Corporate Social Responsibility in a Remedy-Seeking Society: A Public Choice Perspective

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ABSTRACT

This Article applies the lessons of public choice theory to examine corporate social responsibility. The Article adopts a broad definition of corporate social responsibility activism to include both (1) those efforts that seek to convince corporations to *voluntarily* take into account corporate social responsibility in their own decision-making, and (2) the efforts to alter the legal landscape and *expand legal obligations* of corporations beyond traditional notions of harm and duty so as to *force* corporations to invest in interests other than shareholders and profits because they must comply with these new laws.

After surveying the corporate social responsibility debate, this Article examines public interest-labeled groups (including corporate social responsibility groups) under a public choice lens and determines that they seek to maximize their budgets, maximize influence, maximize membership, secure their jobs, and in the case of corporate social responsibility sometimes directly effectuate wealth transfers into their organizations or constituencies (e.g., from shareholders to stakeholders). When rent-seeking for legal change is the more efficient use of corporate social responsibility advocates' limited resources, those groups will invest in the creation of law.

This Article pays special attention to a broad definition of rent-seeking that includes the investments made, through precedent-building litigation models, in the creation of legal liability regimes or realistic new threats of legal liability in an effort to obtain leverage over corporations in settlements or other negotiations designed to convince corporations to change behavior. According to studies on settlement dynamics, when novel new litigation theories start to survive motions to dismiss, corporate defendants have more incentives to settle to avoid harm to reputation or brand, in addition to avoiding adverse judgments. The Article concludes using the Alien Tort Statute (ATS) as a case study illustrating how the interest-group dynamic can play out in the development of a corporate social responsibility-driven liability regime.

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INTRODUCTION

Advocates for some corporate "socially responsible" role and the imposition of some duties upon corporate boards greater than maximizing wealth often cast themselves as society's champions for the greater public interest or public good. This is too simple a story. A primary goal of this Article will be to demonstrate that corporate social responsibility (CSR) advocates are interest groups too. Thus, law and economics can teach us a bit about the behaviors we can expect from corporate social responsibility advocates, depending on the available legal architecture which can be deployed to advance the advocates' interests and preferences in an effort to gain leverage against their adversaries—the profit-seeking corporations. Corporate social responsibility advocates will engage in rent-seeking behavior, investing in legal outcomes when it is beneficial to their cause. Thus, how the law of corporate social responsibility is shaped and how advocates operate to shape the law can each be explained in part by reference to interest-group behaviors and public choice theory. While corporate social responsibility reverberates with sounds of the wonderful, it has rent-seeking undertones like any other effort to use the law to shape social policy through controls on private behavior.

After centuries of academics weighing in on the debate over corporate social responsibility, there exists almost a required four-part checklist of introductory disclaimers in any article that will soon ink yet more pages on the already swollen corporate social responsibility bookshelf. There are, at least, some predictable, seemingly obligatory categories of observation in most article introductions and I will provide my due compliance before proceeding.

First, an author should acknowledge that they are cautiously, indeed nervously and with some hesitation, entering a field already well tread. Professor Cynthia Williams, for example, in one of her lengthy explorations of corporate social responsibility stated that "[i]t is with some trepidation that this author undertakes a rather extended venture into the contested arena of corporate social responsibility."[1] I hereby incorporate that statement and thereby check off the first box on the list.

Second, the author should alert readers that the academic material on corporate social responsibility is massive and overwhelming and acknowledge that it is hard to imagine why

1 Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization,* 35 U.C. DAVIS L. REV. 705, 706 (2002).

someone would want to read yet another article in this seemingly saturated area of law, economics, and public policy. Professors Henry Butler and Fred McChesney captured this sentiment well when they exclaimed while writing on corporate social responsibility that "[f]or centuries legal, political, social, and economic commentators have debated corporate social responsibility *ad nauseam*."[2]

Third, it is obligatory to mention something about the definition of corporate social responsibility. Quite frequently this will involve some explanation that there is no one, definitive definition of corporate social responsibility, and this cautionary note will sometimes include a statement that the author will not attempt a singular definition. Usually it will also follow with some statement that the author will focus on one or more particular meanings of the phrase captured within the broader concept of corporate social responsibility. Consider Professor Peter Madsen's comment in the opening to an article that "[d]efining CSR is, as the saying goes, like trying to nail Jell-O to the wall."[3] Or, as Williams explains as another example, "[o]ver the past decades . . . it has been difficult to define what one means, in any fully specified way, by the concept of corporate social responsibility, and thus it has been difficult to discuss except at a high level of generality."[4] There is no doubt that corporate social responsibility is tough to define and means different things to different people. As this Article proceeds, I will attempt to make clear the meaning of the phrase as I intend to use it when possible or helpful, but I will also write with some of the necessary generalities.[5]

In this Article, I will be defining corporate social responsibility activism broadly as related to both (1) those efforts that seek to convince corporations to *voluntarily* take into account corporate social responsibility in their own decision-making, willingly launch corporate initiatives based on concerns beyond profit, and sometimes specifically and intentionally address social and stakeholder values; and (2) the efforts to alter the legal landscape and *expand legal obligations* of corporations beyond traditional notions of harm and duty so as to

2 Henry N. Butler & Fred S. McChesney, *Why They Give at the Office: Shareholder Welfare and Corporate Philanthropy in the Contractual Theory of the Corporation*, 84 CORNELL L. REV. 1195, 1195 (1999).

3 Peter Madsen, *Professionals, Business Practitioners, and Prudential Justice*, 39 MCGEORGE L. REV. 835, 836 (2008).

4 Williams, *supra* note 1, at 775.

5 David Millon, *Shareholder Social Responsibility*, 36 SEATTLE U. L. REV. 911, 919 (2013) ("There is no single, generally accepted definition of CSR," but "it is possible to sketch the concept's meaning in broad outlines.").

force corporations to invest in interests other than shareholders and profits because it must comply with these new laws. Throughout this Article, I will also use terms like activism, advocacy, and expansionism interchangeably to capture the nature of those interest groups that seek to engraft new social welfare-oriented obligations, and impose higher standards, on corporations. These interest groups see businesses as their opposition or competition.

Finally, within the four obligatory components of a corporate social responsibility article introduction, the author should make some claim that there is something new and unique in the article at hand that makes it worthy of some attention. This is particularly important because the corporate social responsibility field is already so substantially plowed. Sometimes, the claim will be about something truly new. At other times, the author might need to admit that the work is partly new just in the sense that this particular author has never said it before and not yet thrown his perspective into the mix. Professor Stephen Bainbridge provided an insight on this phenomena when he observed in an article focused on corporate social responsibility that, usually, every current corporate social responsibility "debate is not being driven by any crisis in corporate law,"[6] but instead "[i]t is just a perennial problem on which each new generation of corporate law scholars feels obliged to put its stamp."[7]

While there will be a bit of that "first time in print by my pen" newness in this article and some articulations will be made for the first time *by this* author, yet not the first time such ideas have ever been uttered, my aim is to provide a few insights that have not yet been articulated in the literature with any sense of clarity. Principal among these will be why it is useful to look at corporate social responsibility advocates as classic interest groups seeking to obtain wealth transfers that they would be incapable of receiving absent their manipulation of the legal process to achieve changes in legal doctrine in order to obtain advantage in advancing their goals. In particular, this Article will focus on the investments corporate social responsibility advocates make in the creation of legal liability regimes or realistic new threats of legal liability in an effort to obtain

6 Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1435 n.40 (1993) [hereinafter Bainbridge, *In Defense*].

7 *Id.* Bainbridge followed this claim directly with the statement, "[h]erewith my spin." *Id.*

leverage over corporations in settlements or other negotiations designed to convince corporations to change behavior.

Part I will survey the corporate social responsibility debate, briefly describing the spectrum along which the arguments regarding wealth-maximization and other more expansive social responsibilities exist. Part I will conclude with an introduction to the means by which law can provide benefits to those seeking acceptance for greater, more expansive notions of corporate social responsibility. Part II will introduce public choice and interest-group theory. It will explain the process of rent-seeking for legal advantage and explain why corporate social responsibility activists should be received with the skepticism afforded all interest groups in the political process. It will conclude that, like other interest groups, corporate social responsibility activists try to use the law to obtain advantages for their cause at a lower cost than they could obtain these benefits by bargaining for these things in the open marketplace. The law and economics literature does not discuss often enough the separate public choice and rent-seeking phenomena distinctively seen in the development of liabilities through litigation.[8] Part II will also discuss this process of rent-seeking as being broader than the pursuit of legislation. Any concept of rent-seeking should include interest group investment in changing the law to create liability regimes that benefit the group (here, corporate social responsibility advocates) and expand the duties and compensatory obligations of their competitors (here, corporations).

Despite the fact that the literature is saturated with articles on almost every aspect of corporate social responsibility, there is surprisingly little attention paid to the interest group dynamics in the contest between corporations and advocates for a more expansive type of corporate social responsibility above and beyond what might occur as a natural consequence of seeking wealth-maximization. Although there are a number of examples of rent-seeking behaviors by corporate social responsibility advocates that could be discussed, given the limited space for this symposium article, Part III will examine only one type of behavior with one case study—liability-seeking efforts under the Alien Tort Statute (ATS).[9] The ATS provides a recent example where we saw the interest-group dynamic play out in the

8 Paul H. Rubin, Christopher Curran & John F. Curran, *Litigation Versus Legislation: Forum Shopping by Rent Seekers*, 107 PUB. CHOICE 295, 295–96 (2001) (discussing the relatively fewer works devoted to public choice implications in litigation for rent-seeking ends vis-à-vis the number of similar analyses of legislative processes).

9 28 U.S.C. § 1350 (2012).

development of a liability regime for human rights and other international law abuses. Part III examines the evolution of the ATS as a liability-imposing corporate social responsibility tool. The corporate social responsibility advocates' investment in the development of an ATS liability doctrine (for a time with some substantial success) will demonstrate how interest groups operate in what might be called "rent-seeking" through judicially based "remedy-seeking" behavior.

In the end, through general analysis and the ATS case study, this Article seeks to unveil the public interest curtain that often shields corporate social responsibility activists from the scrutiny their efforts should receive. When it comes to corporations, a remedy-seeking society is often too quick to presume that more socially desirable outcomes require restraining corporate shareholder wealth. At the very least, it should be understood that any efforts to do so will advantage another self-interested group rather than somehow serving primarily the true public interest.

I. THE CONTOURS OF THE CORPORATE SOCIAL RESPONSIBILITY DEBATE

A. A Ubiquitous Contest Between Two Competing Visions of Responsibility and Duty

Corporate social responsibility has no single, accepted definition, yet it stirs the passions of many behind their own conception of the term.[10] As a result, issues regarding the social responsibility of corporations—including whether there are any such obligations at all—have generated substantial debate over the years.[11]

Within the debate over the scope of corporate social responsibility there are two poles with varying positions in between.[12] On one side of the spectrum are those who believe that corporations have social responsibilities of some kind or degree beyond the bottom line and beyond compliance with existing laws. The opposite side of the spectrum believes that the social responsibility of corporations cannot be judged outside of the obligation of a corporation to achieve wealth-maximization in the corporate management's fiduciary duties to its shareholders

10 Williams, *supra* note 1, at 775.

11 Millon, *supra* note 5, at 921 ("Given the lack of an agreed definition of CSR, it comes as no surprise that there are several different models or theories of CSR.").

12 Williams, *supra* note 1, at 711–20 (summarizing the corporate social responsibility literature and the varying legal and policy positions).

or obligations in compliance with its web of contracts. Of course, nuanced definitional issues and middle ground positions appear within the discussion as well—including questions regarding what counts as "law," what is our definition of "duty" and "harm," and what is the meaning of "wealth-" or "profit-maximization." This section will briefly discuss the presence and growth of the debate within corporate law followed by a brief discussion of the substantive claims behind the wealth-maximization theories juxtaposed with the more expansive theories of corporate social responsibility.

While it is true that this is an age-old debate,[13] there is no doubt that the issue of corporate social responsibility—especially the rise of camps arguing for an enlarged sense of corporate duty to social interests and stakeholders outside of the corporate form—has received steadily increasing attention across the past several decades. One insight into this evolution of the corporate social responsibility conversation can be gleaned from a survey of the use of the phrase "corporate social responsibility" across time. For that task, I will turn briefly to the results from Google's Ngram function[14]—which has been described as "the first tool of its kind, capable of precisely and rapidly quantifying cultural trends based on massive quantities of data. It is a gateway to culturomics!"[15] This unique Google product enables users "to examine the frequency of words . . . or phrases . . . in books over time."[16] The database permits searching "through over 5.2 million books: ~4% of all books ever published!"[17] The creators proclaim that this tool will have "profound consequences for the study of language, lexicography, and grammar."[18] The Ngram

13 Butler & McChesney, *supra* note 2, at 1195.

14 GOOGLE BOOKS NGRAM VIEWER, http://books.google.com/ngrams (last visited Oct. 4, 2013) [hereinafter *Google Labs Ngram Viewer*] (based on the model and database developed by Jean-Baptiste Michel, Yuan Kui Shen, Aviva Presser Aiden, Adrian Veres, Matthew K. Gray, William Brockman, The Google Books Team, Joseph P. Pickett, Dale Hoiberg, Dan Clancy, Peter Norvig, Jon Orwant, Steven Pinker, Martin A. Nowak, and Erez Lieberman Aiden. *See* Jean-Baptiste Michel, Yuan Kui Shen, Aviva Presser Aiden, Adrian Veres, Matthew K. Gray, William Brockman, The Google Books Team, Joseph P. Pickett, Dale Hoiberg, Dan Clancy, Peter Norvig, Jon Orwant, Steven Pinker, Martin A. Nowak, & Erez Lieberman Aiden, *Quantitative Analysis of Culture Using Millions of Digitized Books*, SCIENCE, Jan. 14, 2011, at 176, *available at* http://www.sciencemag.org/content/early/2010/12/15/science.1199644).

15 *Google Ngram Viewer*, CULTUROMICS, http://www.culturomics.org/Resources/A-users-guide-to-culturomics (last visited Oct. 3, 2013); *see also* Michel et al., *supra* note 14, at 176 (describing the database and related data collection tool).

16 *Google Ngram Viewer*, *supra* note 15.

17 *Id.*

18 Michel et al., *supra* note 14, at 178, Figure 2; *see also id.* at 177 ("Our results suggest that culturomic tools will aid lexicographers in at least two ways: (i) finding low-frequency words that they do not list, and (ii) providing accurate estimates of current

Viewer undoubtedly provides an interesting picture for discussion of the usage of words and phrases, although it admittedly has some inherent limitations and some recognized criticisms of its scientific value.[19]

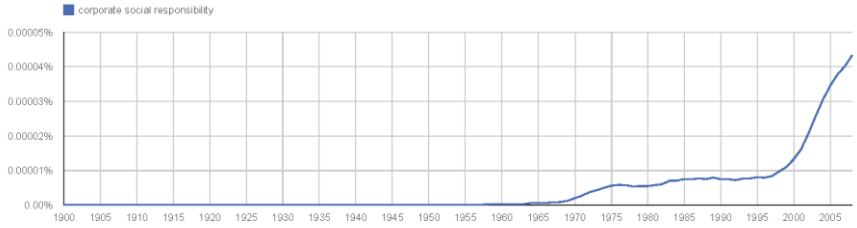
The Ngram for the phrase "corporate social responsibility" shows the phrase's increased usage over time, and an especially interesting rate of increase since 2000, likely as a result of our increased scrutiny of corporations following a series of financial crises:

TABLE 1:

GOOGLE LABS BOOKS NGRAM VIEWER

GRAPH *CORPORATE SOCIAL RESPONSIBILITY* FROM 1900 TO 2008

FROM THE CORPUS OF ENGLISH WITH A SMOOTHING OF 3



Source: GOOGLE BOOKS NGRAM VIEWER, http://books.google.com/ngrams (last visited Oct. 4, 2013) (based on the model and database developed by Jean-Baptiste Michel, Yuan Kui Shen, Aviva Presser Aiden, Adrian Veres, Matthew K. Gray, William Brockman, The Google Books Team, Joseph P. Pickett, Dale Hoiberg, Dan Clancy, Peter Norvig, Jon Orwant, Steven Pinker, Martin A. Nowak, and Erez Lieberman Aiden, *Quantitative Analysis of Culture Using Millions of Digitized Books*, SCIENCE, Jan. 14, 2011, at 176**).**

Table 1 shows trends from 1900 to 2008 (the latest available date) for the unigram "corporate social responsibility." The y-axis shows what percentage of all the unigrams contained in Google's sample of books written in English include the phrase "corporate social responsibility." "Usage frequency is computed by dividing the number of instances of the n-gram in a given year by the

frequency trends to reduce the lag between changes in the lexicon and changes in the dictionary.").

19 John Bohannon, *Google Opens Books to New Cultural Studies*, 330 SCIENCE 1600, 1600 (2010) (describing the Ngram project and its initial critics). Peer review is as of yet limited on this relatively new tool, yet even the creators warn, "[b]asically, if you're going to use this corpus for scientific purposes, you'll need to do careful controls to make sure it can support your application. Like with any other piece of evidence about the human past, the challenge with culturomic trajectories lie in their interpretation." Google Ngram Viewer, *supra* note 15. Suggestions for controls are available in the main paper supporting the application. *See also* Michel et al., *supra* note 14, at 181. "Culturomic results are a new type of evidence in the humanities. As with fossils of ancient creatures, the challenge of culturomics lies in the interpretation of this evidence." *Id.* (giving a few example searches with interpretations).

total number of words in the corpus in that year."[20] Smoothing allows for a consideration of the trends as a moving average and can be adjusted for any search.[21] When one runs the search on Google, hyperlinks appear underneath the graph, allowing one to browse through the books available that contributed to the data set.[22]

Although the Ngram reveals "corporate social responsibility" appears in an extremely small percentage of the overall books in Google's digitized collection, it certainly shows both a notable frequency and a significant upward trend in its usage. This is, admittedly, only a collection of raw data. But the usage and trend are both apparent.

With an increased discussion of expanded corporate social responsibilities, the academic, legal, and policy discussions have also increasingly debated both the existence and meaning of "stakeholders"—some constituency, larger than the shareholders of corporations and those with whom the corporation holds contracts, to which the corporation nonetheless owes some duty on which to expend corporate resources. As Williams explains, "the current corporate social responsibility debate often involves a competition between shareholder versus stakeholder conceptions of the corporation."[23]

According to Professor David Millon, for example, "the pragmatic definition [of 'stakeholder'] advanced by business ethics expert R. Edward Freeman has intuitive appeal, is reasonably workable, and has proved to be durable: a stakeholder of a particular corporation is anyone who 'can affect or is affected by the achievement of an organization's objectives.'"[24] Millon

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20 Michel et al., *supra* note 14, at 176. The Google Ngram data is "normalize[d] by the number of books published in each year." *What Does the Ngram Viewer Do?*, GOOGLE BOOKS, http://books.google.com/ngrams/info (last visited Oct. 4, 2013).

