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Linking Progressive Corporate Law with Progressive Social Movements

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Linking Progressive Corporate Law with Progressive Social Movements

Kellye Y. Testy*

In Linking Progressive Corporate Law with Progressive Social Movements, Professor Testy critically assesses what has been termed a “new” corporate social responsibility project. After noting the hegemony of shareholder primacy in corporate law, she critiques four major counter-hegemonic discourses: team production theory, corporate social accountability, stakeholder theory, and corporate social responsibility (or progressive corporate law). Finding the first three ineffective foils for the problems of corporate power that have spurred calls for reform, she turns to an examination of the progressive corporate law project. That project, presently poised at a defining juncture as it attempts to use the “master’s tools” to “dismantle the master’s house,” nonetheless holds promise for the “piecemeal, but cumulative change” that will be necessary to assure that corporations enhance human flourishing rather than retard it. In order to realize its progressive potential, Testy suggests that the movement bolster itself through more explicit attention to the project’s normative goals, which can and should open the door to increased influence through strategic linkages with other progressive social movements.

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It is easy to be a realist when you accept everything. It is easy to be a visionary when you confront nothing. To accept little and confront much, and to do so on the basis of an informed vision of piecemeal but cumulative change, is the way and the solution.1

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The hottest places in hell are reserved for those who in a period of moral crisis maintain their neutrality.2

I. INTRODUCTION

The Church. The State. The Corporation. What legal and other structures can assure that power is deployed in the service of individual and societal flourishing rather than against it? While this question is a timeless one, it is also timely. Although significant legal and cultural changes may flow from the recent rash of corporate accounting and disclosure debacles,3 the immense power of large multinational corporations has been relatively unconstrained over the past two decades due to the confluence of many factors. Start with a pervasive distrust of regulatory solutions to economic problems, together with a concomitant faith in the righteousness of private ordering. Add to that the privileged status of financial capital in corporate governance, which is reinforced by an obsessive focus by corporate managers and investment communities on short-term share price. All of that, combined with exponential growth in the transfer of technology and other products across national borders, have paved the way for corporations to rival the state, and certainly the church, in institutional power and influence.

In response to the need to address the perceived illegitimate and unchecked power of corporations, what has been termed by some a "new" corporate social responsibility movement is taking shape in the legal academy.4 Under various labels, including "progressive corporate law,"5 "good governance,"6 "social disclosure,"7 and "socio-

3. Much of the planning and writing for this conference took place prior to the fall of Enron and the rash of revelations of corporate accounting improprieties and other corporate wrongdoing. All major newspapers have been full of stories recounting both the wrongdoing, as well as the emerging legislative and other regulatory responses to it. See, e.g., Elisabeth Bumiller, Corporate Conduct: The President; Bush Signs Bill Aimed at Fraud in Corporations, N.Y. TIMES, July 31, 2002, at A1; Kurt Eichenwald, 2 Ex-Officials at WorldCom Are Charged in Huge Fraud, N.Y. TIMES, Aug. 2, 2002, at A1; Richard A. Oppel, Jr. & Kurt Eichenwald, Citigroup Is Linked to a Deal that Let Enron Skirt Rules, N.Y. TIMES, Aug. 2, 2002, at A1. For a Web site containing continuing updates on the issue of "corporate scandals," see http://integrationsolutions.westlaw.com/corporate scandals.
a diverse group of legal academics has trained its attention on problems perceived to be related to corporations' lack of attention to interests other than short-term maximization of shareholder profits. Admittedly, attention to corporate social responsibility is not new in the usual meaning of the word. A significant corporate social responsibility movement emerged in the 1970s, aimed primarily at imposing upon corporations increased regulatory constraints, commonly federal ones. Consciously and admittedly progressive in orientation, the former social responsibility movement left little doubt about its goals and values. As the title of one of that movement's major tomes suggests, the view was that corporate power was unruly and dangerous and needed "taming." One distinguishing feature of the new corporate social responsibility movement is that its focus is primarily upon corporation law and theory. "Instead of regulating the uses to which the tool is put, these commentators look to redesign the tool itself. . . ."

In this Essay, I explore the key efforts at redesign presently at work in the new corporate responsibility movement and suggest that the project is presently poised at a worrisome juncture. On the one hand, the efforts at redesign might be quite progressive in that they seek to use the very tools of corporate law for social change, including changing the nature of the corporate enterprise. On the other hand, as Audre Lorde once said, "the master's tools will never dismantle the master's house." Accordingly, if the redesign efforts accept the values
and goals of the structures they seek to alter, then the new corporate responsibility movement risks becoming domesticated and failing to mount a significant challenge to the status quo.

Which shall it be? Has the corporate social responsibility project mellowed to the point of ineffectiveness in its new incantation? Or, has the shift to taking on corporations on their own terms signaled a more confrontational and structural turn, one that deserves the label “progressive corporate law”? I certainly favor the latter, and thus in this Essay attempt to identify how the movement might bolster itself to move more fully in the progressive direction. In Part II, I briefly discuss the five major approaches to corporate governance extant today, noting both the hegemony of the shareholder primacy model, as well as exploring whether any of four key alternative approaches to corporate law and policy offer potential for displacing or improving that model. In Part III, I call for more attention to the normative and strategic goals that a progressive corporate law project ought to privilege and evaluate whether any of the existing approaches to corporate governance are likely to serve those goals. In Part IV, I then present an important benefit of more fully articulating those goals—the potential for strategic linkages with other progressive social movements. Such interdisciplinary connections can create solidarity, and in solidarity there is power stemming from both a widened perspective as well as sheer numbers. Perhaps just the power the project needs for the “piecemeal, but cumulative change” that will be required to assure that corporations work in the service of social justice rather than against it.

