Ownership, Limited: Reconciling Traditional and Progressive Corporate Law via an Aristotelian Understanding of Ownership

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I. INTRODUCTION

What exactly is a business corporation? For whose benefit is (or ought) it be managed? Although scholars have debated these questions for decades, the answers to them have grown increasingly important.[1] For today, few organizations in the world have as much power to do good, or harm, to individuals, communities, and society as a whole than does the business corporation.[2] Yet, unfortunately, fundamental questions concerning the corporation remain a matter of sharp disagreement. This Article proposes an understanding of the corporation that builds a bridge between two sides of the debate, enabling a compromise solution to the question of "for whose benefit the corporation ought to be managed?" At the heart of this proposal, and what enables this Article to accomplish what I claim it can accomplish, is the application of an Aristotelian conceptualization of ownership to corporate shareholders.

Scholars have divided, roughly, into three camps over the question of what a corporation is, and this division has informed (again, roughly) opinions on for whose benefit the corporation is or should be managed. Traditionally, the corporate shareholder has been characterized as an owner of the corporation whose shares he or she (or it) possesses.[3] More recently, "progressive" corporate law scholars have re-cast the shareholder as merely one of many "stakeholders" in the corporate enterprise.[4] Still others—"contractarians"—object to the "reification" of the corporation, and assert that a corporation is not a thing capable of being owned, but rather merely a "nexus of [metaphorical] contracts."[5]

To those concerned with issues of corporate governance and corporate social responsibility,[6] the characterization of corporate shareholders should matter (among other reasons) because it arguably goes a long way in establishing for whose sake and how the corporation ought to be managed. For if shareholders are viewed as owners of the corporation, then it comfortably follows that the board of directors, the body entrusted with managing the corporation, serves largely as the shareholders' agent. This thinking, in large part, gave rise to the reigning "shareholder wealth maximization" norm of corporate law, under which boards of directors are charged primarily with maximizing

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1. *See*, *e.g.*, Daniel P. Sullivan & Donald E. Conlon, *Crisis and Transition in Corporate Governance Paradigms: The Role of the Chancery Court in Delaware*, 31 LAW & SOC'Y REV. 713, 727–40 (1997) (summarizing the various trends in corporate law over the last two centuries).

2. Indeed, many multinational corporations have assets and resources at their disposal that dwarf those of most nation-states. *See* Douglass Cassel, *Human Rights and Business Responsibilities in the Global Marketplace*, 11 BUS. ETHICS. Q. 261, 266–67 (2001).

3. Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance,* 97 NW. U. L. REV. 547, 563–64 (2003) [hereinafter Bainbridge, *Director Primacy*].

4. *See* Constance A. Bagley & Karen L. Page, *The Devil Made Me Do It: Replacing Corporate Directors' Veil of Secrecy with the Mantle of Stewardship*, 36 SAN DIEGO L. REV. 897, 898–99 (1999); *see also* Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 971, 971–73 (1992).

5. Stephen M. Bainbridge, *Competing Concepts of the Corporation (a.k.a. Criteria? Just Say No)*, 2 BERKELEY BUS. L.J. 77, 84–87 (2005).

6. I use the phrase "corporate governance" to refer generally to issues regarding the ordering of rights and responsibilities *within* a given firm; I use the phrase "corporate social responsibility" to refer generally to issues regarding the rights and responsibilities of corporations to individuals, entities, and communities *extrinsic* to the firm.

shareholder interests (traditionally understood as the equivalent of maximizing shareholder wealth).[7]

If, however, shareholders are not viewed as the owners (or the sole owners) of the corporation, but rather as merely one of several stakeholders in the corporation, then it might more readily follow that the board of directors serves largely to promote and mediate among the interests of these various stakeholder groups.[8] And if the corporation is not conceived of as an entity at all, but rather simply a nexus of contracts, then the board of directors exists primarily to exercise the contractual powers conferred upon it, and to ensure that each real or metaphorical contractee receives his or her (or its) due.[9] Under such a contractarian conceptualization, whether the board operates primarily to maximize shareholder wealth would depend upon whether one concludes that shareholders contracted for such maximization (explicitly or implicitly) in return for their equity investment in the corporation.[10]

This Article proffers to reconcile, to a degree, some of the divergence between the traditional and progressive camps of corporate law scholarship by demonstrating that the traditional conceptualization of the corporation (namely, that of a company owned by its shareholders) can be substantially harmonized with the ends promoted by "progressive" approaches to corporate law (namely, that the board of directors must consider the interests of various other corporate constituencies, and not simply those of the shareholders, when making its decisions). This reconciliation is made possible via recourse to an Aristotelian understanding of ownership. For if one embraces an Aristotelian understanding of ownership (and there are persuasive and justifiable reasons for doing so, especially within the context of corporate shareholders[11]), one could argue that (1) corporate shareholders are indeed the owners of the corporation, but (2) Aristotelian limitations on the rights of ownership enable—if not compel—boards of directors to exercise their agency obligations on behalf of the shareholders in a way that is consistent with the common good (and that, consequently, takes into account the interests of various nonshareholder constituencies of the corporation). This reconciliation is useful in that it enables one to argue for increased consideration of nonshareholder interests by boards of directors (aims of progressive corporate law scholarship) without being pressured to disassociate one's self from the traditional "shareholders as owners" model of the firm. Additionally, since this reconciliation retains the traditional model of the firm as shareholder-owned, it generally reaffirms shareholder primacy and eschews the more aggressive positions taken by some within the progressive corporate law camp (such as the position that boards of directors owe no special duty to shareholders beyond those duties owed to all stakeholders generally[12]), and thus presents a compromise

7. *See id.* Whether an obligation to maximize shareholder interests translates directly to an obligation to maximize shareholder wealth is itself an important question, which is addressed below. *See infra* Part IV.B.1.

8. *See* Bagley & Page, *supra* note 4, at 898–99, 933–43 (explaining the board's role in balancing competing stakeholder interests).

9. *See* Stephen M. Bainbridge, *The Board of Directors as Nexus of Contracts*, 88 IOWA L. REV. 1, 24–25 (2002) (discussing the contractarian model of the firm).

10. *See* Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1427, 1442–45 (1993). *See generally* Henry Hansmann, *Ownership of the Firm*, 4 J. L. ECON. & ORG. 267 (1988).

11. *See infra* Part V (justifying the use of an Aristotelian understanding of corporate ownership).

12. *E.g.*, Wai Shun Wilson Leung, *The Inadequacy of Shareholder Primacy: A Proposed Corporate*

answer to the question "for whose sake ought a corporation be managed?"

This Article is organized as follows: Part II supplies a short history of American corporate law, and thereafter summarizes the three main conceptualizations of the corporation. Included in Part II is a discussion of the role of the board of directors under each of these conceptualizations. Part III addresses the concept of ownership generally, under traditional, contemporary, and Aristotelian perspectives. Part IV applies the implications of an Aristotelian understanding of ownership to corporate shareholders, and explores the theoretical and practical difficulties of such an understanding, and Part V sets forth a justification of the Aristotelian approach. In conclusion, this Article contends that applying an Aristotelian understanding of ownership to corporate shareholders is meritorious because it enables those who wish to advocate an increased level of responsibility on the part of corporate boards to nonshareholder constituencies to do so without abandoning the traditional conceptualization of the shareholder as an owner of the corporation, and proffers a reasonable compromise between dueling perspectives on the role and duties of boards of directors.

II. CORPORATIONS CONCEPTUALIZED

There are and have been a variety of different conceptualizations of the corporation, and of the shareholder's relationship thereto.[13] Based upon their present and historical importance, this Article shall focus on three such conceptualizations: the shareholder ownership model, the stakeholder model, and the nexus of contracts model.[14] As previously mentioned,[15] the conceptualization adopted can have significant implications regarding the role and duties of the board of directors—implications which affect issues of corporate governance and corporate social responsibility. Following a brief sketch of the history of American corporate law, this Part shall examine each of these three conceptualizations, along with their corresponding implications regarding the role of the board of directors.

A. A Short History of the Corporation

"[M]an is by nature a political animal,"[16] and so it should come as no surprise that practically as far back as recorded history can demonstrate, human beings have banded together to form business enterprises.[17] The forerunners of today's corporations—if not

Regime That Recognizes Non-Shareholder Interests, 30 COLUM. J.L. & SOC. PROBS. 587, 589 (1997) ("Boards must consider equally the interests of non-shareholding stakeholders and shareholders when making decisions that can affect both groups.").

13. For one useful summary of these various conceptualizations, see Sullivan & Conlon, *supra* note 1, at 713–21.

14. A novel and interesting conceptualization recently advanced by Stephen Bainbridge (but not addressed in this Article) is the "director primacy" view of the corporation. *See generally* Bainbridge, *Director Primacy, supra* note 3 (explaining the director primacy theory).

15. *See supra* Part I (noting the significance of the selected conceptualization theory).

16. ARISTOTLE, POLITICS bk. I (Kessinger Publishing 2004).

17. *See Business in Babylon*, 12 BULL. BUS. HIST. SOC'Y 25, 25–26 (1938) (tracing the history of business firms); David A. Skeel, Jr., *Christianity and the Large Scale Corporation* 4–5 (U. Penn. Law School Public Law and Legal Theory Research Paper Series, Paper No. 07-45, 2007), *available at* http://papers.ssrn.com/abstract=1025959 (discussing the history of the corporate form). This forms, in large

early corporations themselves—can be traced back to the universities of medieval Europe, where we can see analogues to modern-day shareholders and boards.[18] The first English settlement in America—Jamestown, Virginia—was settled by the joint-stock company known as the "Virginia Company of London" in 1607, thus introducing the corporation to American soil at least four centuries ago.[19]

In the early days of the American republic, corporations were individually and specifically established through state legislative action.[20] Not surprisingly, therefore, in 1800, the United States was home to only 355 corporations.[21] Corporations were not established for whatever purposes their founders wished to pursue, but rather "to promote a public interest or purpose,"[22] and thus were chartered to build and/or operate, among other things, banks, insurance companies, churches, canals, bridges, and roads.[23] Indeed, "[t]he dominant feature of businesses incorporated in the eighteenth century was their public character."[24] This was similar to the American colonial experience, for under eighteenth-century English law, corporate status was viewed "as a special, limited

part, the basis for the argument that, contrary to some of the theories set forth in the pages that follow, *see infra* Part II, corporations are neither mere legal fictions, creations of the state, nor nexuses of contracts, but rather naturally occurring human associations, along lines similar to the family, the village, or the state. *See* Sullivan & Conlon, *supra* note 1, at 719 (discussing the "natural entity model" of the corporation); *see also* Edward W. Younkins, *Morality and Character Development: The Roles of Capitalism, Commerce, and the Corporation*, 4 J. MARKETS & MORALITY 94, 101 (2001) ("A corporation is created by, owned by, and operated by a freely constituted group of individuals. The state merely recognizes and records the formation of corporations—it does not bring them into existence."). For an excellent Aristotelian/natural law articulation of this argument, see Robert G. Kennedy, *Business and the Common Good in the Catholic Social Tradition*, 4 VILL. J.L. & INV. MGT. 29, 42–47 (2002). This view is, as we shall see, arguably the "antithesis" of the "nexus of contracts" understanding of the corporation. *See* Mark A. Sargent, *Competing Visions of the Corporation in Catholic Social Thought* 10 (Villanova Pub. Law & Legal Theory Working Paper Series, Paper No. 2004-13, 2004).

18. *See* Katie Russell, *The Nations of the University of Paris: The Rise and Fall of a Medieval Corporation*, BANYAN, Spring 2003, http://depts.clackamas.cc.or.us/banyan/3.1/nations.asp (stating that "universities had to get charters because they were corporations"); *see also* Joseph F. Johnston Jr., *Natural Law and the Fiduciary Duties of Business Managers*, 8 J. MARKETS & MORALITY 27, 42 (2005) ("The corporation is a historical institution that is the product of centuries of social, cultural, and legal as well as economic forces."); Mathias M. Siems, *The Foundations of Securities Law*, 20 EUR. BUS. LAW. REV. (forthcoming 2009) (manuscript at 3–6), *available at* http://ssrn.com/asbstract=1089747 (summarizing the development of the corporate business form).

19. *See* THOMAS A. BAILEY, THE AMERICAN PAGEANT 13–14 (3d ed. 1966).

20. *See* JAMES D. COX & THOMAS LEE HAZEN, CORPORATIONS 31 (2d ed. 2003) ("To incorporate by special act, a private bill had to be introduced in the state legislature, be considered by the legislative committees, pass both houses, and be signed by the governor."). For a more thorough treatment of the state's role in the creation of the modern corporation, see Gregory A. Mark, *The Role of the State in Corporate Law Formation*, *in* INTERNATIONAL CORPORATE LAW 1 (2000).

21. Lynda J. Oswald, *Shareholders v. Stakeholders: Evaluating Corporate Constituency Statues Under the Takings Clause*, 24 J. CORP. L. 1, 11 (1998).

22. *Id.*

23. COX & HAZEN, *supra* note 20, at 32; WILLIAM A. KLEIN & JOHN C. COFFEE, JR., BUSINESS ORGANIZATION AND FINANCE 113 (9th ed. 2004); Siems, *supra* note 18, at 6 (observing that "up until the end of the 18th Century . . . joint-stock companies were not genuine private entities because they required authorization and, in exchange, were often conveyed public-law rights").

24. COX & HAZEN, *supra* note 20, at 32; *see also* Kelo v. City of New London, 545 U.S. 469, 514 (2005) (Thomas, J., dissenting) ("At the time of the founding, '[b]usiness corporations were only beginning to upset the old corporate model, in which the raison d'etre of chartered associations was their service to the public.'" (quoting M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780–1860, at 49–50 (1977))).

concession of the sovereign," and granted "to achieve a specific political objective, such as colonizing a territory, developing foreign trade, or exploiting a particular trade opportunity or natural resource."[25] During this period, the prevailing model of the corporation has been referred to as the "concession theory," and the Supreme Court articulated the essence of this theory in the 1819 case of *Dartmouth College v. Woodward*[26] as follows:

> A corporation is an artificial being, invisible, intangible, and existing only in the 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. These are such as are supposed best calculated to effect the object for which it was created.[27]

However, by the middle of the nineteenth century, the "pressures of industrialization," including business's need to raise large amounts of capital, caused state legislatures to be "deluged with requests for legislation bestowing corporate status."[28] The attractiveness of the corporate form stemmed largely from (and continues to stem largely from) the limited liability protection it affords investors.[29] In order to relieve the legislative workload, and to combat corruption in the chartering of corporations, states began adopting general incorporation statutes, by which "almost any legitimate enterprise [could] be conducted in corporate form upon compliance with simple statutory formalities."[30] This facilitated the transformation of the corporation from an entity oriented primarily to public purposes to a vehicle for private economic gain.[31] With this transformation, the concession theory of the corporation faded away,[32] and was largely replaced by a view of the corporation as a natural extension of an individual's, a family's, or a group's private property.[33] Nevertheless, even this view—that is, of the corporation as a private business enterprise—was grounded upon the "classical capitalist concept . . . [that] the invisible hand will ensure that every individual, 'in pursuing his own selfish good . . . [will] achieve the best good for all.'"[34]

25. KLEIN & COFFEE, *supra* note 23, at 112.

26. Dartmouth Coll. v. Woodward, 17 U.S. 518 (1819).

27. Oswald, *supra* note 21, at 14 (quoting *Woodward,* 17 U.S. at 636).

28. COX & HAZEN, *supra* note 20, at 32; *see also* Siems, *supra* note 18, at 6 (discussing the "growing importance of securities markets in the last 200 years" as a means of raising capital).

29. *See* Daniel J. Morrissey, *Piercing All the Veils: Applying an Established Doctrine to a New Business Order*, 32 J. CORP. L. 529, 534–35 (2007) (quoting Columbia University President Nicholas Murray Butler who famously remarked: "In my judgment the limited liability corporation is the greatest single discovery of modern times . . . even the steam engine and electricity are far less important than the limited liability corporation and they would be reduced to comparative impotence without it.").

30. COX & HAZEN, *supra* note 20, at 32.

31. *See* Oswald, *supra* note 21, at 11–12 (observing that corporations became more common as they were allowed to pursue private economic interests).

32. *Id*. at 14.

33. *See* Sullivan & Conlon, *supra* note 1, at 728 (noting that during this era of the "natural entity model," corporate property rights were defined "as aggregated individual property rights" and thus corporations were ultimately granted "the same constitutional rights and responsibilities that society decrees are inalienable to natural persons").