21 Google Books describes "smoothing" as follows:

> Often trends become more apparent when data is viewed as a moving average. A smoothing of 1 means that the data shown for 1950 will be an average of the raw count for 1950 plus 1 value on either side: ("count for 1949" + "count for 1950" + "count for 1951"), divided by 3. So a smoothing of 10 means that 21 values will be averaged: 10 on either side, plus the target value in the center of them. At the left and right edges of the graph, fewer values are averaged. With a smoothing of 3, the leftmost value (pretend it's the year 1950) will be calculated as ("count for 1950" + "count for 1951" + "count for 1952" + "count for 1953"), divided by 4.

What Does the Ngram Viewer Do?, *supra* note 20.

22 *Id.* ("Below the graph, we show 'interesting' year ranges for your query terms. Clicking on those will submit your query directly to Google Books.").

23 Williams, *supra* note 1, at 707.

24 Millon, *supra* note 5, at 920 (quoting R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH 46 (1984)).

adequately explains these persons affected (and thereby defined as "stakeholders") as including "workers, creditors, local communities, suppliers, consumers, and those affected by the corporation's impact on the environment."[25] Freeman and Millon's definition captures the essence of what most people mean by the term. But the "anyone who can affect or is affected by" language should be sufficient for the reader to understand the potentially unlimited breadth of possible stakeholder constituencies.

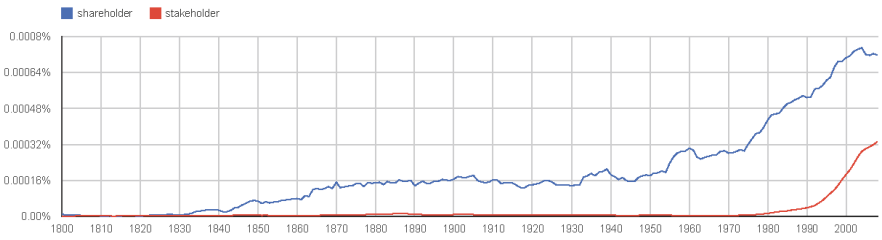
Tracking the rise of the usage of the word "stakeholder" over time is another interesting way to illustrate the injection of corporate social responsibility into our vocabulary and usage. The Ngram tool allows the researcher to compare two terms or phrases, thus Table 2 provides the Ngrams for both "shareholder" and "stakeholder."

TABLE 2:

GOOGLE LABS BOOKS NGRAM VIEWER

GRAPH *SHAREHOLDER* (UPPER LINE) V. *STAKEHOLDER* (LOWER LINE)

FROM 1800 TO 2008 FROM THE CORPUS OF ENGLISH WITH A SMOOTHING OF 3



Source: GOOGLE BOOKS NGRAM VIEWER, http://books.google.com/ngrams (last visited Oct. 4, 2013) (based on the model and database developed by Jean-Baptiste Michel, Yuan Kui Shen, Aviva Presser Aiden, Adrian Veres, Matthew K. Gray, William Brockman, The Google Books Team, Joseph P. Pickett, Dale Hoiberg, Dan Clancy, Peter Norvig, Jon Orwant, Steven Pinker, Martin A. Nowak, and Erez Lieberman Aiden, *Quantitative Analysis of Culture Using Millions of Digitized Books*, SCIENCE, Jan. 14, 2011, at 176**).**

Table 2 shows trends from 1800 to 2008 (the latest available date) for the unigrams "stockholder" as the upper line and "stakeholder" as the lower line. As Table 2 shows, the usage of "shareholder" has seen a rather steady increase from the mid-1800s to the mid-1970s, with a heightened rate of increase in frequency of usage since the late 1970s and early 1980s. "Stakeholder" barely registers on the graph before the late 1970s and has since shown a steadily sharp rise across the past three decades. This data regarding the use of the term in books stands

25 *Id.*

as a possible proxy for its overall importance in the corporate law discussion. The rise in usage illustrated here coincides with an increasing importance given to the stakeholder concept in corporate law discussions.

It is clear that corporate social responsibility is a continuingly important part of the current corporate law discourse. As noted at the outset of this Part, there are two extremes involved in this debate that see the duty of a corporation quite differently. For those with a wealth-maximization view, corporate social responsibility has little meaning beyond maximizing the wealth of the shareholders and complying with contracts and the law.[26] Any benefits to the rest of society are happy benefits of the corporation's focus on profits.[27] Occupying the other pole in the spectrum, another view might be described as the progressive or expansive side, oriented toward advocating for broad-based duties for the corporation—both morally and legally. For this side, there is a greater constituency other than shareholders (even including at times all of "society") with whom profits must be shared, for the protection of whom profits may need to be sacrificed, or for the benefit of whom expenditures must be made.[28]

I have described the conflict in previous work as requiring us to decide what guidance we suggest and what requirements we impose (as a matter of law or policy) to define "proper" corporate decision-making:

> The spectrum between these extremes resembles the classic debate over the negative and positive rights of man as they relate to obligation and the justification for intervention by institutions of power. The corporate social responsibility discussion raises three principal issues about how a moral corporation lives its life: how a corporation chooses its self-interest versus the interests of others, when and how it should help others if control decisions may harm the shareholder owners, and how far the corporation must affirmatively

26 *See* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (1962); *see also* Milton Friedman, *The Social Responsibility of Business Is To Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 32.

27 Elsewhere I have described this side of the spectrum as viewing "the concept of corporate social responsibility as essentially nonexistent, unless it happens to be an accidental and spontaneous outcome of otherwise self-interested financial motives of a profit-maximizing corporation." Donald J. Kochan, *Legal Mechanization of Corporate Social Responsibility Through Alien Tort Statute Litigation: A Response to Professor Branson with Some Supplemental Thoughts,* 9 SANTA CLARA J. INT'L L. 251, 254 (2011) [hereinafter Kochan, *Mechanization*].

28 In previous work, I have described this extreme as one that advances the notion that "corporations should become governmental surrogates, conscripted philanthropists, or otherwise constrained with affirmative perceived-moral obligations that can be compelled by coercive force." *Id.*

> go to help right the perceived wrongs in the world in which it operates.[29]

These issues go to the heart of the debate about the meaning of corporate social responsibility. The remaining sections in this Part will further examine in more detail the sides of the spectrum in this corporate social responsibility debate and will take a look at each side's expectations for the law's role in protecting or advancing its positions.

B. The Shareholder Wealth- or Profit-Maximization Camp

Regardless of whether one adopts a separation of ownership and control conception of the corporation or a nexus of contracts conception, both accept a wealth-maximization model of corporate social responsibility (even if for slightly different reasons).[30] The primary constraint on corporate behavior is not the advancement of some vague social interest but instead is the advancement of profits within the bounds of the law, which includes compliance with contracts and compliance with otherwise generally applicable legal rules and regulations.[31] Despite extensive efforts to dislodge it, this traditional view also remains the predominantly accepted legal view of a corporation's social responsibility.[32]

Proponents of the wealth-maximization view claim that these more certain and limited metrics are not only substantively superior, but they are also better defined—making them more manageable and more susceptible to monitoring. As Clark explains, "[a] single, objective goal like profit-maximization is

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29 *Id.* (citing CHARLES FRIED, RIGHT AND WRONG 1 (1978) (writing generally on the obligations of man and his relation to the state using an analogous set of choices)).

30 *See* Bainbridge, *In Defense*, *supra* note 6, at 1427–28 (some reach a preference for the wealth-maximization norm but as a result of a nexus of contracts theory of corporate law rather than focusing on the separation of ownership and control).

31 Clark explains the idea that profit is conditioned upon compliance with applicable law as follows:

> [T]he profit-maximizing norm does *not* imply that corporations and their managers have only minimal legal obligations to persons other than shareholders. Quite the contrary is true. Every major relationship between the corporation and persons or groups it affects is subject to vast and intricate bodies of legal doctrine and to legal enforcement mechanisms. These legal controls are ineffective in some instances and suboptimal in others, but they exist.

ROBERT CHARLES CLARK, CORPORATE LAW § 16.2 (1986).

32 *See* Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063, 2065 (2001) ("Shareholder wealth maximization is usually accepted as the appropriate goal in American business circles."); Williams, *supra* note 1, at 714 (describing profit-maximization and that the "predominant academic view in the United States about corporate social responsibility is directly derived from the shareholder theory of the corporation").

more easily monitored than a multiple, vaguely defined goal like fair and reasonable accommodation of all affected interests."[33]

The work of Milton Friedman is often associated as the standard bearer for this "wealth-maximizing" or "profit-maximizing" view of corporate social responsibility.[34] As Friedman states:

> The view . . . that corporate officials and labor leaders have a 'social responsibility' that goes beyond serving the interest of their stockholders or their members . . . shows a fundamental misconception of the character and nature of a free economy. In such an 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.[35]

This wealth-maximization view also famously finds support in the 1919 Michigan Supreme Court decision in *Dodge v. Ford Motor Company* where the court denounced Henry Ford's plan to share profits with employees at the expense of shareholders.[36] There the court explicated clear limits on the discretion of corporations to take into account broader social interests in its expenditures of profits:

> 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.[37]

Dodge remains a dominant force in defining the prevailing view of corporate social responsibility within corporate law.[38]

This view as expressed by Friedman and in *Dodge* is largely based on the traditional notion of the corporation as involving the separation of ownership and control. This position rejects any

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33 CLARK, *supra* note 31, § 16.2.

34 Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 564 (2003) ("Milton Friedman's famous essay on corporate responsibility remains the classic statement of the shareholder primacy model."); *see also* Roe, *supra* note 32, at 2065 n.2 (2001) ("Although aggressive when it appeared, Friedman's perspective is now mainstream in American business circles . . . .").

35 FRIEDMAN, *supra* note 26, at 133; *see also* Friedman, *supra* note 26, at 124.

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

37 *Id.*

38 *See* Bainbridge, *In Defense*, *supra* note 6, at 1423–24 ("[T]he mainstream of corporate law remains committed to the principles espoused by the *Dodge* court.").

and all duties to those other than the shareholders.[39] It contends that corporate decisions to spend shareholder profits on societal needs or goods imposes a tax on, or constitutes a wealth transfer from, those shareholders and that it illegitimately does so without shareholder consent.[40] Others reach the same conclusion regarding wealth-maximization as the optimal restraint on corporate decisions, although adopting a nexus of contracts conception of the corporation whereby the corporation's scope of duty is itself constrained in a manner that does not directly take into account outside stakeholder constituencies.[41]

Importantly, as Ribstein notes, "the legal issue is not whether the corporation or any of the individuals who manage it *should* care about society."[42] The better question is "*whether the law should mandate such governance*, given lawmakers' inherent limitations, the potential costs of legal rules, and disagreements about appropriate social objectives."[43] The wealth-maximization view does not mean that corporate managers are heartless or that corporations will fail to contribute to social welfare. As previously mentioned, the economic growth spurred by corporations pursuing profits helps all of society. And specifically, those in the wealth-maximization camp point to the jobs created, the contracting engaged in that consumes goods and services, the goods produced and services provided, and the taxes paid by corporations, for example, as evidence that corporations are

39 As Macey explains:

> Under traditional state and corporate law doctrine, officers and directors of both public and closely held firms owe fiduciary duties to shareholders and to shareholders alone. Directors and officers are legally required to manage a corporation for the exclusive benefit of its shareholders, and protection for other sorts of claimants exists only to the extent provided by contract.

Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23, 23 (1991) [hereinafter Macey, *An Economic Analysis*]; *see also* THE AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01(a) (1994) ("[A] corporation . . . should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain.").

40 Aneel Karnani, *The Case Against Corporate Social Responsibility*, WALL ST. J., Aug. 23, 2010, at R1 ("Managers who sacrifice profit for the common good also are in effect imposing a tax on their shareholders and arbitrarily deciding how that money should be spent.").

41 Bainbridge, *In Defense*, *supra* note 6, at 1429–30 (under the nexus of contracts, wealth-maximization and fiduciary duties exclusive to shareholders is set as the efficient default rule away from which rational investors will not likely deviate).

42 *See* Larry E. Ribstein, *Accountability and Responsibility in Corporate Governance*, 81 NOTRE DAME L. REV. 1431, 1432 (2006).

43 *Id.* at 1432–33 (emphasis added).

helping others when pursuing their own profit-maximizing ends.[44]

One of the most important constraints on wealth-maximization is that a corporation is duty-bound to comply with the law. As Clark explains, the view holds that "[p]rofits should be made as large as possible, within the [limited legitimate] constraints," which first and foremost includes compliance with the law.[45]

There is yet another important limitation that deserves special mention as well. It is an obvious but too often ignored sub-constraint within the wealth-maximization constraint—the power of consumer demand and the price system. As Ludwig von Mises has explained, corporate power is only as good as the orders given by the captains of the market—the consumers:

> The direction of all economic affairs is in the market society a task of the entrepreneurs. Theirs is the control of production. They are at the helm and steer the ship. A superficial observer would believe that they are supreme. But they are not. They are bound to obey unconditionally the captain's orders. The captain is the consumer.[46]

Consumers have the ability to "pay" for their own preferred social responsibility of corporations. If they truly value it and desire it, then any rational profit-maximizing corporation will provide it.[47] Consumers and shareholders alike have the power to purchase corporate social responsibility outcomes. That is a cause and consequence quite distinct from coercively dictating those results. As Friedman added, "The stockholders or the customers or the employes [sic] could separately spend their own money on the particular action if they wished to do so."[48] Corporations will supply a product that naturally arises in a market where consumers demand products that are socially responsible and are willing to pay for any additional cost for the

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44 Williams, *supra* note 1, at 714 (explaining the wealth-maximization view and its claims regarding ways that "corporations meet their proper social responsibilities by excelling in their economic activities, which then contributes to a well-functioning economy . . . .").

45 CLARK, *supra* note 31, § 16.2.

46 LUDWIG VON MISES, HUMAN ACTION: A TREATISE ON ECONOMICS 270 (3d rev. ed. 1963).

47 *Id.* at 648–49. Mises explains:

> All market phenomena are ultimately determined by the choices of the consumers. If one wants to apply the notion of power to phenomena of the market, one ought to say: in the market all power is vested in the consumers. The entrepreneurs are forced, by the necessity of earning profits and avoiding losses, to consider in every regard . . . the best possible and cheapest satisfaction of the consumers as their supreme directive.

Id. at 649.

48 Friedman, *supra* note 26, at 33.

production of that demanded product. If adding a corporate social responsibility element to a product makes the production of the corporation's goods or the provision of the corporation's services more expensive, presumably those additional costs can be captured by an increased price that a willing consumer base will pay because they value the additional efforts made by the corporation.[49]

Thus, consumers themselves absorb the costs to the corporation for the provision of that socially beneficial good. A socially responsible ingredient is added to a product, proactively or reactively, and that ingredient meets consumer demand. Whether it is a demand for "green" and recycled toilet paper, non-GMO corn, fuel-efficient vehicles, energy-conserving appliances, or similar products, if purchasers exist, then the corporations will label, market, and supply these products.[50] Elsewhere, I have described this corporate reaction as achieving socially responsible outcomes as a result of internally induced, profit-driven, and voluntary behavior.[51]

So long as demand is the sole reason for the provision of the good and the consumer market is willing to bear the costs of production through higher prices, such corporate actions are justified within the wealth-maximization norm. In that case, if demand disappears, the corporation is under no compulsion to continue providing that good.

It then becomes the individual responsibility of consumers to apply pressure with their own resources, pocketbooks, and buying power—rather than the law—to alter corporate behavior. Mises explains that the consumers run the show and dictate what is made and how it is made. "Their buying and their abstention from buying decides who should own and run the plants and the farms. They make poor people rich and rich people poor. They determine precisely what should be produced, in what quality, and in what quantities."[52]

The expansive corporate social responsibility advocates would rather, however, push for top-down imposition of corporate social responsibility standards forcing corporations and their shareholders to accept losses by bankrolling the social programs rather than those advocates themselves paying directly for the

49 *See generally* Karnani, *supra* note 40.

50 *Id.* (describing new markets for fuel-efficient cars, energy-conserving products, and healthier foods as examples, explaining that "in cases where private profits and public interests are aligned, the idea of corporate social responsibility is irrelevant . . . .").

51 Kochan, *Mechanization*, *supra* note 27, at 255.

52 *Id.*

desired behavior and social outcomes. As usual, instead of accessing market mechanisms to satisfy their preferences, these activist interest groups engage in rent-seeking behavior to obtain these social "gains" for some cost less than what they would have to pay if bargained for in a free and fair open market exchange.[53]

Finally, seemingly altruistic or charitable actions may be taken voluntarily by corporations where the impetus for the donation or other action is the calculated benefit to profits from the action due to an ability to capitalize on marketing, branding, or other means of increasing the consumer base or attracting additional investors. Reputation enhancing efforts based on these criteria of self-interest should be considered internally induced and voluntary. These efforts will cease when they are no longer profitable for the corporation. If the decision is made in order to maximize profits, it falls into this category of voluntary behavior that nonetheless leads to concurrently meeting both profit-based and social concerns.

Often, however, as discussed in more detail below, neither the wealth-maximization norm and its constraints on corporate behavior nor the beneficial effects of corporate profits on society are enough to achieve the remedies and results sought by those usually advocating for greater social responsibilities. Those advocates claim that existing conditions and allocations of profits leave other so-called stakeholders or otherwise "affected" individuals in unsatisfactory positions.[54] They contend that this deficiency should be met with more law to constrain the operations of the corporations, including an altered definition of legal duties owed.

C. The Expansive, Remedy-Seeking Notion of Corporate Social Responsibility and Its Broader Vision of Corporate Duties and Obligations

Advocates for a broad or progressive notion of corporate social responsibility argue that there is, or should be, some broader constituency to which a duty is owed beyond shareholders,[55] those involved in contractual relationships with

53 *See infra* Part II.

54 Adefolake Adeyeye, *The Role of Global Governance in CSR*, 9 SANTA CLARA J. INT'L L. 147, 149 (2011) ("CSR focuses on the attempt to regulate corporate behavior in order to ensure that corporations carry out their activities in consideration to multi-stakeholder interests.").

55 Williams, *supra* note 1, at 716 ("[P]rogressive scholars contend that directors ought to consider the impact of their decisions on a wider range of constituents than shareholders, and thus ought to consider the implications of their actions on employees, consumers, suppliers (in some cases), the community, and the environment.").

the corporation, or those harmed by corporate behavior under traditional notions of harm.[56] On the latter, corporate social responsibility theories sometimes rest on an expanded and different kind of definition of harm.[57]

As mentioned before, corporate social responsibility has many definitions and manifestations. Even among the progressive or expansionist advocates of corporate social responsibility, there is little agreement as to the goals or mechanisms for achieving corporate social responsibility or advancing broader stakeholder interests vis-à-vis corporate power.[58] Professor Larry Ribstein, for example, has explained that "[t]he debate over corporate social responsibility is often vague or unrealistic or both."[59] He continued that those participants seeking greater responsibilities for corporations "speak in terms of how corporations ought to be run, without specifying the legal changes that will produce these results."[60] Friedman noted that "[t]he discussions of the 'social responsibilities of business' are notable for their analytical looseness and lack of rigor."[61] Although many expansionist corporate social responsibility advocates are united in their desire to restrict the universe of acceptable corporate behaviors, they are not necessarily in agreement on all positions within that broader framework.[62]

Despite the sometimes less than cohesive message, corporate social responsibility activism, whatever its iteration, has strength in its optics. "'Corporate social responsibility' is a term that sounds difficult to quibble with as a goal. It exudes a sense of 'the good' or 'the proper.'"[63] After all, it is hard to defend the opposite—"irresponsibility." Much like other terms for

56 *See* Millon, *supra* note 5, at 919 ("The 'social' element of CSR is the idea that corporations have responsibilities to the broader society.").

