICAN PAPERS* 143, 157 (Rep. Melvin R. Laird ed., 1968) ("The fact is that most of these regulatory agencies have ended up setting price floors to protect industry, not price ceilings to protect consumers—and regulated industry has tended to become more inefficient a result.")).

served to support existing oligopolistic power at the expense of consumers.<sup>169</sup> Consequently, claims that conversion of entities, such as utility companies and insurance providers, to profit-making machines is “good for the economy” and “good for people” are dubious at best, as illustrated by a comparison of the Enron case with the Western Resources case. In Enron, individuals in pursuit of self-interest, left to their own devices, sought personal enrichment, glory, and the building of empires at the expense of consideration of other constituencies. In the Western Resources case, the ambitious CEO seemed to be following the same path, but an objective body, tasked with looking after the public interest, exposed the facts surrounding proposed transactions and stopped managerial actions certain to drive that company into unmanageable debt, resulting in considerable losses to the shareholders.

Given these contemporary and historical lessons, conservatives recklessly abandon their belief in pragmatism when they invoke a romanticized vision of “free market America.” The assumption that the laissez-faire system can somehow “heal” itself of its defects without any meaningful form of regulation is misguided and unfaithful to history. Despite its appealing frontier connotations, the concept of a “free market” separate from government is simply a myth. As Dean Joseph Tomain observes, markets simply do not exist without governments: “Governments create, protect, and enable transactions of property in markets.”<sup>170</sup> Dean Tomain explains further that governments work to enable markets by ex ante or ex post regulation. Ex ante regulation occurs prospectively, when government promulgates a regulatory scheme to promote economic, equitable, or social aims.<sup>171</sup> Ex post regulation occurs retrospectively, when “the market” operates according to a “baseline of rules designed for the creation, transfer, and protection of property,” otherwise known as the common law.<sup>172</sup> Conservatives seem to want it both ways: no promulgation

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<sup>170</sup> See Tomain, *Networking*, *supra* note 12, at 830.

<sup>171</sup> *Id.* at 831 (“To correct dislocations before the fact, ex ante as the economists say, government intervention into ‘the market’ is necessary, and such intervention modifies or displaces the common law baseline.”).

<sup>172</sup> *Id.* at 830; see also Rabin, *supra* note 114, at 1192 (explaining the distinction between the “policing model of regulation” and “the weaker model of government intervention based on common law tort and property principles [which was] the prevalent form of ‘regulation,’ along with sporadic state and local controls, before the Commerce Act”).

<sup>173</sup> Externalized costs have been defined as:  
a positive or negative impact upon a person not a party to it. Air and water pollution caused by the manufacture of a commodity is an example of a negative externality, one resulting from the consumption of the environment as if it were a free good, when it is in fact a scarce re-

of meaningful prospective, ex ante standards, and no lawyers bringing suits as ex post regulation to remedy the externalized costs<sup>173</sup> created by a failure to regulate beforehand.

The second force apparently driving conservatives to favor a mythical model of unrestrained corporate capitalism is that to compete globally, American corporations must combine in order to control market share internationally. This justification clashes strikingly with the oft-articulated conservative values of retaining individual economic prerogatives and the power of self-determination, not to mention preservation of local communities.<sup>174</sup> It must be recognized that the aim of global domination cannot be achieved without ensuring a sphere of marketplace control that transcends individual corporations and “requires cooperation, planning, and noncollusive concerted action.”<sup>175</sup> “Market power, based on control through administered prices,” must be shared and mutually protected by companies who otherwise would compete, “while the law works to stabilize the position of entrenched oligopolists.”<sup>176</sup> In the resulting oligopoly-dominated market,<sup>177</sup> “combination and cooperation render

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source. So too are injuries to workers in an unsafe workplace, or injuries to depositors in failed banking institutions.

Dempsey, *supra* note 153, at 17-18; cf. Garret Hardin, *The Tragedy of the Commons*, SCIENCE, Dec. 13, 1968, at 1243 (presenting a tale of a “rational herdsman” competing with other herdsman to increase the size of his herd without limit, in a world that is limited).

Shareholder primacy assumes the existence of external remedies. The theory “does not imply that the interests of corporate stakeholders must or should go unprotected. It merely indicates that the most efficacious legal mechanisms for protecting the interests of nonshareholder constituencies—or at least all constituencies other than creditors—lie outside of corporate law,” including the areas of labor, pension, health and safety, warranty, tort, and antitrust law. Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 442 (2001).

<sup>174</sup> See *supra* note 142 and accompanying text. It is also at odds with an early conservative theory of laissez-faire, combined with non-intervention in economic affairs of other countries, as a foundation for peace. Raico, *supra* note 59, at 5.

<sup>175</sup> BOWMAN, *supra* note 60, at 23.

<sup>176</sup> *Id.*

<sup>177</sup> Market conditions facilitating oligopoly pricing exist in many U.S. industries today. Michal S. Gal, *Reducing Rivals' Prices: Government-Supported Mavericks as New Solutions for Oligopoly Pricing*, 7 STAN. J.L. BUS. & FIN. 73, 75 (2001).

<sup>178</sup> As stated in George A. Hay, *Oligopoly, Shared Monopoly, and Antitrust Laws*, 67 CORNELL L. REV. 439, 444 (1982),

In contrast to a firm in a perfectly competitive market . . . the oligopolist does not expect its rivals to behave in [an] aggressive manner. Rather, it assumes that rivals will not expand their output at all, and under the most favorable assumption, that rivals will follow its move by matching its price and similarly reducing output. This assumption results from the belief that when the number of rivals is small, each will realize that their fortunes are interdependent. Any one firm's aggres-

traditional notions of competition meaningless,<sup>178</sup> and the decisions of the marketplace do not hold the same significance for “competition.”<sup>179</sup>

In fact, in order for the United States to dominate the global marketplace, “competition,” a basic assumption of laissez-faire ideology and a systemic protector of consumers,<sup>180</sup> must, and has, given way to shared monopoly, characterized by corporate concentration, consolidation, and merger.<sup>181</sup> In today’s economy, therefore, the Invisible Hand of the free market is less capable than ever of fulfilling its theoretical function as a natural counter-force to greed and self-interest.<sup>182</sup> Instead, the law’s protection of big business against the harsh realities of pure competition has allowed greed and self-interest, along with a lack of accountability, to flourish.

Policy makers must recognize the contradictions inherent in conservative nostalgia for a mythical era of pure laissez-faire versus anxiety over America’s international position, and make decisions with eyes open. Conservatives, who value the lessons of history,

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sive action will, because of its perceptible impact on its rivals’ sales volume, inevitably be self-defeating; such action induces retaliation that ultimately renders all rivals worse off.

The coordinated conduct of such firms, referred to as conscious parallelism or oligopoly pricing, arises simply through independent rational behavior and does not amount to illegal collusion. Gal, *supra* note 177, at 76. Professor Gal comments that “[d]espite the significance of the oligopoly pricing problem, antitrust does not have any efficient tool in its arsenal to combat it directly, without upsetting established notions of market conduct or taxing the administrative system beyond its regulatory powers.” *Id.*

<sup>179</sup> BOWMAN, *supra* note 60, at 137.

<sup>180</sup> As Professor Rabin notes, in the nineteenth century, those lower down the commercial chain—including consumers of rail transportation services—were the beneficiaries of the “cutthroat” competition among the railroad carriers. Rabin, *supra* note 114, at 1198.

<sup>181</sup> BOWMAN, *supra* note 60, at 169.

<sup>182</sup> Conservative antitrust policy and conservative judicial support of corporate autonomy have helped sustain a permanent “oligopoly of oligarchists” in the American economy. *Id.* at 179-80.

<sup>183</sup> In a poll taken in August 2002, sixty-four percent of citizens polled reported that they had neutral or negative feelings about large business corporations. See % *Say the Bush Admin Isn’t Paying Enough Attention to Working Families*, NATIONAL JOURNAL’S HOUSE RACE HOTLINE, Aug. 29, 2002. “Only 10% of adults surveyed last year think corporations can be trusted a great deal to look out for the interests of their employees.” Stephanie Armour, *Employees’ New Motto: Trust No One*, USA TODAY, Feb. 5, 2002, at 1B. While greed and corruption have characterized American corporations since their beginnings “from Civil War profiteers to inside-trading scandals of the ‘80s . . . the new millennium has ushered in a wave of fraud, corporate malfeasance, investment scams, ethical lapses and conflicts of interest unprecedented in scope.” Strauss, *supra* note 16. “A recent Brookings Institution poll found that public support of corporations has waned since fall [2001].” *Id.*

should examine the past, as well as their ideological contradictions, as they formulate their positions in response to today's corporate crises.

*The Waning Power of Self-Determination*

In the wake of a continuing series of scandalous revelations, news sources report that public distrust of corporations is at a record high.<sup>183</sup> But in fact, distrust of large business corporations is as old as the form itself.<sup>184</sup> The terms of the modern debate echo those of nineteenth century anti-monopolists, who warned of the perils to consumers and the public resulting from the accumulation of vast corporate wealth and political power.<sup>185</sup> Two distinct views emerged. Proponents of the first, represented by Theodore Roosevelt, favored selective enforcement of antitrust laws, and regarded large corporations as a positive development in their promotion of the laudable goal of efficiency.<sup>186</sup> Supporters of the second view, represented by Justice Louis Brandeis, adhered to the classical liberal economic outlook.<sup>187</sup> Justice Brandeis described this view of corporations as follows:

Although the value of this instrumentality in commerce and industry was fully recognized, incorporation for business was commonly denied long after it had been freely granted for religious, educational, and charitable purposes. It was denied because of fear. Fear of encroachment upon the liberties and opportunities of the individual. Fear of the subjection of labor to capital. Fear of monopoly. Fear that the absorption of capital by corporations, and their perpetual life, might bring evils similar to those which attended mortmain.<sup>[188]</sup> There was a sense of some insidious menace inherent in large aggregations of capital, particularly when held by corporations.<sup>189</sup>

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<sup>184</sup> See BOWMAN, *supra* note 60, at 38-42; Adolph A. Berle, Jr., *Foreword* to MODERN SOCIETY, *supra* note 118, at x, xi. According to Demos, a public policy research organization in New York, over the last century Americans' trust in major financial and Wall Street institutions has fluctuated considerably according to larger changes in American politics. David Callahan, *Private Sector, Public Doubts*, N.Y. TIMES, Jan. 15, 2002, at A21. Examples include the Progressive Era backlash against abuses of nineteenth century "robber barons" and New Deal Liberalism which grew out of the distrust caused by the Wall Street excesses of the 1920s and the crash of 1929. *Id.*

<sup>185</sup> BOWMAN, *supra* note 60, at 61.

<sup>186</sup> Rabin, *supra* note 114, at 1218-19.

<sup>187</sup> *Id.* at 1219.

<sup>188</sup> "Mortmain" is "an inalienable possession of lands or buildings by an ecclesiastical or other corporation." BLACK'S LAW DICTIONARY 1012 (6th ed. 1990).

<sup>189</sup> *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 548-49 (1933) (Brandeis, J., dissenting).

With the first wave of corporate mergers in the last two decades of the nineteenth century, the debate swelled to new proportions, as members of the Populist and Progressive Movements challenged corporations' funding and control of American politics.<sup>190</sup> While purporting not to oppose naturally-arising, "reasonable" combinations, these activists believed that pervasive unfair business practices required regulation in order to preserve competitive capitalism.<sup>191</sup> Manifestations of the trend toward monopolistic practices, including the railroad and beef trusts, helped lead to the passage of the Sherman Antitrust Act in 1890.<sup>192</sup>

Another concern arose at the turn of the twentieth century with the formation of interstate as well as intrastate chain stores. The emergence of such stores prompted some states to discourage them by imposing special taxes and licensing and other regulatory fees.<sup>193</sup> A sea change was occurring in business ownership. Again, Justice Brandeis noted:

Through size, corporations, once merely an efficient tool employed by individuals in the conduct of private business have become an institution—an institution which has brought such concentration of economic power that so-called private corporations are sometimes able to dominate the state. The typical business corporation of [the nineteenth century], owned by a small group of individuals, managed by their owners, and limited in size by their personal wealth, is being supplanted by huge concerns in which the lives of tens or hundreds of thousands of employees and the property of tens or hundreds of thousands of investors are subjected, through the corporate mechanism, to the control of a few men.<sup>194</sup>

Then, as now, untamed corporate growth threatened the existence and economic well-being of smaller players<sup>195</sup>—farmers, indus-

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<sup>190</sup> BOWMAN, *supra* note 60, at 61.

<sup>191</sup> *Id.* at 63.

<sup>192</sup> See *United States v. Trans-Mo. Freight Ass'n*, 166 U.S. 290, 219 (1898) (recognizing that many "trusts and conspiracies," including the beef and railroad trusts, motivated Congress to pass the Act). In the Senate debate on the original bill introduced by Senator John Sherman, Sherman stated, "If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessities of life." But he clarified that the aim of the bill was not to undo economic and social advantages produced by "lawful and useful combination." BOWMAN, *supra* note 60, at 63.

<sup>193</sup> See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

<sup>194</sup> *Liggett*, 288 U.S. at 565.

<sup>195</sup> Professor Warren Grimes dubs smaller players "Lilliputians," defining the class to include:

professionals (such as doctors or lawyers) who practice individually or in small groups and must do business with power buyers of their ser-

trial workers, independent proprietors, and, of course, shareholders, including mutual fund contributors. Then, as now, those favoring unregulated corporate expansion argued that the Invisible Hand of the free marketplace,<sup>196</sup> combined with the individual's exercise of contractual liberty in the private sphere, provides sufficient regulation of markets, jobs, and consumer rights.<sup>197</sup>

Chicago School ideology notwithstanding, it cannot credibly be contended that the market system has overcome the intrinsic flaws that originally required business regulation and now effectively self-regulates according to theory. Both history and current events demonstrate otherwise.<sup>198</sup> American economic regulation initially grew out of a failure of the market to protect consumers and a need to ad-

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vices; small businesses (such as independent pharmacies or book store owners) that confront power buyers or sellers; small franchisees that have ongoing dealings with a powerful franchisor [sic]; small farmers or ranchers that sell their output to power buyers; and any independent contractor that sells services to a power buyer (such as a taxicab or truck owner that sells his services to a large taxicab or trucking firm).

Warren S. Grimes, *The Sherman Act's Unintended Bias Against Lilliputians: Small Players' Collective Action as a Counter to Relational Market Power*, 69 ANTITRUST 195, 196 (2001).

<sup>196</sup> Dempsey writes that under pure market theory, [s]carce resources are distributed by the 'invisible hands' of the market system to their highest valued use. Classic economic theory embraces the premise that optimum efficiency is achieved when the world's resources are allocated in a way that maximizes the welfare of consumers, as measured by their preferences in the marketplace.

Dempsey, *supra* note 153, at 11.

