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Edward D. Rogers

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Striking the Wrong Balance: Constituency Statutes and Corporate Governance

Edward D. Rogers*

I. INTRODUCTION

When corporate executives visit statehouses and Capitol Hill, they usually seek to reduce, rather than enlarge, their legal obligations to employees, customers, suppliers, and the public. Recently, however, executives have asked for authority to consider the interests of these groups when making corporate decisions, including decisions regarding control of the corporation itself.[1] To date, twenty-nine states have complied by enacting so-called "constituency" statutes.[2] The typical constituency statute expressly empowers corporate directors to consider "the effects of any corporate action upon employees, suppliers and customers of the corporation, communities in which officers or other establishments of the corporation are located and all other pertinent factors."[3] If these statutes are broadly construed by courts to sanction interest-bal-

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* The author recently completed a clerkship with the Honorable Anthony J. Scirica of the United States Court of Appeals for the Third Circuit and is now an associate at Ballard Spahr Andrews & Ingersoll in Philadelphia, Pennsylvania. The views expressed herein are solely those of the author. The author wishes to thank Professor Harvey J. Goldschmid, Alex Rogers, and Tom Tobiason for their encouragement and incisive comments on earlier drafts of this Article.

1. Roberta Romano, *The Political Economy of Takeover Statutes*, 73 VA. L. REV. 111 (1987); *see also* Peter Behr, *Debating the Nature of U.S. Corporations; Recent Turmoil Raises Issues of Ownership, Responsibility*, WASH. POST, Jan. 11, 1987, at G1.

2. *See* Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14, 27 & n. 56 (1992) (listing states with constituency statutes).

3. *See, e.g.*, ME. REV. STAT. ANN. tit. 13-A, § 716 (West 1993).

ancing at the expense of shareholders, they will fundamentally alter the traditional duties of corporate boards and managers.[4]

Constituency statutes have sparked much legal scholarship concerning whether they will achieve their stated goal of protecting nonshareholder groups. This debate focuses on the capacity and sincerity of corporate boards and managers to balance interests effectively. Commentators dispute whether the statutes will promote corporate "social responsibility" or merely serve as a blank check for corporate managers to entrench themselves.[5] Opponents of the statutes urge a narrow construction while proponents promote an expansive reading.[6]

This Article analyzes constituency statutes from a different perspective. It examines how the interest-balancing sanctioned by the statutes raises dangers, given the distribution of power within corporations, by comparing the corporation to the federal government, another interest-balancing institution in which power is shared. Focusing on the relationship between the board and management, this Article notes that the numerous checks and balances developed to equalize power between Congress and the executive branch are absent in the corporate context. The comparison between political and corporate governance demonstrates that corporate power is concentrated in management, which remains insulated from the type of accountability that influences political decision-making. The comparison also provides a source for alleviating this problem through an increase in the power of directors. The Article concludes that the broad discretion granted by constituency statutes will increase management's power, thereby making a bad situation worse for shareholders, and potentially endangering the interests of other constituencies with which management's interests often conflict. To counter this problem, this Article proposes that corporate gover-

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4. Broad construction of the statutes is not a foregone conclusion, particularly since the authority to balance these interests is typically phrased in permissive rather than mandatory terms. *See id.* Nor have the few cases construing the statutes analyzed this problem closely. *See, e.g.*, Amanda Acquisition Corp. v. Universal Foods Corp., 708 F. Supp. 984, 1016 (E.D. Wis.) (upholding board resistance to tender offer on the ground that offer was not in the interest of any of these constituencies), *aff'd*, 877 F.2d 496 (7th Cir.), *cert. denied*, 493 U.S. 955 (1989).

5. For a recent articulation of these opposing arguments, see James J. Hanks, Jr., *Playing With Fire: Nonshareholder Constituency Statutes in the 1990s*, 21 STETSON L. REV. 97 (1991) (arguing against constituency statutes); Steven M. Wallman, *The Proper Interpretation of Corporate Constituency Statutes and Formulation of Director Duties*, 21 STETSON L. REV. 163 (1991) (arguing in favor of constituency statutes); *see also* Orts, *supra* note 2 (canvassing the various positions).

6. *Compare* Committee on Corporate Laws, *Other Constituencies Statutes: Potential for Confusion*, 45 BUS. LAW 2253 (1990) (urging narrow construction), *with* Wallman, *supra* note 5 (urging broad construction).

nance incorporate mechanisms to insure accountability similar to those that have successfully diffused power in the political arena.

II. THE CORPORATE GOALS DEBATE

Constituency statutes rekindle an old debate over whether the law should limit corporate goals to profit maximization for shareholders or expand corporate goals to include consideration of affected groups, such as employees, customers, suppliers, and communities. This debate is not without common ground. Nobody disputes that public policy balances the interests of employees, communities, and others against the corporation's interest in making profits for its shareholders.[7] Proponents and opponents of "broad corporate goals"[8] also agree that if profit maximization is considered over the long term, it often will not conflict with the interests of the corporation's other constituencies.[9] Treating employees well, for example, helps ensure a more content and thus more productive work force. Likewise, charitable contributions can improve a corporation's image and generate good will.[10]

The real dispute concerns whether corporations should balance other constituencies' interests where a conflict exists between such interests and those of the shareholders.[11] Corporation law has traditionally authorized a board of directors to pursue only the goal of profit maximization,[12] with limited exceptions.[13] As a result, nonshareholder constit-

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7. Statement of the Business Roundtable, *Corporate Governance and American Competitiveness, March, 1990*, 46 BUS. LAW 241, 244 (1990) [hereinafter "Roundtable"]; *see also* ROBERT C. CLARK, CORPORATE LAW 678 (1986).

8. This Article will use the phrase "broad corporate goals" to refer to balancing interests of various constituencies within the corporate decisionmaking process as opposed to remitting these interests solely to the public policymaking process.

9. *See, e.g.*, CLARK, *supra* note 7, at 681-84 (1986); Roundtable, *supra* note 7, at 244.

10. *See* Steven M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 971, 1000 (1992).

11. Even the Business Roundtable, among the most vocal proponents of broad corporate goals, concedes that long-term profit-maximization may conflict with the interests of other constituencies. Roundtable, *supra* note 7, at 244-45. It has observed that "[r]esolving the potentially differing interests of various stakeholders and the best long-term interest of the corporation and its shareholders involves compromises and tradeoffs," and it is "impossible to assure that all [stakeholders] will be satisfied because competing claims may be mutually exclusive." *Id.*

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

13. PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01

uencies have typically found protection from hardships caused by corporate decisions not in the boardroom but in federal and state legislatures, through labor, environmental, health and safety, antitrust, and other laws.

Critics of broad corporate goals offer two different arguments, a "monitoring" argument and a "political" argument. The monitoring argument focuses on the dangers to shareholders under a "broad corporate goals" regime. It stresses that broad corporate goals are too amorphous to provide a meaningful benchmark by which shareholders can hold boards and managers accountable.[14] Rather, corporate executives should recognize that the shareholders serve as a proxy for profit maximization as the group entitled to residual profits from the corporation.[15] Constituency statutes reduce boards' and managers' accountability to shareholders by authorizing boards to balance interests and by deterring takeovers.[16]

The "political" argument emphasizes that broad corporate goals will result in poor social policy decisions and thus undermine their stated objectives. This argument holds that boards and managers are ill-suited to make the inherently political decisions of balancing constituencies, which requires judgment about the proper allocation of wealth in society.[17] Unifying the arguments against broad corporate goals and con-

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(Amer. Law Inst. 1992) [hereinafter "ALI Principles"] (authorizing exceptions from the profit-maximization norm for compliance with the law, "ethical considerations," and limited charitable contributions).

14. CLARK, *supra* note 7, at 20.

15. *Id.* at 678. Considering shareholders as a proxy for profit maximization obviates the need to confront the rhetorically appealing argument made by broad corporate goals proponents that the big winners in the takeover market are venal arbitrageurs. For a discussion of this argument, see Ronald J. Gilson, *Just Say No to Whom?*, 25 WAKE FOREST L. REV. 121, 124 (1990) [hereinafter Gilson, *Just Say No*].

16. *See* Ronald J. Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers*, 33 STAN. L. REV. 819, 841-45 (1981) [hereinafter Gilson, *Tender Offers*] (arguing the superiority of takeovers over mergers or assets sales, which first require board approval and then shareholder approval, or proxy contests, whose effectiveness is reduced by legal rules and collective action problems).

17. *See* Christopher J. Smart, *Takeover Dangers and Non-Shareholders: Who Should Be Our Brothers' Keeper?*, 1988 COLUM. BUS. L. REV. 301, 330 (1988). Two distinct rationales underpin this argument. First, critics argue that boards lack the "political legitimacy" necessary to weigh these interests since they are private officeholders whose wealth makes them unrepresentative both of society and of the groups most affected by corporate conduct. *See* CLARK, *supra* note 7, at 693. A second rationale focuses on the incompetency rather than the unrepresentative character of corporate boards and managers. In this view, the "business values" of profit maximization clash too sharply with the political and social judgments necessary to design effective public policies. *See, e.g.*, Carl Kaysen, *The Corporation: How Much Power? What Scope?*, *in* THE CORPORATION IN MODERN SOCIETY 102-03 (Edward S. Mason ed., 1967).

stituency statutes is a concern that boards and managers will abuse their new-found discretion to further their own interests.[18]

Defenders of broad corporate goals dispute the assumption underlying the monitoring argument by characterizing shareholders as passive investors, less dependent on the corporation than other constituencies, and thus not entitled to monitor corporate activities.[19] This enables broad-goals proponents to dismiss the monitoring argument as misguided rather than refute it. They attack the political argument against broad corporate goals more directly by pointing to defects in government. Government is flawed, they argue, because congressmen and senators care largely, if not exclusively, about their own re-election and remain captive to the special interests they are supposed to regulate.[20] This second argument is crucial to the success of the first. Because Congress and state legislatures retain the power to preempt many corporate balancing decisions through legislation, it follows that according balancing power to corporations as well as government will have a positive effect on social policy.