II. THE REVITALIZED CORPORATE GOVERNANCE PROJECT

A. The Hegemony of Shareholder Primacy

Since Berle and Means’s classic exposition in the 1930s, discussions of corporate governance and its reform have centered on solving problems arguably posed by the separation of ownership from control in the public corporation. Briefly and simply stated, ownership and control are separated in the modern public corporation because the

14. Ruthann Robson has written a number of interesting works on the process of domestication, which she defines as the process of internalizing the values of the dominant culture to such an extent that it becomes “common sense.” See, e.g., RUTHANN ROBSON, LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW 18 (1992).

15. UNGER & WEST, supra note 1, at 32.

board of directors and the officers it appoints (managers) command the enterprise. Shareholders, although deemed the owners of the enterprise, are largely passive investors. Shareholders are passive because share ownership is widely dispersed, leaving shareholders unable to overcome collective action and free rider impediments to effective corporate suffrage. Left without a potent foil, managerial power is relatively unconstrained. Consequently, corporate governance rules are frequently justified as an effort to keep management working in the interest of the corporation that the shareholders own, rather than in its own self-interest.

Many corporate law commentators have taken the separation of ownership and control thesis a further step, asserting that it leads to what is now termed a "shareholder primacy norm." That is, managers' highest duties are to shareholders and to maximizing their wealth; thus, shareholders must be preferred in the event that a conflict between corporate constituents emerges. For instance, the classic example is a decision over a plant closing. Managers could increase the value of the corporation's shares if an unproductive plant were closed; at the same time, such a closing would displace workers and disrupt the community in which the corporation is situated. Under the shareholder primacy norm, managers must close the plant to fulfill their duty to shareholders, despite the harm to workers and other nonshareholder communities that such a closure would engender.

Although several able commentators have made the case that the shareholder primacy norm is embodied neither in past or present legal standards nor in corporate practice, most commentators, regardless of their place along the political spectrum, continue to place this model on quite a pedestal. Indeed, often the concept of shareholder primacy was taken for granted to such an extent that its applicability was presumed, regardless of the particular economy in which the corporations in question were operating. Some healthy critique is brewing. For example, Mark Roe recently has suggested that a shareholder primacy norm fits "less comfortably" with national wealth maximization where competition is monopolistic or otherwise weak. Perhaps Roe's insights will serve as a wedge to inspire and enable

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further study on the precise contexts in which shareholder primacy and societal wealth maximization are aligned, if any. Moreover, recent corporate collapses and fraud disclosures, such as those of Enron, Worldcom, and others may spur a revision of this norm. Unless and until that time, however, shareholder primacy retains its hegemony in much legal and business commentary on corporate governance.

**B. Counter-Hegemonic Discourses**

Like all hegemonic discourse, however, this one too has generated reaction, rebuttal, and rebellion. Many commentators have taken issue with the shareholder primacy and wealth maximization model, seeking to describe alternative visions of corporate law. While some of the individual characteristics of these efforts will no doubt be lost for the sake of simplicity and brevity here, there are presently four broad categories of reactions and rebellions that can be identified in the literature on corporate governance. Below I briefly outline each, taking them in what I consider an increasing order of theoretical distance from the shareholder primacy norm: (1) the team production model, (2) corporate accountability, (3) stakeholder theory, and (4) corporate social responsibility, or progressive corporate law.

1. **Team Production Model**

A team production theory of corporate law is a relative newcomer to the field of corporate governance. Drawing upon Alchian and Demsetz's classic work on economic organization, as well as upon more recent and innovative attention to power in the firm by Rajan and

20. This more contextual consideration of corporate theory is appropriate given the wide divergence not only in sizes and types of corporate entities operating within the United States, but also the wide variety of market situations in which corporations operate in the global marketplace. A more nuanced, contextual approach is also consistent with the approach I recommend herein. See infra Part III.

21. See *supra* note 3 and accompanying text.


23. In the words of one of the more famous students of power relations, "[d]iscourse transmits and produces power; it reinforces it, but also undermines and exposes it, renders it fragile and makes it possible to thwart it." MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 101 (Robert Hurley trans., 1978).

Zingales, Professors Margaret Blair and Lynn Stout have developed an alternative model of corporate law and theory that they label the Team Production Model (TPM). As its name implies, TPM conceptualizes corporate participants—including managers, shareholders, employees, creditors, and local communities—as a team. The team forms because the members perceive that each will obtain more from the cooperative endeavor than from individual action. The resulting team production, however, is nonseparable once produced—much like a cake that, once stirred and baked, is all the better for the inability to identify the separate ingredients that went into its making. Thus, the collective production (or rents) must be distributed through some allocative method.

