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# ARTICLES

## CORPORATE PHILANTHROPY AND THE BUSINESS BENEFIT: THE NEED FOR CLARITY

SHELBY D. GREEN\*

"'MYSTERY' was made possible by a grant from Mobil Corporation."<sup>1</sup>

### I. INTRODUCTION

In 1987, Mobil's contributions to charitable causes reached almost \$10 million.<sup>2</sup> Even more generous, Exxon gave over \$2.5 million to public television, \$19 million to colleges and universities, and \$3.2 million to the arts, museums and historical associations, as well as millions to other donees.<sup>3</sup> All told, Exxon gave more than \$39.8 million<sup>4</sup> and with IBM, Atlantic Richfield and similar companies chipping in, charitable causes received nearly \$4.5 billion from U.S. corporations.<sup>5</sup> While not insignifi-

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1. Transcript of underwriting acknowledgement for "MYSTERY," a television series featured on public television.

2. MOBIL FOUNDATION, INC., 1987 STATEMENT OF CONTRIBUTIONS 24 (1988) [hereinafter "MOBIL STATEMENT"].

3. EXXON CORPORATION, DIMENSIONS 1987, A REPORT ON EXXON'S 1987 CONTRIBUTIONS IN THE PUBLIC INTEREST AND THE EXXON EDUCATION FOUNDATION REPORT 3 (1988) [hereinafter "EXXON REPORT"].

4. *Id.* at 2.

5. AMERICAN ASSOCIATION OF FUND-RAISING COUNSEL TRUST FOR PHILANTHROPY GIVING USA, THE ANNUAL REPORT ON PHILANTHROPY FOR THE YEAR 1987. Total charitable contributions from all sources for 1987 was \$93.68 billion. *Id.* Of the \$76.8 billion given

cant, this sum represented less than five percent of all charitable giving for that year, as individuals accounted for \$76.8 billion.<sup>6</sup>

What is the motivation for such philanthropy? Admittedly, many individuals and businesses give simply to realize the tax benefits.<sup>7</sup> Even without the tax deduction, many individuals who give would find it hard to refuse the Girl Scouts or the church offering plate. Moral sentiments are decisive. But, beyond tax incentives, why do these non-human entities — business corporations — give to charity and how can such philanthropy be reconciled with the most basic aspect of a business corporation, i.e., the object of making money for its investors?

It is supposed that corporations give to charitable causes out of self-interest — indeed, it is argued that this is all that the law permits<sup>8</sup> — as a measured business response to political pressures and public hostility.<sup>9</sup> But can corporations give out of altruism — simply on the basis that giving is the social responsibility of all citizens, including corporate citizens? Case law and some commentary appear to answer no. Nevertheless, the actual giving practices of corporations seem difficult to explain otherwise.

In early corporate history, it was of great importance to examine the motivation for expenditures. The common law was most exacting in its scrutiny of the exercise of corporate powers and generally prohibited activities by corporations not directly related to the corporate business.<sup>10</sup> The relationship between charitable contributions and the achievement of business returns, initially, eluded the courts and scholars. Any expenditure of corporate assets on causes which appeared altruistic in nature

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to charity by individuals, more than half, \$43.6 billion, went to religious organizations. *Id.* at 9.

6. *Id.*

7. Under the Internal Revenue Code, individual taxpayers can reduce taxable income by amounts contributed to charity up to fifty percent of adjusted gross income (with certain other limitations). Corporate taxpayers can take a deduction for charitable contributions of up to ten percent of taxable income. I.R.C. § 170(b)(2)(1990).

8. See Prunty, *Love And The Business Corporation*, 46 VA. L. REV. 467, 475-76 (1960); see also Garrett, *Corporate Donations*, 22 BUS. LAW. 297 (1967).

9. Manne, *The Limits And Rationale Of Corporate Altruism: An Individualistic Model*, 59 VA. L. REV. 708 (1973); see also Note, *Corporate Altruism: A Rational Approach*, 59 GEO. L.J. 117 (1970).

