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## Plato, THE PRINCE and Corporate Virtue: Philosophical Approaches to Corporate Social Responsibility

Colin Marks<sup>1</sup> & Paul S. Miller<sup>2</sup>

### *Abstract*

*Corporate Social Responsibility (“CSR”) has been a topic of discussion within corporate law and policy for over 40 years. CSR, in its broadest sense, explores what obligations a corporation should or can undertake to further the goals of society. Business academics have described four social responsibilities that any company has to society: economic, legal, ethical, and philanthropic. The progressive advocates within the legal academic debate surrounding CSR argue that a corporation should seek to do more than just turn a profit; it should seek to make society “better.” However, by seeking to make society “better,” the corporation begins to act more and more like the state. This raises interesting questions about the role of corporations within society. Ethical and political philosophy can help answer these questions. Much has been written from the Utilitarian and Kantian perspectives of business management, especially from the Law and Economics movement and its critics. In the context of CSR, this viewpoint is often represented by a shareholder primacy norm, in which the allegiance of the corporation is to itself and its shareholders. However, there is a third branch of ethical/political philosophy which argues that social goals are best pursued by discussing the kinds of characteristics people should have, especially the characteristics of rulers. Two of the most important works that follow this approach are Plato’s REPUBLIC and Machiavelli’s THE PRINCE.*

*Machiavelli’s THE PRINCE provides one paradigm for rulers. For Machiavelli, the chief focus of the ruler is to ensure the survival of the state, which is done best by ensuring his own survival. CSR’s usefulness to a corporate prince is that it allows him to let his corporation appear to be virtuous, but gives him the freedom to act in the best interests of the corporation and himself. In the REPUBLIC, Plato proposed that rulers owe citizens more than survival; they must protect citizens from injustice. The wise ruler, the philosopher king, recognizes that virtue is not only a means of doing good; it is a better means of ensuring survival. Applying this rationale to the corporation as a ruler would seem to support the progressive proponents of CSR. However, applying Plato’s paradigm to the CEO and officers may actually support a shareholder primacy norm if the corporation’s citizens are equated to the shareholders. On the other hand a Machiavellian approach to CSR in particular and business actions in general could strongly support a shareholder primacy viewpoint of business law.*

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*This article seeks to explore the aspects of CSR in light of Machiavelli's THE PRINCE and Plato's REPUBLIC. These two philosophers sought to explain and justify how the rulers of large, socially important institutions, i.e. civil government, operate for the good or ill of those who live within them. As corporations are themselves similar mini-states, akin to the city-states and poleis in the times of Machiavelli and Plato, and as some CSR proponents seek to have the corporation take on many tasks that have, in the past, been performed by the state, exploring CSR through these two works provides useful insight. Our topic, however, is not the paths of justice in the ancient or renaissance world, but whether these two philosophers can help us understand how CSR can be applied today; perhaps even to warn us of its abuses or encourage CSR's healthy application.*

“Few men have virtue enough to withstand the highest bidder.”  
George Washington<sup>3</sup>

## I. Introduction

Corporate Social Responsibility (CSR), was debated long before the meltdown of the economy in the Fall of 2008.<sup>4</sup> As Robert Reich noted in 2007:

Over 80 percent of corporate recruiters say business school graduates should display an awareness and knowledge of the subject. Hundreds of corporate conferences are held on it annually. Tens of thousands of corporate executives listen attentively to consultants who specialize in it explain its importance. The world's top CEOs and officials, gathering annually at the World Economic Forum in Davos, Switzerland, solemnly discuss it and proclaim their commitment to it. Numerous "social auditors" now measure how well corporations have achieved it, and hundreds of companies produce glossy company reports touting their dedication to it. NGOs-nongovernmental organizations, with full-time staffs, Web sites, newsletters, and funding appeals-develop codes of corporate conduct on aspects of it, and rate corporations on their adherence to it. At least eight hundred mutual funds worldwide say they are devoted to it. The United Nations Global Compact, launched at Davos in 1999, enumerates goals for it, and by 2006 more than three thousand firms had signed on. Great Britain even has a minister for it.<sup>5</sup>

Of course, how to achieve CSR depends greatly on what your view of a company's social obligations entail. The famous economist Milton Friedman argued that if corporations are making money, they are meeting their social obligations.<sup>6</sup> However, many scholars, identified as progressives, argue that CSR seeks more from corporations than profit making.<sup>7</sup> In the legal academic literature, these so-called progressives argue that CSR, and the debate that surrounds it, recognizes that corporations can act for the benefit (or detriment) of others beyond themselves.<sup>8</sup> But CSR cannot be some sort of internalized

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<sup>3</sup> THE QUOTABLE POLITICIAN 223 (William B. Whitman ed. 2003)

<sup>4</sup> See, e.g., *Just good business: A special report on corporate social responsibility*, THE ECONOMIST, January 19, 2008; See Colin P. Marks & Nancy B. Rapoport, *The Corporate Lawyer's Role in a Contemporary Democracy*, 77 FORDHAM L. REV. 1269, 1269 (2009).

<sup>5</sup> Robert Reich, SUPERCAPITALISM 168 (2007).

<sup>6</sup> Milton Friedman, *The Social Responsibility of Business Is to Increase Profits*, THE NEW YORK TIMES MAGAZINE, September 13, 1970.

<sup>7</sup> William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 265 (1992).

<sup>8</sup> See Colin P. Marks, *Jiminy Cricket for the Corporation: Understanding the Corporate Conscience*, 42 VAL. U. L. REV. 1129, 1149 (2008) (“What is important, however, is what the CSR debate represents, *i.e.* recognition that corporations have the ability to choose to engage, or not engage, in behavior that benefits some entity, group, or individual other than just the corporation.”).

code for corporate operations as corporations do not have an inner conscience.<sup>9</sup> It must, therefore, be a tool to be used by a corporation's human agents.<sup>10</sup> Progressive scholars have argued that corporations exist to fulfill various social goals, and what those particular goals are may be added to or changed as society wishes.<sup>11</sup> At the other end of the spectrum are those who urge a more Friedman-friendly approach -- that corporations should act to the benefit of its owners, *i.e.* shareholders. This shareholder primacy norm recognizes that corporations should do what is best first and foremost for its own interests and CSR should be used to enhance, and not impede, that goal. But people run a corporation.<sup>12</sup> So whenever we are discussing corporate responsibility of any sort, we are discussing the conduct of corporate officers.<sup>13</sup> The question then becomes what might influence these corporate officers to adopt CSR initiatives; that is, does CSR help corporations survive and does the role of the corporation within society compel the adoption of CSR initiatives despite the harm it may do to the corporation?<sup>14</sup> This question can be explored within the philosophical frameworks of Machiavelli and Plato.

In *THE PRINCE*, Machiavelli wrote of the need for leaders to appear virtuous, even if they must sometimes act against such virtues.<sup>15</sup> A Prince should appear virtuous so as not to antagonize his subjects, as they might overthrow him.<sup>16</sup> At the same time, the Prince cannot let virtue stop him from acting when he sees threats to himself (and by extension the state).<sup>17</sup> CSR could be seen to be a means by which corporations can also appear virtuous. The degree to which such a use is legitimate depends on the degree to which one considers *THE PRINCE* to be legitimate.<sup>18</sup> It is not too far fetched to envision

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<sup>9</sup> *Id.* at 1144 (citing LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 134 (3d ed. 2005) (“[C]orporations are obviously not human. . . . [and] could act to ‘aggregate the worst urges of whole groups of men . . . .’”).

<sup>10</sup> Among the types of tool it might be: An ethics code (obviously), a “how to” guide for corporations to manage their public reputations, or a means to create value through eliminating waste and discovering new products. “Just Good Business,” *THE ECONOMIST*: JUST GOOD BUSINESS: A SPECIAL REPORT ON CORPORATE SOCIAL RESPONSIBILITY, 5, Jan. 19, 2008.

<sup>11</sup> Allen, *supra* n. \_\_\_\_, at 271.

<sup>12</sup> Marks, *supra* n. \_\_\_\_, at 1144.

<sup>13</sup> *Id.*; L. Friedman, *supra* n. \_\_\_\_, at 134.

<sup>14</sup> The definition of harm in this context can be a whole discussion in itself. Is it just the short term reduction in profits that might otherwise be present without CSR, or can longer term, indirect harms to the society that the corporation is part of also be taken into account?

<sup>15</sup> Niccolo Machiavelli, *THE PRINCE* 69 (Daniel Donno trans., Bantam Classics 1966, 2003) (1513) [hereinafter *THE PRINCE*](Therefore a prince will not actually need to have all the qualities previously mentioned, but he must surely seem to have them. . . . [H]e must stick to the good so long as he can, but, being compelled by necessity, he must be ready to take the way of evil).

<sup>16</sup> *Id.* at 70 ([T]he prince . . . [should] endeavor to avoid those things which would make him the object of contempt or hatred).

<sup>17</sup> *Id.*

<sup>18</sup> As an example of those who believe it legitimate, consider *MANAGEMENT AND MACHIAVELLI* by Anthony Jay. It presented *THE PRINCE* as a primer for how management should conduct itself. Jay did not present his book as a means of acquiring power; instead he viewed Machiavelli as presenting the best method for analyzing problems of leadership. ANTHONY JAY, *MANAGEMENT AND MACHIAVELLI: AN INQUIRY INTO THE POLITICS OF CORPORATE LIFE* 25. (“I have called this book *Management and Machiavelli* not because it is based on Machiavelli’s arguments but because it is based upon his method, the method of taking a current problem and then examining it in a practical way in the light of experiences

today's CEO seeing his survival and the company's survival as one and the same. Further, the paths to the upper echelons of corporate power are as varied as those of the Renaissance Prince.<sup>19</sup> All this is to say that the modern CEO might be well disposed to act on Machiavelli's suggestions.

A Machiavellian viewpoint, however, is probably not how some proponents of CSR, particularly progressives, would like it analyzed. After all, CSR proponents want corporations to act with the interests of stakeholders in mind as they pursue profits.<sup>20</sup> Which philosopher, then, might present a competing vision to *THE PRINCE*? This article puts forward Plato as the counter to Machiavelli. The justification for this lies in the similarity of the culture of Renaissance Italy and Ancient Greece. Both were heavily influenced by Homer.<sup>21</sup> According to Homeric thought, the goods that should be striven for are riches, power, status, and prestige—for one's self and one's country. The personal attributes that allow a man to reach such goals are considered virtues.<sup>22</sup> This is to say that if being a good person was to seek the Homeric goals; the personal characteristics that allowed one to reach those goals must be seen as good. The conduct of both the leading figures of Fifth Century B.C. Greece and the Italian Renaissance clearly embodied this viewpoint.<sup>23</sup>

But what happens when these virtues lead to disaster? This is what happened to Athens after their defeat in the Peloponnesian or the near constant warfare in Italy during the late middle ages and Renaissance. These are the times in which Plato and Machiavelli wrote. Machiavelli's solution was victory and order at all costs; a reinforcement of Homeric ideals.<sup>24</sup> Plato's answer was radically different:

Unless philosophers become kings in our cities, or unless those who are now kings and rulers become true philosophers, so that political power and philosophic intelligence converge, and unless those lesser natures who run after on without the other are excluded from governing, I believe there can no end to troubles . . . , in our cities or for all mankind.<sup>25</sup>

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of others who have faced similar problems in the past.”). But if his method is valid, so too must be its conclusions.

<sup>19</sup> *THE PRINCE*, *supra* n. \_\_\_\_, at Ch 3-14.

<sup>20</sup> Jill E. Fisch, *The “Bad Man” Goes to Washington: The Effect of Political Influence on Corporate Duty*, 75 *FORDHAM L. REV.* 1593, 1601 (2006).

<sup>21</sup> See Alasdair MacIntyre, *WHOSE JUSTICE, WHICH RATIONALITY?*, 13 (1988) (“Central to that body of oral and written matter were the *Illiad* and the *Odyssey*. From Homer, therefore, Athenians had to begin.”) and (Discussion of Ancient Greek impact on Humanism in Renaissance Italy).

<sup>22</sup> Such virtues were referred to as *aretē*. These were virtues that allowed a person the courage to be daring (*andreaia*) and knowing when to be cautious (*sōphrosunē*). MacIntyre, *supra* n. \_\_\_\_, at 26 (1988).

<sup>23</sup> Some historic examples might be appropriate—perhaps Pericles and Alcibiades in Athens and the Medici and Borgia families in Italy.

<sup>24</sup> With himself as Odysseus, to judge by his letters, See *The Prince*, *supra* note 7, at 4-5, (“Having read this thing, they will see that I did not sleep of gamble away the fifteen years I engaged in the study of statecraft, and anyone ought to value the services of a man who has become richly experienced at another's expense.) and dedications to Lorenzo di Medici Id. at 15-16 (“And if from your great height Your Highness will sometimes cast a glance below to these lowly places, you will see how undeservedly I endure the heavy and relentless malice of fortune.”).

<sup>25</sup> Plato, *THE REPUBLIC* (Richard W. Sterling and William C. Scott, tr., Norton 1985, 1996), 473c (p. 165). The numbering used for citations are the ones first put down by Stephanus (Henri Estienne) in his

For Plato, it was (and is) the conduct of men that lead to bad results, and what were once seen as virtues that govern their actions should be changed for new ones if disaster results.<sup>26</sup> Plato did not advance this argument naïvely; he was well aware of the consequences such arguments could bring, but felt they had to be made.<sup>27</sup>

Our topic, however, is not the paths of justice in the ancient or renaissance world, but whether these two philosophers can help us understand how (or whether) CSR can (or should) be applied today; perhaps even to warn us of its abuses or encourage CSR's healthy application. Part II of this article is an explanation of CSR's historic development in both the business management and legal academic context. Part III explains the relevance of Machiavelli and Plato's works in a modern context. Part IV ties together the paradigms set-out by Machiavelli and Plato with the legal academic approaches to CSR. We conclude that analogies can be made between Machiavelli's view of power and the shareholder primacy norm and Plato and the Progressives if we consider them at the level of the corporate entity. But, the people who actually wield the power in the corporations may not in fact see their interests aligned with the shareholders, and instead may be more like the foreign invaders that Machiavelli warned against. Viewed from this perspective, the Machiavellian model may in fact be more in line with how corporations are really governed. Such a model, however, has evaded description as it mimics both the shareholder primacy norm at times, and the Progressive movement at other times, but, under examination, should be embraced by neither the shareholder primacy norm nor the Progressives.