Both proponents and opponents of broad corporate goals should worry that, if unchecked, corporate decisionmakers will act in their own self-interest at the expense of corporate constituencies, however defined. This Article explores that problem by comparing the institutional settings in which corporate and political decisionmakers operate.

III. COMPARISONS BETWEEN POLITICAL AND CORPORATE GOVERNANCE

The Business Roundtable has argued that:

> Corporate governance is . . . erroneously compared to political governance [because] the fundamental purposes of the corporation as an economic entity are quite different from those of a political body . . . . A corporation has as its prime purpose the long-term optimization of economic outcomes, [which] requires the ability to act quickly and responsively. Legislative bodies, on the other hand, represent and give expression to a multiplicity of constituent interests. Our political

18. *See* CLARK, *supra* note 7, at 692.

19. *See* Abram Chayes, *The Modern Corporation and the Rule of Law*, *in*, THE CORPORATION IN MODERN SOCIETY 39 (Edward S. Mason ed., 1967); Harvey J. Goldschmid, *The Greening of the Boardroom: Reflections on Corporate Responsibility*, 10 COLUM J.L. & SOC. PROBS. 15, 36 (1973) (address of Professor Chamberlain).

20. *See* Elliott J. Weiss, *Social Regulation of Business Activity: Reforming the Corporate Governance System to Resolve an Institutional Impasse*, 28 UCLA L. REV. 343, 381 (1981).

system is designed to create compromises between competing interests . . . [and is accordingly] a slow and deliberative process that discourages bold moves or right angle turns . . . . An additional difference between economic and political organizations is that there are economic alternatives immediately available to an unhappy shareholder . . . . For all of these reasons, . . . [n]ominating procedures, the accountabilities and liabilities of elected representatives, the voting process, and recourse alternatives are, and should be, vastly different.[21]

Although few can disagree that the speed and decisiveness needed for business decisions counsels against wholesale importation of political decisionmaking structures into the boardroom, the Roundtable's argument is otherwise flawed in several respects. First, constituency statutes remove several of the Roundtable's bases to distinguish corporate from political governance. The statutes reduce, or make less attractive, the "economic alternatives immediately available to an unhappy shareholder" by making it easier for boards to install anti-takeover measures in the guise of protecting other constituencies.[22] Furthermore, in authorizing boards "to create compromises between competing interests," the statutes make corporate decisionmaking more, rather than less, like political decisionmaking.

More broadly, comparing political and corporate governance has theoretical and practical appeal. Corporate law, like political science and constitutional law, focuses on concerns of power, accountability, and checks and balances. Additionally, the arms of corporate decisionmaking have analogues in the political arena. In theory, the board functions as a legislature elected by a polity (the shareholders), and it authorizes actions by management, which serves as the corporation's executive branch.[23]

The problem is that, in practice, the board is often the weak link in corporate governance.[24] This Article develops this claim by comparing the distribution of power between Congress and the Executive Branch

21. Roundtable, *supra* note 7, at 243-44.

22. *See, e.g.*, ME. REV. STAT. ANN. tit. 13-A, § 716 (West Supp. 1993) (authorizing boards to "consider the effects of any action upon employees, suppliers and customers of the corporation, communities in which offices or other establishments of the corporation are located and all other pertinent factors" when discharging their duties).

23. *See* E. Latham, *The Body Politic of the Corporation*, *in* THE CORPORATION IN MODERN SOCIETY 218-31 (Edward S. Mason ed., 1967).

24. As Professor Bernard Black put it:

> In theory, the shareholders of public companies elect directors, who watch corporate officers, who manage/watch the company on the shareholders' behalf. But since Berle and Means, we have understood that this theory is a fiction. The managers—the current officers and directors—pick the directors, and the shareholders rubberstamp the managers' choices.

Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520, 521 (1990).

with the distribution between the board and management in the typical large corporation. Concluding that power is more evenly distributed in government than in the corporation, this Article looks to political institutions for tools to improve corporate governance by increasing the board's capacity and responsibility to hold managers accountable to shareholders. The Article then confronts the broad-corporate-goals argument on its own terms. Drawing on the earlier comparisons and on some broader concerns about self-regulation, it explores the social policy implications of letting corporations balance interests through constituency statutes.

IV. CONSTITUENCY STATUTES AND CORPORATE GOVERNANCE

A. *Institutional Differences Between Political and Corporate Governance*

Checks and balances in political and corporate governance can be divided into three categories. One category is the electoral process, the means by which shareholders and voters remove poor decisionmakers. Second, internal controls help distribute power within corporate and political governance structures. These include control over the agenda, control of knowledge, and control of information, all of which affect the relative power of the legislative and executive branches. A third group of checks and balances consists of external controls that supplement internal constraints as limitations on power, including interest groups and the media in the political context, and the courts and markets in the corporate context.

This analytic framework considers shareholders only as electors of directors and as investors in the stock market. Alternatively, shareholders could be viewed as the corporate analogue to political interest groups. These subgroups of the electorate have the resources and knowledge to influence political decisionmaking, just as shareholders have power to influence corporate decisionmaking. However, problems such as collective action, lack of knowledge and expertise, and the transitory nature of many stockholdings historically have precluded meaningful

shareholder input in corporate governance.[25] The growth in institutional investors may enable shareholders to overcome this historic weakness.[26]

1. Campaigns and Elections

The right to oust board members through proxy contests constitutes a potentially important means by which the shareholders can check the board's power, but it is limited by the expense of proxy contests and by the control of management and the board over the proxy process.[27] One obvious difference between corporate and congressional election procedures is in the existence of opposition candidates. Congressional seats are typically contested. By contrast, "in 99.9% of corporate elections held in [a recent year], only one slate was offered."[28] Moreover, unlike in the political arena where voters often select candidates through primary elections, the executive branch—management—normally picks the slate.[29]

Another difference lies in the sources of campaign funds for political and corporate elections. Incumbent board members can use corporate funds to wage proxy contests against insurgents.[30] This practice is subject only to the ill-defined limitation that the funds can only be used for contests relating to corporate "policy" rather than to "personnel."[31] In the congressional context, an analogous source of funds would be public monies or, more precisely, funds from individual office accounts. These, however, are not permissible sources of campaign funds.[32]

25. On collective action, *see, e.g.*, FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 1 (1991). On shareholders' lack of expertise with complex issues of corporate governance and operations, and on their short holding periods, see ALI Principles, *supra* note 13, at 54.

26. *See* Bernard S. Black, *Agents Watching Agents: The Promise of Institutional Investor Voice*, 39 UCLA L. REV. 811 (1992); John C. Coffee, Jr., *Liquidity Versus Control: The Institutional Investor as Corporate Monitor*, 91 COLUM. L. REV. 1277 (1991).

27. *See, e.g.*, Gilson, *Tender Offers*, *supra* note 16, at 843.

28. JAY W. LORSCH, PAWNS OR POTENTATES: THE REALITY OF AMERICA'S CORPORATE BOARDS 22 (1989).

29. *Id.* at 23.

30. *See, e.g.*, EDWARD R. ARANOW & HERBERT A. EINHORN, PROXY CONTESTS FOR CORPORATE CONTROL 547-65 (1968).

31. *See* Rosenfeld v. Fairchild Engine & Airplane Corp., 128 N.E.2d 291 (N.Y. 1955); ARANOW & EINHORN, *supra* note 30, at 550 (labeling the distinction "illusory"); MELVIN A. EISENBERG, THE STRUCTURE OF THE CORPORATION: A LEGAL ANALYSIS 104-05 (1976) (arguing that the policy/personnel distinction is "meaningless" because of the obvious characterization problems it creates).

32. Senators and congressmen may not receive public monies for campaigns as presidential candidates can under the Internal Revenue Code, 26 U.S.C. § 9006 (1988). Furthermore, Rule 41.1 of the Standing Rules of the Senate provides for strict segre-

The congressional election rules have considerable conceptual appeal as a potential means of liberating board elections from management control and transforming them into a more meaningful check for shareholders. In practice, however, these rules have failed to reduce the entrenchment of incumbents in the Senate and Congress. More than 90 percent of congressmen and two-thirds of the senators are routinely reelected.[33] The high incumbency rate occurs partly because incumbents themselves enact the legislation governing the sources of election financing. Since the policy/personnel distinction limits the courts' ability to set campaign finance rules for corporate directors, incumbents make the campaign finance decisions in corporate government as well; typically, only successful insurgents are reimbursed.[34]

In one respect, the corporate rules are arguably more sound than the congressional rules. The use of corporate funds for proxy contests protects against the "deep pockets" phenomenon,[35] in which the campaign costs proliferate to the point that a well-financed candidate wins simply by outspending his opponent. This phenomenon has also been cited in support of requiring public financing or spending caps in congressional campaigns. Without such devices many worthy challengers may be deterred from running.[36]

In sum, the congressional election process suggests several ideas for reform to the corporate election process, most notably the use of opposition slates. However, the congressional election process also provides grounds for pessimism by demonstrating that rule changes alone cannot reduce the entrenchment of incumbents, especially when the winners make the rules. A more promising source for corporate governance re-

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gation of campaign staff from Senate staff, and Rule 40.1 prohibits use of the congressional franking privilege within 60 days of primary or general elections for any mass mailings relating to anything other than official business, as does Rule 46.6 of the Rules of the House of Representatives.