34. Steven M.H. Wallman, *The Proper Interpretation of Corporate Constituency Statutes and Formulation of Director Duties*, 21 STETSON L. REV. 163, 167 (1991) (quoting P. SAMUELSON, ECONOMICS 43 (9th ed. 1973)); *see also* Andrew Lumsden & Saul Fridman, *Corporate Social Responsibility: The Case for a*

B. Shareholder Ownership Model

By the early twentieth century, the scale of businesses conducted in the corporate form had grown to tremendous proportions (due, in part, to the advantages of this form).[35] Capital needs led to a wide dispersion of equity investors (shareholders), and the complexities involved in corporate management gave rise to a class of professional managers who ran the corporation, in place of the corporation's founders (which had traditionally been the case).[36] In such an environment, opportunities to engage in corporate fraud and to misappropriate investor money abounded, and evidence of widespread corruption was exposed in the investigations that followed the stock market crash of 1929.[37] These phenomena were explored by Adolf A. Berle & Gardiner C. Means in their 1932 book, *The Modern Corporation and Private Property*, which effectively launched the modern era of corporate law theory.[38] This book set forth the now well-known understanding of the corporation as an entity in which ownership and control are separated: the shareholders own the corporation, but the board of directors and management control the corporation.[39] (This is what I have referred to, and shall continue to refer to, as the "traditional" conceptualization of the corporation and of the corporate shareholder.) Reflecting the "prevailing sociolegal attitudes" of their time, and in light of the understanding of the corporation that they had articulated, Berle and Means recognized the need to "safeguard[] small, faceless shareholders from potential directorial self-dealings."[40] Thus, they articulated the fundamental norms of corporate governance that have largely shaped corporate law to this day:

> Berle and Means reconceived the norms of governance in terms of the principle that the corporation's property is the property of the shareholders and "it is unquestionably on their behalf that the directors are bound to act . . . . Managerial powers are held in trust for stockholders as sole beneficiaries of the corporate enterprise."[41]

This norm was given judicial expression, in its most forceful form, by the Michigan Supreme Court in the classic case of *Dodge v. Ford Motor Co.*[42] In *Dodge*, the Court

Self-Regulatory Model 10 (Sydney Law Sch., Legal Studies Research Paper No. 07/34, 2007), *available at* http://ssrn.com/abstract=987960 ("[T]he passage of general incorporation legislation . . . can be seen as recognition that, by their very existence, these private associations play an important role in the development of a modern, integrated and complex economy.").

35. *See supra* text accompanying note 29; *see also* KLEIN & COFFEE, *supra* note 23, at 114–15.

36. COX & HAZEN, *supra* note 20, at 32.

37. *See* Sullivan & Conlon, *supra* note 1, at 729–31 (noting that the results of these investigations showed just how much the corporate governance ethic lacked a concern for anything other than personal profit).

38. ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (Macmillan 1933) (1932); *see also* Stephen M. Bainbridge, *The Politics of Corporate Governance,* 18 HARV. J.L. & PUB. POL'Y 671, 671 (1995).

39. *See* Bainbridge, *supra* note 9, at 3 (stating that the main characteristic of a corporation is the separation of ownership and control).

40. Sullivan & Conlon, *supra* note 1, at 732.

41. *Id*. at 731 (quoting E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1147 (1932)).

42. Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919). *But see generally* Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford (UCLA Sch. of Law, Law & Econ. Research Paper Series, Research Paper No. 07-11, 2008) *available at* http://ssrn.com/abstract=1013744 (arguing that "*Dodge v. Ford* is a mistake, a

held that Henry Ford's decision to withhold shareholder dividends in order to sell automobiles more cheaply to the public at large was a breach of his fiduciary duty to the shareholders.[43] The Court expressed its visions of the proper role and duties of the corporation's directors toward the shareholders as follows:

> 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.[44]

More recently, Milton Friedman famously explained this same vision in an article entitled *The Social Responsibility of Business Is to Increase Its Profits*:

> In a free enterprise, private-property system, a corporate executive is an employee of the owners of the business. He has direct responsibility to his employers. That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible while conforming to the basic rules of society.[45]

Given this understanding of the corporation, in addition to concerns regarding economic efficiency, a key task of corporate law became the minimization of the obvious

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judicial 'sport,' a doctrinal oddity largely irrelevant to corporate law and corporate practice").

43. *Dodge*, 170 N.W. at 684.

44. *Id*. Other scholars have interpreted the *Dodge* case differently, arguing that Henry Ford did not withhold dividends for publicly minded reasons, but rather to "depress stock prices, and thus force the Dodge brothers to sell their stock to majority shareholder Henry Ford at favorable prices (which eventually happened)." Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 774 (2005). If so,

> this would have violated Henry Ford's fiduciary duty not to use his corporate control to benefit himself financially at the expense of other shareholders . . . [and] the otherwise aberrational court decision to interfere with the exercise of managerial discretion about dividend levels seems best explained on the view that the case really involved a conflict of interest raising duty of loyalty concerns.

Id. Whether this reading of the case is correct, and therefore demotes the language in the decision quoted above to mere dicta, this mere dicta remains a very influential statement of the proper role and duties of the corporation's directors. *E.g.*, ROBERT CHARLES CLARK, CORPORATE LAW 603–04, 678–79 (1986) (discussing the obligation of the board to maximize shareholder profits).

45. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, § 6 (Magazine), at 32; *see also* Edward W. Younkins, *Morality and Character Development: The Roles of Capitalism, Commerce, and the Corporation*, 4 J. MARKETS & MORALITY 94, 104 (2001). Edward Younkins has explained this minimalist view of social responsibility as follows:

> The social responsibility of the corporation through its directors, managers, and other employees, is simply to respect the natural rights of individuals. Individuals in a corporation have the legally enforceable responsibility or duty to respect the moral agency, space, or autonomy of persons. This involves the basic principle of the non-initiation of physical force and includes the obligation to honor contracts with managers, employees, customers, suppliers, and others; duties not to engage in deception, fraud, force, threats, theft, or coercion against others; and the responsibility to honor representations made to the local community.

Younkins, *supra*, at 104.

(and sometimes not-so-obvious) agency costs to which the separation of ownership and control gives rise.[46] This led to legal imposition of fiduciary duties on the part of directors to corporate shareholders, linked to the end of shareholder wealth-maximization.[47]

C. Stakeholder Model

Although the shareholder ownership model has dominated twentieth-century corporate law (to such a degree that in 1962, Bayless Manning lamented that "corporation law, as a field of intellectual effort, is dead in the United States"[48]), it (or at least its implications) has not been without its detractors. For as far back as the 1930s, in the pages of the *Harvard Law Review*, Merrick Dodd challenged Berle's assertion that it was a director's duty to maximize shareholder wealth.[49] Dodd argued that corporate officers and directors "serve as trustees for the corporate enterprise rather than for individual shareholders," and thus may "legitimately use corporate resources to address the interests of other constituents and behave in a socially responsible manner."[50] Dodd's argument forms the basis of what I refer to in this Article as the "stakeholder model" of the corporation.[51]

The shareholder-versus-stakeholder debate simmered relatively quietly until the 1980s, when the flurry of takeover activity in corporate America sharply focused attention on the wide divergence of interests between shareholders and other corporate constituencies.[52] The takeover boom of the 1980s re-ignited the shareholder-stakeholder debate because, within the context of most corporate takeovers, shareholders of the target company received a substantial premium in exchange for their shares, while other constituencies of the target company (especially employees) often fared quite poorly (since, among other things, economies of scale usually lead to workforce reductions and

46. *See generally* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure,* 3 J. FIN. ECON. 305 (1976) (discussing agency costs and their relationship to ownership structure).

47. *See* Rutheford B. Campbell, Jr. & Christopher W. Frost, *Managers' Fiduciary Duties in Financially Distressed Corporations: Chaos in Delaware (and Elsewhere)*, 32 J. CORP. L. 491, 513 (2007) ("[F]iduciary duties are 'gap fillers' in the relationship between shareholders, as owners of the corporation's assets, and managers—reducing the transaction costs and agency problems inherent in the separation of ownership from control."); CLARK, *supra* note 44, at 677–78 (same).

48. Sullivan & Conlon, *supra* note 1, at 732.

49. *See* Lisa M. Fairfax, *The Rhetoric of Corporate Law: The Impact of Shareholder Rhetoric On Corporate Norms*, 31 J. CORP. L. 675, 676 n.2 (2006) (citing Adolph A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1367 (1932); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1147–48 (1932)).

50. *Id.* at 681 (citing Dodd, *supra* note 49, at 1160–61). For a fuller summary of the Berle-Dodd debate, see Judd F. Sneirson, *Doing Well by Doing Good: Leveraging Due Care for Better, More Socially Responsible Corporate Decisionmaking*, 3 CORP. GOV. L. REV. 438, 444–46 (2007).

51. For an interesting and provocative recasting of this traditional reading of the Berle-Dodd debate, see William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Orgins: Adolf Berle and The Modern Corporation*, 34 J. CORP. L. 99 (asserting that, contrary to conventional wisdom, Berle was not advocating shareholder primacy, and Dodd was not advocating corporate social responsibility, as those concepts are understood today).

52. *See* Kathleen Hale, *Corporate Law and Stakeholders: Moving Beyond Stakeholder Statutes*, 45 ARIZ. L. REV. 823, 831–32 (2003) (discussing the effect of hostile takeovers on stakeholders).

layoffs following a takeover, and new management is generally more apt to liquidate underperforming parts of the business).[53] Given the prevailing norms of corporate law in the 1980s, directors were arguably powerless to take into account the interests of nonshareholder stakeholders during these takeovers if doing so would have come at the expense of shareholder wealth maximization.[54] In response to this situation, state legislatures across the United States passed "constituency" statutes that enable (and, under one such statute, actually compels) boards to take into account the interests of nonshareholder stakeholders in corporate decision-making.[55] For all their faults, limitations, and shortcomings, the promulgation of constituency statutes represents, undoubtedly, a significant advance for the stakeholder model of the corporation, and has inspired a new generation of stakeholder-oriented scholarship.[56]

The philosophical underpinnings of the stakeholder model of the corporation are difficult to summarize, as their articulation has varied from proponent to proponent.[57] One consistent theme is that since all of a corporation's various stakeholder groups contribute to the corporation's success (or failure), fairness and justice demand that the interests of all such groups be considered (and furthered) by the board of directors (whether equally or in varying degrees proportional to their contribution to the corporation).[58] Another justification often advanced is that it is in the best long-term interests of the corporation as a whole (and thus in the best long-term interests of corporate shareholders) for directors to consider the interests of all corporate stakeholders.[59] As becomes readily apparent, however, this second justification essentially folds the stakeholder model into the shareholder model,[60] and evades the more difficult question of what a board's obligations ought to be in the situation where there is an intractable divergence of interests between shareholders and other stakeholders (such

53. *See id.* at 825–32.

54. *See, e.g.*, Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 181–82 (Del. 1985) (holding that once a corporate takeover was inevitable, the directors of the target company had a duty to "maximiz[e] . . . the company's value at a sale for the stockholders' benefit. . . . The directors' role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company.").

55. *See* Fairfax, *supra* note 49, at 686. Although, by 2003, constituency statutes had been adopted in 41 states, Delaware, by far the most influential state with regard to corporate law, has not adopted such a statute. Cheri A. Budzynski, *Can a Feminist Approach to Corporate Social Responsibility Break Down the Barriers of the Shareholder Primacy Doctrine*? 38 U. TOL. L. REV. 435, 443 (2006).

56. *See generally* PROGRESSIVE CORPORATE LAW (Lawrence E. Mitchell ed., 1995). *But see* Bainbridge, *supra* note 4, at 1024–25 (concluding that, in many contexts, constituency statutes will have no marginal effect on the conduct of boards of directors); Hale, *supra* note 52, at 827–28 (arguing that constituency statutes fall short of their goal of providing meaningful protection to nonshareholder stakeholders); Leung, *supra* note 12, at 620–21 (same). *See generally* Mark E. Van Der Weide, *Against Fiduciary Duties to Corporate Stakeholders*, 21 DEL. J. CORP. L. 27 (1996) (arguing against constituency statutes in principle and practice).

57. *See* Fairfax, *supra* note 49, at 679 (noting the difficulty in articulating the principles underlying stakeholder theory).

58. *See* Roberta S. Karmel, *Implications of the Stakeholder Model*, 61 GEO. WASH. L. REV. 1156, 1171 (1993) (noting that "[t]he stakeholder model is premised on the theory that groups in addition to shareholders have claims on a corporation's earnings because those groups contribute to a corporation's capital").

59. *See* CLARK, *supra* note 44, at 689 (describing ways that "socially responsible" choices are made by corporations).

60. *Id.*

as in the aforementioned takeover context[61]). Another common feature among proponents of the stakeholder model is a shared, practical critique of the shareholder wealth maximization norm as deleterious to the interests of other stakeholders and of society as a whole.[62]

Although, as set forth above, there is some consensus among stakeholder theorists with regard to what a board of directors ought to be doing with regard to nonshareholder stakeholders (and why it ought to be doing it), there is apparently little consensus on the nature of the corporation itself.[63] Some stakeholder theorists continue to view the corporation as a *bona fide* entity (often referring to it as a "community") and not merely an artificial theoretical legal construct.[64] To many of these theorists, what corporate law needs to do is recognize the "property rights of [all] stakeholders over corporate assets and their functioning," and not simply the property rights of shareholders.[65] Others, while still apparently maintaining a vision of the corporation as an entity, nevertheless contest the claim that the modern shareholder can be conceived of as its "owner" in any real sense given the fact that "from a practical perspective, shareholders . . . do not resemble traditional owners."[66]

Many stakeholder theorists (most, perhaps) have adopted the "nexus of contracts" model of the corporation (explained below).[67] This is not surprising, because viewing the corporation in this way can seriously undermine the notion of shareholder primacy. As Jill Fisch has aptly noted, "[d]escribing the corporation as shareholder property is a powerful rhetorical device, because property rights convey a sense of absolutism"[68]: to own property is to have exclusive control of something—to be able to use it as one wishes, to sell it, give it away, leave it idle, or destroy it.[69] Although some modern property rights thinking has backed away from such an absolutist position,[70] it is not difficult to see why a shareowner ownership model of the corporation might be viewed as

61. *See supra* text accompanying notes 52–53.

62. *See* CLARK, *supra* note 44, at 688–89.

63. *Cf.* David Millon, *Communitarianism in Corporate Law: Foundations and Law Reform Strategies*, *in* PROGRESSIVE CORPORATE LAW 12–13 (Lawrence E. Mitchell ed., 1995).

64. *E.g.*, Sargent, *supra* note 17, at 4–10.

65. Lynne L. Dallas, *Working Toward a New Paradigm*, *in* PROGRESSIVE CORPORATE LAW, *supra* note 63, at 37; *see also* Bainbridge, *supra* note 4, at 972–73 ("Dodd . . . saw shareholders as absentee owners whose interests can be subjugated to those of other corporate constituencies and those of society at large."); Jeff Gates, *Reengineering Ownership for the Common Good*, *in* RETHINKING THE PURPOSE OF BUSINESS 281 (S.A. Cortright & Michael J. Naughton eds., 2002) ("[A]s human capital becomes the most valued asset in a business organization, it makes no sense to limit ownership to those who provide financial capital.").

66. Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637, 649 (2006). Consider, for example, that a large number of shareholders own shares in mutual funds, which in turn may invest in other mutual funds—in short, the connection between the shareholder and the specific corporation he or she ultimately "owns" can easily be several steps removed. *Cf.* Karmel, *supra* note 58, at 1158 (noting the impact of institutional investors on corporation ownership).

67. *E.g.*, Bainbridge, *supra* note 4, at 1006–07; Ronald M. Green, *Shareholders as Stakeholders: Changing Metaphors of Corporate Governance,* 50 WASH. & LEE L. REV. 1409, 1415–17 (1993); Millon, *supra* note 63, at 16–19; Lee A. Tavis, *Modern Contract Theory and the Purpose of the Firm*, *in* RETHINKING THE PURPOSE OF BUSINESS, *supra* note 65, at 216, 218.

68. Fisch, *supra* note 66, at 649.

69. *Id*. (quoting Thomas C. Grey, *The Disintegration of Property, in* NOMOS XXII, at 69 (J. Roland Pennock & John W. Chapman eds., 1980)).

70. *See id.* at 649–50 (noting scholarly rejection of the absolutist view of property rights).

inhospitable grounds upon which to base a stakeholder theory of the corporation. This is especially true when the contemporary alternative (and prevailing) model—the nexus of contracts model—allows stakeholder theorists to simply argue over the relative priorities that ought to be given to the interests of various corporate stakeholders (shareholders and nonshareholders alike) in light of the various explicit and implicit contracts that purportedly make up the corporation.[71]

D. Nexus of Contracts Model

Hailing from "law and economics" scholarship is the "nexus of contracts" model of the corporation, which has come to predominate the field of corporate law.[72] Under this approach, "shareholders are merely one of many factors of production bound together in a complex web of explicit and implicit contracts."[73]

Michael Jensen and William Meckling first articulated the view that the corporation was simply a "nexus of contracts" in their famous 1976 article *The Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*.[74] Jensen and Meckling rejected the theory previously advanced by Ronald Coase, under which relationships within a firm were characterized as "authoritarian" in nature (in contrast to those relationships between the firm and the outside world, which were contractual in nature).[75] To Jensen and Meckling, *all* of a corporation's relationships—both internal and external—were contractual in nature.[76] Jensen and Meckling built upon the work of Armen Alchian and Harold Demsetz, who observed:

> The firm has no power of fiat, no disciplinary action any different in the slightest degree from ordinary market contracting between any two people . . . . [An employer] can fire or sue, just as I can fire my grocer by stopping purchases from him or sue him for delivering faulty products . . . . To speak of managing, directing, or assigning workers to various tasks is a deceptive way of noting that the employer continually is involved in renegotiation of contracts on terms that must be acceptable to both parties. Telling an employee to type this letter rather than to file that document is like telling my grocer to sell me this brand of tuna rather than that brand of bread.[77]

Although far from an ineluctable conclusion, most nexus of contracts adherents "continue to treat directors and officers as agents of the shareholders, with fiduciary

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71. Tavis, *supra* note 67, at 218.

