

November 2005

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Recommended Citation

Cray, Charlie and Drutman, Lee (2005) "Corporations and the Public Purpose: Restoring the Balance," *Seattle Journal for Social Justice*: Vol. 4: Iss. 1, Article 41.

Available at: <https://digitalcommons.law.seattleu.edu/sjsj/vol4/iss1/41>

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Corporations and the Public Purpose: Restoring the Balance

Charlie Cray¹ and Lee Drutman²

In 2003, a new tobacco company called “Licensed to Kill, Inc.” was incorporated in Virginia. The company’s purpose, as stated in its articles of incorporation, was “the manufacture and marketing of tobacco products in a way that each year kills over 400,000 Americans and 4.5 million other persons worldwide.”³

Licensed to Kill was incorporated by anti-tobacco activists as a parody, but it proved an important point: virtually anybody can incorporate a business these days, even if the stated purpose of that business is to kill millions of people. In a press release announcing the formation of the company, Licensed to Kill Director Gary Vastone publicly thanked the Virginia Corporation Commission for “granting us permission to exist. If a person were to ask the state for authorization to go on a serial killing rampage, he would surely be locked up in a jail or a mental institution. Luckily, such moral standards do not apply to corporations.”⁴

By granting Licensed to Kill a charter of incorporation, the state conferred a package of legal privileges on the company. The corporation would be allowed to grow to unlimited size and scope, with an unlimited lifespan, and its shareholders would be entitled to limited legal liability. In exchange, the state would receive virtually no benefit beyond a modest economic return. All Licensed to Kill had to do was file some paperwork and pay a small fee of \$130.

Philip Morris and RJ Reynolds are giant tobacco companies with track records of selling deadly products to millions of consumers.⁵ They are large companies incorporated by state governments.⁶ Their parent companies, Altria and Reynolds American, are incorporated in Virginia and North Carolina, respectively.⁷ These corporations continue to enjoy the privileges

granted by their corporate charters in the face of evidence that they have violated tobacco control laws around the world.⁸ Neither Virginia nor Delaware has ever proposed revoking the charters of these corporations, despite having the right and just cause to do so.⁹

Dozens of corporations responsible for major social, ecological, and economic crimes continue to enjoy state-granted privileges, notwithstanding long criminal records.¹⁰ If they were ordinary persons, many of these corporations would probably be convicted and sentenced to long terms of imprisonment. In some states, they might be executed.¹¹ But corporations are not ordinary persons. In fact, they are not persons at all.

What is a corporation? In essence, a corporation is one of many ways to organize business, money, and property. It is a legal form, an abstraction that gives incorporators rights and privileges they would not normally enjoy. The corporate form allows numerous investors to pool capital into one enterprise—the corporation—in exchange for ownership shares. The owners set up a governance structure to do the business of the corporation, and if the company makes money, they share in the profits.

There are millions of corporations of various kinds around the world. The corporation of principal concern in this article is the large, limited-liability, publicly traded corporation because these corporations dominate our economy, politics, and culture. The limited-liability corporation dominates our entire society.

The ownership shares of limited-liability corporations are publicly traded on open markets such as the New York Stock Exchange.¹² Their investors are responsible for debts and judgments against the corporation only up to the value of their initial investment (limited shareholder liability). These companies also have privileges under state laws, such as permission to grow to unlimited size, to enjoy a perpetual life, and to own other companies. Nearly every Fortune 500 company¹³ is a large, limited-liability, publicly traded corporation.¹⁴ These corporations have virtually no inherent limits on behavior and present virtually no risk of liability for their investors.

Under the modern view of a corporation as merely a “nexus of contracts” between private individuals, the common illusion that corporations are primarily private entities with prerogatives beyond citizen control is now accepted as fact.¹⁵ However, there is nothing inherent to the corporate form that makes this inevitable. Rather, its status as a private entity is the result of a long struggle in state and federal legislatures and courts. The American business corporation evolved from a limited and tightly controlled franchise incorporated to complete public improvement projects such as constructing bridges, roads, and canals, and to provide certain services deemed essential to a fledgling economy, such as banking and insurance,¹⁶ to a sprawling, uncontrollable conglomerate over which the states relinquished their mechanisms of control.

As a result, today we have a system in which large corporations are the dominant institutions in our society. They maintain incredible power over our lives and can cause devastating social, ecological, and financial harms. And yet, despite their dominant position, they have very little accountability to the public. As seen in the License to Kill example, today virtually no public benefits or obligations are bargained for in exchange for the advantages (e.g. limited liability) conferred through the corporate form, and the obstacles to doing so, built into the law and political culture, are significant. The ability of the people to use public institutions, including governments, to control corporations is largely circumscribed. The question becomes: how is it possible to restore public control over corporations?

This article argues that understanding the fundamentally public nature of corporations is the key to restoring democratic control over them. If we recognize that corporations are public institutions, created under a process in which ultimate authority is vested in the citizens, then it becomes clear that corporations do not intrinsically bear any rights or privileges except those that citizens choose to confer on them.

In the first part of this article, we review some of the history of the American corporation by drawing upon key judicial decisions, legislative

history, and legal theory to trace how the corporation evolved from a public entity to a private entity over time. We will see that the system of regulation that we currently use to control corporations emerged after the nineteenth century system of placing direct limits on corporations through their charters had disappeared.

Next, we look at debates over the functions that specific corporations and industrial sectors are supposed to perform in society, and whether the broader public interest might be served in a different way. Debates over the proper role of corporations have often centered around controversies over privatization, corporate abuse of publicly owned assets, and “corporate welfare.”¹⁷ We argue that an even broader debate over the nature and role of corporations in society is possible—even necessary.

With this backdrop, we review a number of current industrial sectors and examine the evidence for treating some corporations as public institutions. In the absence of effective external regulation, it is worth resurrecting the notion that corporations must fulfill certain obligations as part of their “contract” with the society that grants them the privileges inherent in the corporate form (e.g. limited liability). This is where our understanding of corporations as public institutions can begin to translate into broader policy. Federal chartering would be the most effective approach for industrial sectors such as defense-related corporations where there is a clear national interest at stake. Other approaches, such as community-controlled corporations and non-corporate entities like community-based trusts may be appropriate vehicles for the delivery of essential services and protection of public assets.¹⁸

It will only be possible to achieve such policies if the public is informed about past attempts to do so. Only an engaged citizenry, motivated to reclaim its own authority to control corporations, can provide the kind of impetus that policymakers and even legal theorists need to challenge existing assumptions about a corporation’s status under the law.

A HISTORY LESSON

Although it is possible to trace the roots of the modern corporation back to Rome,¹⁹ a legal lineage that extends through medieval guilds and towns and churches and universities, most histories of the modern multinational corporation trace its origins to the big European trading companies. These companies, such as the famous East India Company, were created by royal charter or by special act of Parliament in the seventeenth century and were privileged to explore, colonize, and trade in lands beyond the sea.²⁰

The United States grew partly from the efforts of British colonial companies chartered to grab the riches of the new worlds opened up by Europe's great explorers; both the East India Company and the Virginia Company were chartered by the crown for the purposes of exploring the New World and extracting its wealth and natural resources.²¹ The companies simultaneously dumped indentured servants and other unwanted people across the sea.²² These companies were different from modern corporations in that they were quasi-governmental institutions chartered to give members of the company exclusive trading privileges. Members invested in "joint stock," which at first represented only a subscription to a specific voyage, but later evolved into a system of ownership in the company for a period of time. If the enterprise was a success, joint stock owners shared in the financial rewards in proportion to their investments.²³

Although the British charter companies anticipated the modern corporate structure, the simple structure of the early American economy meant that there was little demand for corporate charters for local enterprise until about 1780.²⁴ The giant trading companies of that day were chartered by the King and functioned as extensions of his power. As a result, there was a general distrust of big trading companies.²⁵ The Boston Tea Party was the signature event in an economic rebellion against the East India Company's attempt to monopolize American commodities markets. The Boston merchants were rebelling against a British corporation and British crown whose interests were intertwined.²⁶

After the Revolution, the Founding Fathers set upon the task of forming a new government. They were faced with the question of what role corporations should play in American society.²⁷ But the memories of exploitation by the large British trading companies made many early American leaders wary of business forms that would confer special privileges.²⁸ In his famous treatise, *The Wealth of Nations*, Adam Smith, an economist and friend of some of America's early leaders, was highly critical of corporations for this very reason.

The pretense that corporations are necessary for the better government of the trade is without any foundation. The real and effectual discipline which is exercised over a workman, is not that of his corporation, but that of his customers. It is the fear of losing their employment which restrains his frauds and corrects his negligence. An exclusive corporation necessarily weakens the force of his discipline.²⁹

Smith was opposed to corporations because he believed they interfered with the "invisible hand" of the free market: "It is to prevent this reduction of price, and consequently of wages and profit, by restraining that free competition that would most certainly occasion it, that all corporations, and the greater part of corporation laws, have been established."³⁰

The National Trades Union also opposed incorporation, predicting that monopolies would ruin the individual enterprise and transform citizens into "mere hewers of wood and drawers of water to jobbers, banks and stockbrokers."³¹ The resistance to corporations, therefore, was at the core of the struggle between the new monopolists and the artisan class over the meaning of "republicanism."

Despite these concerns, many community leaders recognized the corporation's substantial potential for organizing civic and business affairs in the new post-war society.³² Meanwhile, the laws that encouraged the creation of local religious and secular education also helped to define the laws that encouraged the development of business corporations; in their

own ways, each of these types of organizations strongly contributed to the public welfare.³³ In addition, it was recognized that the new nation needed infrastructure projects like turnpikes and canals, as well as banks and insurance companies, to facilitate everyday commerce. Through corporations, individuals were able to pool together the funds necessary to undertake projects and enterprises that presumably would benefit society as a whole yet were too massive and risky for individuals to undertake alone.

Widespread public opposition to corporations led early legislatures to grant few charters, and usually only after much debate, but corporations did begin to proliferate by the end of the eighteenth century. In contrast to the half-dozen American business charters granted in the entire colonial period, 147 were issued in the United States between 1781 and 1795.³⁴ These businesses were prohibited from taking any actions which the legislatures that incorporated them did not sanction in their charter. When a corporation caused harm to public interests or went beyond its mandate, its charter could be revoked.³⁵

Much of what we attempt to accomplish today through regulation was accomplished in early America through the chartering process that defined a corporation's purpose. When a corporation violated its charter by operating *ultra vires*, or outside the powers bestowed upon it, the corporation could be dissolved by an act of the legislature that created it.³⁶

The struggle to control corporations through their charters continued for more than a century thereafter.³⁷ Legislative debates over the creation of a corporation reflected an understanding of the public nature of corporations and established that the privileges bestowed by the people's elected representatives would be granted only in exchange for a broader public benefit.³⁸

To keep corporations under control, legislatures placed limits on them through rules on capitalization, debt, land holdings, and profits. Some states also limited corporate charters to a set number of years, forcing their review and renewal when the charter expired. Unless a legislature renewed

a charter, the corporation was dissolved and its assets divided among shareholders.³⁹ Legal rules limited the issuance of stock, clarified shareholder voting rules, and determined procedures for record keeping and disclosure of corporate information.⁴⁰

As additional mechanisms of control, specific rules written into corporate charters gave equal voting rights to large and small investors, outlawed interlocking directorates, and limited capitalization and debts.⁴¹ Under the *ultra vires* doctrine, corporations were prohibited from doing anything that was not specifically authorized in their charters.⁴² Companies were required to surrender their accounting books to the state legislature upon request.⁴³

In addition to protecting the public by limiting corporate power in their charters, states enacted laws to protect vulnerable constituents, to protect the public against various industry-specific abuses, and to impose personal liability up to par value of the stock for shareholders who acquired stock at a discount.⁴⁴

In 1800, the vast majority of the 334 corporations that existed in the United States were chartered to accomplish tasks that could rightly be considered the public's business. Sixty-five percent of these corporations were involved in building turnpikes, bridges, and canals.⁴⁵ Another 20 percent were involved in banking and insurance.⁴⁶ Only eight corporations were involved in manufacturing.⁴⁷ Henry Carter Adams described corporations as agencies of the state, saying: "They were created for the purpose of enabling the public to realize some social or national end without involving the necessity of direct government administration. They were in reality arms of the state"⁴⁸

We should not become too nostalgic for these early days of American corporations. Because legislatures controlled the granting of corporate charters, most of the charters went to politically well-connected and wealthy individuals who became richer and more influential through their corporations.⁴⁹ Many of these early corporations received monopoly rights

as part of their charter and they pushed hard for other advantages that were not always in the public's interest, testing the government's control over corporate action.⁵⁰

Early government Attorney General Roger B. Taney observed: "It is a fixed principle of our political institutions to guard against the unnecessary accumulation of power over persons and property in any hands. And no hands are less worthy to be trusted with it than those of a moneyed corporation."⁵¹

Although it has been suggested that the opposition to corporations during the early nineteenth century represents an agrarian failure to accept the efficiencies of the corporate form, small businesses and skilled artisans argued that corporations with their attendant privileges were too powerful.⁵²

The situation was complicated by proposals to open up the chartering process so that anyone could obtain a corporate charter, and thus to eliminate the air of political privilege surrounding the process of incorporation. Andrew Jackson promoted this solution, and "sprinkled holy water on corporations, cleansing them of the legal status of monopoly and sending them forth as the benevolent agencies of free competition."⁵³ The hope was, in other words, to mitigate the problems created by the corporate form through further incorporation.

The gradual shift from a system of corporate charters to the laws of general incorporation did not immediately prevent states from restricting the power of corporations in their charters. That would not come until later, as corporations began to establish their independence in the courts and play states against each other in a charter-mongering process that loosened certain prohibitions and permitted the formation of giant corporate trusts at the end of the nineteenth century.⁵⁴ The Jacksonian economic legislation eventually revealed a historical irony: it promoted the very ends it was intended to defeat.⁵⁵

In 1819, the Supreme Court struck a blow to state control over corporations by holding that New Hampshire's attempt to turn Dartmouth

College, a private college chartered by the King of England in 1769, into a public institution was a constitutionally impermissible impairment of “the obligation of contracts.”⁵⁶ This ruling was an instrumental shift in the relationship between corporations and the states that created them.