33. GLENN R. PARKER, CHARACTERISTICS OF CONGRESS: PATTERNS IN CONGRESSIONAL BEHAVIOR 14-15 (1986). Moreover, the consistently high incumbency rate is self-reinforcing. In the 1988 Senate elections, for example, incumbents received 80 percent of the total contributions made by political action committees, which are among the largest sources of campaign funds. Jack W. Germond & Jules Witcover, *Fund-Raising Imperative Drives Campaigning*, 21 NAT'L L.J. 694 (1989).

34. EISENBERG, *supra* note 31, at 121-27.

35. *Id.* at 108.

36. *See* Chuck Alston, *Image Problems Propel Congress Back to Campaign Finance Bills*, 49 CONG. Q. 275, 275-81 (1991).

form arises from examination of the different decisionmaking structures within the government.

2. Internal Sources of Accountability

Just as the division of responsibility between Congress and the President is a major focus of constitutional law and political science, the allocation of power between the board and management is an important concern in corporate governance. Management's preeminence results from several factors, each of which merits separate treatment.

a. *Personnel in corporate and political governance*

There exists no overlap between the personnel in the legislative and executive branches of government. By contrast, in the corporate sphere, inside directors act as both managers and as directors. The resulting self-policing is a matter of serious concern, which has inspired a strong movement toward outside directors.[37]

However, neither in the political nor the corporate arena is the issue as simple as the overlap in personnel. In government, the independence of the legislative and executive branches is compromised by subgovernments in specific issue areas, called "iron triangles."[38] This term refers to a three-sided relationship between a congressional committee, the executive agency over which it has jurisdiction, and private interest groups regulated by those two branches of government.

The triangles work because each leg depends upon the other two for favorable policies or special treatment at the expense of more effective public policy and independence of the legislative and executive branches.[39] One such "iron triangle" is the relationship between the Senate Agriculture Committee, the Department of Agriculture, and the National Corn Growers Association. The Corn Growers, for example, might want a generous subsidy or favorable regulation from the Senate Committee or the Agriculture Department. In return, it could contribute to the Senate Committee Chairman's re-election campaign and lobby to expand the authority of the appropriate bureau chief of the Agriculture Department. Additionally, the Corn Growers could offer a lucrative lobbying job to those government officials upon retirement or defeat in an election. Similarly, the bureau chief in the Agriculture Department could dispense lar-

37. Recent studies have shown that well over half of the members of large corporate boards are outside directors. *See* ALI Principles, *supra* note 13, at 144 (citing studies on board membership).

38. *See, e.g.*, PARKER, *supra* note 33, at 199-214.

39. *Id.* at 201-02.

gesse, such as research grants, to the constituents of the Chairman of the Senate Agriculture Committee. The Chairman could return the favor by maintaining the bureau chief's annual appropriation at a healthy level.[40] These relationships inhibit government actors from policing each other and from saying "no" to private interests.[41]

Symbiotic relationships among groups of shareholders, directors, and managers can also undercut accountability in the corporate context. For example, an outside director may be a partner in a law firm whose client is the company on whose board he or she sits.[42] Or a private pension fund manager may seek investment business from the company whose shares he or she manages.[43] Such relationships might discourage the director or pension fund manager from vigorously overseeing these corporate transactions.

An appropriate legal rule for limiting "iron triangle"-type conflicts in the corporate context would distinguish not between outside and inside directors but rather between interested and disinterested directors. The American Law Institute ("ALI"), in Principles of Corporate Governance ("Principles"), provides a definition of directors with a "significant relationship" to the corporation, in order to discourage the development of these conflicts.[44] The ALI's definition of "significant relationship" includes those members of the board whose business or family relationships bring them into a symbiotic position with the corporation, and the Principles require that board committees include a majority of directors without such relationships.[45] The problems that "iron triangles" create in government suggest that this reform can help increase the independence of the board.

b. Agenda control

The board's institutional weakness also results from management's power over the agenda of board meetings, absent a crisis in the corpora-

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40. *See id.* at 210-11.

41. *See id.* at 206 (arguing that such relationships "may lead committee members to adamantly defend an agency from its critics [and] ignore instances of agency misfeasance").

42. This example is drawn from ALI Principles, *supra* note 13, at § 1.29(a)(5).

43. *See* Black, *supra* note 24, at 596-97.

44. ALI Principles, *supra* note 13, at §§ 1.34 (defining "significant relationship"), 3A.02, 3A.04, 3A.05 (requiring majority of disinterested directors on audit, nominating, and compensation committees).

45. *Id.*

tion.[46] The ability to set the agenda is a critical source of leverage for the CEO because inclusion of an item on the board's agenda is a precondition to the board's exercise of decisionmaking power. Items not placed on the agenda are immune from formal board consideration. A recent study of the boards of large corporations revealed that many board members view agenda power as one of management's most potent tools.[47] In addition to agenda power, management typically controls what information the directors receive before meetings. The CEO runs the board meetings, which gives him power to preclude meaningful discussion by scheduling enough presentations to swallow all available meeting time.[48]

In contrast to the corporate context, Congress and the executive branch share power over the legislative agenda. Although Congress technically has absolute power over its calendar, the process of agenda-setting often involves consultation and, at times, conflict between the White House and congressional leaders.[49] For example, the legislative battle over enactment of legislation to give employees advance notification of plant closings illustrates an agenda conflict. First, Congress attached the plant-closing bill to an important piece of trade legislation in the summer preceding the 1988 presidential election.[50] President Reagan then vetoed the trade bill, forcing Congress to enact the plant-closing bill separately with the supermajorities necessary to avoid what could have been a second veto.[51] In particular, the plant-closing bill illustrates a type of "tying" strategy; more generally, it illustrates the maneuvering that occurs in the legislative agenda-setting process.[52]

One commentator has analogized managers' agenda power to the control exerted by the House Rules Committee in limiting the floor amendments congressional representatives can attach to legislation produced by the House's substantive lawmaking committees.[53] The House Rules Committee exercises an important gatekeeping function through its power to declare floor amendments not germane to a pending bill and thus incapable of consideration by the full House.[54] Although the germane-

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46. *See* Bayless Manning, *The Business Judgment Rule and the Director's Duty of Attention: Time for Reality*, 39 BUS. LAW 1477, 1484 (1984).

47. LORSCH, *supra* note 28, at 82-83.

48. *Id.* at 87.

49. *See generally* MARK A. PETERSON, LEGISLATING TOGETHER: THE WHITE HOUSE AND CAPITOL HILL FROM EISENHOWER TO REAGAN 35-37 (1990).

50. *See Plant Closing Measures*, 43 CONG. Q. ALMANAC 678 (1987).

51. *See* Matthew Cooper & Allan Holmes, *The Disaster that Never Happened*, U.S. NEWS AND WORLD REPORT, Feb. 26, 1990, at 47.

52. *See generally id.*

53. *See* Black, *supra* note 24, at 594. Although Professor Black draws this analogy with respect to managers' control over shareholder proposals, his general point, that agenda control influences outcomes, applies in the context of managers' control over the board's agenda as well.

54. Rule 16.7 of the Rules of the House of Representatives requires that all amend-

ness requirement seems like a noncontroversial procedural tool, the Committee often manipulates this rule to effect politically desired legislative agendas. For example, the Committee approved an amendment to attach the plant-closing-notification bill to the 1988 trade bill, despite the persuasive protests of Republican congressmen that it violated the germaneness rule.[55]

The Rules Committee analogy does not hold up in the corporate context for several reasons. First, the constitutional requirements of bicameral passage of legislation and presidential signature exert countervailing pressure against the Rules Committee, as President Reagan's successful veto of the 1988 trade bill illustrates.[56] The House Rules Committee, therefore, constitutes only one of the competing sources of legislative agenda-setting power. Second, and more importantly, the Rules Committee is an agenda mechanism of the legislative branch rather than the executive branch. No such system of checks and balances exists in the corporate arena, because the board has no mechanism comparable to the Rules Committee that would give it leverage over its agenda. Management's nearly unilateral control over agenda-setting hinders the board's ability to oversee management's performance. An appropriate reform would give the board some influence over its own agenda, a goal that could be achieved in several ways.

c. Committees as sources of expertise and information

Corporate boards face significant informational constraints that handicap their efforts to hold managers accountable.[57] This occurs because directors serve part-time and lack independent sources of expertise.[58] The board's limitations constitute one justification for allowing inside

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ments offered on the House floor be germane to the bill. This requirement has been variously defined as consistent with the "fundamental purpose" of the bill or at least within the jurisdiction of the committee that has reported the bill. The plant-closing bill clearly failed the second of these definitions, since it was within the jurisdiction of the House Education and Labor Committee, while the Ways and Means Committee had jurisdiction over the trade bill. A closer question was whether legislation on plant closings, which result in part from foreign competition, was sufficiently related to the trade bill to meet the "fundamental purpose" requirement.

55. 134 CONG. REC. H2280 (daily ed. Apr. 21, 1988) (statement of Rep. Bartlett).

56. For example, an amendment barred by the House Rules Committee may easily be attached as an amendment in the Senate, included in the final bill produced from a House-Senate Conference, and ultimately enacted into law.