57 *See* Bainbridge, *In Defense*, *supra* note 6, at 1432 (corporate social responsibility advocates are worried about the costs that corporate actors supposedly impose upon nonshareholder "constituencies").

58 Williams, *supra* note 1, at 775 ("While many advocates of more corporate social responsibility share a concern that managing global corporations to maximize shareholder wealth has the potential to lead to harmful social effects, including exacerbating persistent income inequalities, there is much less agreement about how to suggest reforming corporate law to address that concern.").

59 Ribstein, *supra* note 42, at 1432; *see also* Williams, *supra* note 1, at 706 (expressing similar difficulties with the definition).

60 Ribstein, *supra* note 42, at 1432.

61 Friedman, *supra* note 26, at 33.

62 Millon, *supra* note 5, at 919 ("Even among sympathetic analysts, key questions generate controversy. There is disagreement about the role of business in society, the persons to whom a business should be responsible, the responsibility that should entail, and so on.").

63 Kochan, *Mechanization*, *supra* note 27, at 254.

movements, corporate social responsibility as captured by the expansionist view exudes an image of purity and virtue. At the same time, much of the corporate social responsibility advocacy paints a very nasty picture of corporate behavior and a very myopic view of the (un)worthiness of profit. Profit motive is seen as merely (and unseemly) greedy and the contributions of economic growth to the betterment of society[64] become ignored. Moreover, within the advocacy or scholarship on the expansive view of corporate social responsibility, there is minimal discussion of negative rights, economic liberty, or laissez faire philosophy as part of the rubric of what constitutes, or contributes to, human rights and freedom.[65] Nor is there much discussion of the general improvements on the human condition that derive from development and investment.[66] Those with an expansive definition of corporate social responsibility exploit every avenue to create a negative image of corporations and downplay their positive contributions to society. Either through demonization of wealth or simply a fear of the "large," corporate behavior is seen as requiring some external check or control especially when we are told that it contributes to the awful conditions for many in areas where corporations operate.[67] These informational and perceptual imbalances further disadvantage those forwarding wealth-maximization as the better view.

In fact, the messaging becomes so powerful and difficult to rebut that Friedman warned corporations that they endanger themselves when they even enter the fray of a corporate social responsibility discussion, because they risk legitimizing the terms of the debate as being based in a battle between good and

64 *See, e.g.*, CLARK, *supra* note 31, § 16.2 (large organizations like corporations, "increase social welfare, because without them certain large-scale business ventures would be impossible or would be carried out in a wasteful way").

65 On these concepts and their contribution to social welfare, see 3 FRIEDRICH A. HAYEK, LAW, LEGISLATION, AND LIBERTY (1979); MISES, *supra* note 46, at 257–326; *see also generally* FRIEDMAN, *supra* note 26.

66 As Adam Smith described:

> Every individual is continually exerting himself to find out the most advantageous employment for whatever capital he can command. It is his own advantage, indeed, and not that of society, which he has in view. But the study of his own advantage naturally, or rather necessarily leads him to prefer employment which is most advantageous to the society . . . . [H]e intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. Nor is it always the worse for the society that it was no part of it. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it.

ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, 421, 423 (Edwin Cannan ed., 1937) (1776); *see also* Jan Narveson, *The "Invisible Hand,"* 46 J. BUS. ETHICS 201, 201 (2003).

67 Adeyeye, *supra* note 54, at 149.

evil.[68] He cautioned that corporate managers engaging in corporate social responsibility talk are legitimizing the "already too prevalent view that the pursuit of profits is wicked and immoral and must be curbed and controlled by external forces."[69] There is little doubt that the jargon painting those directly or indirectly (and, often, tenuously at best) affected by corporate action as the oppressed, and corporations as their oppressors, provides powerful marketing for the social responsibility cause.[70]

The expansionist corporate social responsibility view tends to be one partly grounded in entitlement and a poorly conceived concept of justice and blame.[71] When bad things happen in the world, people search for someone to blame and expect someone to pay.[72] Advocates of increased corporate social responsibility—as they are searching to find somebody to blame and get compensation from—seem to tout the claim that the law must provide a "remedy for every wrong."[73]

Not every perceived wrong, financial hardship, disparity, inequality, or other perceived hardship can find relief from the law and the legal system.[74] "While it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by

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68 Friedman, *supra* note 26, at 32.

69 *Id.*

70 As I have previously described:

> The marketing of law or ideas is advanced by the terms used to define the goals of expanded limitations on corporate behavior: rights, responsibilities, duties, human rights, morality, ethics, virtue, equality, accountability, and the like. It is against the backdrop of stories of genocide, killings, abuse, oppression, despair, poverty, inequality, slavery, starvation, arms, unjust imprisonment, apartheid, the Holocaust, greed, [and] selfishness . . . . It is easy to "sell" the ideas and projects that seek to solve or remedy these problems.

Kochan, *Mechanization*, *supra* note 27, at 254.

71 *See* Sonja B. Starr, *Rethinking "Effective Remedies": Remedial Deterrence in International Courts*, 83 N.Y.U. L. REV. 693, 698 (2008) ("International courts and scholars habitually invoke the principle of *ubi ius ibi remedium*—'where there is a right, there is a remedy.'").

72 Millon, *supra* note 5, at 919 (quoting Joel Bakan categorizing corporations as the "externalizing machine" because of corporate potential to ignore adverse third-party effects) (quoting JOEL BAKAN, THE CORPORATION: PATHOLOGICAL PURSUIT OF PROFIT AND POWER 60–84 (2005)).

73 For example, calling on the maxim *ubi ius ibi remedium*, one author in favor of expansive corporate social responsibility and promoting human rights litigation concluded that

> [a]llowing corporations and State officials to escape liability for their acts simply because they occurred in countries without adequate legal structures to address them does damage to the concept of Rule of Law and defeats the whole idea that where there is a breach of a legal right, a remedy must attach.

Emeka Duruigbo, *The Economic Cost of Alien Tort Litigation: A Response to* Awakening Monster: The Alien Tort Statute of 1789, 14 MINN. J. GLOBAL TRADE 1, 40 & n.235 (2004).

74 *See, e.g.*, Bush v. Lucas, 462 U.S. 367, 373 (1983) (recognizing that the court will not fashion a remedy without a right and even then only when determining congressional intent and considering broader policy concerns).

the realities of this world."[75] The legal system is not intended to provide a legal remedy for every wrong, harm, injury, or unfortunate social condition.[76] Nor is the legal system responsible for constructing itself to deliver a private party to blame and force that party to somehow make perceived wrongs right. Emotions and tragic stories aside, legal doctrines cannot mold themselves to such situations.[77]

Before any remedy can be applied or the law constructed in a manner to require a payment from one (like a corporation) to another (some segment of society benefitted by CSR-based investment), there must be a "right" recognized by law. The proposed beneficiaries of corporate philanthropy have earned no such right.

That limitation—that only rights are protected—explains why the maxim *ubi ius ibi remedium* loosely translates as establishing triggering conditions: *for every right*, there is a remedy. Even that phrase has further limits. Blackstone has explained that "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded . . . . [I]t is a settled and invariable principle in the laws of England, that every right when with-held must have a remedy, and every injury it's [sic] proper redress."[78] This concept, as explained by Blackstone and when understood in context, makes clear that there is only a right with a corresponding remedy if we also identify a duty (and afterward of course also find some violation of that duty which directly causes harm that is traceable to such a violation).

Every right must have a corresponding duty before one can claim any entitlement to action by another. This often-projected maxim that "there must be a right for every wrong" is improperly invoked if there is not a rights/duty analysis.[79] And only those who have that duty or obligation can be sued or otherwise held responsible for a wrong (not to mention all of the other hurdles

75 Tobin v. Grossman, 249 N.E.2d 419, 424 (N.Y. 1969) (explaining the facts of our system that the limits of the law mean that there are "limit[s] to attaining essential justice").

76 Hall v. Trisun, No. CIVA SA05CA0984 OG, 2005 WL 3348956 (W.D. Tex. Nov. 16, 2005) ("Plaintiff is advised that the law does not provide a remedy for every injury suffered. Moreover, the jurisdiction of a federal court to resolve disputes is inherently limited.").

77 *See* Howard v. Lecher, 366 N.E.2d 64, 66 (N.Y. 1977) (discussing that even where the "temptation is great to offer . . . some form of relief," it is "not the function of the law" to provide a remedy for every wrong).

78 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 23, 109 (Univ. of Chicago Press 2002) (1765).

79 *See* Perodeau v. City of Hartford, 792 A.2d 752, 768 (Conn. 2002).

like causation that must then be proved). Many attempts to increase the scope of corporate liability face these hurdles. The reality is that reform cannot always be accomplished through the imposition of new legal rules, although that fact may be unsatisfactory to those looking for their concept of justice.[80] Despite all the ills of the world, we must maintain the limits of the law, and we should appreciate what the law can and cannot do effectively.[81]

The rhetoric of corporate social responsibility sometimes ignores these bedrock principles and necessary prerequisites to the identification of legitimate legal obligations. At other times, expansionist advocates seek to redefine human relations and expand the concept of duty far beyond any meaningful constraint. They begin to invest in the creation of law or legal liability regimes to advance their interests. Corporate social responsibility activism illustrates that segments of society believe that cures for all things that are seemingly wrong in society may be found in the creation of law or the imposition of new legal liabilities. We live in a remedy-seeking society that often embraces these ideas of liability hunting. And, in the sense that these activists push for an alteration in corporate duties to obtain the remedies they seek, those groups are remedy-seeking through rent-seeking, as will be discussed in the next Part. Yet, there must be limits to the capacity of the law to accomplish these ends.

In the end, modern expansionist notions of corporate social responsibility can be seen as seeking an alteration in behavior—a new ethic in corporate conduct based on the desire to alter corporate behavior to achieve certain socially desirable outcomes. It seeks to identify harms, isolate causes of such harms, control negative externalities from doing business, and concomitantly induce or force corporations to internalize the purported larger costs and broader range of impacts from their actions.[82] The proliferation of expansive corporate social responsibility efforts has been effective at inducing changes in corporate behavior—leaving aside whether or not such changes are wise.

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80 James R. Adams, *From Babel to Reason: An Examination of the Duty Issue*, 31 MCGEORGE L. REV. 25, 53 (1999) ("Tort law does not provide a remedy for every harm. We cannot solve every social problem by simply 'passing a law.' There are many ways to control conduct; tort law is but one.").

81 Tobin v. Grossman, 249 N.E.2d 419, 424 (N.Y. 1969) ("The problem for the law is to limit the legal consequences of wrongs to a controllable degree," and therefore attenuated causation cannot be actionable).

82 Millon, *supra* note 5, at 919 (discussing the "social costs" that a profitable corporation can impose).

Just as the measure and the meaning of corporate social responsibility are varied, the mechanisms for achieving the aims of those favoring an expanded notion of corporate social responsibility can equally take a number of different forms. Some of these involve bottom-up private market forces while others seek to alter the legal landscape top-down with fundamental changes in statutes, judicially recognized common law or statutory liabilities, or other legal outlets for reform.

D. The Tactical Basics for Reformers: What Can Law Do to Affect Greater Corporate Social Responsibility?

In past work, I characterized some of the mechanisms that could accomplish corporate social responsibility objectives along a spectrum of increasing levels of coercive rules—from non-coercive, voluntary decisions by corporations aligned with their own interests in wealth-maximization all the way to the highest levels of coercively induced mechanisms of command and control over the decision-making of corporations and their distributions of profits.[83] In this section, I want to focus on just a few of the more specific efforts that can be taken to try to achieve one's corporate social responsibility objectives.

As explained above, the first (and most legitimate) option for achieving one's desired corporate social responsibility results is through purchasing the outcome. If, indeed, consumers demand a particular corporate effort that they deem socially desirable, then the consumer demand is enough incentive for a profit-maximizing corporation to provide that corporate social responsibility "product." Despite all the talk about the big bad powerful "corporations" in expansive corporate social responsibility and other progressive rhetoric, it is the consumers, after all, that have the power.[84] Mises again explains that, "[o]wnership of material factors of production as well as entrepreneurial or technological skill *do not*—in the market economy—bestow power in the coercive sense. All they grant is the privilege to serve the real masters of the market, the consumers, in a more exalted position than other people."[85] The price of the goods or services will be adjusted upward if they have added costs from social responsibility efforts included in the production of goods or provision of services. But, presumably, if

83 Kochan, *Mechanization*, *supra* note 27, at 255–57.

84 MISES, *supra* note 46, at 649 ("It is customary nowadays to signify the position which the owners of property and the entrepreneurs occupy on the market as economic power or market power. This terminology is misleading when applied to the conditions of the market.").

85 *Id.* (emphasis added).

consumers desire that extra "CSR ingredient" in the product, then they will be willing to pay the higher price. It will be an incident (or an accident) of the corporation making wealth-maximization decisions.

Corporate social responsibility advocates can also try to work within existing law to compel corporate decisions that are socially responsible in the advocates' minds. Advocates can become shareholders and try to change things from the inside—through, for example, voting their shares, proxy solicitations, hostile takeovers, direct lawsuits, derivative lawsuits, and other means. Admittedly these options will be constrained so long as the legal definitions of duty remain aligned with the wealth-maximization model. Thus, the more effective technique for these interest groups is to use these avenues as a way to attempt change regarding the contours of board of directors' duties and the vision of the corporate role. There is a part of the corporate social responsibility movement that tries to change the governing rules or metrics of corporate decision-making—to limit the range of acceptable corporate profit decisions and allow more room or even mandate so-called socially responsible choices or stakeholder concerns to be taken into account. The advocates would need to overcome the default rules and convince a corporation to structure itself with different standards and duties, or they would need to convince the judiciary to amend traditional notions of fiduciary duties. Again, these are difficult tasks but it may be worthwhile for advocates to invest in these efforts to cause legal change.

When unable to achieve their corporate social responsibility objectives within corporate law or through a change in the rules of traditional corporate governance, the corporate social responsibility lobby diverts its attention and resources elsewhere. Corporate social responsibility advocates may seek legislation that imposes new duties on corporations and their boards of directors that align with the social interests of the advocates. So-called "stakeholder statutes" or "constituency statutes" allowing or requiring corporations to take stakeholders into account in decision-making are obvious examples of these efforts.[86]

86 *See generally* Kathleen Hale, Note, *Corporate Law and Stakeholders: Moving Beyond Stakeholder Statutes*, 45 ARIZ. L. REV. 823, 833 (2003) (describing stakeholder statutes); Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579 (1992) (discussing the constituency statute approach). More recently, we have also seen "social enterprise" statutes and "benefit corporation" regimes emerge that attempt to further similar goals. *See, e.g.*, Brian D. Galle, *Social Enterprise: Who Needs It?*, 54 B.C. L. REV. (forthcoming 2013), *available*

The corporate social responsibility lobby can also seek to change the substantive law—to regulate the conduct of business activities or to create new duties or liabilities for certain entities and certain behaviors. The expansion of the operating liabilities of businesses and the narrowing of acceptable practices by creating substantive prohibitions or tort liabilities for corporate actions can be accomplished by changing the contents of legislative or regulatory standards. And, these substantive rules can also be changed in the courts through the development of new liability schemes, identification of new harms, or creation of new duties.

Rather than convincing corporations to change their decision-making calculus or transforming their concept of duty, and rather than seeking legislation or judicial standards generally altering the definition of a corporation's fiduciary duties to include secondary stakeholders, corporate social responsibility advocates often seek to manipulate the substantive law to force corporations into making corporate social responsibility investments—to the detriment of shareholder interests—through means of pressure quite apart from truly voluntary decision-making choice. This is accomplished, in part, by creating an atmosphere of threatened liability that changes the respective bargaining power of the corporate social responsibility lobby and arms them with substantial leverage which it can deploy against corporations in efforts to "convince" corporations to change behaviors.[87] The effects are no less damaging than outright legislatively demanded changes in corporate law. Corporations shift resources into suboptimal investments in secondary stakeholder concerns at the expense of distributing profits to their primary shareholders. It diverts resources and misallocates profits into non-shareholder investments. The beauty of such efforts for the corporate social responsibility lobby is that even if they are not entirely successful in creating law (or even when any such efforts have not yet been completed), the corporate social responsibility lobby can start to use the threat of law and the threat of completing a legal regime to change the power dynamics.[88] The corporate social responsibility lobby can leverage the possible creation of law or

at http://ssrn.com/abstract=2302658 (discussing the political economy of social enterprise statutes and questioning the motives and effectiveness of such legislation).

87 Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiation*, 5 HARV. NEGOT. L. REV. 1, 5 (2000) ("The degree of power that each party brings to the negotiation affects the room for maneuver that each feels is available in bargaining situations.").

88 *Id.* at 20 (discussing power dynamics between litigating parties).

the risk of adverse judgments in a manner that paints corporations into a corner, stimulating changes in behavior to stave off the threatened legal maneuver.[89]

Whatever the means—or at least those means outside of engaging, as consumers or otherwise, in truly voluntary contracts with corporations—used to seek a remedy for the harms expansive corporate social responsibility advocates believe are the fault of corporate behavior and attributable to the traditional corporate wealth-maximization model, these advocates are acting in a manner consistent with public choice models of interest group behavior. Whether through seeking legislation, litigation advancing novel theories of liability for corporate behaviors such as for "aiding and abetting" nasty foreign regimes, shareholder activism, derivative suits, or other means, corporate social responsibility advocacy operatives meet the classic definition of interest groups and should be treated with the same skepticism as we might give anyone attempting to manipulate the law for private gain. These advocates are advancing their own agendas and the wealth and power of their own organizations in the process of seeking special treatment from the law.

While expansive corporate social responsibility advocates may claim that their efforts to change the law are for "the public interest" or the overall "social good," they are asking for a wealth transfer from the corporations and their shareholders to those who will supposedly benefit from the corporate social responsibility efforts demanded. Expansive corporate social responsibility efforts are redistributive in nature. The concentrated corporate social responsibility interest groups seek payments in the form of corporate social responsibility reforms or measures by the corporation, and the costs of complying are borne by the shareholders in the form of sacrificed profits.

There is no reason to believe that corporate social responsibility advocates are any less inclined to tap into the law as a means of serving their ends. The next Part will explain how these efforts by corporate social responsibility activists dangerously conscript the law for inappropriate means. Legal rules should not be fitted through manipulation as outcome-based vehicles for social reform.

89 *Id.*

II. CORPORATE SOCIAL RESPONSIBILITY ADVOCATES AND LITIGANTS AS INTEREST GROUPS IN A PUBLIC CHOICE PERSPECTIVE

This Part introduces public choice theory to set forth the primary lesson of this Article—expansive corporate social responsibility advocacy should be viewed in light of what we know about interest group politics. We should not pay any special deference to the aims of these seemingly beneficial groups simply because their names and cause sound in the public interest. Corporate social responsibility advocacy is still private interest advocacy and any attempt to use the law to reposition one's status within the bargaining market is, indeed, still rent-seeking, despite the "social responsibility" labels.