“The [*Dartmouth*] . . . decision expanded the privileges of private property against the claims of the public interest, and it helped unleash capitalist enterprise in nineteenth century America,” intellectual historian Louis Menand suggests.⁵⁷ It was a first step in defining the corporation as an entity beyond citizen control.

In response, many states began to assert tighter public control by giving themselves constitutional powers to revoke or alter charters.⁵⁸

THE CORPORATE CHARTER RACE TO THE BOTTOM

As the nineteenth century progressed, the economy changed. Agrarianism gave way to industrialization. People left the countryside for the cities. In an age of railroads and steel, of oil and manufacturing, corporations became powerful and, increasingly, national institutions. And as corporate lawyers evaded existing limits on the size and scope of corporations by forming holding companies and trusts, state corporate law was about to hit a crisis point.

Beginning in 1891, New Jersey enacted a series of laws that effectively relinquished its ability to regulate and control corporations through charters. First, New Jersey became the first state to allow corporations to buy and sell stock or property in other corporations and issue their own stock as payment, creating “holding companies” that were crucial to the functioning of trusts.⁵⁹ Next, the state repealed its antitrust law in 1892.⁶⁰ Lastly, in 1896, the state enacted its General Revision Act, an embarrassingly permissive law that removed the fifty-year limit on corporate charters, allowed corporations to conduct business in any state or foreign country, and revised capitalization requirements to pave the way for massive

concentration.⁶¹ It also permitted companies to issue nonvoting stock, which enabled certain owners to raise capital while retaining control of a corporation with ease and permitted directors to amend bylaws without the consent of the shareholders.⁶²

As a result of the General Revision Act, a stampede of large companies reincorporated in New Jersey. By 1900, 95 percent of the nation's major corporations were chartered in New Jersey.⁶³ New Jersey reaped the intended financial rewards from this sale of its own sovereignty.⁶⁴ The cost to society, however, was dramatic. Some companies that reincorporated in New Jersey did so to escape attempts by other states at enforcing public accountability. For instance, at the time of reincorporation in 1898, the Standard Oil Company of the famed oil baron, John D. Rockefeller, faced a contempt action in Ohio for refusing an Ohio Supreme Court order to dissolve the Standard Oil Trust, a network of companies under one board of directors that controlled 95 percent of all refined oil shipments by the 1880's.⁶⁵ Without any means of enforcement, the Court's finding that the trust was void as against public policy was rendered meaningless.⁶⁶

Because the vast majority of corporations flocked to incorporate in New Jersey, New Jersey's law became the nation's law, creating the legal opportunities for massive consolidation and combination into giant industrial trusts. In less than a decade, the corporate law of one state would thoroughly transform the United States economy "from a reasonably competitive to an oligopolistic structure," in which 328 consolidated corporations controlled roughly two-fifths of the country's manufacturing capital by 1904.⁶⁷ Between 1898 and 1902, a total of 2,653 large firms disappeared in a wave of merger mania.⁶⁸

Though other states initially expressed outrage at New Jersey's changes, when they realized they could not force it to reverse the changes, many of them followed New Jersey's example, removing almost all restrictions in corporate charters and doing away with the idea that corporations should be

held directly accountable to the public and should be reasonably constrained in their quest to pursue private profits.⁶⁹

When New Jersey finally attempted to revoke some of the privileges of its corporations in 1913 to stop the decline it had caused, it was already too late. Many companies simply moved to Delaware, which in 1899 had adopted an even more permissive law than New Jersey—and offered even lower fees to incorporate.⁷⁰ Delaware's 1899 Act allowed incorporators to insert any provisions they wanted into the charter regulating the corporation, its directors, and its stockholders.⁷¹

Today, more than 308,000 companies, including 296 (59.2 percent) of the Fortune 500 largest corporations in the United States, are incorporated in Delaware, which is widely acknowledged as having the most management-friendly statutes of any state.⁷² Delaware law gives executives the most liberal control over the company. As a result, the corporate law of Delaware has effectively become the national corporate law for the past one hundred years.

THE RISE OF LIMITED LIABILITY

Besides reducing their own ability to hold corporations directly accountable, states also fostered increased irresponsibility in the corporate form through a widespread shift to limited liability for investors. Limited liability meant that corporate investors were responsible for only their initial investment in the company. If a company went into debt, investors might lose what they had invested, but the creditors or unpaid employees could not go after the investors' personal assets.

Limited liability corporations had been granted in Britain to investors in the East India Company and other business ventures, and was made universally available there in 1855.⁷³ In the U.S., the acceptance of limited liability occurred only gradually over the course of the nineteenth century, through fits and starts, as it was often the source of raucous debate in state legislatures.⁷⁴ Nevertheless, by the end of the century, as corporations

became larger and ownership grew increasingly diffuse, limited liability became a common feature, and became an embedded feature of the modern corporation as the system of general incorporation gradually replaced individual chartering.⁷⁵

Limited liability was justified as necessary to generate investment because it reduced risks. However, it also encouraged corporate irresponsibility by removing owners from the consequences of their investments. As legal scholar William W. Cook wrote in 1891, “[t]here is nothing in the corporate form itself to justify [the exaggerated application of limited liability]. This pernicious movement has decreased the personal responsibility on which the integrity of democratic institutions depends, and has introduced into both investments and social services a dangerous element of insecurity.”⁷⁶

Limited liability also contributed to the separation of ownership and control.⁷⁷ By shifting risks from the corporation and its investors onto society as a whole, the law changed the nature of the corporation. In short, these changes made the corporation much harder to control, less responsible by design, and hence, less responsive to the public.

THE RISE OF CORPORATE RIGHTS

In addition to limited liability and the shift in the incorporation process, another key development in the nineteenth century lent considerable power to the corporation’s claim as a private institution independent of public control. Primarily as a result of judicial action, corporations increasingly acquired constitutional rights.⁷⁸

This process was connected to the emergence of theories of the corporation as a private entity. That is, at the same time that the chartering process was replaced by general incorporation laws, the “concession” theory of corporations as artificial legal forms created by acts of the state was replaced by a theory of corporations as “natural entities” and “rights-bearing entities” or “legal persons.”⁷⁹

Corporations were already recognized as possessing a personality separate from the individuals composing it by 1886 when the Supreme Court rendered its decision in *Santa Clara County v. Southern Pacific Railroad*.⁸⁰ This case marked the first time the Supreme Court recognized corporate personhood as conferring constitutional rights.⁸¹

In establishing the doctrine of “corporate personhood,” the *Santa Clara* court provided corporations with a potentially powerful new shield against public accountability.⁸² Boston University Professor of Sociology and Political Science Alan Wolfe suggests that “[i]f we believe that corporations are private agents, they are free to mind their own business outside the purview of the rest of society.”⁸³ Moreover, private corporations are rights-bearing creatures protected by the Constitution as individuals. Most significantly, they enjoy the constitutional right to freedom of speech. “If, on the other hand, corporations are understood as public actors, all these conclusions are reversed. Corporations would have obligations not only to their shareholders, but also to others in the society as well”⁸⁴

TWENTIETH CENTURY ATTEMPTS AT CORPORATE ACCOUNTABILITY

With the spread of general incorporation, and the conferral of constitutional rights on corporations, questions about how to maintain control over corporations began to shift away from the corporate chartering process, and instead toward government regulation and internal corporate governance.⁸⁵

Regulatory laws were not initially meek or modest, but corporations gradually took control of the federal regulatory agencies charged with enforcing those regulations—with predictable consequences. Two corporate accountability experts dryly regarded this capture of the new and purportedly robust external regulation scheme as “[t]he ultimate commercial accomplishment.”⁸⁶

Meanwhile, corporate law and theory began to center around debates over corporate “citizenship” and the public duties of corporate directors and officers. This debate, which continues today, primarily centers around three main theories that have gained the most traction. The first theory is the corporation as a separate entity. Proponents argue that, as its own entity, the corporation has a duty to be a “good citizen” and to make decisions in the public interest, even above the objections of shareholders.⁸⁷

The second theory to gain traction is the idea that a corporation does the most public good by maximizing shareholder wealth. This theory gained popularity because it allowed corporate lawyers to develop seemingly legitimate public policy around the idea that corporations owed no duty outside of its own shareholders.⁸⁸

The third theory is the “nexus of contracts” theory, in which the corporation was seen as a system of market-style bargains negotiated among various “stakeholders” who have different relationships to the corporation. This theory, which became a dominant conception of the corporation in the second half of the twentieth century, diminished the public nature of the corporation and reduced the state to protecting and enforcing contracts made by private parties.⁸⁹

CHARTERING A NEW COURSE

Today we have lost touch with the chartering process that creates corporations. We must once again take the incorporation process seriously and recognize that incorporation is a privilege that the public offers to private investors, and the public ought to get something back in return. This is the foundation upon which any serious attempt to establish legal control of corporations should be built. Every corporation—whether it is Wal-Mart, ExxonMobil, General Motors, or Halliburton⁹⁰—exists because a state or federal government granted it a charter in exchange for a promise to obey the law.

Under the current paradigm of federal regulation, we rarely think about how we could place direct limits on corporations through their charters. As the License to Kill example illustrates, incorporation today is a routine, bureaucratic process. States ask little in return for giving incorporators legal privileges associated with the corporate form. States can reassert control over corporations by creating real threats to revoke charters. Every state has a statute that provides for the revocation of corporate charters.⁹¹ This authority, exercised pursuant to a legal procedure known as *quo warranto*, remains woefully underused.⁹² Even corporations that engage in repeated criminal activities are rarely threatened with charter revocation. While all states retain the power to revoke, political pressure exerted by large corporations usually prohibits state legislatures and attorneys general from effecting corporate control through charter revocation.⁹³

In 1998, a group of thirty citizens' organizations and individuals asked the state of California to exercise this authority. With the help of Loyola Law School professor Robert Benson, the group filed a 127-page petition asking the California attorney general to revoke the charter of Union Oil Company of California (Unocal), based on its many environmental violations and its complicity in "unspeakable" human rights violations, such as its work with brutal governments in Afghanistan and Burma.⁹⁴

As the petition explained, courts have consistently held that certain acts of wrongdoing clearly warrant charter revocation. Judges have upheld revocation as a remedy for "misuse" or "nonuse" of the corporate charter, "unlawful acts," "fraud," "willful abuse of chartered privileges," "usurpation of powers," "improper neglect of responsibility," "excess of power," "mistake in the exercise of an acknowledged power" and "failure to fulfill design and purpose."⁹⁵

Corporations have been held dissolvable for failing to lay railroad tracks by a date promised, joining other companies to monopolize sugar, conducting fraudulent real estate practices, putting out false advertising, serving polluted water to customers, running baseball games on Sundays,

paying members of the President's family excessive salaries, self-dealing, and for the apparent complicity of failing to remove the Corporate President after four convictions in one year for illegally selling alcohol.⁹⁶

California Attorney General Dan Lungren rejected the petition to revoke Unocal's charter three days later in a three-sentence letter, declining to act.⁹⁷ Professor Benson's description of the event illustrates the absurdity of Lungren's response:

Lungren's office went into a comical panic when it got wind of the petition. His department called the California Highway Patrol the night before the coalition's press conference at the state office building in Los Angeles and had the CHP warn the group not to appear because a permit was needed to have a press conference on state property. Lungren's spokeswoman told the press first that the attorney general had no authority to revoke corporate charters; then—oops!—reversed herself hours later and said the department would take several months to study it. Three business days later, the refusal letter went out.⁹⁸

Though the petition failed, in 2003 the petition filers regrouped and worked to introduce a Corporate Three Strikes bill in the California State Senate. As drafted, the bill would require the state attorney general to revoke the charter of any corporation that is convicted of three "major felonies," defined as those that resulted in human death or incurred a fine of \$1 million or more, within a ten-year period.⁹⁹ Additionally, the attorney general would revoke the right to conduct business in the state from those corporate felons not subject to charter revocation by the California government.¹⁰⁰ The law also would have required corporations to take out a full-page ad in the state's leading newspapers to publicize their crimes.¹⁰¹

Predictably, the bill met stiff resistance in committee, where it failed to get the support of two key Democrats. The critics' main concern was that a third-strike conviction would be disastrous for workers and shareholders. However, the bill contained a provision allowing the courts to appoint a receiver to take over and manage the affairs of the corporation "as justice

and equity require . . . and shall issue orders necessary to ensure that jobs and wages are not lost, to protect community interests and legitimate investor interests, and to maintain the entity's obligations to protect the health, safety, and environment of workers and the public."¹⁰²

Although the three strikes bill failed to pass, the proposal to use the same receivership process commonly applied to corrupt unions or bankrupt corporations is a potentially effective way to take into account any existing claims upon the corporation. Receivership can also be leverage by which to require companies to restructure themselves and eradicate the source of lawbreaking behavior in order to be allowed to continue to conduct business in the future. An example of how receivership might work in this capacity is the New York District bankruptcy court's appointment of former Securities and Exchange Commission (SEC) commissioner Richard Breeden as a corporate monitor in the case of WorldCom.¹⁰³ Breeden's report on WorldCom set out corporate governance changes with which the court required MCI (WorldCom's successor) to comply in order to emerge from bankruptcy. It established important precedents, including a cap on CEO pay.¹⁰⁴ Although Breeden's recommendations were relatively modest, a similar process could be used to force a corrupt business to restructure or make other internal reforms in order to make it more accountable to the public under a new charter.

