The Rise of the Corporation, the Birth of Public Relations, and the Foundations of Modern Political Economy

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Abstract

The rise of the modern corporation was an integral part the Second Industrial Revolution. This important economic and social transformation would not have occurred if business firms had been unwilling to make the large investments necessary to implement the new technologies that drove the industrial growth and development, and business firms would have been reluctant to make the investments without the shield of limited liability and the opportunity to spread their risks across diversified portfolios of corporate stocks. Nonetheless, the rise of the modern corporation created problems. The most successful corporations grew to unprecedented proportions, and the public’s concerns about their growing economic and political power contributed to the Progressive Movement and pressures for social and political reform. There were no federal or state constitutional protections for corporate speech in the early twentieth century. Indeed, corporations were regarded as creatures of state law, whose powers were usually defined by their charters under state incorporation statutes. The federal and state governments could have enacted sweeping regulations on corporations’ speech and related behavior. But they did not. Corporations thus began to make sustained attempts to alter public attitudes and improve their public images through systematic public relations campaigns and corporate welfare programs. The public never came to think of the corporation as a person or anything other than a business entity, but the public relations campaigns succeeded in humanizing the corporation and integrating it into the American public’s sense of community. More importantly, perhaps, they succeeded in rationalizing the role of the corporation in the American economy and legitimizing its role in modern American life. This has had profound implications for the way that American business law and public policy have evolved during the twentieth century.

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All contributions by corporations ... for any political purpose should be forbidden by law.... Not only should the National and ... state Legislatures forbid ... using the money of the corporation in ... any election,... they should also forbid ...[its]... use in connection with any legislation....

Theodore Roosevelt, Annual Address to Congress, 1905

[T]o exclude or impede corporate speech is to muzzle the principal agents of the modern economy. We should celebrate ... the addition of this speech to the public debate.

Justice Anthony Scalia, concurring opinion in Citizens United v. United States, 2010

INTRODUCTION

Justice Scalia’s remarks from his concurring opinion in Citizens United v. United States reflect a widespread modern acceptance of the important role that corporations play in our economy, society, and everyday life. As the quote from Theodore Roosevelt suggests, however, scarcely more than a hundred years ago there was widespread skepticism about corporations and their influence on American politics. Roosevelt spoke in the wake of the Great Merger Movement, a wave of industrial consolidations that resulted in the largest discrete increase in

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1 558 U.S. 50 (2010).
2 See infra Part II.G.
industrial concentration in American history.\(^3\) The Great Merger Movement had been possible because of changes in corporate law in the late nineteenth century that allowed the consolidations to occur through incorporations under general state statutes and because the Sherman Act, as interpreted by the Supreme Court, had not prevented it.\(^4\) It helped to reduce the risks that companies faced in making significant investments in important new technologies and paved the way for the modern industrial economy of the twentieth century.\(^5\) But it was also the final step in the emergence of a new era in American life, an era in which large corporations would play a central role in the economy and society.

Not coincidentally, Roosevelt also spoke in the wake of a campaign financing scandal, one that had impugned his own integrity.\(^6\) A public inquiry into suspicious dealings in the insurance industry revealed that large insurance corporations had surreptitiously made comparatively huge donations directly into the campaign coffers of several politicians in the early 1900s, including Roosevelt’s in the presidential election of 1904.\(^7\) Roosevelt, no doubt, was stung by the revelations, and wanted to allay any concerns that he had been bought by any corporate interests. But Roosevelt’s remarks went beyond the need for campaign finance reform and suggested the need for more sweeping curbs on corporations’ political influence. Indeed, there was widespread alarm at the turn of the twentieth century about the growing economic and

\(^3\) It was notably larger than any of the subsequent merger waves. See infra Part I.B.

\(^4\) See infra Part I.C.

\(^5\) See infra Part I.D.

\(^6\) See infra Part II.H.

\(^7\) The inquiry was headed by Charles Evans Hughes, the future Chief Justice of the U.S. Supreme Court. Ironically, Hughes was at the time known primarily as a corporate attorney. See infra Part II.H.
political power of the corporations. Many worried that corporate influences were subverting democracy, and the U.S. was becoming plutocratic.

The economic and social transformation that began in the late nineteenth century created a number of stresses and strains in American society. As the nation made the transition from a rural, agrarian economy to an urban, industrial one, many of the traditional, nineteenth century ways of life, as well as the Victorian values that sustained them, were disrupted or challenged: local communities became less important, occupations became more professional, work became more routine and hierarchical, racial and ethnic conflicts were heightened, and gender stereotypes came under attack. The changes and disruptions wrought myriad strains of discontentment: the discontent was manifested among farmers, the working class, the middle class, racial and ethnic minorities, and women. These strains of discontentment created pressures for reform that fueled the Populist Movement in the late nineteenth century and the Progressive Movement at the turn of the twentieth century. These political movements created strains and divisions within both the Democratic and Republican Parties, and contributed to an important political realignment during the period from 1896 to 1916.

The explosive growth in the number of large corporations and the related increase in market concentration that culminated in Great Merger Movement at the turn of the twentieth

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8 See infra Part II.G.

9 The word “plutocracy” was commonly used in newspaper and magazine articles to denounce the political influence of the large corporations and their wealthiest stockholders. See infra Part II.G.

10 See infra Parts II.A – II. F.

11 See infra Parts II.A – II.F.

12 This was arguably when the contours of the modern American political spectrum with a liberal Democratic Party and conservative Republican Party first began to emerge. See infra Part II.I.
century was an integral part of the economic and social changes that disrupted late nineteenth century America and drove the Progressive Movement. Although the Progressive Movement had many impulses and took many directions, its prevalent concern was about the growing economic and political power of the ‘trusts’. The corporations themselves initially did little to lessen those concerns and defuse reformist pressures. Indeed, the ruthless dealings of the ‘Robber Barons’ in the late nineteenth century, and the ‘conspicuous’ consumption of wealthy industrialists at the turn of the twentieth century exacerbated the tensions. When the corporations’ surreptitious attempts to influence election outcomes with comparatively huge campaign contributions were revealed, this only confirmed, for many people, that they were a danger to democracy and strengthened the reformist pressures.

At the turn of the twentieth century corporations did not have any constitutional rights to engage in speech. The First Amendment did not protect their speech against the federal government, and the First Amendment had not been incorporated against the states under the Fourteenth Amendment, so their speech obviously had no federal constitutional protections against the state governments. Moreover, they had no free speech rights under the state constitutions, either. Indeed, they were regarded at the time as creatures of state law, whose rights and activities were controlled by their charters. State courts could, and occasionally did,

13 Indeed, many worried more about the corporations’ political power than about monopoly pricing or ant-competitive behavior. See infra Part II.G.

14 See infra Part III.A.

15 See infra Part II.H.

16 The Supreme Court’s early treatment of the corporation’s legal status was often muddled, but it did not apply the First Amendment to corporate political speech until 1978, and it did not incorporate the First Amendment against the states until 1926. See infra Part III.B.
use the ultra vires doctrine to construe corporations’ charters so narrowly so as to prohibit them from engaging in certain kinds of speech.\textsuperscript{17} Indeed, as shareholder derivative suits became more prevalent, the ultra vires doctrine could have inhibited many corporations from making political contributions or engaging in other forms of political speech. But that did not happen. Instead, courts increasingly declined to apply the ultra vires doctrine and deferred to the decisions of corporate directors under the business judgment rule.\textsuperscript{18}

Given the political pressures during the Progressive era, it is striking that corporate speech and related behavior was not subjected to much more severe limitations. Some states did enact campaign finance laws that prohibited corporate political contributions, and in 1907 the federal government enacted the Tillman Act to prohibit corporations from making direct campaign contributions in federal elections, but it is not clear any of these measures were very effective.\textsuperscript{19} Indeed, the larger corporations soon came to understand that the public’s concerns could not be redressed simply by influencing particular election outcomes. They faced a bigger problem: their public images.\textsuperscript{20} As corporations learned that public opinion and public attitudes could be manipulated, and that their public images could be repaired, they began to invest in public relations programs. In the first half of the twentieth century, the modern public relations industry was thus born and American corporations sought not only to humanize their companies and integrate them into the American public’s sense of community, but also to rationalize and

\begin{footnotesize}

\textsuperscript{17} See \textit{infra} Part III.C.

\textsuperscript{18} See \textit{infra} Part III.C.

\textsuperscript{19} See \textit{infra} Part II.H.

\textsuperscript{20} At the turn of the twentieth century, it was commonly said that the corporation had “no pants to kick or soul to damn.” This reflected a concern about the corporations’ lack of a moral compass and sense of social responsibility and undermined the legitimacy of the corporation’s role in American society. See \textit{infra} Part III.D.

\end{footnotesize}
legitimize the market system within which they flourished and inculcate into the public an ideology that would institutionalize a role for the corporation.\textsuperscript{21}

The public relations campaigns worked. Most Americans now would probably agree that corporations are an integral part of a modern capitalist economy. Moreover, while many might not agree with Justice Scalia and the majority of the Supreme Court about how far corporate speech rights should be extended, there is little, if any, public pressure for the kind of sweeping restrictions on corporate political activities that Roosevelt suggested in his Annual Address to Congress in 1905. Indeed, the fact that the corporation plays a central role in our modern economy and the fact that it has achieved widespread social and political legitimacy are not unrelated. It was inevitable that the central actor in our modern economy would seek some kind of social acceptance and legitimacy. Indeed, if it had not achieved a significant measure of social acceptance and legitimacy it probably would have been subjected to much more restrictive regulations and it would not have become quite so important to our economy. If courts and legislatures had not allowed corporations to engage in the many kinds of speech that contributed to their public relations campaigns in the early twentieth century, the American economy – and, indeed, American society – would have developed in fundamentally different ways.

The first section of this article provides an overview of the “Second Industrial Revolution,” a period of unprecedented growth and technological change in American business that wrought related changes in the organization of business firms and markets. The second section provides an overview of the Progressive Movement, a loosely coordinated campaign for reform that resulted in part from the dislocations and discontentment caused by the underlying economic and social changes. The third section elaborates on the corporate response, focusing

\textsuperscript{21} See \textit{infra} Parts III.G – III.I.
first on the legal preconditions, and then elaborating in particular upon the rise of corporate
public relations programs, which generally included a variety of advertising campaigns, often
with political as well as narrowly commercial aims, as well as a corporate “welfare work”
movement. The article then concludes.

I. THE SECOND INDUSTRIAL REVOLUTION

The period from 1870-1920 was a turning point in American history.\textsuperscript{22} It was during this
time that the modern corporation emerged, electricity became the dominant source of industrial
power, the automobile first appeared on American roads, the high-rise building appeared on the
American city skyline, inexpensive, mass-produced consumer goods became available all across

\textsuperscript{22} There are many ways in which the course of American history changed at the turn of the twentieth century and
many perspectives on the causes and consequences. For an overview of the economic changes, see generally
THOMAS P. HUGHES, AMERICAN GENESIS: A CENTURY OF INVENTION AND TECHNOLOGICAL
ENTHUSIASM, 1870-1970 (1989), DAVID C. MOWERY & NATHAN ROSENBERG, TECHNOLOGY AND
MANAGERIAL REVOLUTION IN AMERICAN BUSINESS (1977); for alternative perspectives on the social and
political changes, see generally RICHARD HOFSTADTER, THE AGE OF REFORM (1955), ROBERT WIEBE,
THE SEARCH FOR ORDER, 1877-1920 (1967), AND MICHAEL McGERR, A FIERCE DISCONTENT: THE
RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870-1920 (2003); for perspectives on
the legal changes, see generally MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW,
CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916 (1963), AND MARTIN J.
SKLAR, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916: THE MARKET,
THE LAW, AND POLITICS (1988); finally, for an interesting discussion of the impact of the corporation on
American culture, see ALAN TRACHTENBERG, THE INCORPORATION OF AMERICA: CULTURE AND
SOCIETY IN THE GILDED AGE (1982).
the country, and occupations such as law, medicine, engineering, and management began to acquire the modern attributes of professions. These dramatic changes were a direct consequence of the transportation revolution of the nineteenth century and myriad technological innovations in its wake. The transformation touched every region of the country, all racial, religious, and ethnic groups, and all levels of society. It also had enormous implications for the law, politics, and American culture.

A. The Transportation Revolution

The transportation revolution in the U.S. began with the construction of a system of canals in the early nineteenth century. The canals connected the interior of the North American continent to the important markets and shipping harbors on the coasts through the Great Lakes and the Mississippi River. Obviously, the canal system left many parts of the continent outside of the emerging transportation network, but with the advent of the railroad and in the wake of major investments in new railroads during the middle and later parts of the nineteenth century the American transportation network became truly national in scope. Although the railroads may have duplicated some of the transportation capabilities of the canals, they undoubtedly

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23 See, e.g., HUGHES, supra note 22 for an overview.

24 See generally, CHANDLER supra note 22.

25 McGERR, supra note 22 at xiv-xv.

26 CHANDLER, supra note 22 at 34-36.

27 Id.

28 By the 1870s, the U.S. had a national transportation network. Id. at 88.
augmented them in many important ways and significantly reduced transportation costs in many parts of the country.²⁹

The construction of the canals and railroads and the development of a national transportation network raised a number of problems for private investors and public officials. It also created many conflicts between the railroads and their employees and customers, which in turn added to the pressures on private investors and public officials.³⁰ One of the early problems was that competing railroads tended to make duplicative investments.³¹ In many cases, a single railroad through some part of the country was highly lucrative; this encouraged new railroads to invest in that region and compete for a share of the profits. Unfortunately, in competing for railroad customers the railroads often undercut one another’s prices after making large, fixed investments in new tracks and supporting facilities.³² This pushed their prices below average costs and they ended up not being able to cover their fixed costs.³³ The problem often motivated

²⁹ In fact, the railroads had so many advantages that they soon began to replace the canals altogether. Id. at 83.

³⁰ See infra Part II.D. for a discussion of the Pullman strike, one of the most disruptive and violent conflicts between management and labor in the nineteenth century, that virtually paralyzed the national railroad system. Farmers increasingly depended heavily on the railroads to ship their crops to distant markets and they often felt they were charged unfair rates. For a discussion of the farmers’ discontent, see McGERR, supra note 1 at 104-7, 150-5.


³² Id.

³³ Id.
the railroads to consolidate and seek respite from further competition. The consolidations, however, often resulted in accusations that the railroads were charging monopoly prices.\textsuperscript{34}

Indeed, the railroad consolidations and accusations of monopolistic pricing helped to foment the Populist pressures that preceded the Progressive Movement.\textsuperscript{35} The Populist Movement was largely agrarian in its origins, driven by farmers and other rural customers of the railroads who often felt aggrieved by the railroads allegedly anti-competitive behavior.\textsuperscript{36} Ultimately, the farmers were joined by blue collar workers and unionists and progressive-minded reformers in the Progressive Movement, and the reformist pressures took on a much broader scope and several new directions.\textsuperscript{37} Nonetheless, the early discontent with the railroads and the resulting pressures for some form of federal regulation to bring order to the railroad industry and to reduce the railroad’s monopoly power prompted Congress to enact the Interstate Commerce

\textsuperscript{34} Id. Many sympathized, however, with the railroads. Indeed, as Perelman observes, the problems endemic to the railroad industry in the late-nineteenth century contributed to a new “corporatist” school of political economy, which included some of the founding members of the American Economic Association. Id. at 193-4.

\textsuperscript{35} As HOFSTADTER, supra note 22 at 3 notes, the pressures for reform that began in the late nineteenth century unfolded in three distinct stages: “the agrarian uprising that found its most intense expression in the Populism of the 1890s and the Bryan campaign of 1896; the Progressive movement, which extended from about 1900 to 1914; and the New Deal, whose dynamic phase was concentrated in a few years of the 1930s.”

\textsuperscript{36} Although many farmers felt aggrieved by the railroads’ allegedly extortionate rates, and these grievances no doubt contributed to Populist rhetoric, they may have been more imaginary than real. Id. at 58. See also DOUGLAS NORTH, GROWTH AND WELFARE IN THE AMERICAN PAST, ch. ii (1966). Hofstadter attributes agrarian Populism more generally to the transition that American agriculture was making from its self-sufficient tradition to the commercial realities of the modern era. HOFSTADTER, supra note 22 at 58-9.

