The Politicization of the Corporation

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THE POLITICALIZATION OF THE CORPORATION

PHILLIP I. BLUMBERG

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The increasing politicalization of the large American corporation, illustrated by numerous current developments, is primarily the product of changing concepts of the role of business in the society, set against a background of profound unresolved problems in the society itself. It is a process that reflects a number of important elements: the intensity of the social and environmental crisis; the central role of the corporation in the American society; the lack of accountability of corporate management; the technological revolution in communications; a growing concern about the lack of

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responsiveness of political institutions coupled with a recognition of the sensitivity of business to public opinion; changing personal and social values; and the existence of substantial potential support available from non-profit and other institutions and from millions of new small shareholders. In the aggregate, these elements make the large public corporation an appealing and vulnerable target for groups interested in social reform, who see the corporation as one of the major power centers in the society, and who hope to utilize the corporation as an instrument of social progress and the corporate voting process as a vehicle to dramatize their objectives and to force public debate.

This article is concerned with the development of a view of the corporation that is political, not legal; a view that looks upon the corporation as a social institution to be subjected to social controls, not as an economic organization to be operated to achieve economic objectives for shareholders. This increasingly popular view of the corporation is characterized by emphasis on social and economic power, the degree of responsiveness to public demand, the extent of representation of consumer and minority groups, and the complete absence of reference to the economic objectives of the corporation and the interests of its shareholders.

I. THE MANIFESTATIONS OF POLITICALIZATION

Politicalization of the large public corporation is the involvement of the corporation in issues of high public visibility, assuring the controversy a prominent place in the press, radio and television. These issues are essentially social, moral or political in their nature. They do not promote, and may in fact impair, the profitability of corporate operations, and are of interest to the proponents primarily as citizens, rather than as shareholders.

Politicalization of the corporation is reflected in a variety of ways:

1. Angry confrontations or disruptions at shareholder meetings.
2. Picketing, sit-ins, demonstrations and boycotts.

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1 Thus The New Republic recently inquired:
What about the vast powers that corporations exercise directly over people's lives and livelihood? How responsive are these great dominions to popular wishes, and how representative are they of those they presumably serve and from whom they profit? The New Republic, Feb. 20, 1971, at 9.


3 Events of this nature have been directed at The Chase Manhattan Bank, Eastman Kodak, Firestone Rubber, Great Atlantic & Pacific Tea Company and Polaroid.

4 Attacks have been made upon the Bank of America, The Chase Manhattan Bank, Dow Chemical, International Business Machines, General Telephone, General Electric, Mobil Oil and Standard Oil of New Jersey. The Bank of America has been the subject of 22 bombings and 17 burnings since Feb. 1970. N.Y. Times, May 16, 1971, at 53, col. 1.
(4) Harassment and interference with employment recruiters on university campuses.  

(5) Demands for the election of blacks, women and other minority-group representatives on boards of directors.  

(6) Organization of public interest groups, in some cases financed by tax-exempt foundations, investigating the extent of corporate recognition of social and moral factors in business operations.  

(7) Increasing use of the proxy machinery to compel management, under SEC Rule 14a-8, to include social and political questions or proposals for change in the organic corporate structure in the corporate proxy statements.  

One knowledgeable observer of developments in this area has pointed out that this movement in the corporate world could become the most significant political development of the 1970's.  

As a major factor in the society, the corporation cannot escape involvement in the urgent problems of the country. It is by necessity profoundly influenced by the widespread dissatisfaction on the part of significant elements of the American society, the same dissatisfaction that is reflected in the violence of the social scene, the intensity of concern and national conflict engendered by the war in Vietnam, the preoccupation with problems of environmental abuse, the development of "consumerism," the alienation of many younger persons from traditional values and the existence of "revolutionary" movements for "liberation" of blacks and women. These factors have set in motion vital social forces and have inspired energetic, highly articulate, fiercely motivated persons, prepared to devote their energies to the furtherance of the movement; 1970 has thus been described as

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5 Honeywell and Dow Chemical have experienced such interference. The latter was subject to 221 major demonstrations on American college campuses in four years. Address by C. Gerstacker, Chairman of the Board of Dow Chemical Co., to New York Financial Writers, June 5, 1970, at 1. For a detailed review of the Dow Chemical experience on campuses see S. Strethi, Up Against the Corporate Wall 236-53 (1971).  

6 The Public Affairs Council has published a 28-page directory of "organizations dedicated to changing the private sector," many of which are directing their activities at corporations. These include, for example, the Project for Corporate Responsibility and the Center for the Study of Responsive Law, the Council on Economic Priorities, the Southern Africa Task Force, the Industrial Areas Foundation, the Council for Corporate Review, and the Public Interest Center. R. Celler, The Challengers (1971).  


8 Such proposals have been included in the proxy statements for the annual meeting of companies such as American Metal Climax, American Telephone, Dow Chemical, du Pont, General Motors, Gulf Oil, Honeywell, Kennecott Copper and Phelps Dodge.  

"the year of the 'corporate guerrilla fighter.'" These persons regard the state as the corporate state, and the corporation as a prime target.

II. THE FORCES FOR POLITICALIZATION

Business has not anticipated the increased social responsibilities demanded by an aroused public. In consequence, it now faces the onslaught of demands that have great appeal in terms of commonly accepted views of social justice, and that are being presented in a process which is leading to a major degree of politicalization in the activities and objectives of the major American corporation.

There are at least eight major factors contributing to the current re-examination of the fundamentals of the role of American business in society.

A. The Failure of Business Leadership

The basic explanation for the strength of this movement is that many of the demands are morally sound and that business leadership, although recognizing its theoretical responsibility, has been, along with the rest of the society, unpardonably slow to respond in practice. The social and environmental problems of the country would have developed however far-sighted business leadership might have been in anticipating them and participating in their solution. The slowness of business to respond, however, in addition to its own role in the creation of racial injustice and environmental abuse, has contributed to putting business in the painful position of being a prime target in the movement for reform. The intensity of these problems, the extent to which corporations have caused them, the limited response of corporations to their solution—in brief, the failure of business leadership—have accelerated the forces for politicalization.11

B. Changing Concepts of the Role of Business in Society

The movement for politicalization is inescapably intertwined with the widespread acceptance by businessmen, as well as by the public generally, of the theoretical concept of corporate social responsibility.12 This is an acknowledgement that business cannot avoid involvement in the problems of the social climate in which it must operate, and that for a variety of reasons, which I have analyzed in considerable detail elsewhere,13 it is "good business" to participate in their solution. Indeed, one of the most significant developments on the recent American scene has been the increased public expectations and demands on American business with respect to its role in the society, the increased involvement of the large public

10 Schwartz, supra note 9, at 421 & n.2; N.Y. Times, May 22, 1970, at 18, col. 8.
11 As Mr. Dan Lufkin has put it: "In almost every sphere of social concern, the corporation which is so bright and capable in its field of technical competence, has been sluggish, inept and unresponsive." Address by Dan W. Lufkin, Is the Corporation Dead?, to the Connecticut Council of the New England Council, Sept. 22, 1970.
corporation in social problem solving, and the widespread emergence, both among businessmen generally and among the critics of business, of a changing concept of business objectives, reflecting the changing values of a society in transition.

With the encouragement of government, major American business is widely involved in efforts directed toward solution of the major social problems of the times. Business participation in the area of urban problems, poverty, race relations, environmental problems, as well as in the more traditional philanthropic areas of aid to education, science, and local and national charities, has become a commonplace aspect of business operations. A simple overriding objective to make money for shareholders is increasingly being replaced by affirmations of businessmen that their basic role is to serve society as well as to make money. Businessmen—prominent and powerful—are increasingly speaking in such terms. One may inquire whether the felicitous rhetoric is intended to serve more a public relations function than an accurate definition of corporate priorities. The vital significance of such statements is that the object of service to the society which such business spokesmen are applying to business will inevitably become the objective which the public will first accept as an appropriate role for business, subsequently come to expect, and ultimately demand. Having encouraged the public to expect that service to society accompanies and may even transcend the pursuit of profit, businessmen will find that the public will increasingly demand that business perform in accordance with the new business ethic, enunciated not merely by social reformers, but by business leaders themselves.

Common factors thus create pressures both for corporate social responsibility and the politicalization of the corporation. This does not mean, however, that if business ignored the public acceptance-expectation-demand process, and refused to involve itself in the solution of social problems, the pressures for politicalization would disappear. Quite the contrary. If there is any factor that is contributing strength to the position of management in resisting efforts to politicize the corporation, it is the ability to point to a record, albeit limited, of social participation. Thus, the first response of General Motors to Campaign GM Round I was the distribution of a 22-page booklet setting forth the activities of General Motors in the very areas it was accused of ignoring. Business' best answer is its sensitivity and

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14 Statements made by the Chairmen of the Boards of two of America's largest corporations are indicative: B.R. Dorsey, Chairman of Gulf Oil Corp., in an address to the Pittsburgh chapter of the National Association of Accountants: "Today, maximum financial gain, the historical number one objective, is forced into second place whenever it conflicts with the well being of society," Bus. & Soc'y, Aug. 25, 1970, at 5, and J.M. Roche, Chairman of General Motors Corp.: "This corporation and every other must serve the society in which it operates. GM responds to society's expectations." General Motors Corp., Progress in Areas of Public Concern 33 (Feb. 1971); Time, July 20, 1970, at 62-68.
15 See Blumberg, supra note 13, at 206.
response to society's needs and demands, not the pretense, which even
Professor Milton Friedman no longer shares, that the conduct of business
can reflect only short-run economic objectives.\textsuperscript{17} Reduction of social par-
ticipation would certainly result in a strengthening, not a weakening of
the politicalization movement.

C. The Lack of Accountability of Management

Increased public concern with the activities and objectives of business
also arises from the fundamental organic problem of the large public cor-
poration—the essential lack of accountability of corporate management
resulting from the widespread distribution of stock ownership and the
effective separation of ownership from control.\textsuperscript{18}

The recognition that for practical purposes boards of directors are self-
perpetuating trustees, only theoretically responsible to shareholders who
are not in a position to assert effectively the control allocated to them
under corporate law, has produced at least two major consequences. First,
deep concern has arisen over the legitimacy of corporate power that is not
realistically derived from the consent of the shareholders. This lack of stand-
ing also makes it difficult for management to speak with effectiveness on
behalf of the owners of the enterprise. Second, the theoretical owners, the
shareholders, lacking traditional aspects of control over the subject of their
property interests, have typically become temporary investors, strongly in-
clined, in the face of problems, to sell their shares.

