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NOTES

AN HISTORICAL PERSPECTIVE TO THE CORPORATE BAR PROVISIONS OF THE SECURITIES ENFORCEMENT REMEDIES AND PENNY STOCK REFORM ACT OF 1990

The primary demand of a Madisonian system of limited government is to maintain a proper balance between the two opposing principles of public power and private freedom.¹ The principle of public power is self-govern-

1. See THE FEDERALIST No. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961) (articulating necessity for checks and balances). Madison wrote:

It may be a reflection on human nature, that such devices [checks and balances] should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: *you must first enable the government to control the governed; and in the next place oblige it to control itself.*

Id. (emphasis added).

The Madisonian constitutional ideology was heavily influenced by two different approaches to statecraft: Classical liberal political theory and classical republican political theory. See David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J.L. & POL. 1, 5-6 (1987) (arguing both liberal theory and classical republican theory contributed to intellectual basis for federal constitution). Liberal political theory, articulated by John Locke, asserted that in a pregovernmental society individuals possessed certain natural rights and private freedoms. See Randy E. Barnett, *Are Enumerated Constitutional Rights the Only Rights We Have? The Case of Associational Freedom*, 10 HARV. J.L. & PUB. POL'Y 101, 102 (1987) (discussing Lockean belief in pregovernmental individual rights). According to liberal theory, government is created only to preserve legally the individual's private freedom from the aggressions of fellow citizens; government is not the source of rights, but the guarantor of preexisting rights. *Id.* at 102-03. But government itself posed a problem to the Lockean "rights first—government second" philosophy. *Id.* at 103. The very existence of government presented the danger that society at large might employ governmental power to invade an individual's private arena. See David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1237 (1988) (discussing liberal theory's mistrust of coercive governmental power). Accordingly, government had to be limited in order to prevent opportunities for society to restrict private freedom. *Id.* Strictly limiting governmental power to certain functions would promote individual liberty as well as societal welfare. *Id.* By imposing constitutional limitations on governmental power, the Founders intended to protect the private freedoms of each societal member. See Barnett, *supra*, at 103-04 (noting influence of Lockean philosophy on Founders).

Liberal theory's preoccupation with private freedom and the control of governmental power was at odds with the classical republican political tradition of Thomas Hobbes. See Millon, *supra*, at 1238 (contrasting liberal theory with republican theory). Republicanism, or positivism, specified that the only legal rights one possesses are those recognized by government;

ment, which entitles the majority of society to control the minority for the public good.² The principle of private freedom is that, nonetheless, there are certain areas in which the minority must be free of majority control.³ The continual reconciliation of public power and private freedom poses the "Madisonian dilemma."⁴ The dilemma is that for government to function appropriately and to remain viable, neither the freedom of society to govern

government is the source of as well as the guarantor of rights. See Barnett, *supra*, at 101-02 (noting positivism assumes individual rights do not exist until granted by sovereign). While liberalism emphasized governmental nonintervention to ensure private welfare, the republican "government first—rights second" theory stressed governmental or public power to promote and define the common good. See Millon, *supra*, at 1238-39 (discussing republicanism's emphasis on government dedicated to common welfare). The republican tendency to utilize public power to pursue the general welfare assumed that what was good for society as a whole ultimately promoted individual welfare. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* 58 (1969) (noting republican philosophy that "what was good for the whole community was ultimately good for all the parts"). Accordingly, government must be invested with sufficient authority to function in the interests of society and to subordinate excessive emphasis on the private, sectarian interests of individuals. *Id.* Dividing and subjecting governmental power to an effective system of checks and balances became the constitutional mechanism chosen by the Framers to prevent any private element of society from capturing the state machinery and impeding governmental pursuit of the common good. *Id.* at 547-53 (discussing republican legacy of separation of federal legislative, executive and judicial powers).

For a more thorough discussion of the influence of both the liberal and republican political traditions on the Founders, see generally BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); FRANK M. COLEMAN, *HOBBS AND AMERICA: EXPLORING THE CONSTITUTIONAL FOUNDATIONS* (1977); FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* (1985); JOHN G. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975); JACK R. POLE, *POLITICAL REPRESENTATION IN ENGLAND AND THE ORIGINS OF THE AMERICAN REPUBLIC* (1966); Lance Banning, *Jeffersonian Ideology Revisited: Liberal and Classical Ideas in the New American Republic*, 43 WM. & MARY Q. 3 (1986); Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57 (1987); Robert E. Shalhorpe, *Republicanism and Early American Historiography*, 39 WM. & MARY Q. 334 (1982).

2. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 139 (1990) (describing majority rule aspect of Madisonian system). Madisonian ideology emphasized the importance of dedicating governmental structure to the welfare of all citizens:

To make the people's welfare—the public good—the exclusive end of government became for the Americans, as one general put it, their "Polar Star," the central tenet of the Whig faith, shared . . . by any American bitterly opposed to a system which held "that a Part is greater than its Whole; or, in other Words, that some Individuals ought to be considered, even to the Destruction of the Community, which they compose."

WOOD, *supra* note 1, at 55; see also *supra* note 1 (describing classical republican political theory's emphasis on governmental pursuit of public good).

3. See BORK, *supra* note 2, at 139 (describing minority right aspect to Madisonian system). The Bill of Rights specifically addresses the areas in which individuals are to be free from societal control under the Madisonian constitutional framework. *Id.*; see Harry N. Scheiber, *Public Rights and the Rule of Law in American Legal History*, 72 CAL. L. REV. 217, 218 (1984) (noting private rights protected by Bill of Rights); *supra* note 1 (describing liberal political theory's rationale for limited government).

4. See BORK, *supra* note 2, at 139-41 (describing "Madisonian dilemma").

nor the freedom of the individual not to be governed should emerge as completely dominant.⁵

Madisonian democratic theory insists on a divided world in which the public interests of the state are in continual tension with the private interests of the individual.⁶ By displaying traits of both public power and private freedom, the corporation fits uncomfortably into a well-demarcated Madisonian society.⁷ In one capacity the public power of society determines the existence of a corporation's private interests.⁸ Yet, in another capacity, the

5. See *id.* at 139 (noting risk of either tyranny of majority or tyranny of minority); Millon, *supra* note 1, at 1239, 1245 (noting republican theory's fear of factional tyranny and liberal theory's fear of mob tyranny); Saul K. Padover, *Management and Government: The Balancing Sovereignties*, in *THE POWERS AND DUTIES OF CORPORATE MANAGEMENT* 262, 267, 272 (Edmond N. Cahn ed., 1950) (noting in Madisonian system nothing is more threatening to social order than private freedom without public control).

6. See OTTO V. GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGE* 87 (Frederic W. Maitland trans., 1927) (describing foundations of modern political theories). Gierke's monumental work contrasted the more unified medieval conception of society with the modern vision of the world in which "[t]he Sovereignty of the State and the Sovereignty of the Individual were steadily on their way towards becoming the two central axioms from which all theories of social structure would proceed, and whose relationship to each other would be the focus of all theoretical controversy." *Id.*; see also Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1086-89 (1980) (discussing Gierke's description of medieval society).

7. See CHARLES E. LINDBLOM, *POLITICS AND MARKETS* 356 (1977) (stating corporation "fits oddly into democratic theory and vision. Indeed it does not fit."); Edwin M. Epstein, *The Historical Enigma of Corporate Legitimacy*, 60 CAL. L. REV. 1701, 1701 (1972) (reviewing JAMES W. HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780-1970* (1970)) (stating "[i]n a society where the Rule of Law rather than the Rule of Men is presumed to be a foundation of the constitutional order, the American business corporation has been an enigma."); see also Note, *Incorporating the Republic: The Corporation in Antebellum Political Culture*, 102 HARV. L. REV. 1883, 1890 (1989) (noting intermediate position of corporation between sovereignty of state and liberty of individual).

8. See David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 205-11 (describing "artificial entity" conception of corporation). The "artificial entity" theory of the corporation holds the corporation to owe its existence to the positive law of the state. *Id.* at 206. In American jurisprudence, Chief Justice John Marshall penned the classic formulation of the artificial entity theory: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence." *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819); see also BLACK'S LAW DICTIONARY 340 (6th ed. 1990) (defining corporation as artificial or legal entity created by or under laws of state); John C. Coates IV, Note, *State Takeover Statutes and Corporate Theory: The Revival of an Old Debate*, 64 N.Y.U. L. REV. 806, 810-15 (1989) (describing "artificial entity" theory).

Regarding the subordination of corporations to the state, the "concession" theory roughly parallels the "artificial entity" theory. Professor Maitland provided the classic formulation of the concession theory: "The corporation is, and must be, the creature of the State. Into its nostrils the State must breathe the breath of a fictitious life, for otherwise it would be no animated body but individual dust." Frederic W. Maitland, *Introduction to GIERKE*, *supra* note 6, at xx. In similar fashion, according to Professor Dahl:

[I]t is absurd to regard the corporation simply as an enterprise established for the sole purpose of allowing profit-making. One has simply to ask: Why should citizens,

private rights of the corporation are impervious to societal control.⁹ The "corporate dilemma" is that for the corporation to operate both successfully and legitimately within the broader societal framework, neither the public's ability to control the corporation nor the corporation's private freedom from public control should be subordinated permanently.¹⁰ For centuries both English and American societies continually struggled to preserve the interdependent relationship between a corporation's counterpoised attributes of public control and private freedom.¹¹

The historically anomalous¹² nineteenth-century division of corporations into distinct categories of so-called "public" and "private" corporations largely diffused questions concerning the appropriate relation between the public's ability to control the corporation and the corporation's right to be free of such control.¹³ By assimilating public corporations to the role of the state in society—subject to popular control¹⁴—and private corporations to the role of the individual in society—free from public control¹⁵—nineteenth-century doctrine apparently resolved the dilemma posed by the enigmatic corporation.

through *their* government, grant special rights, powers, privileges, and protections to any firm except on the understanding that its activities are to fulfill *their* purposes?

Corporations exist because we allow them to do so.

Robert A. Dahl, *Governing the Giant Corporation*, in *CORPORATE POWER IN AMERICA* 10-11 (Ralph Nader & Mark J. Green eds., 1973) (emphasis in original); see also C.T. CARR, *GENERAL PRINCIPLE OF THE LAW OF CORPORATIONS* 164-73 (1905) (noting concession theory emphasizes that corporations require state approval for existence and that corporateness is special privilege granted by state). According to Carr, the English law of corporations adhered to the concession theory. *Id.* at 171; accord Frederick Pollock, *Has the Common Law Received the Fiction Theory of Corporations*, 27 *LAW Q. REV.* 219, 235 (1911) (arguing England accepted concession theory but not artificial entity theory).

9. See Millon, *supra* note 8, at 211-19 (describing "natural entity" theory of corporations); Coates, *supra* note 8, at 818-25 (same). Under the natural entity conception of the corporation the state has no more power to impose its will on corporations than it does on a natural person. *Id.* at 819. Since classical liberal theory recognized the right of natural persons to hold property, the natural entity theory entitles corporations to the same. See Millon, *supra* note 1, at 1237 (noting central importance of property interests to liberal theory); see also *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388-89 (1798) (recognizing importance of protecting individual property interests from legislative abrogation).

10. See ERNST FREUND, *STANDARDS OF AMERICAN LEGISLATION* 39-42 (2d ed. 1965) (describing dilemma posed by corporation). According to Freund, "[i]n its various forms of ecclesiastical bodies and foundations, guilds, municipalities, trading companies, or business organizations, the corporation has always presented the same problem of how to check the tendency of group action to undermine the liberty of the individual or to rival the political power of the state." *Id.* at 39.

11. See *infra* notes 102-43 and accompanying text (describing attempts by earlier societies to maintain proper balance between public control and private freedom).

12. See *infra* notes 77-82 and accompanying text (arguing division between public and private corporations did not exist prior to nineteenth century).

13. See *infra* notes 149-91 and accompanying text (describing events leading to nineteenth-century division of corporations into separate public and private categories).

14. See *infra* notes 158-61 and accompanying text (describing nineteenth-century relegation of public corporations to public control).

15. See *infra* notes 158-75 and accompanying text (describing nineteenth-century determination to accord private corporation individual constitutional rights).

Although the dichotomy between public and private corporations continues to structure conventional thinking about corporations, the massive amount of recent scholarly commentary on corporations seems to indicate a widespread dissatisfaction with the present, bifurcated conception of the corporation.¹⁶ Most of this commentary suggests the need to reshape cor-

16. See, e.g., RALPH NADER ET AL., *TAMING THE GIANT CORPORATION* 63 (1976) (advocating federal chartering of corporations); CHRISTOPHER D. STONE, *WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR* 71-73 (1975) [hereinafter STONE, *WHERE THE LAW ENDS*] (recommending need to translate spirit of corporate social responsibility movement into tangible institutional reform); Victor Brudney, *Corporate Governance, Agency Costs, and the Rhetoric of Contract*, 85 COLUM. L. REV. 1403, 1403 (1985) (arguing shareholders lack requisites to control management); William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 700-03 (1974) (advocating federal role in conducting corporations); Lewis D. Solomon & Kathleen J. Collins, *Humanistic Economics: A New Model for the Corporate Social Responsibility Debate*, 12 J. CORP. L. 331, 335 (1987) (suggesting corporations "profit from 'social' activities that . . . combat insensitivity to society's changing demands thereby reducing public pressures for governmental intervention") (footnotes omitted); David L. Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1, 5-85 (1979) (discussing alternatives of compulsory or voluntary corporate reform); J.A.C. Hetherington, *Facts and Legal Theory: Shareholders, Managers, and Corporate Social Responsibility*, 21 STAN. L. REV. 248, 274-91 (1969) (noting business operates within broader social framework); Philip A. Loomis, Jr., & Beverly K. Rubman, *Corporate Governance in Historical Perspective*, 8 HOFSTRA L. REV. 141, 141-43 (1979) (noting similar corporate reform movement in early twentieth century); Louis B. Lundborg & Henry G. Manne, *Private Corporations and Social Responsibility, in REGULATION, ECONOMICS, AND THE LAW* 25-39 (Bernard H. Siegan ed., 1979) (debating whether corporations should engage in activities intended to further overall societal interests); Henry G. Manne, *The Limits and Rationale of Corporate Altruism: An Individualistic Model*, 59 VA. L. REV. 708, 708-723 (1973) (noting good business reasons for corporate social activity); Jerry L. Mashaw, *Corporate Social Responsibility: Comments on the Legal and Economic Context of a Continuing Debate*, 3 YALE L. & POL'Y REV. 114, 115 (1984) (debating proper place of corporate social responsibility in corporate decision making); Arthur S. Miller, *A Modest Proposal for Helping to Tame the Corporate Beast*, 8 HOFSTRA L. REV. 79, 79 (1979) (arguing corporations should be treated as collectives rather than persons); Howard L. Oleck, *Remedies for Abuses of Corporate Status*, 9 WAKE FOREST L. REV. 463, 465-66 (1973) (questioning limited personal liability of members of private corporations); Donald E. Schwartz, *Towards New Corporate Goals: Co-Existence With Society*, 60 GEO. L.J. 57, 75-103 (1971) (suggesting need for socially oriented corporate policies); Russell B. Stevenson, Jr., *Corporations and Social Responsibility: In Search of the Corporate Soul*, 42 GEO. WASH. L. REV. 709, 722-36 (1974) [hereinafter Stevenson, *Corporate Soul*] (proposing mechanisms to promote socially responsible corporate behavior); Russell B. Stevenson, Jr., *The Corporation as a Political Institution*, 8 HOFSTRA L. REV. 39, 45-61 (1979) (suggesting politicization of corporation as means of inducing corporate responsibility); Christopher D. Stone, *Corporate Social Responsibility: What it Might Mean, If it Were Really to Matter*, 71 IOWA L. REV. 557, 560-66 (1986) (discussing both interventionism and voluntarism branches of corporate responsibility movement); Walter Werner, *Corporation Law in Search of Its Future*, 81 COLUM. L. REV. 1611, 1660-66 (1981) (noting limitations of corporate reform movement); Oliver Williamson, *Corporate Governance*, 93 YALE L.J. 1197, 1197-98 (1984) (focusing on economics of corporate governance in microanalytic terms).