After rejecting several ex ante and ex post possibilities due to their suboptimal efficiency, Blair and Stout adopt Rajan and Zingales’s idea of vesting allocational authority in an independent third party. Enter the Board of Directors. The board, a “mediating hierarch” in Blair and Stout’s view, if “independent,” can allocate rents more optimally than the other alternatives they earlier rejected. Accordingly, rather than viewing directors as beholden to shareholders, TPM sees directors as beholden to the “team.” Blair and Stout present TPM as both a better description of current corporate governance, as well as a superior normative theory of what corporate governance should be once unyoked from slavish devotion to shareholder interests. Taking away the insistence on shareholder primacy, Blair and Stout

27. Blair & Stout, supra note 26, at 250, 253.
28. See id. at 264-71.
29. Id. at 270-72.
30. Id. Blair and Stout are to be commended for attempting to take on economic reasoning on its own turf, but, accordingly, they adopt much of the now familiar economic terms rather than more “corporate” terms such as “revenue” and “profit.”
31. Id. at 270-74. Blair and Stout reject ex ante (preset) allocation (for example, fixed wages) because of the potential for shirking and free riding that such a system permits when participants believe their return on investment is set, regardless of actual effort expended. A second alternative, ex post division by the participants themselves, is likely to engender inefficient squabbling that reduces rents unnecessarily. A final alternative, also explored, but rejected due to the possibility of opportunistic self-dealing, is vesting allocational authority in a single team member (such as shareholders or employees). Id. at 270-76.
32. Id. at 270-79.
leave rent allocation by the board to a “political” process, detached from substantive guidance on how to cut the cake. As David Millon has written in a critique of TPM on both descriptive and normative grounds, allocation becomes “a matter of power rather than principle.”

Power? Not principle? Sounds a lot like politics as usual. More to the point here, it sounds a lot like corporate governance as usual. Like Millon, I read the TPM theory of corporate governance thus far articulated as less distant from the shareholder primacy norm than it claims to be. In a corporate governance model that allocates rents according to who can strike the best bargain with the board, it is clear who will end up with the largest slice: the best bargainer. And what makes one the best bargainer? Power. What kind of power? Usually, the power to “walk.”

As anyone who has ever bought a car knows, it is the one willing to walk out of the dealership who gets the best deal. Within the corporation, the group with the power to walk is much more likely to be the shareholders. Due to diversified shareholdings in liquid markets, both individual and institutional shareholders enjoy substantial exit rights. The ability to “walk,” combined with high unemployment and communities that are eager to compete for business residency, leave shareholders, far more than employees or communities, in prime position to bargain most effectively with the mediating hierarchs. It is no secret that power begets more power. Indeed, it is one of the most well-taken objections to an increasingly “contractarian” view of law. When rights are allocated on the basis of what one can bargain and pay for, those with more resources will always come out ahead. And they will stay ahead, too.

Still, the new TPM does hold promise. Because it takes on economic theory on its own terms, it may well penetrate the discourse of shareholder primacy in ways that the other counter-hegemonic discourses cannot. Moreover, because TPM does envision the

34. Id. at 1023.
corporation as a collective enterprise, it holds substantial potential for recasting the duties the stewards of that enterprise might owe to those nonshareholder constituents affected by its reach. Finally, it also more pointedly reveals the allocation of corporate rents as the power—political power—contest that I think it is.

2. Corporate Social Accountability

Recent calls for increased corporate social accountability have come from a variety of national and international sources. The accountability approach to corporate law is essentially one of disclosure, adopting the core animating principle of the federal securities laws. Make corporations tell the world what they are doing, and the world will penalize them for bad deeds and reward them for good deeds, making them “account” for their conduct. The corporate accountability approach to corporate governance thus avoids imposing substantive duties on corporations other than one of enhanced disclosure. Because large public corporations are already under substantial duties of disclosure under the federal securities laws, this does not add a duty as much as it expands the list of items that are subject to it.

For instance, Cindy Williams has recently argued that the Securities and Exchange Commission (SEC) has the statutory authority to require, and should require, expanded social disclosure by publicly reporting companies to promote “corporate social transparency” akin to the financial transparency that she believes already exists in U.S. capital markets. On the global front, the Council on Economic Priorities Accreditation Agency recently promulgated an international social accountability standard, S.A. 8000,

37. Williams, supra note 7.
40. Williams, supra note 7, at 1201, 1293-96.
which is designed to be used by independent third parties to audit companies on labor and other human rights issues.\textsuperscript{41}

As Williams concedes, however, the accountability approach to corporate governance is an indirect one.\textsuperscript{42} It is also very market faithful. Proponents of corporate accountability must necessarily take highly efficient markets as their starting point. For accountability to work, the information must make its way to the market in a manner that allows for its incorporation and dissemination there. Moreover, market participants must be willing and able to access that information and to act upon it. It asks corporate managers to “be accountable simply to disclose to their shareholders the extent of the negative consequences of their pursuits.”\textsuperscript{43} Thus, this approach does not limit managers’ power to occasion negative consequences, or punish them directly for doing so. Rather, it leaves the task of judgment to the shareholders. “Expanded social disclosure seeks to provide greater information to shareholders . . . so that shareholders can determine the extent to which they approve of the trade-offs management has made between economic returns and social and environmental effects.”\textsuperscript{44}

Power to the shareholders, not principles for the managers. This is starting to sound familiar. Moreover, in these post-Enron times, reliance on the soundness of our system of corporate disclosure rings particularly hollow.\textsuperscript{45} Granted, our system of corporate disclosure should be a sound one, and at present it needs some work to achieve that baseline goal. Still a disclosure-based regime, standing alone, does little to alter existing power arrangements.