Rent-seeking and private advantage are often behind legislation, regulation, and the creation of law generally.[90] Corporate social responsibility lawmaking efforts may sound like they are in the "public interest,"[91] and for a long time the dominant theory in political science presumed that legislation was and could be crafted with social welfare enhancing effects and intent.[92] This concept that laws can be created for some common good isolated from interest group influence has been challenged by public choice theory,[93] exposing the public interest model to the real world operations and effects of interest group influence in legal and political decision-making.[94] Public choice theory "burst[s] the bubble" of the public interest model and attempts to recast our critique of legislation and other law creation with an understanding that even those with benign or inherently good sounding motives or causes are nonetheless seeking private interest gains.[95]

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90 MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW 46 (2009) (explaining rents and rent-seeking).

91 Andrew P. Morriss, Bruce Yandle & Andrew Dorchak, *Choosing How to Regulate*, 29 HARV. ENVTL. L. REV. 179, 214 (2005) [hereinafter Morriss et al., *Choosing*] (discussing the history of public interest theory).

92 *Id.* at 215.

93 James Buchanan, *Politics Without Romance: A Sketch of Positive Public Choice Theory and Its Normative Implications*, *in* THE THEORY OF PUBLIC CHOICE-II 11 (James Buchanan & Gordon Tullock eds., 1984) (explaining that the truths exposed by public choice destroyed the romance of public interest theory).

94 STEARNS & ZYWICKI, *supra* note 90, at 44–45 (contrasting the public interest and public choice models).

95 Paul Boudreaux, *Eminent Domain, Property Rights, and the Solution of Representation Reinforcement*, 83 DENV. U. L. REV. 1, 18 (2005) (public choice theory "burst the bubble" of the civic republic model by explaining that "[l]aws adopted ostensibly to help the public are in reality the masked use of government to help one group at the expense of others – be it business interests who are helped by regulation of their competitors or outdoor enthusiasts aided by laws restricting private development in parklands").

Public choice theory looks at the world of legislation and other avenues of law creation as marketplaces for the production of goods desired by interest groups. The law suppliers—usually legislators but also including courts—have the ability to produce such goods[96] upon demand from interest groups and the interest groups will pay to acquire the goods (so long as it is more efficient than paying for the same result in an open marketplace without the legislation).[97]

In corporate social responsibility, the expansionist interest groups see their opposition, or competition, as the businesses upon which they seek to impose higher standards. While the expansionist lobby could negotiate in the private market with businesses to encourage changes in behavior, such bargaining would be costly. It may often be less expensive for advocacy groups to obtain the same result—changes in corporate behavior—by spending their budget on changing legal rules to their advantage. This includes seeking legislation to advance their interests, developing litigation strategies to create liabilities for corporations, and the like.[98] We should expect the expansionist corporate social responsibility lobby's resources will be directed to the law making realm when achieving gains there is less costly than bargaining for such gains.

Interest-group consumers of the laws supplied usually benefit quite separate and apart from any concern over the greater social welfare (even if that legislation is given a general welfare spin in order to market to the public that legislation or other legal outcome as a positive for the public good).[99] When it comes to information, interest groups have a leg up. Interest groups are more savvy and experienced at controlling the flow of information than individual citizens, and thus those interest groups are able to manage the message so that the public and its legislators have reason to support the legislation or other changes in law that the interest group favors.[100]

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96 Robert D. Tollison, *The Economic Theory of Rent Seeking*, 152 PUB. CHOICE 73, 80 (2012) [hereinafter Tollison, *Economic Theory*] (discussing the supply and demand of legislation).

97 *See, e.g.*, George J. Stigler, *The Theory of Economic Regulation,* 2 BELL J. ECON. & MGMT. SCI. 3 (1971); Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339 (1988).

98 *See* Rubin et al., *supra* note 8, at 295–96.

99 Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model,* 86 COLUM. L. REV. 223, 227 (1986) [hereinafter Macey, *Public-Regarding*] ("Interest group theory treats statutes as commodities that are purchased by particular interest groups or coalitions of interest groups that outbid and outmaneuver competing interest groups.").

100 *See* NORMAN J. ORNSTEIN & SHIRLEY ELDER, INTERESTS GROUPS, LOBBYING AND POLICYMAKING 75–76 (Robert L. Peabody ed., 1978).

The idea is to obtain something of value by spending less on the lobbying, litigating, and other payments needed to get that something from the government than one would need to spend in a free and openly competitive marketplace where they would have to negotiate with other private parties to obtain that same something of value.[101] This process of "rent-seeking"[102] is the expenditure of resources to obtain this something of value—often an alteration in legal status that directly props up the seeker's bargaining position but at other times some alteration that simply knocks down a competitor's status.[103] A rational interest group will invest in the cheapest alternative mechanism to achieve their desired results.[104] When working for legal change becomes more expensive than seeking a private market resolution, interest group behavior is channeled back again to that private market.[105] When one can obtain a rent—the positive savings differential between the high cost of obtaining something in the market and the lower cost of obtaining the same thing through legal institutions—then the rational investor will seek that rent.

For rent-seeking deals to succeed the public needs to be left with the perception that the actions of legislators are public minded and that the actions of courts are independent and free from outside manipulation for private gains; and, the public must be left with little reason to suspect the existence of private-advantage deals that transfer wealth from individual taxpayers.[106] Quite often due to the concept of "masking," despite legislation or other alterations of legal rules having the effect of promoting a specific interest group's agenda (often at the expense of the public), the face of the legislation or legal rule is designed to make the public believe that it, the public, is the true beneficiary of the law. As a result of such a belief, the public is

101 *See generally* Daniel A. Farber & Philip Frickey, *The Jurisprudence of Public Choice*, 65 TEX L. REV. 873 (1987).

102 *Id.*; *see also generally* Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224, 232 (1967); Tollison, *Economic Theory*, *supra* note 96, at 80 (describing rent-seeking).

103 STEARNS & ZYWICKI, *supra* note 90, at 50 (defining rent-seeking as "meaning affirmative lobbying efforts to secure beneficial legal protections against competition").

104 Tollison, *Economic Theory*, *supra* note 96, at 80 ("[G]roups who can organize for less than a dollar in order to obtain a dollar of benefits from legislation will be the effective demanders of transfers.").

105 STEARNS & ZYWICKI, *supra* note 90, at 46 ("[A]n economic rent arises when an economic activity, for example labor, earns a return that exceeds the opportunity cost of the income-producing asset.").

106 Morriss et al., *Choosing*, *supra* note 91, at 225 ("Politicians . . . seek to minimize their own costs when acting on behalf of interest groups or the general public.").

less likely to question the law and light never shines on the less scrupulous interest group bargain behind the mask.[107]

This masking concept is also sometimes referred to as a curtain, cloak, or veil of legitimacy.[108] Masking works to shield interest group-motivated changes in the law from scrutiny because it hides the costs of the activity behind a veil of a seemingly positive goal. Masking plays a critical role in rent-seeking's successes,[109] and corporate social responsibility advocates are in a strong starting position given the comparative "good versus evil" optics discussed in Part I.[110] As Professor Harry Hutchison has explained, "Properly understood, the corporate social responsibility model allows some to exercise their preferences at the expense of others while couching that exercise in wonderful sounding language."[111]

When such a mask is effective, of course, it diminishes opposition and makes the rent-seeking successful because there is little resistance to the legal movement or the change achieved.[112] In the end, rent-seeking processes are damaging and dangerous because they result in misallocation of resources in

107 John O. McGinnis, *The Bar Against Challenges to Employment Discrimination Consent Decrees: A Public Choice Perspective*, 54 LA. L. REV. 1507, 1530–31 (1994) (explaining the means by which politicians can raise the information costs for those opposing their actions by disguising the true objectives of their actions); Todd J. Zywicki, *Environmental Externalities and Political Externalities: The Political Economy of Environmental Regulation and Reform*, 73 TUL. L. REV. 845, 890 (1999) [hereinafter Zywicki, *Externalities*] (discussing why the rational voter will have no incentive to spend time or money to discover illegitimate wealth transfers and interest group deals).

108 *See* Rebecca M. Kysar, *Listening to Congress: Earmark Rules and Statutory Interpretation*, 94 CORNELL L. REV. 519, 580 (2009) (discussing masking special interest legislation); POLITICAL ENVIRONMENTALISM: GOING BEHIND THE GREEN CURTAIN (Terry L. Anderson ed., 2000) (discussing the curtain behind which private interest deals hide); Jonathan H. Adler, *Rent Seeking Behind the Green Curtain*, REG., Fall 1996, at 26–34 (1996) (curtain concept); Scott Baker & Kimberly D. Krawiec, *The Penalty Default Canon*, 72 GEO. WASH. L. REV. 663, 678 (2004) (discussing a legislative public interest "cloak"); Gregory C. Shaffer, *How Business Shapes Law: A Socio-Legal Framework*, 42 CONN. L. REV. 147, 155 (2009) ("In some cases, 'public interest' statutes may serve as a facade, providing a symbol of government concern while masking government inaction."); Michael Abramowicz & Thomas B. Colby, *Notice-and-Comment Judicial Decisionmaking*, 76 U. CHI. L. REV. 965, 1013 (2009) (discussing rulemaking "charades").

109 Macey, *Public-Regarding*, *supra* note 99, at 251.

110 *See supra* notes 63–82 and accompanying text.

111 Harry G. Hutchison, *Director Primacy and Corporate Governance: Shareholder Voting Rights Captured by the Accountability/Authority Paradigm*, 36 LOY. U. CHI. L.J. 1111, 1135 n.141 (2005). Hutchison further explains that "[a]s thus understood, the corporate social responsibility model is merely one of many conventional models of corporate governance in which actors often exercise their own self-interest and as such, the claim that this model exists in some counter-hegemonic sense remains highly speculative." *Id.*

112 Macey, *Public-Regarding*, *supra* note 99, at 232.

society,[113] forcing individuals to waste money seeking these "law" goods and forcing their competitors to spend money opposing the same. All the while wealth is being coercively transferred in unnatural and unproductive ways.[114]

Lessons can be learned for the corporate social responsibility mask from other seemingly wonderful terms like social justice, environmental sustainability, or others infused with a sense of the public good. Such terms readily attach themselves to lawmaking efforts as part of the masking effort.[115] Whether it is labor unions, the plaintiffs' bar, human rights organizations, corporate social responsibility activists, or the like, these groups are advancing a cause that appears as though it is in the "public interest," but public choice teaches us that is seldom the full dynamic.

This Article started with the promise to make the case that corporate social responsibility advocates are interest groups too, and that is precisely the point here. While many people associate interest groups or "special interests" only with businesses or other overtly profit-driven enterprises, "social" or "public

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113 Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 232 (2012) (explaining the likely billions lost and other inefficiencies each year from rent-seeking legislation); Tollison, *Economic Theory*, *supra* note 96, at 74 (explaining why spending to obtain rent-seeking legislation produces nothing of value and diverts resources from more important investments); *see also* Nicolas Loris, *The Wind Production Tax Credit and the Case for Ending All Energy Subsidies*, 23 DUKE ENVTL. L. & POL'Y F. 323, 327–28 (2013). Loris explains, by example, that "[t]he resources a banana producer used for lobbying for banana tariffs or an extension of the banana tax credit could have been spent actually growing and selling bananas. Rather than engaging in profit-seeking behavior in the marketplace, the producer is engaging in rent-seeking behavior in the political process." *Id.* at 327.

114 Hasen, *supra* note 113, at 197 (discussing the diversion of funds by rent-seeking and interest group legislation into nonproductive uses); Macey, *Public-Regarding*, *supra* note 99, at 230 (explaining that most laws obtained through rent-seeking "enrich the few at the expense of the many"). Empirical study reveals that these opportunity costs, diverted resources, and negative effects on economic growth and entrepreneurship are real:

> Economist Russell Sobel of West Virginia University defines rent-seeking as unproductive entrepreneurship. Political efforts made by rent-seeking companies could have been channeled toward productive uses instead of distorting economic activity. Sobel found that states that provide more political preferences have higher levels of unproductive entrepreneurship and lower levels of productive entrepreneurship, and therefore have slower economic growth.

Loris, *supra* note 113, at 328 (citing Russell Sobel, *Testing Baumol: Institutional Quality and the Productivity of Entrepreneurship*, 23 J. BUS. VENTURING 641, 646 (2008)).

115 Georgette Chapman Poindexter, *Land Hungry*, 21 J.L. & POL. 293, 319 (2005) (providing examples of when public interest-looking groups are often "purely self interested actors" that rely on concepts like the "environment," "social justice," and "preservation" as cover); *see also, e.g.*, Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49 (1998) (discussing interest group influences and masking in eminent domain).

interest" organizations seek to profit from the manipulation of legal standards in much the same way as any other groups.

For example, Sheehan explains why non-governmental organizations (NGOs)—the same groups that often appear as the public face for corporate social responsibility initiatives—are often perceived as public-interested but have the same *self-interested* agenda as any other interest group:

> NGOs have a political ideology. Most believe that the private sector cannot solve environmental problems and that governments must control economic decision-making to protect the environment. This belief may be quite sincere, but it is also rooted in self-interest. Many NGOs depend on governments for jobs, money and power. They seek out grants and contracts from national governments and international agencies. They also bask in the recognition they receive from public agencies, which adds authority to their pronouncements and brings their leaders prestige.[116]

NGOs get more funding if they have successes to market to their membership, and with more funding comes greater job security and growth of the organization.[117] As I have described in past work, the same motivations exist within human rights and international law advocacy organizations, sometimes being the very same groups that put corporate social responsibility at the top of their agendas or at least align themselves with other expansive corporate social responsibility groups.[118]

Environmentalism is a theme sometimes incorporated in social responsibility, and, even when not cast directly as a corporate social responsibility issue, it often has a very similar tone as corporate social responsibility activism does in public discussions. Professor Todd Zywicki has analyzed how environmental public interest groups try to dominate the public debate with high-sounding ideals when in fact they are seeking private interest legal outcomes.[119] The mask provided by such

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116 JAMES M. SHEEHAN, GLOBAL GREENS 2 (1998). *See also generally* JEREMY RABKIN & JAMES SHEEHAN, GLOBAL GREENS, GLOBAL GOVERNANCE (1999).

117 Todd J. Zywicki, *Baptists?: The Political Economy of Environmental Interest Groups*, 53 CASE W. RES. L. REV. 315, 316–18 (2002) [hereinafter Zywicki, *Baptists*] ("Their activities can be understood as being identical to those of any other interest group – namely, the desire to use the coercive power of government to subsidize their personal desires for greater environmental protection and to redistribute wealth and power to themselves.").

118 *See* Donald J. Kochan, *The Political Economy of the Production of Customary International Law: The Role of Non-governmental Organizations in U.S Courts*, 22 BERKELEY J. INT'L L. 240 (2004) [hereinafter Kochan, *Political Economy*].

119 Zywicki explains:

> Environmentalists often claim that environmental activist groups and environmental regulation is animated by the "public interest," i.e., an outpouring of "civic republicanism" that causes individuals to overcome their

environmental groups and their seemingly noble intentions provide a very effective diversion.[120] Environmental groups—like most corporate social responsibility advocates—claim that their cause is bigger and better, more humane, and more basic than profit. Yet, there is little cause to believe that they are using the law in any more noble or just way than any business-based interest group.[121]

These "public interest" groups have characteristics that qualify them for scrutiny as interest groups no different from corporate interest groups, military-industrial interest groups, or others that often have that "special interest" label slapped on them as a pejorative. Sargent explains that "[a]ssertions of fairness, 'the public interest,' social justice, and equality thus are often perceived within the law and economics tradition as masks for the self-interest, as rhetorical dodges deflecting attention from the play of conflicting interests."[122] These public interest-labeled groups (including corporate social responsibility groups) seek to maximize their budgets, maximize influence, maximize membership, secure their jobs, and in the case of corporate social responsibility sometimes directly effectuate wealth transfers into their organizations or constituencies (e.g., from shareholders to stakeholders).

Such wealth transfers can occur through projects or programs designed to provide aid and assistance to corporate social responsibility stakeholders, payments of increased wages, settlements in lawsuits, or other goods provided by the corporations at the expense of their shareholders and in favor of

> narrow self-interest and to support wide-ranging environmental regulatory policies . . . . [A] brief review of the evidence suggests that the public interest model has little descriptive accuracy with respect to the behavior of environmental interest groups.

Zywicki, *Baptists*, *supra* note 117, at 325–26; *see also* Zywicki, *Externalities*, *supra* note 107, at 856–88 (explaining empirically the political economy of environmental interests groups); POLITICAL ENVIRONMENTALISM, *supra* note 108; Adler, *supra* note 108, at 26; Macey, *Public-Regarding*, *supra* note 99, at 232 n.46 ("Even regulations that have long been thought to accomplish such worthy goals as improving the environment recently have been shown to benefit special interests.").

120 Zywicki, *Baptists*, *supra* note 117, at 336 ("[T]he stranglehold that environmental lobbyists exercise over environmental policy-making is the result of the public perception that these groups are, in fact, acting according to the public interest.").

121 *Id.* at 349 (finding "little obvious difference between environmental activists who want more for their projects, and farmers, defense contractors, or thousands of others who use the political process to redistribute money from the public to the goals preferred by their well-organized and influential interest groups").

122 Mark A. Sargent, *Utility, the Good and Civic Happiness: A Catholic Critique of Law and Economics*, 44 J. CATH. LEG. STUD. 35, 42 (2005)*; see also* Stephen M. Bainbridge, *Law and Economics: An Apologia*, *in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 208, 209 (Michael W. McConnell et al. eds., 2001).

these outside stakeholders. Despite their public interest exterior, there is no reason to treat corporate social responsibility groups as anything different. They are trying to maximize their own self-interest at the expense of others and will take advantage of rent-seeking opportunities that are available to them.

In addition to having their own institutional interests as advocacy groups in mind and profiting from lawmaking successes by support and funding, these social policy groups engage in remedy-seeking through rent-seeking. They see ills in the world and believe that transfers of wealth accomplished through the creation of legal rules are necessary to create a remedy for those ills. They seek to impose new duties well beyond the limits that would otherwise be imposed under our traditional notions of liability for direct actions with proof of causation of harms themselves traditionally defined and limited. Such groups would rather obtain a benefit at a lower cost than these groups would be required to pay if they were forced to bargain in a free market for their preferred outcomes.[123] Again, so long as the public believes that their activities are public spirited, then their efforts at making law will often move forward relatively unimpeded.

As discussed in the previous Part, corporate social responsibility advocates can use market mechanisms, acquire stock and try to influence corporations and effect change from the inside through voting and corporate governance techniques, bargain as an outsider for corporate change, seek legislation or regulation to advance their interests, create liability schemes in the courts, use derivative and direct shareholder lawsuits to alter corporate behavior or to discipline corporate "misbehavior," or use other shareholder activism techniques. Within the mechanisms listed, in all but the most benign voluntary exchanges for, and purchases of, corporate social responsibility outcomes where no changes in law would be necessary to accomplish the ends, corporate social responsibility advocates stand to benefit if they can achieve an alteration of law in favor of their interests. Corporate social responsibility groups engage in rent-seeking behavior to alter legal rules. They invest in outcomes like stakeholder legislation, for example, in the same way that a corporation looks to Congress for a tax advantage or other corporate subsidy.