72. Bainbridge, *supra* note 9, at 5–6. *But see* David A. Westbrook, *Corporation Law After Enron: The Possibility of a Capitalist Reimagination*, 92 GEO. L.J. 61, 105–08 (2003) (asserting that the Enron debacle laid bare the deficiencies of the contractarian approach, and reasserting the traditional conception of the corporation as property).

73. Bainbridge, *supra* note 9, at 6.

74. *See* Melvin A. Eisenberg, *The Conception That the Corporation Is a Nexus of Contracts, and the Dual Nature of the Firm*, 24 J. CORP. L. 819, 819 (1999).

75. *Id.* at 821–22.

76. *Id.* at 822. This is not to say that the corporation is a network of legally enforceable promises, but rather that "the corporation is a nexus of reciprocal arrangements" and "the product of market forces." *Id.* at 823.

77. *Id*. at 821–22 (quoting Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 777–78 (1972)).

obligations to maximize shareholder wealth."[78] This conclusion is largely justified by conceptualizing shareholders as having contracted for this right in exchange for their equity investment.[79] This, in turn, is justified as an efficient way to order the corporation and control agency costs:

> Specifying the responsibilities, rewards, and rights of the principal and agent via contract better controls management misconduct than "vague" fiduciary duties. A contractarian mode benefits society by removing cumbersome legal and regulatory codes that in theory prevent market failures and transaction asymmetries but in practice aggravate agency costs and erode competitiveness. The compelling norm of wealth maximization impels the natural tendencies of a self-regulating market to define efficient governance structures and behaviors.[80]

Nevertheless, as Stephen Bainbridge, a nexus-of-contracts proponent, has readily acknowledged, "[b]y throwing the concept of ownership out the window . . . the contractarian model also eliminates Friedman's principle argument for favoring shareholders over nonshareholders."[81] Indeed, "there is nothing in the nexus of contracts notion[] that leads inexorably to a notion of shareholder primacy."[82] Consequently, the nexus-of-contracts model could serve (and does serve) as an attractive model to many who advocate increased stakeholder protection under corporate law because such advocacy might be more easily advanced within the context of a nexus-of-contracts conceptualization of the corporation versus a shareholder-ownership conceptualization.[83] Regardless, it is not the objective of this Article to engage in an extensive critique of the merits of this (or any other) conceptualization of the corporation; rather, this Article seeks primarily to demonstrate that one need not abandon the traditional conceptualization of the corporation in favor of the contractarian conceptualization in order to advance a regime of greater stakeholder protection. Thus, rather than offer arguments *against* the contractarian position,[84] I shall proceed to make the case *for* the traditional conceptualization, as read with an Aristotelian understanding of ownership in mind.

III. OWNERSHIP CONCEPTUALIZED

A. Modern Conceptualization of Ownership

Ever since the "Enlightenment," Western Civilization has largely embraced a

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78. Bainbridge, *supra* note 9, at 6.

79. *See* Bainbridge, *supra* note 10, at 1427, 1442–45 (describing the way corporate shares reflect perceived shareholder risks).

80. Sullivan & Conlon, *supra* note 1, at 719–20; *see also* Bainbridge, *supra* note 10, at 1427, 1442–45.

81. Bainbridge, *supra* note 10, at 1428; *see supra* text accompanying note 45.

82. Susan J. Stabile, *Using Religion to Promote Corporate Responsibility*, 39 WAKE FOREST L. REV. 839, 860 (2004).

83. *See supra* text accompanying notes 71–72 (describing the advantages of the nexus-of-contracts model).

84. *See, e.g.*, Scott FitzGibbon, *Fiduciary Relationships Are Not Contracts*, 82 MARQ. L. REV. 303 (1999) (arguing that fiduciary duties differ from contracts in both their doctrinal status and ethical basis); Johnston, *supra note* 18, at 41–42 (arguing that the contractarian theory is unsound).

historically extreme conception of ownership and private property.[85] Pursuant to this conceptualization, barring a law to the contrary or fairly direct injury to another, an individual is pretty much free to do as he or she wishes with those items he or she owns.[86] As William Blackstone proclaimed, ownership rights over property give a person "the sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[87]

This was not always the case.[88] Moreover, this is no longer universally the case among many leading Western property theorists.[89] Nevertheless, the prevailing modern conceptualization of ownership remains largely characterized by individualism and broad liberty of use.[90] Nowhere, perhaps, is this truer than in the United States, and what Alexis de Tocqueville famously observed more than 100 years ago could probably be repeated today:

> In no other country in the world is the love of property keener or more alert than in the United States, and nowhere else does the majority display less inclination toward doctrines which in any way threaten the way property is owned.[91]

Although influenced by Roman law and medieval feudalism,[92] the modern Western understanding of property rights (especially within the Anglo-American tradition) can be

85. *See* JESSE DUKEMINIER ET AL., PROPERTY 92 (6th ed. 2006) (citing Epstein's defense of an absolute right to private property); JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 157 (1988) (noting traditional breadth and strength of Western property rights).

86. 1 WILLIAM BLACKSTONE, COMMENTARIES *138.

87. 2 WILLIAM BLACKSTONE, COMMENTARIES *2.

88. *See infra* Part III.B (discussing Aristotle's conception of ownership, which incorporates social obligations into property rights).

89. *E.g.*, DUKEMINIER, *supra* note 85, at 81; WALDRON, *supra* note 85, at 25 (observing that "[m]any jurists deny that we have any useful or coherent notion of ownership, and they insist that there is no distinction in principle . . . between a private property economy and a socialist one," and noting these jurists' argument that "[i]n both systems . . . individuals have rights which can be called property rights, and the only interesting question is how these rights are to be packaged and bundled together"). *But see* Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849 (2007) (criticizing the "bundle of rights" theory of property in favor of more traditional, moral-based theories of property). *See generally* Hanoch Dagan, *The Social Responsibility of Ownership*, 92 CORNELL L. REV. 1255 (2007) (highlighting the role of corporate law in adopting property standards incorporating social responsibility); Rebecca Lubens, *The Social Obligation of Property Ownership: A Comparison of German and U.S. Law*, 24 ARIZ. J. INT'L & COMP. L. 389 (2007) (contrasting America's individual-centered property conception with Germany's social-centered conception).

90. *See* Eduardo Moises Penalver, *Redistributing Property: Natural Law, International Norms, and the Property Reforms of the Cuban Revolution*, 52 FLA. L. REV. 107, 195 (2000) ("[T]he individualistic school of property thought is certainly the dominant one within Anglo-American property law . . . .").

91. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 614 (J.P. Mayer & Max Lerner ed., 1966) (1835); *see also* THE FEDERALIST NO.10 (James Madison) (arguing that the protection of human faculties that lead to the accumulation of private property is "the first object of government"). *But see* Jonathan Lahn, *The Uses of History in the Supreme Court's Taking Clause Jurisprudence*, 81 CHI.-KENT L. REV. 1233, 1233–34 (2006) (positing that the relationship between private property and governmental power in the United States is a "rich and complex" one).

92. *See* David A. Thomas, *Is the Right to Private Property a Fundamental or an Economic Right?* SM006 ALI-ABA 33, 38–41 (2007) (setting forth "A Very Brief Legal History of Anglo-American Private Property Rights").

traced most directly to the seventeenth-century theories of John Locke.[93] According to Locke, the right to private property was a natural one, and preceded the formation of the state.[94] "Indeed, the principal purpose of government was to protect these natural property rights, which Locke fused with liberty."[95] The right to property was seen as natural "not in the sense that the individuals concerned are born with them . . . but rather in the sense that the force these rights obtains can be recognized as valid by moral and rational people quite apart from any provisions of positive law."[96]

Locke's theory of property came to permeate English common law,[97] as exemplified by the excerpt above from William Blackstone's eighteenth century *Commentaries on the Laws of England*.[98] This, in turn, heavily influenced colonial thinking in America, under which the right to private property became thought of as "the guardian of every other right."[99] Consequently, vigorous protection of private property rights (understood as per Blackstone's articulation of them) made its way into U.S. constitutional law.[100]

Although Locke himself viewed the right to private property as properly qualified by certain societal concerns,[101] ironically, the tradition that he launched has largely rejected any limits on property rights "derived from social obligation."[102] Thus, under the prevailing modern view, the right to private property "is not conditioned on the owner's performance of any social function"[103] and would even include the right to "abuse" one's property.[104] Indeed, the traditional limits on the right of private property have been demarcated only, for the most part, by the highly contentious worlds of takings, eminent domain, and zoning jurisprudence.[105]

Although some defenders of this modern regime of property rights, such as Robert Nozick, appear to elevate the right to private property as an end in itself,[106] most appear

93. *See* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT 17 (2d ed. 1998). For a short history of property rights in Western Civilization, see generally David A. Thomas, *Why the Public Plundering of Private Property Rights is Still a Very Bad Idea*, 41 REAL PROP. PROB. & TR. J. 25 (2006).

94. ELY, *supra* note 93, at 17.

95. *Id.*

96. WALDRON, *supra* note 85, at 19.

97. ELY, *supra* note 93, at 17.

98. *See supra* text accompanying note 87.

99. ELY, *supra* note 93, at 26. *But see generally* Robert P. Burns, *Blackstone's Theory of the "Absolute" Rights of Property,* 54 U. CIN. L. REV. 67 (1985) (arguing that nineteenth-century American lawyers oversimplified and exaggerated Blackstone's defense of private property rights).

100. *See* ELY, *supra* note 93, at 42–58, 160–63.

101. *See* WALDRON, *supra* note 85, at 207–13 (discussing Locke's views on a limited conception of private property).

102. Penalver, *supra* note 90, at 187.

103. *See* WALDRON, *supra* note 85, at 157 (quoting C.B. MACPHERSON, DEMOCRATIC THEORY: ESSAYS IN REVIVAL 126 (1973)).

104. *Id.* This conflicts directly with Locke's assertion that waste or destruction of property—even one's own—was impermissible. *Id.*

105. *See* Thomas*, supra* note 92, at 56–63 (discussing these three areas of limitation); Lubens, *supra* note 89, at 398–401. Takings and eminent domain law permit a sovereign to limit the use of, or to confiscate, private property in order to further certain public needs, but ordinarily requires the payment of "just compensation" to the affected property owner. *Id.*

106. *See* Penalver, *supra* note 90, at 187–88 (citing ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 150–52 (1974)); *see also, e.g.*, RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

to justify the regime on utilitarian grounds. As David Thomas has written: "The spread of private ownership rights throughout the American population was an essential element in creating the prosperity, health, education, and ambition that have made this country the greatest nation in the history of the planet."[107] This utilitarian defense echoes Locke's original justification of private property, and provides a point of commonality with the Aristotelian approach to private property: as an institution essential to human preservation and subsistence.[108]

B. Aristotelian Conceptualization of Ownership

In contrast to the understanding of ownership that has largely prevailed in Western society, and arguably more in keeping with Locke's own vision of ownership, stands the Aristotelian understanding of ownership.[109] As shall most likely become apparent in this section, and as shall be elucidated in Part IV, an Aristotelian understanding of ownership incorporates concerns for nonshareholder constituencies. As shall also become apparent, an Aristotelian approach to private property sets forth a few broad, general principles (rather than a detailed regimen of specific rules) and thus we shall need to extrapolate from these principles in our efforts to apply them in Part IV.

The signature characteristic of an Aristotelian approach to property and ownership is the distinction drawn between property's possession and its use: "It is clearly better that property should be private, but the use of it common," writes Aristotle in *Politics*.[110]

Property should be privately held, according to Aristotle (and not held in common, as Plato had earlier asserted)[111] for multiple reasons, including the observation that property that is privately owned is more carefully safeguarded and utilized, and that the possession of private property facilitates (or at least permits) the development of an individual's virtue.[112] Ownership of private property also reduces quarreling, as "people are less likely to quarrel when it is clear who owns something."[113]

With regard to the first observation, Aristotle noted the universal phenomenon that privately held property is, generally speaking, more scrupulously maintained, and more effectively utilized, than property that is held by no one, or by the community as a whole.[114] This simple observation is fairly incontrovertible, and goes a long way in explaining Aristotle's defense of private property, in the place of a particularly deep or complicated justification for private property (many of which, nevertheless, exist within

107. Thomas, *supra* note 93, at 70.

108. *See* Caryn L. Beck-Dudley & James E. MacDonald, Lucas v. South Carolina Coastal Council*, Takings, and the Search for the Common Good*, 33 AM. BUS. L.J. 153, 165 (1995).

109. An "Aristotelian" approach to property, as employed in this paper (and elsewhere), shall encompass not only the writings of Aristotle himself, but also the natural law philosophical tradition that Aristotle helped launch. *See* YVES R. SIMON, THE TRADITION OF NATURAL LAW 27 (Vulkan Kuic ed., 1965) (noting shortcomings in Aristotle's concepts that were filled later by other theorists). This tradition invariably includes the thinking of Thomas Aquinas, who "brilliantly clarified, refined, and developed Aristotle's treatment of property." Beck-Dudley & MacDonald, *supra* note 108, at 159.

110. ARISTOTLE, *supra* note 16, bk. I.

111. *See id*. bk. II.

112. *See id*.

113. Beck-Dudley & MacDonald, *supra* note 108, at 159.

114. *See* ARISTOTLE, *supra* note 16, bk. II.

the Aristotelian tradition[115]). The primary justification given by Aristotelian theorists is experiential: societies grounded upon a respect for private property generally fare much better, *ceteris paribus*, than those that do not respect private property.[116] Indeed Thomas Aquinas, expanding upon Aristotle's thinking, explicitly qualified the "right" to private property, noting that unlike other human rights, the right to private property was "not based immediately upon natural human inclinations but upon reflection on human experience."[117] That is, the right to private property was of a second order of magnitude to Aquinas because it was not logically essential to human existence, but rather experientially demonstrated to be instrumental to the safeguarding of those other rights that were essential to human existence.[118] As one scholar put it, "[t]he issue is not one of logic but of prudential determination."[119]

The second justification for private property set forth by Aristotle is that it assists in the development of virtue. This was a concern to Aristotle (and to many of the natural law/virtue ethics theorists who followed him) because the purpose of law, according to Aristotle, is to help both society and the individuals within that society flourish—to achieve a state of "eudemonia" (roughly translated as "true human happiness").[120] And eudemonia, in turn, is made possible by living a life of virtue.[121] Thus, in order to help individuals achieve eudemonia, the law must help safeguard and further virtue.[122] The institution of private property helps with this end because it enables the exercise of

115. *See, e.g.*, GERMAIN GRISEZ, LIVING A CHRISTIAN LIFE 791–800 (1993).

116. *See* AUSTIN FAGOTHEY, RIGHT AND REASON 455 (2d ed. 1958).

117. James R. Stoner, Jr., *Property, the Common Law, and John Locke, in* NATURAL LAW AND CONTEMPORARY PUBLIC POLICY 193, 197 (David F. Forte ed., 1998); *see also* 3 ST. THOMAS AQUINAS, SUMMA THEOLOGICA 1470–71, 1474–75 (Fathers of the English Dominican Province trans., Christian Classics 1901) (1265-1274) (discussing a man possessing a thing as his own and whether it is lawful to steal through stress of need). For an excellent summary of Aristotelian natural law thought regarding private property by the medieval scholastics following Aquinas, see ALEJANDRO A. CHAFUEN, FAITH AND LIBERTY 31–50 (2003). Some of the cited sources that follow draw from the "natural law tradition" and the "Catholic Social Teaching" tradition, and an explanation of this would most likely be helpful and appropriate at this point. Despite what the common perception might be, natural law theory (which originated with Aristotle) is not predicated on any particular set of religious beliefs or doctrines (nor, indeed, does natural law thinking even require the belief in a Creator). *See* A.P. D'ENTREVES, NATURAL LAW 53 (2d ed. 1970) (1951) (noting Grotius's "famous dictum that natural law would retain its validity even if God did not exist"). That said, much of the best Aristotelian natural law thinking, analysis, and application has been undertaken by those within the Judeo-Christian tradition. *See, e.g.*, AQUINAS, *supra*; DAVID NOVAK, NATURAL LAW IN JUDAISM (1999). Consequently (and similarly), the body of scholarship commonly referred to as "Catholic Social Teaching" provides some excellent examples of natural law application and analysis that this Article shall draw upon; for despite its name, Catholic Social Teaching has "been developed and grounded, not in Catholic orthodoxy, but in natural law." Susan J. Stabile, *A Catholic Vision of the Corporation*, 4 SEATTLE J. FOR SOC. JUST. 181, 201 (2005).

118. *See* Stoner, *supra* note 117, at 194; *see also* CHAFUEN, *supra* note 117, at 45 ("Rights to life and liberty are, in a sense, superior to property rights. These [property] rights evolved to preserve life and liberty. In extreme cases when these rights seem to be in contradiction, life and liberty should prevail.").

119. SIMON, *supra* note 109, at 154; *see* CHAFUEN, *supra* note 117, at 34–38 (setting forth the utilitarian benefits of private property as understood by the late scholastics Tomas de Mercado, Juan de Mariana, Bartolome de Albornoz, Luis de Molina, and Antonio de Escobar y Mendoza).

120. I have discussed the contours of Aristotle's "virtue ethics" philosophy in a previous article. Ronald J. Colombo, *Buy, Sell, or Hold*, 73 BROOK. L. REV. 91, 144–47 (2007).