It is recognized that there are some offsetting factors which provide outer
limits to management's lack of accountability. The threat of take-overs,
shareholder dissatisfaction with unfavorable market action of the shares,\textsuperscript{19}
and possible future participation in corporate decision-making by large
institutional investors may provide a limited safety valve in the system.
These, however, are not particularly effective or significant, leaving the basic
limitations on the power of management self-imposed.

Accountability by management to shareholders would clearly not end
the matter, but lack of accountability to shareholders or anyone else,
renders even more troublesome an already difficult problem.

D. The Concentration of Corporate Economic Power

A further factor is the concentration of enormous economic power in
the major corporations. In 1970, the 500 largest industrial corporations

\textsuperscript{17} After starting with a position years ago that corporate social responsibility was a
dangerous, even "subversive," concept, interfering with the optimum allocation of re-
sources through the market mechanism, M. Friedman, Capitalism and Freedom 13 (1962),
Professor Friedman has come to recognize that public attitudes shape the climate in which
business must operate, that good public relations may require such participation in the
solution of social problems or the support of philanthropic activities, and that the
resulting good will may justify the expenditure. Friedman, The Social Responsibility of

\textsuperscript{18} A. Berle & G. Means, The Modern Corporation and Private Property 47-118 (1932).

\textsuperscript{19} See Manne, The "Higher Criticism" of the Modern Corporation, 62 Colum. L. Rev.
represented approximately 65 percent of the total sales and 74 percent of the total net profits of all industrial companies in the country. Large business has become so powerful in the society that it is not realistic for persons concerned with social change to consider programs which do not involve either business participation or a change in business objectives. The combination of great economic power and a management that is essentially unaccountable to shareholders has made the large public corporation particularly vulnerable; it is a major social force subject to insufficient external controls.

E. The Communications Revolution

The technological revolution in communications is of major importance. With the development of television, activities which in the past might have remained obscure today achieve national and even international prominence. The media now provides instant publicity for "confrontation" politics or "corporate guerrilla" activities. Public exposure is not only essential for such tactics, but it is a particularly effective weapon against business, which regards good public relations as an area of fundamental importance, and to which a "bad press" is a matter of deep concern. Publicity is a primary objective of the activists, and one that is readily attained.

F. Lack of Responsiveness of the Political System

Political institutions of the society have not proved sufficiently responsive, and they have successfully resisted, in many aspects, the impact of social reform groups. Persons disappointed with the inability of left-of-center forces to develop a major voice in party machinery and in the electoral process generally have been influenced to turn elsewhere. As the result of the search for a more vulnerable target, the corporation, rather than the political structure, has increasingly become the recipient of the political goals and pressures of various youth, anti-war, anti-pollution, anti-racist and consumer-oriented organizations.

20 Fortune, May 1971, at 170-71.
21 See p. 430 supra.
22 How has the corporate system, nevertheless, maintained public acceptance? A variety of factors have been responsible. The superb success of the American industrial system in increasing employment to 78.6 million jobs, Wall St. Journal, Mar. 1, 1971, at 1, col. 7, and in contributing to a gross national product in excess of $1,000 billion dollars, an increasing sense of professionalism on the part of corporate managers, a sense of trusteeship on the part of many public directors, an apparent responsiveness to public opinion, federal corporate law requirements for full disclosure in the issuance of securities and limiting "insider" and "short-swing" trading, and the salutary provisions of the New York Stock Exchange protecting the position of shareholders in listed companies beyond the requirements of state and federal law. See N.Y. Stock Exch., Listing Procedure 43-48 (Jan. 1970); J. Livingston, The American Stockholder 178-95 (1958); Schneider & Manko, Going Public—Practice, Procedure and Consequences, 15 Vill. L. Rev. 283 (1970), these had all contributed, until very recently, to a general public acceptance that major reform of the corporation was not necessary.
23 See Henderson, supra note 9, at 618.
24 At a conference of social activists held at Carnegie-Mellon University in April 1970, the keynote speaker, Professor Staughton Lynd, summarized: "Our inevitable enemy in
G. Changing Values

Changing views of the nature and role of the corporation are also unquestionably derived from changing personal and social values, particularly among younger people. Hostility by many young people to the large corporations, and to the values which they represent is a well-known development. It is reflected in the increased difficulties in attracting qualified persons to business and in the changing attitudes toward big business, found even in such unlikely groups as business administration students.

It is thus not an accident that most of the persons active in Campaign GM and other campaigns for politicalization of the corporation are surprisingly young, or that the General Motors 1970 Annual Meeting was described by Business Week as follows: "But it was youth, effectively organized by Campaign GM, that held the attention."25

H. Development of a Socially Oriented Shareholder Power Base

The large corporation has developed a number of different shareholder constituencies,26 providing a responsive audience to pressures for social reform. In recent years, there has been a tremendous accumulation of stock ownership by non-profit institutions—churches, foundations and universities27—which, by their nature, are particularly sensitive to social issues and non-economic values. There has been a similar accumulation of stock ownership by other institutional investors—retirement funds, mutual funds and insurance companies, and the trust departments of banks and trust companies28—who are becoming increasingly aware of changing concepts in the nature of their responsibilities in voting their shares. Finally, the widespread diversification of stock ownership among 31.9 million Americans,29 most of whom have a very small economic interest in the companies in which they hold shares,30 clearly embraces many individuals who will be ready to respond to social appeals. In the aggregate, the foregoing groups present a formidable base of potential support for movements seeking to change the emphasis of corporate objectives and priorities.

III. The Nature of the Corporate Political Struggle

Because of the primary importance of the business institution in American society, the normal operations of business at home and abroad neces-
sarily involve it in issues that may be regarded as possessing qualities that rise above the purely economic and that to many possess moral or political significance. Business is thus asked to participate in certain activities, or to refrain from others, because of the alleged morality or immorality of the conduct involved or because of its significance to the local community, the nation or the international society. The objectives of these demands reflect the social and environmental crisis: elimination of pollution, more effective hiring and promotion for minority groups, operation or financing of business in the Union of South Africa, in colonial areas such as Portuguese Africa or in Communist countries, the manufacture of napalm and other anti-personnel weapons for use in Indochina, product safety and minority-group representation on the boards of directors.

The tactics of the proponents of these demands are intended to attract public attention and provoke public debate; it is an effort to arouse public interest to a level of intensity that will force corporate management to respond. It is a battle for publicity, waged primarily in the communications media, to influence the state of mind of citizens generally. The corporate electoral process, in and of itself, is not decisive. It does, however, have a basic usefulness; it provides a platform for public presentation of the point of view of the protesting group, a device for obtaining public exposure and a medium for involvement of interested persons. Thus, the Social Criteria Committee of the Episcopal Church, in recommending the "use of proxies to raise particular social and ecological issues," acknowledged that:

[n]o small part of our purpose is to raise some vital issues and bring them into the forum of public opinion. More important than the percentage of the vote won in any proxy solicitation is the raising of these questions to the level of public debate.

A basic difficulty of many of the social reform proposals is that they have been made to attract public attention to social problems and have little relation to the advancement of the economic interests of the corporation or its shareholders. Further, they have on occasion been made by groups who have become stockholders solely for the purpose of raising the issue. For example, the Project for Corporate Responsibility became the beneficial holder of twelve shares of General Motors on January 29, 1970 in order to have standing to launch Campaign GM Round I with its proposals for the May 1970 Annual Meeting. Similarly, the Medical Committee for Human Rights purchased five shares of Dow Chemical in order to raise the napalm issue.

81 Mr. Saul Alinsky looks to middle-class stockholders, rather than churches, foundations and universities, as the primary base of support for his new organization for reform of the corporation, Proxies for People. Interview with Saul Alinsky, Proxies for People: A Vehicle for Involvement, 1 Yale Rev. Law & Social Action 64, 67 (Spring 1971).


84 Dow Chemical Company notes that the Medical Committee for Human Rights, which
IV. Changes in the Organic Structure of the Corporation

The demands of the corporate activists have not been confined to the role of the corporation in society. They have also been directed toward radical change in the organic structure of the corporation itself. Thus, the original demand for a shareholders' committee for corporate responsibility in Campaign GM Round I has been followed by similar proposals to du Pont, Honeywell and Phelps Dodge, and by shareholder proposals calling for broadening the board to include representation of special interest groups—employees, consumers, suppliers, dealers or the public generally—or otherwise changing board selection, to American Telephone and Telegraph Co., Gulf Oil and Honeywell as well as in Campaign GM Round II. This aspect of the corporate political struggle is rapidly becoming increasingly important.

Earlier in the year, Mr. Ralph Nader called for what he termed the "popularization" of the corporation. He suggested that in the large corporation, five of twenty directors should be elected directly by the public at large in a national election, and the remaining fifteen should be elected

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proposed a resolution pertaining to amendment of the Dow certificate of incorporation to prohibit the making of napalm, bought five shares of Dow stock two years after Dow's manufacture of napalm became a matter of common knowledge. Dow Chemical Co., Proxy Statement 10 (Mar. 16, 1971).

The Dow Chemical issue is perhaps the most celebrated confrontation of its kind. It is of interest that the proposal of the Medical Committee for Human Rights with respect to prohibiting the making of napalm received less than 3% of the votes cast at the 1971 meeting. N.Y. Times, May 6, 1971, at 65, col. 2.

Another example of purchasing shares to acquire standing is the Domestic and Foreign Missionary Society of the Protestant Episcopal Church, which purchased ten shares of American Metal Climax, Inc. on Jan. 26, 1971 in order to present a proxy proposal and to participate in the May 6, 1971 annual meeting. Proxy Statement of the Domestic and Foreign Missionary Society of the Protestant Episcopal Church for the 1971 Annual Meeting of American Metal Climax, Inc. 2 (Apr. 9, 1971).

The term "activist" has apparently become respectable. Thus, John D. Harper, Chairman of the Aluminum Company of America, in addressing the annual meeting stated: "Your management accepts for Alcoa the role of social and environmental activist in the very best sense of that term—in the sense of effecting desirable change." Alcoa, First Quarter Statement 4 (Apr. 29, 1971).

The Wall Street Journal notes that the objectives of the protesting groups have shifted to a "more fundamental attack on the structure of the corporation itself." Wall St. Journal, Mar. 26, 1971, at 4, col. 3.