\textsuperscript{37} McGERR, supra note 22 at 3-76.
Act in 1888. This was the first federal statute to regulate interstate commerce. It was, in that respect, the harbinger of the modern American system of business regulation.

B. The Rise of Mass-Production Manufacturing

The development of a national transportation network had dramatic implications for the American economy. Indeed, the canals and railroads significantly reduced transportation costs and opened up new opportunities for the shipment of goods and travel of people well before the national transportation network was complete. Manufacturing firms responded to the increase in the size of their potential markets by expanding their productive capacity and increasing their output levels. To that end, they began to invest in larger, more capital intensive production facilities and to implement many innovations in production methods. Although most of the innovations were incremental, the cumulative effects were significant, and manufacturing costs

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38 HOFSTADTER, supra note 22 at 164.

39 It is far from clear, however, that the railroads played a crucial role. ROBERT FOGE, RAILROADS AND AMERICAN ECONOMIC GROWTH: ESSAYS IN ECONOMETRIC HISTORY (1964) used a counterfactual econometric analysis to evaluate their impact and concluded they only marginally reduced the social cost of transportation, given the existing networks of canals and rivers. Fogel’s argument bucked the conventional wisdom at the time he first made it, but it has largely prevailed today. See, e.g., Robert Whaples, Where is There Consensus Among Economic Historians? The Results of a Survey of Forty Propositions, 55 J.ECON.HIST. 139, 149 (1995).

40 Douglas North argues that railroad rates fell rapidly from 1865-1900. See NORTH, supra note 36 at 137-42.


declined while manufacturing capacity in many industries exploded. ⁴³ In many industries, the new opportunities created problems and pressures in many industries that were similar to those that were being experienced in the railroad industry. ⁴⁴ Manufacturing firms made significant investments in new capital facilities and then attempted to spread their fixed costs over a larger output of goods. ⁴⁵ In many cases, however, they had to reduce their prices in order to increase their sales. Indeed, they often ended up engaging in vigorous price competition with other firms. ⁴⁶ In some cases, the price competition was so vigorous that they were unable to cover their fixed costs. ⁴⁷

Manufacturing firms typically responded to these competitive pressures first by attempting to collude. ⁴⁸ As a general matter, however, their attempts to collude usually failed. In an industry characterized by rapid technological innovation, in which the laggards tend to fail, attempts to collude rarely succeed. ⁴⁹ In the face of their inability to restrain competition through arms-length collusive agreements, the firms generally turned to tighter forms of consolidation to alleviate the competitive pressures. ⁵⁰ These initially took the form of “trusts” in which

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⁴³ Id. See also, LAMOREAUX, supra note 41 at 14-45.

⁴⁴ SMYTHERE, supra note 42 at 149-153.

⁴⁵ LAMOREAUX, supra note 41 at 14-45.

⁴⁶ Id.

⁴⁷ Id.

⁴⁸ In a series of lectures delivered at MIT after the turn of the twentieth century, Louis Brandeis observed that “trusts” typically attempted to restrain competition first through cartels or trade association agreements; when these failed they turned to tighter forms of cooperation, and usually ended up merging. THOMAS McCRAW, PROPHETS OF REGULATION, 94-101 (1984).

⁴⁹ SMYTHERE, supra note 42 at 146.

⁵⁰ Id.
competing firms would transfer their stock to a board of trustee who could then control the firms’ investment, pricing, and production decisions and reduce competition among them.\textsuperscript{51} The trust device soon encountered legal obstacles, however, and so the firms sought to find some other mechanism for controlling industry competition.\textsuperscript{52} This left mergers as the only viable alternative.\textsuperscript{53} In the wake of new general incorporation laws in New Jersey and then Delaware, scores of manufacturing firms consolidated in dozens of mergers during the Great Merger Movement of 1895-1904.\textsuperscript{54} The mergers were typically financed through the sale of stock in the holding corporation, which then used the cash to buy out the parties to the consolidation.

The consolidations began in the 1880s, as many manufacturing firms first faced new competitive pressures, but they increased rapidly toward the turn of the century and reached a crescendo during the Great Merger Movement.\textsuperscript{55} From 1895-1904 several hundred manufacturing firms were gobbled up by well over 150 new consolidations.\textsuperscript{56} This was without question the most significant discrete increase in industrial concentration in American history and the consolidations no doubt reduced competition in many industries.\textsuperscript{57} Not surprisingly,

\begin{footnotesize}
\begin{enumerate}
\item SMYTHE, supra note 42 at 153.
\item Id.
\item McCRAW, supra note 48 at 96-7.
\item LAMOREAUX, supra note 41 at 1-2.
\item SMYTHE, supra note 42 at 153.
\item According to LAMOREAUX, supra note 41 at 2, more than 1800 firms disappeared in consolidations from 1895-1904.
\item According to Devra L. Golbe and Lawrence J. White, \textit{At Time Series Analysis of Mergers and Acquisition in the U.S. Economy}, in ALAN J. AUERBACH (ed.), CORPORATE TAKEOVERS: CAUSES AND CONSEQUENCES 273-5 (1988) the Great Merger Movement was significantly larger relative to the size of the economy at the time than any of the subsequent merger waves in American history.
\end{enumerate}
\end{footnotesize}
therefore, the consolidations caused considerable consternation. The public’s alarm was probably due in part to the novelty of the trend. The consolidations gave birth to big business as we know it today and thus inaugurated a new stage in American history. People at the time were well aware that they were living through an important transitional period.

C. The Political Response

The public’s concerns were initially motivated by the new corporations’ economic power. These new corporations were much larger than the firms that had predominated earlier during the nineteenth century when mass-production was largely precluded by high transportation costs. Their size usually translated into significant market power, both in the markets for the goods they sold to their customers and those in which they hired their employees. The public’s concerns about their market power placed significant pressure on political leaders to implement some kind of policy response. The common law did regulate certain kinds of anti-competitive behavior, at least to certain degrees, but it proved inadequate to the task of

59 SMYTHE, supra note 42 at 149-53.
61 See, e.g., LAMOREAUX, supra note 20 at 42-4 documenting the significant increase in the size of eastern newsprint mills in the relatively short period from 1892 to 1900.
62 SMYTHE, supra note 58 at 138.
regulating the trusts.\footnote{WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 18-52 (1965) provides an overview of the English common law antecedents to the Sherman Act. As Letwin notes, however, by 1890 the common law limitations on monopoly had become quite weak. \textit{Id.} at 51.} Very few cases were brought against the trusts under the common law and they had no appreciable effect on their behavior.\footnote{William Letwin observes, “It was true that in at least three prominent instances between 1887 and 1890 courts judging private suits refused to uphold agreements in restraint of trade. Such results were comforting indications of ‘the tendency of the judicial mind’ as one contemporary law journal put it, but they were clearly not enough to put an end to the trust problem.” \textit{Id.} at 82.}

Congress eventually responded by enacting the Sherman Act in 1890.\footnote{This is the conventional view of Congress’s motivations. See, e.g., MILLON, \textit{supra} note 60 at 1276-7. Not everyone agrees. Werner Troesken, \textit{The Letters of John Sherman and the Origins of Antitrust}, 15 REV.AUSTRIAN ECON.275, 291 (2002), for instance, contends the Sherman Act was motivated in part by small businesses seeking protection from larger competitors.} This was another signal event in the federal government’s assertion of its powers to regulate business, but the Sherman Act proved to have little more bite than the common law, at least for several years.\footnote{The Sherman Act was enacted in 1890 in response to pressing concerns, but the first important antitrust case was not until \textit{United States v. E.C Knight Co.} 156 U.S. 1 (1895). SMYTHE \textit{supra} note 58 at 98.} The statute was not clearly drafted and did not initially appear to proscribe any conduct that was not already proscribed under the common law.\footnote{\textit{Id.} at 96-7.} Indeed, the ambiguity may have been intentional: the language may have reflected a compromise between proponents of the statute who were anxious to respond to the public pressures for new restraints on the trusts and its
opponents, who were concerned about shackling the free enterprise system. The ambiguities meant that the difficult task of defining federal antitrust law would be left to the courts.\textsuperscript{68}

The first serious challenge to any trust under the Sherman Act was in a suit brought by the federal government against the American Sugar Company.\textsuperscript{69} The case was appealed all the way to the Supreme Court, which held that the Sherman Act did not reach manufacturing activities conducted entirely within a state since these were not a matter of interstate commerce.\textsuperscript{70} At the end of the nineteenth century, the federal government’s regulatory powers were still severely circumscribed by the Court’s narrow reading of the interstate commerce clause.\textsuperscript{71} By 1905, however, the Supreme Court had adopted the “stream of commerce” doctrine and the modern basis for the federal government’s regulatory powers was established.\textsuperscript{72} Well-informed observers understood that this was an important development and would have far-reaching implications.\textsuperscript{73}

\textsuperscript{68} Id.

\textsuperscript{69} Id. at 98.

\textsuperscript{70} Id. at 100-01.

\textsuperscript{71} Id. at 100.

\textsuperscript{72} In writing the opinion for the majority, Justice Oliver Wendell Holmes used the term “current of commerce.” Nonetheless, his opinion clearly expanded the scope of federal interstate commerce powers. As he explained, Commerce among the states is not a technical, legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, …the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce.


\textsuperscript{73} SMYTHE, \textit{supra} note 58 at 129-30.
D. A Technological Revolution and the Birth of Modern Corporate Capitalism

The economic forces that drove the consolidations around the turn of the twentieth century had other reaching effects, some of which we probably still do not fully comprehend. The new corporate behemoths made enormous investments in new plants and equipment that embodied important new technologies. The most important technological development at the turn of the twentieth century, however, was the supply of electricity through an alternating current. It turned out that electricity could be transmitted much farther through an alternating current than a direct current. Although the uses of electric power had been discovered and electric power had been made available earlier in the nineteenth century, the shorter transmission capabilities of electricity supplied through a direct current had limited its uses in manufacturing because it meant that if plants and equipment were to be run on electricity they had to be constructed close to a major source of electric power.

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74 SMYTHE, supra note 42 at 149-53.
75 Id. at 149-50.
76 Id.
77 Id. at 150-1.
78 Id.
The supply of electricity through an alternating current thus helped electric power utilization diffuse much more widely among manufacturing firms.\textsuperscript{79} Electricity not only proved to reduce their energy costs directly, it also helped to generate myriad other technological innovations.\textsuperscript{80} Under the ‘drive system’ that had prevailed with the use of steam and water power, for instance, all the machines in a plant had to run at the same time. Moreover, since they all relied on the same power source they were operated through belts and pulleys that limited the flexibility of their design.\textsuperscript{81} Electric power allowed individual machines to be run separately, and, with the advent of smaller electric motors, it allowed the machines to be designed in ways that were better suited to their purposes.\textsuperscript{82} The diffusion of electric power among manufacturing firms from about 1890-1920 thus required firms to make significant investments in new plant and equipment and to retool existing plant and equipment so that it would not become obsolete.\textsuperscript{83}

\textsuperscript{79} The diffusion of electric power utilization may also have been helped by the rise of big business. In order to utilize electric power, manufacturing firms had to make significant investments in retooling existing plants or entirely new plants. These investments were not only risky, they required significant financial capital. The newly merged manufacturing corporations at the turn of the twentieth century, which could finance the investments through stock issues rather than through debt or retained earnings, and which generally had the market power necessary to reduce the risks, may have accelerated the electrification of American industry. See generally Donald J. Smythe, \textit{The Great Merger Movement and the Diffusion of Electric Power Utilization in American Manufacturing, 1899-1909}, 27 \textit{EAST.ECON.J.} 253 (2001).

\textsuperscript{80} SMYTHER, \textit{ supra} note 42 at 150.

\textsuperscript{81} \textit{Id.}

\textsuperscript{82} \textit{Id.}

\textsuperscript{83} \textit{Id.} at 150-51.
There were many other important technological innovations around the turn of the twentieth century. These also required significant investments in new plant and equipment. But the investments were often risky, especially if they were made in highly competitive industries. Individual entrepreneurs rarely had the personal wealth or the intestinal fortitude to undertake such large investments on their own. The corporation proved to offer a more secure and effective means of raising the requisite capital and thus appears to have played a key role in the dramatic economic transformation. Indeed, the transformation was so significant and complete that it has come to be called the “Second Industrial Revolution.” Other developed economies also underwent similar transformations around the same time, but the U.S. emerged from the changes as the world’s technological leader and it maintained its technological leadership throughout much of the twentieth century.

84 See generally, HUGHES, supra note 22.
85 ROSENBERG & BIRDZELL, supra note 22 at 215.
86 As Rosenberg and Birdzell explain,

[B]etween 1880 and 1920, the United States was increasing its industrial capacity and altering manufacturing technology in ways that required extensive replacement of obsolete plants, often with plants of considerably greater size….there was a serious need for new forms of enterprise better able to attract capital…. [T]he plausible expedients were …incorporation, trusts, and … mergers. Although these produced many enterprises that failed, they also produced a number of large enterprises that proved able… and a burgeoning American economy emerged from the merger movement ready to take off on a second industrial revolution.

Id.

87 Id.
It would be difficult, if not impossible to assess fully what role the law and legal institutions played in the U.S.’s emergence as the world’s technological leader in the twentieth century. It is clear, however, that the economic forces that unleashed the Second Industrial Revolution were both facilitated and influenced by important changes in the law, especially corporate law and the laws regulating the corporation and other forms of business organization.\(^89\) It is also clear that the same forces had enormous social and political consequences and that they were also both facilitated and influenced by contemporary political developments.\(^90\) It is no coincidence that the Second Industrial Revolution coincided with the Progressive Movement. Indeed, the period around the turn of the twentieth century not only featured the most important economic transformation in American history, it was also the time of an important realignment in American politics and society.\(^91\) Indeed, it seems likely that the interrelated changes in the American economy, law, and politics changed not only American society but also the American people, in ways that we may never fully understand.

II. THE PROGRESSIVE MOVEMENT

A. Agrarian Discontent

The social transition from a predominantly agricultural economy with small and moderately sized, family owned manufacturing firms to a modern industrial economy dominated by large corporations was not an easy one. Indeed, the late nineteenth century was a period

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\(^{89}\) See generally, SMYTHE *supra* note 58.

\(^{90}\) See generally, HOFSTADER, *supra* note 22.

\(^{91}\) *Id.*
during which many Americans grew discontented with their lives and prospects as traditions began to clash with emerging modern values.\footnote{McGERR, \textit{supra} note 22 at 3-39.}

The discontent manifested itself first among farmers.\footnote{Agrarian discontent fueled the Populist Movement, which preceded and ultimately was absorbed into the Progressive Movement. See HOFSTADTER, \textit{supra} note 22 at 46-51, 133 and WIEBE \textit{supra} note 22 at 84-90.} Although the canals and railroads opened new markets for agricultural products they also opened up new opportunities for farming.\footnote{As Hofstadter notes, “During the decade 1890-1900, in which …[agrarian]… discontent was most acute, 1,100,000 new farms were settled, 500,000 more than in the previous decade. HOFSTADTER, \textit{supra} note 22 at 52.} Parts of the country that had been too remote to deliver goods to markets became accessible and new farms sprouted up throughout the nineteenth century, especially in the Midwest.\footnote{McGERR, \textit{supra} note 22 at 27 writes, “Well into the nineteenth century, many farmers, distant from the market, had lived fairly self-sufficient lives; they raised what they needed on their land and bartered for the rest. By 1900, that self-sufficiency had largely ended. Whether they wanted to or not, most farmers now produced cash crops for the market.”} At the same time, technological innovations were making the agricultural sector more productive.\footnote{As Wayne D. Rasmussen, \textit{The Impact of Technological Change on American Agriculture, 1862-1962}, 22 J.ECON.HIST. 578, 581 (1962), notes, “The rate of investment in farm machinery and equipment increased rapidly from 1850-80”.} These innovations were largely the result of better farm machinery and land improvements, such as irrigation systems.\footnote{Yair Mundlak, \textit{Economic Growth: Lessons from Two Centuries of American Agriculture}, 43 J.ECON.LIT. 989, 992-93 (2005).} Nonetheless, credit was often difficult to negotiate and the real price of land rose throughout the period, making farming increasingly expensive.\footnote{\textit{Id.} at 992.}
The agrarian discontent that developed during the nineteenth century may have owed something to the growing gulf between the agrarian myth of idyllic individualism and egalitarianism that had become so deeply entrenched in nineteenth century American culture and the grim commercial realities of agrarian life.\(^{99}\) In the face of increased competition and rising costs American farmers experienced decreases in their incomes and wealth. They consequently felt less independent than ever and life seemed less egalitarian than it was supposed to be. In short, the gulf between the agrarian myth and the reality of their lives became more pronounced.\(^{100}\) Moreover, with the advent of the railroads and the telegraph they were increasingly connected to the rest of American culture and they began to adopt its more commercial values.\(^{101}\) Because these new commercial values came at a time when the farmers’ incomes were declining and the material quality of their lives was growing more difficult to sustain, they only contributed to their dissatisfaction.\(^{102}\)

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\(^{99}\) Richard Hofstadter observes,

> Writers like Thomas Jefferson … admired the yeoman farmer not for his capacity … to make money but for his honest industry, his independence, his frank spirit of equality…. The farmer himself … was in fact inspired to make money and such self-sufficiency as he had was usually forced upon him…. The more farming as a self-sufficient way of life was abandoned for farming as a business, the more merit men found in what was being left behind.

