

THE FAILURE
OF CORPORATE LAW

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FUNDAMENTAL FLAWS



PROGRESSIVE POSSIBILITIES

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SEPTEMBER 11 AND CORPORATE LAW

The horrors of September 11, 2001, are still fresh in our hearts and minds, and not just for those who lost dear ones. The war in Iraq is even fresher. These are the two biggest news stories of the new millennium so far, and they are inextricably linked—at least in the sense that the horrors of September 11 made the Iraq war politically possible. Another of the big news stories of the last few years was the corporate scandals of 2002. These scandals brought about the largest bankruptcy in history, a host of criminal convictions, billions of dollars in shareholder losses, the evaporation of thousands of jobs, and the spoiling of the public's confidence in the stock markets and corporate accounting practices. While much has been written about the connection between the first two events, little has been said about their connection to the corporate scandals and to corporate law more generally. Unfortunately, there is something to say.

At first glance, it seems obtuse or heartless to talk about corporate law in connection with the attacks of September 11 and the war in Iraq. It is indeed obtuse or heartless to say that corporations or corporate law caused the events of September 11 or brought about the war. It is, however, correct to say that corporations and corporate law helped create both the context in which the tragedy of September 11 could occur and the contours of the nation's response to it. Corporate law made the tragedy of September 11 more possible, and thus made the war in Iraq more likely as well. This con-

Both professional and personal factors drive this effort. Professionally, I have noticed a recent shift in the attitudes of campaign consultants and political scientists towards each other. Do not read too much into this observation. Consultants still profess disdain for academics. A Democratic friend of mine told me that James Carville once said to him “there isn’t one idea from political science that has ever been of use in a real political campaign.”¹ Setting aside the Carvillian hyperbole of this statement—I assume this means that median voter theory, party identification, and retrospective voting are either irrelevant or so obvious that political science gets no credit for discovering them—it effectively captures the traditional belief among people practicing politics that academicians tend to focus on esoteric concerns. Practitioners often believe that most political scientists have no sense of what campaigns do and therefore are in no position to judge their impact. This is, in a sense, analogous to the disdain many athletes feel for reporters who have never “played the game.”

But consultants increasingly monitor, and even read, the top political science journals and university presses. Bush senior adviser Karl Rove freely extols the virtues of Thomas Patterson’s analysis of the media in *Out of Order*, and has several copies of Samuel Popkin’s book, *The Reasoning Voter*, in his office in the West Wing of the White House. Across the partisan aisle, Democratic pollster Stanley Greenberg was an assistant professor at Yale University, and often references realignment theory in analyzing trends in contemporary survey data. More generally, in the 2000 and 2004 election campaigns top-level strategists from both parties were well aware of what political science had to say about primary fights, convention bounces, debate effects, negative advertisements, television ad watches, and (of course) election forecasting models.

On the other side of the divide, political scientists have become increasingly interested in presidential campaigns. I describe the origins of our historical lack of interest in Chapter 2, but for the present discussion suffice it to say that for years there has been a consensus that presidential campaigns are primarily the means by which we arrive at predictable outcomes. Jimmy Carter’s ouster in 1980 and Ronald Reagan’s landslide victory in 1984 reinforced this consensus. Despite the success of presidential election forecasting models in 1988, however, I believe the Bush-Dukakis race sowed the seeds of discontent with the conventional perspective. In particular, many political scientists believe that George H. W. Bush out-maneuvered Michael Dukakis for the presidency, largely by waging a trivial and negative campaign. There is, of course, a fascinating irony here: scholarly interest rose dramatically in the wake of what was to many

a disappointing and distasteful presidential campaign.

This increased academic interest is manifest in the emergence of several cottage industries within the study of American elections. Most notably, there has been a surge in research on negative advertising, news media coverage, get-out-the-vote efforts, and aggregate- and individual-level movement in the presidential preference polls. We have also seen a number of political scientists serve in presidential campaigns, bringing back a range of unique and interesting data on candidate and campaign activities, as well as on voters’ preferences.² There appears to be an academic market for the kinds of expertise campaign consultants have and the sort of data to which they have access.