Numerous law enforcement officials have recognized revocation of a corporation's charter as an appropriate sanction for corporate crime. Revocation of a charter is particularly useful when the criminal behavior cannot be isolated to a few individuals. A 1979 Department of Justice (DOJ) report on corporate crime describes an approach similar to that used when organizations are placed into receivership: recidivist corporations with criminogenic cultures could be placed on a kind of probationary status under the direction of directors appointed by a court (as was the case with Worldcom) or even a federal corporations commission.¹⁰⁵ The DOJ report recommends that directors representing certain external, public interests be

empowered to recommend internal reforms, including invasive structural reforms targeted towards eliminating the source of repeat lawbreaking activities.¹⁰⁶ The reforms chosen could include forbidding a corporation to engage in particular lines of business or commerce, or barring it from doing business in a geographical area or in a specific product line.¹⁰⁷

The recent wave of corporate scandals can be viewed as largely the result of an aggressive effort to deregulate certain industrial sectors—banking (repeal of the Glass-Steagall Act, which separated commercial and investment banking), telecommunications (Telecommunications Act of 1996, loosening controls on media and spectrum technology corporations), and energy (the gradual gutting of the Public Utilities Holding Company Act by SEC exemptions provided to Enron and other companies, as well as proposals currently before Congress).¹⁰⁸ All of these acts of deregulation allowed for the formation of corporate conglomerates with intrinsic conflicts of interest and anticompetitive structures. In the absence of effective antitrust regulation,¹⁰⁹ the use of structural reforms in corporate charters could be an effective means of restraining vertical integration and cross-industry ownership.¹¹⁰

Although state attorneys general have shown little interest in using corporate charter revocation as a sanction on large corporations, they have occasionally revoked charters of small corporations. The state of California alone, for example, revoked the charters of 58,000 smaller corporations in fiscal year 2001–2002 for failure to pay taxes or file proper statements.¹¹¹

More substantially, in 2001, the Texas secretary of state revoked the charter of Lionheart Newspapers Inc. (a publisher of more than seventy publications) for nonpayment of franchise taxes.¹¹² And in 1998, New York Attorney General Dennis Vacco revoked the charters of two tobacco industry front groups incorporated as nonprofits: The Council for Tobacco Research and the Tobacco Institute Inc.¹¹³ Though the groups were officially incorporated “to provide truthful information about the effects of smoking on public health,” Vacco explained, “instead . . . these entities fed

the public a pack of lies in an underhanded effort to promote smoking to addict America's kids."¹¹⁴

There is some evidence that law enforcement officials are becoming increasingly interested in using the charter revocation and re-chartering options to combat corporate crime. When campaigning to replace Vacco in 1998, future New York attorney general Eliot Spitzer declared that "[w]hen a corporation is convicted of repeated felonies that harm or endanger the lives of human beings or destroy our environment, the corporation should be put to death, its corporate existence ended, and its assets taken and sold at public auction."¹¹⁵ Spitzer is well known for progressive views of corporate reform, and he is not alone. Referring to the powerful coal industry's abusive trucking practices, West Virginia Attorney General Darrell McGraw said, "If a corporation uses its corporate charter to commit an illegal act, then it's our jurisdiction and our responsibility to do something about it."¹¹⁶

It has been suggested that the corporation's status as a "person" under the law entitles it to certain constitutional protections against charter revocation.¹¹⁷ However, Professor Kent Greenfield has suggested that since their charters provide that corporations are incorporated only for "lawful" purposes, unlawful acts can be deemed *ultra vires*, or "beyond the power" of the corporation.¹¹⁸ In such instances, corporations clearly violate the heart of the corporate contract and become subject to the enforcement powers of corporate law.¹¹⁹ While state officials in Delaware and elsewhere might choose not to enforce the *ultra vires* doctrine for political or other reasons, Greenfield suggests that shareholders could use it to enjoin the corporation's continuing unlawful acts.¹²⁰

As Benson explains it, "[t]he people mistakenly assume that we have to try to control these giant corporate repeat offenders one toxic spill at a time, one layoff at a time, one human rights violation at a time. But the law has always allowed the attorney general to go to court to simply dissolve a corporation for wrongdoing and sell its assets to others who will operate in

the public interest.”¹²¹ The failure of public officials to act accordingly suggests that the public service aspect of the corporate form has atrophied. However, it is still possible to reject the notion that the law gives corporations an intrinsic right to exist in perpetuity without regard to their behavior. Instead, a sovereign people, acting through their elected government officials, create corporations and grant them privileges through their charters. When corporations flout obligations to obey the law, and become a danger to society, the governments that create them have the right—and the means—to dismantle them.

USING CHARTERS AS BLUEPRINTS FOR PUBLIC OBLIGATIONS

Another way to control corporations is by writing specific limits directly into the charters. There is nothing prohibiting any state from placing limits on how big corporations can grow to be, how long they can exist, or what kind of liability investors should be exposed to. There is nothing inherent in the corporation that requires it to enjoy the legal privileges it enjoys. If a state wants to be serious about controlling corporations, it can change its incorporation laws to ensure that limits are placed on corporate size, scope, and behavior. Moreover, once a corporation is bound by such rules, it is not free to break them.¹²²

Revising the use of charters in this manner would send a strong message that the state is serious about reasserting corporate obligations to serve public interests and to enable citizen control over corporations. Of course, without other changes of law, the only practical result of corporate law reform might be to discourage any business from incorporating in the state. Corporations can incorporate in any state they like, and the rules of interstate commerce and their rights under the Constitution allow them to protect themselves from states’ attempts to limit their behavior when they are incorporated in another state. If one state decided to enact restrictive corporate laws, most corporations would flee for friendlier legal grounds,

just as many corporations fled to New Jersey during the charter-mongering battles of the 1890s.¹²³

THE PROBLEM OF STATE-BASED CORPORATE LAW

One of the oddities of our corporate law system is that although most of our large corporations conduct business on national and international levels, they continue to be chartered at the state level, and therefore state laws primarily supply the rules that control their existence and governance. A state-based system of corporate law made sense two hundred years ago when state economies were much more distinct and corporations generally operated within a single state. But today, when corporations operate anywhere in the world, such a chartering system seems woefully anachronistic.

The consequence is that the state with laws most favorable to incorporators attracts the vast majority of incorporation activity. As noted, that state is Delaware, home to 308,000 corporations, including almost 60 percent of Fortune 500 companies, and recipient of \$500 million a year in incorporation fees (roughly 25 percent of the state's total revenues).¹²⁴ The state with the second-highest number of Fortune 500 incorporations is New York, with just twenty-five incorporations.¹²⁵ The result is that one state virtually sets the standards of corporate law for the entire country. Delaware, "a pygmy among the fifty states, prescribes, interprets, and indeed denigrates national corporation policy as an incentive to encourage incorporation within its borders, thereby increasing its revenue."¹²⁶ Delaware offers the most pro-management statutes available, essentially allowing incorporators to do whatever they would like as long as it is not otherwise illegal.

This situation presents a troubling obstacle to holding corporations democratically accountable through corporate law. If tiny Delaware (population: 820,000) effectively sets the corporate law for the entire nation, and in some cases, the world, more than 99 percent of Americans

have essentially been cut out of deciding how corporations should be governed.¹²⁷ Law professor Daniel J. H. Greenwood has concluded: “Citizens, acting through the political process as presently constituted, have effectively no say in constituting corporate law. The law, and the corporations formed under it, are rather products of a market that, by historical accident, has freed itself from political control.”¹²⁸

Under the Delaware system, corporate managers are entrusted with stewardship of enormous concentrations of wealth and power—in many instances both larger and more important in our daily lives than most governmental units—with little supervision or answerability to the political process. These autonomous power concentrations, in turn, are granted the strikingly unusual right to choose the law that governs them, thus guaranteeing that corporate law will continue to respect their independence from the will of the people. In short, we have created institutions of major importance and power and then set them on their way to do good or ill with little control or influence by the citizens whom, ultimately, they should serve.¹²⁹

Corporations are subject to the environmental, labor, securities, and other laws of each state in which they operate.¹³⁰ Why should corporate governance laws be any different? If state legislatures want to make sure that employees or shareholders of corporations that operate primarily within their state enjoy more rights than Delaware corporate law grants them, why should they be prohibited from doing so? There is simply no good reason. Yet Delaware effectively sets the corporate law of the nation and creates a troubling obstacle for the ability of states to regulate and control corporations that operate within their borders.

One way to deal with this problem would be for a state (say, for example, New York) to challenge the ability of Delaware to set corporate governance rules for corporations that operate primarily in New York. Professor Kent Greenfield suggests that Delaware’s dominance is illegitimate “because its ability to define the rules of corporate governance depends on the so-called

‘internal affairs’ doctrine, which provides that the rules governing the internal affairs of corporations (that is, the rules of corporate governance) originate from the state in which the corporation is chartered.”¹³¹ According to Greenwood, the internal affairs doctrine was not originally established under constitutional or statutory provisions of law, but only under judicial tradition, though some statutes now embody the principle.¹³²

In fact, during the 1980s and early 1990s—a period of big mergers and acquisitions and plant closures—some states moved to change their corporate laws to require the courts to reflect the interests of employees and other stakeholders.¹³³ As a result, in over half of the states directors are now permitted to take stakeholder interest into account.¹³⁴ Connecticut, for example, requires boards to consider the interests of corporate stakeholders when making major decisions.¹³⁵ Meanwhile, a recent proposal has also been made to further expand the duties of corporate directors to account for the interests of communities, the environment, and other stakeholders.¹³⁶

Greenfield argues that the state that has the greatest interest in regulating the internal affairs of a corporation should determine the rules of corporate governance.¹³⁷ In practice, this means states would impose their own corporate governance laws on corporations whose business is primarily carried on within that state, regardless of where the corporation is incorporated. When these laws come in conflict with Delaware law (as they inevitably would), it would ultimately be up to a judge. By relaxing constraints on the internal affairs doctrine, corporate law would become more democratic.¹³⁸

IS IT TIME TO REVIVE THE FEDERAL CHARTERING OPTION?

Another way to solve the problem of conflicts in state corporate law would be to establish a system of federal chartering for businesses that operate in multiple states. Instead of a competition among states to enact

the most pro-corporate laws, a federal chartering system could require a consistent set of rules about internal corporate governance.

The push for a federal chartering system is not a new idea, despite how little traction it has gained thus far among corporate-controlled political debates. Proposals for federal corporate charter laws were included in the 1904 Democratic Platform, the 1908 Republican Platform, and the 1912 Democratic Platform.¹³⁹ Between 1915 and 1932, at least eight bills related to federal chartering were introduced in Congress.¹⁴⁰ In the 1930s, populist Senator Joseph O'Mahoney of Wyoming promoted the idea of "National Charters for National Business."¹⁴¹ In his statement to the Temporary National Economic Committee (TNEC) at its closing session on March 11, 1941, O'Mahoney suggested that to ensure business responsibility it is necessary to have "a national charter system for all national corporations."¹⁴²

O'Mahoney's proposal would have required corporations with assets in excess of \$100,000 to obtain a federal license to engage in interstate business, forbade stock ownership by one corporation in another and the diversification of a corporation's business beyond the provisions of its charter.¹⁴³ O'Mahoney threatened corporations that violated child labor and collective bargaining laws with the loss of their license to do interstate business.¹⁴⁴ His effort to control corporate power through federal chartering was derailed by the gathering storm surrounding World War II, and the TNEC that O'Mahoney convened to ask tough questions about corporate excesses was largely forgotten.¹⁴⁵

In 1976 the idea of federal chartering was again revived by Ralph Nader, Mark Green, and Joel Seligman in *Taming the Giant Corporation*.¹⁴⁶ They proposed a federal law requiring national businesses with more than \$250 million in annual sales or more than 10,000 employees to obtain a federal charter.¹⁴⁷ These charters would include requirements for full-time outside directors, disclosures about workplace conditions, prohibitions against monopoly concentration, and disclosure of lobbying activities and tax

returns—all provisions designed to protect shareholders, employees, consumers, taxpayers, and communities.¹⁴⁸

“The problem is ultimately one of power,” they wrote. They posed this question: How do we limit unaccountable power and ensure that corporate executives who hold managerial power are the best possible managers?¹⁴⁹ They proposed a system of federal chartering that requires corporations to pay attention to a broad range of public concerns beyond profits.¹⁵⁰

There are a handful of federally chartered companies today. Amtrak is federally chartered, as are mortgage lenders Freddie Mac and Fannie Mae.¹⁵¹ Both of these lenders were created to operate in the Department of Housing and Urban Development for the public purpose of increasing homeownership.¹⁵² Fannie Mae’s amended charter directs it towards purposes that would not normally be served by for-profit corporations. It provides assistance to secondary markets for residential mortgages, including activities related to mortgages on housing for low- and moderate-income families.¹⁵³ Fannie Mae also provides home loans, including loans for energy conservation and solar power systems, and collects data to monitor discriminatory practices in the home mortgage industry.¹⁵⁴

EVALUATING THE FEDERAL CHARTERING OPTION

As a policy matter, it makes sense to consider once again the federal chartering process as a mechanism for containing corporate power and effectuating important national corporate reform policies. A state-based system of corporate law presents formidable obstacles to national reform. It makes the use of the chartering process to increase accountability in corporations difficult unless all fifty states were to adopt the same reform simultaneously. Moreover, federal chartering is a useful mechanism for effecting public health and other kinds of policies where specific industries wield considerable influence.

Consider Big Tobacco, for example. Towards the end of his memoir, *A Question of Intent*, David Kessler, the head of the Food and Drug

Administration from 1990 to 1997, concludes that regulating the tobacco industry in the traditional sense would not adequately achieve national public health objectives:

My understanding of the industry's power finally forced me to see that, in the long term, the solution to the smoking problem rests with the bottom line, prohibiting the tobacco companies from continuing to profit from the sale of a deadly, addictive drug. These profits are inevitably used to promote that same addictive product and to generate more sales. If public health is to be the centerpiece of tobacco control—*if our goal is to halt this manmade epidemic—the tobacco industry, as currently configured, needs to be dismantled* [T]he industry cannot be left to peacefully reap billions of dollars in profits¹⁵⁵

After attempting to regulate the tobacco industry for seven years, Kessler concluded it was necessary to dismantle the industry in order to deal with the public health menace it had created.¹⁵⁶ He proposed forcing tobacco companies to be spun off from their corporate parents, and called for Congress to “charter a tightly regulated corporation, one from which no one profits, to take over manufacturing and sales.”¹⁵⁷

Kessler's solution to the tobacco problem resonates with the argument we make about federal corporate chartering. The public needs to exercise control over corporations its laws have created. Corporations that consistently harm the public should not have government charters that allow them to continue to conduct business. Kessler's ideas would help rein in corporations that directly threaten our collective well-being. Tobacco has been recognized as a public health threat for some time. The Centers for Disease Control and Prevention estimates that in addition to 440,000 premature deaths, smoking costs the nation \$167 billion a year in health care costs and lost productivity—well over seven dollars for each pack of cigarettes purchased by consumers.¹⁵⁸

Although Kessler's tobacco proposal is unlikely to be introduced in Congress anytime soon,¹⁵⁹ it reminds us that that our ability to control

corporations comes from a powerful starting point: We create corporations and endow them with rights and privileges for one ultimate purpose—to serve the public good. Upon this basic framework, much follows.