HOFSTADTER, \textit{supra} note 22 at 23-4.

\(^{100}\) Hofstadter writes, “For the farmer it was bewildering, and irritating too, to think of the great contrast between the verbal deference paid him by almost everyone and the real status, the real economic position, in which he found himself.” \textit{Id.} at 35.

\(^{101}\) \textit{Id.} at 58-9.

\(^{102}\) \textit{Id.}
B. Urban Working Class Discontent

Between 1870 and 1900 young people migrated in large numbers from rural areas to the cities to work in plants, factories, mines, and other businesses. By 1900, the U.S. had become a predominantly urban society and the agrarian myth which had animated Jefferson’s conception of democracy began to fade from memory. The growing ranks of industrial workers became more vocal about their own discontent. While they may never have aspired to live the idyllic life of pastoral isolation and individualism that characterized the agrarian myth, they had growing material wants and aspired for better lives for themselves and their children. Many of the workers in the new factories were immigrants, especially in the larger cities such as New York, Boston, and Philadelphia. They not only had to negotiate their way into the American workforce, they often also had to learn a new language and adjust to new customs and ways of living. Meantime, the industrial workplace itself was undergoing important changes that increased tensions between the workers and industrialists.

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103 The total amount of labor in farming continued increasing throughout the late nineteenth century, peaking only in 1910. MUNDLAK, supra note 97 at 992. As McGERR, supra note 22 at 32 notes, however, that young people frequently left their families’ farms for the cities.

104 Id. at 30. The total population was obviously growing, so this explains how the proportion of labor in agriculture could fall while the total amount of labor in agriculture was still rising.

105 Id. at 13-21.

106 Id. at 33.

107 McGerr suggests that the ethnic diversity of the industrial working class impeded the growth of the union movement. Id.
Earlier in the nineteenth century, factory work was often done by skilled tradesmen and firms’ production processes were small in scale and relatively non-routine. The workers generally had some control over the pace of their work and manner in which it was undertaken. Certain customs and norms proliferated in particular industries that derived from the trades and crafts of the workers that were employed in them and these customs and norms often regulated the workplaces, at least to some degree. As firms invested in larger, more capital intensive facilities near the turn of the century, however, to avail themselves of new technologies and economies of scale, they needed to assert more control over their production processes and establish more clearly defined work routines. The firms’ initially focused primarily on the control of production and increasing the intensity of work effort. This emphasis on work effort defined what became known as the “drive system” of production. Later, however, as firms adopted increasingly sophisticated technologies, they also became interested in new management techniques and began to implement the precepts of the scientific management movement.

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109 As Montgomery explains, craftsmen typically worked according to a “moral code” that helped to facilitate their cooperation with one another. Id.
110 Id.
111 Id. at 113.
112 SANFORD JACOBY, EMPLOYING BUREAUCRACY: MANAGERS, UNIONS, AND THE TRANSFORMATION OF WORK IN THE 20TH CENTURY 20 (1985). As Jacoby describes it, the “drive system” was not always humane: the workers were sometimes subject to “abuse, profanity, and threats.” Id.
113 The most notable figure in this trend was Frederick Winslow Taylor, the founder of the scientific management movement. HOFSTADTER, supra note 22 at 241. See generally, JACOBY, supra note 112 at 29-48.
C. The Union Movement and Labor Strife

Industrial workers often responded to their employers’ efforts to wrest control of the workplace by seeking to organize.\textsuperscript{114} Their employers frequently opposed their unionization and this often added to the tensions in the industrial workplace. Nonetheless, the union movement grew in scope and strength throughout the late nineteenth century. So, unfortunately, did strife between the unions and their industrial employers.\textsuperscript{115} The Haymarket riot of 1886, for example, began after a period of upheaval in American labor relations through the winter of 1986, and a rally in support of striking workers at a McCormick Harvesting Co. plant in Chicago at which a number of McCormick workers were shot and killed.\textsuperscript{116} At a rally organized in response to the incident the next day an anarchist threw a pipe bomb and a policeman was killed.\textsuperscript{117} The police opened fire and at least some workers apparently responded with gun fire of their own. Several people were killed and scores were injured.\textsuperscript{118} Although the incident contributed to the

\textsuperscript{114} The employers generally attempted to rationalize production by investing in further mechanization and making the workers’ tasks less skilled and more routine. DAVID GORDON, RICHARD EDWARDS, & MICHAEL REICH, SEGMENTED WORK, DIVIDED WORKERS 113 (1982). As HOFSTADTER, supra note 22 at 241 observes, “Much of this was resisted by labor unions as an attempt to set up a system of paternalistic control, and much was indeed associated with a fostering of company unions.”

\textsuperscript{115} McGERR, supra note 1 at 119-20.

\textsuperscript{116} JAMES GREEN, DEATH IN THE HAYMARKET 145-173 (2006).

\textsuperscript{117} Id. at 175-188.

\textsuperscript{118} Id. at 186.
establishment of the first international May Day celebration,\textsuperscript{119} it was probably a setback for the American union movement, and it was a reflection of the growing labor tensions in America.\textsuperscript{120}

The Pullman strike in 1894 brought labor tensions to a head.\textsuperscript{121} The strike began after the Pullman Palace Car Company had taken many of its workers off straight wages and put them on a piece rate compensation scheme.\textsuperscript{122} Like many other American workers at the time, Pullman employees had been pressing for an eight hour day, and regarded this as an attempt by the company to squeeze even more work out of them.\textsuperscript{123} In the wake of rising tensions, most Pullman employees walked off the job and Pullman shut down its factory.\textsuperscript{124} The Pullman workers were soon joined by members of the American Railway Union, who, in order to show their solidarity with the Pullman workers, refused to work on trains with Pullman cars.\textsuperscript{125} Since railroad workers across the country refused to switch Pullman cars, the nation’s railroad system was virtually paralyzed.\textsuperscript{126} In the wake of growing unrest and fears of increasing violence, President Cleveland ordered the federal government to intervene and ultimately ended the strike.

\textsuperscript{119} \textit{Id.} at 286.

\textsuperscript{120} \textit{Id.} at 318-320.

\textsuperscript{121} According to David Ray Papke, the Pullman strike was “more extended and convulsive” than any of the previous ones in the late nineteenth century and serves as “our best window on law’s interaction with capital and labor in industrializing America.” DAVID RAY PAPKE, THE PULLMAN CASE: THE CLASH OF LABOR AND CAPITAL IN INDUSTRIALIZING AMERICA xiii (1999).

\textsuperscript{122} \textit{Id.} at 16.

\textsuperscript{123} \textit{Id.}

\textsuperscript{124} \textit{Id.} at 18-19.

\textsuperscript{125} \textit{Id.} at 24-25.

\textsuperscript{126} In quick order, almost a hundred thousand men were on strike and over twenty railroads were tied up or shut down altogether. \textit{Id.} at 26.
using federal troops.\textsuperscript{127} Although the strike probably damaged the Pullman Company,\textsuperscript{128} it also did little to help the union movement.\textsuperscript{129} It was another signal event reflecting the growing malaise between industrial workers and their employers at the turn of the twentieth century.

\textit{D. Middle Class Progressives}

The ranks of the farmers and workers who were discontented with their prospects in the emerging modern corporate economy were joined by growing numbers of middle-class Americans, primarily from the ranks of small business owners, professionals, and white-collar supervisors and managers.\textsuperscript{130} These groups also felt threatened by the growing power of the trusts and often worried that their social status was deteriorating in the emerging new economic order.\textsuperscript{131} Small business owners, for instance, often struggled to compete with the large

\textsuperscript{127} The strikers did not always relent without a fight, and dozens of men were killed in clashes with federal troops across several states. \textit{Id.} at 29-35.

\textsuperscript{128} A commission appointed by President Cleveland to investigate the strike described Pullman as “unyielding and suggested it might have been able to avert the strike if it had been willing to make concessions. \textit{Id.} at 83.

\textsuperscript{129} The commission appointed by President Cleveland also characterized some of the union’s demands as “unreasonable.” The American labor movement would never again be able to muster a general strike. Some scholars have marked the Pullman strike as a turning point, after which the labor movement retreated from radical ambitions and set narrower goals. \textit{Id.} at 99.

\textsuperscript{130} McGERR, \textit{supra} note 22 at 42-3.

\textsuperscript{131} Richard Hofstadter notes that until about 1870 the small merchant, distinguished lawyer, or preacher was often a person of local eminence. After that, their wealth and power were increasingly dwarfed by the wealth and power of those who owned and managed the large corporations. HOFSTADTER, \textit{supra} note 22 at 135-137. Robert Wiebe observes that members of occupations with professional aspirations, such as law, medicine, and economics came to form a “new” middle-class. WIEBE, \textit{supra} note 22 at 112.
corporations and not infrequently failed.\textsuperscript{132} This then pushed them into the labor market and they sometimes ended up working in the managerial ranks of larger businesses.\textsuperscript{133} The professions, such as law and medicine, were undergoing changes of their own. Lawyers, for instance, increasingly worked for the railroads or the manufacturing corporations, and their traditional professional values often conflicted with the new demands on their services.\textsuperscript{134} Many felt that their practices were becoming more business-like, and that the standards of conduct and ethics in the legal profession were deteriorating.\textsuperscript{135}

Middle class women occupied a unique place in late nineteenth century America. They were generally neither beholden to employers for salaries or wages, like many working class women, nor were they entirely independent because of the role they were expected to play in the management and upkeep of their homes.\textsuperscript{136} Many were well-educated and dissatisfied with their domestic roles.\textsuperscript{137} Indeed, many were dissatisfied with the middle class men to whom they were married, in many cases because of the Victorian values and habits of their middle class husbands.\textsuperscript{138} In some cases, women avoided marriage because they feared becoming trapped in dull and meaningless lives of domesticity.\textsuperscript{139} It is no surprise, therefore, that middle class

\textsuperscript{132} McGERR, \textit{supra} note 22 at 54-5.

\textsuperscript{133} \textit{Id.} at 55.

\textsuperscript{134} HOFSTADTER, \textit{supra} note 22 at 157-59.

\textsuperscript{135} \textit{Id.}

\textsuperscript{136} McGERR, \textit{supra} note 22 at 45-6.

\textsuperscript{137} \textit{Id.} at 47.

\textsuperscript{138} \textit{Id.} at 47-8.

\textsuperscript{139} \textit{Id.} at 52.
women were often at the forefront of reform.\textsuperscript{140} For one thing, middle class women increasingly sought political and economic equality with men.\textsuperscript{141} The suffragette movement, for instance, was largely driven by middle class women, and younger middle class women increasingly broke down the resistance of their families and entered the workforce, often in white collar clerical jobs or teaching.\textsuperscript{142} Sometimes the women even continued working after they married, although marriage usually still meant the end of their careers.\textsuperscript{143}

\textit{E. Racial Division}

The late nineteenth century was also a time of growing racial tensions and violence.\textsuperscript{144} At the turn of the twentieth century, 90\% of African-Americans lived in the south.\textsuperscript{145} Indeed, over 30\% of the Southern population was African-American.\textsuperscript{146} Increasing numbers of African-Americans had been born after the Emancipation Proclamation, and had never experienced slavery first-hand. There was talk among white Southerners of “New Negroes” – younger African-Americans who they considered to be less deferential than their parents and

\textsuperscript{140} Id. at 52-3. As Robert Wiebe points out, this may have been partly because of the way in which prevailing stereotypes limited women’s opportunities. Social work was one of the occupations that comported with the Victorian image of women as “tender mothers, angels of mercy, and keepers of the morals.” WIEBE, \textit{supra} note 22 at 122.

\textsuperscript{141} McGERR, \textit{supra} note 22 at 52.

\textsuperscript{142} Id.

\textsuperscript{143} Id.

\textsuperscript{144} Id. at 185.

\textsuperscript{145} Id.

\textsuperscript{146} Id.
grandparents because they had never been slaves.\(^{147}\) Indeed, there was a growing African-American middle class, comprised of business owners and professionals, whose manner of dress and lifestyles often irritated some poorer white people.\(^{148}\)

The confidence and success of the emerging African-American middle class probably contributed to an increase in racism and violence against African-Americans in the late nineteenth century, particularly in the South.\(^{149}\) Of course, many whites were among those disgusted by the violence.\(^{150}\) Nonetheless, although some white progressive reformers did truly support complete social and political equality for African-Americans, the sad fact is that most progressive reformers were racists who commonly thought that segregation was the best answer to the nation’s racial problems.\(^{151}\) Indeed, according to Robert Wiebe, many Southern progressives at the turn of the century continued to assert that the U.S. was a “white man’s country.”\(^{152}\) Quite understandably, therefore, the Progressive Movement never had the enthusiastic support of African-Americans.\(^{153}\)

\(^{147}\) *Id.* at 186.

\(^{148}\) *Id.*

\(^{149}\) Michael McGerr, for instance, recounts a racist diatribe by U.S. Senator Benjamin Tillman on the floor of the Senate in 1907. *Id.* The available data indicates that the number of lynchings across the nation rose in the late nineteenth century, peaking in 1892 at 230. African-Americans were subjected to increasing amounts of other forms of violence as well. *Id.* at 187. Robert Wiebe observes that there was a resurgence of Jim Crow in the South after the elections in 1896. In his view, the “viciousness” of Southerners’ attacks reflected the failures of their communities. WIEBE, *supra* note 22 at 107-110.

\(^{150}\) McGERR, *supra* note 22 at 186.

\(^{151}\) *Id.* at 187-194.

\(^{152}\) WIEBE, *supra* note 22 at 108.

F. A Growing Chorus

Although members of all these discontented groups hardly spoke with one voice, many of the threads of late nineteenth century discontent found expression in a growing chorus of calls for reform. Since the Progressive Movement was a product of all these diverse voices, this was reflected in the many, sometimes conflicting, directions it took. Progressive reformers at once sought to improve the lives of the poor through new forms of welfare, achieve greater equality between the sexes by gaining voting rights for women, end the evils wrought by alcohol consumption by ushering in prohibition, forestall the growing divorce rate, and, most paradoxically of all, reduce racial tensions and conflict by increasing racial segregation.154 But even though the Progressive Movement often took aim at social problems, such as alcoholism, divorce, and racial violence, the main thrust of the Progressive Movement was always to redress the rising power of the corporations and the growing dangers of plutocracy.155

154 McGERR, supra note 1 at 77-218.

155 As Richard Hofstadter explained,

While Progressivism would have been impossible without the impetus given by certain social grievances, it was not nearly so much about the movement of any social class, or coalition of classes, against a particular class or group as it was a rather widespread and remarkably good-natured effort of the greater part of society to achieve some not very clearly specified self-reformation. Its general theme was the effort to restore a type of economic individualism and political democracy that was widely believed to have existed earlier in America and to have been destroyed by the great corporation and the corrupt political machine.

HOFSTADTER, supra note 1 at 5.
twentieth century, the Progressive Movement thus posed a challenge to the owners and managers of the new corporations, one they could scarcely ignore.