Where possible (and less expensive than private bargaining), these corporate social responsibility groups will want to tip the

123 Zywicki, *Baptists*, *supra* note 117, at 349 (environmental rent-seeking helps groups avoid costlier marketplace alternatives).

law in their favor. There are incentives to make an investment in the creation of law that will put the investor—here, the corporate social responsibility advocates—in a strategically advantaged position vis-à-vis competitors or others in the marketplace—here, principally corporations—where transactions would otherwise be free, on equal footing, and at arm's length.

As mentioned earlier, public choice typically focuses on the incentives for interest groups to invest in the production of *legislation* beneficial to its interests and giving it a strategic advantage—the creation of rents—not available in the private marketplace.[124] Similar analysis, however, can be applied to the production of law generally. Public choice theory construed broadly includes a description of rent-seeking investments in law creation in any form to accomplish changes in legal status.[125]

Most specifically for purposes of this Article's analysis, interest groups will invest in the production of liability regimes within the judicial system that similarly advantage the interest group or disadvantage their competitors.[126] So liability here focuses less on altering firm governance standards than it does on limiting the scope of acceptable/legal firm decisions.[127] The first success lies in creating the new duty with a corresponding liability. The secondary benefit lies in the mere threat and leverage that comes from having a new doctrine to wield against an adversary. Where the mere existence of the threat of liability regime can disadvantage the corporation at the bargaining table, it is worthwhile for the interest group seeking to alter the corporate behavior to invest in early stage developing of novel liability theories.[128] Seeking legal change to obtain valuable

124 *See, e.g.*, Gordon Tullock, *Rent Seeking*, *in* 7 THE NEW PALGRAVE DICTIONARY OF ECONOMICS 95 (Steven N. Durlauf & Lawrence E. Blume eds., 2d ed. 2008).

125 Rubin et al., *supra* note 8, at 295–97 (noting that "[m]ost public choice analyses stop with the passage of interest group legislation" but, drawing on empirical examples, stressing the relevance of applying the same principles to incentives in using litigation for rent-seeking ends).

126 *Id.* at 295 ("[I]nterest groups can sometimes use the common law litigation process for benefit seeking. We provide a model of the decision by an interest group as to whether to use the litigation process or traditional lobbying for the purpose of obtaining benefits from government, and show that the model has empirical relevance.").

127 *See, e.g.*, ANDREW P. MORRISS ET AL., REGULATION BY LITIGATION (2009) (describing several case studies where interest group outcomes were sought and achieved through civil litigation models).

128 *See* Emanuela Carbonara & Francesco Parisi, *Rent-Seeking and Litigation: The Hidden Virtues of the Loser-Pays Rule* 3 (Minn. Legal Studies Research Paper Series, Research Paper No. 12-39, 2012), *available at* http://ssrn.com/abstract=2144800 ("When parties litigate, they normally expend resources to improve their odds of winning . . . . Economists describe such situations, where parties expend resources to improve their share of (or probability of winning) fixed stake as 'rent-seeking,' which is how the law and economics literature has predominantly analyzed litigation costs.").

leverage above and beyond their bargaining position without the law provides rents to the corporate social responsibility interest groups.[129] The existence or nonexistence of a liability regime for the behavior targeted for change affects the relative power of expansionist interest groups to extract promises from corporation to change behavior.[130] Even if it is just in the investment in law in order to create a threat of liability, it will make sense for an interest group to invest in shifting the legal rules if the existence of that threat can thereby alter the bargaining power—i.e., create leverage.[131]

As civil litigation emerges to promote corporate social responsibility through liability regimes, the remedy the plaintiffs' attorneys and advocates are seeking often extends beyond relief for the particular plaintiff in a case. The goal is bigger.[132] Additional goals include changing corporate behavior,[133] promoting public policy,[134] obtaining declarations of public norms,[135] sparking "institutional reform,"[136] and the like.[137] In the ATS situation, for example, it involves the transformation of

129 *See, e.g.*, Kal Raustiala, *Commentary: Density and Conflict in International Intellectual Property Law*, 40 U.C. DAVIS L. REV. 1021, 1034 (2007) (discussing as an example the phenomena in intellectual property law involving "rent-seeking efforts by producers, who try to use the lawmaking process to leverage their political strength in an effort to segment and protect markets against increasing competition").

130 Adler & Silverstein, *supra* note 87, at 20.

131 Rubin et al., *supra* note 8, at 303–08 (explaining the use of tort litigation, for example, as interest-group motivated rent-seeking and the empirically proven comparative advantages and successes of plaintiffs in this forum vis-à-vis business interests).

132 Beth Stephens, *Translating* Filártiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1, 14 (2002) ("This trend of public interest litigation predisposes the U.S. public, judiciary, and legal advocates to view civil litigation as a potential means to realize large-scale policy goals and hold accountable perpetrators of egregious abuses, whether or not such litigation results in an enforceable judgment.").

133 Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61, 64 (2008) ("ATS cases against corporate defendants involve high stakes on both sides. For victims, these cases offer an unusual chance to receive monetary compensation for human rights violations, in addition to providing symbolic vindication and deterring corporate involvement in internationally wrongful conduct.").

134 Stephens, *supra* note 132, at 13 ("[I]n some public interest cases, 'the subject matter of the lawsuit is not a dispute between private individuals about private rights, but a grievance about the operation of public policy.'").

135 Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2349 (1991).

136 *Id.* at 2347–48 ("[T]ransnational public law litigation seeks to vindicate public rights and values through judicial remedies. In both settings, parties bring 'public actions,' asking courts to declare and explicate public norms, often with the goal of provoking institutional reform.").

137 Stephens, *supra* note 132, at 14 ("[C]ivil litigation may lead to a full investigation of the facts of an incident, identify the persons responsible, produce a public judgment of that responsibility, and generate compensation for those harmed and punitive damages as a sanction for the accused.").

a simple torts case into a case with a larger message and meaning.[138] Judgments can operate to negotiate issues in larger public ideological conflicts.[139] And the threats of liability can operate to induce settlement—on both monetary and action-based terms.

Corporations are motivated to negotiate with corporate social responsibility advocates when there is a perceived risk to the corporate brand or reputation.[140] The interest groups are savvy at focusing on what the corporations have to lose.[141] Those negotiations take on a much more serious character when the advocates for social responsibility can legitimately threaten a lawsuit with a real risk of liability if the corporation does not change its behavior or otherwise settle with the advocacy group.[142] The corporations are willing to bargain as a self-protection measure, trying to minimize the harm that could be inflicted upon them if they do not bargain with the interest group.[143]

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138 *See, e.g.*, Donald E. Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709, 725 (2012) (stating that "it seems that the real value of an ATS case is that it transforms a tort case into a human-rights case," although concluding it is not clear how effective this strategy has been for activist plaintiffs).

139 Koh, *supra* note 135, at 2349 ("Even a judgment that the plaintiff cannot enforce against the defendant in the rendering forum empowers the plaintiff by creating a bargaining chip for use in other political fora.").

140 Lisa M. Fairfax, *Easier Said Than Done? A Corporate Law Theory for Actualizing Social Responsibility Rhetoric*, 59 FLA. L. REV. 771, 805–06 (2007) ("Recent literature regarding corporate brands reveals that corporations . . . spend considerable effort creating and protecting the corporate identity through the use of such techniques as brands and slogans.").

141 G. RICHARD SHELL, BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE 98 (2006) (discussing the strength of leverage when there is a concrete risk of loss).

142 Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 418–19 (1973) [hereinafter Posner, *Economic Approach to Legal Procedure*] (discussing subjective probability of prevailing and stakes as elements in settlement calculus).

143 Fairfax, *supra* note 140, at 806–07. Fairfax explains that, "[r]eputation represents a key component of corporate identity, and corporations aim to build a reputation of trustworthiness . . . . The crux of recent literature is that once a corporation constructs an identity, people within the corporation feel a responsibility to engage in actions that protect and preserve that identity, thus fostering a quality reputation." *Id.* (citing, *inter alia*, KEVIN LANE KELLER, STRATEGIC BRAND MANAGEMENT: BUILDING, MEASURING, AND MANAGING BRAND EQUITY 546 (2d ed. 2003) (discussing the "Science of Branding"))*; see also* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 24–25 (1984) ("[T]he loss of the case may damage the defendant's public reputation . . . . In situations of this nature, the dollar judgment sought by the plaintiff may reflect only a small portion of the defendant's total loss if the plaintiff wins."); Shaun Mulreed, Comment, *Private Securities Litigation Reform Failure: How Scienter Has Prevented the Private Securities Litigation Reform Act of 1995 from Achieving Its Goals*, 42 SAN DIEGO L. REV. 779, 781 n.2 (2005) ("In considering whether to settle or litigate, a corporation must weigh both the costs of settlement and potential brand injury against expected results at trial.").

When faced with a lawsuit or the threat of a viable liability claim, it is entirely possible that the judgment value is far exceeded by the external effects of the litigation on the corporation and the corporation's own interests in preserving its brand, image, reputation, customer base, investor interest, and the like. Thus, corporations will often even settle when they could win the substantive lawsuit but do not wish to incur the incidental expense of the litigation and collateral damage along the way. Moreover, if there is an ambiguous or uncertain risk, which may very well be the case in newly developing liability regimes, then the corporation may want to be risk averse—again motivating settlement.

Interest groups will change course or divert their strategy based on where their investment can return the greatest result. The relative availability of liability mechanisms will have an effect on resource allocation. Interest groups will invest in litigation so long as the litigation (or cause of action) is viable. If attractive causes of action exist, we can expect that an expansionist interest group will invest more in litigation and less in other avenues of attack. If courts are receptive to innovative liability ideas, then too we should expect interest groups to invest in developing a favorable liability doctrine complete with bankrolling litigation efforts for the purpose of developing precedent and dicta that constantly adds growing value to the new scheme.

Because the viable cause of action is a very valuable and powerful tool, we should expect that such groups will invest in the development and expansion of liability doctrines that have a high likelihood of becoming recognized as providing for legitimate new claims. According to studies on settlement dynamics, there is a dramatic shift in leverage between litigation competitors as soon as a doctrine develops to the point that claims begin to survive motions to dismiss.[144] Soon thereafter the incentives for corporate defendants to settle in corporate social responsibility-driven litigation will increase.[145] Consequently, even an investment in a liability regime that only takes it just

144 Hillary A. Sale, *Judges Who Settle*, 89 WASH. U. L. REV. 377, 386 (2011) ("Avoiding damages and reputational harm and gaining preclusion all provide an incentive to settle . . . . Even if the defendants believe that the allegations lack merit, when the plaintiffs' claims survive a motion to dismiss, the risk of a trial and the possibility of a bad outcome increase.").

145 *Id.*; *see also* A.C. Pritchard, *Markets as Monitors*: *A Proposal to Replace Class Actions with Exchanges as Securities Fraud Enforcers*, 85 VA. L. REV. 925, 952–53 (1999) ("If the plaintiffs can withstand a motion to dismiss, defendants generally will find settlement cheaper than litigation . . . . Any case plausible on the pleadings will have a positive settlement value if only to avoid the costs of discovery and attorneys' fees . . . .").

that far—to the point that the once novel theory is now accepted, viable, and capable of surviving a motion to dismiss or summary judgment—may be a very valuable use of an interest group's budget. Sometimes, the change in the *status* of the parties and their positioning in negotiations are far more important than the relative merits of the claims.

As the next Part will explain, the Alien Tort Statute is an example of such an interest-group motivated development of a liability doctrine. Lawsuits and their potential for monetary awards were attractive to ATS expansionists, but they were not the most advantageous outcome of the seeming acceptance of corporate liability under the ATS. The doctrine that developed provided leverage in negotiations with corporations and an invigorated position when demanding behavioral change from the corporation.[146] The mere ability of corporate social responsibility-minded plaintiffs to survive a motion to dismiss in ATS suits against corporate defendants tipped the scales in a manner that substantially increased the bargaining power of the corporate social responsibility advocates. When causes of action cannot be developed or where they are taken off the table—such as with a Supreme Court case like *Kiobel*[147] that essentially now removes most of the ATS cases from the list of viable litigation routes for gaining leverage against multinational corporations for their activities outside the United States—we should expect such interest groups to shift their resources to alternative points of attack.

Despite the consequences of *Kiobel* narrowing to near nil the effective and available ATS claims designed to alter corporate behavior, the history of the ATS provides a useful study for (1) examining the broad concept of rent-seeking beyond legislation; (2) analyzing the effects of investment in lawmaking outcomes including liability doctrines; and (3) demonstrating that corporate social responsibility advocacy groups act like other interest groups when seeking their preferred outcomes. Investments in liability doctrines can be helpful in obtaining valuable leverage for use in trying to change corporate behavior, as one will see in the example that follows in the next Part. The ATS corporate liability regime was designed, constructed, and the product of investment by coalitions of interest groups aligned by expansive corporate social responsibility preferences. The ATS

146 Beth Van Schaack, *With All Deliberate Speed: Civil Human Rights Litigation as a Tool for Social Change*, 57 VAND. L. REV. 2305, 2329 (2004) ("As jurisprudence under the ATCA has become more robust, the genuine threat of legal entitlement increasingly presents the necessary predicate for settlement negotiations.").

147 Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013).

worked its way into becoming a major mechanization for using litigation to affect changes in corporate conduct.

III. THE ALIEN TORT STATUTE AS A CASE STUDY IN CORPORATE SOCIAL RESPONSIBILITY ADVOCATE-INVESTMENT IN THE CREATION OF LIABILITY DOCTRINES

To illustrate some of this Article's contentions regarding interest group investment in corporate social responsibility law, I will use the investments made in developing a liability regime for multinational corporate operations through the vehicle of the Alien Tort Statute (ATS) as a case study.[148] The ATS grants the federal district courts subject-matter jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[149]

The ATS liability revolution emerged around 1980, before which almost no litigation had been brought under that statute.[150] After being "discovered," the Alien Tort Statute became one of the most important and controversial mechanisms by which federal courts wrestled with and sometimes entertained international law and human rights issues. Across the years, most of the cases alleged that nation-states, state actors, and even private individuals or corporations had actually committed, or in complicity or conspiracy had been responsible for, violations of international law.

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148 28 U.S.C. § 1350 (2012). For more complete discussions of the Alien Tort Statute, its history, and its implications for law and policy, several other works by this Author may be instructive. *See generally* Kochan, *Mechanization*, *supra* note 27; Donald J. Kochan, *Sovereignty and the American Courts at the Cocktail Party of International Law: The Dangers of Domestic Judicial Invocations of Foreign and International Law*, 29 FORDHAM INT'L L.J. 507 (2006); Donald J. Kochan, *Boyakasha, Fist to Fist: Respect and the Philosophical Link with Reciprocity in International Law and Human Rights*, 38 GEO. WASH. INT'L. L. REV. 349 (2006); Donald J. Kochan, *No Longer Little Known But Now a Door Ajar: An Overview of the Evolving and Dangerous Role of the Alien Tort Statute in Human Rights and International Law Jurisprudence*, 8 CHAPMAN L. REV. 103 (2005) [hereinafter Kochan, *No Longer Little Known*]; Kochan, *Political Economy, supra* note 118; Donald J. Kochan, Note, *Constitutional Structure as a Limitation on the Scope of the "Law of Nations" in the Alien Tort Claims Act*, 31 CORNELL INT'L L.J. 153 (1998) [hereinafter Kochan, *Constitutional Structure*]; *see also* Donald J. Kochan, *After Burma*: *Like the Massachusetts Law, the Alien Tort Claims Act Allows Improper Interference in U.S. Foreign Policy*, LEGAL TIMES, Aug. 21, 2000, at 54.

149 28 U.S.C. § 1350 (2012). For annotation based histories of ATS litigation, see Russell G. Donaldson, Annotation, *Construction and Application of Alien Tort Statute (28 U.S.C.A. § 1350), Providing for Federal Jurisdiction Over Alien's Action for Tort Committed in Violation of Law of Nations or Treaty of the United States*, 116 A.L.R. FED. 387 (2005); CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, 14A FEDERAL PRACTICE AND PROCEDURE § 3661.1 (Pocket Part 2005).

150 Judge Friendly has described the Act as an "old but little used section [that] is a kind of legal Lohengrin; although it has been with us since the first Judiciary Act, no one seems to know whence it came." IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) (citation omitted) (holding fraud not a violation of international law).

While ATS corporate social responsibility-based liability and the reform-through-litigation strategy that led to its creation were largely put to a stop when the U.S. Supreme Court decided the 2013 case of *Kiobel v. Royal Dutch Petroleum Co.*,[151] the evolution of the ATS—including the investment in the development of the liability regime by broad-minded corporate social responsibility advocates and the leverage that those advocates obtained during the years while the ATS seemed a viable threat to corporations—is nonetheless instructive regarding how investments in liability regimes operate effectively for interest groups.

A quotation from a 2003 article in the *Financial Times* helps illustrate the suitability of choosing the ATS as a case study for an examination of the mechanics of corporate social responsibility-based interest groups: "US plaintiffs' lawyers have revived a dormant 18th-century law and made it their chief weapon in a 21st-century battle over corporate responsibility in an age of globalisation."[152] That was undoubtedly true.[153] From 1980 to 2013, the scope of ATS litigation grew extensively in large part due to investments made in its creation. As it grew, there was an ever-increasing risk that major liabilities could attach for corporate business decisions and behaviors accompanied by the expansion of enforceable duties corporations owed to diverse groups of stakeholders worldwide.[154] As one author put it, the doctrine evolved "[i]n the best traditions of American legal creativity,"[155] as spurred by corporate social

151 133 S. Ct. 1659 (2013).

152 Patti Waldmeir, *An Abuse of Power: US Courts Should Not Punish Companies for Human Rights Violations Committed Overseas*, FIN. TIMES, Mar. 14, 2003, at 12.

153 Williams, *supra* note 1, at 724–66 (discussing problems and possibilities of using the ATS to achieve corporate social responsibility).

154 John B. Bellinger, III, *The U.S. Can't Be the World's Court*, WALL ST. J., May 27, 2009, at A19 (op-ed by attorney in Washington, D.C. and former legal advisor to the U.S. Department of State) ("We may be on the verge of a new wave of legal actions against U.S. and foreign corporations in American courts . . . . Litigation under the Alien Tort Statute may force companies to modify their international activities in some cases, although it rarely produces monetary awards for plaintiffs.").

155 Waldmeir, *supra* note 152, at 12. As analysts watched the ATS evolution, commentary was rich. For example, in commenting on the then-ongoing ATS suit against Unocal, *The Economist* in its April 24, 1999 issue described the potential implications of this new trend in tort litigation: "The next big test will be whether the Alien Tort Claims Act can be used against companies as well as individuals." *Human-Rights Trials: To Sue a Dictator*, THE ECONOMIST, Apr. 24, 1999, at 26. And, the authors prognosticated that if companies began losing under the ATS, it could "provide a major headache for many American companies operating abroad." *Id.* When discussing an award against Serbian leader Karadzic, an August 2000 *Washington Post* editorial called the new line of ATS human rights' cases "troubling" as "proceed[ing] under an ill-conceived but now well-accepted reading of a 1789 law that . . . is a modern graft on a largely moribund statute; international human rights law did not exist in the 18th century." *Lawsuits and Foreign Policy*, WASH. POST, Aug. 12, 2000, at A20. In November 2002, it was opined in the

responsibility advocates generally along with human rights groups, labor organizations, the plaintiffs' bar as a strong supporter with its own financial interests,[156] and others aligned with interests in developing new liability schemes.