Kessler's proposal to federalize and re-charter the tobacco industry stems from the need for a strong national health policy with explicit consequences for industrial practices. A similar approach could be used to control other dangerous technologies. The chlorine industry, for example, is at the center of the spread of certain persistent toxic pollutants (e.g., dioxin, PCBs, pesticides, ozone-depleting chemicals, etc.) recognized to cause a wide range of serious human health and environmental effects.¹⁶⁰ Various organizations including the American Public Health Association,¹⁶¹ the U.S./Canadian International Joint Commission on the Great Lakes,¹⁶² and environmental groups, have called for a planned phaseout of the industrial production and use of chlorine-based chemicals—a class that includes 11,000 individual chemicals.¹⁶³

In 1994, the Environmental Protection Agency (EPA) proposed to study the viability of a national strategy to “prohibit, substitute, or reduce” the use of chlorine in four key industrial sectors (PVC, solvents, pulp bleaching, and water treatment), but a powerful response from the Chlorine Chemistry Council defeated the EPA's proposal.¹⁶⁴ Additional calls for the elimination of chlorine-based chemicals were made in the Stockholm Convention on Persistent Organic Pollutants,¹⁶⁵ which has targeted a “blackout” list of global pollutants of highest concern.¹⁶⁶

A national public health strategy to phase out chlorine in order to protect human health, the environment, and national security¹⁶⁷ could be achieved by a strategy similar to Kessler's proposal for controlling Big Tobacco. Under such a policy, corporations that produce and use chlorine would be required to phase it out or separately re-charter their chlorine-based production activities as part of a planned phaseout, providing a transition that takes into account the interests of communities and workers.¹⁶⁸

In order to illustrate how federal chartering could provide greater public control over corporations, this article will examine four “private” industries that have tremendous influence on public policies important to the broader society. First, we will look at the nation’s defense and security contracting firms and the question of national security. Second, we will examine the accounting industry and its failure to adequately meet the needs of the investing public. Third, we will discuss broadcast media and its substantial effect on community affairs. Finally, we will move beyond the federal chartering model to examine certain essential services where local control is a more suitable mode of public regulation.

FEDERAL CHARTERING AND NATIONAL SECURITY

It is hard to imagine an industrial sector better suited for federal chartering than the nation’s defense and security contracting firms. The existence of these firms is predicated upon federal policy goals with the largest receiving major income streams through federal contracts. For example, Lockheed Martin, the Pentagon’s number one primary contractor, received \$21.9 billion in 2003 from the Pentagon out of its total sales of \$32 billion.¹⁶⁹ Yet, even national defense corporations are chartered under state law and they enjoy the same weaknesses of state control that benefit other private corporations.

As private firms, the defense contractors are able to engage in lobbying, make campaign contributions to key members of Congress, and engage in other forms of influence-peddling in order to influence defense policy planning and weapons systems expenditures. Examples of private contractors defining the government’s defense policy are rampant and systemic. In the recent case of Halliburton in Iraq, for example, Bunnatine Greenhouse, the senior contracting specialist with the Army Corps of Engineers blew the whistle on Halliburton’s involvement in the contracting process.¹⁷⁰ “I can unequivocally state that the abuse related to contracts awarded to KBR represents the most blatant and improper contract abuse I

have witnessed during the [twenty year] course of my professional career [in government contracting],” said Greenhouse.¹⁷¹

The problem extends far beyond Halliburton. The growth of private military firms and corporate intelligence contractors in the past decade has created additional profitmaking pressures on national security policymaking processes.¹⁷² Interlocking relationships exist between the largest defense contractors and the Pentagon—including corporate representation on key defense planning boards, and the regular passage of Pentagon and industry personnel through the proverbial “revolving door”—i.e., to the private sector companies that they formerly oversaw.¹⁷³ The result is a steady stream of abusive contracting practices and a potentially dangerous distortion of American national security objectives. As a *New York Times* reporter describes the situation, “Lockheed has become more than just the biggest corporate cog in what Dwight D. Eisenhower called the military-industrial complex. It is increasingly putting its stamp on the nation’s military policies, too.”¹⁷⁴

Another result of defense contractors’ influence over Congress and defense policy boards is a long-term commitment to the development of high-tech weapons systems that only specific contractors are able to produce.¹⁷⁵ These weapons systems arguably have little to do with preventing acts of terrorism—one of the nation’s current greatest security concerns.

Two decades after President Eisenhower alerted the nation to the perils of maintaining a permanent “military-industrial complex,”¹⁷⁶ John Kenneth Galbraith suggested that it was time to recognize that big defense companies like General Dynamics and Lockheed, which do all but a fraction of their business with the government, are really public firms and should be nationalized.¹⁷⁷ “By no known definition of private enterprise can these specialized firms or subsidiaries be classified as private corporations,” Galbraith wrote.¹⁷⁸ He noted that much of the fixed capital of these firms is owned by the government and that as a highly-concentrated

industry, the defense firms were effectively protected from competition.¹⁷⁹ In 1968, 10 percent of defense contracts were subject to competitive bidding and 60 percent went by negotiations to contractors which were the only source of supply.¹⁸⁰ There was no market between the firm and the government. Instead, members of two public bureaucracies worked out agreements for supplying weapons and other war technologies.¹⁸¹

“The process of converting the defense firms from *de facto* to *de jure* public enterprises would not be especially complicated,” Galbraith suggested, outlining a transition plan for doing so: If a company or subsidiary exceeded a certain size and degree of specialization in the weapons business, its common stock would be valued at market rates well antedating the takeover, and the stock and the debt would be assumed by the Treasury in exchange for Government bonds. Stockholders would thus be protected from any loss resulting from the conversion of these firms.¹⁸²

Galbraith proposed that the new nonprofit companies directors would could be designated by the Government.¹⁸³

The greatest enthusiasm for Galbraith’s proposal came from individuals associated with these defense firms who had witnessed fantastic waste and misuse of the nation’s resources. Many liberal members of Congress, who received campaign contributions from the defense sector, opposed the idea.¹⁸⁴

Converting the companies to publicly-controlled, nonprofit status would introduce a key change: it would reduce the entities’ impetus for aggressive lobbying and campaign contributions. Chartering the defense contractors at the federal level would in effect allow Congress to ban such activities outright, thereby controlling an industry that is now a driving force rather than a servant of foreign policy objectives. As public firms, they would certainly continue to participate in the policy fora designed to determine the nation’s national security and defense technology needs, but the profit-driven impetus to control the process in order to best serve corporate shareholders would be eliminated. Thus, by turning defense and security

firms into full public corporations, we would replace the criteria by which their performance is judged from quarterly earnings targets to criteria that is more consistent with the national interest.

ACCOUNTING IN THE PUBLIC INTEREST

The accounting industry¹⁸⁵ is another industry whose failure to adequately serve the public interest remains a significant problem. It, too, creates an opportunity to introduce national policies that would place in the public domain a function crucial to sustaining investor confidence in public securities markets.

Accounting firms played an important role in Enron's collapse into bankruptcy and other recent financial accounting scandals by authorizing financial reports that involved major forms of deception.¹⁸⁶ The Sarbanes-Oxley Act of 2002 provides for strong penalties for financial fraud,¹⁸⁷ and eliminates certain conflicts of interest created by the consulting work that accounting firms conducted for their audit clients. But the act exempted tax and other forms of consulting that continue to constitute a major part of the accounting industry's business.¹⁸⁸ "Tax work requires you to be an advocate for the client," a critic of the loophole recently pointed out to the Financial Times. "That is not compatible with audit work."¹⁸⁹ In addition, tax consulting companies continue to engage in outside business dealings with their directors and have high-ranking executives who formerly worked for the accounting firm, which can compromise the objectivity of the auditors.¹⁹⁰

Columbia University Law School Professor John Coffee suggests that auditors serve a necessary function as "gatekeepers" for corporations whose assertions about their own financial health are inherently suspect.¹⁹¹ As independent watchdogs, auditors scrutinize corporate financial statements and certify their accuracy. Yet the accounting firms create conflicts of interest that undermine their objectivity and prudence by accepting millions of dollars worth of consulting contracts with the same clients to develop and

implement the very procedures that they are later required to audit. Given the financial rewards for complacency built into the system, it is difficult to imagine how public confidence can be restored unless auditing functions are established in a completely independent body accountable to the public.

The Supreme Court reversed a lower court's conviction of Arthur Andersen for its role in the Enron scandal, one of many accounting scandals that ultimately led to its demise.¹⁹² However, the firm was a recidivistic offender that suffered significant damage to its reputation for its role in other accounting scandals, including Waste Management¹⁹³ and Sunbeam¹⁹⁴ before Enron, and MCI/WorldCom,¹⁹⁵ Global Crossing,¹⁹⁶ and Qwest,¹⁹⁷ afterwards.¹⁹⁸

Andersen is not alone in its failure to provide an objective check on corporate financial reporting. All of the Big Four accounting firms¹⁹⁹ have been implicated in massive audit failures that cost investors billions of dollars. The global Big Four accounting firm Deloitte & Touche, for example, faces \$10 billion in shareholder claims for its role in Parmalat, the "Enron of Europe."²⁰⁰ The firm also paid \$50 million to settle Securities and Exchange Commission (SEC) civil charges that it failed to prevent massive fraud at Adelphia.²⁰¹

PricewaterhouseCoopers (PwC), another Big Four accounting firm, paid \$48 million in 2005 to end litigation related to Safety-Kleen, a payout consistent with previous class-action settlements for its role in Raytheon (\$50 million) and U-Haul International's parent company Amerco Inc. (\$50 million).²⁰²

Ernst & Young, a third Big Four firm, has also had major problems that threaten its existence, including a \$4.7 billion negligence claim by UK-based Equitable Life.²⁰³ In April 2004, the SEC barred the firm from taking on new clients for six months and ordered it to take on an outside monitor to overhaul its independence policies, described by the SEC as a "sham."²⁰⁴ The SEC administrative law judge found the firm's "day-to-day operations were profit-driven and ignored considerations of auditor independence" by

jointly marketing consulting and tax services with an audit client, PeopleSoft Inc.²⁰⁵

KPMG, the last of the Big Four accounting firms, faces lawsuits for its auditing role at Fannie Mae (widespread accounting manipulations forced Fannie Mae to restate an estimated \$9 billion in earning in 2005),²⁰⁶ Xerox (KPMG paid \$22.5 million to settle charges brought by the SEC, the largest regulatory penalty paid by an auditor in history),²⁰⁷ and Gemstar-TV Guide International, Inc. (it agreed to pay \$10 million to Gemstar shareholders).²⁰⁸ KPMG admitted to criminal wrongdoing and agreed to pay \$456 million in fines, restitution and penalties as part of an agreement with the Justice Department to defer prosecution of the firm in association with the marketing of problematic tax shelters that cost the IRS \$2.5 billion in evaded taxes.²⁰⁹ KPMG had “firm-wide numerical goals for new tax idea submissions” and pressured KPMG tax professionals to meet this goal, according to one report.²¹⁰

Regulators feel constrained to sanction the Big Four when it comes to new evidence of unprofessional behavior. After Andersen, no one wants to be blamed for causing another firm to collapse. Yet major accounting scandals are a virtual certainty. The FBI predicts that “major white collar crime will impact the U.S. economy over the next five years.”²¹¹ The Bureau is currently investigating over 189 major corporate frauds, eighteen of which involve losses exceeding \$1 billion.²¹²

The concentration of the accounting industry has raised concerns that the collapse of another “Big Four” firm could cause “paralysis in financial markets.”²¹³ The Big Four audit 97 percent of all public companies in America with sales over \$250 million.²¹⁴ Few industry observers believe that any of the next-largest firms could handle the kind of giant, multi-national accounts that the global accounting firms are equipped to service.²¹⁵ Moreover, in the event that only three big accounting firms remained, it would be difficult for the client companies to juggle the relationships necessary to comply with conflict of interest rules.

It is not clear that the collapse of another big accounting firm can be prevented given the emasculation of corporate crime enforcement and tort reforms that extend beyond the already problematic ones passed in the 1990s.²¹⁶ As it is, the Big Four accounting firms face an estimated \$50 billion in outstanding claims, and have huge problems getting insurance, particularly against unpredictable “catastrophic” risk.²¹⁷ In 2005, the industry implicitly acknowledged its perilous position when it signaled its intent to introduce a legislative limit on auditors’ liability.²¹⁸ The firms’ precarious position and continuing conflicts of interest provide a significant basis for federalizing the auditing function.

Rep. Dennis Kucinich (D-OH) proposed this kind of approach to financial auditing problems in early 2002, before Andersen collapsed and Sarbanes-Oxley was completed. Kucinich’s bill would have created a Federal Bureau of Audits responsible for auditing all publicly traded corporations.²¹⁹ “Americans rely on the FBI to protect them from criminals and terrorists, the FBA (Federal Bureau of Audits) [would] protect American stockholders from the silent crimes committed by corporate criminals,” Kucinich suggested. “The Enron scandal suggests we need cops who carry calculators instead of firearms!”²²⁰

Given the precarious state of the accounting industry, a conservative case can be made that placing the auditing process under federal control is necessary to preserve the country’s free-market system. We must recognize that accounting fraud has calamitous consequences for the firms involved, for millions of people who depend on the performance of the market for their retirement security, and for the broader economy. In this respect, confidence in corporate financial reporting is a question of national economic security.