10. *Id.*

was condemned as *ultra vires* or beyond the corporation's legitimate powers.<sup>11</sup> However, changes in prevailing industrial conditions brought along changes in business methods. At the turn of the century, some courts grew receptive to the notion that a donation to an otherwise charitable cause might yield economic benefits to the corporation.<sup>12</sup> In one of the early cases recognizing this theory, *Steinway v. Steinway & Sons*,<sup>13</sup> the court explained:

It is a question, therefore, in each case of the logical relation of the act to the corporation purpose expressed in the charter. If that act is one which is lawful in itself and not otherwise prohibited, is done for the purpose of serving corporate ends and is reasonably tributary to the promotion of those ends, in a substantial and not in a remote and fanciful sense, it may fairly be considered within charter powers. The field of corporate action in respect to the exercise of incidental powers is thus, I think, an expanding one. As industrial conditions change, business methods must change with them, and acts become permissible which at an earlier period would not have been considered to be within corporate power.<sup>14</sup>

In light of current interpretations of a corporation's power to give to charity and the enactment of statutes in virtually every state and the District of Columbia expressly empowering corporations to make charitable contributions,<sup>15</sup> it is still fair to ask to what extent the law limits the power of corporate managers or whether charitable giving is a matter of business judgment, a prerogative of the corporation's board of directors. Many charitable gifts, such as contributions to inner city programs to aid the homeless or contributions to humanistic studies at liberal arts colleges, are open to attack as merely altruistic in their aim. Despite the appearance of altruism though, can it be

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11. *Community Federal Savings & Loan Ass'n. v. Fields*, 128 F.2d 705, 708 (8th Cir. 1942).

12. For example, establishment of a hospital for employees of the corporation might generate greater productivity from a healthy and contented workforce.

13. 17 Misc. 43, 40 N.Y.S. 718 (Sup. Ct. 1896).

14. *Id.* at 47, 40 N.Y.S. at 720. See also text accompanying notes 38-69, *infra*.

15. See Note, *Corporate Altruism: A Rational Approach*, 59 GEO. L. R. 117, 136 n. 113 (1970).

proven that corporate managers are not in reality chilled by the necessity to demonstrate some discernable return to the corporation?

Recently, the American Law Institute ("ALI"), as part of its Corporate Governance Project,<sup>16</sup> proposed a rule to define the limits of a business corporation's power to make charitable contributions. Proposed Section 2.01, The Objective and Conduct of the Business Corporation, would provide:

A business corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain, except that, whether or not corporate profit and shareholder gain are thereby enhanced, the corporation, in the conduct of its business

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(c) may devote a reasonable amount of resources to public welfare, humanitarian, educational, and philanthropic purposes.<sup>17</sup>

As with the other areas addressed in the Corporate Governance Project, the ALI perceived a need to restate or clarify often conflicting or illogical legal principles in light of historical and judicial developments. There is a need for such a restatement on the power of a business corporation to make charitable contributions.

This need for clarity or harmony is the subject of this essay. Part II summarizes a philosophical debate between two scholars on the mission of the corporation. Part III briefly traces the historical development of the relevant principles and Part IV ex-

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16. The mission of the Corporate Governance Project is contained within the subtitle of the work, that is, to provide "Analysis and Recommendations" on corporate practice. The drafters explain that all statements concerned with law should be regarded as recommendations of the Institute, with the context and the explanations in the comment making clear how far a recommendation is believed to be consistent with prevailing law and how far legal change is contemplated and if the latter, whether by decision or by legislation. *Principles of Corporate Governance: Analysis and Recommendations* vii-ix (Am. Law Inst. Tent. Draft No. 2 1984).

17. *Id.* at 25.

amines the actual philanthropic practices of several large publicly held corporations. Finally, Part V considers the continuing significance of the common law rule in light of these practices and urges support for the ALI proposal.