57. *See* LORSCH, *supra* note 28, at 56-58.

58. *See id.* at 23-25, 57.

directors.[59] The congressional response to these problems provides a less conflict-ridden solution to increase the board's expertise. During the early days of the Republic, Congress faced the same informational constraints currently facing boards of directors. As one scholar has noted:

> The early Congress remained formally unspecialized, . . . [while] the executive branch . . . instituted specialized organization in the form of cabinet departments. The resulting disparity between the specialized executive and the unspecialized legislature was most apparent in financial affairs, and was impressively exploited by Secretary of the Treasury Alexander Hamilton. By 1795, on matters of debt, finance, currency, and expenditures, the Congress was outmaneuvered at every turn by Hamilton's operation at Treasury.[60]

In response, Congress created permanent standing committees with defined areas of expertise.[61] This "division of labor insulates the legislature from executive capture,"[62] and to this day, congressional committees provide critical sources of specialized knowledge. They draft legislation and improve Congress' capacity to oversee the performance of the executive branch.[63] Furthermore, individual members of Congress rely heavily on committees as informational resources, and studies show that congressional committees serve as "voting cues" for members on legislation with which they are not intimately familiar.[64] This dependence has grown in recent years as the details of legislation are increasingly hammered out in committees and as senators and congressmen face greater demands on their time.[65] Again, the legislative development of the plant-closing-notification bill provides evidence of this phenomenon. In adopting the plant-closing bill, first as an amendment to the 1988 trade bill and later as a free-standing piece of legislation, both the House and Senate deferred largely to the expertise of the committees in drafting the measure.[66]

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59. *See, e.g.*, ALI Principles, *supra* note 13, at § 3A.01 cmt. c ("[p]ermitting senior executives to serve on the board ensures knowledgeable and detailed board discussion about the business, and encourages management to take important issues to the board").

60. Kenneth A. Shepsle, *Representation and Governance: The Great Legislative Trade-Off*, 103 POL. SCI. Q. 461, 465 (1988).

61. *Id.*

62. *Id.* at 482

63. On the drafting function of committees, see generally Shepsle, *supra* note 60. On the oversight functions of committees, see BERNARD ROSEN, HOLDING GOVERNMENT BUREAUCRACIES ACCOUNTABLE 64-69 (1990).

64. *See* PARKER, *supra* note 33, at 140.

65. *Id.*

66. Floor consideration of the plant-closing bill initially took place in the Senate as an amendment to the trade bill. Although compromises were struck that weakened its language, those compromises were drafted by the relevant subcommittee and full committee chairmen, Senators Metzenbaum and Kennedy, respectively. *See Plant-Closing Measures*, *supra* note 50, at 678-79. The only other floor consideration of the bill

Corporations have also begun to use committees to improve the quality of decisionmaking on their boards. A recent study indicates that "[b]y 1987, 75 percent of the boards of industrial companies had [three] to [five] committees, the most common of which were audit, nominating, and compensation."[67] That study also reveals that directors view committees as essential resources given their informational, knowledge, and time limitations,[68] in much the same way Congress does.

Despite surface similarities between congressional and board committees, important differences exist between the two. First, formation of corporate committees is optional, and second, inside directors may serve as members.[69] Both features inhibit board committees from holding managers accountable. The ALI Principles include provisions to recommend or require certain types of committees on all large corporations, such as audit, nominating, and compensation committees, and would require that a majority of their membership be drawn from disinterested directors.[70]

The experience of the congressional committee process suggests that these reforms are sound and perhaps should be extended, at least as a matter of corporate practice, if not statutory mandate. Corporate committees should participate actively in setting the board's agenda and offering proposals at board meetings, just as congressional committees report legislation to the full House and Senate. For example, the compensation committee could be authorized to study different types of performance-based compensation systems, either by itself or by contracting out.[71] It should then be able to propose such a system to the full board for consideration.

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came during consideration of the conference report on the trade bill, at which time both the House and Senate rejected floor amendments. *See* 134 CONG. REC. H2284 (daily ed. Apr. 21, 1988) (covering House proceedings).

67. LORSCH, *supra* note 28, at 58. ALI Principles reports that a 1990 study found 99 percent of responding companies had audit committees, ALI Principles, *supra* note 13, at § 3.05 (Reporter's Note 4), 60 percent had nominating committees, *id.* at § 3A.04 (Reporter's Note 1), and 93 percent had compensation committees, *id.* at § 3A.05 (Reporter's Note 1).

68. LORSCH, *supra* note 28, at 59.

69. Delaware law allows, but does not require, board committees and is silent as to whether they may include inside directors. DEL. CODE ANN. tit. 8, § 141 (1993).

70. ALI Principles, *supra* note 13, at §§ 3A.02 (requiring audit committee), 3A.04, 3A.05 (recommending nominating and compensation committees).

71. *See id.* at § 3A.05 cmt. d ("the compensation committee should periodically acquire relevant information about internal and external compensation practices").

For some, practical considerations dictate that even with committees the board should not have the agenda-setting power of Congress. The board lacks knowledge, information, and expertise when compared with the CEO, who has the benefit of a large staff.[72] Why should better decisions be expected if agenda power is given to a board of part-time directors or its committees? By contrast, because it functions on a full-time basis and has a wealth of collective expertise from a large staff, Congress faces no such knowledge gap. But that argument begs the question of whether the board should operate under such a handicap. A closer look at the way Congress uses committees and other structures to cope with knowledge and informational constraints provides a possible answer to that question.

d. Staff and oversight agencies as sources of expertise and information

The existence of committees, without more, represented only the initial congressional response to executive capture. Since World War II, Congress has increased its informational capacities. First, Congress has established powerful oversight organizations. Ten congressional committees have investigation subcommittees[73] and Congress has, by legislation, expanded the mission of the General Accounting Office ("GAO") beyond its traditional auditing function, to include review of the performance of federal programs.[74] In addition, the creation of the Congressional Budget Office ("CBO") in 1974, has given Congress "an objective, independent source of budgetary expertise,"[75] whose economic forecasts often diverge from the more optimistic predictions published by the president's Office of Management and Budget. Although nobody would argue that the federal government has won the war on waste or on budget deficits, observers agree that the CBO and the GAO give the Congress important oversight tools and a source of early warning in cases of executive mismanagement.[76]

These benefits could be realized by increasing the role of the board's audit committee or by the creation of new committees to oversee operational management or strategic planning.[77] Similar diagnostic and early

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72. LORSCH, *supra* note 28, at 80-88.

73. ROSEN, *supra* note 63, at 65.

74. *Id.* at 76.

75. James A. Thurber, *New Powers of the Purse: An Assessment of Congressional Budget Reform*, *in* LEGISLATIVE REFORM (Leroy N. Rieselbach ed., 1978) [hereinafter Rieselbach ed.].

76. *See generally* Shepsle, *supra* note 60; ROSEN, *supra* note 63.

77. The suggestion for strategic planning committees is made in LORSCH, *supra* note 28, at 181.

warning capacities would be provided under recent proposals for corporate "ombudspersons."[78]

The proposed creation of these new structures, however, raises the problem of who would work in them. Enhanced congressional expertise in oversight organizations and committees has resulted in part from an exponential growth in congressional staff.[79] However, the increase in congressional staff has not been free from criticism. One commentator has argued that an increased staff reduces the democratic nature of Congress because the staff has grown so large that it operates as an autonomous group of unelected policymakers. Also, because individual members' staffs generate so many different projects for members of Congress, they reduce the time members spend researching and deliberating legislation.[80]

For some of the same reasons, corporations and commentators have largely rejected proposals to provide staffs to boards of directors. The most extensive proposal of this type, put forth by former Supreme Court Justice Arthur Goldberg, has been attacked as "both unsound and unworkable" on grounds that it would create nothing more than "a shadow staff with an institutionalized obligation to second-guess the management, but with very limited responsibility for results, . . . would add additional expense and time . . . [and would] create a further and unnecessary level of decisionmaking to corporations which already tend toward overbureaucratization."[81]

The criticisms of both congressional and board staffs share a common limitation. They focus largely on the size of the staff rather than as the existence of the staff. However, the purpose of a staff is not to create another "level of decisionmaking" but rather to enable the existing level of decisionmaking—the board—to work better.[82] Furthermore, the addi-

78. Victor Futter, *An Answer to the Public Perception of Corporations: A Corporate Ombudsperson?*, 46 BUS. LAW 29, 40-44 (1990).

79. MICHAEL J. MALBIN, UNELECTED REPRESENTATIVES: CONGRESSIONAL STAFF AND THE FUTURE OF REPRESENTATIVE GOVERNMENT 240, 253 (1980) (detailing growth between 1947-79, and reporting that staff is responsible for most of the congressional oversight that is done outside the GAO). Eighty-five percent of Congressmen in a recent survey rated staff "very helpful" in increasing their oversight capacity. *See* ROSEN, *supra* note 63, at 67.

80. MALBIN, *supra* note 79, at 240-41.

81. EISENBERG, *supra* note 31, at 155-56; *see also* ALI Principles, *supra* note 13, at § 3.04 cmt. c (listing these objections).