THE NEWS MEDIA DEBATE

Another sector of the U.S. economy that falls largely within the public domain, but is dominated by the investor-driven interests of corporate

conglomerates, is the broadcast news media. Broadcast corporations pay nothing for using the public's airwaves, the most valuable resource of the information economy, with an estimated commercial value of over \$750 billion.²²¹ The United States Supreme Court in *Red Lion Broadcasting v. FCC* concluded that broadcasters who receive licenses to operate on the public airwaves free of charge must serve the public interest.²²² Given a license to operate, they are granted the privilege of using scarce community broadcast frequencies, and are therefore "obligated to give suitable time and attention to matters of great public concern."²²³

Under current FCC standards, corporate broadcasters are required to meet minimal requirements as a condition of their local station licenses, but the requirements are not very significant. These requirements include preparation of public reports on children's programming and an assessment of how they are serving their listening communities,²²⁴ providing "reasonable access" to legally qualified political candidates as defined by FCC rules and regulations,²²⁵ and providing closed-caption television programming.²²⁶ In reality, most broadcasters air their scant community messages in the "wee hours of the night," when audiences are at their lowest and it is impossible to sell commercial advertising.²²⁷ A 2003 survey of local TV stations in six different markets determined that only 0.5 percent of programming covered local public affairs, despite the potential value of "localism" in serving the public interest.²²⁸

In large part as a result of FCC policies to loosen ownership caps, the ownership of broadcast media across the nation has been concentrated into only a handful of huge media conglomerates such as Viacom, Time Warner, Rupert Murdoch's News Corporation, General Electric, and Disney.²²⁹ These corporations have an enormous impact on the information an average American receives. A similar concentration of ownership has occurred in radio. As a result of loosened ownership rules, Texas-based Clear Channel has rapidly acquired over 1,200 U.S. stations in a few years and begun to broadcast homogenized programming in cities and towns across the

country.²³⁰ Media analysts link this concentrated corporate ownership of the media to a decline in the dissemination of independent, community-based political perspectives, with significant adverse consequences for democratic discourse and community well-being.²³¹ In Minot, North Dakota, for example, where six radio stations are owned by Clear Channel, it took over an hour for the police to disseminate emergency information about a lethal spill of toxic chemicals because the local stations were broadcasting content that originated 1,600 miles away.²³²

Across the political spectrum, and even within the broadcast industry, critics blame media corporations for effectively preventing diverse access to the airwaves and thus lowering news reporting standards. CNN founder Ted Turner argued that had he started his career in broadcast ownership in 2003, when the FCC proposed to further loosen media ownership rules, he would not have been able to launch CNN.²³³ Turner stated, “[l]arge media companies are far more profit-focused and risk-averse. They sometimes confuse short-term profits and long-term value. They kill local programming because it’s expensive, and they push national programming because it’s cheap—even if it runs counter to local interests and community values.”²³⁴

A growing media reform movement has developed a number of strategies to reclaim the public’s airwaves, protect public broadcasting and hold news corporations accountable to their public interest obligations. These strategies include local challenges to broadcast license renewals, demands for limits on commercial advertising, and establishment of free municipally controlled wireless communication networks.²³⁵ These efforts seem to be supported by the language of the U.S. Supreme Court. “It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.”²³⁶ Even within the FCC, some commissioners support

broader license renewal obligations that force radio stations to take their public interest obligations more seriously or lose their licenses.²³⁷

In addition to these reforms, a structural limit on news corporations' ownership of media resources should be inscribed in their corporate charters, and required as conditions for obtaining a public broadcast license. Furthermore, portions of the broadcast spectrum should be declared off-limits to for-profit private corporations.

LOCALLY CONTROLLED CORPORATIONS

So far, this article has largely focused on federal control as the most desirable source of public authority over corporate activity. We have described cases, such as defense, in which public interests would effectively be protected by a system of federal chartering. In addition, we have explored reasons to restructure specific industry sectors, such as tobacco and auditing, in order to place a critical part of the industry under direct public control at the federal level. We have also cited federal limits on media corporations as a means of curbing their ability to crowd out competing voices with a legitimate right to public expression. We now turn to specific sectors of the economy where, in order to protect the public interest, it will be more effective to re-envision the corporation through a framework of local control.

Municipal control is most necessary with corporations that provide essential services like electricity, water, and transportation to individual communities because of the important function of these services and the technologies associated with them. The social value of these entities is measured by their responsiveness to the people they serve, rather than their ability to benefit remote shareholders. Moreover, their inherent technological requirements and structural efficiencies make them "natural monopolies."²³⁸ Tyson Slocum, the research director of Public Citizen's Critical Mass Energy Project, describes how electricity generation and distribution is one such monopoly:

Unlike other industries in the American economy, it is very difficult to foster competition in the electricity industry. Electricity's high overhead costs limit the number of players, since it requires hundreds of millions to build or buy a power plant Constraints on siting power plants also inhibit competition because plants must be near power lines and meet minimum public health standards, since those using natural gas, oil or coal (as 70 percent of U.S. plants do) produce harmful emissions.²³⁹

In order to determine how the provision of essential services like electricity and water can best serve the public interest, we cannot look merely at what level of government should charter a corporation; we must also look at whether a public or private institution is best suited to providing such services. Municipally incorporated utilities, restricted to a specific purpose and accountable to the local citizens, are arguably the best equipped to provide continuous services to the broader population.

The 2000–2001 California electricity crises illustrates the difference between municipally accountable services and shareholder-driven utility companies that are free to gouge consumers in a deregulated environment. The manipulation of California's electricity markets cost ratepayers tens of billions of dollars, but it did not affect cities such as Sacramento and Los Angeles, which controlled their own utilities.²⁴⁰ These cities were not subject to the predatory price-gouging and artificial shortages created by Enron and other companies.

Across the country, 2,100 municipalities own their own utilities, and there are an additional 900 energy cooperatives.²⁴¹ In 1999, the Department of Energy found that, on average, customers who owned their utilities paid 18 percent less than customers of investor-owned utilities.²⁴² The New Rules Project explains, “[b]ecause customer-owned utilities are democratic and locally controlled, and service rather than profit oriented, we should encourage their formation. In today's topsy-turvy electricity world, states should encourage the formation not only of customer-owned distribution utilities, but public transmission utilities and generation utilities as well.”²⁴³

Beyond the financial advantage of customer ownership, the technological scale and fragmentation inherent in local control provides the additional benefits of stability and environmental protection. As the big northeastern blackout of August 2003 demonstrated, a nationally or regionally integrated grid system is potentially vulnerable to a failure in one location. Recognizing that vulnerability, beginning in the early 1980s, Pentagon analysts and energy efficiency experts made the case that a decentralized system of energy and electricity would improve our national security.²⁴⁴ Smaller, locally owned utilities rarely build giant power plants that are costlier to the environment and prime targets for terrorist attacks.²⁴⁵ Additionally, municipal control facilitates the introduction of locally appropriate and ecologically sustainable technologies.²⁴⁶

Past examples demonstrate that municipal services performed better under public control than when privatized. According to historian Clifton Hood, New York City's subway system was first operated in 1904 by the Interborough Rapid Transit Company and then in conjunction with the Brooklyn Rapid Transit Company after 1913.²⁴⁷ Rising inflation after World War I caused both companies to teeter in and out of bankruptcy, so the city started its own subway network in 1933. The Independent Subway System competed with the private lines, which delivered poor service, and in 1940, the city created a unified, municipally run system.²⁴⁸

Firefighting is another example of a service that was once in the private sector but is now traditionally maintained as a public service. Communities that have experimented with the privatization of firefighting services have reported disastrous results. In 1985, the Salem, Arkansas Fire Corporation arrived at a fire and let the home burn because the owner had not paid the \$20 annual subscription fee.²⁴⁹ "Once we verified that there was no life in danger, and no immediate danger to a [subscriber's] property, then according to our rules we had no choice but to back off," explained the fire corporation's chief.²⁵⁰

The experience with essential services suggests that tightened regulation and federal chartering may not be the most effective means of providing public benefits. Local, customer-owned services, managed either by municipal governments or as independent utilities, are much more responsive to the needs of their constituents than corporations, whose principle allegiance is to another constituency—their shareholders. The example of essential services suggests that for some sectors of the economy, institutional approaches like these may be more appropriate.

CONCLUSION: FROM PRIVATE BACK TO PUBLIC

As Alan Wolfe once suggested,

If we believe that corporations are private agents, they are free to mind their own business outside the purview of the rest of society. . . . If, on the other hand, corporations are understood as public actors, all these conclusions are reversed. Corporations have obligations not only to their shareholders, but also to others in the society as well; they have public duties. . . .²⁵¹

The legacy of the corporation as a private entity beginning with *Dartmouth* and continuing with the adoption of general incorporation laws resulted in the loss of an important means of holding corporations accountable to the public interest. Although “the idea persisted that the state conferred the privileges of incorporation not simply for the private benefit of the incorporators, but also to further the general welfare,”²⁵² easy access to incorporation significantly weakened the perspective that corporations are entities with privileged legal status created by the state.²⁵³

The acquisition of certain constitutional rights and the dissemination of key judicial doctrines and legal theories provided the corporation even further independence from the state. The result is an assumption that the state can no longer bargain on behalf of the public in exchange for the advantages of incorporation—a major concession. The implications of this concession are rarely raised in public debates over corporate accountability.

In this article, we have invoked specific examples of corporations and industries (e.g. media, defense, financial accounting, and community-based services) that are commonly considered to be more public than private. But ultimately, it is important to ask how private can any corporation be if it exists by legal rights granted to it by a public charter?

Corporate law and theory have long been skewed in the direction of treating corporations as private entities. As a result, citizens' ability to reclaim our fundamental authority to determine the role corporations should play in society has been thoroughly undermined. It is as if we have been colonized by the very institutions we granted the privilege to exist.²⁵⁴ Only by showing how corporations are essentially public entities can we reassert the authority of states, laws and ultimately, the sovereign rights of the people to control corporations.

Rather than attempting to force corporate law to attend to these questions immediately, we recognize that public opinion must change significantly before it will be possible to achieve corporate law reforms. The arguments to be made for conceptualizing the public nature of corporations are defined not merely in corporate law, but are rooted in the broader culture. Debates like the one here must occur in public forums before the impetus for developing a framework of effective law reform can occur.

David Millon suggests that corporate law has never had an ambitious social agenda.²⁵⁵ It is hard to imagine how it would come to have a social orientation in the future. In fact, corporate law may be an impediment to real corporate accountability. Policy debates surrounding existing theories of the corporation tend to drag participants into a dynamic that impoverishes democratic imagination.

Until citizens fully imagine ways to reassert our collective authority over corporations, we will necessarily work within corporate-dominated political and economic systems to raise questions about corporate power. We want to know why there is no balance sheet that accounts for public subsidies to corporations and the estimated \$2.6 trillion in both legal and illegal costs

that corporations cost the public each year.²⁵⁶ What exempts corporations from this kind of corporate accounting?

From the beginning of their existence, corporations have had a public dimension. Actually, the concept of corporations as private entities is more artificial than the idea of public corporations. The theory of the private corporation is the product of decades of advocacy by corporate lawyers, judicial opinions and doctrines that favor corporate interests and legislation dominated by corporate influence. By reclaiming a history of the corporation we can begin to lay the foundation for legitimizing a new public theory of corporations.

In the *Dartmouth College* case Justice Marshall wrote, “[t]he objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and in most cases, the sole consideration of the grant [of corporate identity].”²⁵⁷

In another famous United States Supreme Court case, *Charles River Bridge*,²⁵⁸ Chief Justice Taney insisted that the notion of corporate charters as private contracts be rejected, and that corporations must benefit the whole community: “[W]e must not forget, that the community also have rights, and that the happiness and well-being of every citizen depends on their faithful preservation.”²⁵⁹

As Justices Byron White, William Brennan, and Thurgood Marshall noted in *First National Bank of Boston v. Belotti*:

Corporations are artificial entities created by law for the purpose of furthering certain economic goals. In order to facilitate the achievement of such ends, special rules relating to such matters as limited liability, perpetual life, and the accumulation, distribution, and taxation of assets are normally applied to them. States have provided corporations with such attributes in order to increase their economic viability and thus strengthen the economy generally. It has long been recognized, however, that *the special status of corporations has placed them in a position to control vast amounts*

*of economic power which may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process. . . . The State need not permit its own creation to consume it.*²⁶⁰

These Justices are correct about the nature of corporate power and the threat it creates to democracy. The state should not stand back in the face of pervasive corporate power and allow itself to be overpowered and consumed. If we consistently remember that corporations are creatures of the state and its laws, and that “We The People,” acting through our democratic governments, have the power to control corporations, we will be on the path toward restoring democracy.

¹ Charlie Cray is the director of the Center for Corporate Policy (<http://www.corporatepolicy.org>). An early draft of this article was based on the first chapter of the authors’ book, LEE DRUTMAN & CHARLIE CRAY, *THE PEOPLE’S BUSINESS* (2004). The authors are grateful to Maud Schaafsma for her help with this article.

² Lee Drutman is the communications director of Citizen Works (<http://www.citizenworks.org>).

³ <http://www.licensedtokill.biz/about.html>.

⁴ Press Release, License to Kill, Inc., New Tobacco Company, Licensed to Kill, Inc, Incorporated in the State of Virginia: Aims to Kill Over 400,000 Americans and 4.5 Million Other People Worldwide Annually (Apr. 17, 2003), *available at* <http://www.licensedtokill.biz/media/pr030417.html>. Note that all of the people “quoted” in the press release, including Gary Vastone, are fictional people with names meant to sound like symbols of death (Gary Vastone, for example, was intended to sound like “Gravestone”).