3. Stakeholder Theory

Stakeholder theory proceeds on the premise that there are a number of related, but separable, interests in the manner in which a corporation exercises its power, and that managers should consider all of those “stakeholder” interests in its decision-making processes, not just one (such as shareholders). Stakeholder (or other-constituency)
theory was born in the takeover boom of the 1980s, as managers struggled to find a legitimate reason to "just say no" to an acquirer offering a substantial share-price premium.\textsuperscript{46} Although usually resistant to entreaties to consider nonshareholder interests, managers seized upon the idea of "other constituents" as a reason to reject a premium bid and thereby remain in control of their enterprise (and their jobs). Over thirty states now have legislation permitting corporate directors to consider interests of other groups, in addition to shareholders, when making decisions.\textsuperscript{47} Only one (Connecticut) of those statutory schemes, however, makes that broader consideration mandatory; the rest are merely permissive.\textsuperscript{48}

Not surprisingly, the permissive nature of other-constituency statutes has limited their effect in corporate decision-making processes.\textsuperscript{49} Outside of the hostile-takeover context, evidence of directors willingly adding other constituencies into the decision-making mix under the permissive statutes is nil.\textsuperscript{50} Similar to TPM, stakeholder theory risks creating a free-for-all among stakeholders in the quest for control of the corporate enterprise, a free-for-all in which the already powerful are likely to continue to prevail. The definitional and operational difficulties of a stakeholder approach to corporate governance have been well documented and discussed elsewhere.\textsuperscript{51} Chief among those critiques is that the ambiguity in defining who is and who is not a "stakeholder" will actually increase the power and discretion of management, because they will be beholden to no one in particular.\textsuperscript{52} At least with shareholder primacy, the argument goes, managers are clear on whom they should be serving. That clarity, even if it does no more, at least offers more constraint than an amorphous responsibility to "stakeholders."

Despite their hypocritical origins, permissive nature, and practical difficulties, these statutes have nonetheless succeeded in stepping up discourse around the concept of the corporate stakeholder. This

\textsuperscript{46} See, e.g., Jonathan D. Springer, Corporate Constituency Statutes: Hollow Hopes and False Fears, 1999 ANN. SURV. AM. L. 85, 92-94.
\textsuperscript{47} Id. at 94-96.
\textsuperscript{48} Id. at 101 n.73.
\textsuperscript{49} See, e.g., id. at 101-02.
\textsuperscript{50} Id. at 94-96, 100-01.
\textsuperscript{52} See supra note 51 and accompanying text.
discourse has found its way into numerous academic and practice-specific writings and discussions. More importantly, it has made its way into business school classrooms. There, future managers are taught that it is good for the corporation to consider all stakeholders and that such inclusiveness is part of a corporation’s best practices. Accordingly, taken at the level of discourse, the stakeholder (or “communitarian”) approach to corporate governance has had substantial effect and promises to continue to thrive, at least in this norm-creation and norm-modification sense. Indeed, like the TPM model that makes the corporate rent allocation contest more visibly political, the stakeholder model holds significant promise for spurring more complex analysis of power relationships within the corporation.

4. Corporate Social Responsibility

Corporate social responsibility is the most aggressive, and arguably progressive, of the four counter-accounts of shareholder primacy and relentless short-term wealth maximization. “Theories of corporate social responsibility cast a potentially broader net, emphasizing all of the social costs of corporate activity, and therefore embrace, for example, environmental or political concerns as well as stakeholder interests.” Although within the corporate social responsibility movement there are surely differences in both the underlying motivations as well as the recommended changes required in law and policy, there are also unifying similarities. Most importantly, concern over the increasing concentration of wealth in society that the relentless pursuit of shareholder profit has facilitated, and how the power that wealth creates is deployed, animates the growing chorus of corporate social responsibility advocates.

While it is safe to say that this movement has been effective at the level of discourse about corporate law, for the most part it has yet to claim any significant victories at the level of legal doctrine or public


54. Id.

55. An argument could be made, of course, that all of these counter-discourses operate at this level. Thus, even if they are not successful in working out specific regulatory changes, they do succeed in altering discourse and norms. This “Foucaultian” view of corporate social responsibility would be a good topic for study and elaboration by one trained in discourse analysis and theory.

56. Millon, supra note 33, at 1002 n.5.

57. For an excellent collection of corporate social responsibility writings, which adopt the progressive label, see PROGRESSIVE CORPORATE LAW, supra note 5.
policy.\textsuperscript{53} (Of course, with the post-Enron flurry of legislative and other denouncements of corporate greed, victory may at last be in view.\textsuperscript{55}) Although there is today much talk in business about social responsibility, most commitments to that idea are increasingly cast in terms of improving profits rather than improving the societal conditions that first spurred the progressive corporate law movement. Admittedly, those profit-minded approaches also claim that there is a correlation between what is "good for society" and what is "good for business profit."\textsuperscript{69} Were that correlation exact, however, it is unlikely a progressive corporate law movement would have had the motivation or need to begin this dialogue in the first place. It is the perception of a significant divergence between the two that has generated the movement.