82. As Professor Harvey Goldschmid put it, "[t]he idea is not to create a new bureaucracy; a small independent staff would simply give the board the necessary

tion of staff would help committees compensate for the significant time and information constraints faced by boards. For example, a compensation committee staff could research different types of performance-based compensation systems appropriate to the corporation's particular industry, or a nominating committee staff could help identify a pool of disinterested directors. Without a staff, committees will be forced to rely largely on board members, whose time constraints gave rise to the formation of the committees, or on management, who may have a conflict if, for example, the issue is executive compensation. An alternative solution, adopted by the ALI Principles, would authorize disinterested directors to retain outside experts.[83] Like the proposal to establish a staff, this approach would give the board a source of impartial advice and expertise. However, because board members would have to retain the experts on a case-specific basis, outside experts would more likely be reactive, i.e., called in when the directors perceive the existence of a problem, whereas a small permanent staff might provide directors with early warning of the problem.

The foregoing discussion has focused on internal controls in the political process. Committees, oversight organizations, staff, and agenda power help Congress influence policy development and oversee executive performance and thus constitute important checks and balances in the federal government. Granting corporate boards these tools would similarly improve their capacity to exercise a meaningful oversight function by providing independent sources of expertise and lessening their reliance on inside directors and management.

The comparison between the board's current capacity and that of Congress suggests that, for shareholders, constituency statutes make a bad situation worse. They accord more power to directors already handicapped in exercising the powers they have. Furthermore, given the lopsided distribution of power in favor of managers, the managers, rather than the directors, would likely do the balancing between constituencies. The statutes would therefore undercut the board's ability to hold managers accountable to shareholders by authorizing managers to pursue a different set of ill-defined goals.

Equally important checks and balances are provided by external controls that help ensure that boards and legislatures properly use the powers they are given. An analysis of these forces reveals more striking differences between corporate and political governance and sheds further light on the efficacy of constituency statutes.

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tools." *Goldschmid*, *supra* note 19, at 28.

83. ALI Principles, *supra* note 13, at § 3.04.

3. External Sources of Accountability

a. *The corporate context*

External sources of accountability in the corporate sphere include the capital markets, competition, the market for corporate control, judicial review, and legislation.[84] Constituency statutes significantly weaken each of these tools, except competition. By authorizing boards to install defensive tactics after balancing interests,[85] the statutes deter takeovers, the most powerful means by which the capital markets hold corporate managers accountable. Additionally, the statutes reduce the effectiveness of judicial review via stockholder suits by providing a broad and amorphous rationale under which the board can defend its decisions. Finally, enactment of these laws provides statutory support for boards to balance other interests against those of shareholders, impeding state legislatures from serving as a powerful external control on management.

i. Judicial review

A brief review of how constituency statutes hinder judicial review under the widely used Delaware approach illustrates how these statutes threaten to reduce the potency of the courts as an accountability mechanism. Except in the case of self-interested transactions, which courts carefully scrutinize under the duty of loyalty doctrine,[86] shareholders typically enforce judicial remedies against directors under a duty of care theory, and the courts then judge the board's action under the business judgment rule.[87] In the takeover context, which often pits the board and management against shareholders, a heightened business judgment rule adopted in *Unocal Corp. v. Mesa Petroleum Co.*[88] requires the board to prove that it adopted a defensive measure because it had "reasonable grounds for believing that a danger to corporate policy and effectiveness

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84. *See* CLARK, *supra* note 7, at 679; Statement of the Business Roundtable, *The Role and Composition of the Board of Directors of the Large Publicly Owned Corporation* 2-3 (1978).

85. *See, e.g.*, 15 PA. CONS. STAT. ANN. §§ 1715, 1716 (1993) (authorizing interest balancing in all board decisions).

86. *See, e.g.*, Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del. 1983).

87. *See* Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985); Litwin v. Allen, 25 N.Y.S.2d 667 (N.Y. App. Div. 1940).

88. 493 A.2d 946 (Del. 1985).

existed because of another person's stock ownership" and that the defensive measure adopted was "reasonable in relation to the threat posed."[89]

Unocal's "reasonability" test hardly provides airtight protection to shareholders, as illustrated both by its use to authorize rejection of a lucrative tender offer in *Paramount Communications, Inc. v. Time, Inc.*[90] and by language in *Unocal* itself suggesting that the board could consider the interests of nonshareholder constituencies.[91] But despite its ambiguities, the *Unocal* test remains an important source of protection for shareholders, particularly when compared to constituency statutes. These statutes either codify *Unocal's* suggestion concerning consideration of interests other than that of shareholders, or eliminate the *Unocal* test altogether by authorizing interest balancing.[92] Under a typical formulation, directors must discharge their duties, which include the installation of takeover defenses, "in the best interests of the corporation."[93] In making such decisions, the director "may . . . consider the effects of any action on shareholders, employees, suppliers and customers of the corporation, and communities in which offices or other establishments of the corporation are located, and all other pertinent factors."[94] Broad judicial construction of these statutes would eviscerate *Unocal's* heightened standard of review by explicitly sanctioning consideration of these other interests as part of the determination that a potential hostile takeover posed a "reasonable threat to corporate policy." Furthermore, the mere existence of these statutes should certainly deter many tender offers.

Nearly all of the twenty-nine constituency statutes take broad corporate goals a step further by building this mandate into their statutory duty of care formulations.[95] The statutes, therefore, insulate under the

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89. *Id.* at 955.

90. 571 A.2d 1140, 1152-55 (Del. 1989) (citing *Unocal*, 493 A.2d at 955).

91. *Unocal*, 493 A.2d at 955; *see* A. A. Sommer, Jr., *Whom Should the Corporations Serve?: The Berle-Dodd Debate Revisited Sixty Years Later*, 16 DEL. J. CORP. L. 33, 47-49 (1991).

92. Nearly all of the other constituency laws authorize permissive balancing of nonshareholder interests. *See* Charles Hansen, *Other Constituency Statutes: A Search for Perspective*, 46 BUS. LAW 1355 (1991) (listing the statutes). This "may" formulation codifies whatever ambiguity remained from *Unocal.* At least one state's statute contains language expressly rejecting the *Unocal* threshold test. IND. STAT. ANN. § 23-1-35-1 (1)(f) (West 1990) (providing that "*certain judicial decisions in Delaware* and other jurisdictions . . . relating to potential change of control transactions that impose a different or higher degree of scrutiny on actions taken by directors in response to a proposed acquisition of control of the corporation, are *inconsistent with the proper application of the business judgment rule under this article*") (emphasis added).

93. ME. REV. STAT. ANN. tit. 13A, § 716 (West 1993).

94. *Id.*

95. The Maine statute is representative of constituency statutes in general. It de-

already permissive business judgment rule decisions made after balancing the interests of other constituencies. Broad construction of these statutory provisions would effectively transform the business judgment rule into an expansive grant of immunity for all corporate decisions outside the duty of loyalty arena. It is hard to imagine any business decision that could not be defended as the product of balancing the interests of other constituencies. This is especially true since the statutes provide no guidance as to how the balancing is to take place.

ii. Legislation

Constituency statutes also reveal that shareholders cannot depend on state legislatures as external sources of accountability over managers. The swiftness with which states have adopted these statutes suggests that, at least at the state level, even the most vocal and powerful shareholders lack lobbying power. Their impotence stems from a variety of sources, including the well-chronicled collective-action problems that inhibit group activity among shareholders,[96] the states' understandably parochial concerns about job flight, and the traditional "race to the bottom" problem motivated by a concern for franchise taxes.[97] The mere existence of these statutes in twenty-nine states implies state legislatures are unwilling to help create more independent and effective boards of directors.

Three devices can help protect shareholders from constituency statutes. First, shareholders can vote for their corporations to opt out of the statutes or to reincorporate in other states. Second, they can bring derivative actions and urge narrow construction of the statutes. But these are piecemeal and often expensive strategies, since opt-out proposals and lawsuits are corporation-specific initiatives likely to draw concerted opposition from management.

The third, more comprehensive solution is federal legislation setting minimum standards for the conduct of directors. Federal legislation

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fines a director's duty of care to include consideration of "the effects of any action upon shareholders, employees, suppliers and customers of the corporation, communities in which offices or other establishments of the corporation are located and all other pertinent factors." *Id.*

96. *See supra* note 26 and accompanying text.

97. *See* William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 668-69 (1974) (discussing how Delaware franchise taxes accounted for nearly one quarter of the state's total tax collections).

could neutralize the "race to the bottom" by creating a floor under which states could not reduce duty of care standards for directors. Additionally, parochialism is less likely to occur in Congress, where one state's gain is another state's loss. But Congress' persistent refusal to enact such legislation demonstrates that this is a long-shot strategy. Congressional inaction reflects the other external constraints under which it operates, to which it is now appropriate to turn.

b. The political context

Managerial discretion under constituency statutes is especially disturbing, given the absence in the corporate context of external institutional constraints present in the congressional context. Two principal constraints are the influence of private interest groups and the news media.

i. Interest groups

Private interest-group power is legion in the political process. Some groups organize along economic lines, such as trade associations and labor unions. The congressional battle over plant-closing legislation illustrates how private groups battle among themselves in an attempt to shape or block legislation. These groups also issue voting ratings that measure the support individual members of Congress lend to their causes. These ratings provide powerful cannon fodder during re-election campaigns.[98] Although scholars argue over whether these groups do more harm than good in the political process, no one disputes that they constitute a significant external check on congressional discretion.[99]

Recent years have also witnessed a sharp increase in the power of so-called "cause" or "public" interest groups, such as Common Cause and Ralph Nader's Public Citizen, which seek to improve government's accountability to the public.[100] Since they are financed on a grass-roots basis by citizens, these groups are not beholden to narrow economic interests. Rather, they exist to exert countervailing pressure against private interests.[101] For example, Common Cause effectively highlighted

98. "Incumbents use 'good' scores to raise money from ideological compatriots, and challengers use 'bad' scores to show that a member is out of step with his constituents." Sheron Perkinson, *Scorecards Find Few Shifts in 1989 Voting Patterns*, 48 CONG. Q. 643 (Mar. 3, 1990).