The enormous wave of consolidations at the turn of the century no doubt heightened concerns about big business and strengthened the Progressive Movement. Some of the concerns were obviously about the economic power wielded by the corporations, since the consolidations caused a significant and rather sudden increase in industrial concentration. Moreover, the Sherman Act had done little, if anything, to impede the merger wave, nor had the Supreme Court’s early antitrust decisions. Many worried that the new corporations would abuse their market power by raising prices and/or impeding competitors. These were, no doubt, legitimate concerns, but they were hardly the only, or, for that matter, even the most serious, concerns many Progressives had about the consolidations and the rise of big business. Indeed, many contemporaries, both Progressives and otherwise, were concerned about the sheer size of the new corporations and the threat that they posed to American democracy.

156 McGERR, supra note 1 at 150-158.

157 LAMOREAUX, supra note 41 at 1-6.

158 George Bittlingmayer, Did Antitrust Policy Cause the Great Merger Wave?, 28 J.L.&ECON. 77 (1985) has suggested that the Supreme Court’s early antitrust decisions may actually have caused the mergers. However, SMYTHE, supra note 42 at 96-131 provides an analysis of the Supreme Court’s early antitrust decisions and concludes otherwise.

159 LAMAREAUX, supra note 41 at 159.

160 As Richard Hofstadter wrote,

The Progressive case against business organization was not confined to economic considerations…. Still more widely felt was a fear founded in political realities – the fear that the great business combinations, being the only center of wealth and power, would be able to lord it over all other interests and thus to put an end to traditional American democracy.
Louis D. Brandeis, for instance, who has been described as “the most influential critic of trusts during his generation” frequently railed against the “curse of bigness.”\textsuperscript{161} Brandeis’s aversion to the trusts may have derived in some part from his own sense of social exclusion as well as his professional experiences. Although he was a brilliant law student at Harvard, he was Jewish and from the South, and he sought to make his career at a time in the legal profession when social connections may have mattered more than ability.\textsuperscript{162} Perhaps in part as a response to his sense of social alienation, when he graduated from law school he formed a partnership with Samuel D. Warren, who had the social connections that he did not, and chose to focus on the practice of law rather than moving in the right social circles.\textsuperscript{163} In fact, although Brandeis practiced commercial law, most of his clients were smaller or moderate sized businesses – firms which generally competed with the large corporations.\textsuperscript{164} His reputation as the “peoples’ lawyer” and his aversion to the large corporations may have been a consequence, in part, of having represented clients whose interests often conflicted with those of the larger, more powerful corporations.\textsuperscript{165}

Brandeis was hardly alone in his distrust of the large corporations. The Progressive Movement fostered an era of “muckraking” journalism, a journalistic genre that typically sought

\textsuperscript{161} McCRAW, \textit{supra} note 48 at 82.

\textsuperscript{162} \textit{Id.} at 82-5.

\textsuperscript{163} \textit{Id.} at 84-5.

\textsuperscript{164} \textit{Id.} at 86-7.

\textsuperscript{165} \textit{Id.} at 87.
to illuminate the abuses and iniquities of big business and draw attention to related social ills.¹⁶⁶ Renowned writers, such as Upton Sinclair and Ida Tarbell, contributed to a flood of glaring exposes of big business in the early twentieth century.¹⁶⁷ Many of the muckraking articles, however, also sought to expose political corruption.¹⁶⁸ Numerous articles written both before and after the turn of the twentieth century expressed concerns about the growing political influence of “the trusts” and the dangers of plutocracy.¹⁶⁹ There were frequent allegations that big business was buying political influence through campaign contributions. Indeed, in an article published shortly after the election of 1900, William Jennings Bryan reflected on the growing importance of fundraising in political campaigns and noted that political contributions from

¹⁶⁶ HOFSTADTER, supra note 22 at 185-96. As Hofstadter explains, from a journalistic perspective there was nothing really new about “muckraking.” What was new was the huge circulation of the magazines and newspapers. Id. at 186. Moreover, only a fraction of the journalism at the time was of this “muckraking” type, and even that was not necessarily motivated by hostility towards big business. Id. at 193.

¹⁶⁷ McGERR, supra note 22 at 157-8, 161-2.

¹⁶⁸ With larger circulations, the newspapers became less tied to the political parties. HOFSTADTER, supra note 22 at 188.

¹⁶⁹ See, e.g., a letter to the editor in the New York Times in 1890 that asked, “Who can longer doubt … that the present tendency is the establishment of a plutocracy and the destruction of the democracy?” Plutocracy vs. Democracy: Millionaires in Office Endangering our Republican Institutions, N.Y. TIMES, September 14, 1890, at 14; an article in 1892 reporting on ex-Senator Thomas F. Bayard warnings about the growing dangers of plutocracy, Tending to Plutocracy, N.Y. TIMES, March 23, 1892, at 1; an article reporting comments made by William B. Hornblower of the New York bar: “There can be no doubt that the tendency of the present decade is in the direction of the centralizing plutocracy.” W.B. Hornblower on the Constitutions of 1795 and 1895, the Public Service, and Centralizing Plutocracy, N.Y. TIMES, October 3, 1895, at 7; and an article on the National Political and Social Conference in Buffalo in 1899 that debated an address to the public on the “two great evils of militarism and plutocracy which now threaten the republic.” Militarism and Plutocracy, N.Y. TIMES, July 4, 1899, at 7.
corporations had become increasingly significant – and biased in favor of the Republicans -- since the election of 1896.\(^{170}\) Perhaps even more significantly, in a series of articles published in \textit{Cosmopolitan} in 1906, David Graham Phillips wrote a scathing expose of the way big business had used its influence in the U.S. Senate to obstruct many Progressive reforms.\(^{171}\) Educated observers understood that the “trust problem” was not merely about the concentration of economic power, it was about the concentration of political power in the hands of a wealthy class of corporate industrialists.\(^{172}\)

\textbf{G. Legislative Reforms}

The muckraking and other pressures did lead to some important reforms. There was, of course, the Interstate Commerce Act of 1887 and the Sherman Act of 1890.\(^{173}\) In fact, some

\footnotesize
\begin{itemize}
    \item \(^{170}\) As Bryan explained,
\end{itemize}

\begin{quote}
[I]t is worthwhile to consider why such large campaign funds are now used by Republicans….

The magnitude of the fund which can be collected depends upon the interest which the great corporations feel in the result, and upon the imminence of the danger to the privileges which they are enjoying. Prior to 1896, the moneyed element of the country was divided between the two leading parties; but even then the Republican party had a considerable majority among the bankers, railroad magnates and manufacturers. In 1896, the Republican party secured the support of practically all of those capitalists who thrive through government favoritism, or in the absence of necessary restraining legislation…. Since 1896, the consolidation of wealth has gone on with a rapidity never before known.
\end{quote}


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\begin{itemize}
    \item \(^{171}\) \textit{McGerr}, supra note 22 at 175.
    \item \(^{172}\) \textit{Id.}
    \item \(^{173}\) \textit{Hofstadter}, supra note 22 at 164.
\end{itemize}
states had established agencies to regulate railroads long before the Interstate Commerce Commission was established, and others had enacted their own antitrust laws and even filed suits against combinations under them well before the Sherman Act was enacted. Moreover, by the turn of the twentieth century, some states had tried to force the corporations to share their wealth, in some cases by enacting corporate taxes and in others by enacting laws requiring corporation to make local investments. In 1903, the federal government created the Bureau of Corporations, which served to illuminate the role of the corporations without regulating them directly. And in the years following that, the federal government prosecuted some very high profile antitrust cases against powerful corporate defendants, first the Northern Securities Co. and then Standard Oil Co. In the wake of Upton Sinclair’s novel, The Jungle, the federal government enacted The Pure Food and Drug Act in 1906.

Perhaps most significant of all, largely because it presaged the modern debate about campaign finance reform, there was a wave of electoral reforms at both the state and federal levels beginning in the late nineteenth century. Kentucky prohibited direct corporate campaign spending through an amendment to its state constitution in 1891. By 1897, Florida,

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174 McCRAW, supra note 48 at 17-19.

175 McGERR, supra note 22 at 153.

176 Id. at 154.

177 HOFSTADTER, supra note 22 at 245.

178 SMYTHE, supra note 58 at 118-126; McGERR, supra note 22 at 157-159.

179 McGERR, supra note 22 at 160-164.


181 Id.
Missouri, Nebraska, and Tennessee had also prohibited direct corporate campaign spending.  

Indeed, the trend continued well into the twentieth century, and by 1937, 38 states had, in some manner, prohibited direct corporate campaign spending.  

The federal government was not to be left out of the game, either. With the passage of the Tillman Act in 1907, which also prohibited direct corporate campaign contributions, Congress enacted its first campaign finance reform law. 

The impetus for electoral reform, particularly at the federal level, received a significant boost from a scandal in the insurance industry that began with a series of articles exposing the insurance companies’ treatment of their small shareholders and their ties to Wall Street’s big financiers.  

A struggle for control between two leading insurance magnates drew further bad press.  

In response to growing public pressures, the New York State Assembly initiated an investigation.  

Charles Evans Hughes, then a corporate attorney but eventually to be the Chief Justice of the Supreme Court, headed the public inquiry. Under Hughes sharp questioning, insurance company executives revealed the high costs of their policies, the low dividend payments for shareholders, their own huge salaries, and their attempts and success at buying political influence in state governments.  

Perhaps most damning of all, however, Hughes’s

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182 Id.
183 Id. at 298, fn. 19.
184 34 Sta. 864 (January 26, 1907). Id. at fn. 1.
185 McGERR, supra note 22 at 170.
186 Id.
187 Id. at 171.
188 Id. at 171-172.
interrogations uncovered the insurance companies’ secret contributions to Roosevelt’s campaign in the preceding Presidential election of 1904.\footnote{Id. at 172. The public response was unequivocal and negative. In an editorial, for instance, the New York Times wrote,

Considered from the point of view of public morality and public interest, the gift of this great a
sum for use in a political campaign was an act so manifestly immoral and censurable that an
attempt to justify it or palliate it would quickly exhaust the resources of sophistry. And this
condemnation applies with just as much force to the contributions made in 1896 and 1900. It is,
of course, no part of the business of life insurance companies to take a hand in politics or to
attempt by any means to sway whatever to sway the decision of the electorate.

\textit{The Campaign Fund Scandal}, N.Y. TIMES, September 17, 1905, at 8.}

In candid testimony, U.S. Senator Thomas Collier Platt revealed not only that he had received campaign contributions from insurance companies, but that he understood that such contributions put the recipient under a moral obligation not to attack the interests of those who made them.\footnote{McGERR, \textit{supra} note \textit{22} at 172. See also \textit{Campaign Funds and Moral Obligations}, N.Y. TIMES, November 23, 1905, at 8.} Through the hearings, the public discovered not only that Senator Chauncy DePew received a retainer from the Equitable Life Insurance Company for serving on its Board, but that he had received a large loan from the company through a real estate firm that he owned.\footnote{McGERR, \textit{supra} note \textit{22} at 172.} The insurance companies would have liked to seize the chance to have the insurance industry regulated federally, rather than by the states, but the push for federal regulation...
foundered, even though it was supported by President Roosevelt.\footnote{192} Many states responded quickly, however, by imposing new state regulations.\footnote{193}

Congress did respond to the scandal, however, by enacting the Tillman Act, which prohibited direct campaign contributions by corporation in national elections. Not surprisingly, the Tillman Act had the full support of Roosevelt, whose reputation had been damaged by the public’s discovery that he had received significant campaign contributions from insurance companies in the election of 1904.\footnote{194} The Tillman Act, however, had more bark than bite. While it prohibited corporations from making direct campaign contributions in national elections it did not prohibit or limit the officers of corporations from making direct campaign contributions.\footnote{195} Nor did it establish any agency or other body to oversee campaign

\footnote{192}{\textit{Id.} at 173.}

\footnote{193}{\textit{Id.} at 174.}

\footnote{194}{See Theodore Roosevelt, Fifth Annual Message to Congress, December 5, 1905. Indeed, according to the New York Times, the final version of the bill passed with little opposition. \textit{To Bar Corporation Cash in Campaigns: House Passes Gaines Bill with Little Opposition}, N.Y. TIMES, January 22, 1907, at 6. (Apparently, Senator Gaines introduced the final version of the bill even though the statute has come to be called the Tillman Act.)}

\footnote{195}{As Herbert Alexander wrote,}

\begin{quote}
Occasionally corporate executives were given bonuses with the explicit understanding that the after-tax balance would be contributed to campaign funds. Some few executives were assigned to work on campaigns while remaining on corporate payrolls. More often, slush funds were set up under various facades, and money was secretly dispensed from them, frequently in cash, to candidates. In general, the public did not know precisely what was going on, but the business executives and politicians did….
\end{quote}
contributions or investigate alleged violations. As a practical matter, therefore, it probably did little, if anything, to reduce corporate political influences on elections. It did, however, respond to the public’s concerns and may have helped to alleviate pressures for more efficacious reforms.

H. An Important Political Realignment

Some scholars argue that one of the Progressive Era’s most enduring legacies was to initiate a major realignment in American politics. Indeed, important political developments during this period restructured the American political spectrum and framed the contours of political debates throughout the twentieth century, arguably even to the present day. Of course, it is always difficult to identify causality in politics and so it is impossible to know how much Progressive pressures contributed to the realignment as opposed to exogenous factors and

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196 *Id.*


198 Shelton Stromquist, for instance, argues that the Progressive Movement laid the foundations for modern American liberalism, including its rejection of platforms and programs based on social class. STROMQUIST, *supra* note 197. Thomas West concurs, contending that the theories of the Progressive Movement, that rejected the principles of the ‘Founders’ Constitution’, provided the basis for the liberal view that came to predominate after 1965. WEST, *supra* note 197 at 30.
happenstance. Regardless, it is clear that the election of 1896 was a pivotal event.\footnote{199} It was fought in the trough of a depression, and, as one would expect, the primary issue in the election campaigning was economic policy.\footnote{200} Until the 1890s the Democratic Party had adhered to traditional concepts of Jeffersonian democracy and classical liberalism, such as free trade, a limited government, and a gold standard for money.\footnote{201} Thus, Grover Cleveland, the sitting Democratic President, had been elected on a platform that emphasized adherence to the gold standard and a sound, but tight, money base, free trade and private property rights.\footnote{202} The Republican Party, on the other hand, had stood for protective tariffs, legislative intervention to protect public morals, and, to a lesser degree, monetary expansion.\footnote{203}

The severity of the depression in the 1890s, however, contributed to pressures for change within the Democratic Party. William Jennings Bryan and an assortment of allies led an insurgency within the party in an attempt to alter its platform.\footnote{204} They succeeded, and Bryan won the Democratic Party’s nomination that year.\footnote{205} He campaigned on a platform that promised to switch to a silver standard, which would have meant a much looser, more expansionary monetary policy, and also to curb the growing economic and political power of the


\footnote{200} Id. at xii.


\footnote{202} Id. at 555-556.

\footnote{203} Id. 557.

\footnote{204} WILLIAMS, supra note 199 at 67-92.

\footnote{205} Id.
trusts, as well as implement other policies that would have encroached on private property.\footnote{Id. at 102-109.} The Republican Party platform adhered to the gold standard and also to the Party’s traditional support of protectionist tariffs.\footnote{Id. at 139-143.} Many Democrats, including Grover Cleveland, were unhappy about Bryan’s nomination.\footnote{Id. at 67-74.} Some, in fact, bolted the Democratic Party and formed a new party. The “New Democratic” Party was thus born, if for only a short life. The New Democratic Party (NDP) stood for the traditional Democratic Party positions, including adherence to the gold standard, free trade, and the rights of private property.\footnote{Id. at 110-128.}

The NDP failed at the ballot box and did not seem to influence the outcome of the election.\footnote{BEITO & BEITO, supra note 201 at 566.} Some Democrats may have feared that if they voted for the NDP they would simply be throwing their votes away, since the real contest was clearly between the Democrats and the Republicans.\footnote{As David and Linda Beito point out, the real choice was between voting for McKinley, voting for Bryan, or staying home. Id. at 566-567.} Some may have been more averse to the Republican’s support of protectionism than they were to the Democrat’s support of freer money. Others may simply have thought the election was not worth the bother of voting. In any case, the Republicans won, and it does not appear that the NDP tilted the outcome in their favor.\footnote{Id. at 567.} Bryan may, in the end, have appeared too radical for a majority of voters. The realignment within the Democratic Party, however, was
important and it proved to be permanent. The Democratic Party would never again stand on a platform that so closely reflected principles of classical liberalism. The election of 1896 was arguably when the modern Democratic Party was born, with a liberalism defined by a propensity to support government intervention and regulation.