<sup>197</sup> A recent example occurred last fall, when Congress considered the politically charged subject of Medicare benefits. A proposed bill to add a prescription drug benefit to Medicare bogged down because Republicans favored letting the "invisible hand of the market" rather than government set prices and premiums. Vicki Kemper, *Privatization at Heart of Stalemate in Debate Over Medicare; A GOP Proposal for a Market-Driven Program May Scuttle a Deal on a Prescription Benefit*, L.A. TIMES, Oct. 24, 2003, at A26. Democrats worried that the cost of medicine would climb too high if not forced down by government regulations. *Id.*

<sup>198</sup> George Soros argues that market fundamentalism will be as temporary as the pre-1913 victory of markets over social and political institutions:

Financial markets are inherently unstable and there are social needs that cannot be met by giving market forces free rein. It is market fundamentalism that has rendered the global capitalistic system unsound and unsustainable. This is a relatively recent state of affairs. At the end of the Second World War, the international movement of capital was restricted and Bretton Woods institutions were set up to facilitate trade in the absence of capital movements. Restrictions were removed only gradually, and it was only when Margaret Thatcher and Ronald Reagan came to power around 1980 that market fundamentalism became the dominant ideology.

Eisuke, *supra* note 120. *But cf.* BOWMAN, *supra* note 60, at 168-71 (arguing that Reagan-Bush pro-merger policies marked permanent change in American antitrust law).

dress the social chaos “wrought by the rise of big business.”<sup>199</sup> As discussed above, the government has repeatedly stepped in to correct the results of a fundamental misconception of laissez-faire advocates: the belief that it is possible and desirable to reduce all human values to market values.<sup>200</sup> Although a conservative backlash was predictable in response to the proliferation of federal agencies in the 1960s and 1970s,<sup>201</sup> today’s conservatives make the same conceptual mistake as their forebears regarding the power of the market to police itself.

Yet the market seems almost to have displaced the very system of American democratic government as an object of veneration by political conservatives. Conservatives are known for their nationalism and patriotism, founded upon a belief in America’s distinctive character, reverence for its constitutional form of government, and a preoccupation with preserving its unique cultural heritage.<sup>202</sup> In the realm of public discourse, however, proponents of “leave us alone” oligopolistic markets have successfully equated allegiance to capitalism and deregulation with core American principles, such as personal choice and opportunity to shape one’s destiny. Such a conflation has created an atmosphere, paradoxically, in which dissenters to the principle of unlimited corporate growth are cast as political subversives.<sup>203</sup>

<sup>199</sup> Ballam, *supra* note 157, at 611-12.

<sup>200</sup> LOUIS L. JAFFE & NATHANIEL L. NATHANSON, ADMINISTRATIVE LAW 7-8 (4th ed. 1976). As Senator Cummins stated during the debate on the Sherman Act: [W]e must do something to preserve the independence of the man as distinguished from the power of the corporation; that we must do something to perpetuate the individual initiative. We often go wrong, I believe, in assuming that because a great corporation, a vast aggregation of wealth, can produce a given commodity more cheaply than can a smaller concern, therefore it is for the welfare and the interest of the people of the country that the commodity shall be produced at a lower cost. I do not accept that article of economic faith. I think we can purchase cheapness at altogether too high a price, if it involves the surrender of the individual, the subjugation of a great mass of people to a single master mind.

51 CONG. REC. 12,742 (1914) (statement of Sen. Cummins) (paragraph structure omitted).

<sup>201</sup> As Professor Stephen Dempsey describes:

[W]hile there were forty-nine federal agencies in 1960, by 1976 there were eighty-three agencies. The number of civil servants employed by regulatory agencies grew from 28,000 in 1970, to 81,000 in 1979. By 1985, more than 15 million local, state, and federal employees administered the regulatory welfare state. Paul MacAvoy estimated that in 1965, regulated industries produced 8.5 percent of the gross national product; by 1975, that figure was 23.7 percent.

Dempsey, *supra* note 153, at 14 (footnotes omitted).

<sup>202</sup> DUNN & WOODARD, *supra* note 57, at 29-31.

<sup>203</sup> Consider the formation of the three-year-old Club for Growth, whose mission is

One critical aspect of the laissez-faire model, overlooked or downplayed by conservative theorists, is its assumption, drawn from the metaphor of the territorial frontier,<sup>204</sup> of a guaranteed “exit option” for each party in a free market transaction. This “exit” principle, rooted as far back as ancient Rome,<sup>205</sup> presupposes that consumer choice is capable of serving as a check on oppressive commercial practices. In analyzing the importance of the frontier, Professor James Buchanan states, “The proper economic interpretation of frontier lies in its guarantee of an exit option, the presence of which dramatically limits the potential for interpersonal exploitation.”<sup>206</sup> While conservatives use laissez-faire ideology to support a hands-off approach to corporate growth and conduct, they disregard the resulting imbalance of power between commercial parties and the consequential subversion of the conservative ideals of personal choice and freedom to shape one’s economic destiny.

This central contradiction is illustrated in the Consumer Side case study, described in Part I of this Article, in which a farmer acquired and attempted to sow crops with a “lemon planter” manufactured by international conglomerate Deere & Company.<sup>207</sup> The resulting lawsuit, which the farmer and his company lost,<sup>208</sup> illustrates how arrogant and unresponsive a modern oligarchy can be to its smaller customers when it knows—indeed, when it has helped ensure—that the smaller party has available, at best, a very limited “exit option.”

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to disparage anyone, including Republicans, who opposes the administration’s pro-business policies. See Nicolas Thompson, *Attacks on Fiscal Moderates Fuel Battles in GOP; Both Parties Decry Group’s Ads as Illegal*, BOSTON GLOBE, May 19, 2003, at A3. The group’s leader, David Keating, vows to attack members of either party who are not “free market,” even those he terms “Republicans In Name Only” or “RINOs.” *Id.* One of the group’s tactics has been to equate opposition to tax cuts favoring big business with an unpatriotic stance against the war in Iraq. *Id.*

<sup>204</sup> James M. Buchanan, *The Soul of Classical Liberalism*, 5 INDEP. REV. 111, 117 (2000).

<sup>205</sup> As Professor Ralph Raico explains, a free market works best when trade is decentralized:

After the fall of Rome, no empire was ever able to dominate the continent. Instead, Europe became a complex mosaic of competing nations, principalities, and city-states. The various rulers found themselves in competition with each other. If one of them indulged in predatory taxation or arbitrary confiscations of property, he might well lose his most productive citizens, who could ‘exit,’ together with their capital.

Raico, *supra* note 59, at 1.

<sup>206</sup> Buchanan, *supra* note 204, at 117.

<sup>207</sup> See *supra* notes 36-51 and accompanying text.

<sup>208</sup> *Limestone Farms*, 29 P.3d at 462.

The agricultural equipment sector is something of an oligopoly, in that only four companies manufacture over ninety percent of all agricultural equipment.<sup>209</sup> The major companies employ similar purchase documents, routinely disclaiming implied warranties of fitness and merchantability and limiting available remedies to repair and replacement of defective parts.<sup>210</sup> In this way, the manufacturers, with their legions of lawyers and sophisticated grasp of the litigation landscape—classic “repeat-player” corporations<sup>211</sup>—are able to determine the outcome of a potential lawsuit years before it actually occurs. Experience instructs these companies to minimize their legal exposure with disclaimers and other limitations designed both to keep them in control of the transaction and out of the courtroom. Such power enables these corporations to dispose of most claims through successful summary judgment motions.<sup>212</sup> The terms of the transaction are established in advance unilaterally,<sup>213</sup> and the other party—often, a smaller farm company—has at best a limited exit option. The exit leads to another transaction with similar predetermined, unilaterally-drawn rules.

For example, in the *Limestone Farms* case, the farmer who pur-

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<sup>209</sup> These figures are based on analyses of the following annual reports from 2001: Deere & Company, *available at* [http://www.deere.com/en\\_US/compinfo/reports/annual/?sidenavstate; Case/New\\_Holland](http://www.deere.com/en_US/compinfo/reports/annual/?sidenavstate; Case/New_Holland), *available at* [http://investors.cnh.com/ireye/ir\\_site.zhtml?ticker=CNH&script=700](http://investors.cnh.com/ireye/ir_site.zhtml?ticker=CNH&script=700); Caterpillar Challenger, *available at* [http://www.caterpillar.com/about\\_cat/investor\\_information/pdf/YECX0014.pdf](http://www.caterpillar.com/about_cat/investor_information/pdf/YECX0014.pdf); and AGCO, *available at* [http://media.corporate-ir.net/media\\_files/NYS/ag/reports/agco\\_2001ar/main.html](http://media.corporate-ir.net/media_files/NYS/ag/reports/agco_2001ar/main.html).

<sup>210</sup> *Cf.* Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233, 233-34 (noting consumer sale contracts are long, complex, standardized, preprinted contracts, carrying mandated disclosures which consumers are discouraged from reading, in a marketplace where choice is often unavailable, given the industry-wide use of similar boilerplate contract provisions).

<sup>211</sup> *See* Galanter, *The Haves*, *supra* note 37, at 97-98 (finding that repeat players are actors “who are engaged in many similar litigations over time,” such as insurance companies and prosecutors, who have low stakes in any one case and the resources to pursue their long run interests). Professor Galanter now divides the players into the “uphill cluster,” defined as cases brought by individuals against organizations, and the “downhill cluster,” defined as cases typically brought by plaintiff organizations against organizational or individual defendants. Marc Galanter, *Contract in Court*, 2001 WIS. L. REV. 577, 592-93.

<sup>212</sup> *See* Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141 (2000) (examining increased use of summary judgment in federal courts between 1973 and 1999); Kent Sinclair & Patrick Hanes, *Summary Judgment: A Proposal for Procedural Reform in the Core Motion*, 36 WM. & MARY L. REV. 1633, 1661 (1995) (summarizing the filing and granting of summary judgments in federal court from 1985 through 1993).

<sup>213</sup> As Professor Galanter documented, among the advantages enjoyed by repeat players is the “ability to structure the transaction.” Galanter, *The Haves*, *supra* note 37, at 125 fig.3.

chased the defective planter could deal only with the dealership, not with the corporation. He asked all the right questions concerning the condition of the planter and its warranties. While the dealership salesman told the farmer the planter was new and fully warranted by Deere, Deere had in fact disclaimed all meaningful warranties and liability, and provided as well that the dealership could not make binding representations on behalf of the corporation, a situation the average farmer could not be expected to anticipate.

Consequently, in their suit against Deere & Company and the Deere dealership, the farmer and his limited liability company ("LLC") were doomed before they filed their petition in district court. The plaintiffs claimed breach of express<sup>214</sup> and implied warranties of fitness and merchantability,<sup>215</sup> failure of the essential purpose of the warranty,<sup>216</sup> and violations of the state consumer protection act.<sup>217</sup> Realizing the defendants would argue the only proper

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<sup>214</sup> An express warranty is created by "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain." KAN. STAT. ANN. § 84-2-313(a) (1996) (codifying U.C.C. § 2-313(a)). Additionally, "[a]ny description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description." U.C.C. § 2-313(b) (2002).

<sup>215</sup> Implied warranties arise by operation of law and not by agreement of the parties, their purpose being to protect a consumer from loss where merchandise fails to meet normal commercial standards. *Limestone Farms*, *supra* note 39, at 461. The UCC authorizes a seller expressly to disclaim implied warranties of merchantability and fitness for a particular purpose. *See* KAN. STAT. ANN. § 84-2-316 (1996). However, many consumer statutes forbid sellers from disclaiming the implied warranties in consumer transactions and void such disclaimers. *See, e.g., id.* § 50-639(a)(2), (e).

<sup>216</sup> Even in a non-consumer case, where a seller provides an express limited repair or replace warranty to the exclusion of other remedies, a buyer is not required to allow a seller to tinker with a defective product indefinitely. *Mercury Marine v. Clear River Constr. Co.*, 839 So. 2d 508, 524 (Miss. 2003); *Wilk Paving, Inc. v. Southworth-Milton, Inc.*, 649 A.2d 778, 781 (Vt. 1994). Therefore, where an apparently fair and reasonable contract clause fails of its essential purpose or operates to deprive a party of the substantial value of the bargain, it must give way to the general remedy provisions of U.C.C. § 2-715, which include consequential and incidental damages. U.C.C. § 2-719, cmt. 1 (2002).

<sup>217</sup> *See Limestone Farms*, *supra* note 39, at 615. Like many consumer statutes, Kansas's statute originally was modeled on the Uniform Buyer Protection Act, which rendered unlawful any deception or misrepresentation in connection with the sale of merchandise to a consumer. KAN. STAT. ANN. § 50-623 Kan. cmt. (1973). The original Act provided only for public enforcement. *Id.* That statute was replaced in 1973 with a broader one that covered the sale of services and real estate, and authorized private enforcement, including provisions for penalties and attorneys' fees to a prevailing plaintiff. *Id.* As in other jurisdictions, much of the power of the revised statute has been stripped away by court interpretation, including imposition of traditional standing requirements and narrow interpretations of relevant terms, despite a legislative mandate to courts to construe the statute liberally in order to promote enumerated policies, including protection from unconscionable supplier practices and unbargained for warranty disclaimers. KAN. STAT. ANN. § 50-623 (b), (c) (1983).

plaintiff was the non-consumer land lessor whose representative signed the purchase order, the farmer asserted that various UCC provisions called for examination of the facts surrounding the transaction in order to discover its true character.<sup>218</sup> Further, the farmer contended that he acquired the planter as a consumer, since planters are not titled, and he took exclusive possession of it with intent to purchase.<sup>219</sup> The farmer never got that opportunity, however, be-

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<sup>218</sup> Brief, *supra* note 40, at 25-33. The UCC encourages courts to look beyond the four corners of sales documents to understand the true intent of the parties involved in a transaction. See KAN. STAT. ANN. § 84-2-202 (1996) (codifying U.C.C. § 2-202) (stipulating that written agreements may be explained or supplemented by oral evidence regarding course of dealing or course of performance); *Barbara Oil Co. v. Kan. Gas Supply Corp.*, 827 P.2d 24, 35 (Kan. 1992) (quoting Kansas Comment to KAN. STAT. ANN. § 84-2-202). Reversing the common law, the UCC establishes a presumption that a writing is not integrated. *Id.* In determining whether a writing is integrated, the court considers such factors as whether the writing contains disclaimer clauses, the nature and scope of prior negotiations and any alleged extrinsic terms, and the sophistication of the parties. *Burge v. Frey*, 545 F. Supp. 1160, 1170 (D. Kan. 1982) (applying Kansas law). The course of actual performance of an agreement is deemed the best indication of what the parties intended the writing to mean. U.C.C. § 2-202 cmt. 2 (2002).