99. The influence of private groups on legislation is so accepted as a truism that it forms the basis for headlines in articles on legislative episodes. *See, e.g*, Nadine Cohodas, *Business Defeats Labor on Plant-Closing Bill*, 43 CONG. Q. 2528 (Nov. 30, 1985) (chronicling the House defeat of the plant-closing bill in 1985).

100. *See, e.g.*, Stephen Kurkjian, *Officials Too Tempted by Travel*, BOSTON GLOBE, June 25, 1991, at 1 (describing groups' efforts to reform Congressional behavior).

101. ROSEN, *supra* note 63, at 102-08.

abuses in Pentagon spending, to the chagrin of the large corporations dependent on defense contracts, and has prompted Congress to confront the influence of political action committees in election campaigns.[102]

No comparable groups of shareholders currently perform the accountability functions of interest groups in government. Although institutional investors may become a powerful interest group of shareholders,[103] it is still too early to tell whether they will effectively play this role.[104]

ii. The media

The differential coverage of corporate and political decisionmaking by the news media provides another contrast between the two arenas. Congressional policymaking is subject to more intense public scrutiny than ever before. This development has resulted from the "sunshine" reforms of the post-Watergate era that opened committee markups and House-Senate conference negotiations to public view,[105] from the televising of House and Senate proceedings on C-Span, and from an ever increasing and vigilant Washington press corps. The media also checks the influence of private interest groups in the political process because it tends to be biased against the exertion of public power by these private groups and in favor of the "cause" groups such as Public Citizen.[106]

Corporate decisional processes, by contrast, receive no such public scrutiny. Board meetings are not open to the press. Indeed, "it is difficult to imagine a broadcast station reporting on business executives in the way they report the activities of . . . politicians."[107] Additionally, the print wire services typically report only "business stories at the end of a

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102. Chuck Alston, *Fertilizing the Grass Roots*, 49 CONG. Q. 280 (Feb. 2, 1991) (detailing the influence of Common Cause and Public Citizen in the current debate over campaign finance legislation); Frank J. Sorauf, *Campaign Money and the Press: Three Soundings*, 102 POL. SCI. Q. 25, 38-40 (1987).

103. *See supra* note 27.

104. Roberta Romano, *Public Pension Fund Activism in Corporate Governance Reconsidered*, 93 COLUM. L. REV. 795 (1993) (discussing mixed empirical results of studies of institutional investor behavior).

105. *See generally* Charles S. Bullock III, *Congress in the Sunshine*, *in* LEGISLATIVE REFORM 209-21 (Leroy N. Rieselbach ed., 1978).

106. *See* Sorauf, *supra* note 102, at 26-27, 38-40 (arguing and providing empirical evidence that media coverage tends to be biased against private interest groups because the media receives a majority of its source material from "public" interest groups, such as Common Cause).

107. ROBERT LAMB ET AL., BUSINESS, MEDIA, AND THE LAW: THE TROUBLED CONFLUENCE 27 (1980).

quarter involving companies with earnings of $100 million or more," and "[a]t Dow Jones, which publishes The Wall Street Journal, any transaction under $5 million must be unusual to be deemed newsworthy."[108] The public image of large corporations exerts some influence on the behavior of corporate management. However, because the media does not cover corporate decisionmaking in the same way that it covers political decisionmaking, coverage of misfeasance comes after the fact in reports of scandal or announcements of major catastrophes, such as the Exxon Valdez oil spill.[109]

Increased media coverage for corporate decisionmaking, however, poses its own set of problems. First, it may be unnecessary, at least for shareholders, whose interests are limited to share price and events affecting that price. Additionally, market analysts already exert pressure on corporate managers. Greater media coverage might actually inhibit risk-taking or profit-maximizing behavior by corporations. The media's ideological bias in political reporting suggests that it might not accept, for example, a corporate policy emphasizing profit maximization and return to shareholders. But the contrast between media coverage of government and of corporate decisionmaking serves as another illustration of the greater institutional constraints imposed on the political, as opposed to the corporate, decisionmaking process.

4. Lessons From the Governmental Analogy

Any attempt to model corporate governance reforms on political institutions must remain sensitive to the legitimate differences between legislatures and corporations. Effective corporate management requires decisive and swift decisionmaking to respond to market developments. The political process, by contrast, moves at a deliberate pace and generates compromise decisions that often represent incremental steps toward identified goals.[110]

Again, the plant-closing legislation is illustrative. Enactment of legislation in 1988 to provide workers with advance notification of plant closings represented the culmination of a fourteen-year effort.[111] By this time, most large corporations were already providing the early notification to workers that would be mandated by the bill.[112] The plant-closing

108. *Id.*

109. In 1989, the Exxon Valdez oil tanker hit a reef off the coast of Alaska and spilled millions of gallons of oil into Prince William Sound. The captain of the ship was found to be intoxicated at the time of the accident.

110. *See* Roundtable, *supra* note 7, at 243.

111. Merrill Goozner, *Workers Already Give Notice on Flaws of Plant-Closing Law*, CHI. TRIB., Aug. 3, 1988, at C1.

112. *Id.*

legislation finally enacted was a measure significantly weakened by the compromises necessary to secure its passage. Whereas the original 1975 version of the measure would have required businesses to provide two years' advance notification,[113] the final version mandated only sixty days' notice for workers and affected local communities.[114] Furthermore, the legislation contained broad exemptions for faltering companies.[115]

The challenge in using the congressional/executive model as a source for corporate governance reform lies in adopting those features that would improve accountability of managers consistent with the realities of corporate decisionmaking. This requires an analysis of why the lawmaking process moves so slowly and incrementally. The delay in enacting the plant-closing legislation resulted in part from the procedural requirements of legislation, notably passage in each house of an original bill and then a conference report, followed by, presidential approval. A far more important source of delay, and the chief cause of the final bill's modest character, was the need for compromise between two powerful constituencies: business and organized labor.

This factor alone counsels against according the board and managers the authority to balance the interests of various constituencies. One scholar has observed that a "multi-interest board . . . would be a debating society, incapable of reaching the timely decisions that are essential to efficiency, [and that] management would be even freer than now from rigorous audit by their boards of directors."[116] This criticism refers to the more sweeping reform of co-determination, under which boards are comprised of various corporate constituencies. However, the congressional experience suggests that according the board power to balance interests could also cause delay if the board took seriously its obligation to balance these interests or if the interests themselves pressured the boards to do so.[117] Moreover, the incremental quality of the plant-clos-

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113. *Id.*

114. 29 U.S.C.A. § 2102 (1991).

115. The Act exempted companies that closed plants due to "business circumstances that were not reasonably foreseeable" at the time that the 60-day notice would have been triggered, and in situations in which the employer "reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business." *Id.* at § 2102(b).

116. NEIL H. JACOBY, CORPORATE POWER AND SOCIAL RESPONSIBILITY 174 (1973).

117. *See* Committee on Corporate Laws, *supra* note 6, at 2269 (observing that "[i]f directors are required to consider other interests . . . the decision-making process will become a balancing act or search for compromise").

ing legislation illustrates that a rigorous balancing of interests is antithetical to the decisiveness and risk-taking that are critical attributes of business decisions.

According the board some power over its agenda, and assisting it through the formation of more active committees and a small independent staff, would provide corporate governance the benefits of the congressional model without its costs. These reforms need not increase delays that threaten corporate effectiveness, and they would lead to more informed decisionmaking. In addition, an independent staff for the board and/or its committees would improve its capacity to respond to management failure in a timely fashion.

Increased agenda-setting power and informational resources for boards of directors might also have *in terrorem* effects. Corporate managers tend to be sensitive to threats. For example, takeovers help discipline even those managers whose corporations are not acquired.[118] Similarly, the prospect of plant-closing legislation caused many corporations to give workers advance notice long before Congress enacted the measure.[119]

External pressures are also needed to give effect to enhanced board powers, just as interest groups and the press help ensure that elected officials use their powers to generate responsive public policies. In the corporate context, the courts and the markets hold boards accountable. Narrow construction of the constituency statutes would help restore at least some of the discipline exerted by the market for corporate control. Meaningful judicial review can help ensure that the board takes seriously any new powers given to it to check management. Existence of a judicial remedy is particularly important since countervailing pressures inside the boardroom give grounds for pessimism about the effectiveness of structural reform. These include the consensual nature of the boardroom decisionmaking process[120] and the fact that most outside directors are drawn from the ranks of corporate management and may empathize with rather than police the actions of corporate management.[121]

An effective judicial standard would redefine the business judgment rule along the lines adopted by the ALI Principles to introduce an objective component to the subjective good faith standard that heretofore has characterized the rule.[122] A tougher business judgment rule should not

118. *See* Gilson, *Tender Offers*, *supra* note 16, at 841.

119. As the Chicago Tribune reported: "While Corporate America fought the bill in Congress and in the statehouses, the constant legislative focus on the issue forced corporations to change dramatically the way they treated their workers when they had to shut plants. Sudden, massive shutdowns . . . have for the most part faded from the economic landscape." Goozner, *supra* note 110, at Cl.

120. LORSCH, *supra* note 28, at 93.

121. *See id.*

122. ALI Principles provide that a director fulfills his duty of care if, *inter alia*, he

be viewed as a one-sided attempt to invite litigation or to penalize directors and deter risk-taking. Rather, it would represent an enforcement tool commensurate with the increased power and capacity of boards to oversee management's performance. With more vigorous committees and staff resources, boards should be able to satisfy a more stringent business judgment rule.