Other commentators resist the social responsibility movement. See, e.g., ROBERT L. HEILBRONER, *THE LIMITS OF AMERICAN CAPITALISM* 55 (1966) (contending "[f]or perhaps the first time in American history there is no longer any substantial intellectual opposition to the system of business nor any serious questioning of its economic privileges and benefits."); RALPH K. WINTER, *GOVERNMENT AND THE CORPORATION* 44-68 (1978) (criticizing suggestions

porate practice in a manner that would mandate private corporations to be mindful of their social responsibilities.¹⁷ From another perspective, the social responsibility movement seeks to restore a degree of public control over the private corporation.¹⁸

for social control of corporate power); Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1259-92 (1982) (supporting traditional methods of corporate governance); Robert Hessen, *A New Concept of Corporations: A Contractual and Private Property Model*, 30 HASTINGS L.J. 1327, 1349-50 (1979) (denying justifications for corporate social responsibility); Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, § 6 (Magazine), at 32 (stating "the social responsibility of business is to increase its profits.").

Another aspect of the corporate responsibility movement is directed specifically at corporate managers. See, e.g., STONE, WHERE THE LAW ENDS, *supra*, at 152-83 (proposing companies designate certain percentage of directors to protect public interests); Alfred F. Conard, *Reflections on Public Interest Directors*, 75 MICH. L. REV. 941, 941-61 (1977) (suggesting possibility of placing public interest directors on corporate boards); William O. Douglas, *Directors Who Do Not Direct*, 47 HARV. L. REV. 1305, 1329 (1934) (noting lack of social-mindedness of corporate directors); B.R. Jouett, *The Responsibility of Directors of Corporations*, 58 AM. L. REV. 384, 385-400 (1924) (suggesting public responsibilities for corporate managers); Marshall L. Small, *The Evolving Role of the Director in Corporate Governance*, 30 HASTINGS L.J. 1353, 1355-1403 (1979) (discussing recent changes in governance of corporate executives).

As the literature on corporate social responsibility suggests, and as several authors note, after a period of relative stability, the conceptual understanding of the corporation is once again in a period of transition. See Millon, *supra* note 8, at 203 (noting revived corporate theory debate in hostile takeover context); Coates, *supra* note 8, at 807 (arguing debate over hostile takeovers indicates that meaning of word corporation remains unsettled). Coates also lists other contexts in which the abstract questions of corporate theory have begun to reemerge, notably corporate criminal liability and corporate first amendment rights. *Id.* at 807 n.7; cf. Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1441 (1987) (arguing following Second World War "the corporation as a legal institution" ceased to be either "controversial" or "of interest"); Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 175 (1985), reprinted in CORPORATIONS AND SOCIETY: POWER AND RESPONSIBILITY 13 (Warren J. Samuels & Arthur S. Miller eds., 1987) (subsequent page references to reprint) (stating after 1930 issue of defining corporations "vanished from controversy").

17. See E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1153-63 (1932) [hereinafter Dodd, *Trustees*] (suggesting corporate managers owe responsibilities to society as well as to corporate shareholders). Professor Dodd attempted to justify corporate policies that benefitted nonshareholder constituencies and resulted in lost profits. *Id.* at 1147-48. Dodd essentially argued that a corporation should act as a good citizen. *Id.* at 1154-55. Dodd's article responded to an article by Professor Adolf A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931), suggesting corporations existed solely for the private gain of stockholders. The ensuing exchange between Berle and Dodd formed the foundations for the modern social responsibility movement. See Adolf A. Berle, Jr., *For Whom Corporate Managers are Trustees: A Note*, 45 HARV. L. REV. 1365, 1367-70 (1932) (arguing modern business corporation lacks social responsibility); E. Merrick Dodd, Jr., *Is Effective Enforcement of the Fiduciary Duties of Corporate Managers Practicable?*, 2 U. CHI. L. REV. 194, 205-07 (1935) (questioning Berle's position that managers of private corporations should not serve nonshareholder constituencies). See generally Joseph L. Weiner, *The Berle-Dodd Dialogue on the Concept of the Corporation*, 64 COLUM. L. REV. 1458 (1964) (noting current relevance of Berle-Dodd exchange on concept of corporation).

18. See Stevenson, *Corporate Soul*, *supra* note 16, at 722-36 (comparing various me-

The recently enacted corporate bar provisions of the Securities Enforcement Remedies and Penny Stock Reform Act of 1990 (Remedies Act)¹⁹ may reflect a heightened sensitivity by Congress—representative of society at large—to the notion that even traditionally private corporations should be subject to a degree of social control.²⁰ By authorizing courts to intervene on behalf of the public in a corporation's internal affairs, the corporate bar is difficult to square with the conventional, almost canonical, idea of the private corporation as an institution considered largely autonomous from social control.²¹ When viewed from an historical perspective, however, neither the underlying objective of²² nor the method employed by²³ the corporate bar is without precedent. If the purpose of the corporate bar is to protect the public from today's manipulative corporate trading practices, the corporate bar parallels the spirit of earlier legislative attempts to safeguard societal welfare from similarly disruptive market practices.²⁴ Arguably resembling an earlier, broader vision of the corporation, the corporate bar may evidence a willingness of Congress to rethink the proper relationship between the corporation's private freedom and society's public power.

I. THE CORPORATE BAR

Congress enacted the Remedies Act to provide the Securities and Exchange Commission (SEC) with additional remedies to maximize the SEC's enforcement of the federal securities laws.²⁵ One impetus behind the Remedies Act came from the perception that the SEC's existing enforcement

mechanisms capable of influencing corporate behavior). Several techniques exist for asserting public control of private corporations. *Id.* The current method of maintaining public control of corporations centers around an ad hoc, after-the-fact body of legislative regulation that forbids undesirable corporate conduct. *Id.* at 722. By contrast, past practices placed greater emphasis on inserting public control of corporations during the incorporation stage. *See infra* notes 177-79, 183-86 and accompanying text (discussing restrictive features of both special and general incorporation acts).

19. Pub. L. No. 101-429, 104 Stat. 931 (1990).

20. *See infra* notes 25-45 and accompanying text (outlining corporate bar provisions of Remedies Act).

21. *See infra* notes 72-75 and accompanying text (defining private corporations).

22. *Compare infra* notes 27-28, 48-49 and accompanying text (noting purpose of corporate bar to ensure public confidence in securities markets) *with infra* notes 111-14 and accompanying text (noting purpose of forestalling statutes to maintain integrity of early trading markets).

23. *Compare infra* notes 29-49 and accompanying text (describing corporate bar's removal of fraudulent corporate managers from corporate profession) *with infra* notes 115-43 and accompanying text (describing prior methods of purging fraudulent market traders from trading profession).

24. *Compare infra* notes 25-51 and accompanying text (outlining purpose and method of corporate bar) *with infra* notes 110-43 and accompanying text (outlining purpose and objective of medieval statutes prohibiting forestalling).

25. *See S. REP. No. 337, 101st Cong., 2d Sess. 1 (1990)* [hereinafter Senate Report] (articulating goal of providing SEC additional enforcement mechanisms); *H.R. REP. No. 616, 101st Cong., 1st Sess. 13 (1990), reprinted in 1990 U.S.C.C.A.N. 1379, 1380* [hereinafter House Report] (subsequent page references to official H.R. REP.) (same).

authority prevented the SEC from seeking a remedy commensurate with the egregiousness of many of the alleged violations, and that the SEC's primary enforcement measures—injunctions and administrative proceedings—did not sufficiently deter potential violators of the securities laws.²⁶ More importantly, the Remedies Act attempts to address the perception of diminished investor confidence in the securities markets following the Wall Street Scandal cases of the 1980s.²⁷ According to Congress, a strong enforcement program is essential to investor confidence in the integrity, fairness and efficiency of the securities markets.²⁸

One mechanism included by Congress in the Remedies Act to restore public confidence in the securities markets is the corporate bar provisions of the Remedies Act. Sections 101 and 201 of the Remedies Act, codified, respectively, as section 20(e)²⁹ of the Securities Act of 1933 (Securities Act)³⁰ and section 21(d)(2)³¹ of the Securities Exchange Act of 1934 (Exchange

26. See Senate Report, *supra* note 25, at 2 (discussing previous lack of adequate enforcement remedies); House Report, *supra* note 25, at 14 (discussing need for increased flexibility in enforcement); Ralph C. Ferrara et al., *Hardball! The SEC's New Arsenal of Enforcement Weapons*, 47 BUS. LAW. 33, 33 (1991) (discussing motivations behind Remedies Act).

27. See Senate Report, *supra* note 25, at 2 (noting rise by over 260% of securities investors' complaints to SEC during 1980s). According to the Senate Report:

Potential law violators have been lured by the prospects of enormous profits, in situations where the risk of detection by financial regulators has appeared small. Recent years have witnessed the biggest insider trading scandals in history, widespread incidences of fraudulent financial reporting by financial institutions and other corporations, illegal activity in connection with tender offers, billions of dollars of losses to small investors as a result of illegal activity in the "penny stock" market, market manipulation and other illegal trading activity, and fraudulent and misleading disclosures in the sale of securities.

Id.; House Report, *supra* note 25, at 14 (noting rise of complaints during 1980s); William R. McLucas et al., *SEC Enforcement: A Look at the Current Program and Some Thoughts About the 1990s*, 46 BUS. LAW. 797, 798-803, 825 (1991) (noting SEC's increased awareness of Wall Street scandals of 1980s); James Treadway, *Looking for the Perfect Enforcement Remedy: Old Wine in New Bottles or: Have I Seen This Movie Before?*, 48 WASH. & LEE L. REV. 859, 860-61 (1991) (discussing SEC's previous inability to handle flagrant violators of securities laws).

28. See Senate Report, *supra* note 25, at 2 (discussing importance of investor confidence to securities markets); House Report, *supra* note 25, at 14 (same).

29. The Securities Act of 1933 (Securities Act) § 20(e), 15 U.S.C.A. § 77t(e) (West Supp. 1992). Section 20(e) provides:

In any proceeding under subsection (b) of this section, the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as it shall determine, any person who violated section 17(a)(1) of this title from acting as an officer or director of any issuer that has a class of securities registered pursuant to section 12 of the Securities Exchange Act of 1934 or that is required to file reports pursuant to section 15(d) of such Act if the person's conduct demonstrates substantial unfitness to serve as an officer or director of any such issuer.

Id.

30. 15 U.S.C. §§ 77a-77aa (1988).

31. The Securities Exchange Act of 1934 (Exchange Act) § 21(d)(2), 15 U.S.C.A.

Act),³² constitute the corporate bar provisions of the Remedies Act.³³ The corporate bar provisions expressly authorize the federal courts to bar or suspend any individual from serving as either an officer or director of any corporation with a class of securities registered pursuant to section 12³⁴ of the Exchange Act or, alternatively, any corporation required to file reports under section 15(d)³⁵ of the Exchange Act.³⁶ Also, the corporate bar requires the SEC to show that the individual violated either of two scienter-based antifraud provisions—section 17(a)(1) of the Securities Act³⁷ or section 10(b) of the Exchange Act³⁸—or the rules or regulations promulgated pursuant to section 10(b).³⁹ Additionally, the SEC must prove that the person's conduct demonstrates "substantial unfitness" to serve as an officer or director of a corporation.⁴⁰ Finally, the bar imposed may be conditional or unconditional

§ 78u(d)(2) (West Supp. 1992). Section 21(d)(2) provides:

In any proceeding under paragraph (1) of this subsection, the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as it shall determine, any person who violated section 10(b) of this title or the rules or regulations thereunder from acting as an officer or director of any issuer that has a class of securities registered pursuant to section 12 of this title or that is required to file reports pursuant to section 15(d) of this title if the person's conduct demonstrates substantial unfitness to serve as an officer or director of any such issuer.

Id.

32. 15 U.S.C. §§ 78a-78jj (1988).

33. See generally Ferrara et al., *supra* note 26 (outlining provisions of Remedies Act); Dixie L. Johnson, *New Remedies and Responsibilities for the SEC*, 11 BUS. LAW. UPDATE 7 (Mar. Apr. 1991) (same); Allan A. Martin et al., *SEC Enforcement Powers and Remedies Are Greatly Expanded*, 19 SEC. REG. L.J. 19 (1991) (same); McLucas et al., *supra* note 27 (same); John Sturc et al., *The Securities Enforcement Remedies and Penny Stock Reform Act of 1990*, 24 SEC. & COMMODITIES REG. 79 (1991) (same); Treadway, *supra* note 27 (same).