## II. CHARITY AND THE BUSINESS CORPORATION — THE DEBATE

Whether or not corporate managers may direct corporate profits away from shareholders to public charities raises at once the issue of the role of the corporation and its managers in society. In the early 1930's, two leading corporate law scholars, Adolf Berle and E. Merrick Dodd, debated the question.<sup>18</sup> In Berle's view:

All powers granted to a corporation or to the management of a corporation, or to any group within the corporation, whether derived from statute or charter or both, are necessarily and at all times exercisable only for the ratable benefit of all the shareholders as their interest appears.<sup>19</sup>

Thus, according to Berle, corporate managers were "trustees" for the benefit of the shareholders and their sole responsibility was to the shareholders, and not to society generally.<sup>20</sup> Berle's thesis was far from idle theory, as significant developments in the law of corporations were then unfolding. Most importantly, the enactment of liberal corporate statutes which multiplied the powers of corporate managers and the growth in size of corporations meant that, increasingly, shareholders relinquished control over the use of their property to corporate managers.<sup>21</sup> Few doubted the need to establish controls which would more effectively prevent corporate managers from diverting corporate profits from stockholders into their own pockets.<sup>22</sup>

In 1932, Dodd responded to Berle. While he agreed with the

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18. For a critical analysis of the debate, see Weiner, *The Berle-Dodd Dialogue on the Concept of the Corporation*, 64 COLUM. L. REV. 1458 (1964).

19. Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1056-59 (1931).

20. *Id.* at 1073-74; see also BERLE & MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

21. BERLE & MEANS *supra* note 15, at 4-5.

22. BERLE & MEANS *supra* note 16, at 247-49.

need to protect shareholders from self-seeking managers, he did not agree that adoption of hard rules limiting permissible objects of the business corporations was the answer.<sup>23</sup> Rather, Dodd noted a growing feeling that business had responsibilities to the community, and that corporate managers who control business should voluntarily, without legal compulsion, perform in such a way as to fulfill those responsibilities.<sup>24</sup> He stated:

The view that those who manage our business corporations should concern themselves with the interests of employees, consumers, and the general public, as well as of the stockholders, is thus advanced today by persons whose position in the business world is such as to give them great power of influencing both business opinion and public opinion generally.<sup>25</sup>

In fact, Professor Dodd points out:

[T]here are indications that even today corporation managers not infrequently use corporate funds in ways which suggest a social responsibility rather than an exclusively profit-making viewpoint. Take, for example, the matter of gifts by business corporations to local charities . . . The view that directors may within limits properly use corporate funds to support charities which are important to the welfare of the community in which the corporation does business probably comes much nearer to representing the attitude of public opinion and the present corporate practice than does the traditional language of courts and lawyers.<sup>26</sup>

Many corporations, in the absence of explicit statutory authority and in spite of the traditional language of the courts, regularly made contributions to charitable causes. Twenty years later, following the enactment of statutory provisions authoriz-

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23. Dodd, *For Whom are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1147-48 (1932).

24. *Id.* at 1153-54.

25. *Id.* at 1156.

26. *Id.* at 1159.

ing corporations to make charitable contributions and significant court decisions on the issue, Berle concluded that "[t]he argument has been settled (at least for the time being) squarely in favor of Professor Dodd's contention."<sup>27</sup>

### III. TO GIVE OR NOT TO GIVE? — THE ANSWER AT COMMON LAW

The traditional language of the courts on the mission of the business corporation was that this entity existed for the benefit of its shareholders.<sup>28</sup> Under this conception, charity had no place within the business corporation.<sup>29</sup> But the law did not always take so narrow a view of the corporation's powers. On the contrary, at its genesis, the corporation promised service to society.

By the eighteenth century, it was accepted doctrine that the right to conduct business in the corporate form was a matter of royal prerogative.<sup>30</sup> According to Hurst, the reasons for this policy had more to do with politics than economics.