<sup>219</sup> Brief, *supra* note 40, at 46-47. The statute defined “consumer” as “an individual or sole proprietor who seeks or acquires property or services for personal, family, household, business, or agricultural purposes.” KAN. STAT. ANN. § 50-624(b) (1983 & Supp. 2003). This definition of consumer is intentionally broad and includes farmers. See *id.* § 50-624 Kan. cmt. on Subsection (b) (1973); *Stair v. Gaylord*, 659 P.2d 178 (Kan. 1983). “A consumer transaction” is a “sale, lease, assignment or other disposition for value of property or services within this state . . . to a consumer.” KAN. STAT. ANN. § 50-624(c). The Kansas Comment to this “Definitions” section states, “the only requirement is that the transaction involve a consumer.” *Id.* § 50-624 Kan. cmt. on Subsection (c) (1973) (emphasis added). The farmer argued that the transaction was a “disposition for value”: a consumer-farmer was intimately involved in the transaction and took immediate, exclusive, and proprietary possession of the planter directly from the supplier; he was the primary beneficiary of the transaction; and the fact that a third party temporarily supplied the purchase funds did not change the true character of the transaction. Brief, *supra* note 40, at 46-47. Therefore, under other statutory provisions, horizontal privity was not required. KAN. STAT. ANN. § 50-639(2)(b) (1983 & Supp. 2003) and 1973 Kansas Comment 3 (eliminating “once and for all” horizontal and vertical privity requirements for actions based on consumer transactions).

The case appeared to be a question of first impression for Kansas courts, but other jurisdictions had addressed similar situations, a few ruling in favor of the consumer. See, e.g., *Maillet v. ATF-Davidson*, 552 N.E.2d 95 (Mass. 1990) (holding injured press operator’s status as employee of buyer and lack of privity with manufacturer did not bar claim as consumer); *Mermer v. Med. Correspondence Servs.*, 686 N.E.2d 296 (Ohio Ct. App. 1996) (holding that transactions in which attorneys acting for plaintiff purchased medical records were consumer transactions); *Rauderbaugh v. Action Pest Control*, 650 P.2d 1006 (Or. Ct. App. 1982) (holding irrelevant the fact that defendant company made a misleading statement to the Veterans Administration rather than to the consumer-plaintiff because plaintiff relied on the statement); *Kennedy v. Sale*, 689 S.W.2d 890 (Tex. 1985) (holding plaintiff employee had standing as consumer under state consumer law to sue on group insurance pol-

cause the district court granted the defendants summary judgment on all claims, and the court of appeals affirmed.<sup>220</sup>

In ruling for the manufacturer and dealership, the courts held that the only proper plaintiff was the land lessor, who had loaned the farmer the purchase money. The lessor's representative had signed the form purchase order, and that, for the courts, was dispositive. The courts declined to consider the negotiations and discussions between the dealer and the farmer, holding instead that, as evidenced by the purchase order, the farmer never owned the planter. As such, the farmer was not a proper plaintiff, and his acquisition of the new planter was irrelevant.<sup>221</sup> Similarly, the farm LLC had not been formed at the time the farmer acquired the planter, so it was not in horizontal privity with the defendants. The only possible plaintiff, the land lessor, suffered no losses as a result of the planter's defects;<sup>222</sup> therefore, no proper plaintiff existed. The boilerplate warranty disclaimers and the formalist privity requirements together worked to nullify all potential claims.

Holdings in cases like *Limestone Farms*, involving industries with parallel sales practices, undermine capitalist self-regulation by stripping smaller buyers of viable exit options and, consequently, of their power to serve as effective countervailing forces to the indifference of large seller corporations. The courts reviewing the farmer's case had a number of options available, consistent with existing law, that would have permitted a jury to review his claims.<sup>223</sup> Yet, despite the farmer's and dealership's engaging in a classic buyer-seller negotiation, drawing on regional custom and establishing a unique course of dealing, the courts ignored the actual negotiations in favor of a four-corners interpretation of the boilerplate document provided by the corporate defendant.

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icy even though employer alone purchased policy).

<sup>220</sup> *Limestone Farms*, *supra* note 39, at 616.

<sup>221</sup> *Id.* at 615; *cf. supra* note 218.

<sup>222</sup> The farmer leased the land on a cash-rent basis and had managed to pay the rent for that season. *See* Brief, *supra* note 40, at 4.

<sup>223</sup> *See* text accompanying *supra* notes 214-17. The courts could have held, *inter alia*, that the farmer was a sole proprietor consumer when he acquired the planter for his prospective farm; that the farmer, as an agent of the farm company, purchased the planter for the benefit of the company, with borrowed funds, consistent with local custom; that the purchase orders were ambiguous (they indicated the buyer was an individual, not a company), requiring resort to extrinsic evidence; that the boilerplate form, not seen by the farmer, was not fully integrated and/or unconscionable and unenforceable. *See* Brief, *supra* note 40, at 24-64.

#### IV. CONSERVATIVES' USE OF FICTIONS TO OBSCURE ABANDONMENT OF TRADITIONAL VALUES

As discussed above, with their unswerving allegiance to the ideal of laissez-faire, conservatives have all but abandoned the core values they profess to hold dear. In the context of corporate law, conservatives have promoted the distorted theories of Efficiency Doctrine and Shareholder Primacy,<sup>224</sup> concepts entailing just enough falsity and fiction to foster ungovernable oligopolies at the expense of most other values, including survival of traditional culture, communities, and morality.

##### *The Conservative Record: Abandonment of Traditional Values*

While standing against regulation of business from the outside, conservatives have also opposed measures that would ensure effective internal control. Even in the wake of a series of devastating corporate "meltdowns," as one corporation after the next is revealed to have footings in the sand,<sup>225</sup> many political conservatives in Washington have opposed meaningful corporate governance reform.<sup>226</sup> The pri-

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<sup>224</sup> "Shareholder primacy" represents the idea that the shareholder is preeminent in the hierarchy of a corporation's constituencies. David Millon, *Game Plan or Business as Usual? A Critique of the Team Production Model of Corporate Law*, 86 VA. L. REV. 1001, 1001 n.3 (2000).

<sup>225</sup> A Chicago-based forensic accounting firm found that 330 companies restated their financial statements because of "accounting errors" in 2002, an increase of twenty-two percent from the year before. Carrie Johnson, *New Accounting Panel Being Watched for Reform Clues*, WASH. POST, Mar. 4, 2003, at E1. Many corrections came after the passage of the Sarbanes-Oxley Act and the collapse of Arthur Anderson, which had worked for Enron. *Id.*

<sup>226</sup> Although post-Enron, some conservative politicians, such as John McCain (R-Ariz.), actively supported reform, many continued to advocate wide-open prerogatives for big business. Richard A. Opper, Jr. & Alison Mitchell, *GOP Surpasses Bush on Corporate Reform; Republican Legislators Call for Tougher Measures Against Wrongdoing*, S. FLA. SUN-SENT., July 12, 2002, at 1A. For example, in connection with the proposed Sarbanes-Oxley Bill, Sen. Phil Gramm (R-Tex.) stated that he hoped to drastically scale back proposals for accounting and corporate governance reforms. *Id.* Even the sponsors of the bill that ultimately passed expressed reservations about reform efforts. Representative Michael G. Oxley (R-Ohio), the chairman of the House Financial Services Committee, warned that the Senate was turning into a "feeding frenzy." *Id.* President Bush expressed irritation about the continuing focus on corporate irresponsibility, citing the attack on the World Trade Center as more meaningful: "I believe people have taken a step back and asked, 'What's important in life?'" President Bush said. "You know, the bottom line and this corporate American stuff, is that important? Or is serving your neighbor, loving your neighbor like you'd like to be loved yourself?" *Id.* Bush's conservative voter base opposes such regulation. See Michael Stein, *Taking a Political Pulse: The Stock Markets, Economy and President Bush*, MONTCLAIR TIMES, July 24, 2002.

The European media was not fooled by the brief, high-profile show of conservative support for reform. As Eddie Holt wrote in *The Irish Times*, "Public opinion in

vate sector's abdication of its responsibility to goals other than the narrow profit-making mission—wholeheartedly supported by conservatives inside and outside of the academy—sends a ringing message to the rest of society regarding accountability. Corporate leaders' decisions to sacrifice private principle and conscience to the altruistic-sounding objective of "shareholder primacy" correlate directly with the current corporate "meltdown" and attendant accounting and management scandals, which have wrought far-reaching negative consequences on markets and in the lives of individuals. Over the past couple of years, it has been difficult to pick up the daily newspaper without seeing yet another account of illegal or unethical conduct by corporate executives. Fraud, conflicts of interest, and self-dealing are rampant.<sup>227</sup>

The promotion of constricted conservative economic theories is especially egregious in light of evidence that unregulated corporate conduct does not result in the sort of pure efficiency the theories claim<sup>228</sup> or, in many cases, the degree of shareholder benefit promised.<sup>229</sup> Instead, predictably, "rational self-interest" drives the people who comprise the corporation, and, as illustrated by the Enron and Western Resources cases, they frequently put their own interests ahead of other, loftier goals.

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the US has already forced Republican politicians to wear grave faces and praise corporate reform even though they were utterly against such 'interference' throughout their careers. Indeed, Republican senators have voted in favour of an accountancy practices' reform bill that they opposed just months ago." Eddie Holt, *We Gotta Take 'Im Out*, IRISH TIMES, Aug. 17, 2002, at 51. *But cf.* Benjamin R. Barber, *A Failure of Democracy, Not Capitalism*, N.Y. TIMES, July 29, 2002, at A19 (stating Sarbanes-Oxley Bill only appears to be a reassertion of public over private interests). In fact, former SEC Chairman Arthur Levitt, appointed by President Bill Clinton in 1993 and again in 1998, had attempted to push through reform measures that would have stopped accounting firms from selling services to the companies they audited. Anya Schiffrin, *SEC Chairman Says He Won't Complete Term*, THE INDUSTRY STANDARD, Dec. 20, 2000 (noting Levitt sought to ban accounting firms from getting consulting contracts from companies they audit and pioneered Regulation FD, which requires companies to give the same information to retail investors as investment bank analysts).

<sup>227</sup> See, e.g., Stephen Labaton, *Handcuffs Make Strange Politics, You Say? But Not in Washington*, N.Y. TIMES, Aug. 2, 2002, at C1 (detailing ongoing criminal investigations and prosecutions for fraud of executives of Arthur Andersen, Worldcom, Adelphia Communications, Imclone Systems, AOL, Computer Associates, Enron, Global Crossing, and Qwest).

<sup>228</sup> See Steven A. Ramirez, *Law and Macroeconomics of the New Deal at 70*, 62 MD. L. REV. 515, 523-24 (2003).

<sup>229</sup> See generally Faith Stevelman Kahn, *Pandora's Box: Managerial Discretion and the Problem of Corporate Philanthropy*, 44 UCLA L. REV. 579, 585 n.17 (1997); Jonathan D. Springer, *Corporate Constituency Statutes: Hollow Hopes and False Fears*, 1999 ANN. SURV. AM. L. 85, 105.

*Recent Reforms*

Having looked the other way for years and even after arguing against reform,<sup>230</sup> Congress and the major stock exchanges in a classic exercise in shutting the gate after the pigs have escaped, moved in 2002 to increase corporate accountability in general and the effectiveness of boards in particular. The New York Stock Exchange (“NYSE”) and NASDAQ private listing standards have a different and arguably more effective focus than the congressional approach, because the former concentrate on self-regulation, whereas the Sarbanes-Oxley Act<sup>231</sup> hastily drafted and passed, emphasizes external, bureaucratic-based policing measures.<sup>232</sup>

In early and mid-2002, at the request of then-SEC Chairman Harvey Pitt,<sup>233</sup> the NYSE and NASDAQ proposed changes to their

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<sup>230</sup> Both the SEC Chairman Harvey Pitt and a number of conservative congressmen opposed increasing corporate oversight and accountability. “The smart-but-inept Pitt,” for example, “called for a kinder, gentler SEC at a time when evidence seemed to confirm the complaint of former SEC Chairman Arthur Levitt that the agency was already a tame, nearly toothless tiger. Pitt sought a less adversarial atmosphere,” holding meetings with former clients who argued against reform. James Jaffe, *Pitt and Stalled Reform*, CHI. TRIB., Jan. 5, 2003, at C1. When Congress asked him what the SEC needed, he recommended that it make the chairmanship a Cabinet position. *Id.*

<sup>231</sup> Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

<sup>232</sup> See generally R. William Ide, *Post-Enron Corporate Governance Opportunities: Creating a Culture of Greater Board Collaboration and Oversight*, 54 MERCER L. REV. 829 (2003). Professor Arthur P. Brief of Tulane University Business School believes “[t]he private efforts are going to have more impact in the long run. . . . Corporate governance has been corrupted in America, and the only way to change that is to reduce the power in the C.E.O.’s hands.” Kurt Eichenwald, *Even If Heads Roll, Mistrust Will Live On*, N.Y. TIMES, Oct. 6, 2002, at C1.

<sup>233</sup> NYSE, *Nasdaq Urged to Review Rules*, L.A. TIMES, March 20, 2002, at C7. As of March 1, 2003, Pitt, in a lame-duck capacity, was still running the SEC. “It’s outrageous that Harvey Pitt, whose own conflicts of interests and poor judgment led to this resignation more than two months ago, remains in charge while the commission crafts landmark rules to implement the corporate responsibility law enacted last summer,” remarked Rep. Edward J. Markey (D-Mass). Stephen Labaton, *S.E.C.’s Critics Come to a Boil (Again)*, N.Y. TIMES, Jan. 26, 2003, at C2. Professor Lynn Turner, former SEC chief accountant, speculates that the Administration kept Pitt to continue to fulfill the goals of special interests and to minimize the impact of the Sarbanes-Oxley Act. Tim Reason, *Two Weeks in January*, CFO MAG., Mar. 1, 2003, at 75. As has been widely published, before President George W. Bush appointed Harvey Pitt SEC Chairman, Pitt worked as a lobbyist for many of the firms later to come under his jurisdiction. See, e.g., Dana Milbank, *SEC Chairman Pitt a Potential Liability to Administration; Bush Defends Regulator from Critics*, WASH. POST, July 11, 2002, at A6. Before the Enron scandal, Pitt had little interest in enforcement activity. “I believe that the marketplace usually determines what rational people do,” he said in an interview. Jeffrey Toobin, *The Man Chasing Enron*, NEW YORKER, Sept. 9, 2002, at 94. Pitt’s predecessor, Arthur Levitt, was a relatively activist chairman, passing rules near the end of his term that restricted the consulting services accounting firms could of-

corporate governance listing standards. On July 6, 2002, the NYSE published the recommendations of its Corporate Accountability and Listing Standards Committee,<sup>234</sup> which focused primarily on insuring the independence of directors. After President Bush signed the Sarbanes-Oxley Act into law on July 30, 2002, the NYSE revised its standards, and on August 16, 2002, published its final proposals and forwarded them to the SEC for approval.<sup>235</sup> The SEC approved the Final Corporate Governance Standards on November 4, 2003.<sup>236</sup> The first standard requires director independence and that boards be populated with a majority of independent directors.<sup>237</sup> An “independent director” is one the board has determined has no material relationship with the listed company.<sup>238</sup> The board’s determination must be published in the company’s annual proxy statement.<sup>239</sup> Other standards require corporations hold “executive sessions” for non-management directors and publish company-specific governance guidelines and codes of conduct and ethics.<sup>240</sup> In addition, the standards mandate that CEOs certify that they are unaware of any violation by their companies of the listing standards.<sup>241</sup> The NASDAQ proposal, which has not been adopted, is less comprehensive,<sup>242</sup> though it may be revised to track the NYSE standards more closely.<sup>243</sup>

While the private standards emphasize director independence, the Sarbanes-Oxley Act of 2002 focuses on enhancing disclosure requirements and preempting potential conflicts of interest. The Act creates a Public Company Accounting Oversight Board whose purpose is to establish standards for accounting firms with public client companies and audit those companies for compliance.<sup>244</sup> Addition-

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fer to their clients and banned the common corporate practice of leaking market-moving information to stock analysts and big investors. *See* INVESTMENT NEWS, June 4, 2001, at 10.