34. Exchange Act § 12, 15 U.S.C. § 78o(b) (1988).

35. Exchange Act § 15(d), 15 U.S.C. § 78o(d) (1988).

36. Securities Act § 20(e), 15 U.S.C.A. § 77t(e) (West Supp. 1992); Exchange Act § 21(d)(2), 15 U.S.C.A. § 78u(d)(2) (West Supp. 1992). Note the language of sections 20(e) and 21(d)(2) is broad enough to permit the SEC to seek a bar against an individual who was not an officer or director of a corporation at the time of their fraudulent activity. See House Report, *supra* note 25, at 27 (noting corporate bar is not limited to cases involving corporate officers or directors).

37. Securities Act § 17(a)(1), 15 U.S.C. 77q(a)(1) (1988).

38. Exchange Act § 10(b), 15 U.S.C. § 78j(b) (1988).

39. Securities Act § 20(e), 15 U.S.C.A. § 77t(e) (West Supp. 1992); Exchange Act § 21(d)(2), 15 U.S.C.A. § 78u(d)(2) (West Supp. 1992).

40. See Ferrara et al., *supra* note 26, at 67 (criticizing vagueness of "substantial unfitness" standard); see also Senate Report, *supra* note 25, at 21 (suggesting permanent bar is particularly appropriate for egregious violations or recidivists).

Interestingly, British law also permits courts to disqualify certain persons from service as directors of companies. See Jayne W. Barnard, *The Securities Law Enforcement Remedies Act of 1989: Disenfranchising Shareholders in Order to Protect Them*, 65 NOTRE DAME L. REV. 32, 74-76 (1989) (discussing Britain's Company Directors Disqualification Act of 1986). The Company Directors Disqualification Act of 1986 obliges British courts to disqualify directors of an insolvent company if the director manifests conduct "unfit to be concerned in the management of a company." *Id.*; see also Douglas M. Branson, *Countertrends in Corporation*

and may be either permanent or for whatever period of time the court determines is proper.⁴¹

Despite Congress' belief that federal courts already possessed the authority to order corporate bars pursuant to the courts' inherent equitable powers to grant ancillary relief,⁴² Congress believed that providing courts with express statutory authority to bar an individual from fiduciary corporate service in cases of deliberate fraudulent conduct would best effectuate Congress' purpose of restoring public confidence in the public markets.⁴³ Although Congress noted that the corporate bar remedy represents a potentially severe sanction on individual misconduct,⁴⁴ Congress nonetheless determined that individuals demonstrating a blatant disregard for the requirements of the federal securities laws should not hold positions of trust in large corporations.⁴⁵

By granting courts the power to remove certain corporate executives from office, the corporate bar admittedly intrudes upon the traditional right

Law: Model Business Corporation Act Revision, British Company Law Reform, and Principles of Corporate Governance and Structure, 68 MINN. L. REV. 53, 85-87 (discussing disqualification of British company directors).

41. Securities Act § 20(e), 15 U.S.C.A. § 77t(e) (West Supp. 1992); Exchange Act § 21(d)(2), 15 U.S.C.A. § 78u(d)(2) (West Supp. 1992).

42. See Senate Report, *supra* note 25, at 3, 8, 22 (noting federal courts' power to fashion equitable relief to effectuate purposes of securities laws); House Report, *supra* note 25, at 27 (same); David S. Ruder, *Securities and Exchange Commission Enforcement Practices*, 85 NW. U. L. REV. 607, 611-12 (1991) (noting Remedies Act merely clarifies courts' power to bar wrongdoers from acting as managers of public companies); see also *J.I. Case Co. v. Borak*, 377 U.S. 426, 433-35 (1964) (holding courts may provide all relief necessary under Exchange Act for protection of investors); *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 284-91 (1940) (outlining general scope of ancillary relief); *SEC v. Materia*, 745 F.2d 197, 200-01 (2d Cir. 1984), *cert. denied*, 471 U.S. 1053 (1985) (describing courts' power to order all equitable relief necessary under circumstances).

Prior to the Remedies Act, courts employed a limited version of the corporate bar remedy in a number of cases pursuant to consent decrees. See *Barnard*, *supra* note 40, at 54 n.158 (listing cases in which SEC negotiated consensual bar orders). In addition, in one litigated case prior to the Remedies Act a court ordered a corporate bar. *SEC v. Techni-Culture, Inc.*, [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,501 (D. Ariz. 1974).

See generally George W. Dent, Jr., *Ancillary Relief in Federal Securities Law: A Study in Federal Remedies*, 67 MINN. L. REV. 865 (1983) (surveying history and practice of ancillary relief in federal securities law); James R. Farrand, *Ancillary Remedies in SEC Civil Enforcement Suits*, 89 HARV. L. REV. 1779 (1976) (examining appropriateness of imposing ancillary relief); Arthur F. Matthews, *Recent Trends in SEC Requested Ancillary Relief in SEC Level Injunction Actions*, 31 BUS. LAW. 1323 (1976) (reviewing securities cases settled on terms affecting selection of corporate officers or directors); James Treadway, *SEC Enforcement Techniques: Expanding and Exotic Forms of Ancillary Relief*, 32 WASH. & LEE L. REV. 637 (1975) (examining development of novel forms of ancillary relief).

43. See House Report, *supra* note 25, at 14, 27 (noting Congress' hope that providing courts with express authority to impose corporate bar might remove any doubts as to availability of such relief).

44. See Senate Report, *supra* note 25, at 21 (noting severity of corporate bar remedy).

45. See *id.* (describing congressional justifications behind corporate bar remedy).

of a company's shareholders to select whomever they wish as fiduciaries.⁴⁶ However, Congress recognized that in many cases of insider trading the corporate shareholders may directly benefit from the wrongdoing and, therefore, will have little economic incentive to vote out the offending executive.⁴⁷ Accordingly, the corporate bar demonstrates the willingness of Congress to define a corporation's objectives in terms broader than the mere interests of the corporation's shareholders.⁴⁸ By authorizing courts to purge the markets of those officers and directors of leading corporations whose fraudulent inclinations tend to undermine the integrity of the nation's securities markets, the corporate bar provisions of the Remedies Act attempt to hold corporations responsive to nonshareholder constituencies—most notably the general public.⁴⁹

By protecting noninvestor interests through social control, the corporate bar creates an incongruity with the purely internal perspective characteristic of private corporations since the nineteenth century.⁵⁰ If the corporate bar represents a willingness of Congress to intervene on behalf of the public in the internal endeavors of private corporations, the corporate bar arguably may question whether the twentieth-century shareholder-centered conception of the corporation has been too narrowly conceived.⁵¹ In many ways the corporate bar could represent a preliminary manifestation of an increasing desire by the populace at large to reconsider the balance of power between the corporation and society.

II. THE CORPORATION AND SOCIETY

That society at large determines the nature of corporateness derives from the underlying theoretical foundations of the corporation. The germ of the corporate idea is not indigenous to any one person or nation.⁵²

46. See MODEL BUSINESS CORP. ACT ANN. § 7.28 (1992 Supp.) (providing shareholders with broad authority to elect corporate directors).

47. See Senate Report, *supra* note 25, at 22 (noting possibility shareholders may directly benefit from managerial wrongdoing).

48. See House Report, *supra* note 25, at 27 (noting Congress' desire to protect public investors).

49. See *id.* (noting broader public interests are involved when actions of violator undermine integrity of markets).

50. See *infra* notes 72-75 and accompanying text (describing general freedom of private corporations from direct governmental intervention).

51. See *infra* notes 72-75 and accompanying text (describing twentieth-century conception of private corporation).

52. See Robert L. Raymond, *The Genesis of the Corporation*, 19 HARV. L. REV. 350, 353 (1906) (stating "[n]o philosopher, statesman, or lawyer sat down, cogitated, and said, 'It would be convenient to give several persons acting together certain attributes and call them a corporation.'"); cf. ADOLF A. BERLE, JR., *STUDIES IN THE LAW OF CORPORATION FINANCE* 3 (1928) [hereinafter BERLE, FINANCE] (stating corporate idea derived from Roman law); BISHOP C. HUNT, *THE DEVELOPMENT OF THE BUSINESS CORPORATION IN ENGLAND 1800-1867* 3 (1936) (attributing idea of "juristic person" to Roman lawyers); HENRY O. TAYLOR, *A TREATISE ON THE LAW OF PRIVATE CORPORATIONS* 6 (5th ed. 1905) (noting early common law of corporations

Rather, the genesis lies in the elemental process of thinking of several persons acting together as one—a single collective or group.⁵³ The existence of collectives, such as clans, families, churches, athletic teams, fraternal organizations, political parties or nations, is common to primary stages of human development and thought.⁵⁴ Although natural human beings compose these collectives, the state⁵⁵ often has awarded certain of these collectives corporate effect separate and distinct from their constituent human members.⁵⁶ As the state does not “create” a human being, it is questionable whether the state can “create” an entity or corporation.⁵⁷ The positive law

borrowed largely from Roman law); 1 THOMAS W. WATERMAN, *A TREATISE ON THE LAW OF PRIVATE CORPORATIONS* 43-44 (1888) (tracing corporate idea to Greek civilizations); Jouett, *supra* note 16, at 384-85 (arguing Roman origins of corporation); Samuel Williston, *History of the Law of Business Corporations Before 1800*, 2 HARV. L. REV. 105, 106 (1888) (noting Blackstone attributed honor of originating corporate idea to Romans). *But see* CARR, *supra* note 8, at 133-34 (suggesting early forms of English corporateness were native English product and noting minimal Roman influence); JAMES W. HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970* 1-9 (1970) (arguing despite corporation's English antecedents, corporate law in United States is uniquely homegrown product); Adolf A. Berle, Jr., *Historical Inheritance of American Corporations, in THE POWERS AND DUTIES OF CORPORATE MANAGEMENT* 192 (Edmond N. Cahn ed., 1950) [hereinafter Berle, *Inheritance*] (arguing American corporation descended directly from England); Arthur W. Machen, Jr., *Corporate Personality* (pt. 1), 24 HARV. L. REV. 253, 255 (1911) (arguing Roman law accorded slight consideration to “what we call corporations”); Raymond, *supra*, at 354 (pointing out corporation existed in England before England received Roman law books).

53. *See* 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, *THE HISTORY OF ENGLISH LAW* 471 (1895) (arguing history of corporations is “form of thought” rather than “rule of law”); John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 673 (1926) (describing group idea of corporations). According to Dewey:

When a body of twenty or two thousand or two hundred thousand men bind themselves together to act in a particular way for some common purpose, they create a body which by no fiction of law but by the very nature of things, differs from the individuals of whom it is composed.

Id.; Harold J. Laski, *The Early History of the Corporation in England*, 30 HARV. L. REV. 561, 581 (1917) (suggesting essence of corporateness lies in thinking of group of men as one); Raymond, *supra* note 52, at 350 (arguing nature of corporation is merely mode of thought).

54. *See* VICTOR MORAWETZ, *A TREATISE ON THE LAW OF PRIVATE CORPORATIONS* 2-3 (2d ed. 1886) (suggesting conception of collective entities occurs at earliest stages of human development); *see also* Harold J. Laski, *The Personality of Associations*, 29 HARV. L. REV. 404, 404 (1916) (noting man's associative nature).

55. *See* Padover, *supra* note 5, at 267 (defining state as human organization, set up by its citizens, for performance of certain minimum tasks necessary for civilized existence).

56. *See* W. Jethro Brown, *The Personality of the Corporation and the State*, 21 LAW Q. REV. 365, 366 (1905) (noting corporation is legally distinct from its members); Laski, *supra* note 53, at 563-68 (suggesting corporate character occurs when transition from natural collectivism to abstract entities with identity separate from constituent members occurs); Laski, *supra* note 54, at 407-08, 424 (discussing fiction denying partnership entities corporate status); Pollock, *supra* note 8, at 231 (noting law considers corporation to be distinct from its members). *But see* H. Ke Chin Wang, *The Corporate Entity Concept (or Fiction Theory) in the Year Book Period* (pt. 1), 58 LAW Q. REV. 498, 500-01 (1942) (arguing in early medieval periods corporations were not considered distinct from human components).

57. *See* Machen, *supra* note 52, at 259-61 (arguing law merely recognizes and gives legal effect to preexisting corporate entities).

of the state does, however, assign a bundle of capacities and duties to certain preexisting groups just as it assigns rights and obligations to certain humans.⁵⁸ The state thereby recognizes or refuses to recognize and give legal effect to that group or person.⁵⁹

In many ways, the jural bundle of rights and capacities known as the corporation resembles a legal person.⁶⁰ Accordingly, society has often analogized groups with persons because of the resemblance of their respective capacities.⁶¹ At certain points in history the characteristics accorded such "group persons" more resemble those possessed by human persons than at other times.⁶² Just as the state may entitle some humans to different sets of rights and duties than other humans,⁶³ the state likewise accords certain group persons different attributes than other group persons.⁶⁴ Additionally,

58. See POLLOCK & MAITLAND, *supra* note 53, at 469 (describing corporate collectives as "subjects of rights and duties"); Berle, *Inheritance*, *supra* note 52, at 192 (noting evidence supports idea that state assumes control of preexisting collectivities rather than creating them); Heinz Lubasz, *The Corporate Borough in the Common Law of the Late Year-Book Period*, 80 LAW Q. REV. 228, 232 (1964) (arguing English kings prescribed preexisting English boroughs with corporate capacity); Machen, *supra* note 52, at 259-61 (suggesting law instills preexisting groups with corporate capacities).

59. See Brown, *supra* note 56, at 372 (arguing corporation is not physical reality but merely legal conception); Dewey, *supra* note 53, at 677 (describing how corporate existence depends on positive state sanction); Laski, *supra* note 54, at 405 (noting state confers rights and duties both on corporations and persons). Laski satirically points out that a group of men absent state sanction do not become one corporate person when they associate to do business any more than ten horses become one animal when they draw the same cart. *Id.* at 406.

60. See 1 STEWART KYD, A TREATISE ON THE LAW OF CORPORATIONS 13 (Garland Publishing, Inc. 1978) (1793) (stating "[a] corporation . . . or body incorporate, is a collection of many individuals, united into one body, under a *special denomination*, having perpetual succession under an *artificial form*, and vested, by the policy of the law, with the capacity of acting, in several respects, as an individual . . .") (emphasis in original); POLLOCK & MAITLAND, *supra* note 53, at 471-76 (discussing "anthropomorphic" picture of corporation); Brown, *supra* note 56, at 367 (suggesting corporations are legal persons); see generally Charles S. Lobingier, *The Natural History of the Private Artificial Person: A Comparative Study in Corporate Origins*, 13 TUL. L. REV. 40 (1938) (tracing origins of fictitious corporate person concept).