The impelling objective was to help focus and secure political power at the head of the state. Values of governmental or business efficiency might move the grantees of charters. But through the early seventeenth century these were not the prime concerns of the Crown, which took the lead in asserting the national government's exclusive creative authority. . . .<sup>31</sup>

Thus, it suited the crown to issue charters to companies which promised public economic benefits. In fact, from the six-

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27. BERLE, *THE 20TH CENTURY CAPITALIST REVOLUTION* 169 (1954). Other scholars, however, have not conceded to Dodd's theory, as the list of commentary on the social responsibility of corporations is legion. See e.g., Sommer, *The Struggle for Corporate Responsibility*, 8 CARDOZO L. REV. 795 (1987); Murphy, *Ethical Concerns Among Corporate Executives*, 21 VAL. U.L. REV. 631 (1987); Stone, *Corporate Social Responsibility: What it Might Mean, If It Were Really To Matter*, 71 IOWA L. REV. 557 (1986); Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1 (1979); Epstein, *Societal, Managerial, and Legal Perspectives on Corporate Social Responsibility — Product and Process*, 30 HASTINGS L. J. 1287 (1979).

28. *Dodge v. Ford Motor Co.*, 204 Mich. 459, 170 N.W. 668 (1919).

29. *Hutton v. West Cork Railway Co.*, 23 Del. Ch. 654 (1883).

30. HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970* 3 (1970).

31. *Id.* at 3.



teenth century, royal chartering of companies to develop foreign trade and colonies was a prominent feature of national policy.<sup>32</sup>

The dual object of the business corporation continued in the United States. The earliest business corporations established at the end of the eighteenth and the beginning of the nineteenth centuries were founded for public service objectives such as building turnpikes and canals, supplying water, fire fighting and providing insurance.<sup>33</sup> However, out of fear of great aggregations of wealth and manpower, the corporate privilege was granted sparingly and strict limits were placed on size, scope of activity, and amount of real property that could be held.<sup>34</sup>

It was not until the end of the nineteenth century, under the momentum of the industrial revolution, that states enacted general corporation codes under which entrepreneurs could organize themselves for most business purposes, without the old limitations on size and ownership of property.<sup>35</sup> Eventually, with the proliferation of corporations in all nature of business activity and the liberalization of corporation codes, private profit became generally accepted as the controlling objective in all businesses other than those classed broadly as public utilities.<sup>36</sup>

Perhaps the most celebrated case to articulate this view is *Dodge v. Ford Motor Company*.<sup>37</sup> By 1919, the Ford Motor

32. *Id.* According to Hurst, the royal charters legitimized the public functions performed by these trading companies in organizing terms of trade, setting up local governments, controlling customs, and in effect, making foreign policy in their areas of operation. *Id.* at 4; see generally Seavoy, *The Public Service Origins of the American Business Corporation*, 52 BUS. HIST. REV. 30, 45-47 (1978) and Williston, *History of the Law of Business Corporations Before 1800*, 2 HARV. L. REV. 105, 109-110 (1888). According to Williston, among the more successful trading companies were the East India Company, the Royal African Company, and the Hudson's Bay Company. *Id.*

33. CHAYES, INTRODUCTION TO DAVIS, CORPORATIONS (paper ed. 1961); DAVIS, ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS 7 (1917).

34. Seavoy, *supra* note 27, at 49; see also CARY & EISENBERG, CASES AND MATERIALS ON CORPORATIONS 38 (5th ed. 1980).

35. CONARD, CORPORATIONS IN PERSPECTIVE 13 (1970). In the late eighteenth century, a number of states began following the practice in England and enacted legislation providing for self-incorporation, thereby avoiding the need for a special legislative act for a corporate charter, although the early statutes limited their application to religious, charitable or municipal institutions. See also CHAYES, *supra* note 33, at 2; DAVIS, *supra* note 33, at 25.