<sup>234</sup> NYSE Official Website, Corporate Governance, Historical Reference Material on NYSE Listed Company Corporate Governance Standards, at <http://www.nyse.com/p1021232175378.html> (last visited Mar. 31, 2004).

<sup>235</sup> *Id.*

<sup>236</sup> NYSE Official Website, Corporate Governance, Introduction & Final Corporate Governance Listing Standards [hereinafter NYSE], at <http://www.nyse.com/pdfs/finalcorpgovrules.pdf> (last visited Mar. 31, 2004).

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* Standard 2.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* Standards 3, 9.

<sup>241</sup> *Id.*

<sup>242</sup> *Raising Corporate Governance Standards: A Review of the New NYSE & Nasdaq Listing Proposals*, WALL ST. LAW., July 2002, at 6.

<sup>243</sup> NYSE, *supra* note 236, Standard 12.

<sup>244</sup> 15 U.S.C. §§ 7211-7219 (2002).

ally, the Act increases criminal penalties for corporate fraud and institutes broad corporate governance changes,<sup>245</sup> including establishing an affirmative duty for attorneys to inform upper management and the board of any transgressions.<sup>246</sup>

The long-range impact of recent reforms is yet to be determined, but some commentators have questioned the efficacy of these reactive measures.<sup>247</sup> Certainly, the negative economic reverberations of corporate malfeasance will be felt widely for years to come. Innocent third parties, including employees and shareholders, suffer irreversible economic loss and, on a broader level, states struggle to balance budgets ravaged by the fallout.<sup>248</sup> Thus, these recent remedies seem akin to trying to cure cancer with an aspirin—the symptoms grew out of a pervasive disease of the culture—but they are salutary changes if for no other reason than because they have brought to bear the bright light of public scrutiny on what for two decades has

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<sup>245</sup> See 18 U.S.C. § 1350 (2002).

<sup>246</sup> See 15 U.S.C. § 7245 (2002).

<sup>247</sup> Professor Douglas Branson labeled the Act “unwieldy and underfunded. . . . It just goes all over the place. You can’t get your arms around it.” Michael Journee, *Reform Law Called “Abomination,”* IDAHO STATESMAN, Nov. 16, 2002, at 1. Professor Bernard Wolfman of Harvard called the compromise rule “anything but tough.” Elliot Blair Smith, *Corporate Reforms May Not Measure Up*, USA TODAY, Jan. 24, 2003, at 3B. Another reform of the Act relates to the role of lawyers. Initially, the rule required an attorney to report substantial legal violations by client companies and to effect a “noisy withdrawal.” Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release No. 8150, Exchange Act Release No. 46,868 (Nov. 21, 2002), 67 Fed. Reg. 71,670 (proposed Dec. 2, 2002) (to be codified at 17 C.F.R. pt. 205). The new version of the rule simply requires a lawyer to “climb the ladder” to report within the organization. Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release No. 8185, Exchange Act Release No. 47,276 (Jan. 29, 2003), 68 Fed. Reg. 6296 (Feb. 6, 2003). Professor Susan Koniak of Boston University considered the change in this requirement a “bad statement about the bar and what it stands for.” Smith, *supra*.

On January 22, 2003, the SEC approved additional new rules relating to restrictions on auditors of public companies and disclosure of off-balance sheet transactions. These rules are a “significant softening” of rules proposed in 2002. Jonathan D. Glater, *S.E.C. Backs Rules for Auditors, Revised from Original Plan*, N.Y. TIMES, Jan. 23, 2003, at C7; see Labaton, *supra* note 233, at C2 (“Reports that the staff of the Securities and Exchange Commission is watering down corporate governance reforms mandated by Congress have many of the agency’s critics steaming.”).

<sup>248</sup> See, e.g., Deslatte Aaron, *State Cuts 870 Jobs, \$67 Million in Budget*, SPRINGFIELD NEWS-LEADER, Jan. 3, 2003; Warren Fiske, *Virginia’s Budget Sinks Deeper in Red*, VIRGINIAN-PILOT, Feb. 12, 2002; Kenneth R. Gosselin, *Confidence at 9-Year Low; State Residents Worried About Budget Woes, Job Losses, War With Iraq*, HART. COURANT, Feb. 11, 2003, at E1; David M. Halbfinger, *Analysts Warn of a Shortfall in New Jersey’s Next Budget*, N.Y. TIMES, Apr. 3, 2001, at B5; Jim Tharpe, *Revenue Off for 12th Month; State Income Falls by \$686 Million in Past Budget Year*, ATLANTA J. CONST., July 11, 2002, at 1F; David Whelan, *State Budget Woes Imperil Financial Future of Many Nonprofit Groups*, CHRON. OF PHILANTHROPY, Aug. 8, 2002.

amounted to a secretive, clubbish CEO-worshipping cult.<sup>249</sup>

So long as control rests in bureaucracies and “untouchable” institutions, the citizens’ subservience to these large institutions will remain. Conservative policies, which continue to favor large institutions at the expense of citizen constituencies, foster this result.

*The Fiction of Shareholder Primacy*

The Enron debacle and other examples of pervasive corporate malfeasance are rooted in a conservative view of corporate law, which has dominated for decades, particularly the last twenty years. Today’s issues of managerial accountability actually began a century ago, hand in glove with anxiety over the increasing concentration of wealth and separation of the ownership of business from the control of business.<sup>250</sup> The debate intensified with the crowning of a self-perpetuating class of “new princes” in corporate America who were to preside over economic empires funded by other people’s money.<sup>251</sup> The question was to whom management and boards of directors owed loyalty, shareholders alone, or shareholders plus other “stakeholders,” such as corporate employees and other segments of society affected by corporate policies and activities.<sup>252</sup>

The debate was heated, and the positions clear. Adolph Berle and Gardner Means argued that managers were trustees for shareholders and should not spend any corporate assets or engage in activities not directly beneficial to shareholders’ financial interests.<sup>253</sup>

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<sup>249</sup> Cf. Eichenwald, *supra* note 232.

<sup>250</sup> The phenomenon of separation of ownership from control in the large corporation was noted at the beginning of the twentieth century by Eduard Bernstein and Konrad Schmidt. Maurice Zeitlin, *Corporate Ownership and Control: The Large Corporation and the Capitalist Class*, 79 AM. J. SOC. 1080, 1080-81 (1974); see also WALTER LIPPMANN, DRIFT AND MASTERY 50-55, 58-59 (1914).

<sup>251</sup> In 1932, Berle and Means wrote:

[I]t is therefore evident that we are dealing not only with distinct but often opposing groups, ownership on the one side, control on the other—a control which tends to move further and further away from ownership and ultimately to lie in the hands of the management itself, a management capable of perpetuating its own position. The concentration of economic power separate from ownership has, in fact, created economic empires, and has delivered these empires into the hands of new form of absolutism, relegating “owners” to the position of those who supply the means whereby the new princes may exercise their power.

ADOLPH A. BERLE, JR. & GARDINER MEANS, THE MODERN SOCIETY AND PRIVATE PROPERTY 124 (1932).

<sup>252</sup> See David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 220-21.

<sup>253</sup> *Id.* at 221. Berle wrote that considering corporations are trustees for the entire community “admitted them to a far greater power position than I thought they

Conservative economist Milton Friedman supported this view, defending “unalloyed corporate profit maximization”<sup>254</sup> as the corporation’s only justifiable goal.<sup>255</sup> Merrick Dodd countered that with corporate “citizenship”<sup>256</sup> came the same sort of social responsibility attaching to human citizenship.<sup>257</sup> The conservative view came to dominate the dialogue and continues to do so.<sup>258</sup> In light of the conservative victory, Professor David Millon advises that “only criticism centered on the internal relationship between shareholders and management has had a hope of being taken seriously. Berle’s vision . . . has provided the basic model for thinking about corporations and therefore has effectively defined the boundaries within which serious debate about corporate law can take place.”<sup>259</sup>

Under the dominant model, corporate management and the board of directors operate as agents of the absentee “owner,” the shareholders.<sup>260</sup> As agents of that “single” owner, management serves only that owner’s interests and in “ruthless”<sup>261</sup> pursuit of that interest,

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should have.” Berle, *supra* note 184, at xii.

<sup>254</sup> Millon, *supra* note 252, at 227.

<sup>255</sup> Friedman, *supra* note 147. Friedman argued that corporations had no business trying to divine what constitutes “public interest” and that they could serve society best by pursuit of private profit. *Id.*

<sup>256</sup> Scott Bowman explains in depth the genesis of the concept of corporate citizenship. See BOWMAN, *supra* note 60, at 6-8. Classical liberalism “first developed as a progressive, if not radical, ideology that served to justify the interests and political objectives of the rising capitalist class . . . .” *Id.* at 6. Its development revolved around “an affirmation and defense of the freedom and rights of the individual whether political, religious, or pecuniary.” *Id.* Thus it justified “an economic system that was premised on contractual relations between individuals.” *Id.* The premise gave rise to an ideological justification of corporate power. *Id.* at 8, 72-73. Pro-business constituencies used the ideas of Adam Smith, who was critical of the inefficiencies of corporate enterprise, as their strongest ideological basis. *Id.* at 8. The U.S. Supreme Court began to view the business corporation as an individual entity suited to the premises of liberalism, and the law gave birth to “the doctrine of corporate individualism.” *Id.*

<sup>257</sup> See E. Merrick Dodd, *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1148 (1932).

<sup>258</sup> Fifty years ago, Berle said it differently. In 1954, in his book *The 20th Century Capitalist Revolution*, he conceded somewhat reluctantly that Professor Dodd had won the argument to the extent that “modern directors are not limited to running business enterprise for maximum profit, but are in fact and recognized in law as administrators of a community system.” Berle, *supra* note 184, at xii. Berle later clarified his concession by stating that he did not necessarily think this was the “right disposition,” but merely recognized “a social and legal situation whose existence can neither be denied nor changed.” *Id.*

<sup>259</sup> Millon, *supra* note 252, at 228-29.

<sup>260</sup> Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 971, 972-73 (1992).

<sup>261</sup> Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 280 (1999).

works toward a single goal,<sup>262</sup> to maximize the owner's wealth. The firm must work to minimize "agency costs," defined as the risk of managers shirking their duties to the absentee shareholders, together with the cost to shareholders of monitoring the managers'/agents' performance.<sup>263</sup>

Although the principal-agent or "shareholder primacy" theory is the dominant model of the firm, counter-theories have continued to evolve, including the corporate governance movement,<sup>264</sup> the progressive corporate law movement,<sup>265</sup> and the communitarian theory of corporate responsibility.<sup>266</sup> Proponents of these models have attempted to steer the dialogue about corporations toward broader concerns, including the ramifications of corporate power.<sup>267</sup> But, according to Professor Millon, most "serious[]" corporate scholars strive to disassociate themselves from these movements.<sup>268</sup> In support

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<sup>262</sup> But see Alan J. Meese, *The Team Production Theory of Corporate Law: A Critical Assessment*, 43 WM. & MARY L. REV. 1629, 1635 (2002) (stating "directors and managers pursuing shareholder interests" have incentive to induce team members to make "firm specific investments" to save such costs in the future).

<sup>263</sup> *Id.* at 1638.

<sup>264</sup> See John C. Coffee, Jr., *Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response*, 63 VA. L. REV. 1099 (1977).

<sup>265</sup> For a series of articles illuminating this prospective, see PROGRESSIVE CORPORATE LAW (Lawrence E. Mitchell ed., 1995).

<sup>266</sup> As Professor Millon explains, communitarians believe that by virtue of membership in a shared community, individuals owe duties independent of those based in contract. David Millon, *Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373, 1382 (1993).

<sup>267</sup> See, e.g., Douglas M. Branson, *The Social Responsibility of Large Multinational Corporations*, 16 TRANSNAT'L LAW. 121 (2002); Lawrence E. Mitchell & Theresa A. Gabaldon, *If I Only Had a Heart: or, How Can We Identify a Corporate Morality*, 76 TUL. L. REV. 1645 (2002); Marleen O'Connor, *Labor's Role in the American Corporate Governance Structure*, 22 COMP. LAB. L. & POL'Y J. 92 (2000).

<sup>268</sup> See Millon, *supra* note 252, at 228 (referring to calls for corporate social responsibility as "hopelessly marginal"). In his critique of the "team production" theory of corporate law, which argues that the board of directors is a "mediating hierarch" among the shareholders and various factors of production, Professor Alan Meese writes:

Because Blair and Stout would discard the norm of shareholder primacy, some may associate their argument with "progressive" calls for corporate social responsibility, i.e., the sacrifice by corporations of efficiency and shareholder profits in furtherance of other concerns. Blair and Stout, however, *expressly disassociate themselves from the progressive movement, and with good reason. . . .* To be sure, the mediating hierarch conception of the public corporation may produce results that might seem more "fair" and "just" to some than the results produced by a shareholder primacy model. To Blair and Stout, however, this attribute is purely incidental. As they see things, states have adopted the mediating hierarch conception of the public corporation for hard-headed reasons of efficiency.

Meese, *supra* note 262, at 1644-45 (emphasis added).

of this restricted view of corporate law and accountability, a stream of fictions runs through the dialogue about corporations. Two primary fictions steer the discourse. The central fiction is the law's well-settled treatment of the corporation as an individual, a characterization that both symbolically diminishes its size and economic power, while at the same time provides protections that undermine accountability. The second major fiction, of more recent vintage, is that the shareholder primacy theory drives or reflects corporate practice.