Presidential elections remained tumultuous, however, throughout the Progressive Era. Indeed, in 1912 there was a schism within the Republican Party that was in many ways redolent of the rift between Democrats in 1896. Theodore Roosevelt had tapped William Howard Taft to be his successor within the Republican Party at the end of his Presidency in 1908. Taft won the Presidential election that year, but Roosevelt quickly became disenchanted with Taft’s presidency. Roosevelt, in fact, had the support of the progressive wing of the Party and Taft clearly emerged as the leader of the conservative wing of the Party. Roosevelt decided to challenge Taft for the Republican nomination in the election of 1912, even though Taft was the

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213 David and Linda Beito argue that the Democratic Party thereafter lost its support for principles of classical liberalism. Id. Hal Williams argues that that the election shifted power in the Democratic Party to the south and that the Democratic Party subsequently reflected the views of southern whites for several decades. WILLIAMS, supra note 199 at 153.

214 BEITO & BEITO, supra note 201.

215 Roosevelt became more progressive after leaving office in 1908. He was therefore unhappy when he saw Taft courting the more conservative wing of the Republican Party. Although, Roosevelt and Taft tried to repair the rift in the Republican Party, their efforts were to no avail. See JAMES CHACE, 1912: WILSON, ROOSEVELT, TAFT & DEBS – THE ELECTION THAT CHANGED THE COUNTRY 11-19, 55-60, (2004).

216 Indeed, Roosevelt eventually worried that he would be blamed for foisting Taft on the Party. Id. at 19.

217 Roosevelt intentionally absented himself from the political scene while Taft began his first term in office. When Roosevelt was on his return from a trip abroad he received a letter from Taft and was immediately troubled. Id. at 11-12.
sitting President. Taft won the Republican nomination, with the support of conservative Republicans, but Roosevelt and many progressive Republicans were unhappy with the way the convention had been managed by Elihu Root, the convention chairman, and were unwilling to rally behind Taft. Taft won the Republican nomination, with the support of conservative Republicans, but Roosevelt and many progressive Republicans were unhappy with the way the convention had been managed by Elihu Root, the convention chairman, and were unwilling to rally behind Taft. Roosevelt and his progressive allies formed the Progressive Party and ran against Taft and Woodrow Wilson, the Democratic Party nominee, in the election of 1912.

The traditional Republican vote appears to have been split between the Party’s conservatives, who voted for Taft, and its progressives, who voted for Roosevelt. Wilson was the clear winner and went on to serve two terms as President. Roosevelt won more popular votes than Taft. Indeed, although Taft apprehended that he had little chance of winning the election, he wanted to ensure that the Republican Party would remain committed to a conservative agenda. In 1916, when the Progressive Party nominated Roosevelt for the Presidential election of that year, Roosevelt, to many of the Progressive Party members’ shock and dismay, declined the nomination. Instead, he urged the Progressive Party to throw its support behind

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218 Among other things, under Root’s chairmanship of the convention, the Republican Party refused to credential many of Roosevelt’s supporters. Id. at 118-123.

219 Id. at 238-239.

220 Id. at 238.

221 In a campaign speech in September 1912, that sounded like it could have been delivered by Ronald Reagan almost seventy years later, Taft said,

A National Government cannot create good times. It cannot make the rain to fall, the sun to shine, or the crops to grow; but it can, by pursuing a meddlesome policy, attempting to change economic conditions, and frightening the investment of capital, prevent a prosperity and a revival of business, which might otherwise have taken place.

Id. at 221-222.

222 Id. at 252.
the Republican Party’s nominee, Charles Evan Hughes, even though he had never really liked Hughes.\textsuperscript{223} Hughes had declared that he was committed to progressivism, even though he had the backing of most conservative Republicans, such as Taft, and that was enough to win Roosevelt’s support, possibly in part because Roosevelt felt that the Democratic Party had already hijacked many of the Progressive Party’s ideas.\textsuperscript{224} The schism within the Republican Party that manifested itself in the election of 1912 thus effectively ended in the election of 1916. But the Republican Party emerged from the episode in its modern guise, as the champion of conservatism rather than progressivism. The Progressive Party meantime all but died.\textsuperscript{225} 

Any concise summary of the complex developments and changes in American politics during the Progressive era will inevitably prove simplistic. Nonetheless, it is important to draw as many lessons from the period as possible, and we would be remiss not to attempt to at least limn the contours of the most important changes. Given that heuristic purpose, and with the caveat in mind, one might be emboldened to conjecture that between the Presidential elections of 1896 and 1916, the modern American political spectrum began to congeal around a liberal Democratic Party and a conservative Republic Party. It certainly seems safe to say that the Democratic Party would never again adhere to principles of “classical liberalism,” such as individual liberty, freedom of trade, and freedom of contracts,\textsuperscript{226} and that the Republic Party emerged from the period as the closer allies, if not always the champions, of big business.\textsuperscript{227}

\begin{flushleft}
\textsuperscript{223} \textit{Id.} \\
\textsuperscript{224} \textit{Id.} \\
\textsuperscript{225} \textit{Id.} \\
\textsuperscript{226} See generally BEITO & BEITO, supra note 201. \\
\textsuperscript{227} Even Theodore Roosevelt was at core a conservative, in spite of his tendency to rally around progressive causes. As Hofstadter wrote,
\end{flushleft}
Along the way, the American Socialist Party peaked in popularity in 1912 and the American socialist movement ebbed thereafter, never to factor in any important national elections again. The radical strain of the Progressive Movement had been eviscerated, and American politics was thereafter essentially centrist.

III. THE CORPORATION REINVENTS ITSELF

A. The Corporations Respond

At the turn of the twentieth century, the corporation occupied an important, but insecure place in American life. Many Americans were concerned about the growing economic and political power of big business, and there was a growing radical movement in American politics, centered around Eugene Debs and the Socialist Party, but also reflected by the strong support within the Democratic Party for William Jennings Bryan, who was a product of the early Populist Movement and a strident critic of the trusts, and even the support within the Republican Party for Theodore Roosevelt, who may have been a conservative at heart, but who carved a reputation for himself as a great “trust-buster” and was much less friendly toward big

Historians have long been aware how T.R., while enjoying the support and indeed even on occasion whipping up the sentiments of the insurgent forces in American life, turned for advice in the solution of his problems to the great conservative leaders in the Senate and to the great spokesmen of Eastern industry and finance capital; and how much support he accepted for his campaigns from the financial interests whose custodians these men always were.

HOFSTADTER, supra note 22 at 251.

228 Id. at 238-239.

229 See CHACE, supra note 215 at 67-90 for a description of the “Debs Rebellion.”

230 See generally, BEITO & BEITO, supra note 201.
business than many other prominent Republicans at the time. Indeed, concerns about big business led to important federal and state regulatory reforms well before the end of the twentieth century. The Great Merger Movement and a cacophony of muckraking newspaper and magazine articles increased the resonance of calls for further checks on big business. Indeed, some worried that the political power of the trusts was a threat to democracy and that the U.S. was already on the road to plutocracy.

Business leaders knew they needed to respond to the public’s concerns and forestall any new legislation that might curtail their opportunities or impede business growth. Some business leaders had learned during the Gilded Age that arrogance or perceived indifference to the public good – even ostentatious lifestyles – might cause a public backlash and risk exposing their business practices to closer scrutiny and regulation. As the twentieth century dawned, the country’s wealthy business owners generally exhibited much less extravagance than the

231 HOFSTADTER, supra note 22 at 251.
232 See the discussion, supra Section II.H.
233 William Jennings Bryan put the matter succinctly in 1900 when he wrote, “The issue presented in the campaign of 1900 is the issue between plutocracy and democracy.” W.J. Bryan, The Issue in the Presidential Campaign, 170 THE NORTH AMER.REV. 753, 753 (1900). As he elaborated, “Surely, the rapid development of plutocracy during the last few years will arouse the people to the dangers which threaten our Republic….Corporate capital exerts and influence over our government more potent than ever before.” Id. at 770.
235 McGERR supra note 22 at 4-6, for instance, describes the public backlash against Cornelia Bradley Martin’s outrageously lavish costume ball in 1897. THORSTEIN VEBLEN, THE THEORY OF THE LEISURE CLASS (1899) famously lampooned the rich of the Gilded Era, and coined the term “conspicuous consumption” to describe their extravagances.
builders and scions of the great railroad fortunes had in the nineteenth century.\textsuperscript{236} While this alone may not have repaired their public images, at least they were doing them no further harm. But sophisticated business leaders increasingly knew it was not enough. Indeed, their concerns were significant enough to overcome some of the typical impediments to collective action and some important business interest groups were formed.\textsuperscript{237} The National Civic Federation, the National Association of Manufacturers, the U.S. Chamber of Commerce, and several other, similar pro-business groups were formed between 1890 and WWI.\textsuperscript{238} These groups did not, however, speak with one voice and were often divided internally over their strategies and objectives.\textsuperscript{239}

\textit{B. The Constitution and the Corporation}

Until the Tillman Act in 1907, corporations routinely made significant donations directly into the campaign funds of political candidates who supported their interests, or were at least less opposed to them than their campaign opponents. The imbalance in corporate campaign contributions was striking: in some elections pro-business candidates received several times the amount of funding of their campaign opponents; the difference was invariably attributable to the disproportionate donations from their corporate supporters.\textsuperscript{240} Indeed, direct campaign

\textsuperscript{236} This was, of course, in response to some of the bad publicity their “conspicuous consumption” had generated.

\textsuperscript{237} Of course, business interests were not always uniform. Moreover, sometimes corporate leaders preferred the idea of relatively benign regulations administered by an agency they could influence to the rigors of competition. See LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE TWENTIETH CENTURY 59-60 (2002).

\textsuperscript{238} WIEBE, supra note 22 at 123; HOFSTADTER, supra note 1 at 257-258.

\textsuperscript{239} SKLAR, supra note 22 at 16. FRIEDMAN, supra note 237 at 59-60.

\textsuperscript{240} McGERR, supra  note 22 at 172, 174-178.
contributions may have helped to elect McKinley rather than Bryan in 1896 and 1900, and Roosevelt, rather than Bryan in 1904. They may also have helped to elect scores of pro-business politicians to other federal and state offices. When the size and nature of these contributions became known to the public, however, there was a severe backlash. Many felt that the contributions were immoral and the public’s alarm about the growing dangers of plutocracy was heightened. Indeed, even Roosevelt, who had won the Presidential election of 1904 with significant corporate donations, spoke out strongly in support not only of the need for limits on corporation’s direct campaign contributions, but also for limits on corporate spending that might indirectly influence political outcomes. Congress responded by enacting the Tillman Act in 1907. This only prohibited direct corporate campaign contributions and could, in any case, be easily circumvented.

Corporations at the time did not have any First Amendment rights to protect them from campaign spending limits under either federal or state election laws. Indeed, neither the First Amendment nor the concept of the corporation as a legal person had been sufficiently well defined by the Supreme Court for anyone to be able to infer that corporations had constitutionally protected speech rights of any kind. The Supreme Court did not apply the First Amendment to protect corporations against federal regulations until well into the twentieth century, and it did not incorporate the First Amendment against the states until 1925. Indeed, it

241 Id.
242 Id.
243 Id.
244 Id. at 175-176.
245 See the quote supra from Roosevelt’s Annual Address to Congress (1905).
246 ALEXANDER, supra note 195 at 35.
was not clear that the Court would apply the Fourteenth Amendment to corporations until even later than that. Although many have interpreted the Supreme Court’s decision in *Santa Clara County v. Southern Pacific Railroad Company*\(^{247}\) in 1886 to impute “personhood” to the corporation under the equal protection clause of the Fourteenth Amendment,\(^{248}\) the opinion itself does not actually refer to the issue. In fact, the Court had decided it did not want to address it. Many scholars, judges, and even Supreme Court Justices have erroneously interpreted the case to stand for the legal affirmation of the concept of corporate personhood because of a headnote in the published version of the opinion, which was actually written by the court reporter, J.C. Bancroft Davis.\(^{249}\) Because Davis was exercising his own discretion as to what the Court’s opinion stated, his headnote had no precedential value and it did not reflect a change in constitutional doctrine.\(^{250}\)

To add to the confusion, in *Pembina Consol. Silver Mining & Milling Co. v. Com. of Pennsylvania*, Justice Field, in his majority opinion, addressed the scope of the meaning of the word “person” under the Fourteenth Amendment and wrote that “[u]nder the designation of a ‘person’ there is no doubt that a private corporation is included.”\(^{251}\) Interestingly, in support of that position, Justice Field quoted Justice Marshall, from his opinion in *Providence Bank v.*

\(^{247}\) 118 U.S. 394 (1986).


\(^{249}\) Gregory Mark contends that the Court intended nothing more than to uphold its own precedents protecting corporate property as property of the corporation’s owners. *Id.* at 1463-1464.

\(^{250}\) *Id.*

\(^{251}\) 125 U.S. 181, 189 (1888).
In the case of Billings, in which Marshall wrote, “The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men.” But in that case Justice Marshall was addressing whether a corporation should be regarded as having any special freedoms from the usual burdens placed on natural persons. His position was that they should not, unless such special privileges were stated in their charters. As he explained, “Any privileges which may exempt it from the burdens common to individuals, do not flow necessarily from the charter, but must be expressed in it, or they do not exist.” Indeed, this was consistent with Justice Marshall’s longstanding approach to the corporation. As he had written in Trustees of Dartmouth v. Woodward in the first Supreme Court case addressing a corporate legal issue in 1819, “A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressely, or as incident to its very existence.” As a matter of logic, it is quite consistent to think that a corporation bears all of the usual burdens of a natural person, incidental to its creation, but not necessarily all the usual rights of a natural person.

Indeed, Justice Field clearly recognized that a corporation did not bear all the rights of a natural person because he also wrote in Pembina that “[c]orporations are not citizens within the meaning of ...[the privileges and immunities clause of the Fourteenth Amendment].”

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252 29 U.S. 514, 562 (1830). Justice Field slightly misquoted Justice Marshall as writing, “The great object of a corporation is to bestow the character and properties of individuality on a collective and changing body of men.” Pembina Consol, 125 U.S. at 189.

253 Providence Bank, 29 U.S. at 562.

254 17 U.S. 518, 636 (1819).

255 Pembina Consol, 125 U.S. at 187.
Presumably, corporations had some of the rights of natural persons under the equal protection clause of the Fourteenth Amendment but not all of the rights of natural persons under the privileges and immunities clause. Since the privileges and immunities clause has become virtually irrelevant, it is not entirely clear what Justice Field may have meant. Some scholars, however, believe that the privileges and immunities clause of the Fourteenth Amendment was intended to incorporate the first eight – or perhaps even all ten -- articles of the Bill of Rights against the states. As it turns out, the Supreme Court has incorporated most of the Bill of Rights against the states under the equal protection clause of the Fourteenth Amendment instead, but it seems very likely that Justice Field would have denied to the corporation many of the rights enjoyed by natural persons under


257 According to Ahkil Amar, in Spies v. Illinois in 1887, John Randolph Tucker had argued to the Supreme Court,

Though originally the first Ten Amendments were adopted as limitations on Federal power, yet in so far as they secure and recognize fundamental rights – common law rights – of the man, they make them privileges and immunities of the man as citizen of the United States, and [those privileges] cannot now be abridged by a State under the Fourteenth Amendment. In other words, while the Ten Amendments, as limitations on power, only apply to the Federal government, and not to the States, yet in so far as they declare or recognize rights of persons, these rights are theirs, as citizens of the United States, and the Fourteenth Amendment as to such rights limits state power…

Id. at 1270-1271.

Amar notes that Justice Field embraced Tucker’s argument five years later when he wrote, “After much reflection I think the definition given at one time before this court by a distinguished advocate – Mr. John Randolph Tucker – is correct.” Id. at 1271.
the Bill of Rights. Thus, in *Minneapolis & St. L. Ry. Co. v. Beckwith*, when Justice Field, writing for the majority of the Court, acknowledged the “soundness of …[the]… position that corporations are persons within the meaning of the clause in question,” and erroneously claimed that the Court had “so held” in *Santa Clara*, he probably did not mean to imply that the Court had interpreted corporations as having all the rights of natural persons under the Bill of Rights.