## **II. An Overview of Corporate Social Responsibility**

### **A. CSR is a name for various theories that present guidelines for corporations to further a corporate and/or societal purpose.**

Before delving too deeply into a discussion of CSR, it is useful, if not essential, to review what activities are encompassed by the term CSR. What exactly does it mean to be socially responsible as a corporation? Is merely obeying the law socially responsible? What about choosing to go "green," which also has economic benefits to the corporation as well as society?<sup>28</sup> Or is CSR just another way of describing corporate charity? How one defines CSR is important as this has an effect upon whether an individual supports it. The famous economist Milton Friedman's view of CSR provides a classic example of this.

#### **1. Friedman's view of CSR.**

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1578 edition of Plato's works. They have become the standard numbering scheme for Plato's works and allow ready comparison of the text from different editions.

<sup>26</sup> See e.g., Plato, GORGIAS, THE REPUBLIC.

<sup>27</sup> E.g. Plato, APOLOGY, CRITO

<sup>28</sup> Or perhaps seeks to simply obscure the corporation's activities within a pleasant green veneer. See Joe W. Pitts, III, *Corporate Social Responsibility: Current Status and Future Evolution*, 6 RUTGERS J. LAW & PUB. POLICY 334 (2009) ("The criticism of CSR as merely, or excessively, a public relations activity represents the frustration some critics have with the pace of progress on the ground and insufficient or counterproductive implementation of the concept.").

Friedman quite famously denounced CSR by stating that, in a free economy, “there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud.”<sup>29</sup> Based upon this quote, one could easily conclude that the thrust of Friedman’s argument was to reject CSR as a legitimate business pursuit. However, a further reading of Friedman’s essays on the topic reveals that Friedman’s definition of CSR was very specific. To Friedman, CSR was nothing more than giving away profits to unrelated charitable causes. If a charitable donation was in fact tied to some other corporate goal, ulterior or otherwise, Friedman simply did not call it CSR. Indeed, Friedman seemed to think it was dishonest to even label such giving as CSR, stating that he admired those corporations “who disdain such tactics as approaching fraud.”<sup>30</sup>

A closer review of Friedman’s essays on CSR reveals that, though he may not have considered it part of CSR, he did believe that corporations have responsibilities to groups outside its own shareholders — to abide by the laws in place by governments as well as by custom. As the above cited quote concludes, business has a responsibility to stay “within the rules of the game, which is to say, engages in open and free competition, without deception or fraud.”<sup>31</sup> In another essay, Friedman expounds that the corporate executive’s responsibility “is to conduct the business in accordance with [the shareholders’] desires, which generally will be to make as much money as possible *while conforming to the basic rules of the society, both those embodied in the law and those embodied in ethical custom.*”<sup>32</sup> Thus, though Friedman was against corporate executives giving away profits (unless so ordered by the owners/shareholders), if he was presented with a model in which legal compliance was an aspect of CSR, he surely would favor at least that aspect of it.

Many scholars take a broader view of CSR than Friedman. According to these scholars, CSR includes an economic and ethical responsibility in addition to a legal compliance responsibility. Yet, Friedman’s ire at corporate giving is not isolated. Indeed, philanthropic activities are often included under ethical responsibility and are the focus of much controversy in a number of academic circles.

## **2. Business scholars’ view CSR as encompassing a wide range of activities.**

Business management literature has explored the topic of CSR.<sup>33</sup> This literature defines CSR as including a business’s responsibility to the wider societal good beyond

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<sup>29</sup> MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (2d ed. 1982); *see also* MILTON FRIEDMAN, *The Social Responsibility of Business, in THE ESSENCE OF FRIEDMAN* 36, 36–38 (Kurt R. Leube ed., 1987) [hereinafter FRIEDMAN, *Social Responsibility*].

<sup>30</sup> FRIEDMAN, *Social Responsibility*, *supra* n. \_\_\_\_, at 41. As Friedman notes, however, he would not advocate that corporations refrain from using the label CSR if it advantaged the corporation because that would, in itself, be asking the corporations to engage in a socially responsible activity. *Id.*

<sup>31</sup> FRIEDMAN, *supra* n. \_\_\_\_, at 133.

<sup>32</sup> FRIEDMAN, *Social Responsibility*, *supra* n. \_\_\_\_, at 37 (emphasis added).

<sup>33</sup> *See generally* Colin P. Marks & Nancy B. Rapoport, *The Corporate Lawyer’s Role in a Contemporary Democracy*, 77 FORDHAM L. REV. 1269, 1272-75 (2009). As Cynthia Williams has noted, “[l]egal academics have struggled to produce useful definitions of CSR, and in that effort may be well advised to look to management literature.” Cynthia A. Williams, *A Tale of Two Trajectories*, 75 FORDHAM L. REV. 1629, n. 54 (2006).



the business's economic performance.<sup>34</sup> The model most often cited is that of Professor Archie Carroll.<sup>35</sup> In 1979, Carroll categorized CSR into four social responsibilities that businesses have to society: economic responsibilities, legal responsibilities, ethical responsibilities, and discretionary (sometimes called philanthropic) responsibilities.<sup>36</sup> The first category, economic responsibility, represents the basic responsibility of a business to be profitable.<sup>37</sup> The second category, legal responsibility, represents the responsibility of a business to operate within the framework of legal requirements.<sup>38</sup> The third category, ethical responsibility, represents the "responsibility to do what is right, just, and fair."<sup>39</sup> Though ethical norms are embodied in both the economic and legal responsibilities, this category embodies society's "expectations of business over and above [any] legal requirement."<sup>40</sup> The final category, discretionary or philanthropic responsibility, represents society's expectation that a business should assume social roles above and beyond its economic, legal, and ethical responsibilities.<sup>41</sup> This could include making contributions to "various kinds of social, educational, recreational, or cultural purposes."<sup>42</sup>

Of all of the categories, philanthropic responsibility provokes the most debate among scholars.<sup>43</sup> While it is somewhat inaccurate to label something as both discretionary and as a responsibility, Carroll maintained this category as a part of his CSR conceptualization because he viewed society as expecting businesses to engage in some discretionary activities.<sup>44</sup> However, other commentators disagree on the discretionary nature of philanthropic activities and instead subsume them under the economic and ethical responsibilities, or as being an integral part, rather than a discretionary part, of CSR.<sup>45</sup> Thus, the debate appears to center on whether CSR includes

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<sup>34</sup> Matten & Moon, *supra* n. \_\_\_\_, at 405; Archie B. Carroll, *A Three-Dimensional Conceptual Model of Corporate Performance*, 4 ACAD. MGT. REV. 497, 497-98 (1979).

<sup>35</sup> See Aviva Geva, *Three Models of Corporate Social Responsibility: Interrelationships between Theory, Research, and Practice*, 113:1 BUS. & SOC. REV. 1, 2 (2008) (referring to Carroll's 1979 article on CSR as a "foundational article on social performance."); Dirk Matten & Andrew Crane, *Corporate Citizenship: Toward an Extended Theoretical Conceptualization*, 30 ACAD. MGT. REV. 166, 167 (2005) (noting that Carroll's 1979 model of CSR is widely cited).

<sup>36</sup> Archie Carroll, *A Three-Dimensional Conceptual Model of Corporate Performance*, 4 ACAD. MGT. REV. 497, 499 (1979); Archie Carroll, *The Four Faces of Corporate Citizenship*, 100/101 BUS. & SOC. REV. 1, 1-2 (1998); Geva, *supra* n. \_\_\_\_, at 5-7; Matten & Crane, *supra* n. \_\_\_\_, at 167.

<sup>37</sup> Matten & Crane, *supra* n. \_\_\_\_, at 167; Carroll, *supra* n. \_\_\_\_, at 500.

<sup>38</sup> Carroll, *supra* n. \_\_\_\_, at 500.

<sup>39</sup> Matten & Crane, *supra* n. 24, at 167.

<sup>40</sup> Carroll, *supra* n. \_\_\_\_, at 500.

<sup>41</sup> *Id.*

<sup>42</sup> Matten & Crane, *supra* n. \_\_\_\_, at 167. Carroll originally conceptualized these categories into a pyramid, and though he claimed they were not mutually exclusive, they were ordered by their "fundamental role in the evolution of importance." Carroll, *supra* n. \_\_\_\_, at 499-500. As a pyramid, economic responsibilities were at the bottom, topped by legal responsibilities, then by ethical responsibilities, and finally, by discretionary responsibilities at the very top. Geva, *supra* n. \_\_\_\_, at 5.

<sup>43</sup> Geva, *supra* n. \_\_\_\_, at 9.

<sup>44</sup> Carroll, *supra* n. \_\_\_\_, at 500.

<sup>45</sup> See Geva, *supra* n. \_\_\_\_, at 6, Table 1 (explaining how intersecting and concentric circle models of CSR differ from Carroll's pyramid model).

only, as its essential parts, the economic, legal, and ethical responsibilities or whether CSR should also include philanthropic activities.<sup>46</sup>

Friedman rejected the concept of philanthropic/discretionary giving as essentially undemocratic.<sup>47</sup> He argued that when a corporate executive spent corporate funds on charity, that executive spent the shareholders' money, via the shareholder's interest in the corporation, for a general social interest.<sup>48</sup> Thus, such an executive would essentially be imposing a tax on either the customers, through higher prices, or on its own employees in the form of lower wages.<sup>49</sup> Friedman argued that this imposition of taxes and expenditure of assets is a government function that should be left to the legislature to impose.<sup>50</sup> In contrast, Carroll's hierarchy simply has philanthropy as a discretionary part of CSR.

This optional view of philanthropic giving contrasts with a second view of CSR, which is embodied in a growing trend suggesting that businesses have a responsibility beyond their legal and ethical responsibilities.<sup>51</sup> As one commentator has noted, "[p]hilanthropy, which is usually understood as exceeding this minimum, appears to serve as the distinguishing point between the neoclassical economic position and the new widely accepted notion of corporate citizenship, which highlights the importance of corporate giving."<sup>52</sup> Thus, this newer line of thinking appears to embrace discretionary giving as an essential part of CSR, which may be subsumed under the other responsibilities.<sup>53</sup>

### 3. Legal scholarship views on CSR.

The above debate mirrors an ongoing one within the legal academic community over the role of the corporation within society. As early as the 1930s, Adolph Berle and E. Merrick Dodd debated the idea that a business might wish to aspire to a higher goal than simply turning a profit. Berle took the position that a corporation owes only a duty to the shareholders to maximize wealth, while Dodd suggested that the corporation should serve a social purpose as well.<sup>54</sup> Dodd's side of this debate has been described by some legal academics as Corporate Social Responsibility or CSR. Thus far, legal

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<sup>46</sup> This concept is sometimes referred to in the business management literature as "corporate citizenship." Matten & Crane, *supra* n. \_\_\_\_, at 168.

<sup>47</sup> Friedman, *supra* n. \_\_\_\_, at 38-39.

<sup>48</sup> *Id.* at 38.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* Friedman also appeared to take the view that CSR was a very narrow category of giving that did not benefit the corporation. Friedman was not critical of a corporation may engaging in charitable giving when it provided an advantageous tax deduction or garnered good public relations but noted that it may be hypocritical to term such giving as socially responsible. *Id.* at 41. Thus, giving that falls within one of the other responsibilities (economic, legal or ethical) arguably appears to be acceptable corporate behavior in Friedman's view.

<sup>51</sup> Geva, *supra* n. \_\_\_\_, at 9.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 6-9.

<sup>54</sup> Larry Catá Backer, *Multinational Corporations, Transactional Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 287, 298-99 (2006); C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 KAN. L. REV. 77, 81 (2002).

academics have not uniformly defined CSR.<sup>55</sup> As Professor David Engel noted, “[t]he people who say they are discussing corporate social responsibility are by no means all interested in the same questions, and they often seem to be talking past each other.”<sup>56</sup> However, generally speaking, most seem to assume a definition similar to the one assumed by Milton Friedman; that CSR refers to conducting philanthropic activities at the expense of profits.<sup>57</sup> This definition of CSR, as Jill Fisch has noted, is “characterized by its view that corporations have obligations to non-shareholder stakeholders and the public generally, and that these obligations include duties of fairness and morality that extend beyond legal and contractual rules.”<sup>58</sup> Thus the term CSR is often associated with the progressive corporate law proponents, but this actually represents just one side of the spectrum in the legal academic debate over the role of CSR. However, rather than argue over how to define CSR, as the business management academics have done, many legal academics have simply adopted a view that CSR proponents are advocating for the progressive corporate law view-point.<sup>59</sup> This progressive corporate law philosophy is counter to the shareholder primacy norm which sees the corporation as the property of the shareholders and views executives as owing duties primarily to the shareholders, with little concern for non-shareholder stakeholders (except to the degree that it would affect the shareholders). Though there are various shades of gray in the debate, for the purposes of this article, we will focus our discussion on the shareholder primacy norm and Progressive ends of the debate.