The fiction of a business corporation as a person with rights, rather than a state instrumentality, developed gradually in the nineteenth century through a series of Supreme Court cases that set the stage for the corporation's ability to amass immense economic and political power.<sup>269</sup> One of the most significant cases in this line was *Dartmouth College v. Woodward*,<sup>270</sup> in which Chief Justice Marshall wrote that while admittedly a legal fiction, the corporation nevertheless possesses characteristics "incidental to its very existence," the most important of which are "immortality, and . . . individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual."<sup>271</sup> Pro-business forces seized on the legal fiction of a business corporation as a person with constitutional rights to defend corporate monopoly power by implying that the corporation was just another entrepreneurial "individual,"<sup>272</sup> thereby disassociating the corporation from the politically un-

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<sup>269</sup> See, e.g., *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch.) 61 (1809) (holding that while a corporation is not a citizen, its membership can be examined for purposes of Art. III federal court jurisdiction); *Terrett v. Taylor*, 13 U.S. (9 Cranch.) 43 (1815) (striking down Virginia statutes authorizing confiscation of corporate lands, thus distinguishing legislature's power over private versus public corporations); *Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) (holding unconstitutional New Hampshire legislature's amendment to Dartmouth's charter as an unlawful impairment of private contract); *Charles River Bridge v. Warren Bridge Co.*, 36 U.S. (11 Pet.) 420, 546 (1837) (refusing to recognize implied right of exclusivity in charter of company, noting that "any ambiguity in the terms of the contract, must . . . operate in favor of the public"); *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839) (holding for practical reasons that corporations are not citizens for purposes of Privileges and Immunities Clause); *Minneapolis & St. Louis Ry. Co. v. Beckwith*, 129 U.S. 26 (1889) (considering corporations persons for purposes of Fourteenth Amendment Due Process); *Chi., Milwaukee & St. Paul R.R. Co. v. Minnesota*, 134 U.S. 418 (1890) (holding regulation that did not provide for judicial review of rates constituted deprivation of property without due process); *Allgeyer v. Louisiana*, 165 U.S. 578 (1898) (holding that petitioner's liberty of contract had been violated by rate decision).

<sup>270</sup> *Dartmouth College*, 17 U.S. 518.

<sup>271</sup> *Id.* at 636.

<sup>272</sup> Scott Bowman recounts that during an 1837 debate concerning Pennsylvania's power to revoke its charter with the Second Bank of the United States, pro-business forces invoked the "Dartmouth College principle" to undermine the pro-revocation

popular, monied elite.<sup>273</sup>

The second main fiction about corporations is that Berle's description of corporate management as accountable agents of the absentee owners continues to serve in a practical sense as a model for or description of actual corporate conduct. The theory assumes a degree of employee loyalty, even altruism, and commitment to the corporate mission that no longer seems to prevail.<sup>274</sup> It fails to account for the ascendancy of selfishness and material acquisition as transcendent values—values that both feed and are fostered by modern corporate culture. The model reposes faith in systemic checks and balances, including boards and shareholders, that experience has proven insufficient to offset the sheer potency of greed and self-seeking that act as motivators of top management.<sup>275</sup>

Modern conservative scholars persist in promoting the model without adjusting it to reflect the lessons of experience. The tendency of modern conservatives to fictionalize when speaking of the corporation is epitomized by the “misguided”<sup>276</sup> contractarian movement.<sup>277</sup> Staunch adherents to the principal-agent theory and to Efficiency Doctrine, contractarians posit that a corporate firm is best understood not as a freestanding entity with a public presence and corresponding obligations, but as a purely private “nexus of contracts,” an “aggregate of various inputs” acting together to produce goods and services.<sup>278</sup> They stand on the shoulders of economist Ronald Coase, who theorized that “a corporation is an umbrella that enables private parties to contract with each other more efficiently by limiting the costs of the transactions between them.”<sup>279</sup> The contrac-

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forces. BOWMAN, *supra* note 60, at 49-50. Bowman quotes Louis Hartz:

When it identified the corporation and the state with two individuals in a relation of business contract, it served to clothe the corporation with a kind of personal individuality—a symbolic effect, which . . . nullified the distinction between individual and corporate enterprise which was at the heart of the anti-charter theory.

BOWMAN, *supra* note 60, at 50 (quoting LOUIS HARTZ, *ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776-1860*, at 250 (1948)).

<sup>273</sup> *Id.* at 50 (quoting HARTZ, *supra* note 272, at 250).

<sup>274</sup> See generally Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519 (2001).

<sup>275</sup> See, e.g., Reed Abelson, *Enron's Board Quickly Ratified Far-Reaching Management Moves*, N.Y. TIMES, Feb. 22, 2002, at C6; Jeffrey Sonnenfeld, *How Go-Along Boards Jam Up Firms*, USA TODAY, Feb. 6, 2002, at 13A.

<sup>276</sup> Douglas M. Branson, *Corporate Governance “Reform” and the New Corporate Social Responsibility*, 62 U. PITT. L. REV. 605, 621 (2001).

<sup>277</sup> According to Professor Bainbridge, most law and economics scholars embrace the “nexus-of-contracts theory of the firm.” Bainbridge, *supra* note 3, at 859.

<sup>278</sup> *Id.*

<sup>279</sup> Alan Wolfe, *The Modern Corporation: Private Agent or Public Actor?*, 50 WASH. &

tarians claim to be realists, asserting a need to explain what is, rather than “plunge headfirst into ought.”<sup>280</sup> In their “real” world, the law assumes, in effect, that the corporation’s primary constituencies, including employees, suppliers, and shareholders, bargain with each other in purely voluntary exchanges, each coming to the table with equal power, motivated by rational self-interest.

Contractarian theory borrows a central concept from classical liberalism by characterizing the internal workings of corporate life from an atomistic perspective,<sup>281</sup> which reposes trust and belief in the power of individuals to steer their economic destinies. While this permits the theorists to indulge a romanticized view of corporate reality, it also drops corporate accountability out of the equation, because a “corporation” has no existence outside of individuals.

Recognizing that in many instances voluntary exchanges do not actually take place within a corporation, contractarians argue that the fiction is nevertheless useful; because self-interest is a uniform motivator in transactions, they imply, the model of Economic Man as a self-seeker is reliably predictive.<sup>282</sup> Furthermore, in retrospect, it appears as if the players went through the process of reaching agree-

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LEE L. REV. 1673, 1676 (1993). The theory has been interpreted to reject the “false” notion that corporations are legal entities created by state action; rather, “states do little more than register private decisions already made by private parties.” *Id.* at 1676.

<sup>280</sup> Bainbridge, *supra* note 3, at 862. Bainbridge writes: “contractarianism offers a metaphor in which the separation of ownership and control is not a problem, but rather simply a necessary, and arguably unremarkable, attribute of the modern public corporation.” *Id.*

The inevitability of corporate growth for the purpose of efficiency was recognized long ago:

[S]omething very like the modern corporation is the inevitable product of an industrializing society, whether the society follows a capitalist or socialist trend of development. . . . Given the technologically determined need for a large stock of capital, the managerial requirements set by the problem of administering the efforts of many men, and the area of discretion demanded for the effective conduct of an entrepreneurial function, the corporation, or a reasonable facsimile thereof, is the only answer.

Edward S. Mason, *Introduction to MODERN SOCIETY*, *supra* note 118, at 1. However, unlike Bainbridge, Mason’s generation of conservative corporate analysts did not find the prospect “unremarkable,” but rather recognized the potential perils associated with power concentrated in these “non-Statist collectivism.” Berle, *supra* note 184, at xiv.

<sup>281</sup> Bainbridge, *supra* note 3, at 882. Despite the acknowledgment that economics correctly drives corporate decision-making, contractarians “envision[] a community of spirit, bound together by chains of custom, prescription, loyalty, and honor.” *Id.*

<sup>282</sup> *Id.* at 869.

ment and emerged with a “mutually beneficial” binding contract.<sup>283</sup> These are “outcome” rather than “process” contracts, they explain.<sup>284</sup> Outcome contracts consist of unilaterally-dictated terms, accepted by the weaker party;<sup>285</sup> they can be characterized as “bargains” because the law treats them like bargains, though the legal obligation the law imposes came about without bargaining.<sup>286</sup> These theorists admit the contractarian model does not reflect reality, but as one scholar queries, “So what?”<sup>287</sup> They rest complacently in what they contend is a description of the status quo.<sup>288</sup>

Developed in the 1980s, the contractarian movement corresponds in a number of ways to Ronald Reagan’s brand of political conservatism and market fundamentalism. As discussed above, Reagan conservatism appealed to the country’s waning sense of tough individuality, independence, and self-determination. Reagan’s economic policies were heavily influenced by the Chicago School’s foundation principle that private decision-making drives the economy. Like Reagan conservatives, contractarians cling to a romanticized view of an atomistic world of individual power, preferring not to acknowledge the modern day reality of the exceptions that swallow the rule. Beneath the fictions employed by contractarians lies a harsh view of “natural law,” premised on the assumption that certain individuals are doomed by natural selection to positions of subservience.<sup>289</sup>

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<sup>283</sup> See *id.* at 870.

<sup>284</sup> *Id.*

<sup>285</sup> Bainbridge’s explanation is that the weaker party “accept[s] the trade-offs inherent in the standard form” agreement. *Id.* at 870-71.

<sup>286</sup> See *id.* at 869-70. As Professor Douglas Branson describes this view, contractarians argue “that the only function of corporate law should be to provide an ‘off the rack’ standard form contract which approximated the result the parties to an incorporated venture would negotiate, absent transaction costs (legal fees, information costs, and so on).” Branson, *supra* note 276, at 620-21. Professor Bainbridge offers as an example of an outcome contract drawn from his own experience renting a car while in a line with “many impatient travellers [sic].” The agent handed him a “long detailed standard form agreement. Did I bargain over the agreement’s terms?” he asks rhetorically. “Of course not. Did I even read the agreement? No, of course not. Was the agreement nevertheless a binding contract?” Perhaps, depending on the nature of the unread, unbargained-for clauses, Bainbridge says, but only if they are not particularly oppressive; failure to read a contract is not in itself enough to prevent enforcement of the contract. Bainbridge, *supra* note 3, at 870. This raises the question: what constitutes oppression in the age of repeat-player corporations and conservative courts?

<sup>287</sup> Bainbridge, *supra* note 3, at 871.

<sup>288</sup> See *id.* at 861.

<sup>289</sup> The conservative principle of the legitimacy of inequality, based on natural law principles, is firmly and historically grounded. See, e.g. MEYER, *supra* note 35, at 38, 144; David Hume, *Of Justice* (1751), from AN ENQUIRY CONCERNING THE PRINCIPLES OF

Belief in and exploitation of “natural variation” in human abilities shores up the conservatives’ “hard line” on social issues and infuses the contractarians’ description of contractual “reality.” Behind their public affirmation of fair treatment of individuals lies a long-held conservative subscription to the principle of the “legitimacy of inequality.”<sup>290</sup> Natural variations in intelligence, ability, and the content of character inevitably produce classes in society, conservatives believe, and there is a natural tendency for elites to rise to the top.<sup>291</sup> Conservatives dislike “equalitarianism” that “would forbid to men the acquisition of unequal goods, influence or honor and the right to pass these ‘inequalities’ on to their heirs . . . .”<sup>292</sup> These deeply-rooted conservative views inform the contractarians’ fictional model of the “voluntary” transaction.

Edmund Burke might explain modern conservatives’ use of illusion to obscure the reality of unequal bargaining power and the lack of meaningful exits as “veiling.” Burke might say that contractarians are simply and wisely “throwing a veil” over irregularities in order to preserve the appearance of continuity.<sup>293</sup> He believed veiling permits society to rise above the barbarism that would prevail if humankind’s true impulses and predilections were exposed.<sup>294</sup>

Burke’s veiling metaphor helps illuminate the tension between conservatives’ belief in efficiency formulas and vigilant pursuit of self-interest, on the one hand, and their professed adherence to a more civilized code of moral principle, such as treatment of individuals according to their worth, on the other. In order to justify the exploitation inherent in unregulated self-seeking, which can strike harshly inside and outside of the hierarchical corporate context, it is essential to construct a model that distorts facts, hypothetically placing all actors on an equal footing. This same basic conceptual fiction props up classical contract, discussed below, which deems that all actors come

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MORALS, in CONSERVATISM, *supra* note 4, at 40; W.H. Mallock, *A Study of the Rights, the Origin, and Social Functions of the Wealthier Class* (1898), in CONSERVATISM, *supra*, at 220-21; Edmund Burke, *Reflections on the Revolution in France* (1790), in CONSERVATISM, *supra*, at 95-96; William Graham Sumner, *Sociological Fallacies*, in CONSERVATISM, *supra*, at 240-4; Joseph A. Schumpeter, *Aptitude and Social Mobility* (1927), in CONSERVATISM, *supra*, at 224-32.

<sup>290</sup> Muller, *supra* note 4, at 18.

<sup>291</sup> See *supra* note 289.

<sup>292</sup> MEYER, *supra* note 35, at 38.

<sup>293</sup> Muller, *supra* note 4, at 20-21. Burke created the concept of “veiling” as against the Enlightenment metaphors of transparency and light—the veil as “a fabric of understandings that hides the true object of the natural passions.” *Id.* The veil of culture leads men to restrain themselves, while its removal returns man to a “natural” barbaric state. *Id.*

<sup>294</sup> See *id.* at 21.

to the table in equal bargaining positions, with equal opportunity to make the law that will bind them. Of course, in today's world of international oligopolies and form contracts, from the smaller players' perspective, at least, that is nonsense.

Conservatives betray the lessons of history and their asserted belief in prudence and pragmatism when they emphasize self-interest and efficiency as the sole guiding principles in thinking about transactional law.<sup>295</sup> Experience teaches that the world of commerce is rife with inequalities and that to preserve non-economic values, such as treatment of others according to worth, accountability for the effects of one's conduct, and maintaining civilized interaction, the law must respond.

Despite the soundness of the assumptions underpinning Coase's theory, today's large corporate firms do not resemble the efficient machines the theories postulate. People are indeed motivated by self-interest. Theoretically, firms do develop as efficient alternatives to businesses contracting with multiple independent producers to meet their growing requirements. But in an era of empire-building and unregulated mergers and acquisitions, large corporations with their "trappings of sovereignty," aggregated wealth, and other characteristics of private government, often resemble business's despised nemesis, the state.<sup>296</sup> Rather than reaping the rewards of vigorous competition—better products at the lowest possible prices—consumers end up subsidizing comfortable oligopolies, and the excessive lifestyles of executives, with their bloated expense accounts, Hampton vacations, and guaranteed bonuses and golden parachutes. Corporate theorists must confront this reality and do better than writing off these flaws in the system as, for example, "excessive agency costs."<sup>297</sup>

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<sup>295</sup> See generally George Soros, *Busted: Why the Markets Can't Fix Themselves*, NEW REPUBLIC, Sept. 2, 2002, at 18. Soros describes his theory of "reflexivity," according to which misconceptions are partly responsible for most economic boom/bust sequences and identifies two specific elements that account for "what went wrong" in the 1990s: "a decline in professional standards and a dramatic rise in conflicts of interest." *Id.* He asserts that both are "symptoms of the same broader problem: the glorification of financial gain irrespective of how it is achieved." *Id.*

<sup>296</sup> See Brewster, *supra* note 118; see also William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 414 (1989); Richard Saliterman, *Perceptions Bearing on the Public Policy Dynamics of Corporate Law*, 20 HAMLINE L. REV. 261, 265 (1996) (quoting Mark Green, *Attainment of Social Goals Requires Corporate Reform*, in COMMENTARIES ON CORPORATE STRUCTURE AND GOVERNANCE: THE ALL-ABA SYMPOSIUMS 1977-1978, at 265, 268 (Donald E. Schwartz ed., 1979)); Wolfe, *supra* note 279, at 1684.