⁵ Philip Morris is part of the Altria food conglomerate. Altria, http://www.altria.com/about_altria/1_2_5_1_altristory.asp (last visited Nov. 1, 2005). Reynolds American is the U.S. subsidiary of the new conglomerate, formed in 2003, when RJ Reynolds merged with Brown & Williamson, the U.S. subsidiary of British American Tobacco. Reynolds American, Inc., http://www.reynoldsamerican.com/Who/whoweare_cover.asp (last visited Nov. 1, 2005). The two companies rank numbers one and two, respectively, among American tobacco companies. Brett D. Fromson, *Slugfest in the Smoke Ring*, WASH. POST, Mar. 1, 1998, at H1.

⁶ According to its annual report to shareholders, Altria is incorporated in Virginia. *See* Altria Form 10-K, filed with the U.S. Securities and Exchange Commission, 2005, <http://www.sec.gov/Archives/edgar/data/764180/000095012305003146/y06457e10vk.htm> (last visited Dec. 15, 2005); according to its report to shareholders, Reynolds is incorporated in North Carolina. *See* Reynolds American Form 10-K, filed with the U.S. Securities and Exchange Commission, 2005,

<http://www.sec.gov/Archives/edgar/data/1275283/000095014405005767/g95351kae10vka.htm> (last visited Dec. 15, 2005).

⁷ *Id.*

⁸ INFACIT, GLOBAL AGGRESSION: THE CASE FOR WORLD STANDARDS AND BOLD U. S. ACTION CHALLENGING PHILIP MORRIS AND RJR NABISCO, (1998); Robert Weissman, *The Tobacco Papers IV: Big Tobacco Goes Global*, MULTINATIONAL MONITOR (July-Aug. 1998), available at <http://www.multinationalmonitor.org/mm1998/98july-aug/smoke4.html>.

⁹ See DAVID KESSLER, A QUESTION OF INTENT 391 (2001). For an explanation of state charter revocation remedies (*quo warranto*), see Thomas Linzey, *Awakening a Sleeping Giant: Creating a Quasi-Private Cause of Action for Revoking Corporate Charters in Response to Environmental Violations*, 13 PACE ENVTL. L. REV. 219 (1995).

¹⁰ See Russell Mokhiber, *Crime Wave! The Top 100 Corporate Criminals of the 1990's*, MULTINATIONAL MONITOR, July–Aug. 1999, available at <http://multinationalmonitor.org/mm1999/99july-aug/toc.html>; MARSHALL B. CLINARD & PETER C. YEAGER, CORPORATE CRIME (1980).

¹¹ Numerous small companies have been put out of business (i.e. had their charters revoked) as a result of lawbreaking activities, including a failure to pay taxes. See Charlie Cray, *Chartering a New Course: Revoking Corporations' Right to Exist*, MULTINATIONAL MONITOR, Oct.–Nov. 2002, at 8, available at <http://www.multinationalmonitor.org/mm2002/02oct-nov/oct-nov02corp1.html>. In 1998, a group of thirty citizens' organizations and individuals filed a petition with the California state attorney general to revoke the charter of Unocal, citing a record of environmental and human rights violations. See ROBERT BENSON, CHALLENGING CORPORATE RULE 9 (1999) (reprinting a complaint lodged with the Attorney General of California under California Code of Civil Procedure § 803, California Corporations Code § 801, To Revoke the Corporate Charter of the Union Oil Company of California, September 10, 1998).

¹² Established in 1792, the New York City-based New York Stock Exchange is the world's leading market for trading equity shares in corporations. See <http://www.nyse.com>.

¹³ Fortune Magazine publishes a list of the top 500 companies each year, ranked by total operating revenues for the companies' latest fiscal year. Description of Fortune 500 Activities, <http://www.knowledgerush.com/kr/encyclopedia/Fortune-500> (last visited Nov. 1, 2005).

¹⁴ All companies on the Fortune 500 are required to publish financial data, and must report part or all of their figures to a government agency. Private companies that produce a 10-K are included. See Fortune.com, The 2005 Fortune 500 FAQ Definitions and Explanations, <http://www.fortune.com/fortune/fortune500/articles/0,15114,1043208,00.html> (last visited Dec. 15, 2005).

¹⁵ FRANK H. EASTERBROOK & DANIEL R. FISCHER, THE ECONOMIC STRUCTURE OF CORPORATE LAW 12 (1991).

¹⁶ RONALD E. SEAVOY, THE ORIGINS OF THE AMERICAN BUSINESS CORPORATION, 1784-1855: BROADENING THE CONCEPT OF PUBLIC SERVICE DURING INDUSTRIALIZATION 4–5 (1982).

¹⁷ By “corporate welfare” we refer to a variety of tax breaks and loopholes, bailouts, giveaways, loan guarantees, and other benefits provided to corporations, often at the expense of the rest of society. RALPH NADER, CUTTING CORPORATE WELFARE 13 (2000).

¹⁸ For more information about community trust corporations and other locally controlled forms see E.F. Schumacher Society, <http://www.smallisbeautiful.org>; GAR ALPEROVITZ, AMERICA BEYOND CAPITALISM: RECLAIMING OUR WEALTH, OUR LIBERTY, AND OUR DEMOCRACY (2005), available at <http://www.americabeyondcapitalism.org>; WILLIAM GREIDER, THE SOUL OF CAPITALISM (2003).

¹⁹ John P. Davis suggests that the English conception of a corporation is too easily assumed by many to have been taken full-grown from the law of Rome, noting that: (a) the most prominent feature of the corporation under English law (artificial personhood) is wanting in Roman law, and (b) the historical evidence is weak. JOHN DAVIS, CORPORATIONS VOLUME II: AN INTRODUCTORY STUDY OF CORPORATIONS 222–23 (Abram Chayes ed., Capricorn Books 1961) (1904). Nevertheless, Davis suggests that many features of Roman law relating to subordinate political communities (e.g. *civitates*, *municipia*, *coloniae*, *vici*) approached the status of later English “corporations sole”: “The term *corpus* was the technical legal term implying the recognition and sanction of the *collegium* or *universitas* by the state.” *Id.* at 224.

²⁰ HENRY WINTHROP BALLANTINE, BALLANTINE ON CORPORATIONS 31 (rev. ed. 1946).

²¹ See TED NACE, GANGS OF AMERICA: THE RISE OF CORPORATE POWER AND THE DISABLING OF DEMOCRACY 30–37 (2003).

²² *Id.*

²³ Samuel Williston, *History Of The Law Of Business Corporations Before 1800*, 2 HARV. L. REV. 105, 109–10 (1888).

²⁴ JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780–1970, at 7 (1970).

²⁵ DAVID KORTEN, WHEN CORPORATIONS RULE THE WORLD 60–61 (2d ed. 2001).

²⁶ NACE, *supra* note 21, at 42.

²⁷ CHARLES PERROW, ORGANIZING AMERICA: WEALTH, POWER, AND THE ORIGINS OF CORPORATE CAPITALISM 32 (2002).

²⁸ NACE, *supra* note 21, at 4–45; *id.* at 33.

²⁹ ADAM SMITH, THE WEALTH OF NATIONS BOOKS I-III, at 233 (Penguin Classics 1999) (1776).

³⁰ *Id.* at 123, 227.

³¹ JOHN WILLIAM CADMAN, JR., THE CORPORATION IN NEW JERSEY: BUSINESS AND POLITICS 1791–1875, 76, n. 185 (1949).

³² SEAVOY, *supra* note 16.

³³ *Id.*

³⁴ ROBERT A. EAST, BUSINESS ENTERPRISE IN THE AMERICAN REVOLUTIONARY ERA 285 (Peter Smith 1964) (1938) (citing J.S. DAVIS, ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS VOL. 2, Appendix A).

³⁵ Charter revocation or dissolution was a prerogative remedy of the state, defined as *quo warranto*, under which it was required to demonstrate “by what authority” it has the right to carry out a specific act. In the context of corporate charters, this prerogative has a broad historical context, since corporations were viewed as public franchises. Before state legislatures, that authority was originally vested in the Crown (e.g. the British East India Company was a Crown-chartered corporation). The common law remedy of *scire facias* originated as a judicial writ to have the charter of a company repealed or revoked for its misuse or abuse. Abolished in the U.S., it may still be available in Canada. See Gil Yaron, *Awakening Sleeping Beauty: Reviving Lost Remedies and Discourses To Revoke Corporate Charters* (Jan. 2000) (unpublished masters thesis, University of British Columbia Law School), available at <http://www.aurora.ca/info/revoke.pdf>.

³⁶ Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality* (with Notes on How Corporate Law Could Reinforce International Law Norms) (Apr. 3, 2001) (unpublished law school research paper No. 2001-02, Boston College Law School), available at <http://ssrn.com/abstract=253770>.

³⁷ For a review of the early chartering process see Frank Adams & Richard Grossman, *Taking Care of Business: Citizenship and the Charter of Incorporation*, in *DEFYING CORPORATIONS, DEFINING DEMOCRACY* 59, 63–65 (Dean Ritz ed., 2001).

³⁸ EDWIN MERRICK DODD, *AMERICAN BUSINESS CORPORATIONS UNTIL 1860, WITH SPECIAL REFERENCE TO MASSACHUSETTS* (1954).

³⁹ Adams & Grossman, *supra* note 37, at 62; David Millon, *Frontiers of Legal Thought I: Theories of the Corporation*, 1990 DUKE L.J. 201.

⁴⁰ Adams & Grossman, *supra* note 37, at 62.

⁴¹ *Id.*

⁴² See Greenfield, *supra* note 36, at 24–26.

⁴³ IV JOSEPH STANCLIFFE DAVIS, *ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS* 328 (1917).

⁴⁴ Millon, *supra* note 39.

⁴⁵ RALPH NADER, MARK GREEN, & JOEL SELIGMAN, *TAMING THE GIANT CORPORATION* 34 (1976).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 63 (quoting Henry Carter Adams, *Presidential Address to the American Economic Association* (1896)).

⁴⁹ See Millon, *supra* note 39, at 207.

⁵⁰ *Id.* at 210.

⁵¹ ARTHUR M. SCHLESINGER, JR., *THE AGE OF JACKSON* 105 (1945).

⁵² Note, *Incorporating The Republic: The Corporation in Antebellum Political Culture*, 102 HARV. L. REV 1883, 1896 (1989). “Antebellum debates about corporations were not merely, as those who assume an underlying consensus of liberal aspirations for private property and wealth contend, disputes over who would have access to the corporation as a new opportunity for accumulating wealth and a new form of legally protected private property. Instead the corporation raised concerns, central to the republican tradition, about whether new forms of property and wealth were consistent with the social and

economic underpinnings necessary for civic equality and public-spiritedness.” *Id.* at 1888.

⁵³ SCHLESINGER, *supra* note 51, at 337.

⁵⁴ *See id.* at 337–38.

⁵⁵ *Id.* at 337.

⁵⁶ *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518 (1819).

⁵⁷ LOUIS MENAND, *THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA* 243 (2001).

⁵⁸ NACE, *supra* note 21, at 84, 85.

⁵⁹ NADER, GREEN, & SELIGMAN, *supra* note 45, at 44–45.

⁶⁰ *Id.* at 45.

⁶¹ *Id.*

⁶² *Id.* at 46.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 42.

⁶⁶ *Id.* at 43.

⁶⁷ *Id.* at 47.

⁶⁸ RICHARD B. DUBOFF, *ACCUMULATION AND POWER: AN ECONOMIC HISTORY OF THE UNITED STATES* 57 (1989).

⁶⁹ NADER, GREEN, & SELIGMAN, *supra* note 45, at 48.

⁷⁰ *Id.* at 50.

⁷¹ *Id.* at 52.

⁷² JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA* 141 (2003)

⁷³ NACE, *supra* note 21, at 53.

⁷⁴ DODD, *supra* note 38.

⁷⁵ NACE, *supra* note 21, at 78–79.

⁷⁶ WILLIAM W. COOK, *THE CORPORATION PROBLEM* 288 (1891).

⁷⁷ WILLIAM G. ROY, *SOCIALIZING CAPITAL: THE RISE OF THE LARGE INDUSTRIAL CORPORATION IN AMERICA* 163 (1997).

⁷⁸ The history of the expansion of corporate constitutional rights is described in LEE DRUTMAN & CHARLIE CRAY, *THE PEOPLE’S BUSINESS* 41–80 (2004). *See also* NACE, *supra* note 21.

⁷⁹ Millon, *supra* note 39, at 206, 211.

⁸⁰ *Santa Clara County v. S. Pac. R.R.*, 118 U.S. 394 (1886). Lawyers have been wont to attribute to the corporation a “personality” since the thirteenth century. *See* FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I VOL. I*, at 488 (Lawyer’s Literary Club 2d ed. 1959) (1895).

⁸¹ The implications of and dubious means by which this precedent was established is explored in THOM HARTMANN, *UNEQUAL PROTECTION: THE RISE OF CORPORATE DOMINANCE AND THE THEFT OF HUMAN RIGHTS* 5–6 (2002).

⁸² Alan Wolfe, *The Modern Corporation: Private Agent or Public Actor?* 50 WASH. & LEE L. REV. 1673, 1675 (1993).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See GABRIEL KOLKO, *THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916* (1963).

⁸⁶ ROBERT A.G. MONKS & NELL MINOW, *POWER AND ACCOUNTABILITY* (1991).

⁸⁷ Millon, *supra* note 39, at 217.

⁸⁸ *Id.* at 220–21.

⁸⁹ *Id.* at 229.

⁹⁰ Wal-Mart is the nation's largest retailer. <http://en.wikipedia.org/wiki/Wal-Mart>.

ExxonMobil is the nation's largest oil company. <http://en.wikipedia/wiki/Exxon>.

General Motors is the nation's largest car manufacturer.

http://en.wikipedia.org/wiki/General_Motors. Halliburton is the largest contractor to the U.S. Army and one of the nation's largest oil industry services corporations.

<http://www.halliburton.com/about/index.jsp>.

⁹¹ Thomas Linzey, *A Citizen's Guide to Corporate Charter Revocation Under State Law*, COMMUNITY ENVIRONMENTAL LEGAL DEFENSE FUND, <http://www.celdf.org/cdp/cdp1.asp> (last visited Dec. 15, 2005).

⁹² Yaron, *supra* note 35.