#### **a. Shareholder primacy norm**

At one end of the spectrum is the property conception of the corporation. The corporation is the property of its owners, *i.e.* the shareholders. As the directors of a corporation are elected by the shareholders, it is their duty, in directing the corporation, to do so for the benefit of the shareholders.<sup>60</sup> This sentiment was expressed most vividly in the 1919 case of *Dodge v. Ford Motor Co.*<sup>61</sup> In *Dodge*, the plaintiffs, who were minority shareholders in Ford Motor Company, brought suit against the directors to compel the issuance of a dividend.<sup>62</sup> Despite being in a position to pay generous dividends in previous years, in 1916, Henry Ford, who owned 58% of the Ford Motor Company stock, declared that no more special dividends would be paid and that the earnings would instead be put back into the company.<sup>63</sup> Henry Ford announced his motive for this decision in a press release, stating, that it was his intention “to employ still more men; to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes. To do this, we are putting the greatest share of our

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<sup>55</sup> David L. Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1, 3 (1979);

<sup>56</sup> *Id.*

<sup>57</sup> *See, e.g., id.* at 9-10.

<sup>58</sup> Jill E. Fisch, *The “Bad Man” Goes To Washington: The Effect of Political Influence on Corporate Duty*, 75 FORDHAM L. REV. 1593, 1601 (2006).

<sup>59</sup> Arguably, the business management literature has a healthier view of CSR as including responsibilities to make a profit which should be balanced with other responsibilities. *See Marks, supra* \_\_\_\_\_, at 1281-83.

<sup>60</sup> Engel, *supra* n. \_\_\_\_\_, at 267.

<sup>61</sup> 170 N.W. 668 (Mich. 1919).

<sup>62</sup> *Id.* at 669.

<sup>63</sup> *Id.* at 670-71.

profits back into the business.”<sup>64</sup> Based on this and other comments by Henry Ford, the plaintiffs sued to enjoin Ford from expanding its operations by building a smelting plant and to compel Ford to issue a special dividend.<sup>65</sup> After a hearing, the lower court agreed with the plaintiffs, enjoined Ford Motor Company’s use of the surplus to expand its operations, and ordered a special dividend to be issued.<sup>66</sup>

On appeal, the Michigan Supreme Court announced in very clear terms to whom the corporation owed its loyalties.<sup>67</sup> In reviewing Henry Ford’s testimony as well as legal precedence, the court stated,

There should be no confusion (of which there is evidence) of the duties which Mr. Ford conceives that he and the stockholders owe to the general public and the duties which in law he and his codirectors owe to protesting, minority stockholders. A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.<sup>68</sup>

Though the court reversed an injunction based upon the expansion of Ford’s operations, it did affirm a portion of the trial court’s order requiring a distribution of approximately \$20 million of the cash surplus, finding that even with some of the money being diverted to the expansion of operations, the surplus was great enough that it was the directors’ duty to distribute “a very large sum of money to stockholders” in the form of a dividend.<sup>69</sup> Thus, the *Dodge* case demonstrates the duty of care owed by corporate directors, and has been interpreted as equating this duty with a duty to maximize profits for the benefit of the shareholders.<sup>70</sup>

This property model is commonly equated with the shareholder primacy norm, in that it places the maximization of shareholder wealth above that of more altruistic concerns.<sup>71</sup> This conception of the corporation is most often aligned with the position of Adolph Berle<sup>72</sup> (of the Berle/Dodd debate described above) as well as with Milton Friedman’s conception of the corporation.<sup>73</sup> Indeed, Friedman considered it undemocratic for corporate directors to expend corporate monies on charity, as that was a role better left to elected representatives.<sup>74</sup> However, this view is not necessarily limited

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 672-74.

<sup>66</sup> *Id.* 677-78.

<sup>67</sup> *Id.* at 683 (“It is the contention of the plaintiffs that the effect of the plan is intended to be . . . to continue the corporation henceforth as a semi-eleemosynary institution and not as a business.”).

<sup>68</sup> *Id.* at 683-84.

<sup>69</sup> *Id.* at 685.

<sup>70</sup> Engel, *supra* n. \_\_\_\_, at 268.

<sup>71</sup> D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 278 (1998). Smith argues that the shareholder primacy norm has mutated from its origins and is “nearly irrelevant to the ordinary business decisions of modern corporations.” *Id.* at 279.

<sup>72</sup> Adolph A. Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931).

<sup>73</sup> Barnali Choudhury, *Serving Two Masters: Incorporating Social Responsibility into the Corporate Paradigm*, 11 U. PA. J. BUS. L. 631, 635-36 (2009).

<sup>74</sup> FRIEDMAN, *Social Responsibility*, *supra* n. \_\_\_\_, at 38-39.

to charitable contributions. Some scholars have asserted that even legal compliance should be tempered by economic concerns. In a 1982 article by Frank H. Easterbrook and Daniel R. Fischel, they urge, in a footnote, that,

managers do not have an ethical duty to obey economic regulatory laws just because the laws exist. They must determine the importance of these laws. The penalties Congress names for disobedience are a measure of how much it wants firms to sacrifice in order to adhere to the rules; the idea of optimal sanctions is based on the supposition that managers not only may but also should violate the rules when it is profitable to do so.<sup>75</sup>

This view is not necessarily consistent with Friedman’s view, however, as even Friedman noted that the responsibility to maximize profits was tempered by “conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom.”<sup>76</sup> Nonetheless, in the context of legal compliance, this focus on profits demonstrates the heart of the shareholder primacy norm; though other stakeholders (such as employees, customers or the community affected by the corporation) may have claims based upon contract or other areas of the law, corporate law’s proper focus is upon the interests of the shareholder.<sup>77</sup>

### **b. Progressives**

In response to the shareholder primacy norm, Progressives advocate a broader stakeholder model, under which “the corporation serves the interests of all the corporation’s stakeholders, including shareholders, but the shareholders do not enjoy primacy over other stakeholders.”<sup>78</sup> As Professor D. Gordon Smith succinctly describes this movement, “[w]hat rankles the progressives is that the descriptive claim [that corporations usually operate in the best interests of shareholders] represents a state of affairs they find repugnant. The primary item on the agenda of the progressives, therefore, has been to change corporate law in a way that accounts for the needs of nonshareholder constituencies.”<sup>79</sup>

Though the origins of the Progressive movement could be found earlier, Merrick Dodd’s debate with Berle provides a modern source for this conception of corporate purpose. Dodd stated that “[b]usiness—which is the economic organization of society—is private property only in a qualified sense, and society may properly demand that it be carried on in such a way as to safeguard the interests of those who deal with it either as employees or consumers even if the proprietary rights of its owners are thereby

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<sup>75</sup> Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1177 n.57 (1982). As Professor Cynthia Williams has observed, this view was rejected in an initial draft of the American Law Institute’s PRINCIPLES OF CORPORATE GOVERNANCE as “premiered on a false view of the citizen’s duty in a democratic state.” Cynthia A. Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N.C. L. REV. 1265, 1271-72 (1998) (quoting PRINCIPLES OF CORPORATE GOVERNANCE § 2.01 cmt. f (Tentative Draft No. 1, 1982)).

<sup>76</sup> FRIEDMAN, *Social Responsibility*, *supra* n. \_\_\_, at 38-39; Choudhury, *supra* n. \_\_\_, at 667-68.

<sup>77</sup> See Smith, *supra* n. \_\_\_, at 277-78 (“Employees, creditors, suppliers, customers, and others may possess contractual claim against the corporation, but shareholders claim the corporation’s heart.”).

<sup>78</sup> Choudhury, *supra* n. \_\_\_, at 665.

<sup>79</sup> Gordon, *supra* n. \_\_\_, at 281.

curtailed.”<sup>80</sup> This is not to say that the progressive movement in corporate law requires corporations to become eleemosynary institutions. Progressives simply view the responsibilities of a corporation as going beyond serving the shareholder’s bottom line. Not surprisingly, Progressives reject the law-as-price theory promoted by Easterbrook and Fischel, whereby corporations can weigh the consequences of conforming to or violating the law and choose violation if the risks are acceptable.<sup>81</sup>

The progressive movement has been criticized by shareholder primacy norm proponents as requiring corporate boards to serve two masters — both shareholders and stakeholders.<sup>82</sup> Faced with such a choice, corporate managers inevitably must choose one over the other—or even worse, neither. “[A] manager told to serve two masters (a little for the equity holders, a little for the community) has been freed of both and is answerable to neither.”<sup>83</sup> Shareholder primacy norm proponents would thus argue that the shareholder primacy norm best serves the interests of all stakeholders.<sup>84</sup>

Perhaps in light of this, many commentators have adopted a middle-ground approach to CSR. A common theme to this literature is the concept of “shared values” in which corporations should strive to identify areas where they can serve both their own interests and the interests of society as well.<sup>85</sup> Indeed, one of the authors of this article has elsewhere put forth a conception of CSR that would require a balancing of economic, legal and ethical interests in any decision-making.<sup>86</sup> However, a middle-ground is not always conveniently found, and ultimately lines regarding the corporate purpose still must be drawn.

## **B. CSR at the margins**

In some areas, such as charitable donations, it is easy, or perhaps easier, to find common ground between what is good for society and what is good for the corporate bottom line. Indeed, Friedman appeared to think it hypocritical to recognize such giving as CSR because it was self-serving to the corporation. As Friedman recognized, “it may well be in the long run interest of a corporation that is a major employer in a small community to devote resources to providing amenities to that community or to improving government. That may make it easier to attract desirable employees, it may reduce the wage bill or lessen losses from pilferage and sabotage or have other worthwhile effects.”<sup>87</sup> But despite Friedman’s reluctance to label such giving as CSR, modern academics have seen this arena as one where CSR has the most potential.

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<sup>80</sup> E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1162 (1932).

<sup>81</sup> *See, generally*, Cynthia A. Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N. C. L. REV. 1265 (1998).

<sup>82</sup> David G. Yosifon, *The Consumer Interest in Corporate Law*, 43 U.C. DAVIS L. REV. 253, 296 (2009).

<sup>83</sup> FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 38 (Harv. Univ. Press 1996).

<sup>84</sup> Yosifon, *supra* n. \_\_\_\_, at 258-59.

<sup>85</sup> *See, e.g.*, Judd F. Sneirson, *Green is Good: Sustainability, profitability, and a New Paradigm for Corporate Governance*, 94 IOWA L. REV. 987, 989-90 (2009); Margaret M. Blair, *Director’s Duties in a Post-Enron World: Why Language Matters*, 38 Wake Forest L. Rev. 885, 885 (2003). *See also* Choudury, *supra* n. \_\_\_\_, at 631-34.

<sup>86</sup> Marks & Rapoport, *supra* n. \_\_\_\_, at 1281-83.

<sup>87</sup> FRIEDMAN, *supra* n. \_\_\_\_, at \_\_\_\_.

However, there are a number of areas where the goals of society are adverse to, or at least do not necessarily align with, corporate interests. One glaring example is in the arena of legal compliance. Should corporations, as Easterbrook and Fischel have argued, weigh the costs of legal compliance with the risks of getting caught and the severity of the penalty imposed? A hypothetical may help illustrate this point.

A Better Crop, Inc. (“ABC”) is a produce wholesaler with its headquarters in California. ABC sells produce, such as lettuce, tomatoes, and other fruits and vegetables to retail grocers. The primary pesticide used by ABC on its farms (and its contracted farms) is XYZ, which has been the subject of recent studies regarding autism. Though there is some preliminary data correlating the pesticide to autism, the evidence is vague and no causal link has yet been shown. Nonetheless, in response to these studies, California imposes a ban on the use of XYZ on commercial farms. However, the fine imposed for violating the ban is small and it is doubtful that it will be strictly enforced. Though ABC is concerned about the possible negative publicity should their abuses come to light, the cost of switching from XYZ to another pesticide would increase the prices they would have to charge for produce by 15%. If ABC went pesticide-free, they would have to charge an additional 20% to account for the loss in crops. Both options will likely drive down consumption of ABC’s products and hurt ABC’s bottom line. Should ABC take the risk of getting caught, as it is still more profitable to use XYZ?

Such a hypothetical brings into stark contrast the contradicting goals of society and the corporation. Accepting that society imposes such fines where it finds the conduct in question objectionable, then should corporations, which owe their very existence to the State in the first place, respect such laws? Or is the severity of the fine a reflection of how reprehensible society finds the conduct? In other, words, if society was serious about such abuses, would it not create a more severe punishment and stricter enforcement provisions? However, even if this is true, could not the corporation, wielding its power and influence, lobby to ensure a light fine or penalty so that the costs of noncompliance are negligible?

This brings up yet another area where the diverging views of CSR are brought into conflict. As Professor Jill Fisch has pointed out, the corporation, unlike the Holmesian “bad man,” has the ability to ensure that its conduct is not illegal through lobbying efforts.<sup>88</sup> Under a shareholder primacy norm, corporations should use such lobbying powers to benefit the corporation’s bottom line (and thus benefit its shareholders). This power has come into even greater focus with the recent Supreme Court decision of *Citizens United v. FEC*.<sup>89</sup>

In *Citizens United*, the nonprofit corporation, Citizens United (“CU”), produced and distributed a movie critical of 2008 presidential candidate Hillary Clinton.<sup>90</sup> The 90-minute movie titled *Hillary: The Movie*, was released in theaters and on DVD leading-up to the 2008 election primary.<sup>91</sup> CU was also approached to release the movie on pay-per-view, with CU paying \$1.2 million to do so.<sup>92</sup> CU intended the movie to be viewed free

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<sup>88</sup> Jill E. Fisch, *The “Bad Man” Goes to Washington: The Effect of Political Influence on Corporate Duty*, 75 *FORDHAM L. REV.* 1593, 1608-09 (2006).

<sup>89</sup> 130 S. Ct. 876 (2010).

<sup>90</sup> *Id.* at 886-87.

<sup>91</sup> *Id.* at 887. Coincidentally, the movie referred to Clinton as “Machiavellian.” *Id.* at 890.