Mr. James Roche, Chairman of the Board of General Motors, has viewed such proposals as attacks on the "free enterprise system." Wall St. Journal, Mar. 1971, at 4, col. 3. A commentary in the New York Times, however, did not take these proposals seriously, Bender, Universities' Corporate Voice, N.Y. Times, Apr. 4, 1971, § 3, at 1, col. 6, stating that the Campaign GM Round II "proposal [of this nature] . . . [was] widely regarded as a throwaway." Id. at 14, col. 4.
by shareholders under a proxy system that would permit the submission of management and opposition slates in a single corporate solicitation at corporate expense. He suggested accomplishment of this change through the mechanism of a federal incorporation statute, which would supersede, at least for large public corporations, the corporation laws of the various states.48

V. CAMPAIGN GM ROUND I

Campaign GM Round I represents the decisive event in the politicalization of the corporation.47 With proposals that it considered only “symbolic,” and with an objective that was essentially political, it must be regarded as a considerable success. It dramatized once and for all the potentialities of what its counsel later described as the “public interest proxy contest.”48 Further, it shattered for all time the pattern of institutional neutrality under which the institutional shareholder, particularly the non-profit institution, automatically voted its shares for management.49 As a result of Campaign GM, American corporate electoral processes have become fundamentally changed.

The significance of Campaign GM is clearly not the actual result of the balloting on the Campaign GM proposals at the 1970 Annual Meeting of General Motors.50 The war was essentially won at a very early stage in the contest when the Securities and Exchange Commission required inclusion of the two Campaign GM proposals in the General Motors proxy statement,51 and this action became front-page news in the New York Times.52 In addition, the continuing publicity that resulted as numerous prominent institutions issued newsworthy, publicity-yielding explanations of their position on these Campaign GM proposals53 consolidated the triumph.

The fruits of Campaign GM Round I can be summarized as follows:

(1) Prior to the Annual Meeting, General Motors felt obliged to respond to the Campaign GM proposals with the distribution to its more than 1,300,000 shareholders of record and its many additional beneficial holders of a 22-page pamphlet54 describing General Motors “Record of Progress”

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40 N.Y. Times, Jan. 24, 1971, § 3, at 1, col. 3.
47 A comprehensive review of Campaign GM Round I by its counsel appears in Schwartz, supra note 9.
48 Id.
50 Only 7.19% of General Motors shareholders holding 2.73% of the outstanding shares voted in favor of the proposal to elect a shareholders' committee for corporate responsibility, and only 6.22% of the shareholders holding 2.44% of the outstanding shares voted in favor of the proposal to elect three "public" directors designated by Campaign GM. General Motors Corp., Report of the 62nd General Motors Stockholders Meeting 7-10 (1970).
54 See note 16 supra.
in automotive safety, air pollution control, mass transit, plant safety and social welfare, as well as full-page advertisements in 150 newspapers further defending its record on air pollution.55

(2) An appropriate interval after the Annual Meeting, General Motors designated five of its public directors as a Public Policy Committee to advise it on the environmental and social impact of its operations.56

(3) In January 1971, the General Motors Board elected Dr. Leon H. Sullivan as its first black director.57

(4) In February 1971, General Motors appointed a prominent authority on air pollution, Professor Ernest S. Starkman of the University of California, as a vice-president in charge of environmental activities.58

(5) Later in February 1971, General Motors announced that it had obtained the services of a group of six distinguished American scientists headed by Nobel laureate Charles H. Townes, and including former presidential science advisor Dr. Lee A. DuBridge, to advise it on technological and scientific matters, “including in particular the effects of General Motors’ operations and products upon the environment.”59

(6) In March 1971, General Motors appointed a black, Abraham S. Venable, as director of urban affairs.60

(7) Later in March 1971, General Motors distributed to all shareholders a 49-page brochure61 reporting in detail on a conference held “for a group of prominent educators and representatives of foundations and investment institutions . . . to explain the progress General Motors has made in a number of areas of public concern . . . .”62 In concluding this meeting, General Motors Vice-Chairman Richard C. Gerstenberg stated:

This whole meeting was concerned with the need we at General Motors recognize to do better—to build even safer cars, to clean up the environment, to promote minority opportunity, to work for better mass transportation, to do all that is expected of us.

We are determined to do all these things—not only to benefit our customers, not only to benefit our stockholders—but to benefit the whole of society . . . . It is a job we take most seriously.63

Perhaps some of these developments would have occurred in any case, but one is permitted a certain degree of skepticism. In brief, the foregoing represents a series of remarkable developments arising after the conduct of

55 See Schwartz, supra note 9, at 428.
57 N.Y. Times, Jan. 5, 1971, at 49, col. 5. This action is a refreshing contrast to the incident that the Wall Street Journal described as the “most dramatic episode” at the 1970 Annual Meeting. When a black woman law student inquired why General Motors had no black directors, Chairman Roche’s only explanation was: “Because none have been elected.” Wall St. Journal, May 25, 1970, at 4, col. 3.
58 Bus. Week, Feb. 6, 1971, at 80.
60 Wall St. Journal, Mar. 18, 1971, at 9, col. 2.
61 General Motors Corp., Progress in Areas of Public Concern (Feb. 1971).
62 Id. at 1.
63 Id. at 48.
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Campaign GM Round I by a group of a few young people holding only twelve shares of General Motors out of the more than 286,000,000 shares outstanding. It also represents a vigorous and imaginative response by General Motors to the political situation confronting it. Unquestionably, these developments played a significant part in the lower percentage of votes cast for the proposals in Campaign GM Round II.64

The critical aspect of Campaign GM Round I which must be emphasized is the nature of the appeal that was made. The appeal was to the shareholder as a citizen, not as a shareholder. It was an appeal based on what was alleged to be good for the country, not on what was good for General Motors, as well as a frank recognition that what was good for the country might not be good for General Motors, at least in the short run, and perhaps not even in the long run. It contended that the shareholder's interest as a citizen in the underlying social problems transcended his interest as a shareholder in General Motors, and that he should vote as citizen, not as shareholder.

Finally, Campaign GM represented the view that the decision on social reform proposals should not be made solely by shareholders and that "the [non-shareholder] public should be part of the decision-making process."65 Such a view highlights the far-reaching impact of the public-interest proxy movement.

VI. THE POLITICAL ASPECTS OF THE MAJOR CORPORATIONS

The separation of ownership and control has come full circle in the giant corporation. The dispersion and fragmentation of ownership has created a self-perpetuating board of directors that is essentially not accountable to the owners of the enterprise. It has also created a widespread enfranchised constituency,66 whose members typically have an economic stake with less significance than their economic stake in the outcome of contests in the traditional political arena,67 and whose reactions, in significant measure, may reflect public and social considerations rather than the economic ob-

64 The vote on the Campaign GM Round II proposals were as follows:
   (a) the proposal to permit nomination of directors by 100 shareholders or the holders of 1,500 shares and their inclusion in the corporate proxy solicitation along with the management slate: yes—1.36%, no—98.64%.
   (b) the proposal to permit nomination of one director each by constituencies consisting of employees, dealers and consumers acting on the basis of one vote per person, with election by a majority of the shareholders: yes—1.11%, no—98.89%.
   (c) the proposal calling for additional disclosure in the annual report of data with respect to minority employment, pollution and safety: yes—2.36%, no—97.64%.


These results compare with 2.44% and 2.73% of the shares in favor of the Campaign GM Round I proposals. See note 50 supra.

65 Schwartz, supra note 9, at 485.

66 For example, General Motors' approximately 286 million shares are distributed among more than 1.3 million shareholders of record and many more beneficial shareholders. General Motors Corp., Annual Report 1970, 25, 34-35.

67 Of the General Motors' shareholders 42% own 25 shares or less and 79% own 100 shares or less. Id. at 25.
jectives of the business. Further, the constituency represents a cross section of the nation and, in addition, is so numerous that events relating to the corporate electoral processes become major news items in the communications media.

The corporate electoral process is thus ripe for politicalization, at least in the very large corporation. This should be no surprise. From many points of view large corporations can be regarded as political or quasi-governmental institutions. General Motors is the prime example. With total revenues of $48.6 billion, with 793,924 employees economically dependent on it with annual wages of almost $7 billion, and with an international production of 7.16 million cars and trucks in 1969, the decision of General Motors with respect to capital investment, plant locations and closings, employment, price and wage policies represents actions of vast implications for the countries, communities and individuals involved. The concentration in the major industrial companies of such formidable economic power, affecting so many persons and communities, has been described by observers as constituting private governments, and it has been suggested that constitutional concepts developed with respect to traditional governmental processes might well be extended to the leviathans of industry.

There is no need to go so far in this discussion. It need only be noted that the politicalization of the corporation, especially where its policies have become the subject of spirited controversies involving social or moral considerations, rather than economic implications for the corporation, is entirely in keeping with the view of the giant corporation as a private government.

VII. THE ELECTORATE OF THE NEW CORPORATE POLITICS

The electorate of the new corporate politics provides a solid base of potential support for the forces of social reform.

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68 General Motors is the largest industrial corporation, Fortune, May 1971, at 172, and there are not many companies whose operations are comparable. On the other hand, it is the example par excellence of very large American public corporations which, with respect to far-reaching social and political implications of their decisions, differ among themselves in degree, but not in kind.


71 Id.


A. Institutional Investors

Institutional investors now hold an increasing proportion of the outstanding equity securities of the major American corporations. As of the end of 1970, the New York Stock Exchange estimated that $161.9 billion, or 25.4 percent of all equity securities of companies listed on the exchange, were held by institutions. The Patman Committee estimated that in 1967 the trust departments of commercial banks held a total of $167 billion of equity securities; this estimate, however, included all equity shares, not merely those listed on the New York Stock Exchange.

The tradition, until recently, has been strongly against active participation by institutional holders in the affairs of the companies whose shares are held in the institutional portfolio. Although there have been some recent signs of a change in attitude on the part of some funds, generally speaking, institutions are still either prepared to support management or dispose of their holdings.

There are a number of factors that are critical in a review of the impact of moral or social considerations upon the policies of institutional investors. The first factor is the context in which the investment decision is made. This depends on the precise question for decision by the institutional investor. Whether it is a question of the policy for new investments, the sale of existing investments, or the voting of shares on social reform proposals contained in a proxy solicitation or some other participation in the corporation decision-making process, may alter the quality of the decision.

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74 The following is the Exchange breakdown of institutional holdings:

- Pension Funds (public and private): 59.7 billion or 9.3%
- Investment Companies: 43.8 billion or 6.8%
- Non-Profit Institutions (universities and foundations): 30.2 billion or 4.7%
- Insurance Companies: 23.1 billion or 3.6%
- Common Trust Funds: 4.2 billion or 0.6%

With unregistered mutual funds, investment partnerships, non-bank trusts and foreign institutions included, the Exchange estimated that the total of all institutional holdings would exceed 40%. Wall St. Journal, Mar. 1, 1971, at 3, col. 4.