Signs of the synergies between the causes favoring expanding ATS liability doctrines and those seeking greater corporate social responsibility were readily apparent as the law progressed to accept an ever-growing role for the ATS. One labor activist explained that the ATS was viewed within these groups as a "vital tool for preventing corporations from violating fundamental human rights."[157] A *Corporate Legal Times* headline in 2002 put the reputational leverage issue front and center, reading "No Longer Satisfied With Destroying the Reputations of Corporations That Get Entangled in Human Rights Abuses Overseas, Activist Groups are Seeking Retribution in U.S. Courts."[158] One scholar opined that the ATS "cases should be regarded as one element in a wide spectrum of attempts to tame corporate behavior by inventing new global regulatory regimes."[159] There was active investment by corporate social responsibility-aligned advocacy groups in the creation of a legal

Financial Times that the ATS jurisprudential trend presented a "danger that the US judicial system will become the world's civil court of first resort . . . ." Thomas Niles, *The Very Long Arm of American Law*, FIN. TIMES, Nov. 6, 2002, at 15. In yet another article in 2004, the U.S. Chamber of Commerce was quoted as characterizing the emerging ATS suits as "'global forum shopping,' in which foreigners resort to U.S. courts, with their favorable class action and discovery rules, to litigate over alleged human rights abuses overseas by U.S. corporations. 'The U.S. is increasingly becoming the jurisdiction of choice for opportunistic foreign plaintiffs,' says Chamber President Thomas Donohue." Tony Mauro, *Justices Debate Alien Tort Law*, LEGAL TIMES, April 5, 2004, at 8.

156 Van Schaack, *supra* note 146, at 2314 ("As ATCA jurisprudence became more established and courts confirmed that corporations could be sued for human rights abuses, the statute was 'discovered' by plaintiff-side lawyers . . . ."). *Cf.* Richard A. Epstein, *The Political Economy of Product Liability Reform*, 78 AM. ECON. REV. (PAPERS & PROC.) 311, 313 (1988). As Epstein has observed, when lawyers are in the mix in tort suits, both the plaintiffs' and defendants' bar will perpetuate expanded tort liabilities:

> Obviously, the plaintiff's bar has a vital interest in preserving that system of laws which maximizes its own welfare. Less obviously, perhaps, the defendant's bar has closely parallel interests. No defendant lawyer has ever made substantial sums of money by being able to win a summary judgment (i.e., judgment without the need for trial) for its clients.

Id.

157 TERRY COLLINGSWORTH, INT'L LABOR RIGHTS FUND, THE ALIEN TORT CLAIMS ACT – A VITAL TOOL FOR PREVENTING CORPORATIONS FROM VIOLATING FUNDAMENTAL RIGHTS (2003), *available at* http://lrights.igc.org/publications/ATCA.pdf.

158 *See* Robert Vosper, *Conduct Unbecoming; No Longer Satisfied With Destroying the Reputations of Corporations That Get Entangled in Human Rights Abuses Overseas, Activist Groups are Seeking Retribution in U.S. Courts*, CORP. LEGAL TIMES, October 2002, at 35.

159 Ronen Shamir, *Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility*, 38 LAW & SOC'Y REV. 635, 643 (2004).

liability regime that could be utilized to achieve not just judgments but also substantial leverage through an alteration of the relative legal rights between two competitors—corporations seeking profit-maximization for their shareholders on the one hand and stakeholders on the other side wanting instead for corporate expenditures to be made to advance social interests and desiring corporate profits to be shared with those claiming an entitlement to remedies for some broad concept of harm allegedly visited upon them by corporate behavior.

The ATS provided a means by which the soft ideals of human rights and other international law activists could be transformed into hard legal requirements.[160] As such, they and other corporate social responsibility advocates and like-minded activists invested in the development of ATS litigation.[161] Their investments in early litigation brought returns as broader and broader precedents developed and liability under the ATS started to become more realistic and substantial, or at least was perceived as such.

The remainder of this Part will provide further background on the ATS and explain the ATS evolution as a way of describing the process of interest group investment in new liability doctrines. That analysis will include a description of the economic benefits associated with purchasing, in effect, a stick from the law's liability-creating tort function to gain an advantaged position that can be used to beat down a corporation that, before the creation of the new doctrines, was in a more favorable legal bargaining position with fewer recognized legal duties.

In the case of *Filartiga v. Pena-Irala* in 1980, the ATS emerged from non-use and the evolution of ATS litigation began.[162] There, the U.S. Court of Appeals for the Second Circuit held that suits based on customary international law for human rights abuses could be pursued under the ATS.[163] This opened the door for several cases against numerous state actors from rather oppressive regimes. It was clear that those involved in early ATS litigation were in fact investing in the development of

160 Van Schaack, *supra* note 146, at 2335 (discussing using the ATS to "transform the abstract and at times hortatory rights in the various international declarations, covenants and treaties into enforceable legal claims" with more concrete status).

161 *Id.* at 2313 ("The first generation of individual ATCA-style actions was initiated by lawyers affiliated with nonprofit human rights organizations, or lawyers working pro bono, who were inspired by the tradition of using legal tools to advance morality-driven goals.").

162 Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).

163 *Id.*

an expansive doctrine, understanding that the effective development of a new liability scheme must take baby steps,[164] establishing precedent that gradually expands.[165] Professor Beth Stephens has described the civil human rights litigation model witnessed in the ATS cases as involving a strategy of precedent creation and expansion:

> Civil litigation in the United States . . . has long been used as a means of promoting social reform . . . . In the United States, we are generally comfortable with the concept that lawsuits seek remedies designed with an eye to the future . . . .
>
> . . . .
>
> U.S. commentators have explained at length the benefits that civil litigation offers to the victim, to the human rights movement, and to society—even litigation that does not result in actual payment of the damages awarded. *Where the legal theories are novel or untested, a civil lawsuit may seek first to obtain a judicial recognition of the rule of law, a precedent that can then be used to influence future policies and as a basis for future litigation.*[166]

Similarly, Professor Harold Koh has discussed the strategic importance of transnational public law litigation beyond particular cases and extending to the creation of precedent and other "prospective aim[s] as well."[167] These aims include "to provoke judicial articulation of a *norm* of transnational law, with an eye toward using that declaration to promote a political settlement in which both governmental and nongovernmental entities will participate."[168] Koh has further emphasized, after discussing the early ATS cases, that "transnational public law litigation is characterized by . . . the litigants' strategic awareness of the *transportability of those norms* to other domestic and international fora for use in judicial interpretation or political bargaining . . . ."[169] While relief in a particular case is not irrelevant, the prospective benefits from "building" law for use in, and "transporting" precedent to, future cases and as

164 Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2366 (1991) (discussing the first major ATS case *Filartiga* and explaining that in that case "transnational public law litigants finally found their *Brown v. Board of Education*");

165 *See, e.g.*, Vincy Fon, Francesco Parisi & Ben Depoorter, *Litigation, Judicial Path-Dependence, and Legal Change*, 20 EUR. J. L. & ECON. 43, 44 (2005) ("The model of path dependence in the law suggests the rate of recognition of legal claims brought by plaintiffs in past cases affects the state of the law in the future.").

166 Stephens, *supra* note 132, at 13–14 (emphasis added).

167 Koh, *supra* note 135, at 2349.

168 *Id.*

169 *Id.* at 2371.

leverage in bargaining often seemed to be a fundamental objective in the ATS cases.[170]

Many of the earliest ATS cases against state actor defendants resulted in default judgments in favor of the plaintiffs. With little party opposition and often gruesome allegations, receptive courts began issuing judgments accompanied by broadly worded interpretations of the scope of the ATS. These cases seemingly served only a symbolic function with limited effect as judgments were seldom collected.[171] In essence, these awards could be characterized as a "judgments as social commentary" approach.[172]

But it was also a well-orchestrated campaign to build up the ATS early on with easy cases followed by later application to new situations and new defendants (with deeper pockets and who were more likely to offer something of value to the plaintiffs to see the litigation go away).[173] As explained above, this playbook is well known in the evolution of tort law and manifest in public international law litigation as well.

These cases were necessary to create a foundation for a bigger target down the road—corporations. Many of the corporate social responsibility-associated interest groups suing corporations toward the end of the ATS evolution were on the ground from the start, remedy-seeking for alleged harms occurring around the world and looking for someone to hold responsible.

Moreover, it is important to note that while the public law litigators were building precedent, there were few forces working against them. In the early years, there was no countervailing interest-group force balancing the zealous expansionist group

170 Keitner, *supra* note 133, at 64 ("[C]orporate ATS litigation has become a battleground in broader struggles over the role of tort litigation in regulating corporate behavior . . . .").

171 Lauren A. Dellinger, *Corporate Social Responsibility: A Multifaceted Tool to Avoid Alien Tort Claims Act Litigation While Simultaneously Building a Better Business Reputation*, 40 CAL. W. INT'L L.J. 55, 91 (2009) (ATS "litigation has largely been unsuccessful in the sense that no solid judgments against these corporations have been entered. . . . In the past, individuals have used the ATS merely to obtain a sense of justice, realizing that the monetary award may never come.").

172 A *Washington Post* editorial raised concerns about the ATS as it was expanding, especially after seeing judgments pursued solely for symbolic effect. That editorial cautioned that "[y]ou don't have to be indifferent to human rights abuses to have misgivings about this reading [of the ATS], because it creates troubling problems for democratic government and permits the courts to interfere excessively in the conduct of foreign policy." *Old Law, New Questions*, WASH. POST, July 20, 2004, at A16.

173 Van Schaack, *supra* note 146, at 2313 ("At the outset, these legal pioneers sought to establish the ATCA as a tool for the enforcement of human rights norms and to gain judicial elaboration of the scope of those norms.").

investment in ATS litigation. There was no check on the forward progress of the doctrinal evolution. There was, as explained above, little opposition in the lawsuits themselves and few interest groups outside the litigation saw any danger to the doctrinal progress.[174] Corporations did not see the coming threat and did not intervene in the ATS development.[175] Indeed, even the academy was lopsided in favor of the expansion.[176] Academics were in large part the intellectual driving force behind the beginnings of the ATS revolution and, of those that wrote about the ATS at all, the majority of scholars favored its expansion.[177] It was not until the late 1990s that any scholarly works focused on refuting the merits and wisdom of the ATS evolution in any substantial and critical manner.[178]

The development of the new liability doctrines under the ATS was in the finest traditions of rent-seeking too. Activists were seeking to create a law that would place them in a position of dominance over the legal rights of others, ultimately allowing them to obtain outcomes at a lower cost than if they were required to bargain privately for such a reallocation of duties and obligations.

Another major step in the ATS evolution occurred in the 1995 *Kadic v. Karadžic* case, in which the U.S. Court of Appeals for the Second Circuit held that quasi-public and even private actors might be bound by customary international law for certain egregious violations and could be sued under the ATS.[179] This

174 *See* Kochan, *No Longer Little Known*, *supra* note 148, at 108 n.20 (discussing the lack of corporate interest, for example, even in the late 1990s).

175 *Id.* at 107–08.

176 *See* HAROLD HONGJU KOH, TRANSNATIONAL LITIGATION IN UNITED STATES COURTS 35 (2008) (noting that *Filartiga* "triggered a wave of academic scholarship and more than a quarter-century of human rights litigation in U.S. courts"); *see also* David Fontana, *The Rise and Fall of Comparative Constitutional Law in the Postwar Era*, 36 YALE J. INT'L L. 1, 27–30 (2011) ("The law professors who revitalized international law during this time [in the late 1970s and early 1980s before and after *Filartiga*] came from a profession more and more interested in international law—in particular as a source for American federal litigation.").

177 *See, e.g.*, Robert H. Bork, *Judicial Imperialism*, WALL ST. J., June 17, 2003, at A16 (discussing ATS cases as part of the effort toward "the enactment of world-wide law by an unholy alliance of imperialistic judges and a leftish cadre of international law professors"); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 749–50 (2004) (Scalia, J., dissenting) ("The notion that a law of nations, redefined to mean the consensus of states on *any* subject, can be used by a private citizen to control a sovereign's treatment of *its own citizens* within *its own territory* is a 20th-century invention of internationalist law professors and human-rights advocates.") (emphasis in original).

178 My 1998 student note was one of the very first articles providing any substantial and concentrated critique of the ATS specifically. *See* Kochan, *Constitutional Structure*, *supra* note 148.

179 Kadic v. Karadžic, 70 F.3d 232, 239–44 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996).

was the next return on the ATS-promoters' investment, expanding the scope of defendants just a little more and creating the necessary precedential prelude to finding corporate liability under the ATS. And that is precisely what came next.

ATS liability expanded next in the late-1990s with successes in bringing suits (and surviving motions to dismiss) against *corporate* defendants. The 1997 *Doe I v. Unocal* case, where the corporate-defendant ATS suit had its first major validation, was trailblazing.[180] A federal district court held that Unocal, a private corporation, was subject to ATS jurisdiction for alleged human rights abuses abroad.[181] After that 1997 decision, it was open season for the use of the ATS against corporations to try to advance the agendas of a variety of corporate social responsibility-minded interest groups.

Between 1997 and 2013, scores of lawsuits were filed against corporations under the ATS.[182] The theories also broadened over time, sometimes alleging corporate liability on aiding-and-abetting or vicarious liability theories in addition to some claiming that international law was broad enough to impose direct liability for corporate actions independent of the acts of the ruling regimes where they operate.[183]

Activists had faced somewhat incomplete and unsatisfactory victories against nation states or foreign leaders in early ATS litigation. Barriers to "success" for plaintiffs in the early ATS suits included sovereign immunity for state actors, forum non conveniens dismissals, cases dismissed on political question or act of state doctrine defenses, and problems obtaining personal jurisdiction over some state actor defendants, along with other prudential rules that insulated many nations or state actors from ATS review. On top of these barriers, even when plaintiffs were successful in proceeding to trial against a state actor ATS defendant, these parties were often judgment proof or their assets were inaccessible for collection.

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180 Doe I v. Unocal Corp., 963 F.Supp. 880 (C.D. Cal. 1997).

181 *Id.* at 892, 898 (upholding subject matter jurisdiction under ATS based on allegations that an American oil company, acting in concert with the Burmese government, committed various civil and human rights abuses), *aff'd in part & rev'd in part*, 395 F.3d 932 (9th Cir. 2002), *and rehearing en banc granted, opinion vacated by* Doe v. Unocal Corp., 395 F.3d 978 (9th Cir. 2003).

182 For a summary of major pre-*Kiobel* ATS cases, see Lee G. Dunst, *Human Rights Overseas: Courts Have Enforced Strict Gatekeeping Function in Dismissing Suits Under the Alien Tort Claims Act*, N.Y. L.J., Oct. 26, 2009, at S6. *See also generally* MICHAEL KOEBELE, CORPORATE RESPONSIBILITY UNDER THE ALIEN TORT STATUTE (2009); RALPH G. STEINHARDT & ANTHONY D'AMATO, THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY (1999).

183 *See generally* KOEBELE, *supra* note 182.

Targeting corporations in ATS suits overcame several problems for plaintiffs. Corporate ATS suits were in part a response to the dissatisfaction regarding the inability to recover either monetary judgments or true justice against state actors in these early cases.[184] Corporations do not enjoy sovereign immunity and have a more difficult time using the other shields mentioned above. Thus, in many cases, jurisdictional obstacles to suit, while keeping foreign nations and leaders out of the defendant's chair, could be avoided when suing a corporation. The next milestone in the ATS evolution came with the 2004 decision in *Sosa v. Alvarez-Machain*.[185] That case marked the first time that the U.S. Supreme Court had discussed the ATS, although even in *Sosa* the Court offered only minimal guidance as to its scope.[186] The *Sosa* decision did little to disrupt the upward liability trend in the ATS cases and did not foreclose corporate ATS suits.[187]

The ATS suits were at first novel and extraordinary. By 2009, however, at least one writer was arguing that "[t]hese lawsuits have become so routine . . . they've barely caused a ripple in the news cycle."[188] Although perhaps overstated, another author even observed in 2009 that ATS suits had become "commonplace for companies with international operations . . . ."[189] ATS suits were clearly aimed at inducing changes in corporate behavior, and the number of cases steadily rose as the corporate ATS suit became perceived as an increasingly legitimate means of grievance, a beneficial means of remedy-seeking, and an acceptable mechanism for holding corporations to a higher standard of care with a broader base of constituent stakeholder interests owed some duties by those corporations.[190]

184 Nathan Koppel, *Arcane Law Brings Conflicts From Overseas to U.S. Courts*, WALL ST. J., Aug. 27, 2009, at A11 ("Thomas Niles, a former U.S. ambassador to Canada and Greece who is now the vice chairman of the United States Council for International Business, a pro-business group, says corporations are being used unfairly as a surrogate for foreign governments in these cases. 'You can't sue the government of Nigeria or South Africa because of sovereign immunity, so who are you going to sue? Companies, and they are sued essentially for being' in countries where human-rights violations occur.").

185 542 U.S. 692 (2004).

186 *See generally* Kochan, *No Longer Little Known*, *supra* note 148.

187 *Id.*

188 Steven Dudley, *The Trials and Errors of Tort Cases: Lawsuits Against Multinationals for Abuses Abroad may be Losing Steam*, MIAMI HERALD, June 15, 2009, at G12 (recognizing there were "more than 30 [corporate ATS] suits around the country" at the time of his article).

189 *See* Dunst, *supra* note 182, at S6.

190 Koppel, *supra* note 184, at A11. As a *Wall Street Journal* reporter explained, "Victims of human-rights abuses around the world increasingly are *seeking justice American style – by filing lawsuits against deep-pocketed defendants*. Both sides agree on

As the ATS cases had progressed, the ATS activists pushed increasingly expansive theories of the ATS's scope, often with success. The first wave of ATS litigation came in the 1980s with cases that were largely based on sympathetic facts and allegations of unacceptable atrocities with allegations of relatively direct causation by ruthless and despicable defendants. This made these "easy" cases to decide and made the opinions in the cases susceptible to relatively far-reaching statements regarding the purpose and reach of the ATS. Precedent under the ATS was developing, and both precedent and dicta could always be manipulated in the next case to slowly expand the accepted and recognized reach of the ATS and increase the pool of defendants. Every expansion of the liability doctrine was a stepping-stone to yet another stage of expansion.

Corporations eventually recognized the threat, as evidenced by the liability-management techniques engaged in by ATS defense attorneys and public relations managers in the public square in the late 2000s. Several of these reputation managers and liability limiters published articles in the news media regarding the cost of ATS litigation to corporations and the litigation risks involved.[191] Some of these articles and op-eds read with the tone of client development letters, but they are nonetheless an instructive perspective from the front lines reflecting at least the perceived threat. These same defense attorneys later trumpeted the *Kiobel* decision as a glorious end to the dangerous ATS litigation scheme against corporations.[192]

Activist litigators had "seized the opportunity" to begin litigating against corporations under the ATS because corporations were much more attractive targets than early ATS defendants.[193] There was also a higher probability of settling

one thing: Courts increasingly are willing to consider alien-tort suits and to force companies to answer for their behavior overseas." *Id.* (emphasis added).