<sup>92</sup> *Id.*

of charge,<sup>93</sup> but doing so put CU at risk of running afoul of the Bipartisan Campaign Reform Act of 2002 (BCRA), which prohibited corporations from either using general treasury funds to make direct contributions to candidates or from making “independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media, in connection with certain qualified federal elections.”<sup>94</sup> Thus CU sought declaratory and injunctive relief from the Federal Elections Commission challenging the constitutionality of the BCRA with regards to both the prohibition on this type of speech as well as the disclaimer and disclosure requirements.<sup>95</sup>

The lower courts denied relief based upon *stare decisis* as the Supreme Court had previously upheld the constitutionality of the BCRA<sup>96</sup> in *McConnell v. FEC*<sup>97</sup> and *Austin v. Michigan Chamber of Commerce*.<sup>98</sup> On appeal, the Supreme Court, in a 5-4 decision, overturned *McConnell* and *Austin* and found the BCRA’s prohibition on corporate political speech unconstitutional.<sup>99</sup> Among the concerns raised by the government on appeal was that allowing corporations to take part in such political speech would open the door to corruption.<sup>100</sup> The Court, however, was not so concerned based on the record before it, stating:

When Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy. If elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern. We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these influences. The remedies enacted by law, however, must comply with the First Amendment; and, it is our law and our tradition that more speech, not less, is the governing rule. An outright ban on corporate political speech during the critical preelection period is not a permissible remedy. Here Congress has created categorical bans on speech that are asymmetrical to preventing quid pro quo corruption.<sup>101</sup>

The Court concluded that “[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”<sup>102</sup> The Court did uphold, however, the BCRA’s disclaimer and disclosure requirements.<sup>103</sup>

This new holding brings into even sharper focus the power the corporation has to influence government. As Professor Erik Gerding commented soon after the decision, “[f]rom a pure descriptive standpoint, after the *Citizens United* decision, it seems impossible to argue that these spheres [corporations and government] can be neatly

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 887-88.

<sup>95</sup> *Id.* at 888.

<sup>96</sup> *Id.* at 888.

<sup>97</sup> 540 U.S. 93 (2003).

<sup>98</sup> 494 U.S. 652 (1990).

<sup>99</sup> *Citizens United*, 130 S. Ct. at 913.

<sup>100</sup> *Id.* at 908-09.

<sup>101</sup> *Id.* at 911.

<sup>102</sup> *Id.* at 913.

<sup>103</sup> *Id.* at 916.



separated. Corporations are not just playing by the rules, they have the right to participate in setting them. Moreover, they may be the 800 lb gorilla in the room.”<sup>104</sup> The problem the progressive movement faces with regard to lobbying and free speech actions is that the corporation has no ability, in and of itself, to weigh right from wrong and it is questionable, in some circumstances, what does best advance societal goals.<sup>105</sup> Ultimately, because of this lack of corporate conscience, the corporation must rely upon its agents, *i.e.* the board of directors and its officers. Thus, in such areas, CSR comes down to how those individuals view the corporate purpose and their roles in pursuit of that corporate purpose. Thus a review of two classic works on the nature of power and how it should or could be wielded can offer insight into the nature of corporate governing and CSR.

### III. Corporations and Business Ethics of the Past: Plato, Machiavelli, and the City State.

Given the corporation’s reliance on its agents, namely, the CEO, other corporate officers, and the Board of Directors, it is helpful for CSR scholarship to determine how corporate agents might use corporate assets, for what purpose, and what might influence their behavior. Utilitarian theory, with its emphasis on maximizing “happiness,” together with classic economic theory, has been important in providing ethical underpinnings for the shareholder primacy position.<sup>106</sup> However, most Progressive commentators adhere to a more Kantian point of view, which focuses on determining what is “right” or “good” objectively and then determining whether an action falls within that measurement.<sup>107</sup> Both the Utilitarian and Kantian approaches are problematic. As is clear from the discussion above, proponents of the shareholder primacy norm do not believe that CSR adds anything meaningful, and is at best a distraction, at worst a violation of the fiduciary duties corporate officers owe the shareholders. Likewise, the Progressive position preordains that CSR, particularly its philanthropic aspects, should be followed. As Professor Smith’s quote above makes clear, the notion that the pursuit of wealth for its own sake is viewed as inappropriate, if not ethically reprehensible.

The Utilitarian/Kantian dichotomy, while useful, puts all sides of the CSR debate into set positions.<sup>108</sup> However, there is a third branch of Western philosophical thought which argues that social goals are best pursued by defining characteristics people should have,

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<sup>104</sup> Erik Gerding, The Conglomerate Blog, January 23, 2010, *available at* <http://www.theconglomerate.org/2010/01/google-china-and-citizens-united-a-short-essay-on-power-and-corporations.html>.

<sup>105</sup> Fisch, *supra* n. \_\_\_\_\_, at 1603; Marks, *supra* n. \_\_\_\_\_, at 1149.

<sup>106</sup> GEORGE P. FLETCHER BASIC CONCEPTS OF LEGAL THOUGHT 144 (Oxford Univ. Press 1996) (describing utilitarianism thusly: “The most common mode of moral reasoning in the Anglo-American tradition is cost/benefit analysis – the “balancing” of competing advantages and disadvantages of adopting particular courses of action.”).

<sup>107</sup> *Id.* at 146-51, 149 (“In the end Kant’s moral teaching demands purity from all of us.”).

<sup>108</sup> We understand that this is somewhat of an oversimplification of the dichotomy and that arguments could certainly be made that Progressives also follow a global utilitarian model in that corporations should maximize the happiness of society if it outweighs the pain inflicted upon itself. A full discussion of the Utilitarian/Kantian dichotomy is beyond the scope of this article (we feel we have our hands full with the narrower topic at hand) but feel it is at least important to recognize the link between these philosophical schools of thought and modern approaches to CSR.

especially the characteristics of rulers. Two of the most important works that follow this approach are Plato's *The Republic* and Machiavelli's *The Prince*. These works may allow better insight into how corporate actors would and should use CSR. As a first step, we need to address whether it is actually valid to compare the City-States of Ancient Greece and Renaissance Italy with the modern corporation.

## A. The City State and the Modern Corporation, A Comparison

### 1. The Problems of Governance

Both *The Prince* and *The Republic* are tracts of political theory. They are concerned with the mechanics of government, namely, how should rulers rule. But why should we look to them for guidance on corporate conduct? Corporations are, after all, creatures of government, subject to governments, not governments themselves.<sup>109</sup>

The answer lies in the fact that corporations are created for the same purposes as the city-state: as a "response to human needs."<sup>110</sup> Plato states that in nature each person had to see to his own needs.<sup>111</sup> Eventually, it was seen that it was better for a person to concentrate his efforts on producing that for which he has a talent.<sup>112</sup> Plato goes on to explain:

Since each person has many wants, many partners and purveyors will be required to furnish them. One person will turn to another to supply a particular want, and for a different want or need he will seek out still another. Owing to this interchange of services, a multitude of persons will gather and dwell together in what we have to come to call the city or the state.<sup>113</sup>

According to Plato, the scope and size of the city-state expands as new specialties are identified and new groups of specialists join the population to meet the needs of those who desire them. First, the basic necessities are met: food, shelter, and clothing.<sup>114</sup> The producers of these goods are further subdivided (weavers, shoemakers, carpenters, smiths, and other craftsmen), then a network of distributors (merchants) is introduced, as well as transporters.<sup>115</sup> Eventually, the city state will become so large that very particular specialists will be needed who are capable of protecting friends, guarding against enemies, and have the wisdom to do so in all its aspects, not just on the field of battle.<sup>116</sup> Plato calls such people "guardians."<sup>117</sup>

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<sup>109</sup> See, e.g., *Dartmouth College v. Woodward*, 17 U.S. 518, 636 (1819)

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created . . . . But this being does not share in the civil government of the country, unless that be the purpose for which it was created. (Marshall, C.J.).

<sup>110</sup> THE REPUBLIC, 369b (p. 64).

<sup>111</sup> *Id.* at \_\_\_\_ (p. 64)

<sup>112</sup> *Id.* at 369e-370a (p. 65)

<sup>113</sup> *Id.* at 369c (p. 64).

<sup>114</sup> *Id.* at 369d (p. 65).

<sup>115</sup> *Id.* at 370c-371b (pp. 66-67).

<sup>116</sup> THE REPUBLIC, *supra* n. \_\_\_\_, at 375a-376c (pp. 70-72).

<sup>117</sup> *Id.* at 374d-e (p. 70).

Machiavelli's description of the rise of the state is also rooted in basic human need: "for in the beginning of the world, the inhabitants being few, they lived dispersed for a time in the manner of beasts. Then, as the population increased, they drew together . . . the better to defend themselves."<sup>118</sup> In short, the state was formed to promote human welfare. According to Machiavelli the leader of the state "must provide in such a way that, in whatever circumstances, the citizens will always be in need of him and his government. Then they will always be loyal to him."<sup>119</sup> As we all well know, Machiavelli calls such people "The Prince."<sup>120</sup>

For a compelling comparison of the ancient and renaissance city-state with the modern corporation, consider Peter Drucker's *The Concept of the Corporation*. Drucker's description of the purpose of a corporation closely aligns with Plato's and Machiavelli's description of the state: "When we say that the corporation is an institution we say that, like any institution, it is an instrument for the organization of human efforts to a common end."<sup>121</sup> Drucker, like Plato and Machiavelli, considers leadership a paramount concern:

[T]he large corporation is in no way different from an army; it must have the equipment but also, as in the army, equipment is of no avail without the functional organization of human effort. And like the army or like any other social institution, the things that really count are not the individual members but the relations of command and responsibility among them.<sup>122</sup>

As with every other institution, the survival and successful functioning of the corporation depends on the solution of three interdependent problems . . . Of these problems, the decisive one, particularly in the corporation, is the problem of leadership. . . . No institution can possibly survive if it needs geniuses or supermen to manage it.<sup>123</sup>

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<sup>118</sup> Niccolò Machiavelli, *THE DISCOURSES* (Daniel Donno, tr. 1966) Book I, Chapter 2 (p. 102) (contained in *THE PRINCE*, *supra* n. \_\_\_\_).

<sup>119</sup> *THE PRINCE*, *supra* n. \_\_\_\_, at Chapter 9 (p. 46).

<sup>120</sup> *Id.* at Chapter 1 (p. 16).

<sup>121</sup> PETER DRUCKER *THE CONCEPT OF THE CORPORATION* (1993 edition) 20 (1946). Also consider the *Code of Conduct for Google, Inc.*, which states "[o]ur products, features and services should make Google more useful for all our users, whether they're searching, advertising or posting content, and whether they're large corporations or individuals. We have many different types of users, but one guiding principle: 'Is what we are offering useful?'" *Google Code of Conduct Part I.b. available at <http://investor.google.com/corporate/code-of-conduct.html>.*

<sup>122</sup> Drucker, *supra* n. \_\_\_\_ at 25-26. It is interesting to note that Drucker's purpose in some ways was also similar to Machiavelli: the preservation of the corporation, "[I]t is the organization which the corporation must maintain and the survival of which is the supreme law. . . and makes survival all the more the measure of all its actions and decisions." *Id.* at 26.

<sup>123</sup> Drucker, *supra* n. \_\_\_\_ at 21 It may seem that Drucker argues against a Prince as Machiavelli envisions him. But Machiavelli clearly envisioned the Prince having a management team (Machiavelli himself aspired to be part of Lorezo di Medici's in Florence):

[T]here is no way of avoiding flattery except by letting men know that they will not offend by telling the truth; yet if every man is free to tell you the truth, you will not receive due respect.

Therefore a prudent prince will pursue a third course, choosing the wise men of his state and granting only to them the freedom to tell him the truth, but only concerning those matter about which he asks, and no others. Yet he should question them about all

While this is admittedly a very cursory examination of the parallels between the modern corporation and the city-state, it is clear that both the state and the corporation are institutions created for the purpose of human welfare and face similar leadership questions.

## 2. The Comparison of the Governed

Given that there were no corporations in either Machiavelli's or Plato's era, philosophical ideals regarding governing city-states and poleis provide us with the closest analogies in terms of population and economic power.<sup>124</sup> Indeed, the size of some corporations dwarf even the largest of the city-states and poleis: Walmart employs over 2 million people world-wide<sup>125</sup> and recorded \$13.4 billion in profits in 2009;<sup>126</sup> Microsoft employs 88,124 people world-wide<sup>127</sup> and recorded \$17.23 billion in profits in 2009;<sup>128</sup> Exxon Mobil reports to employ nearly 80,000 world-wide<sup>129</sup> and recorded \$45.22 billion in 2009.<sup>130</sup> While shareholder numbers for these corporations are difficult to ascertain due to the constant trading of stocks, Walmart has over 3 billion shares outstanding,<sup>131</sup> Microsoft has in excess of 8 billion shares outstanding,<sup>132</sup> and Exxon Mobil has over 4 billion shares outstanding.<sup>133</sup> Therefore, it seems certain these companies have thousands of shareholders and perhaps even millions.

Compare these corporation numbers to those of the poleis and city-states during Plato's and Machiavelli's time. Plato lived from 428-348 B.C.E. and though population estimates from this time period are scant, data does exist for some of the poleis.<sup>134</sup> For instance, the polis of Mantinea, which occupied an area of roughly 295 km,<sup>135</sup> did not have more than 3,000 people as of 420 B.C.E.<sup>136</sup> It has been estimated that in 318 B.C.E.

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matters, listen to their opinions, and then decide for himself as he wishes. He should treat these councils and the individual advisers in such a way as to make it clear that their words will be the more welcome the more freely they are spoken. Except for these men, he should listen to no one, but rather pursue the course agreed upon and do so resolutely.