75 The House Committee on Banking and Currency.

76 See Time, June 1, 1970, at 55.

Mr. Galston sees this change in attitude and resulting responsibility as dual: to their own beneficiaries and to their fellow stockholders in the corporation, particularly the many small public holders who have no effective voice. Accordingly, he argues that the institutional investor must, it would seem, shed the cloak of the passive equity owner and become . . . alert and active as to voting the stock intelligently at stockholders' meetings, alert and active on . . . issues involving large scale participation of corporate efforts and funds in community affairs.

He continues

In this way, the institutional investor is carrying out its fiduciary responsibilities to its beneficiaries and also playing the role of the responsible stockholder among all other public stockholders of the corporation. Why isn't this a healthy program for commerce and industry?

Another factor is whether a specific social proposal will involve any appreciable economic loss to the corporation and its shareholders. In the absence of economic loss for the corporation, and therefore of any adverse economic impact on the fiduciary's investment in the corporation, the problem facing the institutional fiduciary is significantly changed; the fiduciary's concern with its obligation to maximize return is no longer relevant. The absence of any direct corporate loss in a proposal increases the possibility of institutional support.\(^7\)

The size of the institutional holding may also be of importance. Mr. David Rockefeller, a decade ago, suggested that as the size of funds of institutional holdings in particular companies increases, the problems of liquidation of a substantial holding may be so severe as to deter management from selling and thereby force it to be more demanding of corporate management.\(^8\) In noting this development, Mr. Clarence Galston properly observes that if "the institution is locked into an investment, it would seem expedient, and perhaps mandatory, that it exercise judgment on significant corporate issues."\(^8\)

Finally the type of institutional investor is of significance. Is the institution organized for profit or is it a non-profit organization? If non-profit, what are the objectives of the institution?

\(^7\) Many of the social reform proposals included in the corporate proxy statements of companies such as General Motors, General Motors Corp., Proxy Statement 16-19 (Apr. 6, 1970), Gulf, Gulf Oil Corp., Proxy Statement 6-11 (Mar. 25, 1971), duPont, E.I. duPont de Nemours & Co., Proxy Statement 10-11 (Mar. 12, 1971), American Telephone and Telegraph, American Tel. & Tel. Co., Proxy Statement 12-13 (Mar. 3, 1971), and Honeywell, Inc., see supra note 39, would have involved no material cost to the corporation. For the most part they related to the organic structure of the corporation, proposing changes in the composition of the Board of Directors to include representatives of such groups as employees, dealers, consumers, minorities, the public and even investment bankers, or persons "with expertise in the areas of consumer protection, ecology, and the principles of economic conversion." Honeywell, Inc., Proxy Statement 8 (Apr. 2, 1971). Other proposals involved establishment of shareholders' committees for corporate responsibility, limitation on interlocking directorates, disclosure and review of operations. Similarly, the three Campaign GM Round II proposals would have involved no economic loss. Two related to the organic structure of the corporation involving the election of directors and the third pertained to increased disclosure. See note 64 supra.

Some of the social reform proposals in the 1971 proxy statements would, however, produce significant loss to the corporation. These include the Presbyterian Church resolutions to amend the certificate of incorporation of Gulf to exclude investment in colonial areas and the Episcopal Church's resolution to amend the certificate of incorporation of General Motors to end manufacturing in South Africa, and its American Metal Climax and Kennecott Copper resolutions that the companies not enter into new mining ventures unless they pay compensation for environmental damage. Proxy Statement of the Domestic and Foreign Missionary Society of the Protestant Episcopal Church for the 1971 Annual Meeting of American Metal Climax, Inc. 4 (Apr. 9, 1971); Proxy Statement of the Domestic and Foreign Missionary Society of the Protestant Episcopal Church for the 1971 Annual Meeting of Kennecott Copper Corp. 4 (Apr. 9, 1971).


1. The Non-Profit Institutional Investor

Large non-profit institutional holders provide a major base of support for social reform proposals. With continuing inflation, traditional concepts of trust investments have changed, and churches, universities and foundations have invested substantial portions of their portfolios in common stocks. Churches, universities and foundations, with leadership and constituencies possessing objectives and values quite different from those of business, are particularly sensitive to proposals for social reform. It is safe to predict that now, and in the future, they will find it even more difficult not to play a leading role in the campaign for transformation of the objectives of the large public corporation.

(a) Churches and Foundations. Achievement of social progress, rather than maximization of economic return on investments, may readily be regarded as a fulfillment of the objectives of churches and foundations. This is particularly true of those church denominations that have adopted aggressive social action as a major institutional objective. A possible loss of income or decrease in market value of a limited portion of its portfolio may be regarded as an insignificant price to pay for immediate association with a social movement of considerable appeal to both the leadership and the membership of the church.

Until recently, church interest in corporate activities, at least on the public level, was restricted to isolated incidents. Several years ago, for example, the Methodist Board of Missions transferred management of its $10 million investment portfolio from the First National City Bank because of the Bank's continued participation in a banking consortium providing financing to the Government of South Africa. Similarly, other church groups, including the United Church of Christ, United Presbyterian Church and the Episcopal Church, were ready to bring economic pressure on the banks participating in the consortium. In addition, the women's division of the Methodist Board of Missions sold its Dow Chemical shares, having a value of $400,000, in protest over the napalm issue. Church groups also supported FIGHT in its struggle with Eastman Kodak over black employment.

Even as recently as last year, church activity was limited. The sponsors of Campaign GM Round I could identify only a few church groups, holding an aggregate of 11,000 shares, among their supporters. This is a surprisingly poor showing, although some unidentified church groups may also have supported the Campaign.

84 Time, Feb. 15, 1971, at 57.
86 Project on Corporate Responsibility, Campaign GM Scorecard 1.
Since then, a major increase in church activity to influence corporate policy has taken place. In fact, churches have now pushed to the forefront of the corporate activists: 87

(1) Four resolutions presented by the Southern Africa Task Force of the United Presbyterian Church appeared in the Gulf Oil proxy statement for consideration at the April 27, 1971 annual meeting. These called for establishment of a committee to review Gulf's operations in Africa, amendment of Gulf's charter to exclude investment in colonial areas, disclosure of corporate charitable contributions and the increase of the Gulf Board to include consumer, dealer and public representatives. 88

(2) While the United Presbyterian Church as shareholder worked within the Gulf corporate machinery, two agencies of the United Church of Christ—the Council of Christian Social Action and the Ohio Conference—urged a consumer boycott of Gulf because of its operations in Angola. These church agencies "excoriated" Gulf's activities as supporting Portuguese colonialism in Africa and providing support for the suppression of African national liberation movements. In response, Gulf is reported to have threatened to sue the Ohio Conference for defamation. 89

(3) Six major Protestant denominations, holding 60,000 shares of American Metal Climax, Inc. and 143,000 shares of Kennecott Copper Corporation, asked the two companies to postpone a proposed copper mining venture in Puerto Rico until safeguards had been established to protect the economic, social and ecological future of the island. 90 The church groups, although holding shares with a market value then in excess of $7,000,000 in the two mining companies, are not seeking to determine what is beneficial to the companies, to themselves or to their fellow shareholders, either in the short run, or in the long run. They are looking at the problem in terms of what is desirable for the people of Puerto Rico; they are speaking as members of the larger society. In this connection, it is worth noting that approval of the project by the Puerto Rican government is not regarded


The Episcopal Bishop of Puerto Rico, holding one share of stock, submitted a resolution to the same effect for consideration at the annual meetings of the two companies. Letter of Episcopal Bishop of Puerto Rico, Francisco Reus-Froylan, to Frank R. Milliken, President of Kennecott Copper Corp., Feb. 4, 1971; American Metal Climax, Inc., Report of the Annual Meeting of Shareholders 14-15 (May 6, 1971). The resolution, however, was not included in either corporate proxy statement.
by the church groups as providing sufficient representation or protection of Puerto Rican interests.91 Furthermore, the Presiding Bishop of the Episcopal Church submitted two additional resolutions for the annual meetings of the two companies, relating to payment of compensation for environmental damage generally and to disclosure of the steps taken to guard against such damage.92 Both resolutions were included in the American Metal Climax, Inc. proxy statement,93 and the latter resolution was included in the Kennecott Copper proxy statement.94

(4) The Episcopal Church, holding 12,574 shares of General Motors stock, offered a resolution for consideration at the General Motors Annual Meeting on May 21, 1971, calling for amendment of the certificate of incorporation to require the company to cease manufacturing in South Africa.95 Numerous other church groups have attacked American business operations in South Africa because of the country's racial policies, although at least one distinguished liberal churchman has contended that the operations of American business in South Africa are probably working for the long-term benefit of the black population.96

The activity of the churches is not simply related to their appraisal of their own responsibilities in voting shares already held. For example, the Southern Africa Task Force of the United Presbyterian Church has gone further and urged the church's boards, agencies and institutions to go out and purchase additional Gulf shares to provide additional support for the Church proposals. Two other agencies of the United Presbyterian Church—the Council on Church and Race and the Council on Church and Society—concurred in this recommendation.97 In addition, the church retained the Project for Corporate Responsibility, which was responsible for Campaign GM, to run a "major proxy solicitation and educational effort."98 With all

this, the results obtained at the shareholders' meeting were surprisingly poor.99

Thus, at the 1971 annual meetings various church groups proposed resolutions relating to social or political questions for consideration at the annual meetings of four major corporations: American Metal Climax, General Motors, Gulf Oil and Kennecott Copper. This is unprecedented in American corporate history. It seems only realistic to expect that utilization of the corporate electoral machinery to advance the social concerns of church groups will increase in the future and add further impetus to the introduction of political and social considerations into corporate decisions.

In addition to their great prestige, church groups control substantial funds and can exert considerable economic influence.100 Thus some church groups are "evaluating [their] portfolios in terms of such matters as racial and economic justice, peace and world development"101 or have accepted "the 'responsibility . . . to utilize in a strategic way its economic power'" to achieve social action.102 The Executive Council of the United Church of Christ, for example, has adopted a recommendation to invest "a substantial portion, not less than ten percent" of its unrestricted funds in "high-risk and low-return" investments that will achieve "maximum social impact."103 Such financial power and the moral influence of the church groups clearly represent major factors influencing the climate of opinion in which corporate management must operate.