61. See Max Radin, *The Endless Problem of Corporate Personality*, 32 COLUM. L. REV. 643, 652-55 (1932) (arguing personifying corporation functions is device of convenience and easy reference).

62. See Laski, *supra* note 54, at 404, 413 (noting tendency since nineteenth century for courts increasingly to approximate position of corporation to that of individual); *infra* notes 162-75 and accompanying text (discussing nineteenth-century cases according corporations constitutional personhood).

63. See Brown, *supra* note 56, at 367 (suggesting certain societies considered slaves human beings but not legal persons); Machen, *supra* note 52, at 264 (noting antebellum society accorded southern slaves different rights and capacities than their respective masters).

64. See Machen, *supra* note 52, at 260-61 (noting state recognizes certain groups as corporations while refusing to extend corporate attributes to physically similar groups such as partnerships); Arthur W. Machen, Jr., *Corporate Personality* (pt. 2), 24 HARV. L. REV. 347, 350 (1911) (noting distinctions between corporations and partnerships rest on positive law rather than upon natural differences). Additionally, an identical set of persons may concurrently possess multiple legal capacities and functions. For instance, society may award legal recognition

in times of social or economic growth and expansion, such as the 1980s, society traditionally takes a more facilitative view toward commercial corporations, while in periods of uncertainty or decline society typically curtails corporate autonomy.⁶⁵ The logical extension of these propositions is that a corporation is nothing more and nothing less than what certain societal representatives, presumably reflecting the broader beliefs of society, want it to be.⁶⁶

Conventional thought and doctrine regarding corporations elect to utilize a rigid dichotomy between so-called "public" corporations and "private" corporations as a means of structuring society's analysis of a corporation's proper objectives and functions.⁶⁷ On the one hand, society generally con-

to one group of people as both a political community and an economic corporation. See Lubasz, *supra* note 58, at 241-42 (describing incorporation as investiture of added capacities rather than creation of new entities).

65. See 1 JOHN P. DAVIS, *A STUDY OF THE ORIGIN AND DEVELOPMENT OF GREAT BUSINESS COMBINATIONS AND OF THEIR RELATION TO THE AUTHORITY OF THE STATE* 88-91, 158-59 (1905) (noting how society is more enabling towards corporations at certain times than others and that in times of corporate growth society recognizes the public function served by promoting facilitative economic policies).

66. See Dewey, *supra* note 53, at 656 (suggesting both corporate and natural persons are "right-and-duty-bearing unit[s]"). Dewey argues the substantive content of the legal "person" depends on what rights and duties the law at any one time attributes to it. *Id.* at 655-56, 659. Dewey then notes throughout history society continually has evolved the meaning of the juristic "person." *Id.* at 665; see also BORK, *supra* note 2, at 10 (discussing how law both reflects and shapes societal trends).

67. See 2 DAVIS, *supra* note 65, at 248-80 (describing modern corporations divided between public and private corporations); HURST, *supra* note 52, at 13-115 (1970) (describing development of distinction between public and private corporations); Frug, *supra* note 6, at 1099-1100 (noting nineteenth-century division of corporations into public and private spheres); Thomas K. McCraw, *The Public and Private Spheres in Historical Perspective*, in *PUBLIC-PRIVATE PARTNERSHIP: NEW OPPORTUNITIES FOR MEETING SOCIAL NEEDS* 38-47 (Harvey Brooks et al. eds., 1984) (tracing history of separation of public and private spheres); Millon, *supra* note 8, at 201-03 (noting nineteenth-century division of corporation into separate spheres); Warren J. Samuels, *The Idea of the Corporation as a Person: On the Normative Significance of Judicial Language*, in *CORPORATIONS AND SOCIETY: POWER AND RESPONSIBILITY* 119-20 (Warren J. Samuels & Arthur S. Miller eds., 1987) (noting phenomenon of both public and private corporations); Christopher D. Stone, *Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?*, 130 U. PA. L. REV. 1441, 1444 (1982) (noting "traditional distinctions" between public and private corporate activities); Bruce Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 HARV. L. REV. 156, 156 (1903) (arguing "[t]he distinction between the private callings—the rule—and the public callings—the exception—is the most consequential division in the law governing our business relations."); see also BLACK'S LAW DICTIONARY 340 (6th ed. 1990) (stating distinction between public and private corporations rests on governmental purpose of public corporations); Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1638 (1988) (indicating distinction between public and private corporations depends on nature of corporate activity).

The very existence of texts written exclusively about public or private corporations further demonstrates this division. See, e.g., JOSEPH K. ANGELL & SAMUEL AMES, *TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE* (11th ed. 1882) (private); CHARLES FISK BEACH, JR., *COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS* (1891) (private); JOHN DILLON,

siders public corporations, such as cities or utilities, to be identified with and dominated by the government, founded for unselfish, public purposes, and concerned with a general array of societal functions.⁶⁸ Three components characterize society's conventional thinking on public corporations: A direct subjection to governmental intervention;⁶⁹ an external perspective that explicitly regards relations between the corporation and society;⁷⁰ and a tempered profit motive.⁷¹ These aspects combine to focus the attention of public corporations on larger societal objectives; that is, these characteristics endow the public corporation with a "public dimension."

On the other hand, society normally considers private corporations, the predominant twentieth-century conception of corporateness, to be insulated from direct governmental domination, unresponsive to public concerns or input, and geared primarily toward furthering shareholder interests.⁷² As with public corporations, three elements characterize society's definition of private corporations: A limited exposure to governmental intervention;⁷³ a

TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS (1872) (public); CHARLES B. ELLIOT, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS (1900) (private); GEORGE W. FIELD, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS (1877) (private); WILLIAM M. FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS (perm. ed. 1990) (private); EUGENE MCQUILLIN, A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS (1st ed. 1911) (public); VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS (2d ed. 1886) (private); OSCAR L. POND, A TREATISE ON THE LAW OF PUBLIC UTILITIES (4th ed. 1932) (public); ROBERT S. STEVENS, HANDBOOK ON THE LAW OF PRIVATE CORPORATIONS (2d ed. 1949) (private); HENRY O. TAYLOR, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS (5th ed. 1905) (private); THOMAS W. WATERMAN, A TREATISE ON THE LAW OF CORPORATIONS OTHER THAN MUNICIPAL (1888) (private); BRUCE WYMAN, PUBLIC SERVICE CORPORATIONS (1911) (public).

68. See *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 668-69 (1819) (Story, J., concurring) (defining public corporations as those "exist[ing] for public political purposes only, such as towns, cities, parishes, and counties; . . . public corporations are such only as are founded by the government, for public purposes, where the whole interests belong also to the government."); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 275 (3d ed. 1836) (defining public corporations to be those "created by the government for political purposes, as counties, cities, towns and villages; they are invested with subordinate legislative powers to be exercised for local purposes connected with the public good, and such powers are subject to the control of the legislature of the state."); see also LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 526-31 (2d ed. 1985) (discussing municipal corporation in America); Frug, *supra* note 6, at 1112 (noting nineteenth-century definitions of municipal corporations remain valid today).

69. See Stone, *supra* note 67, at 1453, 1462 (noting traditional susceptibility of public entities to governmental intervention).

70. See Millon, *supra* note 8, at 201 (noting public corporation's explicit regard to relations between corporation and society at large).

71. See Stone, *supra* note 67, at 1464 (noting motive of public corporations may lean toward providing public services rather than maximizing profits).

72. See David Millon, *State Takeover Laws: A Rebirth of Corporation Law*, 45 WASH. & LEE L. REV. 903, 903, 911-18 (1988) (outlining modern understanding of corporation); Millon, *supra* note 8, at 203, 211-16, 220-31 (articulating view of modern corporation); Coates, *supra* note 8, at 819-35, 873 (describing predominant twentieth-century conception of corporation).

73. See Stone, *supra* note 67, at 1487-91 (describing general freedom of private corpo-

purely internal focus unresponsive to societal needs;⁷⁴ and a single-minded dedication to the maximization of shareholder welfare.⁷⁵ In the aggregate, these components highlight private corporations' focus on the financial betterment of the corporation's investors. In other words, the components supply the private corporation with a "private dimension." The conventional tendency to distinguish between public and private corporations provides an overarching framework for corporate doctrine to categorize the appropriate priorities and attributes of twentieth-century corporations.⁷⁶

While modern law, thought and parlance reflect this divided conception of the corporation, the notion that business is of two distinct classes, public and private, is an historical anomaly.⁷⁷ In contrast to today's assumption

ration from direct intervention); *see also infra* notes 162-75 and accompanying text (noting development of constitutional doctrine allowing corporations to invoke many of individual restraints on governmental power under Constitution).

74. *See* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 369-72 (3d ed. 1986) (describing internal perspective); Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J. L. & Econ. 395, 401 (1983) (arguing thrust of corporate law concerns intracorporate contractual relations); Arleen Liebowitz, *Are Corporations Undemocratic, Private Minigovernments?*, in *THE ATTACK ON CORPORATE AMERICA* 21-25 (M. Johnson ed., 1978) (describing internal corporate electoral processes); Millon, *supra* note 72, at 911-18 (noting private corporation's general focus on internal relations between management and shareholders); Millon, *supra* note 8, at 201-02 (same).

75. *See* Kenneth B. Davis, Jr., *Discretion of Corporate Management to Do Good at the Expense of Shareholder Gain—A Survey of, and Commentary on, the U.S. Corporate Law*, 13 CAN.-U.S. L.J. 7, 8 (1988) (stating "[t]he bedrock principle of U.S. corporate law remains that maximization of shareholder value is the polestar for managerial decisionmaking"); Cary, *supra* note 16, at 684 (suggesting revenue raising remains only public policy in Delaware corporate law); Dodd, *Trustees*, *supra* note 17, at 1146-47 (describing traditional view of corporations as "association of stockholders formed for their private gain and to be managed by its board of directors solely with that end in view"); Millon, *supra* note 72, at 917-18 (describing "shareholder primacy principle" as fundamental principle of private corporations).

The Michigan Supreme Court articulated the classic formulation of the shareholder primacy principle:

A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.

Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919).

76. *See* FRIEDMAN, *supra* note 68, at 526 (stating generally society considers private corporations "freer" while public corporations thought to be "closely regulated" and "extensively controlled"); Dodd, *Trustees*, *supra* note 17, at 1152-53 (suggesting public opinion does not consider private corporations to have obligations to community); *see generally* Stone, *supra* note 67, (outlining influence of public/private distinction in shaping corporate conduct).

77. *See* *New State Ice Co. v. Liebmann*, 285 U.S. 262, 302 (1932) (Brandeis, J., dissenting) (arguing "[t]he notion of a distinct category of business 'affected with a public interest,' employing property 'devoted to a public use' rests upon historical error."); DAVIS, *supra* note 65, at 31 (arguing "[t]he private corporation pure and simple is a product of social, political and industrial conditions largely peculiar to nineteenth century" and that "private corporation" is contradiction in terms); EDWIN M. DODD, *AMERICAN BUSINESS CORPORATIONS UNTIL 1860* 14 (1954) (stating "[t]he division of business corporation law into the two categories of public

of a structured dichotomy in the character of corporations, previous societies generally considered all entities with corporate status to possess similar legal rights and obligations.⁷⁸ Prior to the nineteenth century, both a corporation's public and private dimensions existed concurrently in a dynamic, interdependent relationship.⁷⁹ Corporations then oscillated on a continuum between their dual attributes of social control and private freedom.⁸⁰ At certain points in time society emphasized social control; in other eras society facilitated a corporation's private freedom.⁸¹ But at no time prior to the nineteenth century did society consider, much less permit, any corporation to exist absent either dimension—at least not for long.⁸²

By not allowing corporations to dedicate themselves single-mindedly to private welfare, previous societies maintained a degree of social control over corporations by curbing corporate activity perceived to be disruptive of broader societal objectives.⁸³ The corporate bar may represent a willingness

and private law is one that would probably have seemed strange to eighteenth-century American lawyers and judges. The proposition that corporations are of two kinds, public and private, . . . was one that did not become established in American case law until some years after the beginning of the nineteenth century.”; Edward A. Adler, *Business Jurisprudence*, 28 HARV. L. REV. 135, 158 (1914) (arguing under common law phrase “private business” was contradiction in terms); Dodd, *Trustees*, *supra* note 17, at 1148 n.7 (asserting until modern times society regarded all business publicly carried on as public in character); Frug, *supra* note 6, at 1082 (arguing before nineteenth century no distinction between public or private corporations existed in England or America). Neither Blackstone nor Stewart Kyd, who authored the first treatise on corporations in 1793, noted the development of distinct public and private categories of corporations. *Id.* at 1095; Walton H. Hamilton, *Affectation With Public Interest*, 39 YALE L.J. 1089, 1094 (1930) (noting “[i]n Lord Hale’s time . . . all activity comprehended under what today we call business was public . . .”); Oscar Handlin & Mary F. Handlin, *Origins of the American Business Corporation*, 5 J. ECON. HIST. 1, 19-20 (1945) (stating differentiation between public and private corporations was completely unknown before 1800); Michael Barzelay & Rogers M. Smith, *The One Best System? A Political Analysis of Neoclassical Institutional Perspectives on the Modern Corporation*, in *CORPORATIONS AND SOCIETY: POWER AND RESPONSIBILITY* 90 (Warren J. Samuels & Arthur S. Miller eds., 1987) (suggesting term private corporation might have struck eighteenth-century observers as oxymoron); Williston, *supra* note 52, at 105 (noting business and municipal corporations historically classed together); *cf.* BERLE, *FINANCE*, *supra* note 52, at 7-8 (describing medieval trade guild as “private association for private purposes”).

78. See POLLOCK & MAITLAND, *supra* note 53, at 478 (noting early medieval law did not divide corporations into various kinds); FRIEDMAN, *supra* note 68, at 526 (stating “[b]efore Blackstone’s day, there was a ‘law of corporations’ which covered all chartered entities. Public and private, profit and nonprofit companies—towns, churches, and businesses—all fit in one legal bag.”); Frug, *supra* note 6, at 1082 (noting prior to nineteenth century no legal distinctions existed between public and private corporations).