<sup>297</sup> See, e.g., Kenneth C. Johnsen, *Golden Parachutes and the Business Judgment Rule: Toward a Proper Standard of Review*, 94 YALE L.J. 909, 920 (1985); Eric W. Orts, *Shirking and Sharking: A Legal Theory of the Firm*, 16 YALE L. & POL'Y REV. 265, 315 (1998); Geoffrey S. Rehnert, *The Executive Compensation Contract: Creating Incentives to Reduce Agency*

*Fictions in Contract Law*

Corporate law scholars are not alone in their preference for fiction over reality. Academicians in the area of contract, though lagging behind by a few years, have followed suit. Scholars are now producing accounts of the “new conceptualism,” “neoformalism,” the “new formalism,” and “anti-antiformalism” in contract.<sup>298</sup> The new conservatives in contract apparently consider the realist revolution a “flop.”<sup>299</sup> They seek “to discredit and displace Llewellyn’s claim to found commercial law in immanent commercial practice.”<sup>300</sup> These descriptions of the current trend in contract law, away from the flexible approach embodied in the UCC and toward a return to interpretation of contracts under rigid, formal requirements, help explain what happened in the farmer’s case.<sup>301</sup>

Prominent among scholars who lately question Llewellyn’s premise is Professor Lisa Bernstein, whose interesting empirical study of private merchant courts has led her to conclude that custom, more specifically “usages of trade” and “commercial standards” as the terms occur in the UCC, may not exist, and, if they do not exist, they cannot be ascertained.<sup>302</sup> Other scholars question courts’ ability to create

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*Costs*, 37 STAN. L. REV. 1147, 1155-60 (1985).

<sup>298</sup> See generally David Charny, *The New Formalism in Contract*, 66 U. CHI. L. REV. 842 (1999); Sidney W. DeLong, *Placid, Clear-Seeming Words: Some Realism About the New Formalism (With Particular Reference to Promissory Estoppel)*, 38 SAN DIEGO L. REV. 13 (2001); Robert A. Hillman, *The “New Conservatism” In Contract Law and the Process of Legal Change*, 40 B.C. L. REV. 879 (1999); James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131 (1995); Mark L. Movsesian, *Two Cheers for Freedom of Contract*, 23 CARDOZO L. REV. 1529 (2002); John E. Murray, Jr., *Contract Theories and the Rise of Neoformalism*, 71 FORDHAM L. REV. 869 (2002); Eric A. Posner, *A Theory of Contract Law Under Conditions of Radical Judicial Error*, 94 NW. U. L. REV. 749 (2000); Robert E. Scott, *A Case for Formalism in Relational Contract*, 94 NW. L. REV. 847 (2000); Michael P. Van Alstine, *Of Textualism, Party Autonomy, and Good Faith*, 40 WM. & MARY L. REV. 1223 (1999); William J. Woodward, Jr., *Neoformalism in a Real World of Forms*, 2001 WIS. L. REV. 971.

<sup>299</sup> See Charny, *supra* note 298, at 846.

<sup>300</sup> *Id.* at 842. Professor Charny explains: “The central counterclaim is anti-incorporationist; even demonstrably efficient customs should not be legally enforceable; parties may wish to have customs, or even express undertakings, enforced by nonlegal sanctions, but not by the force of law. Further, custom may often be inefficient and for that reason not a plausible candidate for legal enforcement.” *Id.* at 842-43 (footnotes omitted).

<sup>301</sup> See *supra* notes 207-23 and accompanying text.

<sup>302</sup> Lisa Bernstein, *The Questionable Empirical Basis of Article 2’s Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710, 715 (1999); see also Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996) (concluding that the UCC’s search for immanent business norms creates undesirable effects in commercial relationships and is flawed because it mistakenly assumes transactors’ actions are the best indication of what they intended their writing to mean).

useful default rules ex ante and adjust risks ex post.<sup>303</sup> These critics of realism in contract interpretation and enforcement argue for a return to the “rigorous application”<sup>304</sup> of common-law plain meaning and parol evidence rules. Arguably, the formalist approach squares with conservatives’ allegiance to Efficiency Doctrine.<sup>305</sup>

Like their counterparts in corporate law scholarship, adherents to neo-formalism in contract make clear that issues of fairness, morality, even ethics, have no place in their restored faith in form over substance. In *The Fall and Rise of Freedom of Contract*, Professor F.H. Buckley writes dismissively, “The naïve law teacher sometimes says, objecting to positive theories of law and economics, ‘But I see it from a moral point of view.’ In doing so, he reveals his ignorance of moral as well as economic theory.”<sup>306</sup> Professor Buckley fails to explain in what ways those who disagree with him are ignorant of moral theory, but one has only to turn to the history of conservative thought for an articulation of basic principles of morality. Beyond that, empirical evidence tells us what we need to know: The suffusion of conservative economic theory into politics, government, and corporate law has had negative results, from both an economic and moral point of view.

Though scholars take pains to distinguish the “new formalism” from the old, this road is well traveled, and the views have not changed. As Professor Charny observes, while formalism has theoretical appeal, “there are distinctive difficulties with its transfer to the realm of contract and commercial practice. It is simply not clear that there is any ‘gain’ from the move to a more formalizable set of rules.”<sup>307</sup> Such a regressive move would place all but the most sophisticated or wealthy transactors at a disadvantage, as courts, as in the

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<sup>303</sup> See Scott, *supra* note 298, at 848.

<sup>304</sup> *Id.*

<sup>305</sup> But see Charny, *supra* note 298, at 850.

The relevant considerations are perhaps best understood in terms of the general economics of formalism in the face of diversity. Crisp formal rules save the courts the task of deciphering a reasonable expectation in particular circumstances—a task that becomes more costly as understandings become more diverse. But this invokes an instrumental dialectic whose indeterminacy [sic] is now familiar. Although a set of simple formal rules saves on the costs of administering the legal system, it may do so at the risk of drastically increasing the costs of transacting, by requiring the anticipation of numerous improbable contingencies or forcing parties to avoid altogether transactions that might culminate in punitive forfeitures as a result of mere small understandings.

*Id.*

<sup>306</sup> F.H. Buckley, *Introduction to THE FALL AND RISE OF FREEDOM OF CONTRACT 2* (F.H. Buckley ed., 1999).

<sup>307</sup> Charny, *supra* note 298, at 850.

farmer's case, uphold contract terms unilaterally drafted by the party in a superior position of knowledge and expertise.

Even assuming some courts are not competent to sort out complex evidence of trade custom and usage, the answer is not to ignore facts in favor of the language of boilerplate writings, the terms of which are dictated by private bureaucrats. Contract formalists, like corporate law contractarians, want to focus on outcome: Do we have the appearance of an agreement? Do we have the trappings of a contract? Is it possible for us to hypothesize, in retrospect, based on the last step of the journey, that the path taken was near enough to what the law used to require? Well, of course. But to people engaged in real world transactions, who live the customs of a region or a trade, the *journey* to contract consummation is everything—it is the bargain. The more sophisticated the traders, the more likely they will ensure their understandings are fully memorialized. But there are many smaller transactions today, such as the farmer's, that take place on the basis of good faith, without the involvement of lawyers, and despite the "old fashioned" nature of the transaction, smaller parties are not able to protect their interests against the repeat players who have preempted all viable exit options.

Admittedly, the fact-finding system is far from ideal, and in today's economic climate it is stretched to the limit. The farmer's case illustrates the weaknesses of courts' recitation of "canned" facts that only superficially resemble what actually occurred. Reasonable arguments can and have been made that the parties doing business are in a better position and more adept at protecting themselves than a judge at a later date. Eric Posner posits that parties are in a position to both predict judicial error, even incompetency, and design their contracts accordingly, and deter opportunistic behavior in contract formation.<sup>308</sup> But as applied to many commercial contexts, this argument swallows its tail by assuming away the very issue at stake; it assumes meaningful choice on behalf of each contracting party. Freedom in transactions must mean more than the decision of whether to enter into a transaction or walk away. Meaningful choice also implicates the absence of external pressures on the parties to enter a particular transaction, for these pressures certainly diminish one's "positive freedom."<sup>309</sup> A monopoly industry is an example of an external

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<sup>308</sup> Posner, *supra* note 154, at 752, 758.

<sup>309</sup> A full discussion of the concept of freedom is beyond the scope of this analysis, but it has been variously defined as the absence of interference in one's activities by other human beings (negative liberty); the ability to exercise opportunity, involving assumptions of a minimal level of education and understanding (positive freedom); and the absence of external impediments on motion. See Isiah Berlin, *Two Concepts of*

pressure that limits freedom of consumer choice by resulting in less output, less variety, and higher prices. Cooperative oligopolies with parallel pricing could have similar effects. Adhesion contracts are another example of an external pressure imposed on a transaction that limits choice. A relative deficit in knowledge, expertise, or resources is yet another external factor that reduces freedom.

#### V. COUNTERVAILING FORCES AND CORPORATE ACCOUNTABILITY

Like societies before us, we will be ill-advised to rely exclusively on the conscience or benevolence of the wielders of power to secure that it be exercised for ends we value.

Abram Chayes, "The Modern Corporation  
and the Rule of Law" in *The Corporation In  
Modern Society*<sup>310</sup>

To the extent it admits of a problem<sup>311</sup> with either accountability or legitimacy,<sup>312</sup> corporate law's answer has been the board of directors, whose theoretical function is to oversee and monitor management. Ordinarily, directors possess authority to select and fire managers, review major corporate decisions, hold management accountable for operating results, and ensure management avoids self-dealing.<sup>313</sup> The early directors were "mushrooms," bored board members who quietly existed in the dark.<sup>314</sup> "Boards of directors were crony ridden, cozy, clubby organizations in which dissent of any kind

*Liberty*, in *FOUR ESSAYS ON LIBERTY* 122 (1969); Mark Pettit, Jr., *Freedom, Freedom of Contract, and the "Rise and Fall,"* 79 B.U. L. REV. 263, 268 (1999).

<sup>310</sup> Abram Chayes, *The Modern Corporation and the Rule of Law*, in *MODERN SOCIETY*, *supra* note 118, at 25, 45.

<sup>311</sup> Cf. Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1292 (1982) (arguing that corporate governance reform advocates misunderstand the economics of the "corporate form of firm organization" and thus misperceive that a problem exists).

<sup>312</sup> To paraphrase Edward Mason, the management of a huge amount of economic activity is in the hands of a few thousand men—who selected these men to exercise this vast authority and to whom are they responsible? They selected themselves—that is the legitimacy problem. Mason, *supra* note 280, at 5. Professor Berle wrote:

Whenever there is a question of power, there is a question of legitimacy. As things stand now, these instrumentalities of tremendous power have the slenderest claim of legitimacy . . . . They must find some claim of legitimacy, which also means finding a field of responsibility and a field of accountability. Legitimacy, responsibility and accountability are essential to any power system if it is to endure.

ADOLF A. BERLE, JR., *ECONOMIC POWER AND FREE SOCIETY* 16 (1958).

<sup>313</sup> Fischel, *supra* note 311, at 1281.

<sup>314</sup> "Mushroom directors are kept in the dark. If they begin to grow in the job, corporations pile a lot of manure on top of them. Finally, if mushroom directors mature in the position, they are 'canned.'" Branson, *supra* note 276, at 613.

seldom surfaced.”<sup>315</sup>

The social reform efforts of the 1970s engendered the corporate governance movement, whose goal was to address the failure of corporations to meet their responsibilities to shareholders and the public.<sup>316</sup> Like Congress’s recent reactive measures, the earlier movement proposed to replace “insiders”<sup>317</sup> with independent directors. The obvious benefits of judgments free of conflicts of interests have been weighed against the potential costs, which include the possibility of an outsider’s lack of expertise and a corresponding clumsiness that might render decision-making less efficient.<sup>318</sup> The movement had some successes; independent boards became common in large corporations<sup>319</sup> and ousted poorly-performing CEOs at IBM, General Motors, Mattel, United Airlines, and a number of other corporations.<sup>320</sup>

But installation of outside directors did not cure the weaknesses in the director system. Management could undermine the board’s oversight function by denying the directors access to critical information, a point demonstrated sensationally when Arthur Goldberg, former Associate Justice of the U.S. Supreme Court and former U.S. Ambassador to the United Nations, resigned from the boards of eight major corporations, complaining of lack of management support.<sup>321</sup> An equally significant weakness of the independent director concept has been a variation of the “Man in the Gray Flannel Suit” syndrome, whereby directors initially viewed as independent eventually sign on

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<sup>315</sup> *Id.* at 608.

<sup>316</sup> Fischel, *supra* note 311, at 1259.

<sup>317</sup> Professor Branson describes the characteristics of a classic “insider” board: The president of a 1930s publicly held corporation (the title “chief executive” was not in vogue then) would pack the board with corporate officer subservient to him (needless to say, no women occupied the post). The executive vice president, one or more additional vice presidents, the presidents of principal subsidiaries, and the corporate treasurer (today’s CFO) all might be on the typical board. The president might also appoint his brother-in-law, the outside corporate counsel from one of the headquarter city’s largest law firms, the regular investment banker, and perhaps the CEO of another corporation with large cross holdings in his own corporation, a ‘white squire’ in today’s parlance.

Branson, *supra* note 276, at 607-08.

<sup>318</sup> Fischel, *supra* note 311, at 1282-83. Fischel concludes: “A convincing empirical case cannot be made, therefore, that a board composed of a majority of independent directors will increase shareholders’ welfare, and no empirical evidence exists to support this view.” *Id.* at 1283.

<sup>319</sup> Donald C. Langevoort, *The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability*, 89 GEO. L.J. 797, 798 (2001).

<sup>320</sup> Branson, *supra* note 276, at 627.

<sup>321</sup> *Id.* at 613.

uncritically to the corporate mission.<sup>322</sup> Economic Man lives in the boardroom, it turns out, and directors are often compensated handsomely,<sup>323</sup> eventuating in conflicts of interest.

As recent events demonstrate,<sup>324</sup> despite earlier reform efforts, corporate boards have frequently been ineffective as checks on corporate mismanagement and abuses.<sup>325</sup> Studies demonstrate that invitations to join boards are based on perceived compatibility and fit.<sup>326</sup> Teamwork and avoidance of conflict are valued,<sup>327</sup> as demonstrated in both the Enron and Western Resources cases.

Although what transpires in board meetings is ordinarily secret, a great deal of information about the action and inaction of Enron's board of directors has become public.<sup>328</sup> The record reveals a board that, in every critical way, failed to do its job. For example, in two separate meetings, held in June and October 1999, the board voted to waive the company's code of ethics to permit the company's CFO, Andrew Fastow, to form investment partnerships.<sup>329</sup> In October 2000, the board's finance committee voted to begin reviewing the partnerships' transactions as well as Fastow's compensation, but never followed through.<sup>330</sup> In February 2002, the board's audit committee assured Arthur Andersen that it would approve Enron's financial

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<sup>322</sup> The syndrome is based on Sloan Wilson's novel *The Man in the Gray Flannel Suit*, which portrays the struggle of a middle manager to choose between his company and his family, amidst pressures to make the corporation's profit-making mission his own. SLOAN WILSON, *THE MAN IN THE GRAY FLANNEL SUIT* (1955).