The activities of foundations in this area have not been as prominent. The Campaign GM Round I Scorecard shows only two foundations, holding a total of 7,830 General Motors shares, in favor of the Campaign GM proposals.104 There is no reason to suppose, however, that the concern of foundations with the interrelation of their investment policies with philanthropic activities, with the voting of their shares, and with social reform proposals will not increase, along with the increasing concern of churches and universities.105

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99 The proposals received less than 2% of the votes cast. Bus. Week, May 1, 1971, at 21; N.Y. Times, Apr. 28, 1971, at 63, col. 6.

100 A church task force has estimated that perhaps 4 billion dollars of current investments might be changed to reflect the "stated social and public policy" views of the churches. N.Y. Times, Feb. 2, 1971, at 1, col. 7.


103 United Church of Christ Report at 51.

At the same time, the church group expressed the opinion that personal influence on corporate management as a result of conference and discussion was more useful than participation in stockholder meetings. Id. at 43.

104 Project for Corporate Responsibility, Campaign GM Scorecard 4. The Rockefeller and Carnegie Foundations voted with management, but with reservations. Id. It is also known that a number of foundations are providing financial support for so-called public interest groups active in promoting the recognition of social and moral factors in the conduct of corporate affairs. Bus. & Soc'y, Jan. 7, 1971, at 4; Bus. Week, May 30, 1970, at 84; id., Apr. 17, 1971, at 42; Time, May 3, 1971, at 84.

105 Thus, the Ford Foundation announced in February that it is conducting a comprehensive review of its policies and responsibilities in this area. Bus. Week, Feb. 13, 1971, at 29.
THE POLITICALIZATION OF THE CORPORATION

(b) Universities. Educational institutions are another powerful source of potential support for political and social demands on corporations. The constituents of these institutions, particularly students, are articulate, alert to public issues and ready to identify with the objectives of social reform. In Campaign GM Round I, for example, they responded in large numbers to the appeal of the movement.

Within the universities, the supporters of social protest typically lack any real participation in the decision-making process. This creates at least two forces that are brought to bear to influence institutional decisions. First, those interested in reallocation of power within the university have found campaigns to force the university trustees to vote against management on issues of social reform a useful device. Their target is the university structure, with social issues serving as rallying points, rather than as major ends in themselves. Second, neither the students, the faculty at large nor alumni have any immediate responsibility for the financial conduct of the university, and consequently are insensitive to the significance of the possible economic impact of the decision on the institution or of the pressure to squeeze the maximum return out of endowments. The issue is presented as a political question affecting the American society generally and is so received and evaluated by the constituents of the university, who respond to the political appeal on the political level.

This was reflected in Campaign GM Round I. The details of its proposals, their relation to the fulfillment of the objectives of General Motors, their impact on General Motors and on its shareholders, and their relationship to the financial posture of the university received little consideration in the discussions of students and faculty. They were essentially irrelevant in terms of the political considerations that were involved. As previously noted, the objective of the campaign was “symbolic.”

In significant part as a response to student pressure, twelve colleges and universities, including Amherst, Antioch, Boston University, Brown, Lincoln, Iowa State, Oregon and Tufts, holding approximately 65,000 shares, voted in favor of one or both Campaign GM proposals, and five others, Rockefeller, Stanford, Swarthmore, Williams and Yale, holding approximately 196,000 shares, abstained. Further, other distinguished universities, including Harvard, Dartmouth and Pennsylvania, although voting with management in opposition to the proposals, made clear their concern with the limited nature of General Motors’ response to the social crisis, and

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106 It has been pointed out that for students “the University is the most accessible and vulnerable institution subject to pressure in support of social needs . . . .” Harvard Committee on Governance, Harvard and Money—A Memorandum on Issues and Choices 24 (1970).
107 As will be seen, see p. 446 infra, the report of the Harvard Committee reviewing the problem emphasized the importance to the university of maximizing return.
108 See p. 435 supra.
109 Project for Corporate Responsibility, Campaign GM Scorecard 1.
110 Id. at 9.
served warning that their support of management should not be assumed in the future.\footnote{For a better glimpse of the impact of public opinion, it is worth noting that although the Harvard Corporation voted its 287,000 shares in favor of management with an admonition about the future, the Harvard student body and the Harvard Faculty of Arts and Sciences strongly approved, and in a poll conducted by the Harvard Alumni Bulletin, the Harvard alumni by a vote of 4-3 supported the Campaign GM proposals. Project for Corporate Responsibility, Campaign GM Scorecard 3.}

In view of the intensity of student and faculty pressure, the universities' problems in this area are of serious proportions. This is well recognized by university administrators at Harvard, Yale, Princeton, Pennsylvania and elsewhere. During the period 1969-1970, at the request of the President and members of the Finance Committee of the Yale Corporation, and with the financial support of the Ford Foundation, a seminar on "Yale's Investments" reviewed in detail the relation of social responsibility and university investments.\footnote{The report of this inquiry has not yet been publicly released.} In October 1970, the presidents and other senior representatives of many prominent colleges and universities met under the auspices of the Taconic Foundation to consider the draft Yale report, to review the general problems presented by the demand for social or political utilization of the university portfolio and to develop a better understanding of possible solutions.

At Harvard, President Pusey appointed a committee of distinguished scholars, headed by Professor Robert W. Austin, and including Professors Louis Loss and A. James Casner, among others, to advise the university in this area. The report of the Harvard Committee\footnote{Report of the Committee on University Relations with Corporate Enterprise (1971) [hereinafter cited as Harvard Report].} essentially called for initial investment to achieve maximum economic return, excluding only investments presenting moral problems.\footnote{Id. at 2-3.} As examples of investments that might best be avoided, the report listed tobacco stocks,\footnote{Id. at 2.} South African corporations\footnote{Id.} and corporations practicing racial and other discrimination.\footnote{Id.} Where the university was already an investor the Committee concluded that it should not sell its stock, but at the same time it could not remain passive, since abstention in most cases was a vote for management.\footnote{Id. at 3.} The Committee advised that the university—like any other institutional investor:

may properly, and sometimes should, attempt to influence management in directions that are considered to be socially desirable. . . . Certainly the University should vote its stock on occasion in favor of change for the symbolic effect of a great university's taking a position on a social problem.\footnote{Id. at 2-3.} Professors Malkiel and Quandt of Princeton agree that the university must invest for maximum return, should participate, subject to moral limitations, in
In addition, the Committee called for appointment of a non-financial advisor to review social implications of the university's investment policies.\(^2\)

The net effect of the Harvard Committee report is a recognition of the responsibility of the university to review social reform proposals on their merits, and to respond to social values in its dealing with management, without, however, providing any standards to guide the university or its advisor on these matters, other than to observe that the drawing of a policy line is difficult, as indeed it is.

Church groups, investing funds with the income allocated for church purposes, and foundations may have little difficulty in deciding whether to invest funds to achieve "maximum social impact." Investment may well be regarded as a method of achieving church or foundation objectives, which in turn would justify the possible economic costs involved, at least from the point of view of the institution. No such easy resolution of the problem is possible in the case of universities, where educational objectives may not be defined in such terms as will justify the diversion of resources to achieve social programs, at least programs in localities outside of the immediate community in which the university is located.

Where the issue does not involve a proposal to invest institutional funds to achieve social progress, a different issue is presented. Where the proposal is the prohibition of corporate activities that may properly be regarded as involving moral, not merely political, considerations, the institution may not avoid evaluation of the issue on its merits. A decision not to support such a proposal is a moral decision. Fiduciaries, along with common mortals, must observe a moral responsibility for their acts.

This merely postpones the debate one step. What is moral? Does the manufacture of products in South Africa present a moral question? Does the sale, as distinct from the manufacture, of products also present a moral question? What of the manufacture or sale of products in other countries such as Greece, or those of the Communist world? What of the manufacture of anti-personnel weapons or other military equipment for the Department of Defense? Do these present moral questions? There will be areas of agreement, but in many cases, opinions will differ. What then does the university do?

Further, assuming that the investment survives moral scrutiny, what decision does the university make on proposals relating to matters that are, in the language of the Austin Committee at Harvard, "considered to be socially

corporate affairs rather than sell its shares, and cannot avoid social and moral values in the voting of its shares and in other participation in corporate affairs. Malkiel & Quandt, supra note 80.

\(^2\) Harvard Report at 4. The Committee on Financial Investments of the United Church of Christ had earlier reached the same conclusion. United Church of Christ Report at 47. The desirability of some agency to advise on social responsibility for investors, who do not have the time or facility to do so, has also been suggested in the financial community itself. C. Galston, Institutional Investors—Their Role as Stockholders of Portfolio Companies Confronting Environmental and Social Problems, a paper presented to Annual Meeting of Association of American Law Schools, Dec. 28, 1970, at 25; Landau, supra note 80, at 25.
desirable," or on proposals pertaining to the organic structure of the corporation? The issue of whether employee, consumer, supplier or dealer members should be added to the boards of directors of General Motors or Gulf Oil or American Telephone is clearly a political, not a moral, issue. What standards should apply? Through what process and by whom should the decision be made? What sort of administrative apparatus will be required to collect relevant information, to ascertain the views of the educational community and to emerge with a recommendation? What distraction will this create from the basic function of the university? What impact will the proposal have on the economic prospects of the investment? What impact will the university action have on the public?

There are a number of areas of serious concern. First, the university may not be able to function as an educational institution if the educational climate becomes inflamed from being embroiled in continuing debate on issues extraneous to its primary purpose. Second, the symbolic effect of university action with respect to social reform proposals will involve it in public controversy, which conceivably could, in the long run, lead to retaliatory action, including reexamination of its tax-exempt status. Finally, the problem must be set against the background of the overwhelming financial needs of American private universities, where any policy which interferes with maximum return on investments aggravates an already difficult financial posture.

In reviewing the different contexts in which this problem may arise, it is apparent that the major area calling for an institutional response occurs when an issue has been thrust upon the institution because it has been placed on a corporate proxy statement. The university cannot escape a decision. It may vote in favor, or oppose, or abstain, or sell its shares, but a decision of some sort is inevitable. This is in marked contrast to other areas where the university may choose to ignore proposals for greater social involvement. The response to the proxy proposal is entirely different from the suggestion that the university utilize a portion of its endowment to make new investments to achieve social purposes or to encourage socially responsible management. It is also entirely different from the question of when, if ever, may the university itself initiate, either alone or with others, proposals for social reform pertaining to the corporations in which it owns shares.