79. See *infra* notes 99-109 and accompanying text (describing dual nature of previous corporations).

80. See *infra* notes 92-109 and accompanying text (discussing early corporate organizations’ simultaneous freedom from and subjection to social control).

81. See *infra* notes 92-109 and accompanying text (discussing previous corporations’ ebb and flow between poles of private freedom and social control).

82. See *infra* notes 99-109 and accompanying text (noting struggle of earlier societies to maintain equilibrium between levels of private freedom and social control).

83. See *infra* notes 102-43 and accompanying text (describing efforts of previous societies to check corporate activity harmful of public welfare).

of contemporary society to reject the purely internal perspective of present corporate law in favor of an approach that addresses important questions about the proper relationship between the corporation and society. If so, in making corporations responsive to broader societal constituencies, the corporate bar parallels an earlier vision of the corporation that once dominated thinking on these matters—a vision that displayed counterbalanced traits of public control and private freedom.⁸⁴

III. AN EARLIER CONCEPTION OF CORPORATIONS

While one might appropriately begin an examination of corporate history earlier,⁸⁵ the logical point at which to begin is the concurrent emergence of the English towns and the merchant trade guilds in the eleventh century.⁸⁶ Commentators generally consider these groups to be the predecessors of current corporations.⁸⁷

The medieval town coalesced largely on account of the proximity of its residents and as a group defense mechanism against outsiders.⁸⁸ Once population began to increase, the market developed within towns as inhabitants traded among themselves as well as with others.⁸⁹ Like-minded merchants soon sought to enhance their economic interests by organizing merchant guilds to regulate the conduct of burgeoning local trade.⁹⁰

84. See *infra* notes 92-109 and accompanying text (describing dual nature of earlier corporations).

85. See *supra* note 52 and accompanying text (discussing possible Roman origin of corporate idea).

86. See DAVIS, *supra* note 65, at 149 (noting appearance of merchant guild at end of eleventh century); Frug, *supra* note 6, at 1080 (noting "reemergence" of cities in eleventh century).

87. See BERLE, FINANCE, *supra* note 52, at 6-7 (discussing English cities and guilds as sources of corporation); CARR *supra* note 8, at 134-49 (discussing corporate features of English borough); DAVIS, *supra* note 65, at 130-244 (noting emergence of corporation from guilds); POLLOCK & MAITLAND, *supra* note 53, at 478 (noting that as early as eleventh century boroughs were on their way to becoming corporations); Laski, *supra* note 53, at 581 (connecting corporateness of English trading companies to borough); Lubasz, *supra* note 58, at 230-43 (discussing boroughs' incidents of corporateness). Lubasz argues the borough did not become "corporate" until the close of the fifteenth century. *Id.* at 230.; see also Raymond, *supra* note 52, at 354-65 (examining borough and guild groups as predecessors to corporation); Williston, *supra* note 52, at 107-08 (stating earliest corporate associations in England were guilds and municipal organizations).

88. See BERLE, FINANCE, *supra* note 52, at 6 (noting coalescing of medieval town as defense mechanism); CARR *supra* note 8, at 134 (same); Frug, *supra* note 6, at 1083 (same); Raymond, *supra* note 52, at 355 (elaborating proximity motivation). For a more thorough discussion of medieval towns see generally: HENRI PIRENNE, *MEDIEVAL CITIES: THEIR ORIGINS AND THE REVIVAL OF TRADE* (1925); HENRI PIRENNE, *ECONOMIC AND SOCIAL HISTORY OF MEDIEVAL EUROPE* (I.E. Clegg trans., 1936); COLIN PLATT, *THE ENGLISH MEDIEVAL TOWN* (1976); CARL STEPHENSON, *BOROUGH AND TOWN: A STUDY OF URBAN ORIGINS IN ENGLAND* (1933).

89. See CARR, *supra* note 8, at 134 (noting development of town as marketing center); Raymond, *supra* note 52, at 355 (noting development of trade).

90. See DAVIS, *supra* note 65, at 148-49 (noting both economic and organizational motivations of merchants).

The success of the merchant guilds depended on the fate of their respective towns.⁹¹ Just as the formation of guilds provided the means for associations of merchants to obtain economic power and autonomy, the structure of towns provided their inhabitants the bargaining power to seek relief from feudal bondage and acquire a semblance of self-government.⁹² Although town and guild were distinct entities, they shared an identity of interests in that protecting the city's autonomy preserved the merchant's way of life.⁹³ Merchants recognized that city autonomy meant the freedom to pursue their private economic interests largely on terms defined by the merchant guilds themselves.⁹⁴ An harmonious identity existed between the interests of the merchants and the interests of the town as a whole; the merchants contributed to town functions and the town sustained the merchants.⁹⁵

By organizing and regulating the conduct of trade within isolated towns in a time of localized trade and weak national government, the guilds performed an essential public function.⁹⁶ Recognizing the important, beneficial services provided by the guilds, society granted the guilds a large degree of private freedom. Without seeking town approval the guilds elected officers; regulated labor conditions, wages and prices; protected workers from exploitation; set standards of quality and workmanship; adopted rules against unfair competition; punished fraud; maintained courts and compulsory systems of arbitration of disputes; and inflicted often severe penalties on those who transgressed the guilds' self-enforced rules.⁹⁷ This thorough degree of control of commercial conduct applied equally to all professions alike, from the innkeeper to the saddler to the ordinary trader.⁹⁸

91. See CARR, *supra* note 8, at 143 (noting guild and town were closely connected but distinct); DAVIS *supra* note 65, at 159-63 (describing relationship between merchant guild and town).

92. See Frug, *supra* note 6, at 1084-86 (noting emergence of town autonomy); Raymond, *supra* note 52, at 355-56 (describing impulse for self-government).

93. See Frug, *supra* note 6, at 1083-87 (describing medieval conception of society in which individual benefitted by freedom of town).

94. See Franklin D. Jones, *Historical Development of the Law of Business Competition*, 35 YALE L.J. 905, 924 (1926) (noting guild members controlled city governments and town meetings often convened in guild halls); see also Frug, *supra* note 6, at 1083 n.99 (stating "the nest of the medieval town" enabled "the egg of the capitalist cuckoo" to incubate (quoting LEWIS MUMFORD, *THE CITY IN HISTORY* 411 (1961))).

95. See Frug, *supra* note 6, at 1083-87 (describing medieval identity of interests between individual and town). Cf. Daniel Bell, *The Corporation and Society in the 1970's*, 24 PUB. INTEREST 5, 7 (1971) (stating in late twentieth century "[a] feeling has begun to spread in the country that corporate performance has made the society uglier, dirtier, trashier, more polluted and noxious. The sense of identity between the self-interest of the corporation and the public interest has been replaced by a sense of incongruence.").

96. See Jones, *supra* note 94, at 922-23 (describing invaluable public services supplied by guild organizations).

97. See *id.* at 922-23, 926 (listing "quasi-governmental" powers exercised by guilds).

98. See Adler, *supra* note 77, at 149-59 (arguing common law did not recognize distinctions between business professions); *supra* notes 77-82 and accompanying text (same).

As long as these incipient corporate organizations maintained local trade conditions in a manner consistent with larger societal objectives, the merchant guilds received a large measure of public support and, consequently, were able to pursue their own interests with virtual complete freedom from any governmental interference.⁹⁹ Society acknowledged the private freedom of these early corporations as long as the corporate organizations maintained a relative symmetry between their public and private dimensions.¹⁰⁰ However, abuses inevitably developed among the guilds, entrenched in control of local government and exercising almost plenary authority over economic activity.¹⁰¹

In response to perceptions that the guilds had begun to manipulate prices and hoard profits for the pecuniary benefit of their members, municipal authorities gathered forces to check these primitive corporate excesses.¹⁰² The public power of the towns enacted a number of ordinances curtailing the private freedom of the previously independent guilds. For instance, town authorities began to elect guild officers, to set prices of commodities and standards of quality, to require guilds to submit their bylaws to town officials for approval, and to annul offensive guild ordinances.¹⁰³ In some instances town officials, in draconian fashion, simply dissolved certain of the once well-established and seemingly autonomous guilds.¹⁰⁴

National lawmakers later assumed responsibility for checking abuses of the public welfare by guilds. Following charges that certain guilds had been acting "for their singular profit and common damage to the people," authorities passed a statute in 1437 submitting all guild ordinances to municipal authorities for approval.¹⁰⁵ Similarly, in response to allegations that guild members had misappropriated public funds, in 1547 lawmakers passed another act that confiscated all of the guilds' property and devoted the property to erect schools and to provide for the poor.¹⁰⁶ In addition to

99. See DAVIS, *supra* note 65, at 159 (noting society tended to bestow large degree of discretion on guilds to pursue their own interests so long as such pursuits coincided with public interest); HURST, *supra* note 52, at 4 (describing private profit seeking in early corporations as incidental return for public functions served by corporations).

100. See DAVIS, *supra* note 65, at 159 (noting private freedom of guilds was contingent on their being mindful of public welfare).

101. See Jones, *supra* note 94, at 927 (noting tendency of autonomous guild members to abuse their power).

102. See DAVIS, *supra* note 65, at 242 (stating society regulated guilds "to keep the self-interest of the guildsmen from overbalancing the interests of society in general"); Jones, *supra* note 94, at 928 (noting hostility of common people to guild abuses).

103. See Jones, *supra* note 94, at 928-29 (describing reassertion of town authority over guilds); Laski, *supra* note 53, at 587 (noting sovereign authorities rendered void certain guild ordinances tending to "their own singular profit and to the common hurt and damage of the people").

104. See Jones, *supra* note 94, at 928 (noting lack of hesitancy of town authorities at times to annul certain offensive guild ordinances).

105. See *id.* at 928-29 (discussing increasing regulatory powers of towns).

106. See *id.* at 929 (discussing national regulation of fraudulent guilds).

seizing guild assets, authorities often held individual members of guilds proportionately responsible for the debts of the corporate group.¹⁰⁷

Enacted in reaction to charges that guild members were enriching themselves at the expense of the guilds' broader responsibilities to society at large, these corrective measures manifested a societal inclination to realign the coinciding public and private priorities of the guilds into a more beneficial balance.¹⁰⁸ For centuries, whenever our English antecedents perceived that the merchant's unabated pursuit of private profit had offset the desired balance between business' public and private dimensions, lawmakers readily reestablished social control over the corporate enterprise.¹⁰⁹

IV. FORESTALLING: A FOREBEAR OF THE BAR?

If the corporate bar represents a readiness of society to rethink its proper relationship with corporations by restoring a degree of public control, it is not surprising that Congress chose a mechanism that parallels those employed in previous centuries to maintain public control over corporations.¹¹⁰ One method chosen by earlier societies to remedy a perceived imbalance between a corporate enterprise's dual attributes of public control and private freedom involved the regulation of forestalling.¹¹¹ Broadly defined, acts prohibiting forestalling sought to prevent any practice that deprived the public of an unrestricted market in which to trade.¹¹²

As today, earlier merchants traded the majority of their wares at common, public markets.¹¹³ The integrity of these markets depended on assuring the ability of the common people to buy and sell goods on an unrestricted basis.¹¹⁴ Officials encouraged merchants to conduct transactions

107. See Wang, *supra* note 56, at 510-11 (noting society occasionally considered guild members personally liable for group debts).

108. See 4 W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 375 (1924) (indicating governmental authorities acted with public approval in suppressing practices harmful to society at large).

109. See W.S. Holdsworth, *English Corporation Law in the 16th and 17th Centuries*, 31 *YALE L.J.* 382, 383-85 (1922) (discussing historical necessity of maintaining social control over corporate organizations). The willingness of English society to subordinate corporate entities to the state illustrated the Roman maxim of keeping the corporate form "under lock and key." *Id.* at 383 (quoting FREDERIC W. MAITLAND, *Introduction to OTTO V. GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE* xxx (Frederick W. Maitland trans., 1900)).

110. See HOLDSWORTH, *supra* note 108, at 379 (predicting society may find it useful to reassert principle underlying medieval doctrines against market manipulation).

111. See *infra* notes 112-43 and accompanying text (describing statutes designed to prevent forestalling).

112. See Jones, *supra* note 94, at 907 (defining forestalling); see also HOLDSWORTH, *supra* note 108, at 375-76 (defining forestalling and similar practices); M. Van Smith, *Preventing the Manipulation of Commodity Futures Markets: To Deliver or Not to Deliver?*, 32 *HASTINGS L.J.* 1569, 1571 n.13 (1981) (same); *infra* note 118 (same).

113. See Jones, *supra* note 94, at 906 (describing early trading markets).

114. See *id.* at 907 (noting need for free flow of trade).

openly, under the watchful eye of the public.¹¹⁵ Authorities were steadfast in their efforts to regulate practices by overzealous merchants designed to obstruct this ancient mechanism of market trading.¹¹⁶ Lawmakers customarily coupled the right of merchants to participate in public markets with the authority of government to control the conduct of the market traders.¹¹⁷ Known as forestalling, attempts by merchants to corner or manipulate market prices, particularly in times of famine or pestilence, both undermined the integrity of the markets and inflated prices available to the public.¹¹⁸ The ensuing public acrimony generated a succession of statutes regulating the practice of forestalling spanning the twelfth to the eighteenth centuries.¹¹⁹

For example, in the early 1260s England experienced dramatic fluctuations in the prices of necessities resulting in many deaths from starvation.¹²⁰ In response, King Henry III promulgated a statute in 1266 entitled "A Statute of the Pillory and Tumbirel, and of the Assize of Bread and Ale," which fixed the prices of various commodities and subjected forestallers to the town pillory.¹²¹ In 1306 King Edward I oversaw the enactment of a similar law to punish those whose deceptive practices inflated prices to the public.¹²² Several of the punishments exacted by this 1306 act should appear

115. See DAVIS, *supra* note 65, at 175 (describing requirement that traders should conduct nearly all transactions openly). The early emphasis on the publicness of business affairs is consistent with the policy of disclosure underlying modern securities laws. See LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 92 (1914) (coining aphorism "[s]unlight is said to be the best of disinfectants"); see also Dennis W. Carlton & Daneil R. Fishel, *The Regulation of Insider Trading*, 35 STAN. L. REV. 857, 858 (1983) (arguing prime objection to insider trading is its tendency to undermine public's confidence in stock markets); Roy A. Schotland, *Unsafe at Any Price: A Reply to Manne, Insider Trading and the Stock Market*, 53 VA. L. REV. 1425, 1440 (1967) (same).