<sup>323</sup> *CEO Pay Rises in Most Industries, Outside Director Pay Also Up in All Industries*, WORKSPAN, Feb. 1, 2004, at 11 (stating that in 2003, median total compensation for outside directors in manufacturing sector was \$69,620).

<sup>324</sup> Corporate scandals continue to emerge. They are well-documented by many easily accessible print and electronic sources. For example, the *New York Times* reported recently on five major corporations and their executives currently facing federal criminal charges, including obstruction of justice, securities fraud, bank and wire fraud, and insider trading. Stephen Labaton, *Handcuffs Make Strange Politics, You Say? But Not in Washington*, N.Y. TIMES, Aug. 2, 2002, at C1. The companies included Arthur Andersen, WorldCom, Adelphia Communications, and Imclone Systems. *Id.* In the same paper, it was reported that Tyco International ousted its new CFO for "arcane and opaque financial maneuvers." Andrew Ross Sorkin, *New Tyco International Head Ousts Chief Financial Officer*, N.Y. TIMES, Aug. 2, 2002, at C2. A comprehensive website tracking the scandals is MSNBC, *A Guide To Corporate Scandals*, at [http://www.msnbc.com/news/wld/business/brill/CorporateScandal\\_DW.asp](http://www.msnbc.com/news/wld/business/brill/CorporateScandal_DW.asp) (last visited Mar. 31, 2004).

<sup>325</sup> See, e.g., Abelson, *supra* note 275 (detailing board's repeated waivers of company's code of ethics and failure to follow through on monitoring obligations); Sonnenfeld, *supra* note 275.

<sup>326</sup> Langevoort, *supra* note 319, at 797.

<sup>327</sup> *Id.*

<sup>328</sup> Abelson, *supra* note 275.

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

statements.<sup>331</sup> The committee, however, failed to ask Andersen questions about the underlying data of the reports.<sup>332</sup> Though financially sophisticated and drawing substantial salaries, board members missed opportunities to question transactions that even a novice would recognize as dubious.

Though in the Western Resources case, the details of key board meetings have not been published, one board member resigned, and her resignation letter was later made public.<sup>333</sup> In the letter, she stated she was not given information necessary to act effectively and, based on what she did know, thought the corporate actions directed by CEO Wittig were ill-advised and counter to the company's best interests.<sup>334</sup> Almost two years later, after the CEO was indicted for fraud in a personal transaction,<sup>335</sup> the board accepted his resignation.<sup>336</sup> Wittig was convicted of bank fraud and money laundering, sentenced to four years, four months, and fined \$1 million.<sup>337</sup> Another federal indictment followed, charging Wittig and another Westar executive with forty counts of conspiracy, wire fraud, and other charges, alleging that the two men sought to "systematically loot Westar of money and assets."<sup>338</sup> With one exception,<sup>339</sup> members of the Westar board stood by passively throughout the events leading to the criminal charges.

In addition to recent changes mandated by Sarbanes-Oxley and the private listing standards, some companies have installed "corporate watchdogs," in the form of independent lead directors, with varying results.<sup>340</sup> For example, following an accounting scandal, Waste Management revamped its board, giving shareholder activist Ralph Whitworth lead director duties.<sup>341</sup> But other companies experimenting with this move have had more negative results. In the case of Tyco International, Ltd., an independent lead director failed to avert

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<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

<sup>333</sup> Jim McLean, *Westar Management, Salaries Denounced; Board Member's Resignation Letter Ordered Released By KCC*, TOPEKA CAP.-J., June 29, 2002, at A1.

<sup>334</sup> *Id.*

<sup>335</sup> Rebecca Smith, *Westar Chief Indicted Over Alleged Bank Fraud*, WALL ST. J., Nov. 8, 2002, at C10.

<sup>336</sup> Dion Lefler, *Wittig Leaves Westar*, WICHITA EAGLE, Nov. 23, 2002, at 1A.

<sup>337</sup> Carrie Johnson, *Former Westar Chief Sentenced to 4 Years; Wittig Still Must Face More Charges*, WASH. POST, Feb. 28, 2004, at E2.

<sup>338</sup> Robert Frank, *Indictment Alleges Westar's Former CEO Sought to Loot Firm*, WALL ST. J., Dec. 5, 2003, at C1.

<sup>339</sup> See *supra* note 333 and accompanying text.

<sup>340</sup> Mary Williams Walsh & David Leonhardt, *To Rein In Abuses, Executives Get Watchdogs*, N.Y. TIMES, July 5, 2002, at C1.

<sup>341</sup> *Id.* at C5.

the company's fall and is being sued himself for breach of fiduciary duty.<sup>342</sup>

The dismal state of affairs leading to recent corporate reforms was not only predictable, but inevitable. Conservatives, who populate many organizations with close ties to business, pragmatically recognize the uncontrollable nature of greed,<sup>343</sup> yet advise that a shared belief in a higher power and a fear of punishment in "the next life" have the best chance of resulting in a "virtuous citizenry."<sup>344</sup> They prefer to leave morality "to private virtues" rather than state-controlled corporate governance.<sup>345</sup> Had some of these outspoken advocates of laissez-faire and efficiency integrated their personal moral standards with their public policy stances, they would have approved increased transparency and accountability well before the corporations "got caught" and the politicians were forced to engage in a frantic scramble to dam the raging river of two decades of runaway self-dealing. It remains a mystery why conservatives, who understand and respect the power of self-interest, who see virtue in temperance and in enforcement of moral standards, who could exert substantial positive influence over business conduct, decline to integrate their non-political and political philosophies, in the name of a romanticized notion of "freedom."

#### *Countervailing Forces*

With corporate boards often tied too closely to management, critics have looked outside the corporation for possible countervailing forces. Half a century ago, Harvard economist John Kenneth Galbraith recognized the growing potential of oligopolies to control markets through conscious parallelism and to reap monopoly profits.<sup>346</sup> He theorized that new, non-governmental forces would rise up to check corporate power and would be as effective as the old same side controls—owners, or in the modern context, shareholders and boards.<sup>347</sup> The new "countervailing power" would come from the other side of the market and include organized labor, as well as re-

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<sup>342</sup> *Id.*

<sup>343</sup> See KEKES, *supra* note 138, at 42-43; Muller, *supra* note 4, at 10.

<sup>344</sup> Bainbridge, *supra* note 3, at 892.

<sup>345</sup> *Id.* at 891-92. Professor Bainbridge emphasizes the power of religious and secular "virtuous communities" to influence the conduct of "a citizenry regulating itself from within." *Id.* at 892, 893. He fails to analyze how the reality of splintered communities, resulting in part from unregulated corporate growth, *see supra* note 115, affects his theory.

<sup>346</sup> Branson, *supra* note 276, at 608.

<sup>347</sup> *Id.* at 609.

tailers, which were “required by their situation to develop countervailing power on the consumer’s behalf.”<sup>348</sup> Galbraith later acknowledged that neither labor unions nor retailers act on the consumer’s behalf, recognizing that union leaders align themselves with corporate power, and retailers often act purely out of self-interest, gouging consumers.<sup>349</sup>

Later, Galbraith suggested there existed an unrecognized countervailing force in the very heart of the corporation itself.<sup>350</sup> This “technostructure,” consisting of middle and high-level managers, as well as professionals such as engineers and scientists, participates in the group decision-making of the corporation.<sup>351</sup> Because they share the values of the rest of society, Galbraith theorized, their influence would keep large corporations “on track,” serving broad social purposes.<sup>352</sup>

Ultimately, Galbraith failed to identify an effective non-governmental countervailing force to corporate economic power. One explanation is that Economic Man prevails; that ultimately, the desire for personal economic security trumps benevolent motivations. Individuals with identifiable conflicts of interest, including employees at all levels with an interest in job security, are least likely to be effective counter-forces to the large institutions employing them, regardless of their personal beliefs about the institutions’ conduct.

#### *The Private Attorney General as a Countervailing Force*

Another potential countervailing force to corporate overreaching exists in the institution of the private attorney general, whereby private individuals and groups initiate litigation to vindicate the public interest.<sup>353</sup> The label “private attorney general” has a broader meaning now than when Judge Jerome Frank coined it in 1943,<sup>354</sup> and a more negative connotation. Judge Frank labeled a phenomenon that the United States Supreme Court had already recognized—that Congress could constitutionally create a justiciable controversy by au-

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<sup>348</sup> GALBRAITH, *supra* note 5, at 115, 117.

<sup>349</sup> Branson, *supra* note 276, at 609-10.

<sup>350</sup> *Id.* at 610.

<sup>351</sup> JOHN KENNETH GALBRAITH, *THE NEW INDUSTRIAL STATE* 71-72 (1967).

<sup>352</sup> *Id.* at 289-90.

<sup>353</sup> See generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (exploring the impact of increasing regulation of social and economic arrangements on the structure of the traditional lawsuit, the characteristic of plaintiffs, standing requirements, and available remedies).

<sup>354</sup> *Associated Indus. of N.Y., Inc. v. Ickes*, 134 F.2d 694, 704 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943).

thorizing private parties to enforce public rights, without necessarily creating a new substantive private right.<sup>355</sup>

When Professor Abram Chayes described this phenomenon in his seminal 1982 article,<sup>356</sup> private attorneys general included individuals, such as the plaintiffs in *Brown v. Board of Education*<sup>357</sup> or *Flast v. Cohen*,<sup>358</sup> as well as professional public interest groups like the Sierra Club and Common Cause, which brought suit on behalf of a membership sharing a common interest in monitoring the administration of public programs. Unlike the classic “Hohlfeldian” plaintiff,<sup>359</sup> who litigates private claims based on common-law rights, the ideological plaintiff seeks to enforce rights common to the public at large.<sup>360</sup> The traditional plaintiff sought to enforce private contract rights,<sup>361</sup>

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<sup>355</sup> In deciding whether Associated Industries of New York had standing to sue the Secretary of the Interior over the department’s order to increase minimum prices for coal, the Second Circuit reviewed two U.S. Supreme Court precedents in which the Court had held that a “person aggrieved” within the meaning of a statutory provision did not require that plaintiffs have traditional standing, but that the litigants have standing to act as representatives of the public interest. *Id.* at 702-03 (citing *Scripps-Howard Radio, Inc. v. Fed. Communications Comm’n*, 316 U.S. 4 (1942); *Fed. Communications Comm’n v. Sanders Radio Station*, 309 U.S. 470 (1940)). The Second Circuit recognized that a statute creating the right to sue on behalf of the public interest did not necessarily create new private rights. *Ickes*, 134 F.2d at 703-04. “Such persons, so authorized,” the court wrote, “are, so to speak, private Attorney Generals.” *Id.* at 704.

<sup>356</sup> Abraham Chayes, *Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 4-5 (1982).

<sup>357</sup> *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 299 (1955).

<sup>358</sup> 392 U.S. 83 (1968).

<sup>359</sup> In the classical litigation model,

[t]he dispute is between private parties, and it concerns the consequences of the parties’ actions for the legal relationships—rights and obligations—between them. This central focus on the dispute more or less determines the other basic elements of the traditional model. First, litigation is bipolar: two parties are locked in a confrontational, winner-take-all controversy. Second, the process is retrospective, directed to determining the legal consequences of a closed set of past events. Third, right and remedy are linked in a close, mutually defining logical relationship. Fourth, the lawsuit is a self-contained entity. It is bounded in time: judicial involvement ends with the determination of the disputed issues. It is bounded in effect: the impact is limited to the (two) parties before the court. Finally, the whole process is party initiated and party controlled. The judge is passive, a neutral umpire.

Chayes, *supra* note 356, at 4-5. See generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

<sup>360</sup> See generally Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohlfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968).

<sup>361</sup> Chayes, *supra* note 356, at 5 (“Lon Fuller, in his *Forms and Limits of Adjudication*, posits that the typical classical-model litigation is a suit between businessmen for breach of contract. The chief function of adjudication is the settlement of contract disputes.”) (footnote omitted).

whereas the non-Hohlfeldian plaintiff came to court to challenge, for example, the Environmental Protection Agency's failure properly to enforce the Clean Water Act.

In the heyday of the private attorney general, the United States Supreme Court relaxed requirements for standing and recognized legal interests "beyond the traditional common law protections of person and property."<sup>362</sup> The Court was responding not only to a revision of the classic litigation model, but to a change in the very nature of law and the role of government.<sup>363</sup> As the "second wave" of regulatory reform swept the nation,<sup>364</sup> citizens desired to hold accountable a government whose activities went far beyond traditional Lockean concepts.<sup>365</sup> The Supreme Court's standing decisions in this era effectively sanctioned "citizen suits" as countervailing forces to both government and private power.<sup>366</sup>

Private enforcement of public law spread to the commercial context when, in the late 1960s, the Federal Trade Commission and the Council of State Governments initiated a joint effort to encourage the enactment of state statutes to supplement the Federal Trade Commission Act's ("FTCA")<sup>367</sup> prohibition of unfair and deceptive trade practices.<sup>368</sup> These organizations created three alternative versions of a model law,<sup>369</sup> and by 1981, every state had enacted it in some form.<sup>370</sup> In addition to substantive provisions similar to the FTCA, the great majority of states authorized suits by private attorneys general.<sup>371</sup> State attorneys general shared authority with individual consumers to file claims against companies that engaged in deceptive or unconscionable trade practices. These statutes did more than provide mechanisms for balanced enforcement of private contractual and warranty rights; they recognized, often explicitly, that citizens could act as effective vindicators of the public interest. Under these statutory schemes, successful plaintiffs could, and in some cases, still can,

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<sup>362</sup> Chayes, *supra* note 356, at 10.

<sup>363</sup> *See id.* at 6-7.

<sup>364</sup> *See supra* notes 164-66 and accompanying text.

<sup>365</sup> Chayes, *supra* note 356, at 10.

<sup>366</sup> *See, e.g.,* Flast v. Cohen, 392 U.S. 83 (1968); Baker v. Carr, 369 U.S. 186 (1962).

<sup>367</sup> 15 U.S.C. § 45 (2000).

<sup>368</sup> Steven J. Cole, *State Enforcement Efforts Directed Against Unfair or Deceptive Practices*, 56 ANTITRUST L.J. 125, 126 (1989).

<sup>369</sup> UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW 141-52 (The Council of State Governments 1967), *cited in* Donna S. Shapiro, *The Georgia Fair Business Practices Act: Business As Usual*, 9 GA. ST. U. L. REV. 453, 453 n.4 (1993).

<sup>370</sup> Jeff Sovern, *Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as a Rule Model*, 52 OHIO ST. L.J. 437, 446 (1991).