THE PRINCE, *supra* n. \_\_\_\_, at Chapter 23 (p. 88).

124 The comparison is particularly apt given the economic power multi-national corporations wield. One oft cited 2000 study revealed that of the top 100 economies in the world, 51 were corporations. See Sarah Anderson & John Cavanagh, *Top 200: The Rise of Corporate Global Power* 3, available at <http://s3.amazonaws.com/corpwatch.org/downloads/top200.pdf>; Benjamin J. Richardson, *Reforming Climate Finance Through Investment Codes of Conduct*, 27 WIS. INT'L L. J. 483, n. 8 (2009).

125 See <http://investors.walmartstores.com/phoenix.zhtml?c=112761&p=irol-faq>

126 See [http://www.forbes.com/lists.2009/18/global-09\\_The-Global-2000\\_Rank.html](http://www.forbes.com/lists.2009/18/global-09_The-Global-2000_Rank.html)

127 See [http://www.microsoft.com/presspass/inside\\_ms.mspix](http://www.microsoft.com/presspass/inside_ms.mspix)

128 See [http://www.forbes.com/lists.2009/18/global-09\\_The-Global-2000\\_Rank.html](http://www.forbes.com/lists.2009/18/global-09_The-Global-2000_Rank.html)

129 See [http://www.exxonmobil.com/Corporate/about\\_who\\_workforce.aspx](http://www.exxonmobil.com/Corporate/about_who_workforce.aspx)

130 See [http://www.forbes.com/lists.2009/18/global-09\\_The-Global-2000\\_Rank.html](http://www.forbes.com/lists.2009/18/global-09_The-Global-2000_Rank.html)

131 See <http://finance.yahoo.com/q/ks?s=WMT+Key+Statistics>

132 See <http://www.microsoft.com/msft/FAQ/stock.mspix>

133 See <http://finance.yahoo.com/q/ks?s=xom>

134 HANSEN & NIELSEN, AN INVENTORY OF ARCHAIC AND CLASSICAL POLEIS 8 (Oxford Press 2004). These numbers generally come from army figures, which give a "rough idea of the number of adult male citizens of military age who are fit for military service." *Id.*

135 *Id.* at 518.

136 *Id.* (noting that "it is not possible to give any exact estimate of the size of the population on this basis").

Megale polis's population was around 65,000.<sup>137</sup> And when the territory of Thebes was conquered and razed to the ground in 335 B.C.E. by Alexander the Great, more than 6,000 men were killed, and the remaining population of 30,000 men, women, and children were sold into slavery.<sup>138</sup> Machiavelli lived from 1469-1527 C.E. and the population data from his life is likewise approximate, but according to one source, the estimated population of all of Italy in 1450 C.E. was only 7,500,000 people.<sup>139</sup> According to another source, 50 years later the estimate was 10,500,000 people.<sup>140</sup> As Italy was not unified until 1861, these population numbers are distributed among as many as nineteen autonomous regions.

## B. Machiavelli's Prince and Doing What is Necessary

It is important to recognize that Niccolo Machiavelli wrote *The Prince* with one primary goal in mind—it was in fact a naked attempt to get into the good graces of Lorenzo Medici.<sup>141</sup> It was also a failure in that regard.<sup>142</sup> It is often overlooked that his advocacy for a monarchy may well have been more the act of a courtier than a reflection of his political beliefs.<sup>143</sup>

Notwithstanding these caveats, Machiavelli's advice is as relevant to corporate CEOs as it was to Medici. Consider:

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137 *Id.*

138 *Id.* at 455.

139 RUSSELL, *THE FONTANA ECONOMIC HISTORY OF EUROPE: POPULATION IN EUROPE 500-1500* 19 (Fontana Books 1969).

140 BRADY ET AL, *HANDBOOK OF EUROPEAN HISTORY 1400-1600: LATE MIDDLE AGES, RENAISSANCE, AND REFORMATION* 13 (E.J. Brill 1994).

<sup>141</sup> *THE PRINCE*, *supra* n. 11, at 5-6 (Translator's Introduction). "I . . . have composed a little book, *De Principatibus* . . . to a prince— especially a new prince—it ought to be welcome. Therefore I am addressing it to the Magnificent Giuliano . . . There is my wish that these Medici lords would begin to use me, even if they were to start by setting me to roll a stone." (letter to Francesco Vittori, December 10, 1513). *See also* *THE ESSENTIAL WRITINGS OF MACHIAVELLI* *xix* (Editor's note) (Peter Constantine ed. & translator, Random House 2007).

The Lorenzo Medici here is not Lorenzo the Magnificent, who died in 1492. It is instead, his grandson. Originally, *The Prince* was to be dedicated to Giuliano Medici, Lorenzo the Magnificent's son, who died in 1516. *THE PRINCE*, *supra* n. \_\_\_ at Dedication (p. 16), n. 1 (p. 135).

<sup>142</sup> This failure could not have been unexpected. After all, he had been tortured in January of 1513 on suspicion of seeking the overthrow of the Medici government.

<sup>143</sup> There has never been any doubt among the students of Machiavelli that he believed in republican government over monarchies. Rousseau believed the book to be a subversive writing,

Machiavelli was a gentleman and a good citizen; but being attached to the house of Medici, he was forced during the oppression of his country to disguise his love of liberty. The very choice of an execrable hero [Cesare Borgia] reveals his secret intention, and the antithesis between his principles in his book *The Prince* and those in his *Discourses on Livy* and *The History of Florence* proves that this profound political thinker has so far had only superficial or corrupted readers. The Pope's court strictly prohibited his book, which I can well believe, since that was the Court he depicts most plainly.

JEAN-JACQUES ROUSSEAU *THE SOCIAL CONTRACT* (Maurice Cranston, tr. 1968, Penguin Books), Book III, p. 118, n. \_\_\_ (1762) Antonio Gramsci, an Italian Marxist, went so far as to argue *THE PRINCE* was a proto-revolutionary work, as it exposes the tactics of the rulers to the common people. ANTONIO GRAMSCI *THE MODERN PRINCE AND OTHER WRITINGS* \_\_\_ (Louis Marks, tr. 1957).

Wisely pursued, the advice I have given above will make a new prince appear to have been long established in his state, and it will bind him more securely and more firmly to it than if he had actually been long established there. The actions of the new prince are . . . closely watched. . . and when they are recognized to be fitting and able, they win men over and compel their allegiance more than ancient lineage does; for men are more taken with the present than with the past. When they find themselves well off in the present, they enjoy it and seek nothing more. Indeed, so long as the prince does not neglect his duties, they will undertake to defend him in every way.<sup>144</sup>

This was an explicit reminder to Medici that his family had only been back in power for a very short time, and had conquered Florence with a Spanish Army.<sup>145</sup> The Florentines were not used to his rule and might decide to revolt again, as they had 18 years before. Such can be said to be similar for the CEO, with Directors and Shareholders always looking over his shoulder. Follow my advice, says Machiavelli, and you will thrive, and your state (corporation) with you.

The Prince is divided into three parts. The first part essentially lists all the different ways a man may become a prince: through inheritance, through force of arms, by evil means, or by religious office<sup>146</sup> and is not germane to this article. The second part concerns what a ruler should do to hold onto power once acquired.<sup>147</sup> The final part was an argument for what should happen next in Florence and on the Italian Peninsula.<sup>148</sup>

We will focus on the second part of The Prince, which is about maintaining power and furthering goals, particularly the goals of personal and political survival. According to Machiavelli, order is the only way to ensure social stability, and the key to order is a strong ruler. One of his key points is that moral obligations should not stand in the way of survival.

Many men have imagined republics and principalities that never really existed at all. Yet the way men live is so far removed from the way they ought to live that anyone who abandons what is for what should be pursues his downfall rather than his preservation; for a man who strives after goodness in all his acts is sure to come to ruin, since there are so many men who are not good. Hence it is necessary that a prince who is interested in his survival learn to be other than good, making use of this capacity or refraining from it according to need.<sup>149</sup>

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<sup>144</sup> THE PRINCE, *supra* n. 11, Chapter 24 (p. 89-90).

<sup>145</sup> *Id.* at 3. The former regime, which Machiavelli was part of, had lost a war and been turned out by the Medic dynasty. The Medici had backed the winning side in a larger war for control over Italy, and essentially sought Florence as a spoil after an 18 year absence. *Id.*

<sup>146</sup> *Id.* at Chapters 1-11 (pp. 16-51).

<sup>147</sup> *Id.* at Chapters 12-23 (pp. 51-89).

<sup>148</sup> *Id.* at Chapters 24-26 (pp. 89-97).

<sup>149</sup> *Id.* at Chapter 15 (pp. 61-62). There can really be no doubt that Machiavelli was thinking of Plato, among others. However, as will be discussed below, Plato's focus was just as much on the injustice he was describing as it was on the perfect city that never existed. Machiavelli did not have any problems with goodness as such. However, he did not really have much problem with vice either. To wit:

Everyone will admit that it would be very praiseworthy if a prince had all those above named qualities that are deemed good; but since he cannot have them, nor devotedly adhere to them, because human conditions will not permit, he must be sufficiently

Machiavelli discusses two issues of relevance for the modern corporate officer: Should the Prince be virtuous? And what should his spending policies be with regard to virtue? Whether one should be virtuous, Machiavelli argues, depends on to what degree it helps the prince, and through him, the state, survive and thrive. As he states:

How praiseworthy it is that a prince keeps his word and governs by candor instead of craft, everyone knows. Yet the experience of our own time shows that those princes who had little regard for their word and had the craftiness to turn men's minds have accomplished great things. . .

.Therefore a prince will not actually need to have all the qualities previously mentioned, but he must surely seem to have them. Indeed, I would go so far as to say that having them all and always conforming to them would be harmful, while appearing to have them would be useful.<sup>150</sup>

At the same time, the prince cannot give into his appetites. He should always appear to be, and actually be, virtuous, whenever possible.<sup>151</sup> The prince should discard virtue only when it is required, not because he can.<sup>152</sup> The reason for this is straight-forward: the prince cannot afford to be hated.<sup>153</sup> If a prince is hated, then the population has no reason for him (and by extension his state) to survive.

The activities of a prince are not solely concerned with following high moral standards. At some point, money must be spent. Of course, there are necessary expenditures - the government's servants must be paid, defenses must be maintained, and so forth. Yet, some spending is a matter of the prince's discretion. Such spending has no purpose other than enhancing the prince's reputation. Machiavelli argues that the prince must be careful with his money:

I say that it would be well to be reputed generous. Yet to be so generous as to gain a reputation for this quality is harmful... To be reputed generous among men, one must indulge in every form of ostentation, with the result that any prince who does so will have to spend all of his resources and, to keep up his reputation, will have to burden his people unduly by resorting to extortionate taxation and every other means of raising

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prudent to avoid a reputation for those vices which would deprive him of his state and, if possible, also avoid those that would not deprive him of it. In case he is unable to avoid these last, however, he need not be overly concerned. Moreover, he need not be concerned if he acquires a reputation for those vices without which he would be unlikely to save his state. For, everything considered, he will find things which, though seeming good, will lead to his ruin if pursued, and others which, though seeming evil, will result in his safety and well-being.

*Id.* at 62.

<sup>150</sup> THE PRINCE, *supra* n. 11, at Ch. 18 (p. 68-69).

<sup>151</sup> "Therefore, a prince will not actually need to have all the qualities previously mentioned, but he must surely seem to have them.... That is, it will be well for him to seem and, actually, to be merciful, faithful, humane, frank, and religious. But he should preserve a disposition which will make a reversal of conduct possible in case the need arises." *Id.* (at 69).

<sup>152</sup> *Id.*

<sup>153</sup> "Of all the things [the prince] must guard against, hatred and contempt come first..." *Id.* at Chapter 16, (p. 64). "Still a prince should make himself feared in such a way that, though he does not gain love, he escapes hatred..." *Id.* at Ch. 17 (p. 66).

It is interesting to note that Machiavelli sees the chief cause for hatred for the prince is seizing the property of his subjects. "[A]bove all, he should refrain from the property of others, for men are quicker to forget the death of a father than the loss of a patrimony." *Id.*

funds....Therefore, being unable to assume the virtue of liberality so that it will be recognized and yet create no danger, a wise prince will not object to being reputed a miser.<sup>154</sup>

However, Machiavelli recognized that many notable rulers in the past, Cyrus, Alexander, and Julius Caesar were seen as generous. The key, argued Machiavelli, was whether the prince was spending his own money, his subjects' money, or someone else's.<sup>155</sup> If it was his or her subjects' own funds, the prince must be frugal, lest he face the choice of being either "poor and contemptible, or, to escape poverty, become[ing] rapacious and hateful."<sup>156</sup> On the other hand, if the funds being spent are from another source, such as bounty from pillaging and extorting conquered lands, then there is no reason for the prince not to be generous, especially to his army.<sup>157</sup>

Machiavelli saw the prince's ability to stay in power as a balancing act between doing what was required to stay in power, but not doing so much as to be despised for it. Ultimately, however, Machiavelli condones any action of a prince that keeps him in power; only failure is unforgivable.<sup>158</sup> In this way, Machiavelli mirrors much of Ancient Greek thought, particularly that of 5th Century Athens B.C.E. prior to its defeat in the Peloponnesian Wars. Machiavelli, it must be remembered, aspired for a prince who could free Italy from its foreign occupation.<sup>159</sup> Anything that could accomplish this would, in his view, be seen as good and be appropriately rewarded by all.<sup>160</sup> This is consistent with the Athenian perspective that looked to external accomplishments to

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<sup>154</sup> THE PRINCE, *supra* n. 11, at Chapter 16 (p. 63).

<sup>155</sup> *Id.* at Ch. 16 (p. 64).