191 For a sampling of these articles, see J. Russell Jackson, *Alien Tort Claims Act Cases Keep Coming: Lawsuits by Plaintiffs From All Over the World Present Major Risks for Companies Doing Business Abroad*, NAT'L L.J., Sept. 14, 2009, at 28 (author "a partner in the mass torts group at New York's Skadden, Arps, Slate, Meagher & Flom, which represents defendants in Alien Tort Claims Act cases"); Jordan Cowman, *The Alien Tort Statute – Corporate Social Responsibility Takes On a New Meaning*, MONDAQ, Aug. 11, 2009 (author a partner in the Dallas office of Akin Gump Strauss Hauer & Feld LLP); Jonathan Drimmer & Jennifer Millerwise Dyck, *Human Rights Threat Matrix: Corporate Responsibility Through a Legal Lens*, PR NEWS, Apr. 20, 2009, at 7 (authors are a partner of Steptoe and Johnson L.L.P, and a VP of APCO Worldwide, respectively).

192 *See, e.g.*, Andrew Pincus, *Is the Alien Tort a Zombie Doctrine? Andrew Pincus Responds*, LITIGATION DAILY, April 29, 2013, http://www.americanlawyer.com/digestTAL.jsp?id=1202597980026&Is_the_Alien_Tort_a_Zombie_Doctrine_Andrew_Pincus_Responds (a perspective of the ATS evolution from beginning to end by one of the lawyers for corporate defendants).

193 Kirschner explains:

cases with positive results for the plaintiffs, judged by a variety of metrics (including bargaining for changed behaviors) in addition to monetary relief.[194]

True to corporate social responsibility form, many ATS suits seek more than monetary damages in their demands for relief.[195] For example, "plaintiffs in the corporate cases have increasingly sought judicial directives governing [Multinational Corporations'] foreign investment policies, relations with their host governments, offshore production arrangements, project security measures, environmental policies, and labor relations."[196] It is not surprising then that these same plaintiffs seek more than money in settlement negotiations including reforms in corporate behaviors.[197]

While there is an emphasis in some public civil litigation for obtaining damages for the particular plaintiff in the case, most often these cases are motivated by something more. In transnational tort litigation, for example, Koh explains that, "although transnational public law plaintiffs routinely request retrospective damages or even prospective injunctive relief, their broader strategic goals are often served by a declaratory or default judgment announcing that a transnational norm has been violated."[198] It is the development of precedent that has broader utility in terms of its advancement of a cause and a promoter's position in negotiations with adversaries of the cause. Redressing the plaintiff's injury is often a secondary goal in corporate social responsibility advocacy-generated litigation.[199] This is not universally true for all involved—some plaintiffs'

> Corporations provide easier targets for ATS claims than individuals or repressive regimes, and litigators seized the opportunity. The 2001 *Doe v. Unocal* case offered to charge them with complicity in human rights abuses. Suits against corporations have reached actions taken by many individuals that only collectively amount to illegalities. Sovereign immunity has not protected corporations as it has governments. Most large corporations have maintained permanent presences within the United States, making it possible to establish personal jurisdiction over them. Corporations also have had more substantial recoverable assets and stronger incentives to settle claims to avoid negative publicity than other defendants.

Jodie A. Kirshner, *Why Is the U.S. Abdicating the Policing of Multinational Corporations to Europe?: Extraterritoriality, Sovereignty, and the Alien Tort Statute*, 30 BERKLEY J. INT'L L. 259, 272–73 (2012).

194 *Id.*

195 Van Schaack, supra note 146, at 2328.

196 *Id.*

197 *Id.*

198 Koh, *supra* note 135, at 2349.

199 *See, e.g.*, Van Schaack, *supra* note 146, at 2313 (speaking of the ATS cases and stating that "[a]lthough ostensibly tort disputes seeking retrospective relief, obtaining an executable judgment was often a secondary goal of this litigation.").

lawyers are in it for a payday and want to maximize the monetary judgment to maximize their contingency fee and their demands in corporate social responsibility liability litigation have complicated settlements aimed at achieving more grand reform-based outcomes.[200] Nonetheless, when a reform agenda dominates the litigation strategy, one can expect that the litigation will be aimed at obtaining some concessions from a corporation that could not have been extracted absent the existence of the liability regime.

ATS advocates began to utilize the tool created by their investment in the creation of new law, leveraging the threat of ATS liability to induce corporations to agree to change conduct or pay monetary settlements. Without the ATS, the advocates' legal position was weaker and they would have been required to "pay" the corporations to change. Stated another way, without the duties even just *potentially* imposed by the ATS, the corporations could stand on their then-existing legal position where a payment to the corporate social interest group would feel less compulsory (and, consequently, what the corporation would be willing to pay to avoid action by the advocacy group would have been less as well).[201]

In discussing why, in part, there are so few judicial opinions on the ATS, the Second Circuit in *Kiobel* explained that:

> Such civil lawsuits, alleging heinous crimes condemned by customary international law, often involve a variety of issues unique to ATS litigation, not least the fact that the events took place abroad and in troubled or chaotic circumstances. The resulting complexity and uncertainty—combined with the fact that juries hearing ATS claims are capable of awarding multibillion-dollar verdicts—has led many defendants to settle ATS claims prior to trial.[202]

Simply recognizing the legitimacy of ATS corporate defendant litigation changes the power dynamic between the parties.

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200 *Id.* at 2314–15 (discussing the complexity of motivations in ATS lawsuits especially once the plaintiffs' bar started joining in with more materialistic goals than some of the reform-minded advocates).

201 As Van Schaack explains:

> Even short of a full settlement, the commencement of litigation may make possible discussions between parties that were foreclosed by power inequalities in place prior to the filing of suit. Indeed, the very filing of the suit can provide a "foot in the door" to communicate with a defendant corporation that may have otherwise dismissed the demands of victims and activists.

Van Schaack, *supra* note 146, at 2330.

202 Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 116 (2010) (citations omitted).

Leverage is very powerful.[203] As G. Richard Shell explains, "[l]everage is your power not just to reach agreement, but to obtain an agreement *on your own terms*."[204] Indeed, it changes the stakes.[205] "Research has shown that, with leverage, even an average negotiator will do pretty well while without leverage only highly skilled bargainers achieve their goals. The party with leverage is confident; the party without it is usually nervous and uncertain."[206]

A special report in *The Economist* studied the ATS evolution and concluded that the merits of the cases were almost a side issue, with the remedy-seeking settlement and leverage dynamics at the center of the stage:

> Most of the rhetoric on CSR may be about doing the right thing and trumping competitors, but much of the reality is plain risk management. It involves limiting the damage to the brand and the bottom line that can be inflicted by a bad press and consumer boycotts, as well as dealing with the threat of legal action. In America, the legal instrument of choice . . . is the Alien Tort Claims Act . . . . Even if it does not get as far as a trial, this can be embarrassing and costly for companies.[207]

Williams similarly opined that the merits of these corporate ATS cases were not nearly as important as the power brought by the mere legal legitimacy of the lawsuits—"they represent a form of leverage and a forum for leverage being newly brought to bear on global corporate social responsibility issues."[208] Most ATS suits against corporations were weak on the merits and instead were useful as a mechanism to get corporations to settle, beating the corporations down with the prospect of protracted and expensive litigation, and ultimately obtain something valuable

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203 SHELL, *supra* note 141, at 103 ("Threat leverage gets people's attention because, as astute negotiators have known for centuries and psychologists have repeatedly proven, *potential losses loom larger in the human mind than do equivalent gains*.").

204 *Id.* at 90.

205 *Id.* at 98 ("To gain real leverage, you must eventually persuade the other party that he or she has something concrete to lose in the transaction if the deal falls through.").

206 *Id.* at 90.

207 *A Special Report on Corporate Social Responsibility: A Stitch in Time,* ECONOMIST, January 19, 2008, at 12*; see also* Dudley, *supra* note 188, at G12. In his reporting, Dudley observed that "corporate watchdog groups say the lawsuits have helped usher in a new era of corporate social responsibility . . . ." *Id.* He continued to report the statement from Pam Muckosy, the research manager for the London-based Ethical Corporation Institute, that "'Sometimes companies pursue CSR in order to improve their international reputation and be a good "global citizen," . . . Other times, it's about securing a local "license to operate." Increasingly, it seems to be about minimizing legal risks.'" *Id.*

208 Williams, *supra* note 1, at 772*; see also* Childress, *supra* note 138, at 725–26 (2012) ("[I]t is arguable that modern uses of the ATS against corporations" result in part because of the "signaling value that is offered when bringing suit against a corporation for alleged violations of international law" and "brand damage while gaining significant publicity in hopes of both encouraging policy change and a monetary settlement.").

for the plaintiff advocates (i.e., a share of some of their profits either directly or through forcing corporate expenditures on projects of value to the plaintiff corporate social responsibility group).[209] Despite these often weak claims, the gains from settlement for the plaintiffs and the corporate social responsibility causes they championed were often substantial—either in dollar terms[210] or in costly alterations in behavior agreed to by a corporation to settle a case.[211]

The lawsuit-as-settlement-leverage litigation model was clearly utilized in the ATS corporate defendant suits. Douglas Branson, for example, has claimed that "[t]he ultimate value of ATS lawsuits, or some of them, is not to hold the multinational parent liable, or to force the multinational to undergo a long and complicated trial. The ultimate objective should be to send a message to corporate boardrooms and to obtain a recovery for persons who have suffered very real harms."[212] That messaging process, according to Branson, meant these ATS suits could be used to scare corporations into settlements or otherwise into making decisions that accomplish changes in behavior consistent with meeting the demands of the corporate social responsibility-oriented interest groups represented by the plaintiffs in these cases.[213] As explained in my earlier work:

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209 Gary C. Hufbauer, *Why Shouldn't Corporations Be Liable Under the ATS?*, 43 GEO. J. INT'L L. 1009, 1010 (2012) ("Many ATS suits are class actions that entail years of litigation, extensive discovery of corporate records, and damage to the corporation's reputation. Such suits are mostly an effort by the plaintiffs to force a corporate settlement regardless of the underlying merits."); David Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability Under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 BERKELEY J. INT'L L. 334, 372 (2011) ("Corporations remain exposed to the risks of diminished reputation and to the costs of legal settlements that offer attractive alternatives to prolonged litigation under the ATS, depending on its current fate before the federal courts.").

210 *See* Dunst, *supra* note 182, at S6 (discussing the fifteen million dollar settlement by Shell in one case and concluding that "the Shell settlement certainly may incentivize plaintiffs to file additional claims under the act in the future"); *Unocal Settles Rights Suits in Myanmar*, N.Y. TIMES, Dec. 14, 2004, at C6; Catherine Rampell, *Yahoo Settles With Chinese Families*, WASH. POST, Nov. 14, 2007, at D4; *see also* Jonathan Drimmer, *Resurrection Ecology and the Evolution of the Corporate Alien Tort Movement*, 43 GEO. J. INT'L L. 989, 998 (2012) ("While for years federal courts routinely dismissed corporate ATS cases, plaintiffs have gained a greater frequency of settlements and victories," and "[s]everal corporate ATS cases have settled for well over ten million dollars."); Van Schaack, *supra* note 146, at 2239 (discussing a variety of settlements induced by ATS suits).

211 Jeffrey A. Van Detta, *Politics and Legal Regulation in the International Business Environment: An FDI Case Study of Alstom, S.A., in Israel*, 21 U. MIAMI BUS. L. REV. 1, 77 (2013) ("the objective of . . . more than a few ATS suits filed against MNEs is to reset the context and terms of activism in opposition to" corporate behaviors).

212 Douglas M. Branson, *Holding Multinational Corporations Accountable? Achilles' Heels in Alien Tort Claims Act Litigation*, 9 SANTA CLARA J. INT'L L. 227, 249 (2011).

213 *Id.*

> The currency by which a corporation may satisfy the pressure imposed against it could involve alterations in behavior, expenditures on public relations campaigns, or contributions to funds or charities of allegedly affected groups. It could take the form of outright monetary payments, ceasing or altering operations to comply with demands or private codes or protocols, enacting codes of conduct, joining compacts, establishing corporate social responsibility departments, instituting training, committing to transparency initiatives like contracting for external audits, and other mechanisms that either alter behavior or otherwise satisfy those interests applying some form of pressure to the corporate operation.[214]

Those investing in ATS liability had succeeded in developing a legal liability regime that frightened corporations.[215]

The threat of liability gave the corporate social responsibility promoters of ATS liability an advantage, particularly for pressuring corporations to settle to make an ATS suit go away or take actions favorable to the advocacy group to avoid the filing of a lawsuit in the first place.[216] The mere acceptance of this liability doctrine and its extension to cover corporate behavior and snag corporations as defendants were alone enough to immediately shift the balance in any negotiations between the advocacy groups and corporations.[217] Settling is sometimes just about hedging risk, similar to a corporation's financial decision to buy insurance.[218] The legal status of, and the weapons available to, the corporate social responsibility activists were strengthened while concomitantly the legal positions of the corporations were weakened. When the law changes, so does the risk calculus,[219]

214 Kochan, *Mechanization*, *supra* note 27, at 256.

215 Childress, *supra* note 138, at 725 (plaintiffs can "create public-relations problems for corporations, and thus force a settlement, because no corporation wishes to be known as a human-rights abuser or violator of international law"); *see also* SHELL, *supra* note 141, at 101 ("A better way to understand leverage is to think about which side, at any given moment, has the most to lose from a failure to agree."); Adler & Silverstein, *supra* note 87, at 20 ("[T]he essence of determining the relative power of the parties in a negotiation depends less on how powerful each party is in any absolute sense than on how badly each party needs or fears the other.").

216 SHELL, *supra* note 141, at 104 ("Leverage is a complex mixture of ideas," including "opportunities that will be lost if the parties fail to reach a deal, threats to each party's status quo, and possible losses to each side's self-esteem should their actions appear inconsistent (in their own eyes) with a prior or professed standard of conduct or dealing.").

217 *See generally* Dellinger, *supra* note 171 (describing strategies to stay out of court under ATS by enacting preemptive corporate social responsibility measures).

218 J.B. Heaton, *Settlement Pressure*, 25 INT'L REV. L. & ECON. 264, 272 (2005) ("Corporations routinely buy insurance, and engage in a variety of more and less sophisticated hedging activities.").

219 Scheffer & Kaeb, *supra* note 209, at 372 ("The ATS presents a formidable challenge in risk assessments because the liability that arises under ATS litigation, whether or not the plaintiffs are successful, can be significant financially and otherwise.").

and so then does one's willingness to give in to another party now in a superior position.

Expansionist corporate social responsibility advocates clothe their cause in a sense of pure motives and objectives, allowing them to sell their cause to the sympathies of the public. It made it difficult to run an opposition campaign with these optics. Thus, corporations faced with ATS suits or the threat of such suits sought to mute the campaign against them associated with an ATS suit by negotiating away the case or possible filing of a complaint. Preventative intervention is essential because some damage could be done even just by filing an ATS suit.[220]

Risk-averse corporations showed a willingness to settle or change behavior to avoid even the possibility of an ATS suit. Negotiated agreements before suits were filed, settlements, and other defensive tactics were designed to prevent, or at least minimize, potential reputational and other damage to the corporation.[221] Corporations were motivated out of the fear of the ATS and the changed position created by the alteration in legal status accomplished by the creation of the ATS doctrine. When the stakes are high for a defendant, settlement is often a reasonable choice.[222]

The "unknowns" regarding how the courts would treat novel theories of liability against corporations created risks that further made settlement a reasonable option for defendants in the early years of the developing doctrine holding corporations liable under the ATS.[223] Uncertainty itself motivates settlement. The Supreme Court has recognized in a different but relatable context that, when there is "uncertainty of the governing rules, entities subject to secondary liability as aiders and abettors may find it prudent and necessary, as a business judgment, to abandon substantial defenses and to pay settlements in order to avoid the expense and risk of going to trial."[224] The risks of substantial litigation costs and the potential for long trials with

220 Dellinger, *supra* note 171, at 59 ("Even though cases regarding human rights violations often result in settlement or dismissal, the tarnish to a corporation's reputation remains.").

221 *Id.* at 74–75 (mere ever-present threat of ATS suits encourages companies to change behavior to avoid litigation).

222 Posner, *supra* note 142, at 418–19 (explaining situations where the stakes impact decisions to settle).

223 *See generally id.*; *see also* John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279, 280–81, 296 (1973) (examining "how individuals engaged in civil suits will behave" and finding that "a critical component in the motivation of such individuals to settle out of court is agreement on the probabilities of the court's action").

224 Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 189 (1994).

extended discovery and lawyers' fees made settlement attractive for ATS defendants.[225]

Here again, discovery alone is a high risk for the corporation and a huge gain for the plaintiffs. For example, in discovery there is an ability to uncover information that, whether it establishes liability or not, may not paint a very pretty picture of corporate operations or at least the conditions in the areas where they operate in developing countries.[226] Guilt by operation in certain regimes—a type of guilt by association—could be implied in the eyes of the public that hears about an ATS suit against a corporation and the atrocious allegations in the daily news for too long. The literature on corporate behavior reveals that corporations will go to great lengths to avoid damage to their brand and reputation.[227] Therefore, the potential damaging impacts on a corporation's reputation and brand from a lawsuit, trial publicity, and plaintiffs' promotion of their case in the press often mitigates in favor of settling.[228] Avoiding these damages to reputation and brand may often be more valuable to a corporation than avoidance of a large monetary judgment, explaining why a corporation might settle even those cases that it believes it can win on the merits.[229] When a corporation faces opposing forces that are threatening the corporate image or reputation, it is not surprising that the corporation will be reactive and work to quell the impact of the reputation-damaging

225 Posner, *supra* note 142, at 417 ("[S]ettlement costs are normally much lower than litigation costs . . . .").

226 Van Detta, *supra* note 211, at 76 (discussing "the considerable transactional costs attendant to American-style discovery and civil practice, the generation of negative public opinion and negative opinion among investors and analysts, and the costs of settlement—which corporate ATS defendants have incurred in more than a few cases").

227 Fairfax, *supra* note 140, at 805–06 (discussing the literature on the importance of brand and reputation protection to corporations).

228 Kevin T. Jackson, *Global Corporate Governance: Soft Law and Reputational Accountability*, 35 BROOK. J. INT'L L. 41, 47 (2010) ("[U]nlike traditional hard law enforcement regimes, today's emerging 'civil regulations' are grounded in the 'rule of reputation,' which ties accountability solely to reputational capital, or lack thereof. Operating internationally and faced with pressure to self-regulate, a company's reputation has become one of its most valuable assets."); Stephens, *supra* note 132, at 14 ("Even absent payment of a judgment, the defendant may be 'punished' by public exposure . . . ."); *see also* Peter T. Hoffman, *Valuation of Cases for Settlement: Theory and Practice*, 1991 J. DISP. RESOL. 1, 35 (1991) ("Settlement also can avoid the unwanted publicity of a trial, a matter particularly important" when there are reputations to maintain.); Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 BERKELEY J. INT'L L. 456, 489–622 (2011) (using multiple case studies to show the effectiveness of out-of-court tactics coordinated with and accompanying transnational tort litigation).