These are interesting and troubling questions. The university can no longer escape its responsibility in facing up to them. The Austin Committee at Harvard has recognized this responsibility and, in effect, has said that the university must weigh each social reform proposal on the merits in determining its action. The patterns of the past have been shattered. The

121 Harvard Report at 3.
122 See id. at 3-4.
institution can no longer automatically vote its shares for management. This is a decisive contrast to the attitudes of yesteryear. It is a remarkable demonstration of the success of efforts, such as Campaign GM, to change the basic pattern of institutional response. It is a confirmation that politicalization of the corporation has occurred in significant measure and is with us to stay.

(c) Retirement Funds. The foregoing discussion has involved the relation between social proposals and the non-profit institution with respect to the investment of the institution's unrestricted funds. In many cases, however, the non-profit institution holds additional funds—of which retirement funds are a prime example—for the benefit of participants.

In cases where the obligation is to pay a pension in a fixed amount irrespective of the yield of the retirement fund portfolio, the problem in effect becomes merged with the overall financial problems of the institution; provision for pensions is merely one of the items of total expense to be funded by total revenues. In other cases, however, the amount of the pension is measured by the performance of the retirement fund portfolio, with the institution under no obligation to fund any deficiency; in such event, the economic costs of a social proposal, if there be any, are borne by the participants, not by the institution. Whether or not the objectives of the institution will be furthered by a social proposal involving significant cost to the corporation, it will be accomplished at the expense of those interested in the fund.

In the cases where social action involves loss to the corporation, some institutions, such as churches, may be prepared to accept a reduced return on their investment in order to achieve social objectives deemed important to the institution. Is it prepared to take the same action with pension funds if it means a reduction in pensions to participants? Is it prepared to decide the question itself or would it prefer to refer the question to the participants on some sort of "pass-through" voting? Is it prepared to permit a majority of participants to approve an action which conceivably could mean the reduction in pensions of all concerned, including an opposing minority?

The Pension Boards of the United Church of Christ are considering an interesting solution to this dilemma. They are exploring a proposal that their retirement funds be divided into two separate funds. One fund "in accordance with the practices heretofore followed" would seek "to provide the best return over the long run consistent with the preservation of principal." The other would consist of "investments which might be made to maximize social impact" involving "lower yields or greater risk." A

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125 Professors Malkiel and Quandt would permit a majority of the individuals, for whose benefit the fund is operated, to make the decision. Malkiel & Quandt, supra note 80, at 45.


127 United Church of Christ Report at 34 n.10.

128 Id.
participant, with the consent of his employer, would be allowed to allocate "some portion of current contributions"129 for his account to the second fund. The report of the Church discussing this matter states that "[n]o single area of discussion in the Committee deliberations produced wider differences of opinion."130 This comment, as well as the highly restricted nature of the proposal under exploration, confirms that at least this church agency is not prepared to achieve social gain by imposing an involuntary sacrifice upon participants. There is some basis for concluding that man tends to act more like "economic man," and less like "social man," when his own financial interests are affected by the action in question. A recent study has indicated that pension fund participants may indeed be hostile to investment policies of pension funds that would reduce pensions, notwithstanding the social values that might be achieved.131

The same type of problem arises in the case of fiduciaries managing pension funds unassociated with any particular institution, such as the College Retirement Equities Fund, which had over 1.5 billion dollars of equity securities in its portfolio as of December 31, 1970.182 It is worthy of note that the decision of the trustees of the College Retirement Equities Fund to vote its 608,000 shares of General Motors in favor of management and against the two Campaign GM Round I proposals was made by the narrow vote of 9 to 7.183 Neither of such proposals, it should be emphasized, involved any immediate economic loss to General Motors. One may inquire whether the CREF trustees, who voted for the Campaign GM Round I proxy proposals, would have felt free to support those Campaign GM Round I proposals omitted from the corporate proxy statement which would have involved significant economic loss to General Motors.

In Campaign GM Round II, the CREF trustees, then holding 715,000 General Motors shares, voted 8-7 to support the proposal for disclosure, divided 7-7, with one abstention, and abstained on the proposal to permit shareholders to nominate an opposition slate of directors, and voted 15-0 against the special interest representation proposal.184

None of the Campaign GM Round II proposals involved direct economic loss to the corporation. The Episcopal Church proposal to cease manufacturing in South Africa, however, presented the possibility of substantial cost. On the proposal the CREF trustees voted 10-4, with one abstention, to vote against the proposal.185

129 Id.
130 Id.
131 See N.Y. Times, Feb. 19, 1971, at 52, col. 3. Dr. Charles Powers of the Yale Divinity School has sadly noted that "[t]he clergy . . . have shown no great interest in having these [pension] funds included in the social-investment initiatives." Powers, supra note 126, at 22.
133 Project on Corporate Responsibility, Campaign GM Scorecard 4.
There are significant differences between the retirement plans of non-profit institutions and the pension or profit-sharing plans of business corporations. The trustee, institutional or otherwise, has been handpicked by the board of directors of the company in question, which customarily retains the power to remove the trustee and designate its successor. The views of the trustee are thus apt to reflect in some degree the values of the board of directors of the employer. Contrast this posture with the four trustees of CREF who were elected by the faculty participants in the plan and therefore reflected faculty attitudes on a representative basis.

Further, in the case of industrial pension funds, the results of the operation of the trust portfolios will increase or decrease the current and future contributions by employers. The benefit of performance inures to the employer, and the pressure will clearly be for economic rather than social performance. Similarly, where the industrial fund is a profit-sharing fund, the amount of the ultimate distributions to beneficiaries will reflect the economic performance of the fund, and the trustees will be under pressure to maximize return.

The question of "pass-through" voting by beneficiaries deserves at least brief mention. Messrs. Lewis and John Gilbert list no less than forty-one well-known corporations that are using "pass-through" voting procedures in which company shares held under pension, profit-sharing, stock-purchase, thrift and similar plans are voted by the trustees pursuant to instructions from the beneficial owners. These examples pertain only to the voting of the shares of the company establishing the plan, and not to the entire portfolio. The "pass-through" practice is obviously designed to eliminate the conflict of interest inherent in direct or indirect management influence on the voting of the shares held under such plans with respect to their own election as directors or other management proposals.

This widespread development illustrates the feasibility of the "pass-through" voting system. Its use in the cases mentioned above, however, rests essentially on the disqualification of the trustees because of the conflicts of interest involved. The question remains whether, in cases where the trustees are not so disqualified, they may abdicate their responsibilities and properly permit decisions in the social reform area to be made by the beneficiaries.

137 L. Gilbert & J. Gilbert, Thirty-First Annual Report of Stockholders Activities at Corporation Meetings 251-55 (1970). Sears, Roebuck and Co., with 21% of its shares held by the Savings and Profit Sharing Pension Fund, is an outstanding example. See Letter from Austin T. Cushman, Chairman of the Board of Trustees, to the B, C and D members of the Savings and Profit Sharing Pension Fund of Sears, Roebuck and Co. Employees, Apr. 23, 1971. It may be noted that Federated Department Stores, Inc. did not permit "pass-through" voting for the 3,137,249 shares held by its Retirement Income and Thrift Incentive Plan although these amounted to approximately 7% of the shares outstanding. Federated Department Stores, Inc., Report of the Annual Meeting of Shareholders 1-2 (June 1, 1971).
2. Mutual Funds and Insurance Companies

Other institutional investors, such as mutual funds and stock insurance companies are organized with economic, rather than non-profit, objectives. The question arises: to what extent are such organizations apt to respond affirmatively to proposals related to social progress rather than the advancement, at least in the short run, of corporate objectives or shareholder interests? It is clear that they will not escape some involvement in the growing concern over the social and environmental impact of business operations. Thus, a prominent legal educator recently submitted a proposal to the Fidelity Trend Fund for consideration at its 1971 annual meeting, that the fund adopt, as its investment policy, a procedure for evaluation of the performance of companies in the areas of “pollution control, minority hiring practices, and production and marketing in South Africa, Rhodesia, Angola, Greece and the Soviet Union” to serve as a basis for purchase or sale of their securities, or for correction of “significantly sub-standard performance” in these areas by voting its shares, by submission of shareholder proposals, or by consultation with management. The proposal received the astonishingly high approval of more than 12 percent of the outstanding shares of the Fund. Similarly, the Project on Corporate Responsibility has requested that the same fund and eleven other major mutual funds include social responsibility criteria relating to minimum environmental protection and minority hiring standards in their investment policies.

A number of factors would appear to make mutual funds an unlikely source of support for social reform. The interest of management and shareholders in performance records necessarily emphasizes short-run economic considerations. Appeals to shareholders as citizens, rather than as shareholders, will be less effective. Further, since the funds are investors in other businesses, and not directly conducting industrial or commercial operations themselves, their activities do not produce issues of high public visibility. They are, therefore, effectively insulated from participation in the sensitive areas of social and environmental concern. Finally, because of the reduced significance of institutional shareholders, the boards of directors of the Funds are even less accountable to their shareholders than the boards of the companies in which they invest. Thus, the ultimate decision is likely to reflect the board’s personal predilections, which, in almost all cases, are likely to be sympathetic to a management faced with social reform proposals. Moreover, in view of the preoccupation of such organizations and their shareholders with performance records and the cumulative growth of portfolio values, it is questionable, whatever the occasional exception, how many boards can resist the evident pressures to respond solely to the short-run economic considerations. Some developments indicate, however, that not-

139 Wall St. Journal, Apr. 21, 1971, at 12, col. 5.
withstanding the foregoing considerations, mutual fund shareholders—as distinct from management—may be more prepared for recognition of social and environmental factors in the management of the fund portfolio than shareholders generally.

Reference has already been made to the shareholder vote on the proposal before the Fidelity Trend Fund Annual Meeting.\textsuperscript{140} The Dreyfus Leverage Fund, holding 25,000 General Motors shares, polled its 127,000 shareholders on the Campaign GM Round II and Episcopal Church proposals before the General Motors 1971 Annual Meeting. 28,580 shareholders responded to the questionnaire. The proposals received a remarkable degree of support: 45 percent of the valid votes were cast in favor of the Campaign GM disclosure proposal, 39 percent in favor of its proposal pertaining to shareholder nomination of an opposition slate of directors, and 30 percent in favor of its proposal for special interest representation on the Board. 22 percent of the valid votes were in favor of the Episcopal Church proposal pertaining to South Africa.\textsuperscript{141}

These unusual results—so different from the attitudes of General Motors shareholders generally—may reflect a number of factors. The results of the questionnaire may have been affected by the tally on a one-vote-per-holder basis rather than one-vote-per-share. Furthermore, although the response was unusually high for a questionnaire, it was much less than the response to proxy solicitations generally. Perhaps, the motivations are different, and the attitudes of those sufficiently interested to respond are not characteristic of fund holders as a whole. Whatever the explanation, the results are surprising. They suggest that if mutual fund voting is influenced by fund shareholder attitudes, mutual funds may after all provide a base of support for social reform proposals.