121. *Id.*

122. *Id.*

selflessness and sacrifice.[123] Charity and sharing, in short, are only possible if a person has something to give or to share: "[T]hose who own nothing cannot be liberal."[124]

Notwithstanding a different perspective on the justifications of private property, the Aristotelian tradition does nevertheless recognize the right to private property—as does modern society in general. Where Aristotelian thinking diverges from the contemporary understanding of property rights is with regard to its understanding of the rightful *use* of private property. Aristotle proclaimed that although property rights should be private, "by friendly consent there should be a common use" of private property.[125] Aquinas echoed that, with regard to the use of "external things," an individual ought to "communicate them to others in their need,"[126] and that "whatever certain people have in superabundance is due, by natural law, to the purpose of succoring the poor."[127] Put differently still, "[t]he right to property must never be exercised to the detriment of the common good."[128] Germain Grisez, a modern natural-law theorist in the Aristotelian tradition, summarizes the difference between contemporary notions of property rights and notions derived from natural law thinking as follows:

> Most people in affluent, contemporary societies think owning property primarily means enjoying the right to do whatever one pleases with it. . . . [Under an Aristotelian/natural law-based understanding of property] [p]eople do not have the right to do as they please with their property. . . . Rather, every owner has a constant, serious responsibility to make certain his or her property fairly serves human needs.[129]

Thus, contrary to the common law approach as enunciated by Blackstone, within the Aristotelian tradition, "[o]wners of private property do not have absolute dominion over their property."[130] This qualified vision of ownership is justified on at least two grounds to Aristotle. First, since the right to private possession of property exists to serve the common good (and not to protect some higher, natural right to private property per se), such an "instrumental" right could legitimately be tailored or curtailed in further service of the common good. Second, to Aristotle all of nature existed for the sustenance of humankind.[131] This turns owners into mere "stewards," whose possessions, "both originally and still, exist for the beneficial use of the whole of humanity, including all of its many generations."[132] As has been explained:

123. *See* ARISTOTLE, *supra* note 16, bk. II, at 112–18; *see also* Peter Judson Richards, *Property and Epikeia,* 82 DET. MERCY L. REV. 599, 611 (2005).

124. *See* CHAFUEN, *supra* note 117, at 34 (quoting the late scholastic thinker Domingo de Soto, in DOMINGO DE SOTO, DE IUSTITIA ET IURE bk. IV, q. 3, fol. 105–06 (Madrid: IEP, 1968)).

125. ARISTOTLE, *supra* note 16, 162.

126. AQUINAS, *supra* note 117, at 1470–71.

127. *Id.* at 1474–75. Although not explicitly defined, superabundance has been traditionally thought of as wealth beyond that needed "to sustain life fittingly and with dignity." PIUS XI, QUADRAGESIMO ANNO ¶ 50 (1931).

128. RODGER CHARLES, THE SOCIAL TEACHING OF VATICAN II 311 (1982) (quoting PAUL VI, POPULORUM PROGRESSIO ¶¶ 23–24 (1967)).

129. *See* GRISEZ, *supra* note 115, at 800.

130. Beck-Dudley & MacDonald, *supra* note 108, at 160.

131. *See* ARISTOTLE, *supra* note 16, at 16 ("Now if nature makes nothing incomplete, and nothing in vain, the inference must be that she has made all animals and plants for the sake of man.").

132. CHARLES, *supra* note 128, at 311 (quoting PAUL VI, GAUDIUM ET SPES ¶ 71 (1965)).

> Private ownership has naturally a certain social character, founded in the law that goods are destined for all in common. If this social aspect is neglected, property often becomes the occasion of greed and serious disturbance and its opponents are given excuse to call the right itself into question.[133]

It is important to identify a split in Aristotelian authorities on the repercussions of the aforementioned principles regarding use. To some, such as Aquinas, the obligation to keep in mind the common good with regard to the utilization of goods means that the poor (or needy) actually have a *right* to such goods depending on the circumstances.[134] Thus, Aquinas maintained:

> It is not theft, properly speaking, to take secretly and use another's property in a case of extreme need: because that which he takes for the support of his life becomes his own property by reason of that need.[135]

Others, however, have defended an owner's monopoly on use despite the obligation to share one's property with those in need.[136] These theorists have attempted to resolve this apparent contradiction by maintaining that "he who uses a good of another person at the same time acquires a debt of equal value with the previous possessor."[137] In the words of Martin de Azpilcueta (Doctor Navarrus), a sixteenth-century disciple of the Dominican School of Salamanca:

> No one is obliged to donate anything to him who is in extreme need: because it suffices that he lends him what is necessary to liberate him from it, and the person in need has no right to take more of the neighbor's estate than its owner, and it is enough, if there is a need, that he takes it as a loan and not as his own.[138]

Regardless of the exact mechanism by which one with property should discharge his or her obligations to those in need (a subject that shall be addressed in Part IV[139]), the very fact that such an obligation exists under the Aristotelian understanding of ownership diverges from most common contemporary notions of property rights.[140] To Aristotle, Aquinas, and other thinkers within the Aristotelian tradition, this dichotomy of possession and use partakes in the benefits of individual possession without unduly sacrificing the needs of society as a whole beyond those benefits.[141] This dichotomy reflects, to them, the optimal ordering of property rights given the frailty of human nature

133. *See id*.

134. *See* AQUINAS, *supra* note 117, at 1474–75 (discussing whether it is lawful to steal things in stress of need).

135. *Id.* at 1475.

136. *See* CHAFUEN, *supra* note 117, at 43 (discussing the distinction between use and domain).

137. *Id*.

138. *Id.* at 44 (quoting MARTIN DE AZPILCUETA, MANUAL DE CONFESORES Y PENITENTES (Salamanca, 1556)).

139. *See infra* Part IV (discussing the implications of applying Aristotelian thinking to stock "ownership").

140. *See supra* Part III.A. An Aristotelian conceptualization of property rights is not completely alien to modern society however. Some modern Western nations, perhaps most notably Germany, explicitly embrace the notion that "[p]roperty entails obligations. Its use should also serve the public interest." Lubens, *supra* note 89, at 389 (quoting GRUNDGESETZ [GG] [Constitution] art. 14 (f.r.g.), the property clause of the German Constitution).

141. *Cf.* Stoner, *supra* note 117, at 196–97.

(as demonstrated by experience). Moreover, it reflects an understanding of society that is distinctively ordered toward the common good.[142]

IV. IMPLICATIONS OF APPLYING ARISTOTELIAN THINKING TO STOCK OWNERSHIP

"The moral responsibility of private ownership does not only affect the obligations regarding physical property or property in industrial capital, but also affects those who control financial resources, those who invest."[143] Thus, having supplied the general Aristotelian understanding of private property and ownership rights, this Part shall now apply that understanding to the particular situation of corporate stock ownership. Assuming a traditional, shareholders-as-owners conceptualization of the corporation, Part IV.A shall apply the Aristotelian understanding of ownership to the shareholders themselves. Part IV.B (still assuming the traditional, shareholders-as-owners conceptualization of the corporation) shall apply this understanding to the corporation's board of directors, and shall explore the implications of the conclusions reached in Part IV.A on the duties of the board. Part IV.C shall then consider the thorny issue of implementation: given the rights and duties of shareholders and boards of directors identified in Parts IV.A and B, should such rights and duties be given effect via enactments of positive law, and if so, how?

As a preliminary matter, however, it would be important to note how the approach to corporate social responsibility set forth herein sidesteps the common objection to any theory of corporate social responsibility that only individuals, and not organizations, have moral obligations and duties.[144] This Article sidesteps that objection by firmly grounding the moral obligations discussed on the *individual shareholder*.[145] And by maintaining the

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142. *See* Helen Alford & Michael J. Naughton, *Beyond the Shareholder Model of the Firm*, *in* RETHINKING THE PURPOSE OF BUSINESS: INTERDISCIPLINARY ESSAYS FROM THE CATHOLIC SOCIAL TRADITION 27, 39 (S.A. Cartright & Michael J. Naughton eds., 2002) (noting that the "common good model" utilizes ownership to promote the "excellent good of human development").

143. CHARLES, *supra* note 128, at 307.

144. *See, e.g.*, Norman P. Barry, *Do Corporations Have Any Responsibility Beyond Making a Profit? A Response to Dennis P. McCann*, 3 J. MARKETS & MORALITY 115, 117 (2000).

145. A more applicable variant of the objection that only individuals, and not organizations, have moral obligations and duties is based upon the observation that a large number of shareholders today are not individuals, but rather institutional investors. *See* Paul S. Atkins, Comm'r, Sec. & Exch. Comm'n, Remarks Before the Council of Institutional Investors (Mar. 27, 2003), *available at* http://www.sec.gov/news/speech/spch032703psa.htm; *see also supra* note 66 (noting that many shareholders are removed from the corporations they invest in by several steps due to their use of mutual funds). However, this observation does not remove the ultimate human owner, but rather simply transforms such ownership from direct to indirect. Thus, if a shareholder owns stock in a mutual fund, and that mutual fund in turn invests in a multinational corporation, that shareholder retains some degree of moral responsibility over that corporation. Of course, due to the attenuated nature of this ownership, the shareholder's ability to exercise control over the corporation is similarly attenuated. (But not eviscerated, for "[w]ith their own constituencies increasingly demanding accountability and social responsibility in their investments, many institutional investors are pressing companies in which they invest to account for their corporate social responsibility." RAJENDRA S. SISODIA ET AL., FIRMS OF ENDEARMENT 4 (2007).) But here, the objective nature of the common good resolves much of the problem. Since the common good is an objective construct under Aristotelian thinking, shareholder input is not required in order for boards to discharge the duty to observe the common good. Of course, shareholder input would be practically quite helpful in terms of advising and encouraging boards to honor the common good (hence the policy proposals previously set forth), but such input is not theoretically necessary.

traditional paradigm of the corporation, with shareholders as owners and directors as their agents, the *shareholders' moral obligations* can fairly be used to guide and circumscribe corporate activity.[146]

A. Implications for Shareholders

As previously noted, the predominant modern view of property ownership largely disclaims moral obligations beyond those of complying with the law generally.[147] Additionally, shareholders—especially in large, publicly held companies—are usually viewed as mere investors, detached from any personal moral obligations derived from their status as owners of a corporation.[148] Thus, treating shareholders as owners in the Aristotelian sense compels consideration of moral obligations not ordinarily thought of as attached to stock ownership. These obligations are: (1) the duty to take into account the common good in the use of property, and (2) the duty to share one's superabundance of property with those in need.[149]

With regard to the first duty, this obligation would forbid a stockholder to seek to maximize his or her securities' value at all costs. Instead, the stockholder would be obliged to take into account the consequences of value-enhancing activity, and consider whether those consequences violate the common good. To those who would assert that such an assessment is either impracticable or unrealistic, I hasten to point out that this kind of assessment is regularly done by individuals. For example, over the course of a lifetime, individuals are presented with numerous opportunities to increase their wealth through dishonesty or other wrongful means. Although many choose to take advantage of these opportunities, and although many decline to take advantage of these opportunities only because the potential material cost (that is, the consequences of getting caught and being sanctioned) exceeds the potential material benefit of the opportunity, many also choose to forgo the opportunity out of a sense of moral rectitude—including a sense that the common good precludes them from taking advantage of the opportunity in question. As Daniel Greenwood has explained, to claim that investors "have a single interest—maximizing the return on their stock investments at any cost to other human, social, aesthetic, political or ecological values[—]flies in the face of ordinary liberal assumptions that people have many ends, and many and conflicting goals."[150] Others have made the same point, using language equally as strong:

> [T]he stakeholders in any large publicly held corporation come from diverse religious, moral, and cultural traditions, each of which espouses strong non-economic values such as family life, the environment, personal freedom, and integrity. To adopt a normative construct that ignores the reality of those non-

146. *See* Barry, *supra* note 144, at 117 ("The case for corporate social responsibility would be acceptable if it were left to the stockholders . . . .").

147. *See supra* Part III.A.

148. *Cf.* Green, *supra* note 67, at 1415–16 (observing that limited shareholder liability, coupled with limited shareholder control over the corporation, undermine arguments of moral responsibility linking shareholders and the corporation).

149. *See supra* Part III.B (discussing the Aristotelian notion of the rightful use of private ownership).

150. Daniel J.H. Greenwood, *The Dividend Puzzle: Are Shares Entitled to the Residual?*, 32 J. CORP. L. 103, 136–37 (2006).

economic interests that temper the desire to maximize economic gain would render a disservice to stakeholders by denying the essence of their humanity.[151]

Thus, regardless of its potential normative attractiveness, the Aristotelian account of ownership may be closer to the reality of most people's practical understanding and exercise of their ownership rights than the model of the shareholder as posited in contemporary corporate law.

To the extent that a stockholder enjoys a superabundance of wealth, he would be obliged to donate (or share) a portion of that wealth with those in need.[152] How a stockholder discharges this obligation is a matter of considerable discretion, however, and it need not necessarily implicate any corporation in which he or she has an ownership interest. That is to say, a wealthy shareholder of a corporation could attempt to fulfill his or her moral obligations toward the needy by encouraging corporate charity and accepting a reduction in stock value, or, alternatively, by donating money from his or her personal bank account. Aristotelian philosophy asserts merely the existence of this obligation—it says nothing about the exact method of its fulfillment. Thus, a wealthy shareholder need not involve the corporation in which he or she has an ownership interest in order to discharge his or her obligations to the needy; such obligations may be discharged via personal charitable giving unrelated to the corporation.

B. Implications for Boards of Directors

Although the application of Aristotelian conceptualizations of ownership to corporate shareholders is fairly straightforward,[153] the implications this has for boards of directors are less clear. Moreover, these implications are critical to ascertain because in the modern corporation it is the board of directors—and not the shareholders—who direct and control the organization.[154]

1. The Shareholder Wealth Maximization Norm

But before considering the implications of an Aristotelian approach to ownership to the board of directors, it is important to first set forth the appropriate role and responsibility of the board generally. As previously mentioned, boards of directors are traditionally understood to run their corporations on behalf of the corporate

151. Leo L. Clarke & Edward C. Lyons, *The Corporate Common Good: The Right and Obligation of Managers to Do Good to Others*, 32 U. DAYTON L. REV. 280 (2007); *see also* SISODIA ET AL., *supra* note 145, at 7 (stating that "[e]xcept perhaps among day traders and other short-term profiteers, most shareholders do enjoy feeling good about companies in which they invest," and noting that "institutional investors . . . have grown increasingly persnickety about the moral character of the companies in which they invest").

152. *See supra* Part III.B.

153. *See supra* Part IV.A (discussing the moral obligations attached to stock ownership).

154. *See supra* Part II.B. (noting the separation between ownership and control in a corporation). Some have argued that directors and managers *themselves* have personal, moral obligations to direct the corporation in ways that are consistent with the common good. George E. Garvey, *The Theory of the Firm, Managerial Responsibility, and Catholic Social Teaching,* 6 J. MARKETS & MORALITY 525, 535 (2003) ("[M]anagers cannot escape moral culpability by relying on a 'duty' to maximize their shareholders' profits. They must, rather, employ the resources under their control in ways that promote the common good."). This interesting argument is beyond the scope of this Article.

shareholders.[155] This understanding has given rise to the "shareholder wealth maximization norm," under which boards are said to have one objective: to maximize shareholder wealth.[156] But this norm does not follow from the traditional understanding. That is, to act on behalf of someone else's best interests does not invariably entail acting to maximize that person's wealth.[157] Instead, this responsibility would necessarily take into account the need to further and respect all the interests and obligations of one's principal (in this case, the corporate shareholders). This broader view of an individual's (or shareholder's) best interests more accurately captures factual[158] as well as legal reality.[159] Many (if not most) individuals subscribe to values and principles that surpass material wealth in order of importance, and routinely factor moral and ethical concerns into their decision-making. To these individuals, a course of action would only be in their best interest if, regardless of the economic gain it might promise, it does not run afoul of such moral and ethical concerns. Thus, enlarging the definition of "acting within the best interests of the shareholders," for the purposes of board action, to encompass respect for the moral and ethical principles of shareholders should not be considered a modification of the traditional responsibility of the board of directors (which is typically stated quite broadly, e.g., "corporate directors have a fiduciary duty to act in the best interests of the corporation's stockholders"[160]). Instead, it should be received as the restoration of a principle that has been unduly narrowed to consider economic interests alone.[161] For,

155. *See supra* text accompanying note 41 (noting the principle that shareholders are the sole beneficiaries of the corporation).

156. *See supra* text accompanying note 45 (explaining the minimalist view of a corporation's social responsibility).

157. Elhauge, *supra* note 44, at 783 ("To at least some extent, shareholders value nonfinancial aspects of corporate activities, such as whether those activities further the shareholders' social and moral views.").

158. *See supra* text accompanying notes 150–51 (describing the general desire of shareholders to invest in a company with a positive moral disposition).

159. *See* Elhauge, *supra* note 44, at 769 ("But duty of care laws never define the 'best interests of the corporation' as meaning solely the interests of the shareholders, nor do they ever define the interests of the corporation or shareholders to mean solely their financial interests. Both are glosses added by proponents."); Greenwood, *supra* note 150, at 135 (noting that corporate law entrusts boards with deciding "not only the technical issue of how to maximize, but also . . . the political issue of what or whether to maximize"); Stout, *supra* note 42, at 3 ("*Dodge v. Ford* is indeed bad law, at least when cited for the proposition that the corporate purpose is, or should be, maximizing shareholder wealth.").