<sup>371</sup> *See* Cole, *supra* note 368, at 126.

obtain not only their actual damages, but also statutory penalties, punitive damages and/or treble damages, and attorney fees.<sup>372</sup>

Enthusiastic federal acceptance of the private attorney general was short-lived, as the conservative Burger Court resuscitated old standing requirements and related concepts from the classical model of private rights litigation and imposed them on the new reality of an administrative state.<sup>373</sup> The Court has continued to retreat from earlier, more fluid interpretations of standing in an effort to narrow the expanded role of the judiciary in public lawsuits and to return judges to their classical function of deciding discrete disputes between private litigants, retrospective in nature, reaching to the future only by means of case-by-case precedent. The Court accomplished this by clarifying that standing to sue requires plaintiffs to allege a particularized interest, distinct from that held by the public in general.<sup>374</sup> Additionally, the Court imported into public law litigation standing analysis a tripartite causation requirement developed in the context of the traditional private lawsuit.<sup>375</sup>

By the 1980s, as the conservative movement came to dominate politics and judicial appointments, the private attorney general had taken on a different cast. While initially the term denoted an individual or non-profit organization seeking to enforce the public interest, the rise of the large class action lawsuit both broadened the term and stripped it of its original associations. Because of the prohibitive cost and difficulty of pursuing plaintiffs' claims alone, attorneys began to hold back, watching and waiting until a public agency filed an action, then joining in to claim their portion of a lucrative class ac-

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<sup>372</sup> See, e.g., CAL. BUS. & PROF. CODE § 17082 (West 1997); CONN. GEN. STAT. ANN. § 42-110g(a) (West 2004) (allowing court discretion); DEL. CODE ANN. tit. 6, § 2533(b) (1999); *id.* § 2533(c) (stating "shall be treble the amount of actual damages proved"); 815 ILL. COMP. STAT. ANN. 505/10a(a) (West 1999 & Supp. 2003) (allowing court discretion); *id.* 505/10a(c); MO. REV. STAT. § 407.025.1 (2001) (allowing court discretion); MONT. CODE ANN. § 30-14-133(1) (2003) (providing that trebling is discretionary); S.C. CODE ANN. § 39-5-140(a) (Law. Co-op. 1985) (providing damages if willful or knowing violation); TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon 2002) (providing that if knowing violation, no more than three times the amount of damages for mental anguish and economic damages); *id.* § 17.50(d).

<sup>373</sup> Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1445-51 (1988).

<sup>374</sup> See, e.g., *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974); *Sierra Club v. Morton*, 405 U.S. 727 (1972).

<sup>375</sup> See, e.g., *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S.26 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975); *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973).

tion settlement.<sup>376</sup> Private attorneys general became known as “free riders,”<sup>377</sup> and “bounty hunters.”<sup>378</sup>

Recognizing that ideological plaintiffs still brought suits, scholars of the time identified two types of private attorneys general, attaching various labels to the dichotomy, such as “mercenary law enforcers” versus “social advocates.”<sup>379</sup> In reality, in the wake of the increased social consciousness and statutory reforms of the 1960s and 1970s, there were many reasons why plaintiffs and their lawyers sought to adjudicate rights and interests held in common with others.<sup>380</sup> At the very least, many of these lawyers represented a new type of plaintiff, one who did not need to be a member of the elite in order to have an effective advocate.<sup>381</sup>

From the conservative point of view, private attorneys general ought to be looked upon more favorably than government law enforcers. They are private actors; they are “privatizing law enforcement pursuant to the ideals of economic efficiency.”<sup>382</sup> Moreover, even those plaintiffs’ lawyers accurately labeled “mercenary” ought to be admired by conservatives, for they are actualizing their economic self-interest.

Yet conservatives dislike the private attorney general. They contend that plaintiffs’ lawyers, unlike business persons, do not make anything; such lawyers are parasites, living off others’ rights and claims, exploiting the legal system for profit. Conservatives ignore the fact, however, that many businesses do not “make” things. The service industries, for example, comprise a large segment of the modern economy.<sup>383</sup> Moreover, even in the companies that do “make things,” the extravagantly compensated corporate executives do not, as illustrated by a recent *New Yorker* cartoon. The cartoon depicts a

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<sup>376</sup> John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 228 (1983).

<sup>377</sup> *Id.* at 224.

<sup>378</sup> *Id.* at 228.

<sup>379</sup> Bryant Garth et al., *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353, 356 (1988).

<sup>380</sup> *See id.* (concluding that none of the models postulated for the function of private attorneys general was particularly accurate or helpful).

<sup>381</sup> *See* Edward L. Rubin, *The Code, the Consumer, and the Institutional Structure of the Common Law*, 75 WASH. U. L.Q. 11, 20 (1997).

<sup>382</sup> *See id.* (positing that “[c]onservatives find virtue in the private attorney general concept because of its function in ‘privatizing’ law enforcement pursuant to the ideals of economic efficiency,” but providing no support for their assertion).

<sup>383</sup> Census Bureau Press Release, *Service Industries—New Economy’s Biggest Generator of Jobs; Mississippi Leads States*, Census Bureau Reports (June 29, 2000), available at <http://www.census.gov/Press-Release/www/2000/cb00-102.html> (last visited Mar. 31, 2004).

father, relaxing in his easy chair, enjoying a glass of wine and a cigar. He looks proudly into the eyes of his earnest son and explains, "Yes, I do make things, son. I make things called deals."<sup>384</sup>

Moreover, and most importantly, suits by private attorneys general represent law acting as ex post regulation, which, if one applies conservative theory, is to be preferred to ex ante regulation. Private lawsuits require neither a regulatory scheme nor a state bureaucracy to enforce it. Lawsuits are comparatively private in nature.<sup>385</sup> Yet conservatives vehemently lobby and rail against the "trial lawyers,"<sup>386</sup> as if the plaintiffs' bar is the root of the evil rather than just another self-interested responder. In fact, were it not for the conservative trend in interpreting commercial contracts involving an imbalance of power,<sup>387</sup> combined with a failure of legislative reform to keep up with

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<sup>384</sup> William Hamilton, *NEW YORKER*, June 3, 2002, at 56.

<sup>385</sup> See Garth et al., *supra* note 379, at 353 (asserting that conservatives "find virtue in the private attorney general concept because of its function in 'privatizing' law enforcement pursuant to the ideals of economic efficiency").

<sup>386</sup> See Joshua Greene, *John Edwards, Esq.*, *WASH. MONTHLY*, Oct. 1, 2001, at 34. In what has become an especially timely article about Sen. John Edwards, Greene recounts the following:

Tax cuts aside, nothing is closer to George W. Bush's heart than dismantling the current legal system. Long before there was "compassionate conservatism," Bush was attacking the excesses of trial lawyers. In Texas, demonizing lawyers is a hallowed tradition long predating Bush's governorship. In the mid-1980s, state Republicans and conservative Democrats began targeting what they considered predatory litigation, passing laws to limit consumers' rights to sue businesses, and electing justices to the Texas Supreme Court who shared this point of view. Bush merely tapped into this sentiment when he ran for governor. "Probably the first and most important thing I will do when I am governor of this state," Bush promised during the campaign "is to insist that Texas change the tort laws and insist that we end the frivolous and junk lawsuits that threaten our producers and crowd our courts."

*Id.*

<sup>387</sup> The resuscitated formalist model of litigation is rooted in an archaic notion of society, whereby law is regarded as a matter of private right and where material resources are viewed as being directly correlated with intrinsic human worth. As Professor Edward Rubin has written:

This was largely the case in Anglo-Saxon England; the central administration was weak, power rested in the hands of the nobility, and the great majority of the ordinary people were subordinates, if not serfs or slaves. Today, however, enforcement of law is regarded as part of a justly ordered society, and all people are regarded, absent proof of crime, as possessing equal worth. Our continued use of private enforcement mechanisms is simply a holdover from an earlier and long rejected social system; it represents little more than a continuing failure of imagination or commitment.

Rubin, *supra* note 381, at 20.

It follows that when conservative courts reject private plaintiffs who are attempting to enforce statutorily created rights, they are returning the legal system,

changes in the marketplace, citizen suits could still serve as effective countervailing forces to corporate misconduct.<sup>388</sup>

Some jurisdictions continue to authorize citizens to vindicate public and private rights effectively. California stands at the forefront in its legislative efforts to restore the balance of power stolen from citizens in the name of “freedom.” California’s tripartite statutory scheme<sup>389</sup> remains among the most consumer-friendly in the nation, rejecting the regressive conservative trend on standing<sup>390</sup> and permitting citizens to participate actively in enforcement of laws designed to protect them. Because of pro-citizen statutory treatment in such key areas as scienter, injury, and remedies, California courts do not have readily available the pro-corporate option of routinely granting summary judgment to corporate defendants, thereby denying consumers their day in court. Other jurisdictions, including Texas, New Jersey, Georgia, and Alabama,<sup>391</sup> have kept their consumer statutes strong despite a nationwide trend in the opposite direction, though court enforcement has not always followed.

Commentators voice valid concerns about the secondary consequences of allowing individuals to act for themselves or on behalf of the public interest against the bastions of concentrated wealth. Such negative effects include nuisance suits brought to force settlement; windfalls to plaintiffs’ attorneys who “free ride” on class actions, on the government’s or other firms’ coattails; and excessive damages awards by juries, especially punitive damages.<sup>392</sup> None of these problems is insurmountable. For example, in the area of malpractice actions against health care providers, conservatives have suggested far-

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and legal rights, to the elite. Conservatives may believe in the existence of an elite class, but they may not, consistent with the American system of government, restrict the right of access to courts.

<sup>388</sup> Garth et al., *supra* note 379, at 361 (writing that “[c]lass actions and private attorneys general have thus been redefined as simply ‘an evolutionary response to the existence of injuries unremedied by the regulatory action of the government’”).

<sup>389</sup> California Unfair Competition Act, CAL. BUS. & PROF. CODE §§ 17200 -17209 (West 1997 & Supp. 2004); *id.* §§ 17500 -17509; California Consumers Legal Remedies Act, CAL. CIV. CODE §§ 1750-1784 (West 1998 & Supp. 2004).

<sup>390</sup> See CAL. BUS. & PROF. CODE § 17204. An action under the Unfair Competition Law may be brought by any “person, corporation, or association or by any person acting for the interests of itself, its members or the general public.” See generally Penelope A. Prevolos & Evan L. Land, *The Newest Breed of Unfair Competition Cases: Consumer Fraud Class Actions*, 537 PLI/PAT. 301 (1998).

<sup>391</sup> See ALA. CODE §§ 8-1-1 to -2 (2002); GA. CODE ANN. §§ 10-1-370 to -3-435 (2002 & Supp. 2003); N.J. STAT. ANN. §§ 56.8-19 (West 2001); TEX. BUS. & COM. CODE ANN. §§ 17.41-63 (Vernon 2002 & Supp. 2004).

<sup>392</sup> See generally John C. Coffee, Jr., *The Future of the Private Securities Litigation Reform Act: or, Why the Fat Lady Has Not Yet Sung*, 51 BUS. LAW. 975 (1996); Coffee, *supra* note 376.

reaching reforms, focusing in the area of placing ceilings on punitive damage awards.<sup>393</sup> Such a solution is one way of keeping the interests in balance.

In any event, others have written fully and persuasively on these matters. My focus here has been on the discrepancies between what conservatives say they believe and the policies they support. In the wake of widespread corporate malfeasance, it is time to reexamine the conservative assumption, held despite contradictory historical and contemporary evidence, that the laissez-faire system works without meaningful regulation. Conservatives' invocation of a romanticized "free market America" is disingenuous and counter to the democratic ideal of personal liberty.

Conservative policies have removed accountability from the economic and political equation. Frequently citing personal accountability as a core value for the responsible citizen, conservatives fight measures that would ensure it in business and politics.<sup>394</sup> Until very recently, they opposed enforcement of basic standards of honesty and fair dealing by corporations, appointing a figure with blatant divided loyalties as chairman of the Securities and Exchange Commission.<sup>395</sup>

Existing deterrents to corporate misconduct remain ineffective because most consequences can be passed on, covertly, to shareholders and consumers. Fines, damage awards, and disgorgement of unlawfully gained profits are considered, and therefore become, the cost of doing business.<sup>396</sup> Accountability must come from somewhere. If under the conservative paradigm, there is no such thing as the "corporate citizen" responsible to greater society, then we must look to the individual citizens who comprise the corporation. If, as conservatives claim, corporations do not exist separately from the aggregate of individuals whose transactions occur under the corporate umbrella, then responsibility must be enforced at that individual level, in a way that substantially deters the malfeasance.

Effective responses can and must come from a variety of sources: rigorous self-governance; balanced antitrust enforcement; imposition of accountability from external regulatory sources, both *ex ante* and *ex post*; and a refusal to return to failed formalism in contract. Perhaps most importantly, policy makers must demonstrate a willingness

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<sup>393</sup> See Helen Dewer, *Medical Liability Curbs Blocked*, WASH. POST, Feb. 24, 2004, at A4.

<sup>394</sup> See *supra* note 215.

<sup>395</sup> See *supra* note 233.

<sup>396</sup> See, e.g., David Luban, *A Flawed Case Against Punitive Damages*, 87 GEO. L.J. 359, 361 (1998); David B. Spence, *The Shadow of the Rational Polluter: Rethinking the Role of Rational Actor Models in Environmental Law*, 89 CAL. L. REV. 917, 922 n.18 (2001).

to mature beyond the romantic precepts of Old West mythology and recognize that principles that may have worked in a less complex society do not work today because of the disconnect resulting from layers of bureaucracy characterizing the twenty-first century corporation.

While recent reforms make a start, I am concerned that little has been done to put significant power where it belongs: in the hands of citizen constituencies. Conservative policies have helped create and sustain a culture promoting worship of powerful institutions and their elite “princes” that will not disappear with the creation of additional bureaucracies populated by a different selection of elites. By corralling their morality in the limited sphere of personal relationships, conservative advocates of unregulated big business have helped dismantle the very communities in which they hope to practice it and have perpetrated a damaging confusion between the concepts of self-interest and public interest.<sup>397</sup>

Thus, the fault lies not so much in the law as in the contradictions informing it. It is difficult to believe that, as a philosophical matter, conservative thinkers approve of the tangible results of ruthless pursuit of self-interest. I do not believe that most people in general want to place the ruthless pursuit of self-interest above the public good, but the people are less vocal in their opposition than the politicians and single-minded public advocates of the conservative agenda.

As Professor Benjamin R. Barber of the University of Maryland wrote recently:

[B]usiness malfeasance is the consequence neither of systemic capitalist contradictions nor private sin, which are endemic to capitalism and, indeed, to humanity. It arises from a failure of the instruments of democracy, which have been weakened by three decades of market fundamentalism, privatization ideology and resentment of government.

Capitalism is not too strong; democracy is too weak. We have not grown too hubristic as producers and consumers; we have grown too timid as citizens, acquiescing to deregulation and privatization . . . and a growing tyranny of money over politics.

. . . . Such attitudes represent a penchant for a go-it-alone economics that undermines the social contract and turns corporate sins into virtues of the bottom line.<sup>398</sup>

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<sup>397</sup> Soros, *supra* note 295, at 3 (describing the result as “not perfect competition but crony capitalism”).

<sup>398</sup> Barber, *supra* note 226.