36. Dodd, *supra* note 23, at 1151-53.

37. 204 Mich. 459, 170 N.W. 668 (1919). The company's purpose was to purchase, manufacture and place on the market for sale, automobiles, motors and devices and ap-

Company had become tremendously wealthy. In fact, after only 13 years in business, it had nearly \$112 million in surplus. Henry Ford, the founder of the company, desired to spread the company's wealth over the country generally. He declared: "[M]y ambition . . . is . . . to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes. . . ."<sup>38</sup> The board of directors shared Mr. Ford's vision and voted to increase employee wages and to reduce the price of the car, the company's chief product, in order to make it more affordable.<sup>39</sup> The board also decided to suspend the payment of special dividends, which in four years had totaled more than \$41 million, and to pay only the regular dividends of \$1.2 million per year.<sup>40</sup> Unfortunately for Mr. Ford, shareholders, who together owned one-tenth of all the company's stock, protested these plans and filed suit.<sup>41</sup> At trial, counsel for the corporation argued that:

Although a manufacturing corporation cannot engage in humanitarian works as its principal business, the fact that it is organized for profit does not prevent the existence of implied powers to carry on with humanitarian motives such charitable works as are incidental to the main business of the corporation.<sup>42</sup>

In the court's view, there was a decided difference between "an incidental humanitarian expenditure of corporate funds for the benefit of the employees, like the building of a hospital for their use and the employment of agencies for the betterment of their condition and a general purpose and plan to benefit mankind at the expense of others."<sup>43</sup>

The court explained that

[a] business corporation is organized and carried on primarily for the profit of the stockholders.

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pliances incident to the construction and operation of automobiles. *Id.* at 460, 170 N.W. at 669.

38. *Id.* at 462, 170 N.W. at 671.

39. *Id.* at 461-63, 170 N.W. at 670-73.

40. *Id.*

41. *Id.* at 461, 170 N.W. at 670-71.

42. *Id.* at 475, 170 N.W. at 684.

43. *Id.*

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. . . .<sup>44</sup>

The *Ford* decision would most certainly foreclose any thought of gifts to national symphonies, food banks, or humanistic studies at educational institutions outside the community of the corporation's operations, since they would not be calculated to improve the workforce.<sup>45</sup> In fact, the courts of the late nineteenth and early twentieth centuries, insisted upon this sort of connection between the expenditure and the corporation.<sup>46</sup> These courts upheld contributions to local educational institutions for the purpose of fitting persons to be its employees;<sup>47</sup> donations to community chests devoted to social, educational and recreational purposes in the community to satisfy employees;<sup>48</sup> donations to Y.M.C.A.s located along railroad lines to accommodate the railroads' employees;<sup>49</sup> donations to build churches to provide for the employees' spiritual needs;<sup>50</sup> and donations for

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44. *Id.* The powers of the directors included those expressly granted in the corporation's charter, as well as those that are implied. Implied powers are those incidental to and connected with the carrying into effect or the accomplishing of the general purposes of the corporation, as expressed in the object clauses of the corporation's charter. According to Cary & Eisenberg,

This approach [was] strongly justified, for the demands of the business world and the public on a corporation are not static. . . . The social policy that sought to limit corporate power by restricting their size and activity fell victim to the changes initiated by the industrial revolution.

CARY & EISENBERG, *supra* note 34, at 40-41. See also LATTIN, *CORPORATIONS* 205-06 (1971).

45. Instead of proclaiming altruistic objectives, had Mr. Ford simply offered the prospect of increased sales of cars in response to a retail price reduction and increased productivity from employees as a result of higher wages as the reasons for his plan, the court might well have sustained it.

46. The limits of the business corporation's power to give to charitable causes under this theory were explored exhaustively in Cousins, *How Far Corporations May Contribute to Charity*, 35 VA. L. REV. 401 (1949).

47. Cousins, *supra* note 46 at 404 (citing *Armstrong Cork Co. v. H.A. Meldrum*, 285 F. 58 (W.D.N.Y. 1922)).

48. *Id.* at 406-07 (citing *American Rolling Mill Co. v. Comm'r*, 41 F.2d 314 (6th Cir. 1930)).

49. *Id.* at 408 (citing *Kansas City Southern Ry. v. Comm'r*, 22 B.T.A. 949 (1931); *Gulf Mobile R.R. v. Comm'r*, 22 B.T.A. 233 (1931)).