160. Grand Metro. Pub. Ltd. v. Pillsbury Co., 558 A.2d 1049, 1055 (Del. Ch. 1988).

161. *Cf.* Paramount Comm'ns, Inc. v. Time Inc., 571 A.2d 1140, 1151–52 (Del. 1989) (finding legitimate board's concern over preserving its company's "culture"). It could fairly be argued that, although individuals are not wealth-maximizing autonomatons, and although individuals have other values and priorities in life beyond wealth-maximization, investors, when purchasing stock in a corporation, are acting with a single purpose: to increase their wealth. Thus, it would follow that, within this limited context, equating "wealth maximization" with "the best interests of the shareholder" would seem sensible. Nevertheless, I believe that even with this particular context, equating the two is not an accurate characterization of human behavior. For even within the realm of matters economic, many if not most individuals do prioritize certain other values above wealth maximization. *See* Greenwood, *supra* note 150, at 136–37 (noting that investors' goals are numerous and often conflicting); *see also* Craig Mackenzie & Alan Lewis, *Morals and Markets: The Case of Ethical Investing*, 9 BUS. ETHICS Q. 439, 439 (1999) ("Experiments . . . have indeed shown, for example, that people who have pro-environmental attitudes are prepared to take a small loss in order to invest in companies labeled as environmentally-friendly."). Further, it is undeniable that many shareholders are also "stakeholders" in a corporation by virtue of their status as employees of the corporation, neighbors of the corporation's facilities, etc. Lisa M. Fairfax, *Making the Corporation Safe for Shareholder Democracy,* 69 OHIO ST. L.J. 53, 85 (2008).

simply put, "maximizing shareholder welfare is not the same thing as maximizing shareholder profits."[162] Indeed, the most recent statement of the American Law Institute's Principles of Corporate Governance is consistent with this approach:

> Even if corporate profit and shareholder gain are not thereby enhanced, the corporation, in the conduct of its business:
>
> Is obliged, to the same extent as a natural person, to act within the boundaries set by law;
>
> May take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business; and
>
> May devote a reasonable amount of resources to public welfare, humanitarian, educational and philanthropic purposes.[163]

And when this broadened principle is combined with the moral obligations inherent in ownership from an Aristotelian perspective, the full repercussions of the Aristotelian approach to stock ownership become clear. For if stockholders have a moral interest in observing the common good and assisting the needy, boards would be compelled to take these interests into account in their decision-making. Doing so would not be inconsistent with the directors' duties, but rather completely congruent with such duties.[164]

2. Board Consideration of Shareholders' Moral Obligations

How directors can and ought to take Aristotelian moral interests into account is another question. With regard to the shareholders' obligation to utilize their property in a manner consistent with the common good, the directors' task is not (theoretically at least) problematic. In the process of decision-making, the directors would be called upon to consider the impact of corporate activity on the common good, in addition to the costs and benefits that such activity would have upon the corporation itself (and, ultimately, shareholder returns).[165] Many have argued (typically in response to stakeholder theorists

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Thus, for these individuals, even the maximization of their material well-being will not always equate to a maximization of their stock returns.

162. Elhauge, *supra* note 44, at 783.

163. AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS §2.01(b) (2005); *see also* Elhauge, *supra* note 44, at 763–66 (expanding upon the ALI principles).

164. This serves to answer the agency law critique of corporate social responsibility. For example, one commenter noted:

> Managers are employees of the shareholders and have a contractual and, hence, moral responsibility to fulfill the wishes of the shareholders. As a corporate executive, the manager is an agent of the corporation and has a fiduciary responsibility to the shareholders. Corporate social responsibility may be permitted within the limits of prior contractual agreements with the shareholders.

Younkins, *supra* note 45, at 105. By defining a stockholder's interests as including the moral obligations of ownership, the directors of a corporation, when taking moral considerations into account in their decision-making, are not exercising moral judgment on their own behalf, but rather on behalf of the stockholders themselves. *Cf.* Larry E. Ribstein, *Accountability and Responsibility in Corporate Governance*, 81 NOTRE DAME L. REV. 1431, 1433 (2006) ("Managers can promote shareholders' interests without maximizing profits to the extent the shareholders have some objective other than profit maximization.").

165. William Bratton and Michael Wachter point out that such parameters on the decision-making of

who assert the need for boards of directors to mediate among the interests of various constituencies) that introducing objectives into board decision-making beyond shareholder wealth maximization would be an impracticable imposition upon boards.[166] I believe that this overstates the difficulty involved, and that the added complexity to corporate decision making would be one of degree rather than of kind. For even without taking into account such objectives (which, arguably, many corporate boards already take into account[167]), "managerial decision-making is rarely reducible to data processing" and already involves a balancing of various interests and factors.[168]

A more difficult problem presented by this approach is the greater ability it gives management to shirk its responsibilities toward shareholders[169]—the original, critical problem identified by Berle and Means over 70 years ago.[170] Recall that in response to the concern that boards and management were not always scrupulously acting in the best interests of corporate shareholders, the law has imposed fiduciary duties upon boards, mandating that they act, at all times, in the best interests of the shareholders.[171] As shall be explained in further detail when this Article addresses issues of implementation, it is more difficult to hold boards accountable to corporate shareholders for violating these fiduciary duties if directors can defend their decision-making via recourse to "common good" considerations, and are not obliged to operate within the narrowly constrained parameters of the shareholder wealth maximization norm.[172] This is a significant concern, and is necessarily something that will be taken into account when considering

corporate boards are not new at all, but rather a basic "corporatist" assumption that the progenitors of modern corporate law, Berle and Dodd, each brought to their famous debate. Bratton & Wachter, *supra* note 51, at 103. As Bratton and Wachter explain: "[T]he calculus of corporate rights and duties must adjust and recognize a public interest constraint. Specifically, corporate directors have a duty to manage the business and affairs of the corporation in accordance with clearly articulated public policies, even if those policies interfere with the property interests of shareholders." *Id*. A critical difference between the "corporatist" approach described by Bratton and Wachter, and the Aristotelian approach set forth in this Article, is that under a corporatist approach, the public interest/common good obligations placed on corporate conduct are established by *the state;* under the Aristotelian approach, these obligations are not imposed by the state, but are rather moral duties on the part of individual shareholders, which are discerned and in turn acted upon by the board of directors selected by these same individuals.

166. *E.g.,* Norman P. Barry, *Do Corporations Have Any Responsibility Beyond Making a Profit?,* 3 J. Markets & Morality 101, 104–05 (2000).

167. *See* Karmel, *supra* note 58, 1157–58 (comparing the model of directors as corporate mediators to the model of directors as shareholder wealth-maximizers).

168. Dennis P. McCann, *Do Corporations Have Any Responsibility Beyond Making a Profit? A Response to Norman P. Barry,* 3 J. MARKETS & MORALITY 108, 110 (2000). Additionally, nonprofit corporations routinely have fiduciary obligations to various constituencies, and thus the impracticability of recognizing a board's obligations as running to various stakeholder groups appears somewhat overstated. *Cf.* Lewis D. Solomon & Karen C. Coe, *Social Investments by Nonprofit Corporations and Charitable Trusts: A Legal and Business Primer for Foundation Managers and Other Nonprofit Fiduciaries*, 66 UMKC L. REV. 213 (1997) (analyzing the legal bounds of nonprofit fiduciary responsibilities). *But see* Barry, *supra* note 144, at 117 (arguing that "[t]here is a real difference between the complexity surrounding economic decision-making . . . and moral decision-making").

169. *See* Bainbridge, *supra* note 10, at 1441 (commenting on the power afforded to managers under a multifiduciary regime).

170. *See supra* text accompanying notes 38–41

171. *See supra* text accompanying notes 40–44

172. *See infra* Part IV.C; *see also* Bainbridge, *supra* note 10, at 1441 (commenting upon the effect of the business judgment rule in a multifiduciary regime).

policy recommendations premised upon an Aristotelian conceptualization of stock ownership.[173] That said, I do believe that, as a practical matter, this concern may be overstated. Boards already have recourse to the lenient "business judgment rule" standard of review, under which their determinations will not be put aside by courts so long as it can be demonstrated that the decisions in question were untainted by conflicts of interest and the result of informed decision-making.[174] Permitting boards to include common good considerations in their decision-making would only add marginally, if at all, to the leniency of this already lenient standard.[175] Moreover, as David Westbrook suggests, perhaps these concerns are misplaced, as today the "key conflict . . . at most publicly-traded companies is" not between the owners/shareholders and the directors, but rather "between owners and the rest of the world."[176]

Lastly, some can be expected to question how a board could possibly implement shareholders' obligations regarding the common good when shareholders (and board members) may very well have different understandings of the common good. In response, it is important to make clear that the common good is an *objective* construct, and therefore does not vary from individual to individual.[177] Thus, whether the release of toxins into the air furthers or detracts from the common good actually might have a correct answer under Aristotelian thinking, and the correctness of the answer does not depend upon the personal opinions or preferences of the shareholders (or anyone else for that matter). So, although individuals may vary in their assessment of the common good, this is not particularly different from the fact that individuals might vary in their assessment of the rightness or wrongfulness of any particular matter (from racial discrimination to capital punishment to torture).[178] In each instance, there may be competing viewpoints, and to the extent that they conflict, one could very well be superior to the others. Which approach is the superior one, unfortunately, will not always

173. *See infra* Part IV.C (discussing the implementation of obligations and responsibilities of boards of directors under an Aristotelian understanding of ownership).

174. *See* Bainbridge, *supra* note 10, at 1441.

175. *See* Elhauge, *supra* note 44, at 770 ("[E]ven if the duty of care did nominally require profit-maximization, the business judgment rule makes plain that the duty of care cannot be enforced in a way that would bar managers from exercising discretion to sacrifice corporate profits in the public interest.").

176. Westbrook, *supra* note 72, at 105; s*ee also* John C. Coffee, Jr., "*No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 418 (1981) ("[P]rofessor Walter Werner has argued that the conduct of top managers is substantially influenced by the stockholders' desire for short-term capital appreciation. From this perspective, the corporate manager who makes illegal payments or evades environmental regulations has not breached the stockholders' trust, but instead is faithfully pursuing their desires.").

177. *See* ANTHONY J. LISSKA, AQUINAS'S THEORY OF NATURAL LAW 108 (1996) (discussing that the end to be obtained is "determined by the dispositional properties which make up a human nature. The ends are, therefore, objective goods").

178. Despite, perhaps, wide divergence of opinion regarding what the nature of common good concerns, it should be noted that there appears to be tremendous consensus among shareholders that such concerns should nevertheless be taken into account. *See* Elhauge, *supra* note 44, at 793 (noting that "one survey found that 97% of corporate shareholders agreed (75% strongly) that managers should consider other constituency interests" and that "about 88% agreed that managers considering moving to a new plant that would be profitable to shareholders 'should weigh the effect the move would have on its employees, customers, suppliers and people in the community it presently is in before deciding to move'" (quoting Larry D. Soderquist & Robert P. Vecchio, *Reconciling Shareholders' Rights and Corporate Responsibility: New Guidelines for Management*, 1978 DUKE L.J. 819, 841 tbl.3)).

be readily apparent, and as in any other context of group decision-making, the path ideally chosen will be that which is correctly assessed as optimal under the circumstances.[179]

Regarding the Aristotelian obligation of property owners to share with the needy, here the board of directors faces, initially, an impracticable hurdle. Recall that what informs this obligation would be the wealth of the *individual shareholder*, and not the size, profitability, or success of the corporation.[180] Additionally, even if one considers a wealthy shareholder, how that shareholder discharges his or her obligations to the needy is a matter of discretion on his or her part. A wealthy shareholder may very well elect to donate money to the needy from his or her own personal bank account, in which case any charitable donation of corporate assets on his or her behalf would be superfluous (that is, would go beyond the obligations imposed under an Aristotelian conceptualization of ownership). Given how quickly and readily shares change hands in a public corporation, it would be virtually (if not actually) impossible for a board of directors to know the particular financial status of each corporate shareholder, in addition to the degree to which each such wealthy shareholder has satisfied his or her obligations to the needy. Unless every single shareholder happens to be wealthy, and unless every single shareholder has also fallen short if his or her obligation to give to the needy, it would be improper, ceteris paribus, for the board of directors to donate corporate assets to the needy on behalf of the corporation's shareholders.[181]

C. Implementation

Given the obligations of shareholders under an Aristotelian conceptualization of ownership, and given the responsibilities of boards of directors in light of these obligations, the next subject to consider is how to go about implementing these obligations and responsibilities in the modern business corporation. It would seem as though the adjustments in corporate law needed to realize an Aristotelian conceptualization of ownership within the corporate context are relatively modest. They

179. To the extent that any expertise is felt necessary to render such assessments, boards could create a special committee to handle them. Such creation could occur voluntarily or, perhaps, be mandated by law. *Cf.* Sarbanes-Oxley Act of 2002 § 301, 15 U.S.C. § 78j-1 (Supp. V 2005) (requiring creation of audit committees).

180. *See supra* Part IV.A (applying the Aristotelian understanding of ownership to shareholders).

181. *See* Barry, *supra* note 144, at 117 (discussing the moral principles of company contributions to charitable causes). Some may not see much of a distinction between decision-making that takes the common good into account and corporate charitable giving, and thus may be perplexed by the divergent treatment of these subjects in this Article. For, at a high level of generality, it could be said that each represents a sacrifice of shareholder wealth in furtherance of some other concern. But this conflation of the two concepts overlooks some fundamental differences—differences that drive their disparate treatment. Exercising one's control over private property in a manner consistent with the common good, as I have explained, is central to the Aristotelian concept of ownership. This obligation is binding on all people at all times, and does not differ dramatically from the "ancient legal maxim [that] one's liberty to swing one's arms stops where another's nose begins." United States v. Joseph, 37 M. J. 392, 397 (C.M.A. 1993). Thus, a board's decision to take common good concerns into account is not in derogation of a shareholder's ownership rights, but rather an action in full concordance with these rights (properly understood in an Aristotelian sense). The obligation to engage in charitable giving, on the other hand, neither informs exactly how one may use his/her private property, nor applies to all people in all circumstances. Instead, the Aristotelian duty of charitable giving obliges individuals who enjoy a superabundance of wealth (and only such individuals) to share some of their wealth. How this sharing is to occur—the form it is to take—is left to the individual's discretion.

would focus on (a) empowering shareholders to better exercise the moral obligations of ownership, and (b) enabling boards to take into account the moral obligations of ownership in their decision-making. For reasons that shall be explained later, I do not believe that giving ownership-type rights, or legally enforceable fiduciary protections, to nonshareholder constituencies would be advisable.[182]

1. The Role of Law

Before delving into the substance of the adjustments identified above, a defense of their modesty shall first be presented. After all, one policy prescription could simply be for government to identify "the common good," and mandate that corporate decision-making factor in the government-identified common good.[183] I eschew that approach because, in addition to other serious objections, it would be inconsistent with other values and concerns that are part of Aristotelian thinking. More specifically, such an aggressive, mandatory approach would overstep the proper boundaries of positive law, and undermine the virtue-promoting function of law.

Building upon the foundations laid by Aristotle, Aquinas articulated an important distinction between what human beings ought to do (or ought not to do) by reason of morality, and what positive (human) law ought to command (or ought to prohibit) via coercion.[184] For as Aquinas recognized in a far more homogeneous society seven centuries ago, it would be folly for human law to absolutely mirror all the dictates of morality.[185] This is because not all persons are capable of making perfectly correct choices, and adhering to perfectly correct conduct, all the time.[186] Human lawmakers need to appreciate the fact that the average individual is (by definition) of average—and not heroic—virtue, and the law must set reasonable standards and expectations given this fact—otherwise law itself will fall into disrepute.[187] Indeed, according to Aquinas, only the more grievous vices ought to be circumscribed—namely, those vices that affect the common good.[188] And, in the case of corporate misconduct, the more grievous vices are indeed already circumscribed via criminal law, antitrust law, labor law, environmental law, and the like.[189] The misconduct that corporate social responsibility proponents ordinarily focus upon generally falls below this threshold of legal circumscription[190]—

182. For an excellent analysis of the benefits and drawbacks of several proposed revisions in corporate law to foster greater corporate social responsibility, see generally Ribstein, *supra* note 164.

183. In other words, adopt the corporatist approach. *See supra* note 165 (explaining the differences between the Aristotelian approach and the corporatist approach).

184. *See* Colombo, *supra* note 120, at 144–45 (summarizing the proper objectives of human law as expounded by Aquinas).

185. *See id*.

186. Indeed, most would probably agree that *no person* is capable of making perfectly correct choices, and perfectly executing those choices, all of the time.

187. *See* Colombo, *supra* note 120, at 144–45. *Cf.* Oliver Wendell Homes, Jr., *The Path of the Law,* 10 HARV. L. REV. 457 (1897) (observing that law is designed with the "bad man" in mind).

188. Colombo, *supra* note 120, at 145.

189. *See, e.g.*, Lainie Rutkow & Stephen P. Teret, *Limited Liability and the Public's Health*, 35 J.L. MED. & ETHICS 599, 601 (2007).

190. *See* Lucien J. Dhooge, *Beyond Voluntarism: Social Disclosure and France's Nouvelles Regulations Economiques*, 21 ARIZ. J. INT'L & COMP. L. 441, 465 (2004) ("[T]he European Commission defined corporate social responsibility as commitments voluntarily undertaken by companies 'which go beyond common

suggesting, perhaps, that legislatures and regulators have already concluded that this misconduct is not sufficiently grievous to warrant legal sanction.