Moreover, business has an enormous capacity for commodification. There is real concern that corporate social responsibility will become just another commodity that businesses sell in the service of short-term shareholder wealth maximization, rather than the basis for any substantive change in the way business is done.\textsuperscript{61} What gives one further pause regarding calls for corporate managers to be more attuned to social issues is the question of whether such action on managers part would serve the progressive ends reformers seek. Corporate managers are not elected officials, nor are they a particularly diverse or progressive group. Additionally, as noted above, under the current structure of corporate law managers enjoy virtually unchecked power and discretion.

Specifically, boards of directors are far from a representative group, as far as the various corporate constituents are concerned. Unlike examples abroad, for instance, boards in the United States do not routinely have representatives from labor.\textsuperscript{62} Moreover, boards are

\textsuperscript{58} See supra note 55 and accompanying text.

\textsuperscript{59} See supra note 3 and accompanying text.

\textsuperscript{60} Many attribute a harsh version of this view to Milton Friedman, although Friedman contemplates the drive for profit being within both legal and recognized cultural constraints. See Milton Friedman, A Friedman Doctrine: The Social Responsibility of Business Is to Increase Its Profits, N.Y. TIMES, Sept. 13, 1970, (Magazine), at 32.

\textsuperscript{61} See Peter Sinton, Crisis of Conscience, S.F. CHRON., Nov. 22, 2001, at B1 ("[I]t's easy to cut back on this stuff.")

\textsuperscript{62} Germany is a particularly good example of a more representative board structure. See, e.g., Klaus J. Hopt, The German Two-Tiered Board: Experience, Theories, Reforms, in COMPARATIVE CORPORATE GOVERNANCE: THE STATE OF THE ART AND EMERGING RESEARCH 227, 227-58 (Klaus J. Hopt et al. eds., 1998).
not diverse. Women generally, and men and women from racial minority groups, are receiving increasing numbers of invitations to serve on corporate boards. Still, their numbers are disappointingly low.

Furthermore, while there has indeed been increased attention to the independence of boards from officers of the corporation, and a concomitant increase in the number of "outside" directors serving, many commentators question how "independent" these independent directors really are. For instance, one of the arguably independent directors in the Enron debacle is Dr. John Mendelsohn, president of the University of Texas M.D. Anderson Cancer Center. No one was really surprised when it was revealed that Enron had contributed substantial sums to Dr. Mendelsohn’s Center around the time of his election to the board, as well as having hosted a gala in honor of the Center and George and Barbara Bush’s joint seventy-fifth birthday party that raised over $10 million for the Center. In sum, if managers were to take up the mantle of social responsibility in earnest under present corporate governance structures, progressive reformers might become sorry they had suggested the idea. Put differently, unless the corporate social responsibility movement can also succeed in altering the extant power relationships of corporate law, calls for increased board attention may yield a less-than-progressive result.

64. See, e.g., Donald C. Langevoort, The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability, 89 GEO. L.J. 797 (2001) (citing a number of sources throughout that concern the independence of boards from corporate officers).
65. Id.
67. See id.
68. A contrary view, however, might be indicated by the recent study of corporate philanthropy by the Capital Research Center, which indicates that corporations give “4 times as much to left-leaning charities and public-policy advocates than to right-leaning ones.” CHRISTOPHER YABLONSKI, PATRERNS OF CORPORATE PHILANTHROPY: A MANDATE FOR REFORM, at iii (2001), at http://www.capitalresearch.org/misc/pcpXIII.pdf (last visited July 5, 2002).
III. **NORMATIVE AND SOMEWHERE TO GO: PROGRESSIVE CORPORATE LAW**

Running through each of the four central restructuring efforts discussed above is the commonality of discontent with the present dominant view of corporate law and theory, and arguably the practical effects of corporate action in society as well. After all, why bother to mount a critique if all is well? Nonetheless, present legal critiques are surprisingly reticent about the precise source of that discontent. This Part argues that those who would support a progressive corporate law project must identify and articulate more fully the normative visions for society that animate their calls for reform of corporate law and policy. It is not enough to seek to counter shareholder primacy, for instance, without being clear about exactly what it is about shareholder primacy that is troubling and what its reform will accomplish.

Put simply, then, I am encouraging a more explicit account of what it is that progressive corporate law seeks to accomplish. To do so, however, requires initial attention to the label of the project. Although much used, the term "progressive" is rarely defined in legal commentary. There are ranges of meanings for the word, with much history behind them, far more than there is time and space to explore here. Because the term is subject to so much variance in meaning, however, it is all the more important to attempt to articulate the normative goals of a progressive corporate law project. While it would not be wise to define the project's values and goals rigidly, as that might limit development and growth, neither is it wise to leave it undefined.

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70. For an exception, see David Millon, *Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373 (1993) (discussing the underlying normative differences between communitarian and contractarian approaches to corporate governance).