Justice Black would eventually challenge the idea that the corporation is a person within the meaning of the Fourteenth Amendment in his dissenting opinion in *Connecticut General Life Insurance Co. v. Johnson*, in which he bluntly stated, “I do not believe the word ‘person’ in the Fourteenth Amendment includes corporations;” although he, like Justice Field many years before him, also erroneously believed that the Court had held otherwise in Santa Clara. The Supreme Court did not discuss the issue again until *Wheeler Steel Corp. v. Glander* in 1949. In that case, Justice Jackson, writing for the majority, also erroneously interpreted *Santa Clara* to have held that “the Fourteenth Amendment assures corporations equal protection of the laws.” Indeed, he was of the opinion that the Court had consistently held so since Santa Clara. In his dissenting opinion, however, Justice Douglas, with Justice Black concurring, wrote a scathing criticism of the majority’s interpretation of *Santa Clara*, and although he absurdly attributed

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258 129 U.S. 26, 28 (1889).

259 Id.


261 Id. at 87.


263 Id. at 574.

264 Id.
court reporter Davis’ wording in the headnote to Chief Justice Waite, he observed that, “[t]here was no history, logic, or reason given to support that view,”265 which is quite correct, of course, since the Court did not actually express that view in that case.

The Supreme Court’s early pronouncements on the legal status of the corporation emerge upon careful scrutiny as a comedy of errors. It is clear, however, that, regardless of whether the corporation was a person within the meaning of the Fourteenth Amendment, at the turn of the twentieth century corporations certainly did not have all of the constitutional rights of natural persons under the Bill of Rights, and certainly did not have the constitutional right engage in speech or to make political contributions.266 In *McConnell v. Combination Mining and Milling Co.*, for instance, the Supreme Court of Montana ruled that the mining company’s political expenditures, including lobbying expenses, were ultra vires because the statute under which it was incorporated did not authorize the creation of corporations for political purposes.267 In *People ex rel. Perkins v. Moss* in 1907, in the direct wake of the insurance scandals, the Court of Appeals of New York held that while the political contributions of the insurance company were not crimes, they were “foreign to the chartered purposes of the corporation.”268

Neither of these cases, however, raised any Fourteenth Amendment issues. Indeed, it was not until *People v. Gansley* that a corporation attempted to use its status as a legal person under the Fourteenth Amendment to nullify a state statute: the corporation had made political

265 *Id.* at 577.

266 They did, however, have some Bill of Rights protections against the federal government. Indeed, they received some protections under the due process clause of the Fifth Amendment as early as 1893. Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 590-591 (1990).

267 76 P. 194, 199 (1904).

268 80 N.E. 383, 387 (1907).
expenditures in violation of a state statute and it challenged the statute, arguing that it had a right
to do so by virtue of being a person under the Fourteenth Amendment.\footnote{158 N.W. 195, 196 (1916).} The Michigan
Supreme Court rejected the argument on the grounds that the expenditure of money’s for
political purposes could not be “deemed a property right within the meaning of the Fourteenth
Amendment” since corporations had no rights to make political expenditures under Michigan’s
incorporation statute, nor, indeed, were they deprived of any of their other rights or privileges
under the statute under which they were created.\footnote{Id. at 200.} The court noted that the corporation – the
Lansing Brewing Company – was created for the purpose of manufacturing beer and that the
state legislature probably sought to prohibit corporations from using their funds to influence
elections when it enacted the statute under challenge. In the court’s view, the state legislature
acted within it powers when it sought to prohibit political expenditures by a corporation that was
created under state law to make beer.\footnote{Id. at 201.}

The case did not, however, directly raise any First Amendment issues. Indeed, at the
time the Supreme Court handed down its decision in \textit{People v. Gansley}, the First Amendment
did not apply to the states. The first Supreme Court decision to incorporate the First Amendment
against the states was \textit{Gitlow v. People of the State of New York} in 1925.\footnote{\textit{Gitlow v. People of the State of New York}, 268 U.S. 652 (1925).} In \textit{Gitlow}, the
Supreme Court actually incorporated the First Amendment under the due process clause of the
Fourteenth Amendment rather than the privileges and immunities clause as some, such as Justice
Field, who was long gone from the Court in 1925, might have expected.\footnote{Id.} This would
subsequently make the Court’s almost fortuitous definition of the corporation as a legal person under the Fourteenth Amendment a central issue in the debate about the scope of corporations’ speech rights later on. In the first two decades of the twentieth century, however, there were clearly no federal constitutional constraints on the states’ regulation of any forms of speech, corporate or otherwise.

Moreover, until well into the twentieth century there were no federal constitutional protections for commercial speech, whether by corporations or natural persons. The Supreme Court, in fact, still interprets the First Amendment to provide less protection for commercial speech than for political speech. Thus, there were no real federal constitutional restrictions on the federal or state governments’ regulation of corporate advertising or any other forms of corporate communications intended to promote the sale of their products until after the middle of the century. Indeed, the Supreme Court did not hold that First Amendment protections apply to corporate political speech, either, until First National Bank of Boston v. Bellotti in 1978.

274 In Valentine v. Christensen, 316 U.S. 52, 54 (1942) the Court stated, “We are …clear that the Constitution imposes no …restraint on government as respects purely commercial speech.” The Court did not clearly reject Valentine’s sweeping statement of a commercial speech exception to the First Amendment right to free speech until Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976). The Court acknowledged in Virginia State Board, however, that “There can be no question that in past decisions the Court has given some indication that commercial speech is unprotected.” Id. at 758.

275 Id. at 762. As a general matter, the Supreme Court has defined commercial speech as speech that is intended to “propose a commercial transaction.” Id. at 760.

276 Some caution is in order in stating what the Court held in Bellotti. Justice Powell, in delivering the opinion of the Court, wrote,

The court below framed the principal question in this case as to whether and to what extent corporations have First Amendment rights. We believed that the court posed the wrong question.
Indeed, *Bellotti* arose from a challenge to a federal statute that prohibited corporations from making political expenditures. Some state governments had enacted similar statutes as far back as the turn of the century. It is a simple fact that for most of the twentieth century there were no federal constitutional restraints on the power of either the federal or state governments to limit corporate speech. There were no state constitutional restraints either. Indeed, at the turn of the twentieth century American courts had not yet fully elaborated on the legal definition of speech. It was not yet clear, for instance, that political expenditures were a form of political speech, or that there was, indeed, a legal distinction between political speech and commercial speech. What is perhaps most significant about the first half of the twentieth century, therefore, is that neither the federal nor state legislatures implemented more sweeping prohibitions on corporate speech. Most of the statutes directed at what would today be.

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The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations “have First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead the question must be whether …[the Massachusetts statute in question]… abridges expression that the First Amendment was meant to protect. We hold that it does.

435 U.S. 765, 775-776 (1978). Thus, in *Bellotti* the Court held that the First Amendment applies to corporations, but not that corporations have First Amendment rights.

277 Id.


279 The Supreme Court did not hold that political expenditures are a form of speech until *Buckley v. Valeo*, 424 U.S. 1 (1976).

280 The Supreme Court did not draw the distinction until *Valentine v. Christensen*, 316 U.S. 52, 54 (1942).
considered corporate political speech only prohibited corporations from making direct campaign contributions.\textsuperscript{281} Corporations were generally free to influence political outcomes indirectly, and there were no restrictions on direct campaign contributions from corporate directors or executives acting in their personal capacities.\textsuperscript{282} This allowed corporations to find ways of circumventing the restrictions on their direct contributions. Moreover, there were no restrictions on corporations’ commercial speech, even though some commercial speech was clearly intended to serve political goals.\textsuperscript{283}

\textit{C. The Short and Dull Life of the Ultra Vires Doctrine}

There were, of course, many other ways in which corporations could influence political outcomes. Corporations did not initially have the wisdom to use their freedoms to take advantage of many of the opportunities. But given their growing concerns about public attitudes, corporate leaders began to recognize the importance of public opinion and to think of ways of refurbishing their corporations’ tarnished reputations.\textsuperscript{284} One of the most important ways in which corporations attempted to redress the poor regard in which they were held was by investing in public relations.\textsuperscript{285} Broadly construed, their public relations efforts involved conscious attempts to influence public opinion through the media, charitable or philanthropic donations, and even internal bureaucratic forms of corporate welfare. Although the federal and

\textsuperscript{281} ALEXANDER, \textit{supra} note 195 at 35.

\textsuperscript{282} \textit{Id.}

\textsuperscript{283} See the discussion \textit{infra} Part III.G..


\textsuperscript{285} \textit{Id.}
state governments could have regulated all of these kinds of public relations activities they did not. In some important cases, however, shareholders of the corporations objected to the use of corporate funds for such purposes. This led to some early shareholder derivative suits challenging the activities under the ultra vires doctrine.

In some early shareholder derivative suits, courts did apply the ultra vires doctrine to restrain corporate directors from expending corporate funds for purposes that were not narrowly within the scope of their charters. In McConnell et al. v. Combination Mining and Milling Co., for example, the Supreme Court of Montana held that donations by a corporation for “strictly political purposes” were ultra vires because the statute under which the corporation was created did not enumerate any political purposes. As a general matter, though, courts were inclined to construe the scope of corporate charters broadly. In Hawes v. City of Oakland, for instance, the U.S. Supreme Court rejected a suit by a shareholder who sought to restrain a corporation, the Contra Cost Waterworks Company, from giving free water to the city of Oakland on the grounds that the company’s charter did not forbid such gifts. As the Court explained, the city had the power to confer valuable franchise rights on the company and it may have been “the highest wisdom to let the city use the water….” And in Steinway v. Steinway & Sons, the New York Supreme Court held that “the very moderate expenditures of the company towards church,

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286 Adam Winkler, Other People’s Money Corporations, Agency Costs, and Campaign Finance Law, 92 GEO.L.J. 871 (2004) argues that these it was primarily these objections that drove early campaign finance laws rather than the public’s concerns about corporate political power.

287 76 P. 194, 199 (MT 1904).

288 104 U.S. 450 (1881).

289 Id. at 461-461.
school, library, and baths” for its employees and their families were not ultra vires. As the court explained, “taken as a whole” the expenditures were “directly related to the legitimate objectives of the corporation.”

In these early cases, the courts were foreshadowing the contours of the business judgment rule. Indeed, *Dodge v. Ford Motor Company*, which is often cited as one of the earliest precedents for the business judgment rule, also involved, at least incidentally, a challenge to the use of corporate funds for purportedly philanthropic purposes. The Dodge brothers, who were minority shareholders in Ford Motor Co., challenged the directors’ decision to use the corporations’ earnings for new investments instead of additional dividends. Henry Ford, the majority shareholder and president of the company, explained his strategy was to “to employ still more men, to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes.” Although the Michigan state supreme court asserted that “A business corporation is organized and carried on primarily for the profit of the stockholder…. The discretion of the stockholders is to be exercised in the choice of the means to attain that end, and does not extend to a change in the end itself…,” and ultimately affirmed the lower court’s decree ordering a dividend payment, it also reaffirmed its previous deference to the discretion of a corporations’ directors by quoting from an earlier opinion: “Courts of equity will not interfere in the management of the directors unless it is clearly made to appear that they are guilty of fraud or misappropriation of the corporate funds or refuse to declare a dividend …

290 40 N.Y.S. 718, 721 (NY County 1896).

291 Id.


293 Id. at 683.

294 Id.
when …[it]… would amount to such an abuse of discretion as would constitute a fraud, or … breach of that good faith which they are bound to exercise towards shareholders.”

As corporate law developed further in the twentieth century, the business judgment rule was more clearly articulated and refined, and the ultra vires doctrine receded into virtual insignificance.

D. The Genesis of Corporate Public Relations

There were, therefore, even in the early twentieth century, no important legal impediments to corporations’ attempts to use public relations campaigns to sway public opinions and attitudes. The modern public relations industry emerged when corporations discovered that expenditures on public relations provided a profitable return on investment. As the twentieth century proceeded, corporations expended increasing amounts of resources in efforts to improve both the general public’s and their own employees’ attitudes toward them. The power of corporate public relations and its impact on American politics, law, and society is difficult to assess. Some radical scholars, such as Edward Herman and Noam Chomsky, believe that it has facilitated a kind of corporate hegemony, in which corporate leaders are able to “manufacture consent” for corporate avarice and misdeeds. In truth, there is little evidence upon which to

295 Id. at 682.

296 The modern business judgment rule was stated concisely in Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), when the Delaware Supreme Court explained, “It is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.”

297 See generally MARCHAND, supra note 234 and EWEN, supra note 281.

298 Id.

299 See generally EDWARD HERMAN & NOAM CHOMSKY, MANUFACTURING CONSENT (1988).
sustain such an extreme view. Nonetheless, even more moderate scholars, who have recognized
important limits on the efficacy of corporate public relations programs and have argued that they
have necessarily had much more modest goals, have attributed to them great success.  

There is little question that corporation’s initial efforts to influence public opinion were a
direct response to the Progressive Movement and related public pressures for restraints on the
“trusts” at the turn of the twentieth century. The Robber Barons, Second Industrial
Revolution, the Great Merger Movement, and myriad articles and stories in the newspapers,
magazines, and even novels had contributed to a growing perception that the corporation was an
evil and that it was beginning to control not only the economy, but government. As Roland
Marchand explains,

[A]s major corporations expanded at a bewildering pace at the end of the
nineteenth century, the notion of corporate powerlessness became untenable.
Many companies, through mergers and other forms of vertical integration and
horizontal consolidation, so dominated their industries that they now controlled
their market as much as they were ruled by it. And they threatened to control
much more than that. The pure size of many corporations – their number of
employees, the magnitude of their production, their capital resources, their
national scope in distribution, and their capacity for political influence –
persuaded many Americans … that the nexus of social institutions within which
they lived had been radically transformed. The church and the local community
suddenly seemed dwarfed by the sway of the giant corporations. This momentous

300 See, e.g., MARCHAND, supra note 234 at 362.
301 Id. at 2-4.
shift in the balance of social forces created a crisis of legitimacy for the large corporations. 302

Initially, most corporations responded to their poor public images with public relations programs directed at their immediate political and marketing objectives. 303 Their public relations efforts thus attempted to “provide factual arguments and, at times, palpable actions that would answer anti-business arguments and enunciate a commonality between the private enterprise system and the public interest.” 304 But they soon recognized the need for more than factual arguments and philosophical defenses of free markets. Critics of the corporations and big business at the turn of the twentieth century frequently spoke and wrote of the corporation as having no soul. 305 People recognized that the corporation had the legal status of a person, for many purposes, but they emphasized that it was an artificial person, created for the exclusive purpose of making profits, rather than a natural person with all the moral attributes of a human being. Thus, “in the late nineteenth and early twentieth centuries, both advocates and critics of the giant corporation spoke of …[public relations efforts]… as quests for a corporate soul.” 306

Corporate public relations efforts in the early twentieth century were aided by important changes in the way people acquired information. Many of the same changes that were transforming the nexus of social institutions within which people lived -- the relative demise in importance of the church and local community, for instance -- were also changing patterns of

302 Id. at 2.
303 Id. at 4.
304 EWEN, supra note 281 at 401.
305 MARCHAND, supra note 234 at 7.
306 Id. at 4.
People began to depend less on their personal and local contacts as sources of information and more on newspapers and magazines, which, by the turn of the twentieth century, had circulations that were enormous by nineteenth century standards.Ironically, the success of the muckrakers had been a product of the new power of the media. But people had read the muckraking articles more like spectators and less like participants. As Ewen explains,

"Behind the sensationalization of Progressive publicity lay signs that the public had changed in consequential ways. If the public had once been active in shaping the political life and social intercourse of the nation, the new public was defined increasingly by its vulnerable condition of isolation and spectatorship. Readers of mass-circulation newspapers and magazines were witnesses to society, no longer within the public square but from the sanctuary of their parlors."