Additionally, a mandatory approach to corporate social responsibility undermines one of the primary purposes of both law and private property as Aristotle saw things: namely, the promotion of virtue.[191] Virtue is critically important to Aristotle because he sees it as an indispensable predicate to both a happy life and a flourishing society.[192] Moreover, on a very practical level, it must be acknowledged that not all wrongdoing can be sufficiently foreseen and proscribed, and even if that were possible, "[t]here is no law that can prevent men from using their freedom in disorderly fashion."[193] In other words, there are significant limitations on society's ability to both promulgate, and enforce, law necessary to prevent and/or redress every potential wrongdoing.[194] As Einer Elhauge well explained:

> Even in an ideal world with perfectly unbiased decisionmaking processes, legal sanctions can never be made sufficiently precise to deter or condemn all undesirable activity because we lack perfect information and cannot perfectly define or adjudicate undesirable activity. Trying to eliminate those imperfections in information and adjudication would not be only unfeasible and costly but also undesirable in principle because of the harms that perfect surveillance would impose. Even if we could eliminate imperfect information by constantly videotaping everyone at zero financial cost, we probably would not find it worth the harm to privacy and the resulting deterrence of innovation and desirable spontaneous interaction.[195]

This, then, provides an additional reason why individual virtue is so important to society. For a virtuous individual is less likely (by definition) to engage in activity harmful to the common good, whether such activity is legally permissible or not, and whether such activity can be effectively policed or not. In other words, a virtuous citizenry helps fill the gap between those bad acts that society can and does prevent, and those bad acts that society cannot and/or does not prevent.[196] Moreover, there are strong

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regulatory and conventional requirements.'").

191. *See supra* text accompanying notes 120–24 (explaining the Aristotelian view that private property enables self sacrifice and charity, and that these virtues make possible true human happiness).

192. *Id.*

193. *See* CHAFUEN, *supra* note 117, at 34 (quoting DOMINGO DE SOTO, DE IUSTITIA ET IURE 105-06 (Madrid: IEP, 1968) (1557)).

194. *See* H.L.A. HART, THE CONCEPT OF LAW 166 (2d ed. 1994) ("There is a limit to the amount of law enforcement that any society can afford, even when moral wrong has been done."). And even if it were possible to circumscribe every potential wrongful act, and to enforce such circumscription, there is only so much law that a society such as ours can tolerate if it wishes to remain effectively free. As Grant Gilmore observed, "The better the society, the less law there will be . . . . The worse the society, the more law there will be." GRANT GILMORE, THE AGES OF AMERICAN LAW 111 (1977).

195. Elhauge, *supra* note 44, at 748; *see also* Katja Rost et al., *The Corporate Governance of Benedictine Abbeys: What Can Stock Corporations Learn from Monasteries?* 24 (Inst. for Empirical Research in Econ., Working Paper No. iewwp374, 2008), *available at* http://ssrn.com/abstract=1137090 (identifying the numerous organizational benefits that flow from "[i]nternal behavioral incentives" such as those successfully cultivated by Benedictine Abbeys).

196. *See* Elhauge, *supra* note 44, at 751–52 ("[O]ptimizing conduct requires supplementing legal and economic sanctions with a regime of social and moral sanctions that encourages each of us to consider the

arguments in favor of the position that a degree of virtue is indispensable for the free market economy.[197] Simply stated, the trust and confidence engendered via the presence of virtue significantly reduce transaction costs—among both arm's length market-participants, and internally between employers and employees, agents and principals—making possible transactions that might otherwise have been prohibitively expensive.[198]

Despite the importance of virtue, most scholars—including Aristotelian philosophers—generally recognize that law cannot, strictly speaking, make individuals virtuous.[199] Indeed, most would consider "coerced virtue" a contradiction in terms.[200] Virtue is the acquired habit of employing right reason to choosing good over the alternative, and is something that is developed by individuals over the course of a lifetime.[201] That said, Aristotle believed that the law did, nevertheless, have an important role to play in fostering virtue.[202] Good law can "produce the social environment that people need for authentic virtue," and can "channel people into good patterns of behavior" that facilitate the eventual free embrace of virtuous conduct.[203] And this role is best (and, arguably, least controversially) furthered by simply removing the structural impediments that get in the way of virtue and its exercise:

> Law works best if its ambitions are modest, leaving wider scope for ordinary morality. In corporate law, this modest rule of law principle suggests that it is a mistake to try to prescribe the do's and don'ts of proper manager and director behavior by law. A narrower objective might be to focus principally on removing obvious structural perversities in the market and regulatory framework.[204]

Thus, one easy way for the law to foster virtue is to allow it. And in the world of corporate law, the exercise of virtue is not allowed in many instances. Shareholders are poorly-equipped to exert moral pressure on the corporations in which they hold stock,[205]

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effects of our conduct on others even when doing so does not increase our profits.").

197. *See* Basant K. Kapur, *Harmonization Between Communitarian Ethics and Market Economics*, 2 J. MARKETS & MORALITY 35, 36–37, 45–46 (1999) (arguing that social and ethical considerations do play a role in workers' business dealings); *see also* Elhauge, *supra* note 44, at 753 ("Social and moral sanctions may even be more important than law to market efficiency."); *infra* Part V (explaining the justifications for using the Aristotelian understanding of corporate law).

198. *See* Kapur, *supra* note 197, at 36–37, 45–46 (explaining how trust and other ethical values contribute to more efficient functioning of the economic system); *see also* Ronald J. Colombo, *Exposing the Myth of Homo Economicus*, 32 HARV. J.L. & PUB. POL'Y (forthcoming 2009), *available at* http://papers.ssrn.com/so13/papers.cmf?abstract_id+1189499.

199. *See* ROBERT P. GEORGE, MAKING MEN MORAL 47 (1993) (reviewing MORAL MARKETS: THE CRITICAL ROLE OF VALUES IN THE ECONOMY (Paul J. Zak ed., 2008)) ("Laws can forbid the grosser forms of vice, but certainly cannot prescribe the finer points of virtue.").

200. *Id.*

201. *See* RAYMOND J. DEVETTERE, INTRODUCTION TO VIRTUE ETHICS 56–68 (2002) (describing the process by which human beings are trained to, and later in life elect to, behave virtuously).

202. *See id.* at 121 ("Although Aristotle's virtuous person has no need of moral laws . . . laws and other rule-like principles do play two important roles in Aristotle's ethics.").

203. *Id.* at 121–22.

204. David A. Skeel, Jr., *Christianity and the Large Scale Corporation* 17–18 (U. Penn. Law Sch. Pub. Law and Legal Theory Research Paper Series, Research Paper No. 07-45, 2007), *available at* http://papers.ssrn.com/abstract=1025959.

205. *See infra* text accompanying notes 215–17 (noting that shareholders have limited power to influence

and the common understanding is that boards are, in many jurisdictions, forbidden to sacrifice profits for the sake of moral concerns.[206] Thus, these are the two fronts upon which the battle for an Aristotelian conceptualization of ownership must initially be fought.

2. Shareholder Empowerment

Empowering shareholders to exert moral pressure upon corporate boards would, it seems, involve at least the following two corporate law reforms: (1) additional disclosure on the part of corporations with regard to the externalities of their operations, and (2) an increased range of corporate actions upon which corporate shareholders could act and vote. Neither approach, generally speaking (that is, additional disclosure and increased shareholder say over corporate decision-making), is radical or novel, but rather recurring types of solutions to corporate law problems.[207]

Regarding the first suggestion, additional disclosure on the part of corporations with regard to the externalities of their operations allows shareholders to invoke the "Wall Street Rule" and sell their shares if they are dissatisfied with the corporation. Such disclosure would help foster a market, therefore, for morally-conscious investing. Investors, through their own reading of corporate disclosure documents, or through third-party analysis of such disclosures, would be better able to direct their investment dollars toward those companies which share their moral concerns. The proliferation of "green," "socially-conscious," and faith-influenced mutual funds that employ non-economic screens in selecting investments attests to the vitality of this market.[208]

Without belaboring the details, the disclosure envisioned here would be a "common good" impact statement of sorts that would identify the known externalities (economic and non-economic) upon corporate constituents and third parties. An impressive example of such a statement is Starbucks Corporation's Corporate Social Responsibility report, which details how Starbucks Corporation's activities have impacted "society," the "environment," "health and wellness," and how the corporation has treated its employees.[209] A much more modest method of disclosure, in the form of a section of the

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corporate decision-making).

206. *See infra* text accompanying notes 226–27 (discussing the necessity of nonshareholder constituency statutes because they allow boards to consider factors outside of wealth maximization).

207. *See, e.g*, LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY, AND HOW THE BANKERS USE IT 92 (1914) ("Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."); Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 835 (2005). *But see* Stephen M. Bainbridge, *Responses to Increasing Shareholder Power*, 119 HARV. L. REV. 1735, 1735 (2006) (taking "issue with Bebchuk's proposal to replace the existing, mostly permissive rules disempowering shareholders with a new set of mostly mandatory rules empowering them").

208. Douglas M. Branson*, Corporate Social Responsibility Redux,* 76 TUL. L. REV. 1207, 1219 (2002) ("[T]he growth rate of mutual funds that utilize various 'social screens' in making investments is generally three times the growth rate of other funds."); Raymond Fazzi, *Socially Conscious Investing Proliferates*, FIN. ADVISOR, Jan. 2002, *available at* www.financialadvisormagazine.com/past_issues.php?idArticle=153&idPastissue=ss; *see also* SISODIA ET AL., *supra* note 145, at 4 ("[P]eople are increasingly looking for higher meaning in their lives, rather than simply looking to add to the store of things they own . . . . The search for meaning is changing expectations in the marketplace, and in the workplace. Indeed, we believe it is changing the very soul of capitalism.").

209. STARBUCKS CORP., SOCIAL RESPONSIBILITY/FISCAL 2006 ANNUAL REPORT 1 (2006), *available at*

corporation's annual report, would also suffice (something similar to which is currently required by a number of European nations[210]). Unlike the Starbucks example, I do not think it is necessary to task corporations with scrutinizing the entirety of their operations for potential harm to individuals, communities, or the common good. Instead, merely identifying those potential (and actual) harms that the corporation already knows about, or already should know about, would suffice.[211] However, corporations can, without exorbitant cost, and should, report upon the reasonably foreseeable consequences of their operations, even if these consequences do not affect the profitability of the corporation, or the return to shareholders. As with other areas of corporate disclosure, the threshold for reporting such consequences should be that of materiality: whether a reasonable person would have regarded the matter as important.[212]

Lastly, further significant limitations of the disclosure rule suggested here would probably be necessary to make it workable. Just as, for example, the federal securities laws do not require the periodic disclosure of all information—not even all *material* information—to investors, but rather, only that information which concerns certain specific areas of operation,[213] a mandatory "common good" disclosure rule could similarly be bounded by certain particular areas of concern (such as the treatment of employees, or the environmental effects of business operations), leaving additional such disclosure as voluntary.[214]

As with disclosure, the concept of increasing shareholder say over corporate affairs has been proposed as a solution to a number of corporate law problems.[215] Currently, shareholders are quite limited in their ability to influence corporate decision making, and only the most significant of decisions require shareholder vote (such as amending the corporate charter).[216] Indeed, shareholders' most significant power with regard to corporate governance, namely, the power to elect the board of directors, is itself stymied by rules that practically if not legally limit shareholder ability to exercise this power.[217]

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http://www.starbucks.com/aboutus/csrannualreport.pdf.

210. *See* SISODIA ET AL., *supra* note 145, at 29.

211. Just as individuals are not ordinarily held culpable for harms inflicted that were not reasonably foreseeable, corporations should not be burdened with the need to unreasonably investigate the various potential consequences of each and every one of its actions. *Cf.* William H. Hardie, Jr., *Foreseeability: A Murky Crystal Ball For Predicting Liability*, 23 CUMB. L. REV. 349, 349 (1993) (tracking the history and relative merits of the role of foreseeability).

212. LOUIS LOSS & JOEL SELIGMAN, FUNDAMENTALS OF SECURITIES REGULATION 915–16 (5th ed. 2004) (discussing the materiality standard).

213. *See generally* Form 8-K, 17 C.F.R. 249.308 (2008); Form 10-K, 17 C.F.R. § 249.310 (2008); Form 10-Q, 17 C.F.R. 249.308a (2008).

214. *But see* Elhauge, *supra* note 44, at 815 (doubting the efficacy of such disclosure on the grounds that "shareholder insulation and collective action problems will leave shareholders with little incentive to study any disclosed information and quite underresponsive to social and moral sanctions even if they do").

215. *E.g.*, Bebchuk, *supra* note 207, at 235 (suggesting increased shareholder participation in corporate management); Fairfax, *supra* note 161, at 59–61 (same).

216. Bebchuck*, supra* note 207, at 836–37.

217. *See generally* Lucian Arye Bebchuk, *The Myth of the Shareholder Voting Franchise*, 93 VA. L. REV. 675 (2007) (arguing that shareholders do not, in reality, participate in corporate democracy); *see also* Greenwood, *supra* note 150, at 150 (noting that shareholders' political and market power is limited). Shareholder rights over corporate management are generally limited to (a) voting upon certain corporate undertakings (such as a merger or liquidation); (b) voting upon amendments to the articles of incorporation; (c) undertaking shareholder derivative litigation to remedy breaches of fiduciary duty on the part of the directors;

The lack of control over corporate conduct is particularly problematic once one adopts an Aristotelian conceptualization of ownership. For once one subscribes to the notion that ownership rights are coupled with moral obligations toward the common good, the corporate shareholder acquires an obligation to see to it that the corporation's operations further (or, at least, do not harm) the common good.[218] Thus, although governance has been handed over to the corporation's board and officers, the shareholder "can never shirk [his or her] supervisory and secondary duty . . . to make sure [the corporation is operated] justly, morally, and beneficially."[219] From this duty it flows that a corporate shareholder must have a "clear right . . . to exercise control" over the corporation for which he or she is "held seriously responsible."[220]

Again, the specific details of what form this control should take shall not be spelled out here. At a minimum, however, it would seem that shareholders should have veto power over corporate decisions that could fairly be construed as harmful to the common good.[221] A more aggressive approach would be to require affirmative shareholder approval of such decisions. As with the proposed disclosure rule, practicality probably dictates that specific categories of decision-making that most frequently implicate serious common good concerns be enumerated, and shareholder action be limited to those. Adding to this could be greater ability on the part of shareholders to propose and adopt binding (rather than merely precatory) shareholder resolutions regarding how the corporation can and cannot conduct itself—policies that would inform board decision—making as much as the drive to maximize shareholder value.[222]

Of course, there is no guarantee that increased shareholder control will result in a corporation more oriented toward the common good than is presently the case. In fact, some prominent scholars have argued that precisely the opposite is more likely: corporations would probably become even more focused on shareholder wealth maximization as a result of increased shareholder control.[223] I disagree. As explained, the current regime already presumes that shareholders are solely interested in wealth

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and (d) electing the directors. *See* Robert P. Thompson, *Preemption and Federalism in Corporate Governance: Protecting Shareholder Rights to Vote, Sell, and Sue*, 62 LAW & CONTEMP. PROBS. 215 (1999). Additionally, shareholders can propose shareholder resolutions pursuant to federal proxy regulation, but there are significant restrictions on the form and content of these resolutions, and, moreover, they often must be formulated as merely precatory (and nonbinding). *See* Julian Velasco, *Taking Shareholder Rights Seriously*, 41 U.C. DAVIS L. REV. 605, 609 (2007) (discussing the legal status and rights of shareholders).

218. *See* David C. Bayne et al., *Proxy Regulation and the Rule-Making Process: The 1954 Amendments*, 40 VA. L. REV. 387, 421–22 (1954) (recognizing the shareholder's moral duty to exercise responsibility in controlling his assets).

219. *Id.* at 421.

220. *Id.*

221. *Cf.* Elhauge, *supra* note 44, at 795, 815–18 (discussing the role of shareholder voting in board decisions to sacrifice profits for the benefit of other concerns).

222. *See supra* note 217 (discussing shareholder rights over corporate management).

223. *See* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 304–05 (1991) (asserting that the mediating model would lead to opportunistic corporate governance); Bebchuk, *supra* note 207, at 912 (advancing the theory that central managerial power protects the corporation from "a narrow, shareholder-centered view of the corporation"). *But see* Fairfax, *supra* note 161, at 53 (arguing that evidence suggests that "shareholders will use their increased voting power to advance the interests of stakeholders").

maximization;[224] it is difficult to see how allowing shareholders greater voice in corporate affairs could lead to anything more extreme than this. Rather, to the extent that the current regime is predicated on an incomplete, inaccurate caricature of shareholder concerns and behavior,[225] shareholder empowerment should be predicted to have a moderating, humanizing influence on corporate behavior.

3. Board Empowerment

Independent of shareholder action, boards should be allowed to take the common good into account when engaged in corporate decision-making. Thus, "nonshareholder constituency" statutes, which many states have already adopted, are an indispensable development. These statutes explicitly permit the board to take into account the effects of corporate conduct on constituents other than the shareholders, thus downgrading the wealth maximization norm from *the* priority to *a* priority.[226] Without such statutes, directors could very well face liability (in a shareholder derivate action premised upon breach of fiduciary duty) if they were to pursue a course of action that was designed to do anything less than maximize shareholder returns, regardless of their reasons for so deciding. Thus, for example, a board decision to reduce the pollution of its factories, would, arguably, violate the director's fiduciary duties to the shareholders absent a statute authorizing the board to make its decisions on grounds that include more than simply the maximization of profits if such reduction was neither legally mandated nor "good for business" (as would be the case if the reduction of pollution would, for example, provide the company with a competitive advantage in the marketplace).[227]

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224. *See supra* Part IV.B.1.