73. For three examples of articles that define progressive within the context of their particular subject area, see David A. Skeel, Jr., *Vern Countryman and the Path of Progressive (and Populist) Bankruptcy Scholarship*, 113 HARV. L. REV. 1075, 1077 (2000) (using a broad definition similar to the use of the term herein); Thomas M. Franck & Mohamed ElBaradei, *The Codification and Progressive Development of International Law: A UNITAR Study of*
say whether reform proposals further the project or retard it. There is, of course, some risk that in efforts to be more explicit about values and goals, divisions within the new corporate social responsibility movement may become apparent, or at least more apparent. That risk is one worth taking. Internal critique is healthy.\textsuperscript{74}

A good place to start in thinking about what a progressive corporate law might look like is common meanings of the word “progressive.” One common definition is “favoring, advocating, or directing one’s efforts toward progress or reform, especially in political, municipal, or social matters.”\textsuperscript{75} Of course, that still does not say very much about the kind of reform being sought. In beginning to answer this question, Professor Eric Yamamoto’s description of the meaning of “progressive” in his outstanding work on racial oppression provides guidance.\textsuperscript{76} Yamamoto characterizes a progressive project as an “interconnecting project that seeks to eliminate all forms of subordination, including subordination based on gender, class, religion, national origin, sexual orientation, and disability.”\textsuperscript{77}
This guidance can help to identify what it is about corporations that might further progressive causes, and what it is that is troubling for those interests. In this vein, it is particularly important to acknowledge that corporate power, like most forms of power, is not one sided. Corporations are not inherently oppressive. Indeed, corporations may be better situated than other institutions in addressing some social concerns. Christopher Stone made this point back in 1975,78 although few commentators have given it the considered attention it deserves.79 The good news is that this kind of attention seems to be forthcoming. Today's corporate social responsibility advocates appear to understand that corporate power, too, has many faces,80 as demonstrated by the willingness of these writers to attempt to work with the master's tools as well as to design other tools as well.81 Moreover, an increasing number of scholars outside the corporate law area are recognizing the potential benefit of private, as opposed to public, solutions to socio-legal problems.82

What, then, would be progressive uses of corporate power? What would be oppressive uses of corporate power? In other words, what is the normative agenda of the progressive corporate law project and is the revitalized corporate social responsibility movement furthering it? While articulating the normative agenda of the project should be a dialogic process, at this point I will sketch several core components that should be included.

81. See supra note 13 and accompanying text.
First, progressive corporate law and policy should seek an increased dispersion of wealth in society, rather than an increased concentration of wealth. Gaps between the rich and poor are becoming deeper, and the role of corporate power in this systemic problem should be interrogated. Second, following Yamamoto’s lead, a progressive corporate law project should also seek measures that reduce all forms of subordination and discrimination, including that based upon race, gender (including both gender identity and sexual orientation), age, physical disability, and religious identity. While discrimination concerns are often primarily employee-focused, they also should extend to customers, suppliers, and others with whom the corporation interacts. Third, a progressive corporate law project should be consistent with environmental justice movements. This area has begun to receive frequent mention in discussions regarding the troubling effects of corporate power and the law’s failure to constrain corporate externalities. Fourth, a progressive corporate law project should seek to enhance social democracy, not subvert it. While the question of whether corporations might be better suited to address particular social ills than is the state is still an open one, a progressive corporate law project should interrogate those practices, such as corporate campaign spending and lobbying, that allow corporate power to interfere with and retard democratic governance.

Under these four broad points, do any of the existing approaches to corporate law and policy constitute progressive approaches? First of all, it must be noted that under present corporate law structures and public policy configurations, there is cause for concern along each of the four axes. Wealth concentration is increasing at alarming levels. Racial, gendered, and other forms of subordination, while lessened to some degrees, remain destructive structural problems. Despite increased attention to the “greening” of society, continuing environmental degradation is well documented. Finally, few seriously contend that our government today is “by the people” or “for the


84. For particularly vigorous writing on this score, see DEFYING CORPORATIONS, DEFINING DEMOCRACY: A BOOK OF HISTORY AND STRATEGY (Dean Ritz ed., 2001).

85. For an excellent reader on this subject, see RICHARD DELGADO & JEAN STEFANIC, CRITICAL RACE THEORY: AN INTRODUCTION (2001).

86. See supra note 83 and accompanying text.
people"—but for the convenient definition of a corporation as a legal person. Thus, any defense of existing structure is unlikely to qualify as progressive unless, of course, no revised institutional structures can be conceived of or implemented that can achieve more of the normative goals identified above.

Do any of the reformist approaches to corporate governance exhibit progressivism? As discussed above, at present there are significant obstacles to considering some of these approaches to corporate law as likely to reduce wealth accumulation, subordination, environmental degradation, or democratic obstacles. Both the team production model and the stakeholder model fall short in that (as presently constituted) they are apt to result in a power struggle among the various constituents for corporate rents, and thus are likely to reinforce existing power relations rather than alter them. Both approaches also threaten to increase managerial discretion to the point that managers become less accountable under these models than they are at present under the shareholder primacy model.

The corporate accountability project, to the extent it asks no more than disclosure, does nothing to alter existing structural inequities. It takes on faith that the disclosure requirements will succeed in getting pertinent information out to constituents about corporate social activities, and that those constituents will act on that information to reward good corporate social conduct and penalize bad social conduct. While there is some evidence that increased attention to notions of corporate social responsibility has succeeded in generating attention to these issues, the number of persons (and dollar volumes) acting on such information is still comparatively small.