A plan to reform corporate governance should not, however, depend entirely on judicial review as a source of accountability. The judicial remedy is an expensive, time consuming, and limited means of ensuring the integrity of decisional processes. Establishment of checks and balances, through legislation where necessary, constitutes a more comprehensive and efficient means of establishing appropriate power relationships in governments and in corporations. As a result, judicial review should constitute part, but not all, of a proper reform strategy.

The process by which states enacted constituency statutes also contains important lessons for corporate governance.[123] A full package of governance reforms would limit the discretion of corporate managers to use corporate funds to lobby for such anti-shareholder measures, or to purport to represent their corporate entities when lobbying for the measures. Under the current regime, lobbying decisions and expenses receive the protection of the business judgment rule. This standard appropriately protects lobbying on issues where managers can be expected to pursue shareholders' interests, such as environmental or labor laws. How to limit management's lobbying discretion presents a more complicated question. At first glance, it seems self-defeating and doctrinally inconsistent to apply *Unocal* to takeover defenses while applying the business judgment rule to management efforts to encourage enactment of constituency statutes that insulate these defenses from meaningful judicial review.

However, extending *Unocal* to management lobbying for constituency statutes would probably do more harm than good. The resulting derivative actions would entail difficult line-drawing about the exact nature of lobbying efforts, and could deter managers from lobbying legislatures altogether, even for measures in shareholders' interests. For example,

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"rationally believes that [his] business judgment is in the best interests of the corporation." Use of the word "rationally" introduces an objective component to the standard. ALI Principles, *supra* note 13, at § 4.01(c)(3) cmt. d.

123. One commentator reports that enactment of the Connecticut statute was almost exclusively at the behest of corporate managers, with little or no support from the other constituencies the statute purported to help. Romano, *supra* note 1, at 122-23.

corporate lobbying for a certain health-care reform package, which would increase business expenses in the short term, might be justified in terms of long-term profitability as a means of attracting or retaining productive employees. Alternatively, supporting such a measure might be defended on tactical grounds as the lesser of two evils. Additionally, the sheer ambiguity of the statutes' formulations suggest the difficulty of litigating the lobbying that inspired their enactment.

A more effective means to limit managerial legislative activity is through internal corporate processes. These could include board-imposed limits or shareholder proposals similar to those that seek to opt out of the substantive provisions of constituency statutes, or to amend articles of incorporation to authorize only narrow corporate goals.[124]

The reforms outlined in this section represent appropriate means to cabin managerial discretion and to improve corporate governance toward the goal of profitability. However, they do not directly address the contention that the constituency statutes represent appropriate social policy—a critical consideration. The remainder of this Article examines this subject.

V. CONSTITUENCY STATUTES AND OTHER CONSTITUENCIES

An intuitively appealing argument in favor of broad corporate goals and constituency statutes is that, when compared to political governance, corporate governance represents the lesser of two evils.[125] One commentator defends the expansion of corporate goals by criticizing what he terms the "inherent" flaws of regulation.[126] These inherent flaws result from systemic defects in the congressional lawmaking process, notably the "paramount . . . desire [of Members of Congress] to seek re-election,"[127] and the inability of "unorganized victims of externalities" to help set the congressional agenda.[128] It follows that we have little to lose and much to gain from according corporations the power to balance the interests of corporate constituencies. Since federal legislation could

124. For examples of such shareholder proposals, see INSTITUTIONAL SHAREHOLDER SERVICES, INC., SPECIAL REPORT: THE 1990 PROXY SEASON 14-15 (Aug. 1990).

125. As Dean Robert Clark observes, "the most serious criticisms against [narrow corporate goals] are those that attack the notions that external government regulation of corporations can be an effective way of correcting market failures . . . ." CLARK, *supra* note 7, at 680.

126. Elliott J. Weiss, *Social Regulation of Business Activity: Reforming the Corporate Governance System to Resolve an Institutional Impasse*, 28 UCLA L. REV. 343, 377 (1981).

127. *Id.* at 381.

128. *Id.* at 382.

preempt or mitigate most unwise balancing decisions, the argument must rest on the premise that according corporations some shared power over social policy would yield net positive benefits.

Yet, many institutional constraints that limit political discretion are absent in the corporate sphere. For example, the media's political bias in favor of the interests of the "unorganized" checks the excessive influence of private groups in Congress. Put simply, special-interest politics makes good copy but bad publicity.[129] At least when an "externality problem does reach the Congressional agenda," the media plays a constructive role in keeping it there.[130]

More broadly, the argument that the political process is defective must be measured against the alternative created by constituency statutes—balancing interests in the nation's boardrooms as well as on Capitol Hill and in state legislatures—which contains the potential for management to abuse its discretion, given the absence of internal and external controls and the lopsided distribution of power among the participants. As one scholar observed about broad corporate goals long before the advent of these statutes, "[s]ooner or later, someone asks why corporate managers, as persons performing the peculiarly political function of impartially balancing conflicting interests, should escape the political controls that normally accompany such a function."[131] Evidence of that concern arises from a wide variety of sources.

A. *Public Versus Private Decisionmaking Processes*

That political decisionmaking is subject to greater public scrutiny than corporate decisionmaking justifies different judicial treatment of these processes. Two doctrines of federal antitrust immunity are illustrative. Under the "state action" doctrine, state and local governments are immune from antitrust liability for engaging in anti-competitive conduct.[132] Extending this immunity to a municipality in *Town of Hallie v. City of Eau Claire*,[133] a unanimous Supreme Court explained that "municipal

129. An example is the controversy over the Lincoln Savings and Loan scandal. When the Lincoln Savings & Loan failed, it generated a lot of negative publicity. *See* Robert Rosenblatt, *Combative DeConcini Defends S&L Deals*, LOS ANGELES TIMES, Jan. 10, 1991, at A26.

130. Weiss, *supra* note 126, at 382.

131. Detlev F. Vagts, *Reforming the "Modern" Corporation: Perspectives from the German*, 80 HARV. L. REV. 23, 89 (1966).

132. Parker v. Brown, 317 U.S. 341 (1943).

133. 471 U.S. 34 (1985).

conduct is invariably more likely to be exposed to public scrutiny than is private conduct" due to sunshine laws and the electoral process.[134] The Court also exempts businesses from antitrust liability for seeking to restrain or monopolize trade through lobbying or petitioning government, which is considered protected First Amendment speech under what is known as the *Noerr-Pennington* doctrine.[135] Yet in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*,[136] the Court refused to accord *Noerr-Pennington* immunity to the efforts of steel conduit manufacturers to enact a trade association product standard, stressing that the association's decision did not take place in the open political arena but "took place within the context of the standard-setting process of a private association."[137] Significant to the Court's reasoning was its concern that the anti-competitive "restraint [at issue was] imposed by persons unaccountable to the public and without official authority . . . ."[138]

Hallie and *Allied Tube* reflect a traditional judicial and political concern about self-regulation by private industry. In each case, the Court reasoned that an overly broad grant of antitrust immunity for a private party would allow the fox to guard the chicken coop.[139] This fear underlay the Court's emphasis on the absence of public scrutiny over corporate conduct when compared with the governmental process.

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134. *Id.* at 45 n.9. The court juxtaposed municipal conduct with the actions of private entities, such as rate-setting boards, which remain more insulated from public accountability. *Id.*

135. The doctrine owes its name to Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), *reh'g. denied*, 365 U.S. 875 (1961), and United Mine Workers v. Pennington, 381 U.S. 657 (1965).

136. 486 U.S. 492 (1988).

137. *Id.* at 504.

138. *Id.* at 502.

139. *Allied Tube* repeatedly expressed concern that extension of *Noerr* immunity risked anti-competitive regulation at the hands of the regulated. The Court worried that "the members of [trade] associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm." *Id.* at 500. The Court also expressed concern that "the restraint [at issue] is imposed by persons . . . many of whom have *personal financial interests in restraining competition* . . . ." *Id.* at 502 (emphasis added). Subsequently, the Court held that "where, as here, an *economically interested party* exercises decision-making authority in formulating a product standard for a private association that comprises market participants, that party enjoys no *Noerr* immunity . . . ." *Id.* at 509-10 (emphasis added).

In *Hallie*, the Court expressed fears of self-regulation by way of comparison, in order to justify extension of state action immunity to the City of Eau Claire. The Court reasoned, "absent a showing to the contrary, that a municipality acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf." Hallie v. Eau Claire, 471 U.S. 34, 45 (1985).

Judicial concerns about self-regulation are hardly unique to the Court's constructions of the Sherman Act. Similar sentiments appeared in two prominent cases in the 1930s that struck down as unconstitutional federal legislation according significant lawmaking power to private industry groups.[140] In the first of these cases, *A.L.A. Schechter Poultry Corp. v. United States*,[141] the Court invalidated a portion of the National Industrial Recovery Act that authorized private trade associations to regulate working conditions and "unfair trade practices" under the guise of the "Live Poultry Code." Most offensive to the Court was that "Congress . . . delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries."[142]

The following year, in *Carter v. Carter Coal, Inc.*,[143] the Court struck down certain sections of the Bituminous Coal Conservation Act, under which coal producers set industry-wide labor relations practices.[144] By invalidating the legislation, the Court again expressed concerns about self-regulation, reasoning that the statute constituted "delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business."[145]

Corporate governance has much in common with these antitrust and non-delegation cases. In all three areas, the law tries to balance the distribution of public and private power and attempts to craft rules to minimize the corrosive effects of opportunistic corporate behavior. Although

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140. *See* Carter v. Carter Coal Co., 298 U.S. 238 (1938); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). Despite the dormancy of the "nondelegation doctrine" in constitutional law, these two decisions have been distinguished from other nondelegation cases, and thus perhaps retain vitality at least as statements of the broad principle that delegation of lawmaking to private groups, rather than agencies in the executive branch, is constitutionally suspect. *See* PETER STRAUSS, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES 65 n.48 (1989).