<sup>156</sup> *Id.* at Ch. 16. (p. 64).

<sup>157</sup> *Id.* This particular aspect of Machiavelli's thought is particularly relevant depending how corporate officers view the corporations' assets as belonging to themselves along with the shareholders, or if they view the shareholders property as something they "handle."

<sup>158</sup> Consider:

One could cite a host of modern examples and list the many peace treaties, the many promises that were made null and void by princes who broke faith, with the advantage going to the one who best knew how to play the fox. But one must know how to mask this nature skillfully and be a great dissembler. Men are so simple and so much inclined to obey immediate needs that a deceiver will never lack victims for his deception. Of recent examples proving this, there is one I will not omit. Pope Alexander VI never gave thought to anything but deception and never lacked someone on whom to practice it. There never was a man who made promises more persuasively or swore to them more solemnly and kept so few of them as he. Yet his tricks always brought the results he desired, for he knew this side of the world well.

*Id.* at Chapter 18 (pp. 68-69).

<sup>159</sup> *Id.* at Chapter 26 (pp. 94-97).

<sup>160</sup> *Id.* at 97

This opportunity, therefore, must not be allowed to pass, so that Italy after so long a time may find her redeemer. I cannot describe with how much love, with what thirst for revenge, with what resolute loyalty, with what tenderness, with what tears he would be received in all those provinces which have endured these foreign hordes. What gates would be closed to him? What people would deny him obedience? Whose envy would oppose him? What Italian would withhold his allegiance?



indicate individual and societal excellence.<sup>161</sup> In this view, if the end is met, any means to obtain it are justified. The most important response to this is unquestionably Plato's Republic.

### C. The Platonic Alternative

Since *The Prince* is a purely political tract, and *The Republic* a largely ethical one, how can Plato be seen as responding to Machiavellian theory? To answer this question, we will examine the similarities in the political situations of the two periods. After that, we will examine Plato's response to the Ancient Greek mindset (and by extension Machiavelli).

#### 1. Plato's Greece and Machiavelli's Italy

*The Republic* was written sometime between 380 and 360 B.C.E. in Athens. At that time, the Greek city-states were in the middle of a century of intercity warfare. It began with the Second Peloponnesian War in 431 B.C.E, and ended with the loss of Greek independence to Macedon in 336 B.C.E. after the Battle of Chaeronea.<sup>162</sup> Within Plato's lifetime, he saw the destruction of the Athenian Empire and the weakening of the entire Greek peninsula as Phillip II sought his own hegemony.<sup>163</sup> Plato's ultimate conclusion was that, whether by base appetite or incorrect morality, the constant drive to victory, by individuals or individual city-states with no concern for the consequences of ceaseless war, was destroying his country.<sup>164</sup> He wrote *The Republic* in part, to address his concerns and propose a solution.

Machiavelli's Italy, especially Florence, was equally war-torn. With the end of the Hundred Years War in France in 1453 and the Conquest of Granada in Spain in 1492, the rulers of those two nations turned to the Italian peninsula to fight proxy wars. In Florence, Machiavelli watched the destruction of the old order with the invasion of Charles VII of France, saw Savanorola's extreme religious theocracy ended with an *auto de fe*, the rise and fall of an oligarchical republic (for which Machiavelli served as Secretary to the Second Chancery of the Signoria) under Pier Soderini, and the return of the Medici at the head of a Spanish army.<sup>165</sup> What happened in Florence was going on elsewhere in the Peninsula, and Machiavelli saw Italy as "more enslaved than the Hebrews, more servile than the Persians, more scattered than the Athenians, leaderless, disordered, beaten, despoiled, bruised, trampled, subject to every kind of injury."<sup>166</sup>

#### 2. The Republic

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<sup>161</sup> See ALASDAIR MACINTYRE *WHOSE JUSTICE? WHICH RATIONALITY?* 12-46 (Chapters II-III) (1988) for an extensive discussion of this point.

<sup>162</sup> THE NEW ENCYCLOPÆDIA BRITANNICA 242-53 (v. 20, 15th ed. 2002).

<sup>163</sup> *Id.*

<sup>164</sup> *E.g.*, THE REPUBLIC, *supra* n. \_\_\_\_, at 278b-c (pp. 74-75) ("Nor can we permit it to be said that the gods plot against the gods and make war upon each other—which is in any case false—if we want our future guardians to abhor even the thought of quarreling among themselves... If we could get them to believe us, we would tell our future guardians that quarreling is a blasphemy, and we would say that to this day there has never been a quarrel among citizens.").

<sup>165</sup> THE NEW ENCYCLOPÆDIA BRITANNICA 215-19 (v. 22, 15th ed. 2002).

<sup>166</sup> THE PRINCE, *supra* n. \_\_\_\_, at Chapter 26 (pp. 94-95).

The Republic and The Prince, then, both arose from times of extreme social instability. Yet the authors came up with very different solutions. Plato argued that, contrary to common belief, tough times do not require “tough” leaders, but that such leaders are actually responsible for the hardships of the populace. Machiavelli, as already discussed, argued that it would be best for a leader to establish himself in power and then devote his energies to staying there, as stability would be better for the populace at large than the chaos of constant upheaval.<sup>167</sup>

In Book I of The Republic, Socrates is attending a religious festival and visits the home of an old friend.<sup>168</sup> Through his dialogue with his companions, Socrates proposes the following theory: the unjust man will harm both the just and the unjust in pursuit of his own gains, while the just man harms only the unjust who would harm others or himself.<sup>169</sup> He further argues that injustice can never be profitable, as those who are unjust cannot help but to conduct their lives badly, while those who are just govern their lives well, and by extension, live well.<sup>170</sup>

In Book II of The Republic, Plato begins to address directly the issues that Machiavelli would later raise in The Prince. Here, Socrates is confronted by Glaucon and Adeimantus, who present arguments about the type of person who is successful in becoming a leader of the city. Consider the following in light of our discussion of The Prince:

Perfect Injustice denotes the perfectly unjust man. . .He must be allowed to enjoy the greatest reputation for justice all the while he is committing the greatest wrongs. If by mistake any of his misdeeds should become known, he must be endowed with ample powers of persuasion so that he can cover them up. Should he need to use force, let him do so with boldness and manly strength—and by mobilizing friends and money.<sup>171</sup>

You know well how fathers lecture their sons (and guardians their charges) about man’s obligation and also how they use words that compliment not justice but the good repute that comes with it. They calculate that a reputation for justice will gain a man public office and fortunate alliances and all the things that Glaucon already said would accrue to the unjust man who wears the cloak of righteousness.<sup>172</sup>

These arguments on the success of the unjust man were presented as a goad to Socrates, to dare him to respond to the success of figures who had brought Athens and Greek society as a whole into crisis.<sup>173</sup>

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<sup>167</sup> *Id.* at Chapter 24 (pp. 89-90).

<sup>168</sup> THE REPUBLIC, *supra* n. \_\_\_\_\_, at 327 (p. 26).

<sup>169</sup> *Id.* at 350d-354b (p. 48-52).

<sup>170</sup> *Id.* at 353d-358a (p. 52).

<sup>171</sup> THE REPUBLIC, *supra* n. \_\_\_\_\_, at 361a-b (p. 56-57).

<sup>172</sup> *Id.* at 363a (p. 58).

<sup>173</sup> *Id.* at 367c-d (p. 63)

You have said that justice belongs to that highest class of good things which not only produce good effects but which are, above all, valuable in themselves....So tell us how justice benefits a man intrinsically, and in the same way how injustice harms him. Let others praise or blame the respective rewards and reputations....I repeat, then, disregard outward appearances, and prove to us that justice is better than injustice by showing us

Socrates, as described by Plato, was up to the challenge. However, he goes about making his argument in a less than direct route. If the question is, “what is the just or unjust man?”, Socrates says that we should first determine what makes a just or unjust city, on the theory that we may “read the large letters first then check the smaller letters against them to see if they correspond.”<sup>174</sup>

For Plato, the ruler epitomized by Machiavelli’s prince was the embodiment of the worst possible person, the tyrant. The tyrant, according to Plato, arises when people, fearing the loss of their goods in the face of a perceived evil, choose a protector.<sup>175</sup> This is much the role that Machiavelli sees the prince playing.<sup>176</sup> However, Plato views the arrival of the tyrant not as a good, but as the final disaster.<sup>177</sup> Rather than protecting the people, he enslaves them, takes all steps necessary to secure his power and feed his appetites, and in the search for new conquests create pretexts to make war, thus making the very people who chose him even less safe than before.<sup>178</sup> Unlike Machiavelli’s prince, having secured power the tyrant is unconcerned with even the appearance of virtue, since he views his subjects as potential threats to his rule.<sup>179</sup>

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the effects each has on a man’s should and how and why each effect can properly be called good or evil.

<sup>174</sup> *Id.* at 368d (p. 64).

<sup>175</sup> THE REPUBLIC, *supra* n. \_\_\_\_\_, at 565c-d (p. 256).

<sup>176</sup> THE PRINCE, *supra* n. \_\_\_\_\_ at Chapter 26 (p. 97).

This opportunity, therefore, must not be allowed to pass, so that Italy, after so long a time, may find her redeemer. I cannot describe how much love, with what thirst for revenge, with what resolute loyalty, and what tenderness, with what tears he would be received in all those provinces which have endured these foreign hordes. What gates would be closed to him? What people would deny him obedience? Whose envy would oppose him? What Italian would withhold his allegiance? This barbarian domination stinks in everyone’s nostrils. Let your illustrious house take up this task, then, with that boldness and with that hope which is reserved to just enterprises, so that this nation may be ennobled under your banner and so that under your auspices the words Petrarch wrote may come true: Against barbarian rage, Virtue will take the field; then short the fight; True to their lineage, Italian hearts will prove their Roman might.

<sup>177</sup> THE REPUBLIC, *supra* n. \_\_\_\_\_ at 569b-c (p. 261).

<sup>178</sup> *Id.* at 565d-568d (p 257-261). Plato even observed that the tyrant would no doubt attract poets and other people capable of persuading others of the advantages of the tyrant’s system. *Id.* at 568a-c (p.260). Machiavelli’s championing of Cesare Borgia looks perhaps even worse in such light. See THE PRINCE, *supra* n. \_\_\_\_\_, at \_\_\_\_\_.

Another aspect of the Tyrant, and a very important one for Plato, is that the Tyrant’s appetites do not bring him satisfaction. Instead, they increase anxiety, for the Tyrant believes all share his approach and is always fearful of the next Tyrant. So just like the Prince, the Tyrant pays intense attention to those who he rules. But not to appease them, but to locate threats. This is why Plato believes that the unjust man, of with the Tyrant is the paramount example, cannot be happy. *Id.*

<sup>179</sup> *Id.*

It is a fair question as to whether the Tyrant would be happier and less insecure were he to have The Prince to examine. At first, a distinction can be made that between the Tyrant and the Prince are those appetites. For Machiavelli, a Prince is focused on stability, and he cannot be seen as giving his desires free reign less it threaten his rule. THE PRINCE, *supra* n. \_\_\_\_\_, at Ch. 18 (p. 68-69). He would agree that the Tyrant’s rule cannot last because his appetites will cause him to be hated.

Machiavelli’s argument, for Plato, falls apart because of Machiavelli’s insistence that the only art that the Prince should be concerned with are the military ones. *Id.* at \_\_\_\_\_. Such a training, however, simply replicates the Homeric insistence on winning and personal excellence being one and the same. *E.g.*, THE REPUBLIC, *supra* n. \_\_\_\_\_, at 390-391c (pp. 87-88) (Where Socrates asserts that the actions ascribed to

So how is the city to avoid the injustice personified by the tyrant? In a word: education. For Plato, education was the crucial component for justice: educate citizens properly, and the ruler (who comes from the citizens, and is sometimes directly chosen by them) will be just as a matter of habit.<sup>180</sup> This is especially important because Plato felt that a guardian must be “high spirited,” a person who actually wants to lead and have others follow him.<sup>181</sup> Plato was aware such high spirits can cause people to be “quick-tempered and savage with one another.”<sup>182</sup> Therefore, there must be some means by which rulers can learn to be “fierce to their enemies but gentle to their friends” lest they “destroy one another before their enemies ever get at them.”<sup>183</sup> In order to know when to be fierce and when to be gentle, a ruler must be a lover of learning, a philosopher.<sup>184</sup> This makes education a vital component for a just society, because it is only through education that justice can be nurtured within each individual.<sup>185</sup>

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Achilles in the Illiad cannot have been those a virtuous person, despite Homer’s insistence otherwise). The Tyrant’s appetites arise, in part, because of that training. Instead, and this is the crucial point for Plato, it is the education that a ruler receives beyond the purely military ones, that create an excellent ruler. It is not enough that rulers know how to fight. The ruler must also be philosopher, which is to say, a person who is concerned with, and the training to be able, to find out the truth.

<sup>180</sup> *Id.* at 473c-e (p. 165)

Unless philosophers become kings in our cities, or unless those who are know kings and rulers become true philosophers, so that political power and philosophic intelligence converge, and unless those lesser natures who run after one without the other are excluded from governing, I believe there can be no end to troubles, my dear Glaucon, in our cities or for all mankind. Only then will our theory of the state spring to life and see the light of day, at least to the degree possible.

<sup>181</sup> *Id.* at 375b (p. 71).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 375c (p. 71).

<sup>184</sup> *Id.* at 376b-c (p.72)

Do you not see that knowing and not knowing are the sole criteria the dog uses to distinguish friend from enemy? Does it not follow that any animal that verifies his likes and dislikes by the test of knowledge and ignorance must be a lover of learning?

Oh, indeed.

And is not the love of learning the same as the love of wisdom which, in turn, is philosophy?

All are identical.

Then let us be bold. Having made the case for the dog, let us make the case for the man as well: he who is gentle to his friends and to those he knows must by nature be a philosopher.