Of course, the other potential benefit of disclosure is that corporations may be reluctant to disclose negative social conduct, so they may refrain from engaging in it for fear of having to talk about it. Perhaps. Such a behavioral-modification effect would depend on whether managers perceive that they will be penalized for the disclosure, which seems relatively unlikely given free-rider problems inherent in policies that benefit society at large. Only if disclosure convinces investors not to become shareholders, workers not to become employees, and communities not to become hosts will it have the requisite effect. Moreover, this theory depends on a strong

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87. Monks, supra note 22.
88. See supra notes 23-34, 45-49 and accompanying text.
89. See id.
90. See Williams, supra note 7, at 1293.
presumption that all of those groups have a choice; I believe there are clear and significant differences among and between those constituents on this axis, depending upon the competitiveness of the particular market. Finally, significant concerns remain as to whether even required disclosures reach those groups in a manner in which they can be understood.

The corporate social responsibility project, including what has heretofore been identified as progressive corporate law (sometimes also described as a socio-economic approach to corporate law), appears to fall closest to the goals and values that I have recommended here. Examples of particularly encouraging directions and proposals have come from a number of writers and from a number of directions. Importantly, these writers take multidirectional tacks to changing the relationship between corporations and society, at various times seeking to alter the understandings of present corporate law, to implement changes in structures and doctrines, and to argue for new regulations of activities. For instance, Kent Greenfield cogently argues that the ultra vires doctrine has been read too restrictively and that "dedication to lawfulness is an inherent aspect of corporate governance, and that corporate law offers a way to enforce such dedication." Steven Ramirez makes a strong case that corporate law structures should both permit and encourage increased diversity. Marleen O'Connor has insightfully and forcefully argued for increased protection of workers' rights through altered board structures. Larry Mitchell has generated a remarkable body of work on corporate social responsibility that argues for revisions in our understandings of basic corporate law concepts and suggests structural reforms both within and without corporate law. Lynne Dallas has articulated a "power coalition" theory of the corporation that takes account of the power relationships

91. See id. at 1296 (recognizing that increased disclosure is not a "panacea").
93. See Ramirez, supra note 63.
95. In addition to the progressive corporate law volume that he edited (and that now sadly, is out of print), Mitchell has an impressive collection of work directed at corporate social responsibility, all of which is progressive in the sense I advocate here. See, e.g., LAWRENCE E. MITCHELL, CORPORATE IRRESPONSIBILITY (2001); Transcript, Corporate Citizenship: A Conversation Among the Law, Business and Academia, 84 Marq. L. Rev. 723, 725-30, 747-49 (2001) (providing comments of Lawrence E. Mitchell).
in corporate governance in ways in which the team production and stakeholder models fall short. Finally, many of the authors in this Symposium have now added valuable contributions to this emerging genre of work.

Moreover, some progressive possibilities come from what might be surprising sources. For instance, a promising line of inquiry from Henry Hansmann and Reinier Kraakman regarding the role of organization law is emerging. Hansmann and Kraakman view the role of organizational law as providing "for the creation of a pattern of creditors' rights—a form of 'asset partitioning'—that could not practicably be established otherwise." They argue, however, that the function of limited liability is not so much the usual story of the necessity of protecting shareholder personal wealth from the reach of creditors in order to encourage investment in enterprises, but rather is "the shielding of the assets of the entity from claims of the creditors of the entity's owners or managers." While it is possible to read this analysis as a defense of existing corporate laws, it can also be read more progressively as opening the door for a more nuanced consideration of one of the more troublesome aspects of corporate law. That is, limited liability may be seen as an appropriate shield to protect the corporate enterprise and its many constituents over the claims of any one interest. In arguments for changes in corporate law, then, it may be possible for the progressive aspects of limited liability to be preserved, while revising the aspects that raise concern.

IV. LINKAGES WITH OTHER PROGRESSIVE SOCIAL MOVEMENTS

While there are many strong components of a progressive corporate law movement, it is clearly still a minority voice in the legal academy. How might that voice be strengthened? First and foremost, by forging alliances with other progressive social movements, both within law and outside of it. Because of the complexity and the interdisciplinary nature of the problems that progressive corporate law seeks to address, a perspective that takes account of more than just law is necessary. That is, the most promising way for progressive

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96. Lynne L. Dallas, Working Toward a New Paradigm, in PROGRESSIVE CORPORATE LAW, supra note 5, at 35.
99. Id.
corporate law to achieve its aims is for it to link with other progressive social movements. There are many social movements that seek to engage issues similar to that of progressive corporate law scholars, but there has been surprisingly little crossover work between the two. At this juncture, it is vital that a dialogue begin.

One of the core benefits of more fully articulating the normative visions of a progressive corporate law project, as I earlier suggested should be done, is the potential for linkages and coalitions with other progressive social movements. While it is surely true that the ranks of corporate law scholars have not been the first to overlap with scholars in activist movements, that state of affairs is changing today and is likely to continue to do so. It is becoming less unusual for one to work in corporate law as well as in, say, feminist theory or critical race theory. In the past, these areas of legal inquiry barely knew the other existed, or if they did, made every effort to avoid one another. Today, however, connections are being forged for a variety of reasons.

First, the field of corporate law teachers looks much different today than it has in the past. More white women and more women and men of color are in the ranks of corporate law teachers and scholars today. While I certainly am not arguing that, for instance, one's mere status as a woman leads to an interest in or support of a feminist approach to law, the increase in women corporate law faculty has made it more likely that some of those faculty will view law from the feminist standpoint. So, too, with critical race theory, gay and lesbian legal theory, and related antisubordinationist projects.