A number of new funds are now deliberately appealing to socially conscious investors through well-publicized plans employing social considerations as one of the major elements influencing investment decision.\textsuperscript{142}

\begin{footnotesize}
\begin{itemize}
\item See p. 452 supra.
\item For example, The Dreyfus Third Century Fund, Inc. states in a preliminary prospectus: The Management of the Fund believes that private investment can be a positive force to enhance and encourage further social progress in America . . . . It is the intention of the Management . . . . to limit its selection of investments to securities of those companies which . . . show leadership or progress in the areas of, or have demonstrated their concern for, protection and improvement of the environment and the proper use of the nation's natural resources, consumer and occupational safety, product purity and its effect on the environment, equal employment opportunity, the health, education and housing demands of America or in other areas which help to improve the quality of life . . . . The Dreyfus Third Century Fund, Inc., Preliminary Prospectus 3 (May 7, 1971).
\item Other proposed mutual funds of this nature are the Social Dimensions Fund, which proposes to invest in companies that will "contribute to society beyond satisfaction of basic material needs and the traditional goal of maximum profit, to the exclusion of all other ends," Bus. Week, May 1, 1971, at 29, and the First Spectrum Fund, N.Y. Times, Oct. 5, 1971, at 58, col. 2.
\item The Morgan Guaranty Trust Company is similarly determining the feasibility of a
\end{itemize}
\end{footnotesize}
Further, it is possible to envision the development of an awareness among institutional investors that management sensitivity to social issues may constitute an index of the superior type of businessman, whose decisions in other areas may also be expected to reflect long-range vision. The company that displays social responsibility may thus attract future professional investor support because of anticipated performance in the basic economic aspects of the business arising from the broader horizons demonstrated in the social area.

To increase the degree of possible support from such institutions, it has been widely suggested that annual disclosure of the manner in which the institution's shares were voted should be required. A requirement of disclosure would unquestionably reinforce the pressure on the management of funds to take a second look before voting in favor of corporate management on social proposals.

Further, as Mr. Clarence Galston points out:

[T]he clamor for social awareness and action is widespread and accelerating. It affects virtually every business venture. The institutional investor cannot escape the eventual confrontation.

Nevertheless, whatever the impact on other institutional investors, it may be asked whether, in the end, the result will differ insofar as mutual funds are concerned.

Insurance companies present a different problem because they are essentially public institutions embracing millions of policyholders. They will find it increasingly difficult to avoid responding to public pressures, particularly in the case of prominent public interest confrontations. Mutual insurance companies are especially vulnerable in this regard. Indeed, it is not difficult to visualize the politicalization of the mutual life insurance company itself. If this were to occur, mutual life insurance companies could play a leading role in this area.

B. Political Figures and Governmental Trust Funds

Another obvious source of support in the politicalization of the corporation is the traditional political process itself. Political figures recognizing the mass appeal of the social proposals hasten to participate. For example, in Campaign GM Round I Mayor Lindsay of New York City instructed the trustees of New York City pension funds to vote their 162,000 General Motors shares in favor of the Campaign GM proposals. Other political common-trust fund to invest in companies performing activities that are particularly desirable socially. Am. Banker, June 9, 1971, at 1, 23.

The Project on Corporate Responsibility has also urged a dozen major mutual funds to include social responsibility criteria in their investment policies. Wall St. Journal, Apr. 21, 1971, at 12, col. 3.

See Schwartz, supra note 9, at 514; Galston, supra note 120, at 14; Landau, supra note 80.

See Galston, supra note 120, at 10.

Project on Corporate Responsibility, Campaign GM Scorecard.
support came from Mayor White of Boston, the San Francisco city pension fund and from Wisconsin and Iowa State funds.

Further examples of the apparent usefulness of social reform campaigns directed at corporations as means of furthering the political ambitions of public figures are available. Six United States senators and twenty-two congressmen endorsed Campaign GM Round I. Shortly after the 1970 General Motors Annual Meeting, Presidential candidate, Senator Edmund Muskie, who had earlier endorsed Campaign GM Round I, introduced the Corporate Participation Bill, which was designed to limit the power of the Securities and Exchange Commission to permit exclusion of shareholder proposals from the management proxy statement under Rule 14a-8(c)(2). More recently, Senator Metcalf of Montana, who had not endorsed Campaign GM Round I, criticized the failure of universities to try to influence racial, environmental, safety, and pricing policies of corporations, in terms that follow closely the arguments of Campaign GM.

C. The Small Shareholder

It has been already pointed out that the widespread distribution and fragmentation of equity ownership has created a class of 31.9 million shareholders, most of whom have a relatively petty economic stake in the enterprise in which they are theoretically part owners. For such small holders, emphasis on social, rather than economic, corporate objectives will not realistically result in any significant economic impact upon them as indi-

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146 Id. at 2.
147 Id. at 1.
148 Id. at 2.
152 See p. 432 supra.

Professor Eisenberg makes much of the fact that the large number of shareholders does not mean a significant widespread distribution of equity ownership measured by value. See Eisenberg, The Legal Rules of Shareholders and Management in Modern Corporate Decisionmaking, 57 Calif. L. Rev. 1, 44-46 (1969). Thus, as already noted, 79% of the General Motors shareholders own 100 shares or less. See note 67 supra. Similarly, the 1970 census by the New York Stock Exchange on shareownership reveals the very small investments of most shareholders:

<table>
<thead>
<tr>
<th>Portfolio Size</th>
<th>Number of Shareholders</th>
</tr>
</thead>
<tbody>
<tr>
<td>Under $5,000</td>
<td>12,509,000</td>
</tr>
<tr>
<td>$5,000 to $9,999</td>
<td>6,398,000</td>
</tr>
<tr>
<td>$10,000 to $24,999</td>
<td>5,853,000</td>
</tr>
<tr>
<td>$25,000 to $49,999</td>
<td>2,828,000</td>
</tr>
<tr>
<td>$50,000 and over</td>
<td>2,934,000</td>
</tr>
</tbody>
</table>

N.Y. Stock Exchange, Shareownership—1970, 9 (1971). Thus almost 19 million, or approximately 60%, of the approximately 31 million American shareholders held shares with an aggregate value under $10,000.

What we are not told is the aggregate value of the equity investments of the millions of small shareholders. Although it clearly will not be as large as the widespread distribution of the shares would indicate, it is obviously most substantial. If, for example, the holdings of these 19 million small shareholders were evenly distributed over the two classes of portfolio size in question, the total value would be close to 80 billion dollars.
individually, even in those cases where the proposal involves economic cost to the corporation; their stake is simply too small. This is not to suggest that these small holders may not, in significant numbers, regard themselves as owners, and may not indeed identify psychologically with the giant corporation in which they may hold a few shares. Many of such persons, of course, will be hostile to any pressure that would divert the corporation from its economic objectives. Thus, the little old lady from Dubuque will probably vote with management. The point is that such a decision would rest on psychological, not economic, influences. Nevertheless, as social attitudes change, increasing numbers of small investors may find their own attitudes changing, and may be more responsive to appeals on the political level, such as those being made by Campaign GM and by the church groups.

The great number of shareholders constitute a significant power base that cannot be ignored in political terms. In addition, there is evidence that material voting patterns may develop from such a far-flung constituency. Finally, although by themselves the small shareholders are unorganized and ineffective, with the leadership and organization of public interest groups and the participation of church, university and other institutional holders, they may, in the future, play an increasingly important role.

The potential base of support for social reform proposals is thus substantial. Whether or not a successful combination can ever be assembled to outpoll management is not really the point. If social reformers can achieve significant support in the balloting process, management will be forced to respond to shareholder, as distinct from public, pressure. This would be a vitally different response than to public opinion generally. As time goes on, the use of the corporate balloting process as a method of determining corporate policy may ultimately emerge as an end in itself, and not simply as an interstitial publicity device in a campaign to influence public opinion. At such point, politicalization of the corporation would be complete.

VIII. THE SIGNIFICANCE OF SEC RULE 14a-8(c)

SEC Rule 14a-8(c) plays a crucial role in the public interest proxy contest, which is, in effect, a technique for the employment of the corporate proxy solicitation machinery and the annual meeting as methods for accomplishing political-style confrontation, public debate of social issues be-
fore unwilling audiences and widespread exposure in the communications media.\footnote{158}

Rule 14a-8(c) determines what shareholder proposals may be omitted by management from its proxy solicitation, and would appear to be destined as one of the major legal battlegrounds in the struggle to politicalize the corporation. Rule 14a-8(c) is, in former SEC Chairman Ralph Demmler's apt image, the screen to keep out shareholder proposals, leaving for determination only the policy question of how close the mesh should be.\footnote{157} The decision of the SEC in Campaign GM Round I, to allow inclusion of only two of the seven proposals submitted, illustrated the crucial significance of the Rule, which Judge Tamm's opinion in the Medical Committee for Human Rights\footnote{159} case has catapulted into the forefront of legal attention.