116. See Jones, *supra* note 94, at 907 (noting repeated efforts of authorities to regulate practices designed to manipulate prices).

117. See Leo J. Raskind, *The Misappropriation Doctrine as a Competitive Norm of Intellectual Property Law*, 75 MINN. L. REV. 875, 890 (1991) (describing public concern for behavior of early market participants).

118. See DAVIS, *supra* note 65, at 173 (defining forestalling as buying or preempting goods before they reached the common market); Jones, *supra* note 94, at 907 (defining forestalling as obstructing public's access to unrestricted market).

119. See Jones, *supra* note 94, at 907-20 (surveying numerous statutes attempting to regulate forestalling).

120. See *id.* at 907 (describing poor economic conditions).

121. See *id.* at 907-08 (noting enactment of statute prohibiting forestalling in reaction to poor economic conditions). The statute defined forestallers as those "that buy anything before the due hour, or that pass out of towns to meet such things as come to the markets, to the intent they may sell the same in the town [at a higher price]." *Id.* at 908; Smith, *supra* note 112, at 1571 n.12 (describing statute of 1266).

122. See Jones, *supra* note 94, at 908 (noting passage of 1306 statute). The statute, in pertinent part, provided:

No forestaller shall be suffered to dwell in any town, who manifestly is an oppressor of the poor, and a public enemy of the country, who meeting grain, fish, herring, or other things coming by land or by water to be sold, doth hasten to buy them before another; thirsting after wicked gain, . . . and by that means goeth about to sell the said things much dearer than he that brought them; . . . and by such

familiar to those acquainted with today's securities laws: Forfeiture of those goods purchased prior to their entrance into the general market for the first offense, the pillory for the second offense, imprisonment and fine for the third offense, and banishment for the fourth.¹²³ A chronicler of the time, in telling language, indicated how fierce public outrage was toward merchants whose avaricious pursuit of unreasonable profits led them to attempts at forestalling:

Forestallers, . . . deserve to be reckoned amongst the number of oppressors of the common good and public weal of the realm, for they do endeavor to enrich themselves by the impoverishment of others, They have been exclaimed upon and condemned in parliament from one generation to another, . . . especially by the statute [of Edward I], . . . a canker, a moth, and a gnawing worm, that daily wasteth the commonwealth; and the act and name of a forestaller was so odious in that time, that it was moved in parliament to have had it established by law, that a forestaller should be baited out of the town "where he dwelt by dogs, and whipped forth with whips."¹²⁴

After the Black Death reached England in 1348, Parliament enacted a statute punishing certain forestallers by death.¹²⁵ Following a period of excessive prices in the sixteenth century, lawmakers crafted another series of statutes designed to prevent manipulation of the markets through the control or enhancement of prices.¹²⁶ In 1550 Parliament unanimously passed the statute of Edward IV, the principal medieval statute against forestalling.¹²⁷ High prices for necessities similarly prevailed in the early 1600s.¹²⁸ Intense popular feeling against the manipulative marketing methods of merchants compelled the English sovereigns to promote another round of measures designed to reassert a degree of social control to restore public confidence in market integrity.¹²⁹ For example, in 1618 the government increased its control of the markets by vesting in local officials broad powers

craft and subtily deceiveth a whole town and country.

Id.

123. See *id.* at 908 (describing penalties for forestalling).

124. See *id.* at 908-09 (describing contemporary public sentiment toward forestallers).

125. See *id.* at 909 (describing social conditions during plague and statute of 1353 punishing forestalling by death); Edward S. Mason, *Monopoly in Law and Economics*, 47 *YALE L.J.* 34, 38 n.13 (1937) (noting passage of 1353 statute).

126. See Jones, *supra* note 94, at 912-15 (relating that statutes prohibiting forestalling typically followed periods of public discontent); see also *HOLDSWORTH*, *supra* note 108, at 376 (noting society tended to relax restrictions against forestalling in prosperous times).

127. See Jones, *supra* note 94, at 914 (describing passage and provisions of 1550 statute); Smith, *supra* note 112, at 1571 n.13 (same). Smith also argues the Commodity Exchange Act of 1922 embodies the spirit of the ancient acts against forestalling. *Id.*

128. See Jones, *supra* note 94, at 916-17 (noting excessive prices in 1600s).

129. See *id.* (discussing passage of acts against forestalling as response to bitter popular sentiment against cornering of public markets).

to regulate market offenses.¹³⁰ The duties of these local officials included searching for and “punish[ing] all Forestallers, . . . who by their inordinate desire of gaine do enhance the prices of all things vendible.”¹³¹ By contrast, societal and corporate prosperity reigned in early eighteenth-century England.¹³² As society perceived corporate participants were being mindful of both their public and private dimensions, the state had no need for restrictive legislation protecting the interests of the public.¹³³ Consequently, to facilitate the economy lawmakers repealed many of the regulatory statutes.¹³⁴ However, by the mid-1700s fluctuating prices induced widespread speculation and revived the public perception that the volatile market resulted from manipulative market practices.¹³⁵ Yet again the public clamored for Parliament to curtail those whose deceptive practices undermined the integrity of the markets.¹³⁶ Accordingly, in 1766 the government issued a proclamation reinstating the laws against forestalling.¹³⁷

Finally, as the late eighteenth-century economic order of Adam Smith, which believed that unregulated private freedom contributed to societal welfare, became a political reality, the medieval practice of intrusive governmental regulation of the marketplace passed into disuse.¹³⁸ A series of parliamentary acts expressly repealed the prohibitions against forestalling.¹³⁹ Parliament’s repeal of these prohibitive statutes rejected the need for social control of manipulative market practices and set the stage for the nineteenth-century acceptance of the doctrine of private freedom without public control.¹⁴⁰

Nonetheless, for centuries the English people employed statutes prohibiting forestalling as a device to address business practices harmful to the broader interests of society.¹⁴¹ The regulatory nature of these acts reflected

130. *See id.* at 916 (discussing regulatory reactions of government to popular discontent during 1600s).

131. *See id.* (describing statutory duties of local officials).

132. *See id.* at 917 (noting prosperity prevalent in England during early 1700s).

133. *See* HURST, *supra* note 52, at 4 (noting eighteenth-century emphasis on private economic utility of corporation and relegation of public function to secondary status); Jones, *supra* note 94, at 917 (noting lack of eighteenth-century legislative activity directed against business).

134. *See* Jones, *supra* note 94, at 918 (discussing repeal of many acts against forestalling).

135. *See id.* at 917-18 (noting renewed complaints against forestallers).

136. *See id.* at 918 (noting public complaints against widespread speculation).

137. *See id.* at 917 (noting decision in late 1700s to again enforce acts against forestalling).

138. *See* Raskind, *supra* note 117, at 891-92 (noting Adam Smith’s influence on need for no economic regulation by government).

139. *See* Smith, *supra* note 112, at 1571-73 (citing acts abrogating statutes prohibiting forestalling).

140. *See* Raskind, *supra* note 117, at 891 (discussing Parliament’s purposes behind repeal of forestalling statutes); Smith, *supra* note 112, at 1571-73 (noting repeal of forestalling acts favored merchants’ profit interest); *infra* notes 149-91 and accompanying text (summarizing nineteenth-century rejection of idea private corporations should be publicly controlled).

141. *See* Jones, *supra* note 94, at 919-20 (noting centuries of measures enacted to restrain manipulation of markets). In 1800 a writer provided the following definition of forestalling:

the societal inclination that government possessed a duty to suppress economic activities harmful to societal welfare.¹⁴² The ready willingness of earlier societies to purge the markets of those corporate participants with fraudulent inclinations harmonized with the contemporary view of corporations in which all corporate organizations possessed concomitant public and private dimensions.¹⁴³

V. THE AMERICAN CONCEPTION OF CORPORATIONS

Early American corporations inherited the dual public and private dimensions of their English antecedents.¹⁴⁴ During the formative years of our republic, essential public matters such as canals, banking, insurance, colleges and utilities¹⁴⁵ occupied the majority of the corporations in exist-

Forestalling, commonly speaking, means, to market before the public, or, to anticipate or prevent the public market; but, legally understood, it has a greater signification, for it comprehends all unlawful endeavors to enhance the price of any commodity, and all practices which have an apparent tendency thereto, such as, spreading false rumors; buying commodities in the market before the accustomed hour; buying and selling again the same articles in the same market; No attempt of this kind can be looked upon in any other light than as *offence against the public*, as it apparently tends to put a check upon trade to the general inconvenience of the people, by putting it out of their power to supply themselves with any commodity, unless at an unreasonable expense;

Id. at 919 (emphasis added).

142. See HOLDSWORTH, *supra* note 108, at 375 (noting public approval of protective governmental regulation).

143. See *supra* notes 99-109 and accompanying text (describing dual public-private nature of early corporateness).

144. See GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 319 (1992) (noting in early America no sharp distinction existed between public and private corporations); Ronald E. Seavoy, *The Public Service Origins of the American Business Corporation*, 52 *BUS. HIST. REV.* 30, 30-33 (1978) (noting public dimension to early profit-seeking American corporations); Note, *supra* note 7, at 1886 (arguing business ventures retained their mixed public-private character in antebellum America). As late as the 1840s, the Whig party argued corporations were models of how commerce and virtue could be linked to benefit the public good. *Id.* at 1893.

145. See 1 JOSEPH S. DAVIS, *ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS* 3-107 (1917) (arguing most corporations in American colonies pursued public-oriented endeavors); FRIEDMAN, *supra* note 68, at 182, 511 (noting "public" purposes served by most "private" businesses of early America); HURST, *supra* note 52, at 15-17 (noting public nature of early American corporations). Of the 317 charters granted by the colonies and states between 1780 and 1801, 96% involved transportation, banks and public services. *Id.* at 17. The other 4% of the charters were for general business corporations. *Id.*; see Simeon E. Baldwin, *American Business Corporations Before 1789*, 8 *AM. HIST. REV.* 449, 449-65 (1902) (noting many early American corporations were matters of public enterprise); Allen D. Boyer, *Federalism and Corporation Law: Drawing the Line in State Takeover Regulation*, 47 *OHIO ST. L.J.* 1037, 1042 (1986) (noting readily apparent quasi-public nature of early American corporations); Barzelay & Smith, *supra* note 77, at 90 (noting most early American corporations involved transportation and banks). Contemporary popular thought did not consider even business corporations to be private entities. *Id.*

tence.¹⁴⁶ At the time of the Constitutional Convention few legal distinctions existed between public and private corporations; all corporations continued to possess relatively similar powers and responsibilities.¹⁴⁷ The Founders recognized the utility, as well as the impressive heritage, of maintaining the virtuous equilibrium between the coexisting public and private dimensions of all corporate institutions.¹⁴⁸

But within the Founders' lifetimes, a profound philosophical development in the history of corporations was underway, the culmination of which would lead to the fracturing of the historically dual nature of all corporate entities into the currently distinct categories of public corporations and private corporations.¹⁴⁹ By the end of the nineteenth century, the historical notion that all corporations should be susceptible to both a degree of public control and a degree of private freedom from public control appeared as simplistic and far removed as it seems to twentieth-century contemporaries.

That this division came to fruition in nineteenth-century America should not strike one as paradoxical. Madisonian America inherited a tradition of political and legal thought from England that viewed the world as sharply divided between two antagonistic poles: The Lockean individual and the Hobbesian state.¹⁵⁰ According to Locke, the individual possessed certain inviolable natural rights that limited the power of the state, including the economic liberty to hold property.¹⁵¹ The private rights of the Lockean

146. See HURST, *supra* note 52, at 14, 17 (noting colonial and state legislatures chartered 317 business corporations from 1780 to 1801); WOOD, *supra* note 144, at 321 (noting states issued 11 charters of incorporation between 1781 and 1785, 22 more between 1786 and 1790, 114 more between 1791 and 1795, and nearly 1800 additional charters between 1800 and 1807); Handlin & Handlin, *supra* note 77, at 4 (stating almost 350 corporations received charters between 1783 and 1801).

147. See HURST, *supra* note 52, at 7 (arguing corporate law in America developed no separate policies or rules for private business corporations until end of eighteenth century); NADER ET AL., *supra* note 16, at 33 (noting early American corporate law made no distinction between public and private corporations); Frug, *supra* note 6, at 1094 (stating "[u]ntil the early nineteenth century, no such distinction [between public and private corporations] . . . existed either in America or in England, since all such corporations possessed similar legal powers and protections."); Handlin & Handlin, *supra* note 77, at 19 (arguing neither eighteenth-century England nor America accepted distinction between public and private corporations).

148. See Boyer, *supra* note 145, at 1042 (stating "[w]hen the Founders thought of corporations, they thought of quasi-governmental, quasi-sovereign entities."); Handlin & Handlin, *supra* note 77, at 17-19 (arguing in 1780s corporateness did not imply freedom from interference by state); see also Note, *supra* note 7, at 1889-92 (describing early American distrust of corporations).

149. See *supra* notes 67-76 and accompanying text (describing current divided conception of corporations).

150. See *supra* notes 1-6 and accompanying text (describing Madisonian political theory); see also Frug, *supra* note 6, at 1087-95 (noting influence of Lockean and Hobbesian political traditions).

151. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 188-94 (Thomas I. Cook ed., 1947) (1690) (asserting vested property rights of individuals). According to Locke:

The supreme power cannot take from any man part of his property without his own consent; if for the preservation of property being the end of government and that

individual contrasted sharply with positivism, as advocated by Hobbes, which placed the interests of the individual as subordinate to the command of the state.¹⁵²

This tendency to divide the world solely between the public power of the state and the private right of the individual led late eighteenth- and early nineteenth-century American legal thought to view the enigmatic corporation skeptically, if not with distrust.¹⁵³ A product of medieval society, the corporation exhibited traits of both axioms:¹⁵⁴ its private dimension encouraged the freedom to accumulate individual wealth, yet the corporation's public dimension subjected it to social control restricting freedom of individual enterprise.¹⁵⁵

It did not appear feasible to contemporaries in this well-demarcated world of apparently irreconcilable spheres of public power and private right to retain the corporation's historically dual character.¹⁵⁶ Nor did it appear possible under the balanced Madisonian constitutional framework either to

for which men enter into society, it necessarily supposes and requires that the people should have property, without which they must be supposed to lose that, by entering into society, which was the end for which they entered into it—too gross an absurdity for any man to own. Men, therefore, in society having property, they have such right to the goods which by the law of the community are theirs, that nobody hath a right to take there substance or any part of it from them without their own consent; without this, they have no property at all.