**E. The Corporate Control of the Media**

Not only were people becoming more reliant upon newspapers and magazines for information and acculturation, the newspapers and magazine were becoming increasingly dependent upon corporate advertising revenues. Just as in the manufacturing industries, the media industries had also invested in new machinery and equipment around the turn of the twentieth century. Printing became much more capital intensive and required much larger
investments.\textsuperscript{312} At the same time, with improved transportation capabilities, the potential circulation of the newspapers and magazines was vastly greater.\textsuperscript{313} Of course, they needed to earn more revenues to make a return on their heavy capital investments and so they actively sought to increase their circulations, usually by charging low prices.\textsuperscript{314} The increase in their circulations made advertising in the newspapers and magazines much more effective since it reached a much wider audience. Thus, the newspapers and magazines could charge higher rates for advertising space the more they increased their circulations.

The newspapers thus quickly became much more dependent on advertising revenues than on their newsstand prices for their profits.\textsuperscript{315} Competition only tended to force their newsstand prices even lower. Since their circulations were centrally important to their advertising revenues, they generally stood ready to match any competitors’ price cuts. At the same time, readership of newspapers was increasing dramatically so that, even though their individual circulations were growing, so were the number of newspapers overall.\textsuperscript{316} By the late nineteenth century, the newspaper industry was big business. As Frank Luther Mott described, “In circulations, in the number of pages per issue, and in volume of advertising, the great newspapers grew to sizes scarcely dreamed of before, while figures representing investment, costs, and revenues reached

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.} at 191. The same economic forces were evident at the same time in Great Britain. See, e.g., JAMES CURRAN AND JEAN SEATON, POWER WITHOUT RESPONSIBILITY: THE PRESS AND BROADCASTING IN GREAT BRITAIN 32-41 (1997).
\item \textit{Id.} at 194.
\item \textit{Id.} at 187.
\end{enumerate}
\end{footnotesize}
astonishing levels.” At a time when people were becoming more dependent upon the newspapers for information about the world around them, the newspaper industry was changing so that more and more people received their information from the same sources.

The economic incentives and imperatives that transformed the newspaper industry also transformed the magazine industry. Beginning in the 1890s, mass-circulation magazines began reaching national audiences. They had unprecedented circulations. As Stuart Ewen explains, “Starting with McClures and Munsey’s Magazine – then Hampton’s, Everybody’s, Colliers, Cosmopolitan, Scribner’s, and The American Magazine – a new generation of magazines began to emerge. With cover prices of ten to fifteen cents, circulations grew exponentially. If 50,000 people was considered an enormous readership prior to 1890, between 1900 and 1912, some magazine circulations soared to 1 million.” The developments in the magazine industry thus reinforced the trends established by the newspaper industry. People were more dependent upon the media than ever before, but, because of the huge circulations of the newspapers and magazines, more and more Americans were dependent upon identical information sources.

The changes in the media industries presented corporations with new opportunities for managing their public images. First of all, they were able to have some influence over the issues the media chose to address as well as how the media addressed them. Newspapers or magazines that published sensitive articles critical of specific corporations, or even business generally, might expect to lose an important source of advertising revenues. Ironically, the growth of the newspapers and magazines had initially encouraged the wave of muckraking journalism around

317 Ewen, supra note 281 at 53.

318 Id. at 53-54.

319 Id. at 54.

320 Hofstadter, supra note 22 at 194.
the turn of the twentieth century.\textsuperscript{321} The newspapers and magazines were in the business of making profits and sensationalist exposes of corporate transgressions helped them to sell their newspapers.\textsuperscript{322} Most of the media magnates had little concern for what they published, so long as it helped their newspapers and magazines earn a good profit.\textsuperscript{323} But they eventually learned that some kinds of articles might hurt their bottom line even if they did sell the newspapers. As Richard Hofstadter explained,

Advertisers did not hesitate to withdraw orders for space when their own interests or related interests were touched upon. Bankers adopted a discriminatory credit policy, so that modest loans could not be secured even for the maintenance of a business of great value and proved stability.\textsuperscript{324}

The dependence of the newspapers and magazines on corporate advertising expenditures, and the implicit threat of advertising boycotts, probably helped to filter out of the media many articles and editorials that would have been critical of big business, especially when newspapers and magazines began to be absorbed into large media chains and the media were further drawn into the corporate web themselves after the turn of the century.\textsuperscript{325} Some radical scholars have

\begin{flushleft}
321 \textit{Id.} at 186-187.

322 \textit{Id.} at 191.

323 Hofstadter describes the muckraking journalism that was popular at the turn of the twentieth century as a “more or less accidental.” \textit{Id.} at 191.

324 \textit{Id.}

325 According to Stuart Ewen, the period from the end of the nineteenth century to the 1920s saw “momentous expansion and consolidation of media industries.” \textit{EWEN, supra} note 281 at 176. Moreover, “[t]he impact … was considerable… [A] society once defined by its remarkable variety of cultural backgrounds was being melded into generic ways of seeing, shaped by the priorities of modern commercial enterprise.” \textit{Id.}
\end{flushleft}
emphasized the corporate filter on the news in their critiques of corporate capitalism. Edward Berman and Noam Chomsky, for instance, list the concentration and dominance of the media industries and the fact that their primary revenue source is corporate advertising revenues number one and two on their summary of the five essential ingredients in their “propaganda model.” They list “flak” as a means of disciplining the media number four. It is difficult to evaluate how much the implicit threat of corporate advertising boycotts has shaped the news, but it is clear that American corporations at the turn of the twentieth century did not rely exclusively, or even primarily, on their power to censor the news to achieve their public relations objectives. Indeed, they were far more proactive.

F. The Birth of Corporate Publicity Campaigns

Beginning in the early 1900s, a small number of corporations hired public relations experts to initiate and coordinate systematic efforts to improve their companies’ images. It was then that the public relations profession emerged. Ironically, the first public relations experts were usually former journalists who knew how the news was collected and reported and could use their inside knowledge to help their clients influence what was written. They were typically hired when a large corporation was in the throes of a public relations crisis. Ivy Lee, for instance, arguably the first American public relations manager, was hired by a group of coal companies in 1906 in anticipation of a strike. The coal miner’s union leaders had cultivated

326 HERMAN & CHOMSKY, supra note 299 at 2.

327 Id.

328 EWEN, supra note 281 at 77.

329 Id. at 76.

330 Id. at 77.
strong relationships with the press during a previous strike in 1902, and they had been able to rally public opinion to their cause and win many of their demands.\footnote{Id. at 76.} This time the companies were determined not to let that happen again.\footnote{Id.} Lee had previously worked as a journalist and knew how to curry their favor. In contrast to the policy the coal companies had adopted during the previous strike, he chose to be much more open with the press, although he was careful to make sure that he was always the conduit for any communications.\footnote{Id. at 77.} His efforts were successful and the coal companies received much more favorable coverage.\footnote{Id.} 

One of the first major corporations to establish an in-house public relations department was AT&T. In the first decade of the twentieth century, AT&T was aggressively pursuing a strategy to dominate the national market for telephone services.\footnote{See generally David F. Weiman & Richard C. Levin, Preying for Monopoly? The Case of Southern Bell Telephone Company, 1894-1912, 102 J.POL.ECON. 103 (1994).} AT&T’s strategy was based on pricing below costs, building its network ahead of demand, and encouraging local governments to grant exclusive franchises.\footnote{Id. at 106.} Needless to say, their efforts drew intense criticism from the independent telephone companies and raised significant suspicions among the general public.\footnote{MARCHAND, supra note 234 at 50.} AT&T was particularly concerned about the trend at the time towards public ownership and control of the telephone industry in some Canadian provinces and most European
AT&T began a public relations program just after the turn of the twentieth century, but it was not especially ambitious.\textsuperscript{339}

After a financial panic in 1907 that almost drove the company bankrupt, however, AT&T significantly expanded its public relations efforts.\textsuperscript{340} AT&T’s new president, David Vail, recognized that the company’s objective of achieving national domination faced serious public opposition but felt that a systematic program of public relations could convince the public of the virtues of a private, national monopoly.\textsuperscript{341} In a series of breakthrough advertisements that were characterized by the industry journal, Printer’s Ink, as a “new way to lobby,” AT&T condemned the wastefulness of “telephone duplication” and received supportive editorials from a number of major newspapers.\textsuperscript{342} An AT&T report afterwards concluded that the effort “indicated the possibilities of a broad policy of publicity.”\textsuperscript{343}

AT&T committed itself to building a new public image and proceeded to experiment with new public relations techniques.\textsuperscript{344} It hired one of the nation’s first advertising agencies, N.W. Ayer & Son, to devise a national advertising campaign Ayer & Son changed the tone of AT&T ads.\textsuperscript{345} Where the ads had formerly been didactic, and even defensive, Ayer’s ads were stirring and inspirational. They glorified AT&T’s role in the advancement of human civilization

\textsuperscript{338} Id.
\textsuperscript{339} Id. at 51.
\textsuperscript{340} Id.
\textsuperscript{341} Id.
\textsuperscript{342} Id.
\textsuperscript{343} Id.
\textsuperscript{344} Id. at 52.
\textsuperscript{345} Id.
and promoting national unity and interpersonal connections.\textsuperscript{346} One of Ayer’s strategies was to launch a continuous stream of ads, from one month to the next, and make them attractive so that people would actually anticipate them, perhaps even with some eagerness.\textsuperscript{347} AT&T encouraged its associated Bell companies to adopt the same advertising policies and sought to coordinate the advertising campaigns nationally.\textsuperscript{348}

In spite of its public relations efforts, though, AT&T still feared regulation.\textsuperscript{349} Indeed, instead of attempting to fight what may have been inevitable, AT&T moderated its strategy. Instead of seeking national dominance as a stand-alone company, it would seek to position itself at the center of a national network in support of its Bell associates with regional monopolies (and some independents).\textsuperscript{350} Despite all its early public relations successes, AT&T nonetheless realized that it could not control public opinion and political pressures completely. Instead, it sought to influence how the regulatory regime in the telephone industry was developed.\textsuperscript{351} It lobbied to ensure that regulations would be implemented by state legislatures so that it would be regulated by state telephone commissions rather than federal agencies.\textsuperscript{352} Regulation by state commissions enabled AT&T to have more ongoing influence with the regulators. The AT&T story thus reflects not only the power of corporate publicity campaigns to influence public

\textsuperscript{346} Id. at 54.
\textsuperscript{347} Id. at 55.
\textsuperscript{348} Id. at 56.
\textsuperscript{349} Id. at 57.
\textsuperscript{350} Id.
\textsuperscript{351} Id.
\textsuperscript{352} Id.
opinion and legislation, but also the limitations on corporations’ abilities to control their political environments.

G. Public Relations Humanizes the Corporation

Other corporations soon recognized that they could also use public relations to good ends and jumped on the bandwagon. An infant public relations industry emerged, and a new breed of public relations professionals emerged who developed the precepts of modern public relations campaigns. These public relations pioneers often knew that they were not only manipulating public opinion, but changing the nature of democracy – indeed, they saw that not only as their objective, but as a responsibility. Edward Bernays, for instance, who helped to engineer the U.S. government’s public relations campaign during World War I, wrote,

The conscious and intelligent manipulation of the organized habits and public opinions of the masses is an important element in democratic society. Those who

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353 In his autobiography, one of the pioneers in the public relations industry, Edward Bernays, lists his former corporate clients and includes American Cigar Company, American Distilling Company, American Tobacco Company, Dodge Brothers, Inc., General Electric, General Motors, Proctor & Gamble Company, United Fruit Company, and Westinghouse Corporation among many others. EDWARD BERNAYS, BIOGRAPHY OF AN IDEA: MEMOIRS OF PUBLIC RELATIONS COUNSEL EDWARD L. BERNAYS 817-818 (1965).

354 Some of the first public relations experts were highly educated and very knowledgeable about the social sciences, especially psychology. They also considered public relations a true profession, complete with professional responsibilities. Edward Bernays, for instance, referred to himself as a “public relations counselor.” He was, in fact, a nephew of Sigmund Freud and particularly well versed in the predominant psychological theories of his time. See EWEN, supra note 281 at 3-18 for a discussion of Bernays. Walter Lippmann, another public relations pioneer, was a well known public intellectual. See Id. at 60-64 for a discussion of Lippmann.
manipulate this unseen mechanism of society constitute an invisible government which is the true ruling power of our country.\textsuperscript{355}

Bernays was not alone in recognizing the tremendous power of public relations or the role it would play in modern life. As Walter Lippmann wrote,

\begin{quote}
The creation of consent is not a new art. It is a very old one that was supposed to have died out with the appearance of democracy. But it has not died out. It has, in fact, improved enormously in technic, because it is now based on analysis rather than rule of thumb. And so, as a result of psychological research, coupled with modern means of communication, the practice of democracy has turned a corner. A revolution is taking place, infinitely more significant than any shifting of economic power.\textsuperscript{356}
\end{quote}

One of the things the new public relations experts quickly surmised was that it was not enough to simply sell their corporations’ products -- they needed to humanize the corporations. When people spoke at the turn of the twentieth century of the corporation having “no pants to kick and no soul to damn” they were making a point about the impersonality of the corporation and its lack of moral integrity and sense of social responsibility. As Seth Low explained, for instance, in 1898,

\begin{quote}
The impersonality of the corporation lends itself readily to many abuses from which the sense of personal responsibility saves individual men…. The fundamental evil in the corporate form of management, undoubtedly, is the loss of personal responsibility. It is a common remark that as directors men will do things which as individuals they would not think of doing. Indeed, the evil lies
\end{quote}

\textsuperscript{355} \textit{EDWARD BERNAYS, PROPAGANDA} 37 (1928).

\textsuperscript{356} \textit{WALTER LIPPMANN, PUBLIC OPINION} 248 (1922).
deeper than this. Because they are directors, and therefore, as they say, trustees for others, they feel constrained to do for the benefit of the stockholders what as individuals they abhor.\footnote{Seth Low, The Trend of the Century, 490 THE ATLANTIC MONTHLY 153, 160 (1898).}

Large corporations thus increasingly sought to give themselves a human face. While AT&T’s early ads, for instance, emphasized the efficiency and social utility of a national telephone network, later ads tended to display a more human, and, indeed, frequently, feminine, face.\footnote{See, e.g., “The Spirit of Service,” showing a brave lineman fixing a downed line in a ferocious storm, MARCHAND, supra note 234 at 64, and “Weaver of Speech” showing an attractive, young woman earnestly connecting callers at a switchboard. Id. at 65.} Other corporations followed suit.\footnote{See, e.g., the Heinz ad, “The Homelike Kitchens of Heinz,” showing a woman in apron carrying food in a bowl in a very domestic looking setting, Id. at 171; or the Du Pont ad, “today’s Prometheus,” showing a bespectacled man in an apron examining a test tube, Id. at 195} Some corporations, such as National Cash Register and Western Electric, began to emphasize the people behind their companies.\footnote{See, e.g., “The people and plant that stand behind every National Cash Register,” Id. at 106, and “Some of the 37,000 workers in the world’s telephone shop,” Id. at 112.} Many corporations produced ads that projected warm images of wholesome communities and suggested that they too, somehow, were their customers’ neighbors within these communities.\footnote{See, e.g., the AT&T ad “Friend and Neighbor,” Id. at 85; the General Electric ad, “The initials of a friend,” Id. at 155; and the General Motors ad, “Home Address:, Main Street, U.S.A.,” Id. at 243.} Some corporations produced ads that tried to project images of their stockholders, usually, of
course, as ordinary, middle-class Americans, sometimes bordering on the absurd. Many companies also recognized that their employees were an important audience for their ads, not only because they were concerned about employee morale and labor relations, but also because they knew their employees were an important and growing part of the general public. Thus, some corporations established company magazines and produced ads for these magazines or other publications that depicted happy employees leaving their factories or returning home from a hard day of work.

People were not mindless and they never came to think of corporations as human or anything other than business entities. Indeed, the sophisticated professionals who came to manage their public relations campaigns knew people were not that mindless and so they set much more realistic objectives. The relentless onslaught of favorable corporate imagery did,

362 See, e.g., the Bell Telephone ad, “She’s a Partner in a Great American Business,” illustrating a smiling, grandmotherly woman preparing a meal at a table, Id. at 78; the AT&T ad, “Our Stockholders,” showing a young woman knitting with two children at her sides, Id. at 76;

363 See, e.g., the cover of U.S. Steel News for July, 1940 showing a blue collar employee returning from work to a scene of domestic tranquility, Id. at 228; or the General Motors ad, “What Happens to General Motors Happens to Me,” Id. at 237; or the cover of GM Folks from October, 1938 showing three happy blue collar workers leaving a plant. Id. at 240.