Furthermore, many newer law teachers graduated from law school in the mid-1980s to mid-1990s. That time period witnessed one of the high points of the law and economics movement, as well as increased attention to corporate and economic matters in general, due in large part to the takeover boom of the late 1980s. Speaking generally, of course, many of today's legal scholars are students of the Reagan and Bush eras, likely more familiar, for example, with Warren Buffett than with Jimmy. For this group, markets and corporations are "us," not "them." For this group, markets work, and governments do not. For this group, capitalism is the only game in town, and it is in every town. For this group, "Vietnam" might first mean a good example of an emerging market, not a terrible example of a U.S.

100. Identity is political, not essential. That is, the particular physical characteristics of an individual do not necessarily correlate, nor need they, with that individual's intellectual and political commitments. For an insightful elaboration of this point, see Symposium, Towards a Radical and Plural Democracy, 33 CAL. W. L. REV. 139 (1997).
military intervention. For this group, power is not all bad, maybe not even half-bad. Thus, for those legal and other scholars who work within progressive movements, it is similarly not as intimidating or unusual as it used to be to include commercial and corporate concerns in the field of study. Indeed, those interests are increasingly being explored as sites of liberation, not just oppression.

Accordingly, just as more corporate legal scholars are comfortable, even eager, to discuss issues of race, gender, class, and sexuality, more critical legal scholars are comfortable, even eager, to discuss issues of efficient markets, corporate structure, global capitalism, and economics. With this cross-fertilization comes both opportunity and risk for progressive projects. The risk is that what might once have been edgy, oppositional, take-no-prisoners projects will become tempered to the point of ineffectuality through a domestication process. For some, it is oxymoronic to claim to be a feminist economist, or more to the point here, a "progressive" corporate law scholar. One must necessarily swallow the other, the worry goes, and with power working the way it does, it is likely to be the economist or corporate part of the equation that comes out ahead. While this risk cannot be dismissed out of hand, it can be guarded against through a thoughtful articulation of normative goals and values and considered attention to them both aspirationally and strategically.

When progressive corporate law's core normative goals and values are identified and articulated, it then becomes possible to link with other progressive social movements that share similar goals and values. There are many exciting possibilities for linkage and collaboration (in no particular order): feminism, critical race theory, environmental justice, human rights, Catholic social

101. Increased attention to "law and society" and "socio-economics," as well as increased attention generally to interdisciplinary courses of study have likewise affected this calculus.
102. See, e.g., David M. Skover & Kellye Y. Testy, Lesbigay Identity as Commodity, 90 Cal. L. Rev. 223 (2002); see also Commodification Futures (Martha Ertman et al. eds., forthcoming 2003).
thought,\textsuperscript{107} liberation theology,\textsuperscript{108} citizen action,\textsuperscript{109} queer theory,\textsuperscript{110} corporate ethics,\textsuperscript{111} radical and plural democracy,\textsuperscript{112} and global responsibility.\textsuperscript{113} This list is just representative, there are surely
and the work of exploring that potential as well as forging those linkages should be a key component of the progressive corporate law project in the years ahead. What is striking as one looks at the list of possibilities is just how divergent in political orientation many of these groups are. The willingness to explore the common ground among them may portend our most progressive moment yet.

V. CONCLUSION

The project of grappling with corporate power is a vexing one. It, like all institutional power is both enabling and constraining. The corporate form has enabled individual talent to be collectivized to make the whole worth more than the sum of its parts. While the genius and drive of the resulting entity has improved the living standards of countless persons, it also has harmed many others. The emergent pattern of winners and losers is all too familiar and too clear. Because society is plagued by systemic subordination that prevents equality of opportunities, a market system, including a system of corporate governance, that awards rights only to those who can bargain and pay for them themselves deepens the divisions between the haves and the have-nots in society. This is not necessarily the nature of corporations, nor is it the nature of markets. And this Essay is not an argument for the abandonment of either. It is instead an argument that the "new" corporate social responsibility can ill afford a singular focus on either imposing regulations from outside the corporation, or revising governance structures within, but must instead address both and more in a complex, interdisciplinary approach.

Further, "unabashed linkages" with other progressive social movements would further that more complex approach to corporations and society. These linkages will allow the new corporate social responsibility to engage its progressive dimensions and potentially improve the relationship between corporations and the society in which they are situated. Indeed, these linkages are vital if progressive corporate law is to attain its progressive potential. Milton Friedman once famously asserted that corporate social responsibility is a

114. For a particularly provocative work, see THOMAS FRANK, ONE MARKET UNDER GOD: EXTREME CAPITALISM, MARKET POPULISM, AND THE END OF ECONOMIC DEMOCRACY (2000). Frank is also the founding editor of The Baffler, a magazine of cultural criticism.

115. For an excellent discussion of the importance of linking law reform movements with social movements generally, published after this Essay was submitted, see Edward L. Rubin, Passing Through the Door: Social Movement Literature and Legal Scholarship, 150 U. PA. L. REV. 1 (2001).
"fundamentally subversive doctrine."116 Ironically, progressive corporate law's task is to make certain that he is right.

116. Friedman, supra note 60, at 32.