Id. at 191-92.; *see also supra* note 1 (describing Lockean liberal political theory).

152. *See* THOMAS HOBBS, *LEVIATHAN* 170-78 (J.M. Dent & Sons, Ltd., 1976) (1651) (asserting need for power of state over its individual components). Hobbes argued power in the hands of individual rightholders inhibited the governing state's power to command. *Id.* Discussing "those things that weaken or tend to the dissolution of a commonwealth," Hobbes considered that:

Though nothing can be immortall, which mortals make; yet, if men had the use of reason they pretend to, their Common-wealths might be secured, at least, from perishing by internal diseases. . . .

. . . .

Another infirmity of a Common-wealth, is . . . the great number of Corporations; which are as it were many lesser Common-wealths in the bowels of a greater, like wormes in the entrayles of a naturall man. To which may be added, the Liberty of Disputing against absolute Power, by pretenders to Political Prudence; which though bred for the most part in the Lees of the people; yet animated by False Doctrines, are perpetually meddling with the Fundamentall Lawes, to the molestation of the Common-wealth;

Id. at 170, 177 ; *see also supra* note 1 (describing Hobbesian republican political tradition).

153. *See* Note, *supra* note 7, at 1889-92 (describing nineteenth-century distrust of corporations as intermediate bodies standing between public power of state and private liberty of individual); *supra* notes 7-11 and accompanying text (describing Madisonian uneasiness with corporations).

154. *See* Frug, *supra* note 6, at 1099 (discussing both public power and individual freedom aspects of corporations).

155. *See supra* notes 99-109 and accompanying text (discussing dual nature of previous corporations).

156. *See* Frug, *supra* note 6, at 1099 (noting corporation represented an anomaly to emerging Madisonian thought).

subvert the economic liberty of the individual to the complete political sovereignty of the state or to abolish all legislative power in favor of individual rights.¹⁵⁷

To resolve this intractable problem—a confrontation between the public power of the state and the private rights of the individual—early nineteenth-century legal doctrine took the unprecedented step of fracturing the historically dual nature of corporateness into two separate entities.¹⁵⁸ One, the private corporation, assimilated to the private freedom of the Lockean individual in society while the other, the public corporation, succumbed to the public power of the Hobbesian state.¹⁵⁹ For the first time in history, a cognizable legal distinction existed among mercantile entities.¹⁶⁰ Troubled by the intermediate nature of the corporate form, nineteenth-century thinkers confronted the corporation as one might expect in a polarized world—they severed it. As a result, society could manage the corporation much easier as it, like society itself, was divided between individuals and the state.¹⁶¹

Resolution of the intellectual crisis regarding corporations only provided the philosophical underpinnings for the nineteenth-century transformation of the corporation into its current bifurcated form. It still remained to be seen whether legal doctrine would adapt functionally to the new corporate ideology. In the seminal 1819 case of *Trustees of Dartmouth College v. Woodward*,¹⁶² the United State Supreme Court certified the legitimacy of the distinction between public and private corporations.¹⁶³ An ardent Federalist and Lockean defender of vested property rights, Chief Justice John Marshall used the *Dartmouth College* case to commit those principles to legal doctrine.¹⁶⁴ Marshall employed the Contracts Clause¹⁶⁵ as the constitutional vehicle for the Court's holding that the property rights of private

157. See *supra* notes 1-6 and accompanying text (noting purpose of Madisonian system of government to maintain equilibrium between state sovereignty and individual freedom).

158. See Frug, *supra* note 6, at 1099 (discussing early nineteenth-century division of corporation into two separate entities).

159. See *id.* at 1099-1100 (noting emergence of private corporation as individual rightholder and public corporation as state-controlled entity).

160. See *supra* notes 77-82 and accompanying text (arguing prior to nineteenth century neither societal thought nor legal doctrine considered public and private corporations distinct).

161. See *supra* notes 1-6 and accompanying text (noting division of Madisonian societies between individual and state).

162. 17 U.S. (4 Wheat.) 518 (1819).

163. *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 625-39 (1819). The *Dartmouth College* case arose when the New Hampshire legislature attempted to assume control of Dartmouth by appointing its own board of overseers. *Id.* at 626-27. Dartmouth's trustees sued claiming New Hampshire's action violated the college's corporate charter. *Id.* The New Hampshire Supreme Court previously ruled against the trustees deeming the college a public corporation. *Id.* at 625. On appeal, Chief Justice Marshall reversed the New Hampshire court by classifying Dartmouth as a private corporation. *Id.* at 633-39.

164. See Barzelay & Smith, *supra* note 77, at 95 (describing Marshall's political philosophy).

165. U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligations of Contracts . . .").

corporations were analogous to the Lockean individual's rights in property and, accordingly, commanded protection from antagonistic popular legislatures.¹⁶⁶

Under the Madisonian constitutional framework, individuals possess a certain scope of immunity from majority rule.¹⁶⁷ By endowing the private corporation with the constitutional privilege to hold property on an equal basis with individuals, thus immunizing the property of private corporations from legislative abrogation, the *Dartmouth College* case set the stage for subsequent courts to further insulate the private corporation from a significant measure of social control, denying the corporation's actual history.¹⁶⁸

166. *Dartmouth College*, 17 U.S. (4 Wheat.) at 643-50. Under the *Dartmouth College* decision the scope of protected property rights divided private from public corporations. *Id.* at 643-54.; see also FRIEDMAN, *supra* note 68, at 197 (noting *Dartmouth College* intended to secure and protect corporate property interests from shifting winds of public opinion). Friedman concedes *Dartmouth College* did not have an immediate effect on the everyday law of corporations. *Id.* at 197-98. Nevertheless, *Dartmouth College* ideologically and functionally set the stage for future developments insulating corporate property from public control. See Harry N. Butler & Larry E. Ribstein, *The Contract Clause and the Corporation*, 55 BROOK. L. REV. 767, 781 (1989) (noting contract clause served as initial constitutional restraint on state regulation of economic activity); *infra* notes 169-75 and accompanying text (noting cases after *Dartmouth College* immunizing corporations from social control).

In a concurring opinion in *Dartmouth College*, Justice Story articulated where to draw the line between public and private corporations:

Another division of corporations is into public and private. Public corporations are generally esteemed such as exist for public political purposes only, such as towns, cities, parishes, and counties; and in many respects they are so, although they involve some private interests; but strictly speaking, public corporations are such only as are founded by the government for public purposes, where the whole interests belong also to the government. If, therefore, the foundation be private, though under the charter of the government, the corporation is private For instance, a bank created by the government for its own uses, whose stock is exclusively owned by the government, is, in the strictest sense, a public corporation. . . . But a bank, whose stock is owned by private persons, is a private corporation, although it is erected by the government, and its objects and operations partake of a public nature. The same doctrine may be affirmed of insurance, canal, bridge, and turnpike companies. In all these cases, the uses may, in a certain sense, be called public, but the corporations are private

Dartmouth College, 17 U.S. (4 Wheat.) at 668-69 (Story, J., concurring).

While *Dartmouth College* was the first Supreme Court case to develop the distinction between public and private corporations fully, previously in *Terret v. Taylor*, 13 U.S. (9 Cranch) 43, 51-52 (1815), Justice Story briefly had alluded to the distinction.

167. See *supra* notes 1-6 and accompanying text (discussing Madisonian political theory).

168. See FRIEDMAN, *supra* note 68, at 197 (noting contemporaries understood *Dartmouth College* as removing large part of public control over economic affairs); *supra* notes 78-82 and accompanying text (describing historical subjection of corporation to degree of social control); see also HURST, *supra* note 52, at 62-63 (arguing *Dartmouth College's* holding that private corporations enjoyed protection of contracts clause "was a clear-cut act of judicial lawmaking").

Although the *Dartmouth College* holding certainly protected the property rights of private corporations from a measure of social control, the case also held a corporation possesses only those rights granted by the state. See *supra* note 8 and accompanying text (citing *Dartmouth College* for proposition that corporations owe existence to positive law).

That the social control of the private corporation reached its low ebb in the 1880s with the Supreme Court's assumption in *Santa Clara County v. Southern Pacific Railroad*¹⁶⁹ that a corporation is a constitutional "person" under the Fourteenth Amendment did not occur by happenstance.¹⁷⁰ The affirmation of the private corporation as a constitutional person resonated with the ideological perception that the private corporation possessed the role of the Lockean individual in society.¹⁷¹ In addition, corporate personhood had the attendant functional effect of facilitating the corporatization of the economy.¹⁷² By elevating the private corporation to the constitutional status and immunities of an individual person, the *Santa Clara* case and its progeny¹⁷³ fueled the emerging capitalist economy of the

169. 118 U.S. 394 (1886).

170. *Santa Clara County v. Southern Pac. R.R.*, 118 U.S. 394, 396 (1886) (declaring corporations to be persons for purposes of Fourteenth Amendment's Equal Protection Clause). Prior to oral argument in *Santa Clara*, Chief Justice Waite briefly stated to counsel that "[t]he court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny any person . . . the equal protection of the laws, applies to these corporations. We are all of the opinion that it does." *Id.* at 396.

The difficulty with extending constitutional rights to corporations is that the Constitution nowhere mentions corporations. See HURST, *supra* note 52, at 113 (noting Framers included no reference to corporations in Constitution). Only "persons" have rights under the Constitution. Several Justices later questioned the *Santa Clara* proposition that a corporation is a constitutional person. See *Bell v. Maryland*, 378 U.S. 226, 262 (1964) (Douglas, J., concurring) (questioning casualness of *Santa Clara* ruling); *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 580 (1949) (Douglas, J., dissenting) (stating "the *Santa Clara* case was wrong and should be overruled."); *Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 85-90 (1938) (Black, J., dissenting) (arguing Fourteenth Amendment not intended to apply to corporate persons).

Commentators also criticize *Santa Clara*. See HURST, *supra* note 52, at 66-67, 113-115 (arguing Court's decision in *Santa Clara* to protect corporate assets as "property" of "persons" by substantive reading of Equal Protection Clause of Fourteenth Amendment was as much exercise of judicial lawmaking as it had been in *Dartmouth College* to bring corporate charters within Contracts Clause); John L. Flynn, *The Jurisprudence of Corporate Personhood: The Misuse of a Legal Concept*, in *CORPORATIONS AND SOCIETY: POWER AND RESPONSIBILITY* 131-41 (Warren J. Samuels & Arthur S. Miller eds., 1987) (questioning *Santa Clara's* legal methodology). According to Flynn, Chief Justice Waite's pronouncement of corporate personhood in *Santa Clara* resembled a dictatorial edict rather than legal analysis. *Id.* at 133.; Howard J. Graham, *An Innocent Abroad: The Constitutional Corporate "Person"*, 2 *UCLA L. Rev.* 155, 159-60 (1955) (criticizing absence of opinion on point of corporate personality in *Santa Clara*); David L. Ratner, *Corporations and the Constitution*, 15 *U.S.F. L. Rev.* 11, 15 (1981) (noting "summary conclusion" in *Santa Clara* that corporations were persons protected by Fourteenth Amendment).

171. See *supra* notes 149-61 and accompanying text (discussing nineteenth-century assimilation of private corporation to role of Lockean individual in society); see also FRIEDMAN, *supra* note 68, at 521 (noting irony of employing Fourteenth Amendment, designed to protect newly freed slaves, as stronghold for corporations).

172. See Samuels, *supra* note 67, at 121 (noting individualization of corporation paralleled development of giant corporations). Samuels further notes the individualization of the corporation, ironically, furthered the decline of individualist, entrepreneurial capitalism in America. *Id.*

173. See, e.g., *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657 (1990)

era by freeing business from governmental regulation, allowing business to

(noting corporate speech is within ambit of First Amendment); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 245 (1986) (holding unconstitutional statute burdening corporation's first amendment liberties); *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 9-18 (1986) (extending first amendment protection to corporations); *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 495 (1985) (same); *FEC v. National Right to Work Comm.*, 459 U.S. 197, 209-11 (1982) (recognizing but limiting first amendment protection of corporate speech); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561-66 (1980) (extending first amendment protection to corporations); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 533-44 (1980) (same); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 780 (1978) (same); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 568-76 (1977) (applying double jeopardy protection to corporations); *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353-54 (1977) (extending corporations protection from unreasonable searches and seizures); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952) (safeguarding corporations' first amendment interests); *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936) (reaffirming corporations are "persons" within meaning of Due Process and Equal Protection Clauses of Fourteenth Amendment); *Coombes v. Getz*, 285 U.S. 434, 441-42 (1932) (holding takings clause limits state's power to repeal or amend corporate charter); *Kentucky Finance Corp. v. Paramount Auto Exch. Corp.*, 262 U.S. 544, 550 (1923) (affirming *Santa Clara's* decision that corporations are "persons" within meaning of Fourteenth Amendment); *Atchison, Top. & S. Fe R.R. v. Vosburg*, 238 U.S. 56, 59 (1915) (stating constitutional guaranty of protection of equal laws extends to corporations); *Hale v. Henkel*, 201 U.S. 43, 76 (1906) (entitling corporations to fourth amendment immunity against unreasonable searches and seizures); *Smyth v. Ames*, 169 U.S. 466, 522 (1898) (describing issue of whether corporations are persons under fourteenth amendment as settled); *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226, 241 (1897) (taking property without just compensation violates corporation's fourteenth amendment right of due process); *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578, 592 (1896) (indicating well-settled understanding that corporations are persons within meaning of Due Process and Equal Protection Clauses); *Charlotte, Colum. & Aug. R.R. v. Gibbes*, 142 U.S. 386, 391 (1892) (holding private corporations are persons within meaning of Fourteenth Amendment); *Chicago, M. & St. P. R.R. v. Minnesota*, 134 U.S. 418, 452-59 (1890) (extending constitutional protections of due process and equal protection to corporations); *Minneapolis & St. L. R.R. v. Beckwith*, 129 U.S. 26, 28 (1889) (extending fourteenth amendment due process protection to corporations); *Pembina Mining Co. v. Pennsylvania*, 125 U.S. 181, 188-89 (1888) (including private corporations under designation of "person" in Fourteenth Amendment); *see also Monell v. Department of Social Services*, 436 U.S. 658, 689 (1978) (noting by 1871 corporations were treated as natural persons for virtually all purposes of constitutional and statutory purposes). *But cf.* *California Bankers Ass'n v. Schultz*, 416 U.S. 21, 71-72 (1974) (denying corporate officer privilege against self-incrimination on behalf of corporation); *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (withholding corporation's right to privacy); *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 204-05, 208 (limiting corporation's fourth amendment protection against searches and seizures); *United States v. White*, 322 U.S. 694, 704 (1944) (limiting corporation's fifth amendment privilege against self-incrimination); *Wilson v. United States*, 221 U.S. 361, 379-86 (1911) (withholding fifth amendment's protection against self-incrimination from corporations); *see also Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 284-85 (1989) (O'Connor, J., dissenting) (comparing constitutional protections extended and denied corporations); *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 580 n.3 (1949) (Douglas, J., dissenting) (listing cases assuming Constitution protects corporations).