141. 295 U.S. 495 (1935).

142. *Id.* at 537.

143. 298 U.S. 238 (1936).

144. *Id.* at 279-317. Interestingly, the case arose when a stockholder of a coal company brought an action against the board of directors for its compliance with the Code. *Id.* at 286.

145. *Id.* at 311.

the antitrust and non-delegation cases involve dealings among, rather than within, corporations, these cases share, with corporate governance, concerns about self-dealing.

In addition, both antitrust law and the traditional profit maximization school of corporate governance seek to maintain a general division of responsibility between government and corporations. In general, government should make policy and corporations should make money. Thus, prohibiting corporations from balancing the interests of constituencies at shareholders' expense is like refusing to authorize a supermarket cooperative to design competition policy in the grocery industry,[146] or preventing an association that includes burner manufacturers from boycotting what it views as an unsafe burner.[147]

More subtly, antitrust law and corporate governance share concerns about the excessive concentrations of power likely to result in the absence of constraints. Society's acceptance of fewer institutional constraints in corporations demonstrates a willingness to trust markets to check corporate power, except when governments must intervene to correct market failures. The concerns about accountability in *Allied Tube* and *Hallie*, as well as the Court's concern about the breadth of its antitrust immunity doctrines, can be explained on this ground. But this rationale is viable only to the extent that market constraints work. Just as anti-competitive conduct among corporations threatens to undermine the product markets, takeover defenses installed after interest balancing within corporations impede the workings of the capital market. Through narrow construction of constituency statutes, corporate law should seek to protect the workings of markets. The behavior of corporate managers in the political arena provides a more concrete illustration of the dangers of constituency statutes. The following discussion describes a series of lobbying efforts mounted by corporate management groups.

B. *Corporate Lobbying*

The high level of support among corporate management for broad corporate goals is relatively new and coincides with its fear of hostile

146. United States v. Topco Assocs., Inc., 405 U.S. 596, 610-11 (1972) (rejecting defendant's argument of increased interbrand competition on ground that "Topco has no authority under the Sherman Act to determine the respective values of competition in various sectors of the economy . . . [since such a decision] must be made by Congress and not by private forces . . . [who] are too keenly aware of their own interests in making such decisions").

147. *See* Radiant Burners, Inc. v. People Gas Light & Coke Co., 364 U.S. 656 (1961) (upholding antitrust action by gas heater manufacturer against trade association that refused to issue seal of approval for manufacturer's burner and some of whose members refused to distribute the burner).

takeovers. As the Washington Post reports:

> A dozen years ago, in the activist climate of Watergate and Vietnam War protests, critics demanded that U.S. corporations be held accountable for their social performance as well as their profits. Now it is the business leadership that talks of its responsibility to serve a longer list of "stakeholders"—employees, retirees, customers, suppliers and communities, as well as stockholders. Business leaders need these stakeholders as allies in their fight against stockholder-backed takeover campaigns.[148]

A similar transition has occurred with respect to federalization of corporate laws. Following the widely publicized insider trading convictions of the 1980s, corporate management groups sought federal legislation to curb the "abuses" in the takeover market. As one corporate lobbyist explains, "[t]here was a window of opportunity opened with the Wall Street scandals, starting with [the scandal involving Ivan] Boesky. We believed at that point . . . we had an opportunity to get good disclosure legislation before Congress."[149] The corporate management lobby abruptly shifted gears on the preemption question after the Supreme Court declined to invalidate on preemption grounds the Indiana antitakeover statute decision in *CTS Corp. v. Dynamics Corp. of America*.[150] It then began vigorously pressuring Congress to avoid preempting state antitakeover laws.[151]

At one level, these reversals appear defensible, particularly if one accepts the proposition that the aggregate social and economic effects of takeovers are disputable. Moreover, even takeover proponents might agree that selective reform in such areas as securities disclosure is appropriate. In this light, the preemption shift could be viewed as nothing more than legislative forum-shopping, since "[h]istorically, it has been easier for a corporation to get protection from takeovers in state legislatures than on Capitol Hill."[152]

Not surprisingly, the corporate lobby maintains that its solicitude for corporate constituencies is well intentioned. As one corporate lobbyist puts it: "[p]eople in the communities say in their faces and in their tears what takeovers have meant to their communities. [Boone] Pickens is

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148. Behr, *supra* note 1, at G1.

149. Kirk Victor, *Taking on Takeovers*, 20 NAT'L L.J. 81 (Jan. 9, 1988)(quoting John Pilcher, Nat'l Assoc. of Manufacturers lobbyist).

150. 481 U.S. 69 (1987) (upholding Indiana antitakeover statute against preemption and Commerce Clause challenges).

151. *Victor*, *supra* note 149, at 79.

152. *Id.* at 80.

really on the wrong side of the argument as to who has the people on their side."[153]

This rhetoric sharply contrasts with corporate management's lobbying efforts on issues of direct concern to the other constituencies that lend political and rhetorical support to their lobbying campaign against takeovers. No historic friend of organized labor, one prominent corporate lobby has "intermittently launched lobbying and promotion campaigns since the 1970s aimed at promoting a 'union-free' America."[154] More recently, corporate management vigorously opposed the very modest plant-closing legislation. When Congress sought to enact the plant-closing measure as an amendment to the 1988 trade bill, a prominent corporate lobby sent telegrams to congressional leaders arguing that the plant-closing measure was "inimical to U.S. competitiveness and enactment of a sound trade bill."[155]

Corporate management has also vented its anger against institutional investors, the group that many count on to increase management's accountability.[156] Early in the Bush Administration, the corporate lobby proposed amendments to the Employee Retirement Income Security Act (ERISA) to limit the discretion of pension-fund managers to accept tender offers.[157] The proposals would have clarified what corporate managers perceive as ambiguities in ERISA regarding the extent to which pension-fund managers could make investment decisions based on long-term, as opposed to short-term, value maximization.[158]

The most plausible way to reconcile these seemingly divergent lobbying efforts is to say that they reflect corporate managers' concern with self-preservation and entrenchment. It is hard to justify trusting corporate managers with the task of balancing the interests of shareholders and employees when they actively oppose these groups on other legislative issues. Taken together with the limited institutional constraints and lopsided distribution of power in the corporate decisionmaking processes, this evidence supports two conclusions. First, it suggests that constit-

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153. *Id.* at 82 (quoting Steven M. H. Wallman, counsel to Coalition to Stop the Raid on America).

154. Peter Perl, *Seminars on 'Deunionizing' Have Become Commonplace; Growing Management Opposition is Key Factor in Decline of Labor*, WASH. POST, Sept. 13, 1987, at H2.

155. At least one corporate law scholar has argued that "[m]anagement's profession of concern for stakeholders would be a great deal more credible if, at the same time management sought the right to block a takeover because of anticipated plant closings by the acquirer, it also supported plant-closing legislation that protected stakeholders from its own actions." Gilson, *Just Say No*, *supra* note 15 at 126.

156. *See, e.g.*, Black, *supra* note 24, at 567-75.

157. *See* Pat Wechsler, *Pension Law Defined*, NEWSDAY, Feb. 1, 1989, at 47.

158. *See id.*

uency statutes will fail to achieve their stated objective—more socially responsible corporations. Second, it justifies the position that all corporate constituencies will be better off if their interests are balanced in the political process and if the corporation concentrates on its traditional goal of profit-maximization for the benefit of shareholders.

VI. CONCLUSION

A comparison between corporate and political decisionmaking contains important lessons for the reform of corporate governance. First, the even distribution of power between Congress and the executive branch provides a strong reason to fear the current tilt in corporate governance in favor of managers. From this standpoint, constituency statutes make a bad situation for shareholders worse. Most striking about the comparison is the relative weakness of the board of directors when compared to Congress. For this reason, corporate governance reforms should emphasize a more powerful and independent board. Such a board should be composed largely of disinterested directors, should have some influence over its own agenda, and should have a variety of committees and a small staff. Corresponding to these increases in the board's capacity for oversight, the business judgment rule should be enhanced to encourage board members to take their monitoring responsibilities seriously. None of these reforms risks or requires bringing the delays of the political decisionmaking process into the boardroom.

The existing distribution of power within the corporation also suggests constituency statutes are unlikely to achieve their stated objectives. Corporate managers do not comprise a disinterested group that can be trusted to balance the interests of corporate constituencies when their own jobs are at stake. As their lobbying campaigns vividly illustrate, corporate managements' support for the interests of labor, communities, and other affected groups on behalf of constituency statutes largely reflects self-interest rather than altruism. Additionally, greater public scrutiny and more direct interest-group involvement in the public policymaking process, as well as the internal controls present there, provide sound reasons to prefer government to corporate management as an interest balancer.

Although political and corporate governance share concerns about accountability and concentrations of power, the law has been more vigilant about this problem in government than in the corporation. The importance of corporations to our national economy makes such a gap in

the law disturbing. One way to close the gap is through narrow construction of constituency statutes and through corporate governance reforms that redistribute power from managers to directors.