Former Chairman Budge of the SEC announced in November, 1970 that the Commission is studying possible changes in Rule 14a-8.\footnote{160} Its ultimate decision in this matter will fix the ground rules for future public interest proxy contests,\footnote{161} and presumably provide clearer standards for decision concerning the social reform proposals management must include in the corporate proxy solicitation.\footnote{162}

**IX. THE ALTERNATIVES OPEN TO MANAGEMENT**

What can management do to reduce the impact of the politicalization of the corporation that has occurred to date and that, in my opinion, is irreversible? The basic answer for business is to recognize the moral soundness of most of the demands for social reform and the wisdom of responding effectively to the social and environmental crisis. These must be the strategic objectives of business. Such tactical measures as studies by groups, such

\begin{footnotes}
\footnote{158}{See p. 433 supra. See Alinsky, supra note 31, at 66.}
\footnote{159}{Quoted in Schwartz, supra note 9, at 442-43.}
\footnote{157}{Medical Committee for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1970), cert. granted, 401 U.S. 973 (1971). In short, for the first time, a court held that "[n]o-action" responses by the SEC [to a claim] under rule 14a-8(d) are of a sufficiently formal and final nature to warrant direct review . . . ." 71 Colum. L. Rev. 344, 345 (1971).}
\footnote{160}{In recent months, Rule 14a-8 and the Medical Committee case have been the subject of several comments or notes in law reviews. For example, Note, The SEC and "No-Action" Decisions Under Proxy Rule 14a-8: The Case for Direct Judicial Review, 84 Harv. L. Rev. 835 (1971); Note, Proxy Rule 14a-8: Omission of Shareholder Proposals, 84 Harv. L. Rev. 700 (1971); 20 Am. U.L. Rev. 190 (1970); 71 Colum. L. Rev. 344 (1971); 45 N.Y.U.L. Rev. 1098 (1970); 49 Tex. L. Rev. 922 (1971).}
\footnote{161}{N.Y. Times, Nov. 7, 1970, at 37, col. 7; Wall St. Journal, Nov. 9, 1970, at 12, col. 1.}
\footnote{162}{Chairman William J. Casey of the SEC has already indicated his attitude: "I don't want to see corporate meetings turned into political forums." Wall St. Journal, June 18, 1971, at 3, col. 1.}
\footnote{163}{In his valuable recent article reviewing Campaign GM, Professor Schwartz called for five modifications of Rule 14a-8(c) to facilitate public interest proxy contests and for appointment of a Commission study group to continue reexamination of the problem. Briefly, his suggested modifications include: (1) repealing paragraph (c)(2) of Rule 14a-8, (2) allowing the proponent of a proposal adequate space in management's proxy material to support it, (3) easing the requirement that a proxy statement must be sent before or with any solicitation, (4) expanding the use of proxy statements to provide more information to shareholders, and (5) amending the procedures for reviewing Rule 14a-8 questions. See Schwartz, supra note 9, at 520-29.}
\end{footnotes}
as the American Society of Corporate Secretaries, Inc., The Conference Board and the Practising Law Institute, of the types of security procedures to be adopted to prevent disruption at annual meetings possess only secondary importance.163

Business is already doing much, and must do much more, toward the solution of the major social and environmental problems of the times and in the struggle to deal with urban problems, poverty, race relations, product safety and environmental abuse. The following four examples are illustrative of the priority areas for management.

A. Increase in Philanthropic Support

As I have elsewhere pointed out,164 the extent of corporate expenditures in the social sphere—as distinct from the environmental area—is essentially limited by competitive factors. Only a few companies165 devote amounts that approach the 5 percent of pre-tax net income that the Internal Revenue Code permits corporations to deduct for philanthropic contributions to qualified tax-exempt organizations.166 Contributions of this nature enable business to support the entire spectrum of agencies that are dealing with social needs, as well as traditional areas such as higher education. In 1968, the average for all corporate taxpayers was only 1.06 percent of pre-tax net income,167 and it is apparent that in the area of philanthropic efforts, most businesses are still not prepared to expend amounts that will significantly reduce earnings per share.168

In view of the magnitude of the problems of society, the campaign to raise corporate contributions to a figure closer to the 5 percent of pre-tax income deductible under the tax laws is one of the great challenges facing business leadership. It is a matter of the general attitude of business with respect to what constitutes an acceptable level of social costs. If enough courageous businessmen will take the lead to obtain acceptance within their industries of progressively higher levels of support, business will be demonstrating its concern for social betterment in unmistakable terms. Such action will provide it with a considerably stronger position from which to respond to the social reformers who would seek to alter the structure of business itself.

There may be concern about the designation of recipients and about the control exerted by business over the recipients, particularly if contributions

165 For example, Dayton Hudson Corp., Cummins Engine Co. and Carson-Pirie-Scott Co.
increase significantly. Concern of this nature has been expressed particularly with respect to business support for higher education. One answer to such concern is the "matching gift," where the recipient is chosen by the employee, not the employer. Extension of the "matching-gift" principle to all tax-exempt philanthropic activities, and extension of the selection process to include shareholders, as well as employees, would be a dramatic acknowledgment of corporate responsibility to participate in the solution of social problems. Further, if implemented on a broad enough scale, such a program would provide a desperately needed additional source of support for philanthropic activities generally.

B. Minority-Group Representation

In the area of race relations, the absence of blacks and other minority-group members on the boards of directors of all but a few major American corporations presents a serious social problem. Thus, thirteen West Coast minority-group organizations bitterly criticized California's sixty-seven largest corporations, pointing out that not one of the 1,008 members of their boards of directors was black or Mexican-American, and that only six—most related to company executives—were women. Their goal is 25 percent minority board representation by 1972.

Similarly, in its report in February, 1971 to President Nixon, the National Advisory Council on Minority Business emphasized that minority groups were "all too frequently unrepresented when decisions are made in the high councils of government or in corporate board rooms" and called for appointment of persons from minority groups to the boards of directors of the largest corporations. The significance of this report is clear; it is a recognition, by a Presidential Advisory Council that the large American corporation is a quasi-political organization and that its executive circle, like that of government itself, should include representatives of all sectors of society. This view is a long-overdue recognition of the legitimate aspirations of deprived groups of Americans to participate in the important decision-making centers of power in the American society. It is a conservative effort to widen the stake of deprived groups in the existing order. Business must respond to retain the confidence of the society.

It is gratifying to note that leading corporations are responding, and

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A "matching-gift" plan is simple in operation. It is basically "a dollar-for-dollar matching of an employee contribution [to a recipient of his choice] by the corporation." Council for Financial Aid to Education, Inc., How to Aid Education 13 (1967).

Until comparatively recently, black representation on the board of a major corporation was almost non-existent.

The criticism is contained in a study by Responsible Corporate Action. Responsible Corporate Action, Corporate Apartheid—California U.S.A. Style (Feb. 4, 1971).

Id. at 6.

Id. at 7. The New Republic described this objective as modest. The New Republic, Feb. 20, 1971, at 10.

N.Y. Times, Feb. 21, 1971, § 1, at 50, col. 3.

Minority-group members have been elected as members of the boards of directors of
that the pattern of American corporate life is changing; major American business is beginning to correct the injustices of the past. It is, however, obvious that the process has just commenced. The strength of the pressures for corporate reform will vary with the degree of business response.

C. The Role of "Outside" Directors

As noted, a significant number of the social reform proposals relate to the organic structure of the corporation. They include such suggestions as shareholder committees for corporate responsibility, inclusion of competing slates of directors in the corporate proxy solicitation and election of directors nominated by, or representing, employees, suppliers, consumers and dealers.

It has been pointed out that specialized board representation presents many serious problems. Nevertheless, such proposals do highlight the importance of the "outside" director on the board, and the ultimate strength of such proposals will undoubtedly depend on the extent to which so-called "outside" directors introduce a different perspective into board deliberations and decisions, and in practice, as well as in theory, truly function as public


177 See pp. 434-35 supra.
179 See Eisenberg, supra note 152, at 16-21; Vagts, supra note 178, at 48-78.
180 Thus in announcing the election of Dr. Paul N. Ylvisaker to the Board of Directors of Dayton Hudson Corporation, the corporation noted; "One of the nation's leading social scientists, Dr. Ylvisaker is professor of public affairs and urban planning at Princeton University and was New Jersey's first Commissioner of Community Affairs. We believe he brings to the board a valuable non-business perspective that will help the Corporation respond appropriately to the changing forces at work in society." Dayton Hudson Corporation, Quarterly Report 1971, Inside Front Cover.
directors. Where “outside” directors are not truly independent of management, such as in the case of corporate counsel, investment bankers or commercial bankers, all of whom are vitally interested in preserving business opportunities for their own firms, and are, therefore, not in a position to tangle with management, they are not free to represent the public—either the limited public of the shareholders or the wider public of the community generally.

Business must recognize these wider responsibilities and have genuine “outside” directors, free to represent public attitudes and expectations. If it fails to do so, it may face increasing pressure for “outside” directors who would represent not the interest of public shareholders or the general public, but the specialized interest of employees, consumers, suppliers or dealers or similar groups.

D. The Environment

In the environmental field, the intensity of public demand for corrective action has reached such overwhelming proportions that business has lost much of its freedom of choice. It must respond vigorously. Weyerhauser Company provides an excellent example of what may be accomplished by businessmen in this area. Even though it is engaged in the paper and pulp industry, which faces some of the most difficult air and water pollution problems in the American economy, Weyerhauser has received outstanding recognition for its affirmative efforts. Organizations as diverse as Business Week, in its 1970 Awards for Business Citizenship,181 The Council on Economic Priorities, in its study of the paper and pulp industry182 and the Sports Foundation,183 have singled it out for commendation, with emphasis on the record of achievement, not upon its remaining unsolved problems. This illustrates how business cannot only prevail in the battle for public opinion, but can achieve favorable recognition, provided that, in the words of President George Weyerhauser, both management and shareholders are prepared to sacrifice “short-term gain for long-term appreciation.”184

X. Conclusion

Business can only prosper by being part of a healthy society, and can only preserve its present degree of independence from public control by participation in the solution of social and environmental problems in accordance with public expectations and demands. This can be accomplished by joining in the battle for social justice: the struggle against poverty, race and sex discrimination, environmental abuse, urban blight, and by having a significant number of independent directors reflecting public attitudes on its boards. Business has no alternative but to respond to the public demand. It must operate in the light of the realities of the times. In short, it is in part a

181 See Bus. Week, Mar. 6, 1971, at 51, 54.
183 Id. at X-3.
184 Bus. Week, Mar. 6, 1971, at 54.
political institution. The only question that remains is how far politicalization will proceed.

In this connection, the statement of the Board of Trustees of The Rockefeller Foundation, issued in explanation of its position on the Campaign GM Round I proposals, deserves the most serious attention, both because of its eloquence, and because of the composition of the Board which included such prominent members of the business community as John D. Rockefeller III, C. Douglas Dillon, Robert Roosa, Frank Stanton and Thomas Watson. The Rockefeller Foundation stated that:

[The corporations of America must assert an unprecedented order of leadership in helping to solve the social problems of our time. . . .]

What is needed from business today is leadership which is courageous, wise and compassionate, which is enlightened in its own and the public's interest and which greets change with an open mind.185

An extensive degree of politicalization of the corporation has already occurred. The pressures for further politicalization will continue to increase and may ultimately change the structure and objectives of American corporate enterprise, unless business has the wisdom and strength to respond to the moral imperatives of our times and to display, in the language of the Rockefeller Foundation trustees, an "unprecedented order of leadership in helping to solve the social problems of our time."186 The response of business management to the challenge will be the major factor in determining whether the American corporation will survive in its present form.

185 Time, June 1, 1970, at 55.
186 Id.
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