<sup>185</sup> *Id.* at 376c-d (p. 72)

But now comes the question of his upbringing and education. How shall we manage them? Is this question not germane to the principle objective of our inquiry, namely, the origin and role of justice and injustice in the city? Of course, we do not want to be tedious by prolonging the argument beyond a reasonable length. Neither, however, do we want to omit anything essential to our discussion.

The question of education is clearly relevant to our inquiry.

The question of the education’s curriculum was equally important for Plato:

Then you will understand that the most important part of any work is its beginning. This is especially true for the education of young children. At this tender age they are the most impressionable and therefore most likely to adopt any and all models set before them.

True.

It is within his discussion of the ideal educational curriculum, and the exclusion of the heroic poems from it, that Plato presents the characteristics of the just ruler and the just society: a ruler must be able to identify a wrong and not excuse it because it was the action of a god or other powerful figure;<sup>186</sup> restraint cannot be abandoned in order to punish wrongdoing;<sup>187</sup> oaths and treaties (which had the force of law in Ancient Greece), once taken, should be followed;<sup>188</sup> be courageous;<sup>189</sup> be truthful unless there is a legitimate public good, such as deceiving enemies, for a lie;<sup>190</sup> be moderate in all conduct, especially those concerning bodily appetites;<sup>191</sup> and do not let the desire for wealth get in the way of doing what is proper and humane.<sup>192</sup> It is important to note here that, according to Plato, it is the combination of all these characteristics that lead to justice; justice does not exist on its own.

The fact that Plato targeted the heroic myths is especially crucial to the discussion of CSR and business ethics in general. Plato quite deliberately wanted to have stories of bad conduct by powerful people excluded because of the tendency to glorify such behaviors simply because they are done by the powerful. It was his belief that rather than serving as cautionary tales, such stories instead became examples to be emulated.<sup>193</sup> At a time when powerful business people are referred to as “Masters of the Universe,” Plato’s argument here resonates.

#### **IV. Corporate Virtue: The Fate Of CSR at the Hands of Philosophy.**

Having examined *The Prince* and *The Republic*, it now comes time to apply them to CSR and the modern corporation. When examined in terms of the self-preservation of the corporate entity, Machiavellian concepts support the shareholder primacy norm while Plato’s ideas could be argued as landing on the side of the Progressives. What seems equally clear, however, is that examples support each models’ approach to CSR as making good business sense—it all depends on what particular situation a company finds itself in. However, when the analysis shifts to how those who manage the corporation

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Then we can hardly afford to let the children listen to just any tales or fables recounted by just any teachers who happen along. We surely don’t want the children to adopt opinions and beliefs that might be largely contrary to the kinds of values we deem desirable for them to have when they become adults.

*Id.* at 377a-b (p. 73).

<sup>186</sup> *Id.* at 378b (p. 74).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 379e (p. 76).

<sup>189</sup> *Id.* at 386a (p. 82).

<sup>190</sup> *Id.* at 389b-c (p. 85).

<sup>191</sup> *Id.* at 389d-e (p. 86).

<sup>192</sup> *Id.* at 390e (p. 87).

<sup>193</sup> *See id.* at 378b-c (p. 74), 388d (p. 85), 391e (p. 88).

Plato’s discussion of Achilles’ conduct in the *Illiad* provides a good example of his concern.

That Achilles actually did all these things is something we must not believe. We shall reject the charges that he dragged Hector’s body around the tomb of Paroclus and slew living victims on the funeral pyre. We must not suffer our youth to suppose that Achilles, pupil of most wise Chiron—Achilles, son of a goddess and of Peleus, the most chaste of men and grandson of Zeus—could be so at odds with himself as to suffer from two contradictory maladies: greed such as becomes no free man and a brazen arrogance towards both gods and men.

utilize CSR, it appears that management can (and do) adopt either of these two positions—a shareholder primacy norm or a Progressive stance—to support the decisions made. Thus, corporate managers may be operating under a Machiavellian model that is not embodied by either of these two legal approaches to CSR, but which mimics them as a justification to achieve a self-interested result.

### **A. The Prince, Shareholder Primacy, and CSR.**

There is a direct correlation between The Prince and CSR. As the prince has absolute power, any action he takes is discretionary—he has no obligation to follow the law because he is the law. Some proponents of the shareholder primacy norm, such as Easterbrook and Fischel, take a similar position, arguing that any obligation to comply with a law is simply a question of balancing the costs and benefits of following that law against the gains to be made by breaking it.<sup>194</sup> For a princely CEO following Machiavelli, the first issue must be whether CSR should, in fact, be followed as corporate policy. And the Machiavellian position is clear, it is the survival of the corporation that is paramount. Thus, while Machiavelli clearly instructs that virtue should not stop the corporation from pursuing its own interests, neither should the absence of virtue condemn it.

Looking to the progressive side of CSR, Machiavelli's prince would not approve. More than likely, the prince would find such expenditures as wasteful, devoted more to the appearance of propriety rather than actually benefitting the company. If so, then such activities must cease if the current management is to continue. And there are examples that bear this out:

Cummins Engine, one of the pioneers of the corporate social responsibility movement, had to abandon its paternalistic employment policies and its generous contributions to its communities when its investors demanded higher returns. Dayton Hudson, another notably socially responsible company, came close to being swallowed up in a hostile takeover during the 1980s, and has since then paid exclusive attention to its customers and investors. Levi Strauss, also once on everyone's list of America's most socially responsible companies in part because of its commitment to source its clothing from domestic manufacturers, faced plummeting sales in the 1990s and had to eliminate its remaining domestic production. Polaroid, another pioneer, filed for bankruptcy in 2001. The shares of Britain's retailer Marks & Spencer, which had ranked near the top in a survey of worldwide labor standards, performed so poorly the firm attracted a hostile takeover bid in 2004. Both Body Shop International and Ben & Jerry's had been touted as among the nation's most socially responsible companies until investor pressure pushed Body Shop founder Anita Roddick into an advisory role and Ben & Jerry's was taken over by Unilever.<sup>195</sup>

Furthermore, corporate officers seem to follow Machiavelli's, and Friedman's, advice with regard to spending corporate assets. According to Robert Reich:

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<sup>194</sup> See *supra* n. \_\_\_\_ (currently 75) and accompanying text.

<sup>195</sup> Reich, *supra* n. \_\_\_\_, at 173-74.

The only legitimate reason for a corporation to be generous with its shareholders' money is to burnish its brand image, and such a rationale will go only so far. In Katrina's aftermath, Wal-Mart's [CEO] Scott was candid about the limits of his firm's generosity. "We can't send three trailer loads of merchandise to every group that asks for it," he said, turning down a request for two thousand blankets. "We have to, at the end of this, have a viable business." Charitable giving by corporations is infinitely small compared to what the public sector dispenses.<sup>196</sup>

So, when faced with the possibility of failure, corporate officers seemingly appear ready to follow Machiavelli's advice to do whatever is necessary to ensure their personal survival, which would, arguably, also insure the survival of their companies. In other words, following the shareholder primacy norm would make Machiavellian sense as well as good business sense.

## **B. The Republic, Progressives, and CSR**

Despite the litany of bad results from its practice, noted above, CSR retains vitality within the mindset of those concerned with corporate policy. As Cynthia Williams has noted, "major global companies are increasingly involved in various CSR initiatives that suggest a burgeoning sense of social obligation that goes beyond 'mere' law.... Thus, over the past five years, initiatives have proliferated that aim to increase social and environmental transparency, accountability and adherence to particularized standards of substantive social and environmental conduct."<sup>197</sup> What accounts for this continued willingness on the part of corporate officers to engage in activities that take money away from the corporation and its shareholders? A simple explanation would be that it's the right thing to do. For example, the Dutch logistics company TNT, sent company resources and people into two dozen natural disasters between 2002 and 2007, including the Asian Tsunami of 2004.<sup>198</sup> When asked why it does this, Luis Oelrich, the Director of TNT's Moving the World program responded, "People feel this is a company that does more than take care of the bottom line ... It's providing a soul to TNT."<sup>199</sup> Google, the search engine giant, incorporated the slogan "Don't Be Evil" as part of its corporate identity and backs it up with an open-ended set of employee policies.<sup>200</sup>

It is the Platonic ideal that is at work here. Plato advocated for rulers of high virtue not because such virtues were good in themselves, but because such rulers would see to it that Athens would survive and thrive.<sup>201</sup> More and more corporations are doing good, but

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<sup>196</sup> Reich, *supra* n. \_\_\_\_, at 206.

<sup>197</sup> Williams, *supra* n. \_\_\_\_, at 1635-36.

<sup>198</sup> *The Feelgood Factor*, THE ECONOMIST: JUST GOOD BUSINESS: A SPECIAL REPORT ON CORPORATE SOCIAL RESPONSIBILITY, 6, Jan. 19, 2008 (hereinafter "Feelgood Factor").

<sup>199</sup> *Id.*

<sup>200</sup> Google Code of Conduct, <http://investor.google.com/corporate/code-of-conduct.html>, last visited May 15, 2010.

<sup>201</sup> We acknowledge that in this regard, the shareholder primacy norm proponents could have an equal claim to a Platonic model as actions which help the company survive are in the shareholders' best interest. See also Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 550-51 (2003) (referring, under his director primacy norm (which also adopts shareholders' best interests as an ultimate end goal), to boards of directors as Platonic guardians).

part of the motivation is a desire to do well as companies. TNT, mentioned above, partners with one of its most important customers, the United Nation's World Food Program ("WFP"), in intervening in disasters.<sup>202</sup> This connection allows it to be more efficient in dealing with the WFP in its commercial activities, and it also acts as an incentive to recruit top talent.<sup>203</sup> Coca-Cola, the world's largest beverage company, has targeted preserving the world's freshwater supply, something vital to its survival as a company, as well as to the survival of its customers.<sup>204</sup> Seventh Generation is a \$150 million maker of environmental household products whose entire corporate purpose is to help its customers buy sustainable goods—yet when the company went public, brokers promoted it because it was a good investment, pure and simple.<sup>205</sup>

Such lofty sentiments as environmental protection also provide opportunities for businesses to save money by cutting waste and being more efficient. Many of these business practices are simple to implement such as encouraging supermarket customers to bring reusable bags (instead of being supplied with free plastic ones) and turning off computers when leaving for the day to reduce overhead costs.<sup>206</sup> Furthermore, the desire to reduce a company's carbon footprint, without reducing profits, has yielded new approaches which reduce carbon emissions while increasing efficiency.<sup>207</sup> Even more important, the desire to be environmentally conscious can lead companies to find new products to sell.<sup>208</sup>

It would seem, then, that an impasse has been reached. Machiavelli's and Plato's ideals, applied at the company level, appear to lead to business success equally. This would seem to suggest that whether a company follows all or part of a CSR agenda depends in part on the actual business conditions in which a company finds itself. But, again, companies do not exist as freestanding entities. They are dependent on people.

### C. Machiavellian Corporate Officers and Platonic Corporate Guardians.

So far, we have presented corporate managers as the princes of the corporation. But a key component of Machiavelli, especially for those who seek business advice from him, is that he describes the world as he sees it, not as he wishes it to be.<sup>209</sup> With this in mind, are corporate managers Machiavelli's princes, or are they one of the foreign invaders that Machiavelli so desperately wanted thrown out — invaders who use the country's resources for the benefit of his own foreign country (or himself)? Consider that the Renaissance prince really did have his life on the line should he lose his throne. At best,

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<sup>202</sup> Feelgood Factor, *supra* n. \_\_\_\_, at 6.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> John Tozzi, "The Ben&Jerry's Law: Principles Before Profit," BLOOMBERG BUSINESSWEEK, 69, 70 April 26, 2010 (same article available as John Tozzi, "New Legal Protections for Social Entrepreneurs", [http://www.businessweek.com/smallbiz/content/apr2010/sb20100421\\_414362.htm](http://www.businessweek.com/smallbiz/content/apr2010/sb20100421_414362.htm), April 22, 2010).

<sup>206</sup> "A Change in Climate," THE ECONOMIST: JUST GOOD BUSINESS: A SPECIAL REPORT ON CORPORATE SOCIAL RESPONSIBILITY, 14, Jan. 19, 2008 (hereinafter "Change in Climate").

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> See, e.g., ANTONY JAY, MANAGEMENT AND MACHIAVELLI, 25 (1968) ("I have called this book Management and Machiavelli not because it is based on Machiavelli's arguments, but because it is based on his method of taking a current problem and then examining it in a practical way in the light of the experiences of others who have faced a similar problem in the past.").



a fallen prince faced poverty and exile, much as Machiavelli did. But someone such as a CEO isn't in this position. Today's "golden parachutes" generally guarantee a huge financial windfall for a fired CEO. Furthermore, executive compensation in the forms of salary, bonus, and stock options all come from funds that otherwise would go to company operations, or the shareholders. Thus, while the prince's fortunes are directly related to and dependent upon the wealth of his state, the CEO's or director's priorities are not always so directly aligned and can at times actually be considered to conflict with the corporation's priorities.