229 Scheffer & Kaeb, *supra* note 209, at 373 ("[R]eputational risks . . . can do far more to damage corporate profitability and the long-term credibility of the 'brand name' than most court cases could impose upon a corporate defendant.").

possibilities like the initiation of an ATS suit, let alone its filing and progression to trial.[230]

When defendants are placed in untenable litigation positions and the cost of defending against class actions is especially high, for example, some have gone so far as to characterize the plaintiff's position to demand settlement as metaphorically akin to a blackmailer.[231] Moreover, the mere ability to *threaten* a class action suit has been described by some scholars as creating a situation of "legalized blackmail."[232] Whether class actions or not, ATS suits create the same power dynamic as described in that analysis.

In fact, Judge Dennis Jacobs from the U.S. Court of Appeals for the Second Circuit, when concurring in the denial of rehearing in the *Kiobel* case that had held corporations could not be liable under the ATS, explained that the holding halting corporate ATS suits had the "considerable benefit of avoiding abuse of the courts to extort settlements."[233] He discussed the ATS corporate lawsuit as riddled with opportunities for coercively induced settlements by corporations:

> The holding of this case matters nevertheless because, without it, plaintiffs would be able to plead . . . in a way that . . . would delay dismissal of ATS suits against corporations; and the invasive discovery that ensues could coerce settlements that have no relation to the prospect of success on the ultimate merits. American discovery in such cases uncovers corporate strategy and planning, diverts resources and executive time, provokes bad public relations or boycotts, threatens exposure of dubious trade practices, and risks trade secrets. . . . These coercive pressures, combined with pressure to remove contingent reserves from the corporate balance sheet, can

230 Fairfax, *supra* note 140, at 806–07; Priest & Klein, *supra* note 143, at 24; Mulreed, *supra* note 143, at 781 n.2.

231 *See, e.g.*, *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298–1300 (7th Cir. 1995) (Posner, J.) (citing HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973) (citing Handler while discussing the dynamics in class action cases and the high likelihood that they "produce blackmail settlements")); Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971) ("Any device which is workable only because it utilizes the threat of unmanageable and expensive litigation to compel settlement is not a rule of procedure—it is a form of legalized blackmail."). *See also* Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1386 (2003) ("It seems safe to conclude that proponents are using the word 'blackmail' metaphorically.").

232 *See, e.g.*, In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation, 55 F.3d 768, 784–85 (3d Cir. 1995) ("Another problem is that class actions create the opportunity for a kind of legalized blackmail: a greedy and unscrupulous plaintiff might use the *threat* of a large class action, which can be costly to the defendant, to extract a settlement far in excess of the individual claims' actual worth.").

233 Kiobel v. Royal Dutch Petroleum Co., 642 F.3d 268, 271 (2d Cir. 2011) (Jacobs, C.J., concurring in denial of rehearing).

> easily coerce the payment of tens of millions of dollars in settlement, even where a plaintiff's likelihood of success on the merits is zero. Courts should take care that they do not become instruments of abuse and extortion.[234]

This extortion-like threat was facilitated by an all-out strategy to use both the in-court threat of ATS liability and out-of-court tactics touting the claimed ATS liability as a means to pressure corporations.[235]

Indeed, what is particularly important with the evolution of the ATS cases against corporations is the power that came from the mere recognition by the courts of the legitimacy of these lawsuits.[236] Once courts started denying motions to dismiss against corporate ATS defendants, the settlement dynamic changed dramatically. Research shows that plaintiffs' ability to survive a motion to dismiss substantially alters corporations' and other defendants' risk assessments regarding non-settlement options (such as going to trial).[237] The chance of settlement is much higher when plaintiff's case can withstand a motion to dismiss because it is usually the cheaper and less risky alternative.[238] It is for this reason that the development of the liability regime under the ATS—including the cases that ultimately used early ATS case precedent to build toward the creation of the corporate liability layer of ATS doctrine—became so important and such a powerful rent-seeking achievement.

For a long time, the threat of ATS liability had a substantial impact on leverage. The power dynamic between corporations and corporate social responsibility advocates substantially changed as a result of the liability regime that was emerging and threatening to emerge. As all of these corporate ATS lawsuits began to pick up steam, debate grew regarding the appropriateness of using U.S. courts to extraterritorially enforce

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234 *Id.*

235 Drimmer, *supra* note 210, at 999 ("[O]ut-of-court tactics, *in conjunction with litigation*, have taken hold. Plaintiffs, their attorneys, and their representatives regularly utilize these strategies to pressure corporate defendants to settle cases or change existing practices, publicize their causes, and for other purposes" (emphasis added)); Drimmer & Lamoree, *supra* note 228, at 472–88 (explaining how in connection with ATS and other "transnational tort cases, parties frequently employ [a variety of] out-of-court tactics in part to publicly advance their cause, pressure their opponents, or initiate corporate change" including media, investment, political, and community organizing tactics).

236 *See generally* Adler & Silverstein, *supra* note 87, at 6 (exploring "the concept of power disparities in negotiation").

237 Sale, *supra* note 144, at 386 (2011) (showing the relationship between survivability of motions to dismiss and defendants motivations to settle to avoid damages and reputational harm).

238 *Id.*; *see also* Pritchard, *supra* note 145, at 952–53 (1999) (stating that if plaintiffs can survive a motion to dismiss, defendants will often settle to minimize further harm).

supposed internationally accepted norms and impose liability for violations of such norms by foreign actors and for actions outside the United States that were otherwise subject to foreign laws and regulations.

The *Kiobel v. Royal Dutch Petroleum Co.* case reached the U.S. Supreme Court after the U.S. Court of Appeals for the Second Circuit held that corporations were not proper defendants under the ATS.[239] The Second Circuit's decision split with several other circuits that had decided ATS suits against corporations could proceed.[240] Although not deciding when, if ever, corporations are proper defendants under the ATS, the 2013 Supreme Court decision in *Kiobel* severely limited ATS suits, including those against corporations, by interpreting the ATS as having no (or some say *almost* no) extraterritorial reach.[241] Because almost all of the available corporate social responsibility stories for ATS cases involved corporate actions outside the United States, the ATS as a corporate social responsibility tool against anyone, including multi-national corporations, was effectively neutralized by *Kiobel*.[242]

If there was any doubt about the ATS as a rent-seeking interest group strategy, one need only look at the press releases immediately following *Kiobel* by many of the activist groups lamenting that the Court "shut their doors" to their causes and the fact that the Court "harshly limited" usage of the ATS.[243] The

239 Kiobel v. Royal Dutch Petroleum, 621 F.3d 111, 147–48 (2d Cir. 2010) (holding that corporations are not subjects of international law and therefore law of nations does not recognize corporate liability).

240 *See, e.g.*, Doe v. Exxon Mobile Corp., 654 F.3d 11, 15 (D.C. Cir. 2011), *vacated by* Doe v. Exxon Mobil Corp., No. 09-7125, 2013 WL 3970103 (D.C. Cir. July 26, 2013); Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1025 (7th Cir. 2011); Sarei v. Rio Tinto, PLC, 671 F.3d 736, 818 (9th Cir. 2011) (en banc), *cert. granted and judgment vacated by* Rio Tinto PLC v. Sarei, 133 S. Ct. 1995 (2013); Romero v. Drummond Co., Inc., 552 F.3d 1303, 1315 (11th Cir. 2008).

241 *See Kiobel*, 133 S. Ct. at 1669 ("We therefore conclude that the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption."). *See also, e.g.*, Michael D. Goldhaber, *The Global Lawyer: The Zombification of the Corporate Alien Tort*, THE LITIGATION DAILY, Apr. 21, 2013, http://www.americanlawyer.com/digestTAL.jsp?id=1202596949949 ("Rather than kill the corporate alien tort outright, the Court maimed all forms of alien tort by restricting their territorial reach. The corporate alien tort is therefore doomed to remain a zombie doctrine—not quite alive and not quite dead.").

242 Rich Samp, *Supreme Court Observations: Kiobel v. Royal Dutch Petroleum & the Future of Alien Tort Litigation*, FORBES, Apr. 18, 2013, http://www.forbes.com/sites/wlf/2013/04/18/supreme-court-observations-kiobel-v-royal-dutch-petroleum-the-future-of-alien-tort-litigation/ ("Yesterday's decision . . . will lead to the dismissal of virtually all pending ATS cases.").

243 *See, e.g.*, *Kiobel v. Shell: Supreme Court Limits Courts' Ability to Hear Claims of Human Rights Abuses Committed Abroad*, CENTER FOR CONSTITUTIONAL RIGHTS (Apr. 17, 2013), http://ccrjustice.org/newsroom/press-releases/kiobel-v.-shell%3A-supreme-court-limits-courts%E2%80%99-ability-hear-claims-of-human-rights-abuses-committed-a (quoting

complaints in the press releases sounded like investors who had seen their portfolio (represented by the package of ATS precedents purchased) disappear, holding stocks they could not sell (represented by the fact that the courts were now closed to almost all claims where those precedents could have been valuable), suffering from a metaphorical stock market crash (represented by the devaluation of those precedents as a consequence of the *Kiobel* holding). These groups tried to find a silver lining in the decision and held out hope for some suits against corporations surviving,[244] but realistically there is very little room left in the now-limited ATS for its use as a corporate social responsibility tool. Some groups admitted that they would need to redirect their investments now that the ATS remedy was cut off. For example, one corporate social responsibility group named the Accountability Counsel informed its members in a post-*Kiobel* press release that "[f]or victims of corporate abuse

lead counsel for the *Kiobel* plaintiffs (who has also been counsel in many ATS cases) as stating, "We are disappointed by today's ruling and the fact that U.S. courts have shut their doors to the human rights violations our clients suffered"); Natalie B. Fields, *What Kiobel Means for Corporate Accountability*, ACCOUNTABILITY COUNSEL (Apr. 17, 2013), http://www.accountabilitycounsel.org/news/what-kiobel-means-to-corporate-accountability/ ("Today, the U.S. Supreme Court harshly limited cases that may be brought in U.S. courts against corporations that commit human rights abuses abroad."); *Kiobel Ruling Undermines U.S. Leadership on Human Rights*, HUMAN RIGHTS FIRST (Apr. 17, 2013), http://www.humanrightsfirst.org/2013/04/17/kiobel-ruling-undermines-u-s-leadership-on-human-rights/ ("Today in its decision in *Kiobel v. Royal Dutch Petroleum*, the Supreme Court gutted the Alien Tort Statute (ATS), a law that has been on the books for more than 200 years and for the last 30 years has been a critical avenue to hold serious human rights violators accountable."); Kate Mitchell, *Kiobel v. Royal Dutch Petroleum and the Future of Corporate Accountability for Human Rights Violations Committed Abroad*, OXFORD HUMAN RIGHTS HUB (Apr. 21, 2013), http://ohrh.law.ox.ac.uk/?p=1579 ("The Court held that the Alien Torts Statute (ATS) did not apply extraterritorially, shutting off an avenue previously embraced by human rights advocates for making corporations accountable for human rights abuses committed abroad."); *Civil and Human Rights Coalition Criticizes Supreme Court Ruling in Kiobel as a Setback for Human Rights*, THE LEADERSHIP CONFERENCE (Apr. 17, 2013), http://www.civilrights.org/press/2013/kiobel-supreme-court.html ("Today's decision in *Kiobel v Royal Dutch Petroleum* undermines the unique and important role of U.S. courts in providing an opportunity for justice for those who have suffered serious human rights violations at the hands of repressive regimes around the world. With this decision, the Supreme Court has closed our courthouse doors . . . .").

244 *See, e.g.*, Alison Frankel, *Human Rights Lawyers Look for Silver Lining in Kiobel Black Cloud*, REUTERS BLOG (Apr. 17, 2013, 10:09 PM), http://blogs.reuters.com/alison-frankel/2013/04/17/human-rights-lawyers-look-for-silver-lining-in-kiobel-black-cloud/ ("When the U.S. Chamber of Commerce rushes out a statement hailing a decision by the U.S. Supreme Court, you can be sure that opinion is a defeat for plaintiffs' lawyers."); Wessen Jazrawi, *Kiobel v Shell: US Supreme Court on corporate accountability for foreign human rights abuses*, UK HUMAN RIGHTS BLOG (Apr. 18, 2013), http://ukhumanrightsblog.com/2013/04/18/kiobel-v-shell-us-supreme-court-on-corporate-accountability-for-foreign-human-rights-abuses/ ("[W]hilst *Kiobel* has been a setback for those seeking stronger accountability of multinationals operating abroad, the decision does not mean that corporations are immune from liability, and ways will continue to be sought to that end.").

that had hoped to use U.S. courts, and now cannot, our work [on non-judicial accountability mechanisms] just became that much more important."[245] Several of these groups in their statements specifically discussed *Kiobel* as a blow to corporate accountability and social responsibility campaigns.[246] A critical weapon in the expansionist corporate social responsibility activists' arsenal was lost.[247] Of course, all sides had an opinion.[248] Immediately following the decision, business-aligned interest groups also had their own press releases applauding the *Kiobel* decision in large part due to the relief it provided for the corporation's legal positioning.[249]

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245 Fields, *supra* note 243.

246 *See, e.g.*, Marjorie Jobson, *South Africa: Unanswered Questions For The South Africa Apartheid Litigation As U.S. Supreme Court April 17 Rules Against The Kiobel Case*, KHULAMANI SUPPORT GROUP (Apr. 24, 2013), http://www.khulumani.net/khulumani/statements/item/780-unanswered-questions-for-the-south-africa-apartheid-litigation-as-us-supreme-court-april-17-rules-against-the-kiobel-case.html?utm_source=Khulumani+News+Alerts&utm_campaign=2ea075167c-Kiobel_case_statement4_24_2013&utm_medium=email ("The Kiobel decision seems to have 'cut a hole into the web of accountability . . . .,' said Elisa Massimino, President of Human Rights First."); *US: Supreme Court Limits Suits Against Rights Abusers Abroad*, HUMAN RIGHTS WATCH (Apr. 29, 2013), http://www.hrw.org/news/2013/04/29/us-supreme-court-limits-suits-against-rights-abusers-abroad ("[*Kiobel*] undercuts case law that had made the US courts a mainstay for redress for victims of serious human rights abuses."); *Analysis: Set-Back for Corporate Accountability on Human Rights*, THE DANISH INSTITUTE FOR HUMAN RIGHTS (Apr. 23, 2013), http://humanrights.dk/news/news?doc=22277 ("Last week, events in the US made it harder to hold multinational companies accountable for contributing to human rights abuses in their global operations . . . . For the past two decades, the ATS has been one of the most visible manifestations of the global need for greater clarity on the human rights responsibility of corporate actors.").

247 Jobson, *supra* note 246. Jobson concludes that "this power to advance corporate accountability has been significantly reduced by the US Supreme Court's decision." *Id.* She quotes Rita Kesselring, a Swiss scholar who wrote that, "[i]n an environment in which few institutions, whether judicial or political, have been able to secure the accountability and liability of corporations, the ATS has served a unique and critical function. It has had the power to enforce liability for compromising the dignity of human beings and (it) has strengthened international human rights against corporate abuse." *Id.*

248 Marcia Coyle, *Justice Limit Reach of Alien Tort Law*, AM. LAWYER, Apr. 17, 2013, *available at* http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202596443758&Justices_Limit_Reach_of_Alien_Tort_Law (describing the reactions from both sides to the *Kiobel* decision).

249 *See, e.g.*, *U.S. Chamber Commends Supreme Court for Reining In Abuses of Alien Tort Statute*, U.S. CHAMBER OF COMMERCE (Apr. 17, 2013), http://www.uschamber.com/press/releases/2013/april/us-chamber-commends-supreme-court-reining-abuses-alien-tort-statute ("U.S. Chamber of Commerce today praised [the Kiobel] decision . . . that limits the global business community's liability under the [ATS]" calling the ATS cases "a scheme by class action trial lawyers" to "expose global businesses to frivolous and costly lawsuits"); Peter Nestor, *The Supreme Court Has Ruled on Kiobel. Now What?*, THE BUSINESS OF A BETTER WORLD (Apr. 17, 2013), http://www.bsr.org/en/our-insights/blog-view/the-supreme-court-has-ruled-on-kiobel.-now-what ("Our initial assessment after today's opinion is that most businesses will not likely face suit in U.S. federal court under this ruling, particularly for allegations of abuse occurring abroad.").

As a result of *Kiobel* and the closing of the ATS mechanization to achieve corporate social responsibility objectives, we should see the expansionist interest groups channel their resources to other avenues. There should be a post-*Kiobel* shift in their investment strategy, perhaps away from law creation or just to other law-production centers. We have seen this shift in part with the rise of state-based tort claims seeking remedies for supposed corporate harms and state-based causes of action with extra-territorial reach, including and sometimes beyond what these groups attempted to push through the mechanism of the ATS.[250] It would be interesting in future work to research where these corporate social responsibility groups divert the funds previously dedicated to their ATS litigation budgets.

Despite the convincing proof of its demise through *Kiobel*, the story of the ATS's life tells an interesting tale about interest group behavior and corporate social responsibility activism. The ATS evolution is instructive about the means and institutional venues for rent-seeking behavior and the real possible returns from investing in the creation of law (including liability doctrines) beneficial to one's self-interest.

CONCLUSION

Public choice, interest group theory, and the economic analysis of law provide methods by which we can better understand the operational aspects of corporate social responsibility advocacy. Like any interest groups, those groups labeling as their mission the advancement of new social responsibilities for corporations will engage in the same cost/benefit analysis as any other interest groups determining where to invest their limited time, money, and other resources. When rent-seeking for legal change is the more efficient use of their limited resources, corporate social responsibility groups will invest in the creation of law to advance their own interests at the expense of others. This Article sought to explain these motivations and position corporate social responsibility activism in the same category of skepticism due any interest-group investment in the creation of laws.

250 *See generally* Childress III, *supra* note 138; Ziad Haider, *Corporate Liability for Human Rights Abuses: Analyzing* Kiobel *and Alternatives to the Alien Tort Statute*, 43 GEO. J. INT'L L. 1361 (2012); Roger Alford, *Kiobel Insta-Symposium: The Death of the ATS and the Rise of Transnational Tort Litigation*, OPINIO JURIS (Apr. 17, 2013, 5:48 PM), http://opiniojuris.org/2013/04/17/kiobel-instthe-death-of-the-ats-and-the-rise-of-transnational-tort-litigation/.

Finally, both generally and through the case study of the ATS, this Article sought to demonstrate that rent-seeking analysis should have broad application. There is room for increased scrutiny of new rules of liability emerging from the courts that, in all likelihood, have sometimes themselves been the product of interest group investment in the creation of new judicial doctrine. There are lessons to be learned about precedent-building litigation development strategies employed in public law litigation and elsewhere. Moreover, these insights help expand the utility of public choice analysis, and more aggressive use of this mode of analyzing litigation outcomes for rent-seeking origins could provide further valuable insights on how tort laws and other judicially-created legal doctrines come about and whether their content should receive more critical examination as a result of the background processes of their creation.