⁹³ *Id.* at 143–49; Cray, *supra* note 11.

⁹⁴ Press Release, Feminist Majority, Environmental, Human Rights, Women's and Pro-Democracy Groups Petition Attorney General of California to Revoke UNOCAL's Corporate Charter (Sept. 10, 1998), *available at* <http://www.commondreams.org/pressreleases/Sept98/090198f.htm>.

⁹⁵ See Benson, *supra* note 11.

⁹⁶ *Id.*

⁹⁷ Cray, *supra* note 11.

⁹⁸ Bob Benson, *Soft on Crime?*, THE RECORDER, Oct. 14, 1998, at 5.

⁹⁹ S.B. 335 § 40003(a), Reg. Sess. (Cal. 2003).

¹⁰⁰ S.B. 335 § 40006(a), Reg. Sess. (Cal. 2003).

¹⁰¹ S.B. 335 § 40008(a), Reg. Sess. (Cal. 2003).

¹⁰² S.B. 335 § 40006(c), Reg. Sess. (Cal. 2003).

¹⁰³ RICHARD BREEDEN, *RESTORING TRUST* (2003) (report on corporate governance for the future of MCI, Inc., submitted to The Hon. Jed S. Rakoff, U.S. Dist. Ct. S.D.N.Y.).

¹⁰⁴ *Id.* at 13.

¹⁰⁵ CLINARD & YEAGER, *supra* note 11, at 216–217. In order to emerge from bankruptcy, WorldCom was required to adopt 78 internal reforms recommended by the court's appointed corporate monitor, former SEC chairman Richard Breeden. See BREEDEN, *supra* note 103.

¹⁰⁶ CLINARD & YEAGER, *supra* note 10, at 216–20.

¹⁰⁷ See Comment, *Criminal Sanctions for Corporate Illegality*, 69 J. CRIM. L. & CRIMINOLOGY 40, 54 (1978).

¹⁰⁸ See DRUTMAN & CRAY, *supra* note 1, at 133.

¹⁰⁹ An extensive review of the failures of antitrust regulation can be found in WALTER ADAMS & JAMES W. BROCK, *THE BIGNESS COMPLEX* 97–104, 184–99 (2d ed. 2004).

¹¹⁰ Robert Weissman, *Divide and Conquer: Restraining Vertical Integration and Cross-Industry Ownership*, MULTINATIONAL MONITOR, Oct.-Nov. 2002, at 16, 19. In TAMING

THE GIANT CORPORATION, Nader et al. also discuss how to use of federal chartering laws as a way to place structural restraints on cross-sector conglomeratization, an approach that is also pertinent to efforts to control the big news media conglomerates, discussed below. NADER, GREEN, & SELIGMAN, *supra* note 45, at 232–36.

¹¹¹ Cray, *supra* note 11, at 9.

¹¹² Kerry Curry, *Lionheart Newspapers Sued by Former CFO*, DALLAS BUS. J., July 13, 2001, available at <http://222.bizjournals.com/dallas/stories/2001/07/16/story6.html>.

¹¹³ *In the Game: NYC's Attorney General on Tobacco*, (CNN television broadcast Apr. 30, 1998).

¹¹⁴ *Id.*

¹¹⁵ John Cavanagh & Jerry Mander, *Fixing the Rotten Corporate Barrel*, THE NATION, Dec. 23, 2002, at 22.

¹¹⁶ *W. Va. Attorney General Targets Overloaded Coal Trucks*, PLATTS COAL OUTLOOK, Oct. 22, 2001, at 10.

¹¹⁷ See Katie J. Thoennes, Comment, *Frankenstein Incorporated: The Rise of Corporate Power and Personhood in the United States*, 28 HAMLINE L. REV. 203, 210-11 (2005) (arguing that the courts have applied the Due Process and Takings Clauses of the Constitution to state actions, limiting the states' ability to amend or repeal corporate charters).

¹¹⁸ Greenfield, *supra* note 36, at 2.

¹¹⁹ *Id.* at 2–3.

¹²⁰ *Id.*

¹²¹ Feminist Majority, *supra* note 94.

¹²² See Lucian Arye Bebchuk, *Limiting Contractual Freedom in Corporate Law: The Desirable Restraints on Charter Amendments*, 102 HARV. L. REV. 1820 (1989).

¹²³ NADER, GREEN, & SELIGMAN, *supra* note 45, at 44–50.

¹²⁴ See Jonathan Chait, *Rogue State*, THE NEW REPUBLIC, Aug. 19, 2002, at 20.

¹²⁵ Kent Greenfield, *Democracy and the Dominance of Delaware in Corporate Law*, 67 L. & CONTEMP. PROBS. 135, 136 (2004).

¹²⁶ William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 701 (1974).

¹²⁷ Greenfield, *supra* note 125, at 135.

¹²⁸ Daniel J. H. Greenwood, *Democracy and Delaware: The Puzzle of Corporate Law 1* (2002) (unpublished draft), available at <http://www.law.utah.edu/faculty/bios/greenwoodd/pdf/DemocAndDelGWU.pdf>.

¹²⁹ *Id.*

¹³⁰ Greenfield, *supra* note 125, at 138.

¹³¹ Greenfield, *supra* note 125, at 135–36.

¹³² Greenwood, *supra* note 128, at 25, 29; *id.* at 140.

¹³³ MONKS & MINOW, *supra* note 86, at 140–41.

¹³⁴ *Id.* at 37.

¹³⁵ The Connecticut statute provides that a director “shall consider. . . (3) the interests of the corporation’s employees, customers, creditors and suppliers, and (4) community and societal considerations including those of any community in which any office or other

facility of the corporation is located.” CONN. GEN. STAT. ANN. §§ 33-313(e) (West 1990).

¹³⁶ Robert Hinkley, *28 Words to Redefine Corporate Duties: the Proposal for a Code for Corporate Citizenship*, MULTINATIONAL MONITOR, July-Aug., 2002, at 18, available at <http://www.multinationalmonitor.org>.

¹³⁷ Greenfield, *supra* note 125, at 136.

¹³⁸ *See id.* at 138.

¹³⁹ NADER, GREEN, & SELIGMAN, *supra* note 45, at 68.

¹⁴⁰ *Id.* at 68.

¹⁴¹ *Id.* at 69.

¹⁴² *Id.* at 70 (quoting Senator Joseph C. O’Mahoney, The Preservation of Economic Freedom, Final Statement to the Temporary National Economic Committee, 10 (Mar. 11, 1941)).

¹⁴³ *Id.* at 69.

¹⁴⁴ *Id.*

¹⁴⁵ *See id.* at 70.

¹⁴⁶ NADER, GREEN, & SELIGMAN, *supra* note 45, review the history of attempts to establish federal corporate chartering. Between 1903 and 1914, for example, Presidents Roosevelt, Taft, and Wilson all voiced strong support for a federal incorporation or licensing scheme in their annual messages to Congress. President Taft had his attorney general, George Wickersham, draft a federal licensing bill and propose it to Congress in 1910. The Wall Street Journal supported a federal licensing bill in 1908: “Why should not the Federal Government . . . embody this underlying principle in a statement under which the development of corporations in general may proceed?” *Id.* at 67. Even Elbert H. Gary of U.S. Steel supported the idea: “The only regulation in scope and power to deal with these aggregations of capital is regulation by the Federal Government, because the subject matter of regulation is largely interstate commerce with which the states may not interfere, and the size and extent of the organizations involved is such as to require uniform and national regulation.” *Id.* at 70.

¹⁴⁷ *Id.* at 240.

¹⁴⁸ *Id.* at 121, 145–48, 156–57, 226–36.

¹⁴⁹ *Id.* at 71.

¹⁵⁰ *See id.*

¹⁵¹ Federal National Mortgage Association Charter Act, 12 U.S.C.A. §§ 1716 *et seq.* (1992).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ KESSLER, *supra* note 9, at 392–93 (emphasis added).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Press Release, Centers for Disease Control and Prevention, Smoking Deaths Cost Nation \$92 Billion in Lost Productivity Annually (June 30, 2005), available at <http://www.cdc.gov/od/oc/media/pressrel/r050630.htm>; Press Release, Centers for Disease Control and Prevention, Smoking Costs Nation \$150 billion Each Year in Health

Costs, Lost Productivity (Apr. 12, 2002), available at <http://www.cdc.gov/od/oc/media/pressrel/r020412.htm>.

¹⁵⁹ As of 2001, tobacco companies spent over \$100,000 per day lobbying Congress. Kirsten B. Mitchell, *Cigarette Companies Continue Lobbying in Washington*, ACTION ON SMOKING AND HEALTH, Oct. 21, 2001, <http://www.no-smoking.org/oct01/10-23-01-1.html>.

¹⁶⁰ See JOE THORNTON, *PANDORA'S POISON: CHLORINE, HEALTH, AND A NEW ENVIRONMENTAL STRATEGY* (2000).

¹⁶¹ American Public Health Association News, *Resolution 9304: Recognizing and Addressing the Environmental and Occupational Health Problems Posed by Chlorinated Organic Chemicals*. 84 AM. J. PUB. HEALTH 514, 514–15 (1994).

¹⁶² See INTERNATIONAL JOINT COMMISSION, *SIXTH BIENNIAL REPORT ON GREAT LAKES WATER QUALITY* (1992).

¹⁶³ JOE THORNTON, *THE PRODUCT IS IN THE POISON: THE CASE FOR A CHLORINE PHASE-OUT* (1991).

¹⁶⁴ Joel Bleifuss, *Dioxin as a Therapeutic Agent and Other PRT Tales*, IN THESE TIMES, Mar 20, 1995, at 12–15. See also THORNTON, *supra* note 163, at 297–408.

¹⁶⁵ See <http://www.pops.int/>. See also Charlie Cray, *U.S. Undermines POPS Treaty*, RACHEL'S ENV'T & HEALTH NEWS, July 12, 2000, available at <http://www.rachel.org>.

¹⁶⁶ Certain chemicals on the Stockholm Convention's priority list—including dioxins and PCBS—are a by-product of industrial chlorine production, use, and combustion (e.g. in incinerators or accidental fires), and thus their elimination can only occur from a phase-out of industrial chlorine, as Thornton and others have argued. See THORNTON, *supra* note 163, at 293–95.

¹⁶⁷ Since the September 11th attacks, concerns have increased about a terrorist attack on chlorine production plants and trains transporting chlorine through populated areas. The Department of Homeland Security has determined that an attack scenario involving a chlorine tank explosion could result in an estimated 17,500 deaths and 10,000 severe injuries. See THE HOMELAND SECURITY COUNCIL, *PLANNING SCENARIOS, EXECUTIVE SUMMARIES: CREATED FOR USE IN NATIONAL, FEDERAL, STATE, AND LOCAL HOMELAND SECURITY PREPAREDNESS ACTIVITIES 8-1-8-3* (2004), available at http://www.globalsecurity.org/security/library/report/2004/hsc-planning-scenarios-jul04_exec-sum.pdf.

¹⁶⁸ See also THORNTON, *supra* note 163, at 363–408 (for a more extensive discussion of the economic benefits of a transition to a non-toxic economy).

¹⁶⁹ Tim Weiner, *Lockheed and the Future of Warfare*, N.Y. TIMES, Nov. 28, 2004, at 31.

¹⁷⁰ Bunnatine Greenhouse, *Testimony before the Senate Democratic Policy Committee*, June 27, 2005, available at <http://www.democrats.reform.house.gov/Documents/20050627170012-64293.pdf>.

¹⁷¹ *Id.*

¹⁷² See P. W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* (2003); Pratap Chatterjee, *Intelligence, Inc.*, CORPWATCH, Mar. 7, 2005, available at http://www.corpwatch.org/print_article.php?id=11940.

¹⁷³ William Hartung & Michelle Ciarrocca, *The Military-Industrial-Think Tank Complex*, MULTINATIONAL MONITOR, Jan.-Feb. 2003, at 17; UNITED STATES GOVERNMENT

ACCOUNTABILITY OFFICE, DEFENSE ETHICS PROGRAM: OPPORTUNITIES EXIST TO STRENGTHEN SAFEGUARDS FOR PROCUREMENT INTEGRITY, GAO-05-341 (2005); PROJECT ON GOVERNMENT OVERSIGHT, THE POLITICS OF CONTRACTING (2004), available at <http://www.pogo.org/p/contracts/c/co-040101-contractor.html>; SIDNEY LENS, PERMANENT WAR: THE MILITARIZATION OF AMERICA, 165-168 (1987).

¹⁷⁴ Weiner, *supra* note 169.

¹⁷⁵ See Hartung & Ciarrocca, *supra* note 173, at 19–20.

¹⁷⁶ Dwight D. Eisenhower, *Eisenhower's Farewell Address*, in 2 DOCUMENTS OF AMERICAN HISTORY 653 (Henry Steele Commager ed., 9th ed. 1973).

¹⁷⁷ John Kenneth Galbraith, *The Big Defense Firms Are Really Public Firms and Should be Nationalized*, N.Y. TIMES, Nov. 16, 1969, § (Magazine), at 50.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* The situation today is strikingly similar. According to the Center for Public Integrity, only 40 percent of Pentagon contracts between 1997 and 2003 were conducted under what it terms “full and open competition,” while only one of the top ten biggest contractors won more than half of its contract revenues through an open bidding process. See Larry Makinson, *Outsourcing the Pentagon: Who Benefits from the Politics and Economics of National Security?*, CENTER FOR PUBLIC INTEGRITY, Sept. 29, 2004, available at <http://www.publicintegrity.org/pns/report.aspx?aid=385>.

¹⁸² Galbraith, *supra* note 177.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Note that the big accounting firms are not corporations. Our ability to exert the public policies proposed here should not get hung up on that issue. The principle of maintaining public control of the auditing process is the core question here, not the incorporation process.

¹⁸⁶ See STAFF TO THE SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS, FINANCIAL OVERSIGHT OF ENRON: THE SEC AND PRIVATE-SECTOR WATCHDOGS, (OCT. 7, 2002).

¹⁸⁷ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204 (2002).