Therefore, if the corporate managers are actually akin to a foreign power in the Machiavellian sense, then the prescriptions of frugality Machiavelli laid out for the domestic prince don't apply to him. In fact, such managers have every incentive to use the corporation's assets for personal purposes, seeking to preserve and promote herself or himself regardless of the state of the corporation. This view of the CEO or director under the Machiavellian model may more accurately describe what is *really* going on at the management level. But this realization is not altogether surprising. Others have already recognized that the shareholder primacy norm, with regard to corporate governance in general, is not a true reflection of what happens in day-to-day corporate governance.<sup>210</sup> Indeed, Adolph A. Berle and Gardiner C. Means argued (in their famous Berle-Means thesis) that the sharp divide between corporate ownership and control has resulted in management becoming the effective owners of a corporation.<sup>211</sup> The implicit economic problem, as set forth in their thesis, is that corporate managers have the potential to act in their own self-interest or for some purpose other than profit maximization,<sup>212</sup> a notion that would seem to run counter to a shareholder primacy norm. Yet despite this separation of ownership and control, the shareholder primacy norm continues to remain the dominant theory of corporate governance.<sup>213</sup> Indeed, corporate law scholars who have acknowledged the flaws in the shareholder primacy norm still maintain this norm as the ultimate goal of other models. For instance, Professor Stephen Bainbridge has proposed a director primacy norm, which, while recognizing that the shareholder owners do not actually control the directors, nonetheless maintains that shareholder wealth maximization is the proper "end" of corporate governance.<sup>214</sup>

But if it is true that corporate officers and directors are in control, which clearly seems to be the case, then is it so surprising that these same managers do not always act in the best interest of the corporation? Be it through ignorance of the duties owed to the corporation or due to more sinister motives, the past decade has provided numerous instances in which self-interest has seemingly been the guiding principle of corporate

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<sup>210</sup> Smith, *supra* n. \_\_\_, at 279, 290 (noting that evidence suggest the shareholder primacy norm "may not accurately reflect reality."); Usha Rodrigues, *From Loyalty to Conflict: Addressing Fiduciary Duty at the Officer Level*, 61 Fla. L. Rev. 1, 3 (2009) (asserting that corporate agents put their own interests ahead of the corporation's).

<sup>211</sup> Adolf A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 119-125 (The McMillan Co. 1933); LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 390 (Yale Univ. Press 2002).

<sup>212</sup> LARRY E. RIBSTEIN & PETER V. LETSOU, *BUSINESS ASSOCIATIONS* 254-55 (4<sup>th</sup> ed. 2003); FRIEDMAN, *20TH CENTURY*, *supra* n. \_\_\_ at 390; HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW 1836-1937* 306 (Harvard Univ. Press 1991).

<sup>213</sup> Rodrigues, *supra* n. \_\_\_ at 8.

<sup>214</sup> Bainbridge, *supra* n. \_\_\_, at 572.

managers.<sup>215</sup> While the Enron debacle of the 2000s was once the most outrageous example of executive abuses, it is not isolated.<sup>216</sup> We have since experienced a financial meltdown that has directly affected millions globally, but the officers and directors of many of the responsible institutions have suffered little consequence, and in some instances, continue to reap large bonuses.<sup>217</sup>

Accepting that corporate managers are foreign powers rather than princes, under the Machiavellian model, these managers will place their own interests ahead of those of the corporation. But what does this mean for CSR and its applications? In many instances, little difference may be noticed between the Machiavellian model and the shareholder primacy norm. This is due largely to the often convergent interests of the corporation and the officer or director. Generally speaking, actions which benefit the corporation, likewise benefit management. Shareholder wealth maximization offers job stability, and because the officers and directors are often shareholders themselves, it is in their own self-interest to pursue shareholder wealth maximization. For instance, in light of the *Citizens United* decision, corporations may very well have even greater influence over the political process and greater ability to use this influence to elect candidates who may favor limiting the liability of corporations and its officers. While it is possible that corporate managers will use this influence to promote their own self-interests, in many cases those interests will dovetail with those of the corporation, and thus the Machiavellian model will more-or-less disguise itself under the shareholder primacy norm model. However, there remain areas where the interests of the corporation and the interests of its managers diverge. In these instances, the Machiavellian model sometimes takes on the guise of a Progressive point of view.

For instance, one area in which shareholder interests and management interests may diverge is within the context of a hostile takeover. In a takeover, the offering price per share may very well exceed the trading price, sometimes quite significantly.<sup>218</sup> Such a takeover bid would appear to be in the best interests of the shareholders; however, the officers and directors may well be resistant to such a takeover, as it has the very real potential to negatively impact their own employment or continued membership on the board.<sup>219</sup> Thus, corporate management may take actions such as adopting a “poison pill”

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<sup>215</sup> See Rodrigues, *supra* n. \_\_\_\_, at 3 (“Even as the Enron and WorldCom frauds gave way to fresher tales of options backdating, corporate looting, insider trading, and more recently out-sized golden parachutes, the common denominator remained the fact that corporate agents put their own interests above those of the corporation.”).

<sup>216</sup> For a review of some of the major scandals of the early 2000s, see ROBERT W. HAMILTON & JONATHAN R. MACEY, *CASES AND MATERIAL ON CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES* 571-578 (10<sup>th</sup> ed., Thompson-West 2007).

<sup>217</sup> Jim Puzanghera and Janet Hook, *Debate begins on bill aimed at preventing another crisis*, CHICAGO TRIBUNE, April 30, 2010; Rachael Beck and Stevenson Jacobs, *Bankers rake in bonuses: Performance • Turnaround triggers rewards that retain talent, industry says. Political power • From 1998 to 2009, the financial lobby spent \$3.8 billion*, ST. LOUIS POST-DISPATCH, Jan. 17, 2010 at E1.

<sup>218</sup> See, e.g., Marks & Rapoport, *supra* n. \_\_\_\_, at 1270 (describing the corporate buyout of Anheuser-Busch Company by InBev, SA in which the tender offer of \$65 per share was 30% higher than the price at which the stock was trading on the open market at the time).

<sup>219</sup> See Thomas A. Smith, *Real Options and Takeovers*, 52 EMORY L. J. 1815, 1835-37 (2003).

strategy, making it much more difficult, and expensive, to complete the takeover.<sup>220</sup> Though such actions would seem to be directly in conflict with the shareholders' interests, the corporate law of many states are rather accommodating to such decisions, either respecting them under the business judgment rule<sup>221</sup> or adopting so-called "other constituency" statutes which allow for corporate managers to take into account the interests of other stakeholders beyond just the shareholders.<sup>222</sup>

At first blush, such statutes appear to be a nod to the progressive stakeholder model of corporate governance. However, in reality these statutes have the potential to be used to basically justify self-interested decisions by directors.<sup>223</sup> Though two-thirds of the states have adopted some form of "other constituency" statute, concern over abuse has prompted some commentators and states to reject such proposed statutes. As, the Corporations Committee of the State Bar of California noted in its condemnation of a proposal to adopt such a statute:

Instead of promoting corporate social responsibility, the Committee believes that the [proposed other constituency statute] would lead to less director accountability, less responsive corporate governance and, ultimately, less socially responsible corporate behavior, for the following reasons:

- The Bill would undermine director accountability to shareholders without effectively promoting interests of non-shareholder constituents.
- The Bill is unnecessary because current law is not an impediment to responsible corporate behavior and there are less intrusive means of protecting the interest of non-shareholder constituents.

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<sup>220</sup> See A HANDBOOK OF BUSINESS LAW TERMS 459 (Bryan A. Garner, ed. 1999) (defining a "poison pill" as "A corporation's defense against an unwanted takeover bid whereby shareholders are granted the right to acquire equity or debt securities at a favorable price in order to increase the bidder's acquisition costs.").

<sup>221</sup> See, e.g. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 949 (Del. 1985). In upholding the board's decision to reject a tender offer which it deemed too low, the Delaware Supreme Court stated, A further aspect [of the business judgment rule] is the element of balance. If a defensive measure is to come within the ambit of the business judgment rule, it must be reasonable in relation to the threat posed. This entails an analysis by the directors of the nature of the takeover bid and its effect on the corporate enterprise. Examples of such concerns may include: inadequacy of the price offered, nature and timing of the offer, questions of illegality, the impact on "constituencies" other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally), the risk of nonconsummation, and the quality of securities being offered in the exchange.

*Id.* at 955.

<sup>222</sup> See Jack B. Jacobs, *The Reach of State Corporate Law Beyond State Borders: Reflections Upon Federalism*, 84 N.Y.U. L. REV. 1149, 1167-68 (2009) ("By way of example, beginning in the 1980s, thirty-one states, including Pennsylvania, Virginia, and Rhode Island, adopted so-called "other constituency" statutes. These statutes did two things. First, they relieved target company boards from any obligation, in responding to a takeover bid, to treat the interests of shareholders as paramount over all others. Second, they permitted those boards to consider the effects of a hostile takeover on other constituency groups, such as employees, suppliers, customers, creditors, and local communities.").

<sup>223</sup> Lynda J. Oswald, *Shareholders v. Stakeholders: Evaluating Corporate Constituency Statutes Under the Takings Clause*, 24 J. CORP.L. 1, 2 (1998) ("These statutes turn the well-ordered world of corporate ownership and management responsibility on its head. By permitting . . . managers to consider the interests of non-shareholder "stakeholders" in the corporation . . . these constituency statutes blur the lines of corporate control and ownership and create a class of managers whose decisions are utterly discretionary and unfettered by the normal (albeit weak) controls imposed by traditional corporate law doctrine.").

- The Bill has the potential for causing significant economic harm to shareholders and the public generally.<sup>224</sup>

Thus, in states where constituency statutes have passed, it can be argued that this is one area in which the self-interest of management has not only prevailed, but has done so with the aid of state legislatures under a Progressive guise.

Another area where the Machivellian model has the potential to diverge from the shareholder primacy norm is in the area of legal compliance. To illustrate, we return to the ABC Corporation hypothetical from Part II., *supra*. Under a shareholder primacy norm, the corporate managers should be motivated by what is in the best interests of the corporation. Easterbrook and Fischel would argue that this requires a balancing of the fines imposed by legal noncompliance and the risk of getting caught. However, under the Machivellian model, the corporate manager will worry more about the personal impact of compliance or non-compliance rather than its impact on the corporation. If there is little chance of personal civil or criminal liability, and legal noncompliance could lead to higher profits, then the officer will be less diligent about ensuring legal compliance or may be more willing to engage in activities that operate in a legal “gray” area.

From a Progressive stand-point, such behavior is offensive as it ignores the stakeholders who are adversely affected. And though such conduct may potentially reap benefits for the shareholders, shareholder primacy norm proponents should be equally offended as a proper balancing of risks versus benefits has not taken place – the process has been skewed by the self-interest of the corporate managers. While it is true that shareholders have the ability to sue for breaches of fiduciary duties, given the difficulties of bringing a derivative suit and the deference afforded management under the business judgment rule, the protections offered by the prospect of such a suit will likely only be effective in the most egregious of cases.<sup>225</sup> This is not to say, however, that such self-interest is the norm—we lack empirical data to stoutly support such a claim. But given the events of the past decade, it seems beyond plausible that a Machivellian model is at work within the ranks of corporate management.

## V. Conclusion

While *The Prince* was Machiavelli’s attempt to secure the good graces of the Medici family, it was not necessarily a description of what thought was the ideal method of governance.<sup>226</sup> Machiavelli’s later *The Discourses* revealed a much more Platonic

<sup>224</sup> Committee Position Re: A.B. 2944, Business Law Section, Corporations Committee, State Bar of California, April 18, 2008, available at <http://calbar.ca.gov/calbar/pdfs/sections/buslaw/corporations/ab-2944-statement-of-position-final.pdf>.

<sup>225</sup> See Robert J. Rhee, *Fiduciary Exemption for Public Necessity: Shareholder Profit, Public Good, and the Hobson’s Choice During a National Crisis*, 17 GEO. MASON L. REV. 661, 697-98 (2008) (“Courts could invoke the elision that a board’s decision to assume an enormous financial loss may have some abstract ‘long-term’ benefit, a Potemkin explanation routinely invoked to shield business judgment from active scrutiny of the merits of ill-advised, stupid, or erroneous decisions in furtherance of legitimate jurisprudential reasons.”); Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 87 (2004) (arguing that the business judgment rule “is better understood as a doctrine of abstention pursuant to which courts in fact refrain from reviewing board decisions unless exacting preconditions for review are satisfied.”).

<sup>226</sup> THE ESSENTIAL WRITINGS OF MACHIAVELLI *xix* (Editor’s note) (Peter Constantine ed. & translator, Random House 2007) (“It is widely believed that *The Discourses on Livy* corresponds to his fundamental

leaning to his feelings on governance.<sup>227</sup> In this regard, *The Prince* may not have been a work of advocacy, but a descriptive work in which Machiavelli was merely recognizing what he saw around him.

Conversely, current legal academic debate over CSR and its proper role in the company has reflected less of what is actually happening and more of an ideal. Shareholder primacy proponents have advocated that the proper “end” is to maximize shareholder wealth. While those within this camp might quibble to varying degrees over the means to this end, the focus is undoubtedly on the “owners” of the corporation, *ie.* the shareholders. In response to this school of thought, Progressives have advocated a broader stakeholder model that takes into account the interests of all those affected by the corporation.

Each of these schools of thought have attractive features, however, we feel that both fail to reflect, at least to some degree, the true state of things. Thus, just as *The Prince* described a model of governance perceived by Machiavelli, we believe that a Machiavellian model more aptly describes the governance model of corporate management, at least in some corporations and amongst some officers and directors. This realization is not a purely academic exercise, though such a label is tempting, particularly when relying upon such classic works. Instead, the realization and acceptance that corporate management is operating under such a model is an important first step in crafting laws and policies geared to achieve what we believe is the proper role of corporate management, be it to maximize shareholder wealth or to more broadly use corporate wealth to do good, while also doing well. Furthermore, it is an important first step in achieving a broader goal which Google has claimed as its own corporate creed, “Don’t be evil.”<sup>228</sup>

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beliefs: he interprets the great Roman historian’s *History of Rome* as offering viable models to be emulated in his own time. *The Prince*, on the other hand, is seen as offering viable classical models to a single ruler.”).

<sup>227</sup> *Id.*

<sup>228</sup> Google Code of Conduct, Preface available at <http://investor.google.com/corporate/code-of-conduct.html>.