Prior to the *Santa Clara* decision, the Supreme Court analogized corporations with natural persons in context of corporate citizenship for federal jurisdictional purposes. *See Louisville, Cinc. & Char. R.R. v. Letson*, 43 U.S. (2 How.) 497, 557-58 (1844) (holding corporation should be deemed "an artificial person" and that although "in some particulars [a corporation]

expand exponentially.¹⁷⁴ But by providing the corporation with constitutional status coextensive to that of a natural person, thereby entitling the corporation to a large degree of immunity from majority rule, the line of cases beginning in *Dartmouth College* wrenched the corporation free of its historic exposure to social control.¹⁷⁵

Not coincidentally, the late nineteenth century featured the triumph of another development of equal effect in removing the private corporation from public control.¹⁷⁶ Prior to the nineteenth century, in both England and America, each instance of incorporation required a special act by the sovereign.¹⁷⁷ These special charters were tailor-made to the particular incorporators and included whatever restrictions the granting sovereign deemed appropriate to those being incorporated.¹⁷⁸ Such a cumbersome, yet discerning process served a meritorious purpose by assuring that only those endeavors that met the standard of public service would possess corporate advantages.¹⁷⁹ But to the egalitarian Jacksonian America of the mid-nine-

differs from a natural person," in "the manner in which it can sue and be sued, it is substantially . . . a citizen of the state which created it"). Cf. *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 584, 585-86 (1839) (holding corporation is not "citizen" within meaning of Fourth Amendment's guaranty of privileges and immunities).

174. See Flynn, *supra* note 170, at 132 (noting how *Santa Clara* insulated corporations from large measure of governmental regulation).

175. See *id.* (discussing effect of recognizing constitutional status of corporation). Flynn notes in a Madisonian system individuals possess a certain scope of immunity—defined by the Bill of Rights—from social control. *Id.* Elevating the corporation to a constitutional status with many of the immunities enjoyed by individuals in society necessarily diminishes social control over the corporation. See Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 577-665 (1990) (surveying cases in which corporations' invocation of Bill of Rights shielded corporations from governmental regulation). In addition, constitutional corporate persons fail to bear many of the burdens imposed by the Constitution on natural persons. See Miller, *supra* note 16, at 83 (noting corporations are not asked to go to war or to serve on juries).

The connection between *Dartmouth College* and *Santa Clara* initially may not appear clear. However, with the *Santa Clara* decision the Fourteenth Amendment replaced the Marshall-era contract clause as the principal source of constitutional protection of corporate assets. See Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1601 (1988) (noting concurrent rise of Fourteenth Amendment and fall of Contract Clause as primary source of constitutional protection of corporations); Butler & Ribstein, *supra* note 166, at 781 (same).

176. See FRIEDMAN, *supra* note 68, at 512 (arguing major event in corporation law between 1800 and 1850 involved development of general incorporation statute); Millon, *supra* note 72, at 905-10 (discussing rise of general incorporation statutes); Note, *supra* note 7, at 1883 (arguing general incorporation laws represent antebellum America's major contribution to development of private corporation).

177. See Millon, *supra* note 72, at 906-07 (noting until nineteenth century, corporate charters required special acts by legislature).

178. See FRIEDMAN, *supra* note 68, at 188 (noting state legislatures granted charters "tailor-made to the case at hand"); Millon, *supra* note 72, at 906 (same).

179. See Berle, *Inheritance*, *supra* note 52, at 197-99 (noting by requiring special charters sovereign maintained control over those entitled to corporate privileges).

teenth century, special charters represented special privilege.¹⁸⁰ To rectify this perceived inequality of opportunity, state legislatures promoted the widespread availability of corporate status by passing general incorporation acts,¹⁸¹ which dispensed with the need for a special legislative act for each incorporation by making the privilege of doing business in corporate form available to any group that fulfilled certain formalities.¹⁸²

The initial general incorporation statutes typically specified the particular purposes a corporation could pursue,¹⁸³ prescribed dollar restrictions on asset value and indebtedness,¹⁸⁴ and imposed durational limits on corporate lifespan.¹⁸⁵ While these general incorporation statutes sanctioned equality of opportunity, their attending proscriptive features ensured that all corporations would remain subject to some degree of public control.¹⁸⁶ However, soon thereafter state legislatures, spurred by the desire to attract revenue-producing

180. See ARTHUR M. SCHLESINGER, JR., *THE AGE OF JACKSON* 336-37 (1945) (noting general incorporation acts constitute direct legacy from Jacksonian democracy). The hostility Jacksonians displayed toward special charters stemmed from their perception that special charters bred corruption and monopoly. *Id.*; Hovenkamp, *supra* note 175, at 1634-35 (arguing Jacksonians were not opposed to corporations on principle so much as they believed special charter denied equal access to corporation as method of doing business); Millon, *supra* note 1, at 1255 (noting purpose of general incorporation statutes was to make advantages of incorporation readily available to public).

181. See GEORGE EVANS, *BUSINESS INCORPORATIONS IN THE UNITED STATES 1800-1943* 11 (1948) (noting Connecticut passed first general incorporation law in 1837); FRIEDMAN, *supra* note 68, at 194-95 (arguing efficiency concerns also prompted state legislatures to pass general incorporation acts); Millon, *supra* note 1, at 1255 (noting by 1870 general incorporation laws had begun to supplant special charters in most states).

182. See VA. CODE ANN. § 13.1-619 (Michie 1989) (listing minimum incorporation requirements in Virginia). To incorporate in Virginia, each applicant must provide the corporation's name, the number of shares the corporation is authorized to issue, and the addresses of both the corporation's initial registered office and agent. *Id.* Once the requirements for the articles of incorporation have been complied with and all mandatory fees have been paid, the state of Virginia must issue a certificate of incorporation, and corporate existence begins. VA. CODE ANN. § 13.1-621 (Michie 1989); see generally Richard W. Jennings, *The Role of the States in Corporate Regulation and Investor Protection*, 23 LAW & CONTEMP. PROBS. 193 (1958) (addressing whether state incorporation statutes should be enabling or include provisions to protect interests of shareholders and creditors); Elvin R. Latty, *Why are Business Corporation Laws Largely "Enabling?"*, 50 CORNELL L.Q. 599, 601-02 (1965) (discussing enabling philosophy underlying modern American business incorporation statutes).

183. See NADER ET AL., *supra* note 16, at 37 (noting limited purposes imposed by early general incorporation statutes); Millon, *supra* note 72, at 907-08 (same).

184. See NADER ET AL., *supra* note 16, at 37 (noting well into nineteenth century most states retained limitations on amounts of capital and indebtedness); Boyer, *supra* note 145, at 1043 (noting corporations historically had been confined to ceilings on indebtedness); Millon, *supra* note 72, at 909 (noting retention of asset and indebtedness limits in early general incorporation acts).

185. See FRIEDMAN, *supra* note 68, at 190 (noting durational limits were common element of corporate charters in early nineteenth century); NADER ET AL., *supra* note 16, at 37 (noting early general acts imposed durational limits on corporate existence); Millon, *supra* note 72, at 909 (noting durational limits often varied from 20 to 50 years).

186. See Millon, *supra* note 72, at 909-10 (arguing restrictive features of early general incorporation statutes aimed to prevent corporations from achieving uncontrollable private freedom).

corporations, began to liberalize their general incorporation statutes by authorizing incorporation for "any lawful purpose" and by loosening, then abolishing, the restrictions on corporate lifespan, capitalization and indebtedness.¹⁸⁷

By the early twentieth century in America, a convergence of deregulatory premises on ideological, judicial and legislative fronts had swept away the public control of corporations so instinctive to our English forebears.¹⁸⁸ A new vision of the corporation emerged—one that entitled the corporation to the constitutional rights of a natural person while relieving the corporation from much of its historic subjection to public control.¹⁸⁹ A revolution in the corporate concept transpired in nineteenth-century America.¹⁹⁰ No longer did society expect corporations either to be attentive to the concerns of the populace at large or subject to democratic control.¹⁹¹ Nineteenth-century American society essentially abdicated public control of the private corporation.

VI. CONCLUSION

By holding corporate executives responsive to the interests of the general public, the corporate bar provisions of the Remedies Act may signal an attempt by late twentieth-century America to reestablish a semblance of the historic element of social control over private corporations abandoned by nineteenth-century America.¹⁹² If so, the corporate bar recalls an earlier,

187. See *Liggett Co. v. Lee*, 288 U.S. 517, 559 (1933) (Brandeis, J., dissenting) (describing competition among states for corporate charters as race "not of diligence but of laxity"); FRIEDMAN, *supra* note 68, at 524-25 (discussing lure of easy money as incentive for states to abolish previous restrictions on corporate capacities); Boyer, *supra* note 145, at 1043 (noting by 1875 states commonly allowed incorporation for "any lawful purpose"); Henry N. Butler, *Nineteenth-Century Jurisdictional Competition in the Granting of Corporate Privileges*, 14 J. LEGAL STUD. 129, 129-66 (1985) (tracing nineteenth-century deregulatory impulse); E. Merrick Dodd, Jr., *Statutory Developments in Business Corporation Law, 1886-1936*, 50 HARV. L. REV. 27, 32-55 (1936) (contrasting Massachusetts's more restrictive incorporation statutes with general nineteenth-century trend).

New Jersey and Delaware led the "race to the bottom" by excising aspects of their corporate laws that traditionally inhibited corporate growth and maintained corporate legitimacy. See NADER ET AL., *supra* note 16, at 43-61 (tracing deregulatory developments in New Jersey and Delaware); Cary, *supra* note 16, at 663-68 (discussing states' tendencies to adopt increasingly lenient incorporation laws); Edward Q. Keasbey, *New Jersey and the Great Corporations*, 13 HARV. L. REV. 198, 198-212 (1899) (discussing New Jersey's role in facilitating corporate growth); Millon, *supra* note 72 at 911-13 (discussing deregulatory motivations in New Jersey and Delaware).

188. See Hovenkamp, *supra* note 175, at 1638-40 (suggesting general incorporation acts relieved private corporations of historic public dimension by shifting public dimension predominantly to public corporations); *supra* notes 149-91 and accompanying text (discussing nineteenth-century movement to confer private freedom on corporations).

189. See *supra* notes 99-109 and accompanying text (describing corporation's historic subjection to degree of public control).

190. See FRIEDMAN, *supra* note 68, at 511 (arguing by 1900 "[o]f the original law of corporations—from Blackstone's day—hardly a stone was left unturned).

191. See *id.* at 512 (noting by twentieth century "corporations could do as they wished, arrange their affairs as they pleased, exercise any power desired . . ."); see also *supra* notes 72-75 and accompanying text (stating current societal expectations of private corporations).

192. See *supra* notes 48-51 and accompanying text (arguing Congress enacted corporate bar to protect society at large form corporate excesses).

broader vision of the corporation in which societal willingness to impose restrictions on corporate activity on behalf of the general public whose welfare appeared threatened by certain features of corporate activity reflected the prevailing notion that all corporations should be subject to a degree of public control.¹⁹³ These societies struggled to maintain a proper balance between a corporation's counterpoised, Madisonian attributes of public power and private freedom.¹⁹⁴ The historic antidote to society's indignation toward corporate activities contrary to the public welfare had been for the state to restore public control over corporations by conscripting private corporate freedom.¹⁹⁵ This earlier way of thinking about the corporation fell by the wayside during the nineteenth-century reconceptualization of the corporation.¹⁹⁶ By the early twentieth century, society at large no longer expected the private corporation to be subject to control in the public interest. Conversely, society expected the unfettered private corporation to embellish its private freedom by relentlessly pursuing shareholder welfare.¹⁹⁷

Congress' current inclination—as demonstrated by the corporate bar provisions of the Remedies Act—to regulate corporate activity that negatively affects the welfare of nonshareholder constituencies, however, raises questions whether the twentieth-century conception of the corporation is too narrowly conceived. The corporate bar certainly seems incongruent with orthodox thinking on the private corporation and may reflect a desire of society at large to have something to say about corporate endeavors. As destabilizing to established assumptions about the basic objectives of private corporations as the corporate bar may appear to be, when viewed from an historical perspective, neither the method¹⁹⁸ nor the objective¹⁹⁹ of the Remedies Act is unprecedented.

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193. See *supra* notes 99-109 and accompanying text (arguing prior societies maintained a degree of social control over corporate activity for benefit of general public).

194. See *supra* notes 77-82 and accompanying text (discussing corporations' historically coextensive characteristics of private rights and social control).

195. See *supra* notes 102-09, 111-43 and accompanying text (discussing remedies imposed by earlier societies to curtail corporate excesses).

196. See *supra* notes 149-91 and accompanying text (discussing nineteenth-century transformation of nature of corporateness).

197. See *supra* notes 67-76 and accompanying text (discussing twentieth-century conception of corporations).

198. Compare *supra* notes 29-45 and accompanying text (describing corporate bar's disqualification of fraudulent corporate managers from corporate profession) with *supra* notes 120-37 and accompanying text (discussing prior methods of purging fraudulent market traders from trading profession).

199. Compare *supra* notes 25-28, 46-51 and accompanying text (noting purpose of corporate bar to ensure public confidence in securities markets) with *supra* notes 110-19, 141-43 and accompanying text (noting purpose of forestalling statutes to preserve integrity in early trading markets).