¹⁸⁸ Andrew Countryman, *Auditor Conflicts Remain Prevalent*, CHI TRIB. Sept. 6, 2004, (Business) at 1.

¹⁸⁹ Adrian Michaels, *Accounting Journal Joins Tax Debate*, FIN. TIMES (London), Sept. 1, 2003.

¹⁹⁰ Countryman, *supra* note 188.

¹⁹¹ John C. Coffee, Jr., *Understanding Enron: “It’s About the Gatekeepers, Stupid*, 57 BUS. LAW. 1403, 1407 (2002).

¹⁹² Loren Steffy, *Sage of Ethical Accounting Foretold Andersen Demise*, HOUS. CHRON., Jan. 14, 2005 (Business), at 1.

¹⁹³ On June 19, 2001 three Arthur Andersen partners and the firm itself settled with the SEC for violations of antifraud provisions associated with the firm’s audits of the giant waste disposal firm, Waste Management, Inc. The accounting firm paid a \$7 million penalty. See United States Securities and Exchange Commission, Litigation Release No. 17039 (June 19, 2001) available at <http://www.sec.gov/litigation/litreleases/lr17039.htm>.

¹⁹⁴ On May 11, 2001, the SEC settled with appliance manufacturer Sunbeam, five Sunbeam officers, and an Andersen accountant for a fraudulent accounting scheme associated with a purported “turnaround” at the company. Inappropriate accounting reserves were used to overstate the company’s losses in 1996 and overstate earnings in 1997. See SEC 2001 ANNUAL REPORT, ENFORCEMENT (2001), available at <http://www.sec.gov/pdf/annrep01/ar01enforce.pdf>.

¹⁹⁵ WorldCom was a large telecommunications firm that collapsed into bankruptcy after committing a record \$11 billion accounting fraud, and emerged from bankruptcy in 2003 as MCI. See Larry Neumeister, *Judge Approves \$6.1 Billion in WorldCom Settlements*, ST. LOUIS POST-DISPATCH, Sept. 22, 2005, at B2.

¹⁹⁶ Global Crossing is a telecommunications firm that provides worldwide computer networking services. In 2002 the company declared Chapter 11 bankruptcy after its stock plunged from \$64 to \$1. An SEC investigation was concluded in April 2005, without any finding of fraud. See Global Crossing, *SEC Concludes Global Crossing Investigation*, Apr. 11, 2005, <http://www.globalcrossing.com/xml/news/2005/april/11.xml> (last visited Nov. 18, 2005). At the same time, the company and three former officers of the company were charged by the SEC with reporting failures. The executives were fined \$100,000 each. See United States Securities and Exchange Commission, Litigation Release No. 19179 (Apr. 11, 2005), available at <http://www.sec.gov/litigation/litreleases/lr19179.htm>.

¹⁹⁷ Qwest is a large telecommunications firm. From 1999 to 2002, Qwest engaged in a complex scheme to improperly record more than \$3 billion in revenue and exclude \$231 million in expenses, according to the SEC. See Press Release, Securities and Exchange Commission, SEC Charges Qwest Communications International Inc. with Multi-Faceted Accounting and Financial Reporting Fraud (Oct. 21, 2004), available at <http://www.sec.gov/news/press/2004-148.htm>.

¹⁹⁸ Steffy, *supra* note 192.

¹⁹⁹ The top four accounting firms—Ernst & Young, Deloitte & Touche, PriceWaterhouseCoopers (PWC), and KPMG—are far larger than the next biggest competitor. According to the GAO, the “Big Four” audit 97 percent of all public companies in America with sales over \$250 million, all of Britain’s 100-biggest public companies, 80 percent of public companies in Japan, They hold over 70 percent of the European market by fee income. See U.S. GENERAL ACCOUNTING OFFICE, PUBLIC ACCOUNTING FIRMS: MANDATED STUDY ON CONSOLIDATION AND COMPETITION, 7-8 (2003).

²⁰⁰ David Reilly & Alessandra Galloni, *Facing Lawsuits, Parmalat Auditor Stresses Its Disunity*, WALL ST. J., Apr. 28, 2005, at A1; *Deloitte Considers Parmalat Deals*, BBC NEWS, July 7, 2005, http://news.bbc.co.uk/1/hi/newsid_4662000/4662095.stm.

²⁰¹ Diya Gullapalli, *Deloitte to Be Latest to Settle in Accounting Scandals*, WALL ST. J., April 26, 2005, at A3.

²⁰² *Id.*

²⁰³ Adrian Michaels, *E&Y Pays for Past Indiscretions*, FIN. TIMES (London), Apr. 17, 2004, at A1.

²⁰⁴ Floyd Norris, *Big Auditing Firm Gets 6-Month Ban on New Business*, N.Y. TIMES, Apr. 17, 2004, at A1.

²⁰⁵ *Id.*

²⁰⁶ Jonathan Weil & Diya Gullapalli, *Fannie Restatement Sparks Debate Over Fate of Auditor*, WALL ST. J., Dec. 17, 2004, at C3.

²⁰⁷ See Gretchen Morgenson, *KPMG Settles with S.E.C. on Xerox Audits*, N.Y. TIMES, Apr. 20, 2005, at C3.

²⁰⁸ Press Release, Securities and Exchange Commission, *KPMG LLP and Four Auditors Sanctioned for Improper Professional Conduct in Connection with Gemstar-TV Guide International, Inc. Audits*, Oct. 20, 2004, available at <http://www.sec.gov/news/press/2004-147.htm>.

²⁰⁹ Press Release, International Revenue Service, *KPMG to Pay \$456 Million For Criminal Violations* (Aug. 29, 2005), available at <http://www.irs.gov/newsroom/article/0,,id=146999,00.html>.

²¹⁰ Joseph Weber, *How Big a Cloud is KPMG Under?*, BUS. WEEK, June 17, 2005; Albert B. Crenshaw & Carrie Johnson, *Regretful KPMG Asks for a Break; Audit Firm Argues Charges Unnecessary*, WASH. POST, June 17, 2005.

²¹¹ FEDERAL BUREAU OF INVESTIGATION, STRATEGIC PLAN 2004-2009, at 17 (2003), available at <http://www.fbi.gov/publications/strategicplan/strategicplanfull.pdf>.

²¹² *Id.* at 57.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Called to Account—The Future of Auditing*, THE ECONOMIST, Nov. 20, 2004.

²¹⁶ The Private Securities Litigation Reform Act is cited by Professor Coffee, as well as leading class action attorneys, as an impediment to defrauded investors who wish to sue the “aiders and abettors” of fraud, including accounting firms. See William S. Lerach, *Plundering America: How American Investors Got Taken for Trillions by Corporate Insiders*, 8 STAN. J. L. BUS. & FIN. 69, 92 (2002).

²¹⁷ *Called to Account*, *supra* note 216.

²¹⁸ Andrew Parker, *Accountants Win Support on Limited Liability*, FIN. TIMES (London), Jan. 16, 2005.

²¹⁹ Press Release, Congressman Dennis Kucinich to Introduce Conservative, Pro Free-Market Amendment Auditing Bill Today, (Apr. 24, 2002); See also The Sarbanes-Oxley Act of 2002.

²²⁰ Press Release, Congressman Dennis Kucinich, Statement of Congressman Kucinich on Federalizing Corporate Auditing (Feb. 27, 2002) available at <http://www.kucinich.house.gov/news/DocumentSSingle.aspx?DocumentID=26673>.

²²¹ Michael Calabrese & Matt Barranca, *Reclaiming the Public Airwaves*, in THE FUTURE OF THE MEDIA 207, 208 (Robert W. McChesney et al. eds., 2005).

²²² *Red Lion Broad. v. FCC*, 395 U.S. 367 (1969).

²²³ *Id.* at 394.

²²⁴ FEDERAL COMMUNICATIONS COMMISSION MASS MEDIA BUREAU, THE PUBLIC AND BORADCASTING (1999) available at http://ftp.fcc.gov/Bureaus/Mass_Media/Factsheets/pubbroad.pdf.

²²⁵ Communications Act of 1934, 47 U.S.C.A. §§ 315, 335 (defining “candidates for office” and “Direct Broadcast Service obligations,” respectively); Federal

Communications Commission Regulations, 47 C.F.R. §§ 73.1941, 73.1944 (1994) (defining “equal opportunities” and “reasonable access,” respectively).

²²⁶ Telecommunications Act of 1996, Pub. L. No. 104-114, § 305 (1996); Television Recorder Circuitry Act of 1990, Pub. L. No. 101-431, § 2 (1990) (codified at 47 U.S.C. §303(u), 330(b)).

²²⁷ David Hatch, *Report: PSA’s Air in Worst Daypart*, ELECTRONIC MEDIA, Feb. 25, 2002, at 6.

²²⁸ ALLIANCE FOR BETTER CAMPAIGNS, ALL POLITICS IS LOCAL, BUT YOU WOULDN’T KNOW IT BY WATCHING LOCAL TV, (2003) available at <http://www.bettercampaigns.org/reports/display.php?ReportID=2>.

²²⁹ ROBERT MCCHESENEY, THE PROBLEM OF THE MEDIA 45 (2004). See also BEN H BAGDIKIAN, THE MEDIA MONOPOLY (2004).

²³⁰ Jeff Leeds, *Clear Channel: An Empire Built on Deregulation*, L.A. TIMES, Feb. 25, 2002, § 3 (Business), at 1.

²³¹ ROBERT MCCHESENEY, RICH MEDIA, POOR DEMOCRACY (2001); Bill Moyers, Take Public Broadcasting Back, Closing Address at the National Conference on Media Reform, May 15, 2005, available at <http://www.commondreams.org/views05/0516-34.htm>.

²³² Ted Turner, *My Beef With Big Media*, WASH. MONTHLY, July-Aug., 2004.

²³³ Ted Turner, *Monopoly or Democracy?*, WASH. POST, May 30, 2003, at A23.

²³⁴ *Id.*

²³⁵ To learn about the various public interest campaigns, see Free Press, <http://www.freepress.net>.

²³⁶ Red Lion Broad., 395 U.S. at 390; Associated Press v. U.S., 326 U.S. 1, 20 (1945).

²³⁷ Michael Copps, *Where is the Public Interest in Media Consolidation?*, in THE FUTURE OF THE MEDIA, *supra* note 221, at 117, 123.

²³⁸ See Tyson Slocum, *Electric Utility Deregulation and the Myths of the Energy Crisis*, 21 BULL. SCI. TECH. & SOC’Y (2001).

²³⁹ *Id.*

²⁴⁰ Harvey Wasserman, *Our Fake Energy Crisis: What Really Happened in California*, <http://www.local.org/wasserman.html> (last visited Dec. 23, 2005).

²⁴¹ New Rules Project, *Customer-Owned Electric Utilities: Generaliton, Transmission & Distribution*, <http://www.newrules.org/electricity/customerowned.html> (last visited Nov. 18, 2005).

²⁴² David Morris & Daniel Kraker, *Solutions to Electricity Crisis*, OAKLAND TRIB., June 5, 2001. For more information see <http://www.newrules.org>.

²⁴³ New Rules Project, *supra* note 241.

²⁴⁴ WILSON CLARK & JACK PAGE, ENERGY, VULNERABILITY AND WAR: ALTERNATIVES FOR AMERICA 224–27 (1981); AMORY B. LOVINS & L. HUNTER LOVINS, BRITTLE POWER: ENERGY STRATEGY FOR NATIONAL SECURITY 68–70 (1982).

²⁴⁵ *Nuclear Plants Possible Terror Targets, Memo Warns*, CNN NEWS, Feb. 1, 2002. For related reports and studies see the Nuclear Control Institute, <http://www.nci.org>.

²⁴⁶ See New Rules Project, *Democratic Energy*, <http://www.newrules.org/de/index.html> (last visited Nov. 18, 2005).

- ²⁴⁷ CLIFTON HOOD, 722 MILES: THE BUILDING OF THE SUBWAYS AND HOW THEY TRANSFORMED NEW YORK 14–15 (The Johns Hopkins University Press 2004) (1993).
- ²⁴⁸ *Id.* at 16; See David W. Dunlap, *The World on a Strap*, N.Y. TIMES, Oct. 3, 1993, § 7, at 33.
- ²⁴⁹ Martin Tolchin, *Localities Shift to Private Firefighters*, N.Y. TIMES, July 28, 1985, at 22.
- ²⁵⁰ *Id.*
- ²⁵¹ Wolfe, *supra* note 82, at 1675.
- ²⁵² Millon, *supra* note 39, at 207.
- ²⁵³ MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960, 74 (1992).
- ²⁵⁴ CARL BOGGS, THE END OF POLITICS: CORPORATE POWER AND THE DECLINE OF THE PUBLIC SPHERE 6–12 (2000).
- ²⁵⁵ Millon, *supra* note 40, at 215, 225.
- ²⁵⁶ This figure is in 1994 dollars. The estimate was compiled by accounting professor Ralph Estes in THE TYRANNY OF THE BOTTOM LINE 177–178 (1996).
- ²⁵⁷ Tr.s of Dartmouth Coll., 17 U.S. at 637.
- ²⁵⁸ Charles River Bridge v. Warren Bridge, 36 U.S. 420 (1837).
- ²⁵⁹ *Id.* at 548. As we have seen, the erosion of this kind of consideration of the public interest is pervasive. Moreover, it must be acknowledged that part of this came about on account of non-profit corporations. As Professor O'Melinn has pointed out, the earliest general incorporation statutes were passed in order to allow the incorporation of churches:

The churches had made mighty gains which would soon redound to the benefit of groups devoted to profit, for the deference shown by the state to the religious corporation was about to be extended to the business corporation as well. The states had fashioned a rule for religious disputes that was not far removed from the modern business judgment rule.

See Liam Seamus O'Melinn, *Neither Contract Nor Concession: The Public Personality of the Corporation*, GEO. WASH. L. REV. (forthcoming 2006) available at <http://www.law.onu.edu/faculty/omelinn/CorpMoralweb.htm>.

- ²⁶⁰ First Nat'l Bank of Boston v. Belotti, 435 U.S. 765, 809 (1978) (emphasis added).