364 As Earl Newsom, who worked for Standard Oil explained at a public relations conference in 1946,

The clear, noteworthy image thrown upon the screen must be one of portraying our company as wanting the things that people want. There must be a merging of image and audience if people are to say ‘That is my kind of company – that is good – let us keep and preserve and extend that institution.’ The image cannot be one of human exploitation, of ruthlessness, of greed, of selfishness. The image must be a human image. For it must reveal a company as an organization
however, change public attitudes. People became much more accepting of the role of the corporation in American society and much less cynical about its character. As Roland Marchand explains,

[T]he giant corporation, arising after the mid-nineteenth century, demolished all balance in size and power between the framers of the new corporate images and their audiences. Over time, a cadre of the most talented in devising verbal and visual imagery came to dominate such discourse on behalf of the largest, richest organizations. Although individuals, and occasionally those united in voluntary groups, did not lack the capacity to counter or even undercut the flood of imagery from the corporations, the encounters became increasingly disproportionate as the twentieth century wore on. The citizen incessantly addressed as favorite friend, neighbor, and even family member of the corporation had to develop a prickly discriminatory wariness in order to resist acquiescence and maintain a realistic sense of conflicting interest.\textsuperscript{365}

\section*{H. The Ideology of Corporate Capitalism}

Beyond humanizing the corporation, some of the public relations efforts were devoted towards rationalizing the market system in which the corporations thrived, presumably to forestall new regulations. Indeed, some corporations both supported the war effort and took advantage of the opportunity to propagate the ideology of the free market during World War

\textsuperscript{365} MARCHAND, \textit{supra} note 234 at 362.

EWEN, \textit{supra} note 281 at 380.
II. Some of these ads, and others, were overtly ideological. General Motors, for instance, in an ad titled, “Know How,” proclaimed that although “They said that America was unprepared for war….They forgot that in America free enterprise had for years been encouraging – stimulating – urging men to learn how to make things better and better – in greater volume – at constantly lower costs.” Republic Steel, in an ad titled, “Boys… I’ll tell you what Free Enterprise really is,” uses the image of a professional, middle-aged man speaking to a group of other men around in a shop around a wood stove to describe and praise free enterprise. As the narrator explains, “[I]t’s our right to live our own lives, run our own jobs and our own business in our own way – without needless interference…to criticize our government, bawl out the umpire,… make a speech on the public square…. It offers opportunity to anyone who really wants it. It rewards thrift, hard work, and ingenuity.” The ad ends in rousing fashion when the narrator proclaims, “Frankly, I don’t like the name Free Enterprise…. I’d rather call it American Enterprise, because it’s the most American things we have. Let’s keep it.”

The irony, of course, is that a large corporation – the kind of institution that many Progressive reformers worried was a threat to American society that would destroy democracy

366 See, for example, the Republic Steel ad, “Leatherneck Joe Mechanic,” in which ‘Joe,’ writing from a marine’s perspective, notes that the “radical stuff … always hits us little guys the hardest,” Id. at 325; the General Motors ad, “Victory is Our Business,” that refers to GM as “partners in production” with farmers in the war effort, Id. at 327; and the Du Pont ad, “Soldiers of the Soil,” honoring farmers and showing empathy for those who made sacrifices for the war without receiving any public recognition. Id. at 329.

367 Id. at 337.

368 Id. at 352.

369 Id.

370 Id.
and replace it with “plutocracy” – was now equating free enterprise, an economic system in which the corporation thrived, with democracy and all things American. The fact that Republic Steel could even think of publishing such an ad was itself testimony to the dramatic change in public attitudes during the first half of the twentieth century. Indeed, as Walter Lippmann explained earlier in the century, the corporation had succeeded in embedding a corporate ideology into the public mind in part by using the precepts of neoclassical economic theory to rationalize and legitimize the way that corporate capitalism worked. He began by elegantly describing neoclassical economic theory:

[The older economists]… set out to describe the social system under which they lived, and found it too complicated for words. So they constructed what they sincerely hoped was a simplified diagram, not so different in principle and in veracity from the parallelogram with legs and a head in a child’s drawing of a complicated cow. The scheme consisted of a capitalist who had diligently saved capital from his labor, an entrepreneur who conceived a socially useful demand and organized a factory, a collection of workmen who freely contracted, take it or leave it for their labor, a landlord, and a group of consumers who bought in the cheapest market those goods which by the ready use of pleasure-pain calculus they knew would give them the most pleasure.\footnote{LIPPMAN, supra note 356 at 117.}

He then explained how this positive theory about a private exchange economy was used to provide a normative justification of the free market system:

The kind of people which the model assumed, living in the sort of world the model assumed, invariably cooperated harmoniously in the books where the
model was described. With modification and embroidery, this pure fiction, used by economists to simplify their thinking was retailed and popularized until for large sections of the populations it prevailed as the economic mythology of the day. The buildings which rose, and the bank accounts which accumulated, were evidence that the stereotype of how the thing had been done was accurate. And those who benefitted most by success came to believe they were the kind of men they were supposed to be.372

**Corporate Welfare Work**

It is notable that so many corporations targeted some part of their public relations directly at their own employees. Labor relations were often strained and this was one way of improving employee morale and loyalty. Indeed, the Progressive Movement motivated many corporations to go beyond their rhetoric and implement in-house programs for their employees’ moral and spiritual edification and general welfare.373 At the time these programs were often referred to as “welfare work.”374 Sanford Jacoby traces the origins of welfare capitalism to three influences on some larger corporations that began in the late nineteenth century.375 First, there was the scientific management movement that sought to systematize and rationalize corporations’

372 *Id.* at 117-118.


374 MARCHAND, *supra* note 234 at 16.

375 JACOBY, *supra* note 112 at 29-73.
productions processes and administrative practices.\textsuperscript{376} Second, there was a movement to establish programs for the employees’ direct benefit, such as worker compensation schemes, savings plans, and even some educational and recreational programs.\textsuperscript{377} Third, there was a movement among social workers to establish vocational guidance programs, particularly to improve young peoples’ integration into the labor market.\textsuperscript{378}

These separate influences ultimately merged into the personnel management movement. Although the personnel management movement really only had any widespread influence beginning in the 1910s, some corporations were at the forefront of welfare work long before then.\textsuperscript{379} As early as 1882, for instance, the Colorado Fuel and Iron Company provided a hospital and nursing services for its employees.\textsuperscript{380} In the 1890s it established kindergartens for its employees’ young children, as well as reading rooms, and music and recreational programs for its employees themselves.\textsuperscript{381} The National Cash Register Company was probably the first large corporation to experiment with corporate welfare programs in the early 1900s.\textsuperscript{382} It established a ‘Labor Department’ in 1901.\textsuperscript{383} Other major corporations followed suit and by 1908 one contemporary observed that one and a half million workers in the U.S. were covered by at least

\begin{footnotes}
\footnote{376 Id. at 29-48.}
\footnote{377 Id.}
\footnote{378 Id. at 49-73.}
\footnote{379 MARCHAND, supra note 234 at 16.}
\footnote{380 Id.}
\footnote{381 Id.}
\footnote{382 BERKOWITZ & McQUAID, supra note 373 at 123.}
\footnote{383 Id.}
\end{footnotes}
some kind of corporate welfare program.\textsuperscript{384} Although welfare capitalism was never prevalent in the U.S., well know corporations such as Eastman Kodak, U.S. Steel, General Electric, and International Harvester, all had corporate welfare programs in the early twentieth century.\textsuperscript{385}

There was a spike in interest in corporate welfare programs in the late 1910s, especially during and immediately after World War I when there was a labor shortage and labor relations deteriorated.\textsuperscript{386} Many corporations during the period from 1915 to 1920 first established personnel departments.\textsuperscript{387} Although the personnel managers often hoped to implement sweeping new programs and reform labor management practices, they rarely succeeded.\textsuperscript{388} Their companies typically had little interest in welfare work that was not directed at improving the bottom line.\textsuperscript{389} After the war there was a period of sustained prosperity and labor relations were relatively good. The personnel management movement was no longer high on most corporations’ priorities.\textsuperscript{390} Nonetheless, many corporations did implement significant corporate welfare programs during the first two or three decades of the twentieth century. These proved to have subtle, but possibly important consequences.

Of course, in many cases corporate welfare programs helped to improve labor relations. They improved employee morale and loyalty, reduced employee turnover and related costs, and they may have contributed to labor productivity through an efficiency-wage incentive – an

\textsuperscript{384} Id.
\textsuperscript{385} Id.
\textsuperscript{386} JACOBY, supra note 112 at 99-123.
\textsuperscript{387} Id.
\textsuperscript{388} Id.
\textsuperscript{389} Id.
\textsuperscript{390} Id. at 124-153.
incentive for workers to maintain high productivity so as to ensure they kept their good jobs with good wages and benefits.\textsuperscript{391} But they probably also had important political consequences. For one thing, they improved corporations’ images with their own employees, and since the corporate sector was growing in size relative to the rest of the economy, corporate employees became a sizable part of the general public.\textsuperscript{392} Beyond that, however, the fact that the corporate welfare programs existed, and in the forms they took within the private sector, may have influenced the way some public welfare programs developed, or, as may have been the case, did not develop. Indeed, corporate leaders had sometimes adopted their own welfare programs to preempt government programs and they subsequently resisted “statist interference.”\textsuperscript{393}

The structure of some government welfare programs may also have been influenced by the corporate welfare precedents. Berkowitz and McQuaid, for instance, contend that when the social security system was implemented, corporate leaders were extensively consulted and the system that was adopted was, not surprisingly, modeled, in some important ways, on similar corporate welfare plans.\textsuperscript{394} For instance, the social security scheme was devised so that social security benefits would be paid only to those who had been employed and had made social security contributions, much like in a private retirement plan.\textsuperscript{395} Moreover, the amount of social security benefits someone could receive would be in some crude proportion to the amount they


\textsuperscript{392} MARCHAND, \textit{supra} note 234 at 16.

\textsuperscript{393} BERKOWITZ & McQUAID, \textit{supra} note 373 at 129.

\textsuperscript{394} \textit{Id.} at 133.

\textsuperscript{395} \textit{Id.}
had contributed, again much like in a private retirement plan.\textsuperscript{396} And, of course, the social
security system was to be financed by contributions, and not by general tax revenues.\textsuperscript{397}

Finally, the early corporate welfare programs of the Progressive era laid the foundations
for corporations’ modern-day benefits packages, including private health insurance plans and
dental care plans, and the corporate employees who have benefited from them may not have been
as eager to support similar public plans as they would have been if they had not been provided
them by their employers. Indeed, private health and dental benefits have never been treated as
taxable income, and so they provide tax advantages that may benefit both employers and
employees.\textsuperscript{398} If, for instance, the employer paid the employee the same amount in salary,
instead of benefits, the employee would be taxed. Presumably, the employer and employee can
split the tax savings.\textsuperscript{399} Under a public health insurance program that covered costs directly
through general tax revenues, both employers and employees would stand to lose some of the tax
advantages, and also possibly face greater tax liabilities to cover the costs of extending benefits
to those whose tax contributions are too low to cover their benefits.\textsuperscript{400} Whether corporate
employees are that calculating or not, the mere fact that most, if not all, are covered by private
benefits plans probably means there is less political pressure for public plans. In a perverse

\textsuperscript{396}Id.

\textsuperscript{397}Id.

\textsuperscript{398}This is one of the well known advantages of nontaxable fringe benefits for employers and their employees. For a
discussion of the idea and the literature see Ellen O’Brien, Employers’ Benefits from Workers’ Health Insurance, 81

\textsuperscript{399}Id. at 9-13.

\textsuperscript{400}Ellen O’Brien concludes that, although there are gaps in the literature, there is evidence that private health
insurance plans benefit both employers and their employees. Id. at 29.
sense, the private sector may have “crowded out” the public sector in the provision of some kinds of welfare programs and may continue to do so to this day.\(^{401}\)

This crowding effect, and, for that matter, the efficacy of corporate public relations programs and corporate welfare work in general, no doubt increased as the corporate sector grew in size and became more concentrated during the twentieth century. Indeed, the largest corporations quickly grew to comparatively enormous proportions. By the middle of the twentieth century, the largest two hundred corporations accounted for about a third of the value added in U.S. manufacturing, and, when ranked by volume of sales, accounted for well over a third of all manufacturing employment.\(^{402}\) By the 1970s, the largest two hundred corporations accounted for over forty percent of the value added in U.S. manufacturing and over sixty percent of all manufacturing employment.\(^{403}\) Corporations knew that their own employees and stockholders were an increasingly important part of the public and they targeted some of their advertising and public relations efforts at their own stakeholders.\(^{404}\) As the twentieth century

\(^{401}\) This reverses the usual way of looking at the relationship between the public and private sector. See, e.g., M. Susan Marquis & Steven H. Long, Public Insurance Expansions and Crowd Out of Private Coverage, 41 MEDICAL CARE 344 (2003).


\(^{403}\) Id.

\(^{404}\) Some of the ads were no doubt motivated to improve employee morale and productivity. See, e.g., “Let us put our own house in order,” MARCHAND, supra note 234 at 99. Others, however, seem to have been motivated to indoctrinate the employees with a corporate culture and make them recognize that their interests coincided with the company’s. See “An Advertisement to Our Employees,” Id at 123 or “What Happens to General Motors Happens to Me,” Id. at 238.
progressed, the famous aphorism, “What’s good for General Motors is good for America,” became true, in some part, because it was increasingly true that General Motors was America.

CONCLUSION

The rise of the modern corporation was an integral part of the Second Industrial Revolution. The Second Industrial Revolution would not have occurred if business firms had been unwilling to make the large investments necessary to implement the important new technologies that drove the industrial growth and development, and business firms may have been reluctant to make the investments without the shield of limited liability and the ability to spread their risks across diversified portfolios of corporate stocks. The emergence and growth of the large corporations, however, created significant public alarm and led to calls for controls on the corporations. The changes wrought by the economic and social transformation at the turn of the twentieth century had already disrupted traditional ways of life and contributed to a growing discontentment across many segments of American society. When large corporations began to acquire unprecedented economic and political power, this exacerbated the underlying discontentment and created widespread concerns about the dangers of plutocracy.

There were no federal or state constitutional protections for corporate speech in the early twentieth century. Although the Supreme Court had stated that the corporation was a person under the Fourteenth as far back as 1886, it is clear that the Court at the time did not intend to extend to corporations all of the rights of natural persons. In any case, the First Amendment was not incorporated against the states under the Fourteenth Amendment until 1925. At the turn of the twentieth century, corporations were regarded as entirely creatures of state law, whose powers were defined by their charters under state incorporation statutes. The federal and state
governments could have enacted sweeping regulations on corporations’ speech and related corporate behavior. But they did not. Some forward-thinking corporations took advantage of the opportunities and began to redress their poor public images with systematic public relations campaigns and welfare work programs that anticipated corporations’ modern benefits plans. The public never came to think of the corporation as a person or anything other than a business entity, but, by publicizing the people behind the companies and the role that the companies played in the public’s day-to-day lives, the public relations campaigns succeeded in humanizing the corporation and integrating it into the American public’s sense of community. More importantly, perhaps, the public relations campaigns succeeded in inculcating into the American public an ideology that rationalized and legitimized the market system within which the corporation flourished and institutionalized a role for the corporation in the modern economy.

The Supreme Court’s recent decision in *Citizens United* ignited a firestorm of criticism. In hindsight, this is ironic. Although the scope of corporate speech rights has important political implications, from a historical perspective, *Citizens* merely tinkers at the margins. The larger debate has already been won by the corporations. Most Americans now accept that corporations will inevitably play an important role in politics as well as the economy. Indeed, if the corporation had not succeeded in gaining widespread social acceptance, then, for good or ill, it probably would have been subjected to much more severe legal restrictions and the American economy, as well as American law and politics, would have developed in fundamentally different ways. If the courts and legislatures at the turn of the twentieth century had prevented corporations from engaging in the various kinds of speech and related behaviors that allowed them to legitimize and institutionalize their role in American life, they might not have become, in Justice Scalia words, “the principal agents of the modern economy.”