This confluence of interest and circumstance brings me to my reason for writing this book. I want to describe what it is that presidential campaigns actually do and how well their strategies and activities work towards their goal of winning the election. Of course, it would be a monumental (and foolhardy) task to set out to decide, once and for all, whether campaigns matter.³ I am not so ambitious. I do believe, however, that I can advance the debate by joining detailed descriptive knowledge of how campaigns operate with high-level analyses of their influence. Perhaps most importantly, I believe that understanding American campaigns is crucial to understanding the nature of democracy in the United States. Campaigns are the connective tissue between elected officials and citizens. The notion that campaigns are irrelevant, or even mechanistic, calls into question much of what we think we know about politics in the United States. If elections are predictable referenda based on some combination of the performance of office-holders and the underlying distribution of party identification, it doesn’t much matter what challengers propose during the campaign; they win or lose based on exogenous factors. Should they be advantaged by conditions and win, this would mean they should not feel constrained by the promises or proposals they made during the campaign when they take office, as voters will judge them solely on results. Nor should they feel compelled to represent particular interests, as party and performance will determine whether or not groups give their support. A truly savvy candidate would therefore care only about creating a favorable environment and then activating latent predispositions. There is, in short, little deliberation, little representation, and only a gross sort of accountability. If even partially accurate, this is a profoundly different type of democracy than the framers of the Constitution had in mind and ought to command the attention of all Americans.

There are, of course, other reasons for caring about campaigns and

their effects. Political campaigns across the globe, but especially in the United States, cost a great deal of money. Individuals, corporations, labor unions, and ideological organizations of all stripes contribute money to campaigns, and it would be quite interesting if one were to empirically establish that all of this cash does nothing to affect the outcomes of elections. The prospect of the irrelevant campaign is even more intriguing given (a) the recent increase in free and fair democratic elections across the world, particularly since the fall of the Soviet Union, and (b) the increased prominence of American-style electioneering within these democracies. This first point is particularly unnerving: What if the data show that American election outcomes are as predictable as those in the U.S.S.R. under Stalin (with incumbent job approval and party identification and Germond recently observed that, “There is no demand anymore for those campaign books.”⁶ Similarly, Newsweek, which assigns half a dozen or more reporters to presidential campaigns, has published several books in their Quest for the Presidency series. These are the product of what newsmagazines call “group” journalism, in which campaign correspondents are asked to “weave their discoveries and insights into a coherent whole and to set it in the context of its time.”⁷ In their 1992 narrative, the authors write,

“... This is a work of journalism, not of scholarship, or of political theory, or of public policy. Readers will search it in vain for detailed analysis of the various ‘plans’ offered by the candidates or for a moral commentary on the state of our society and its institutions and processes of self-government. This is, rather, a book about what has come to be called practical politics—the inside story of how presidents are made, (and) broken, in the late twentieth century” (Goldman, et al. 1994: preface).

Note the candid indifference to both normative and broader theoretical concerns. Not all journalistic accounts have been straightforward linear narratives, however. In 1992, Richard Ben Cramer’s *What it Takes* hit the bookshelves—a 1,047-page tome on six contenders for the White House in 1988. Cramer’s book hoppedscotched from candidate to candidate, simultaneously careening between the here-and-now of the campaign and the candidates’ biographies. Even more off the beaten path is Joe Klein’s *Primary Colors*, a fictitious but eerily familiar story of a talented but flawed candidate for the Democratic presidential nomination. The Clinton-esque tale mixed the basic storyline from the 1992 campaign with exaggerated personalities and drama (if it is indeed possible to exaggerate characters such as Bill and Hillary Clinton, Jerry Brown, Mario Cuomo, etc.).

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CORPORATE LAW AS PUBLIC LAW

Currently, most law students learn that a corporation is best conceptualized as a “nexus of contracts.” Corporate law, in turn, is seen as “private” law, which narrowly focuses on the rights and responsibilities contained within the “contract” between management and shareholders. I believe this private law view of corporate law prevents students, scholars, and policymakers from seeing corporate law as properly subject to government control and regulation. It also makes it less likely that people will see the potential positive effects that could result from changes in corporate law.

The view that corporate law is essentially private law rests largely upon a controversial notion of rights and a set of unstated assumptions about the distinction between public and private. Corporate law theorists who try to shield corporate law from the concerns of the public make the same mistake, I believe, that the famous—and famously wrong—1905 Supreme Court case of *Lochner v. New York* made in constitutional law. *Lochner* struck down New York’s maximum hour law for bakers, saying that the regulation of the free market was a violation of the bakers’ freedom to contract, protected as a liberty interest under the Fourteenth Amendment. The *Lochner* Court’s mistake was the assumption that the common law and the laissez-faire marketplace are prepolitical, neutral, and insulated from government regulation. The New Deal changed those assumptions by recognizing that the market was a creature of government and that