225. *See supra* Part IV.A.

226. *See generally* Roberta Romano, *What is the Value of Other Constituency Statutes to Shareholders?*, 43 U. TORONTO L.J. 533 (1993).

227. *Id*. Many assert that "doing good" is actually beneficial for a firm, and thus the conflict between profits and moral obligation are largely illusory. *E.g.*, SISODIA ET AL., *supra* note 145, at 33 ("In our view, the 'shareholder versus stakeholder' debate presents a false dichotomy."); Garvey, *supra* note 154, at 535 ("In a well-functioning firm, with a sound business ethic, management committed to maximizing shareholder profits should not present a serious moral dilemma. Such a theoretical firm would be compensating employees appropriately, using the earth's resources wisely and providing customers with quality products at fair prices. Attention to the 'bottom line' does not detract from the common good."); Younkins, *supra* note 17, at 105 ("Socially responsible actions such as charitable contributions may be acceptable when the manager makes these in anticipation of effects that, in the long run, will be beneficial to business."). These sentiments are certainly true—to a degree, at least. That is, oftentimes, serving the common good, and treating a corporation's various constituencies justly, will be good for business (especially if such conduct is loudly trumpeted). In such cases, there is little conflict between the shareholder wealth maximization norm and the common good, and thus no reconciliation between traditional and progressive corporate law scholars is necessary. However, regardless of how common such a happy confluence of interests might occur, the fact remains that sometimes the dictates of the shareholder wealth maximization and the common good diverge starkly. As one scholar put it:

> [I]n the modern American world of business, managers [sometimes] maximize shareholders' returns only by imposing unacceptable costs on employees, consumers, and society generally. These costs—a sort of moral externality—may reflect the gains derived by depriving workers of their dignity, perhaps by paying less than a living wage or by maintaining an inhumane work environment, by polluting the environment or by producing dangerous, immoral, or excessively costly products.

Garvey, *supra* note 154, at 535; *see also* Joshua D. Margolis & Hillary Anger Elfenbein, *Do Well by Doing*

Unfortunately, empowering directors to take common good concerns into account also enables directors to more successfully advance their *own* interests or agendas at the expense of corporate shareholders. For, as things currently stand in most jurisdictions (including Delaware), a director accused of violating his or her fiduciary duties to the shareholders must, in defense, prove that he or she was indeed acting (or reasonably attempting to act) in the shareholders' best interests (typically interpreted as acting to maximize shareholder wealth).[228] If, however, the directors are permitted to take into account the admittedly broad concept of the common good, they could more easily defend challenged decisions by linking them to some common good concern (rather than needing to demonstrate that the decision was calculated to further the shareholder's interests). Although some scholars believe this concern is overstated due to the operation of the business judgment rule,[229] or misplaced due to the realities of most current corporate wrongdoing,[230] I nevertheless believe that this concern is a significant one that demands serious consideration. A closely related concern is the effect that practically unbridled directorial discretion would have on the capital markets; such a development could precipitate a flight of capital from the markets, as investors may be wary of purchasing stock under such circumstances—fearing both illegitimate and, perhaps, legitimate exercises of the newlyexpanded directorial discretion.

All this demands, it would seem, some limiting device on the power of directors to take the common good into account. And this limiting device must, in turn, not be of such a nature that it would generate litigation over questions of "common good decision making," as this would undercut the very purpose of permitting directors enhanced discretion in this area. Contemplation of the appropriate balance here requires a serious

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Good? Don't Count on It, HARV. BUS. REV., Jan. 2008, at 19, 19–20 (arguing that there is not a substantial link between corporate social performance and corporate financial performance); SISODIA ET AL., *supra* note 145, at xxiv ("Seven hundred executives were asked why their companies engaged in social or citizenship initiatives. Only 12[%] mentioned business strategy, 3% mentioned customer attraction and retention, and 1% cited public expectations. The remaining 84% said they were driven by motivations such as improving society, company traditions, or their personal values."). Needless to say, the situations where the common good and policies designed to maximize shareholder wealth unavoidably diverge present the far more difficult (and interesting) problems that are the focus of this Article.

228. More specifically, if accused of violating his or her duty of care, the director will need to prove that his or her actions were not grossly negligent in attempting to maximize shareholder wealth, and that a conflict of interest between the director and the shareholders was lacking. *See* CLARK, *supra* note 44, § 3.4 (discussing the duty of care). If accused of violating his or her duty of loyalty, the director will ultimately need to demonstrate that he or she was acting fairly toward the shareholders, given his or her obligation to maximize shareholder wealth. *Id.* § 4.1 (discussing the duty of loyalty).

229. *See* Bainbridge, *supra* note 4, at 979–80. Professor Bainbridge explained:

> In most jurisdictions, courts will exhort directors to use their best efforts to maximize shareholder wealth. In a few jurisdictions, courts may exhort directors to consider the corporation's social responsibility. In either case, however, the announced principle is no more than an exhortation. The court may hold forth on the primacy of shareholder interests, or may hold forth on the importance of socially responsible conduct, but ultimately it does not matter. Under either approach, directors who consider nonshareholder interests in making corporate decisions, like directors who do not, will be insulated from liability by the business judgment rule.

Id.

230. *See supra* text accompanying note 176 (stating that the conflict is between the shareholders and the rest of the world, not between the shareholders and the directors).

look at the director's fiduciary duties—namely, the duty of loyalty and the duty of care—to see how these duties would be impacted by an expansion of directorial discretion to encompass common good concerns.

The duty of loyalty protects shareholders against the most egregious forms of director misconduct—misconduct in which the director feathers his or her own bed at the expense of the shareholders.[231] Permitting boards to take the common good into account would have little impact in cases involving a breach of this duty. The prima facie showing—that directors rendered their decisions while subject to a conflict of interest—would not seem to be very much affected.[232] An accused director's defense—that his or her actions were fair to the shareholders—would, perhaps be made somewhat easier because the fairness inquiry would now be broadened to take into account common good concerns. That said, the defense would need, of course, to be presented to a court, and the pretextual invocation of common good concerns is, hopefully, something that the fact-finding process can get to the bottom of. Given the costs and risks associated with litigation over such a fact-intensive subject, it seems highly unlikely that directors will be significantly more willing to breach their duty of loyalty as a result of the potentially increased ability to defend themselves at trial on the issue of fairness.

The fiduciary duty analysis that consideration of common good concerns most seriously impacts is that of the duty of care. Pursuant to this duty, the directors are obliged to make the decisions that a reasonably prudent person would make with respect to the management of his or her own property.[233] By replacing a wealth-maximization focus with a broader best interest mandate (that encompasses common good concerns), directors would have greater latitude in arguing that they acted appropriately. This is, of course, compounded by the business judgment rule standard of review usually applicable in such situations, under which the directors will prevail provided they were not grossly negligent in the fulfillment of their duty of care.[234]

Although, conceptually, this appears problematic, practically speaking this too should not pose a serious problem. Directors can already legitimately take the common good into account if, in doing so, they expect (subject to the standard of gross negligence) that doing so will ultimately redound to the benefit of the shareholders.[235] By redefining the best interests of the shareholder to include a concern for the common good, the Aristotelian approach removes from the analysis the need for a director to justify his or her decision-making as ultimately wealth-maximizing. In other words, a director's defense could rely on the fact that common good concerns precluded or demanded certain choices, and need not resort to linking his or her decision to some ultimate wealth-maximization theory.

Nevertheless, it must be kept in mind that the director's decision will still be guided by the principle that the shareholders have invested to earn a profit, and thus the director's common good analysis will still be fixed firmly within that context.[236]

231. *See* CLARK, *supra* note 44, § 4.1 (discussing the duty of loyalty).

232. *See id*.

233. *See id.* § 3.4 (discussing the duty of care).

234. *Id.*

235. *See supra* note 227 (discussing how maximizing shareholder profits need not detract from the common good).

236. *See* GERMAIN GRISEZ, DIFFICULT MORAL QUESTIONS 454 (1997) (arguing that business managers

Directors could not legitimately pursue, therefore, the common good to the exclusion of the shareholders' interest in earning a profit on their investment (that would be corporate charity); instead, when making decisions aimed at benefiting the shareholders, the directors would be permitted to take the effect of the common good into account. And when one considers that, in the process of such decision-making, directors are to behave as a "reasonably prudent person" would, the additional latitude afforded directors under the Aristotelian approach does not seem particularly problematic.

Further, within the context of the duty of care, what is really at issue is not malfeasance, but rather nonfeasance or simply poor judgment. In other words, within this context, we are not faced with a conflict of interest between the directors and the shareholders, and thus there are no strong, self-interested motives that would drive directors to waste shareholder assets.[237]

The question of corporate charitable giving remains a thorny one, however. As previously discussed, although *all* owners of property have moral obligations to utilize their property in a way that is consistent with the common good, only *wealthy* owners have an obligation to share their superabundance with the needy. Since it is unlikely that every shareholder in a public corporation would be wealthy, corporate charitable giving would be an unnecessary (and, moreover, a justly undesired) undertaking from the perspective of these non-wealthy shareholders.[238] Additionally, as other theorists have pointed out, unless the corporation was organized to pursue philanthropic activities, it would not be just to appropriate corporate resources toward such ends.[239]

Fortunately for those who would like to promote, rather than eliminate, corporate

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must make decisions that generally further the "common end" of the business enterprise).

237. One nagging concern here could be the strong "do-gooder" impulse that some directors and officers might have, which could cause them to afford a disproportionate amount of weight to common good concerns versus shareholder interests. It is difficult, however, to imagine many such individuals who would make their way through the corporate ranks and the vetting process and ultimately be selected as board members or high-ranking executives. It is even more difficult to imagine that the majority of a corporate board would ever consist of such individuals. But if concerns persist, one solution would be to tighten the tie of executive compensation to stock performance—that should serve to dampen, somewhat, a disproportionate tilt toward common good concerns over shareholder interests. And should the disproportionality be particularly egregious, the director in question would most likely be opening himself or herself up to a challenge at election time or, possibly, shareholder derivative litigation premised upon a breach of the duty of care. *See* Robert J. Rhee, *Corporate Ethics, Agency, and the Theory of the Firm*, 3 J. BUS. & TECH. L. 309, 328–29 (2008) ("Agents [already] have enormous discretion to conduct business as they see fit. Agents must always maintain a strong profit motive to ensure economic viability, and the market forces of executive labor and corporate control ensure a healthy degree of fidelity to that end."); *see also* Elhauge, *supra* note 44, at 805–11 (addressing why excessive managerial generosity is not a problem to be feared).

238. In a closely-held corporation, with few shareholders, all of whose identities are well-known by the board, this particular obstacle could, perhaps, be overcome.

239. *See* GRISEZ, *supra* note 236, at 454.

> The common end of every voluntary association is determined by its participants' mutual understanding and consent. A profit-making business is a voluntary association of persons who cooperate in the specific activities for which it was organized, in order to achieve various economic benefits . . . . So, like people who exercise authority in any other voluntary association, the directors and managers of a business should not elect to use its resources for purposes that, however good in themselves, do not contribute to its common good.

Id.

charitable giving, solutions to this obstacle can be found. One solution would be for shareholders to "themselves determine[] the level of corporate social giving."[240] A threshold amount, in terms of percentage of profit, could be set at each annual meeting via shareholder vote. Another would be for directors to simply disclose their intention to engage in corporate charitable giving in advance. This disclosure would enable those shareholders who were not in a position to invest in a corporation with eleemosynary leanings to sell their stock and invest elsewhere.[241] Still others have suggested it would be permissible to base corporate charitable giving upon the level of resources that "the average" shareholder would possess under the theory that shareholders should recognize, if not expect, this possibility.[242]

4. Legal Mandates

Some scholars have advocated the need to give nonshareholder constituents seats on boards of directors, or the protections of fiduciary duties flowing to them from the board, or the ability to sue the corporation if their interests are not properly considered.[243] Such proposals to implement a "stakeholder" model of the corporation, however, hearken back to the more aggressive, mandatory approaches previously rejected as inconsistent with other Aristotelian values.[244] The thrust of the approach taken thus far is to rely upon individual moral discernment to promote corporate conduct that conforms to the common good. This is important within Aristotelian thinking because virtue can only be developed by exercise—not by coercion. By empowering shareholders to act upon their moral beliefs, and by protecting directors who act upon their moral beliefs, the approach outlined above promotes civic virtue by removing the barriers to its exercise. Although there are more immediate and direct ways of controlling corporate misconduct, for

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240. *See* Barry, *supra* note 144, at 117 (discussing appropriate corporate charitable expenditures).

241. Frank Easterbrook and Daniel Fischel have commented that they have no problem with corporate charitable giving so long as it is disclosed. *See* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991). An interesting question, that probably poses a much larger theoretical problem than practical problem, is whether the directors could be justified in announcing this decision if the announcement alone would cause a decrease in stock value—thereby decreasing the value of stock held by those investors who are neither obliged nor in a position to donate to charity.

242. *See* Leo L. Clarke & Edward C. Lyons, *The Corporate Common Good: The Right and Obligation of Managers to Do Good to Others*, 32 U. DAYTON L. REV. 273, 286 (2007); *Cf. Roundtable Discussion: Corporate Governance*, 77 CHI.-KENT L. REV. 235, 257 (2001).

> Warren Buffett's remarks come to mind, that he had a friend who was a fundraiser who raised funds from corporations for some charity. He would go in and he would raise a lot of money from CEOs using stockholders' money, but never did he see a CEO reach in his pocket for his own checkbook and write a check for ten dollars. Somehow, it's much easier to spend money when it's not your own and to be some kind of a local hero.

Roundtable Discussion: Corporate Governance, *supra*, at 257.

243. *See* Green, *supra* note 67, at 1411–12 (discussing the expansion of the view that corporate management should consider the interests of constituents). An interesting proposal recently proffered toward this end is to include non-shareholder concerns in the board's duty of care calculus. *See* Sneirson*, supra* note 50, at 469. Pursuant to this approach, a board would violate its duty of care, and be accountable to its shareholders, by failing to sufficiently inform itself and consider the effects of corporate activity on shareholder constituents. *Id.* at 469–70, 477–81.

244. *See supra* Part IV.C.1.

reasons articulated previously, in the long term, civic virtue serves as an indispensable back-stop to such misconduct.[245] Legally compelling boards to take into account the interests of other constituents, as some advocate, undermines the enterprise of fostering virtue.

Additionally, attempts to promote corporate social responsibility by granting enforcement mechanisms to nonshareholder constituents institutionalize a regime of special interest politics, in which no one is entrusted or expected to look after the common good, but rather in which each party seeks to maximize his or her own private good.[246] This is an important point to bear in mind—although the *strength* of the Aristotelian approach is admittedly limited by its voluntary nature, its *scope* arguably extends much farther than that of many more aggressive approaches. Thus, for example, environmental degradation, if objectively detrimental to the common good, would properly be taken into account by a board of directors under the Aristotelian approach to stock ownership. Although "moral considerations affecting non-stakeholders seem to be appropriate business considerations,"[247] such environmental degradation would not necessarily be something that nonshareholder constituents would feel compelled to lobby against under a stakeholder model of the corporation.[248] Thus, "[t]hough many business ethicists make a direct and explicit linkage between stakeholder theory and the movement toward corporate social responsibility, there is no logical connection between the two. Nor does stakeholder theory justify the idea of corporate social responsibility."[249]

Lastly, the imposition of legal rules compelling the moral obligations identified by Aristotle and his successors could very well precipitate the flight of capital from the equity markets. Wresting control over these issues from shareholders and directors, and granting it (in whole or in part) to regulators, courts, and/or other constituents could be expected to frighten many potential equity investors away from stock ownership, and thus increase the cost of raising capital. Although merely empowering directors to take common good considerations into account may have similar deleterious effects, such effects would most likely be significantly greater were these considerations made coercively enforceable in some fashion.

V. Justifications for Use of an Aristotelian Understanding of Ownership in Corporate Law

Within the Aristotelian tradition has been developed the well-known axiom that ends do not justify the means.[250] Thus, in observance of that axiom, although I have laid out reasons why I believe an Aristotelian approach to stock ownership would be helpful to corporate law theory and practice, I shall now endeavor to justify such an approach

245. *See supra* Part IV.C.1.

246. *See* Westbrook, *supra* note 72, at 117 (observing that stakeholder interests are "particular and . . . in that sense private").

247. Clarke & Lyons, *supra* note 242, at 293.

248. Indeed, it is very possible to imagine a situation in which nonshareholder constituents—employees, for example—might well be in favor of environmental degradation depending upon (a) where it occurs and (b) the impact that preventing such degradation may have on their wages.

249. McCann, *supra* note 168, at 111.

250. Alasdair MacIntyre, After Virtue: A Study in Moral Theory 149 (2d ed. University of Notre Dame Press 1984) (1981).

intrinsically—largely without regard to its usefulness. After all, as I have discussed previously, the Aristotelian conceptualization of ownership is not the commonly accepted view of ownership in our society today[251]—what, then, justifies the use of this conceptualization to define the rights and duties of corporate shareholders?

At least three justifications exist for adopting an Aristotelian conceptualization of ownership within the particular context of shareholder rights and duties. The first justification arises from the historical role and purpose of the business corporation. As previously explained, the business corporation, originally, was an organization chartered to serve a clear public purpose.[252] "The early Nineteenth Century . . . understood the corporation as a means for the state to accomplish certain economic goals."[253] Thus, the multiple advantages of incorporation were not considered something bestowed upon simply any business enterprise, but rather were reserved for those special undertakings that were particularly salutary for the common good.[254] Although this connection has certainly eroded over time,[255] the fact remains that to this day, unlike a partnership, or a sole proprietorship, the corporate form and its advantages exist by grace of the state.[256] This provides, I believe, a justifiable grounds for considering the public interest/common good obligations attached to ownership of a corporation as greater than such obligations in connection with other forms of private property.

Secondly, modern corporate law scholarship already provides a justification for treating stock ownership differently from other forms of ownership in our society. As touched upon previously, many scholars today have observed that corporate stockholders bear little resemblance to "owners" in the colloquial sense of the term.[257] Due to the separation of ownership from control, corporate shareholders do not exercise the typical powers of ownership over the corporations in which they have purchased stock.[258] Thus, the ownership rights of corporate stockholders are already recognized as different from the ownership rights of other property holders. Consequently, the precedent already exists for applying a different conceptualization of ownership to the ownership of corporate stock.

Indeed, modern corporate rhetoric suggests that an Aristotelian understanding of corporate ownership is already being embraced. "[E]very mission statement of every

251. *See supra* Part III.A (explaining that in American society property ownership embraces individualism and broad liberty of personal use).

252. *See supra* Part II.A (explaining that corporations were originally established through state legislative action and only to promote a public interest or purpose).

253. Westbrook, *supra* note 72, at 122.

254. *See id*. (explaining that in the early nineteenth-century the corporation had a purely governmental function).

255. Or perhaps, more accurately, has been supplanted by the view that the corporate business form, even employed strictly for private gain, nevertheless furthers the common good. *See supra* note 34 and accompanying text (setting forth capitalism's postulate that the pursuit of self-interest furthers the common good).

256. *See supra* Part II.A (discussing the transition of the corporation from a primarily governmental organ to a private entity); *see also* Jennifer Hill, *Public Beginnings, Private Ends—Should Corporate Law Privilege the Interests of Shareholders? in* INTERNATIONAL CORPORATE LAW 18–21 (2000).

257. *See supra* note 66 and accompanying text (stating that some theorists argue that shareholders are not owners in the practical sense because they do not resemble traditional owners).

258. *See supra* note 65 and accompanying text (arguing that shareholders are absentee owners and therefore the connection between the shareholder and the corporation is several steps removed).

Fortune 100 Company" already rejects the notion that "a corporation's *primary* purpose is to maximize profits. The common phrasing instead is, simply *fair profit* or an *optimal* return to investors within the context of the congeries of other corporate interests."[259] And, most appropriately, Lisa Fairfax has reminded us that an Aristotelian understanding of rhetoric, which focuses on its "intrinsic value as a persuasive and expressive device . . . reveals normative dissatisfaction with shareholder primacy [defined by Fairfax as the belief that "the corporation's sole or primary purpose is to maximize shareholder profit"[260]] that extends to both customers and employees as well as the business community and investors."[261]

Lastly, and perhaps most controversially, the Aristotelian approach can claim justification to the extent that the prevailing approach is losing its justification. That is, a fundamental principle justifying the status quo is that corporations, like people, serve the common good when they act in furtherance of their own self-interest. This, after all, is the premise of free-market capitalism:

> When commerce is conducted within a capitalistic society, virtue is promoted. The pursuit of profit reflects the presence of many of the virtues. The free market rewards polite, accommodating, tolerant, open, honest, realistic, trustworthy, discerning, creative, fair-dealing businessmen. In the long run, profitable businesses tend to be populated by good people (i.e., people of character), who, at a minimum, conduct business in accord with basic ethical principles calling for honesty, respect for persons and property, fidelity to commitments, justice, and fairness . . . .
>
> Business people have incentives to do the right thing. Lying and cheating may ruin the company's image and reputation. Mistreating workers will lead to decreased productivity, absenteeism, grievances, and employee turnover. Unsafe working conditions will lead to higher wage demands. Misinforming customers or giving them less than they bargained for will lead to reduced sales. Ignoring product safety could lead to accidents, lawsuits, and decreased sales. Taking advantage of suppliers may result in material shortages and possible shutdowns. Screening out potential employees because of race, gender, or other group characteristics means reducing the firm's chances of hiring the best workers. Excluding customers because of their group identity means losing sales to competitors.
>
> Successful businesses seek out talented and virtuous managers who bring out the best in others, help employees develop and improve through training and supervision, provide advice and support, share values with others in the firm, and help workers recognize the wholeness of their lives.[262]

Unfortunately, there is substantial evidence that this is not always the case. As explained by David Westbrook, the Enron debacle serves as an example of "a failure of

259. Clarke & Lyons, *supra* note 242, at 276–77.
260. Fairfax, *supra* note 49, at 676.
261. *Id.* at 712.
262. Younkins, *supra* note 17, at 98–99.

capitalism to order society well."[263] The financial crisis of 2008 further underscores this point.[264] Although an explanation of why the laws of the market don't seem to apply as expected to some aspects of the modern business corporation is beyond the scope of this Article, I shall nevertheless suggest the contours of one potential reason. Perhaps some of the assumptions upon which the laws of the market are based no longer hold. Namely, in the free market economy presupposed by Adam Smith, businesses were largely sole proprietorships (or small partnerships), and the proprietors (or partners) were individuals known within their communities, and of a modicum of moral character.[265] The modern, global, publicly traded firm is a very different entity. The firm does not have a moral character of its own.[266] Moreover, moral responsibility is diffused via the dispersion of ownership and the processes of board decision making,[267] and moral responsibility is muted via the large gulf between corporate decision-makers and the individuals and communities that may be harmed by these decisions[268]:

> [The firm] tends to diffuse personal responsibility and to create conflicts with one's ethical standard in weighing competing values. In short, the firm structure changes the behavior of the actors within and thus produces results that are different than had they acted independently.[269]

In short, these are not necessarily the economic actors that Adam Smith observed when theorizing that the pursuit of individual self-interest promotes the common good:

> The firm, however, with its amorphous ownership/management structure, challenges the idea that the market will reflect the social values of individual

263. *See* Westbrook, *supra* note 72, at 108. Pressing the issue, Westbrook argues that "Enron encourages us to think about the corporation in essentially public terms: Does the organization of the corporation work for the good of society?" *Id.* at 109.

264. *Cf.* Lucian Arye Bebchuk, *A Plan for Addressing the Financial Crisis* (Harvard Law Sch., John M. Olin Center for Law, Econ., & Bus., Discussion Paper No. 620, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1273241.

265. Not coincidentally, Adam Smith was a moral theologian by training, and a professor of moral theology at the University of Glasgow. Michael Richman, *Economist Adam Smith—Dedication to Learning Helped Make Him the Father of Modern Economics*, INVESTORS BUS. DAILY, Mar. 29, 2000, at A4.

266. And this has deleterious consequences in the realm of ethics and morality. *See* McCann, *supra* note 168, at 111 ("If business is more accurately regarded as an amoral machine [than a] moral agent, then managers can confer absolution on themselves for their sins of omission as well as commission.").

267. *Cf.* PIUS XI, QUADRAGESIMO ANNO ¶ 132 (1931).

> The laws passed to promote corporate business, while dividing and limiting the risk of business, have given occasion to the most sordid license. For We observe that consciences are little affected by this reduced obligation of accountability; that furthermore, by hiding under the shelter of a joint name, the worst of injustices and frauds are penetrated; and that, too, directors of business companies, forgetful of their trust, betray the rights of those whose savings they have undertaken to administer. Lastly, We must not omit to mention those crafty men who, wholly unconcerned about any honest usefulness of their work, do not scruple to stimulate the baser human desires and, when they are aroused, use them for their own profit.

Id.

268. *See* David Luban et al., *Moral Responsibily in the Age of Bureaucracy*, 90 MICH. L. REV. 2348, 2360–63 (1992) (discussing Yale University's (in)famous experiments conducted by Stanley Milgram regarding the willingness of individuals to inflict pain upon strangers).

269. Robert J. Rhee, *Corporate Ethics, Agency, and the Theory of the Firm*, 3 J. BUS. & TECH. L. 309, 324 (2008).

> participants. This is particularly true in large and increasingly global firms. The answer in dominant economic, financial, management, and legal doctrine seems to be that business owners want profits and that managers are obliged to accommodate this presumed desire.[270]

The problem does not appear to be the market *per se*, but rather the size, bureaucracy, and nature of the modern business corporation. For it seems as though the corporate structure itself raises "obstacles" to the influence of "social and moral processes to guide behavior."[271] From Hannah Arendt to Stanley Milgram, scholars have observed how bureaucracies can give rise to "a process of moral proxy" in which the individual "delegate[s] his moral authority"[272] to "hierarchical structures" that "tend to suppress the psychological and moral controls of autonomous persons."[273] In short, it may very well be the case that a businessperson today, from a director to an officer to an employee, "no longer regards himself as responsible for his action,"[274] and this would appear to be a far cry from the capitalists and laborers envisioned by Smith. This situation counsels in favor of considering different paradigms of ownership within the specific context of the modern business corporation—including the paradigm set forth by Aristotle.

VI. CONCLUSION

The business corporation "is not inherently bad, although experience has taught that it can be employed in ways that detract from the common good."[275] The challenge of corporate law today—and especially for those who advocate corporate governance reforms and greater corporate social responsibility—is to find ways to rein in corporate abuses without sacrificing the tremendous benefits of the corporate form.[276] An Aristotelian conceptualization of stock ownership can meet this challenge. Moreover, it can meet this challenge without compelling the embrace of "[t]he claim that the shareholders do not own the corporation";[277] a claim which some scholars have found "unpersuasive."[278]

An Aristotelian conceptualization of stock ownership should not be perceived as alien, shocking, or radical to corporate law. Aristotelian philosophy offers the fairly uncontroversial suggestion that human beings ought to do good and avoid the opposite—with regard both themselves and to their private property. One need not be an Aristotelian to subscribe to this notion; indeed, probably most (if not virtually all) people subscribe to

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270. Garvey, *supra* note 154, at 536.

271. *See* Elhauge, *supra* note 44, at 798 (discussing how corporate structure contributes to the insulation of business-owner shareholders from social and moral sanctions).

272. Rhee, *supra* note 269, at 324.

273. *Id.* at 325.

274. *Id.* at 326 (quoting STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW, at xii (1974)).

275. Garvey, *supra* note 154, at 536.

276. *See* Morrissey, *supra* note 29, at 534–35; *cf.* Aesop, *The Goose that Laid the Golden Eggs*, *reprinted in* THE BOOK OF VIRTUES: A TREASURE OF GREAT MORAL STORIES 47 (William J. Bennett ed., 1993).

277. Eisenberg, *supra* note 74, at 825–27.

278. *Id.*

one moral code or another that encourages goodness and deters badness.[279] Therefore, application of Aristotle's principles (perhaps, more accurately, his insights) should be accepted as a correction to certain excesses of modern corporate law. For to the extent that corporate law today characterizes the shareholder as a profit-maximizing automaton, and to the extent that corporate law today actively represses the potential moral impulses of investors, it not only strays (arguably) from its own history, and the reading of its own precedent, but, moreover, dehumanizes investors.

Although few would object to the Aristotelian notion that human beings are morally obliged to be good and to use their possessions in a manner consistent with the common good, it is quite another thing to say that human beings should be legally mandated to engage in such good conduct. But this Article does not cross that line. Instead, the solutions proffered herein merely permit and enable conduct and decision-making that conforms to, or at least takes into account, our moral compasses. In short, the solutions re-humanize investors.

That said, some would certainly criticize this Article for, among other things, undermining the shareholder wealth maximization norm. That norm, they would posit, has fueled the success of the modern business corporation, and ought not to be tinkered with. In response, I stress that the Aristotelian approach set forth in this Article preserves the traditional orientation of corporate law as shareholder focused. This should serve to protect the ability of corporations to compete and thrive, and to raise the capital needed to compete and thrive. Yet, by supplying a different conceptualization of ownership, the approach softens the sharper edges of the corporation's shareholder-focused orientation to the extent that shareholders and directors are comfortable softening them. Given the uncertain future of corporate law, and the clamor for increased governmental regulation and oversight, I suggest that the tempered shareholder primacy approach set forth serves as a justifiable and palatable compromise.

Especially in light of the voluntary nature of implementation suggested (which consists largely of enabling statutes and moral exhortation[280]), undoubtedly others will be dissatisfied with this Article's prescriptions, arguing that they are naïve, or do not go far enough.[281] But "although only a fool designs a system on the assumption that people will

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279. *See* A. Scott Loveless, *Children on the Front Lines of an Ideological War: The Differing Values of Differing Values*, 22 ST. LOUIS U. PUB. L. REV. 371, 374 (2003) (observing the pervasiveness of individual attachment to societal moral codes).

280. *See supra* Part IV.C. Another way of furthering the voluntary implementation of an Aristotelian vision of stock ownership would be via education and training of both boards and shareholders, not to mention corporate attorneys. As Dennis McCann has proclaimed: "No course on business ethics . . . can be considered complete without some serious attention to the moral and social responsibilities of individual investors." McCann, *supra* note 168, at 121.

281. Such critics should consider the entrenchment of the shareholder primacy model, and thus the arguable necessity of crafting reforms within such model. STEPHEN BOTTOMLEY, THE CONSTITUTIONAL CORPORATION: RETHINKING CORPORATE GOVERNANCE 7–8 (2007) ("The shareholder primacy model has proven to be resilient, notwithstanding the importance of broader concerns. I am pessimistic about the prospects for a serious consideration by directors, lawyers and others of broader perspectives on corporate governance until they can be convinced that a broader approach is consonant with the ideas that underlie the orthodox legal model. . . . [T]he challenge is to work with the shareholder primacy model."); Westbrook, *supra* note 72, at 124 ("None of [the] efforts to make corporations responsive to the broader polity is central to the governance of corporations today or in the foreseeable future."). Similarly, contractarian scholars who favor the shareholder primacy norm might also welcome this Article as providing a firmer ground upon which to base that norm; the Aristotelian version

be public-spirited, only a cynical fool precludes the possibility."[282] By opening up possibilities for salutary corporate behavior, it stands to reason that we shall increase the incidence of such behavior. And that is a good thing.[283]

Lastly, given the rational apathy of most shareholders, and given the existing flexibility and protections of the business judgment rule of board decision-making, some may wonder where all this philosophizing gets us. Indeed, some may compare the project of this Article to contemplating "how many angels could dance on the point of a pin?" [284] It would seem that the importance of such contemplation would depend upon how much we care about our understanding of the nature of angels. I suggest that we should care very much about of our understanding of the nature of the corporation. How we understand the corporation, and, more precisely, how we understand the proper roles of shareholders and directors within a corporation, goes a long way, separate and apart from any coercive legal parameters, in guiding the conduct of corporate actors. For one's perceived role, whether consciously or subconsciously, whether to a greater degree or a lesser degree, does seem to affect one's actions.[285] Indeed, "[i]n the debate on corporate ethics, theory has a close connection to practice. The normative end of corporate law can legitimize or not conduct that sacrifices shareholder profit for some other social

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of ownership provides a safer, albeit compromised, route toward prioritizing the corporate shareholder's claims vis-à-vis other corporate constituencies than the nexus-of-contracts conceptualization of the firm.

282. Elhauge, *supra* note 44, at 868.

283. Moreover, ultimately, it would seem, the success or failure, goodness or badness, of any system in a democratically oriented society is dependent upon the quality of its people. *Cf.* THE FEDERALIST NO. 55 (James Madison). As James Madison noted:

> Republican government presupposes the existence of [virtue] in a higher degree than any other form. Were the pictures which have been drawn by the political jealousy of some among us faithful likenesses of the human character, the inference would be, that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another.

Id.

284. Many believe that this is a fabricated quotation intended to ridicule medieval scholars. *E.g.*, ISAAC D'ISREALI, CURIOSITIES OF LITERATURE (1790s), *available at* http://www.spamula.net/col/archives/2005/01/quodlibets_or_scholastic_disqu.html. For what appears to be the most authoritative explanation of this quotation and its origins, see Dorothy Sayers, Essay Presentation at Oxford University: The Lost Tools of Learning (1947), *available at* http://www.gbt.org/text/sayers.html. Sayers relates:

> A glib speaker in the Brains Trust once entertained his audience . . . by asserting that in the Middle Ages it was a matter of faith to know how many archangels could dance on the point of a needle. I need not say, I hope, that it never was a "matter of faith"; it was simply a debating exercise, whose set subject was the nature of angelic substance: were angels material, and if so, did they occupy space? The answer usually adjudged correct is, I believe, that angels are pure intelligences; not material, but limited, so that they may have location in space but not extension . . . . The proper subject of the argument is thus seen to be the distinction between location and extension in space; the matter on which the argument is exercised happens to be the nature of angels . . . ; the practical lesson to be drawn from the argument is not to use words like 'there' in a loose and unscientific way, without specifying whether you mean "located there" or "occupying space there."

Id.

285. *See* Richard E. Priehs, *Appointed Counsel for Indigent Criminal Appellants: Does Compensation Influence Effort?*, 21 JUST. SYS. J. 57, 59 (1999) (summarizing role theory).

value."[286]

286. Rhee, *supra* note 269, at 329.