50. *Id.* at 409-10 (citing *Steinway v. Steinway & Sons*, 17 Misc. 43, 40 N.Y.S. 718 (Sup. Ct. 1896)).

hospital construction in the community.<sup>51</sup> Similarly, where corporations made contributions to projects designed to increase the number of prospective customers,<sup>52</sup> and donations "in order to obtain goodwill and to maintain prestige where such results were sufficiently probable as to constitute a prospect of direct benefit,"<sup>53</sup> they were held to be within the corporation's implied or incidental powers.

Early cases upholding gifts on the basis of the corporation's implied powers illustrate that the choices made by corporate managers were conservative and bore a demonstrable relationship to the corporation. In other words, they were calculated to stabilize and cultivate the workforce as well as customers, thus providing direct benefits to the employees and improving public relations. In later cases, this reasoning was extended to uphold gifts to those objects, such as liberal arts studies and general charitable foundations, whose relationship to the corporation and the prospect of future benefits to the corporation was at best uncertain. Three modern cases addressed the legality of such giving.

In *A.P. Smith v. Barlow*,<sup>54</sup> the corporation was engaged in the manufacture and sale of valves, fire hydrants and special equipment, mainly for the water and gas industries. Over the years, the company had contributed regularly to the local community chest and occasionally to colleges situated in the same county as the company.<sup>55</sup>

In 1951, the board of directors adopted a resolution to contribute \$1,500 to Princeton University.<sup>56</sup> The corporation's charter did not expressly authorize the contribution.<sup>57</sup> Shareholders

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51. *Id.* at 414 (citing *Corning Glass Works v. Lucas*, 37 F.2d 798 (D.C. Cir. 1929); *J.P. Coats, Inc. v. Comm'r*, 28 B.T.A. 1128 (1933)).

52. *Id.* at 420 (citing *Davis v. Old Colony R.R.*, 131 Mass. 258 (1881) (world's peace jubilee and international music festival); *Tomkinson v. South Eastern Ry.*, 35 Ch.D. 675 (1887) (world's fair)).

53. *Id.* at 420-22. Such donations took the form of gifts to literary and scientific organizations, state fairs and public baseball fields.

54. 13 N.J. 145, 98 A.2d 581 (1953).

55. *Id.*

56. *Id.*

57. A statute provided that directors could cause their corporation to contribute for charitable and educational purposes and the like . . . such reasonable sum or sums as they may determine

of the corporation questioned the gift on the ground that the directors were without the necessary power to make the gift, and the board of directors sought a declaratory judgment on the question.<sup>58</sup>

The court upheld the gift on both statutory and common law principles.<sup>59</sup> First, charitable contributions were a lawful exercise of the corporation's implied and incidental powers as defined by the prevailing economic and social conditions.<sup>60</sup> The court stated:

[J]ust as the conditions prevailing when corporations were originally created required that they serve public as well as private interests, modern conditions require that corporations acknowledge and discharge social as well as private responsibilities as members of the communities within which they operate.<sup>61</sup>

The significant "modern conditions" which were different from those prevailing at the time the common law rule evolved were the transfer of most of the nation's wealth to corporate hands and the imposition of heavy burdens by individual taxation. As individuals were unable to keep pace with increased philanthropic needs, charities "with justification, turned to corporations to assume the modern obligations of good citizenship in the same manner as humans do."<sup>62</sup> As state legislatures and Congress encouraged corporate contributions,<sup>63</sup> corporations

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. . . provided . . . that such contributions might not be made in situations where the proposed donee owned more than 10% of the voting stock of the donor and provided further that such gifts be limited to 5% of capital and surplus unless . . . authorized by the stockholders.

N.J. REV. STAT. § 14:3-13.1 (1950).

58. A.P. Smith, 13 N.J. at 145, 98 A.2d at 581.

59. *Id.*

60. *Id.*

61. *Id.* at 150, 98 A.2d at 586.

62. *Id.*

63. The preamble to the 1950 version of the New Jersey statute declared that:

[I]t shall be the public policy of our state and in furtherance of the public interest and welfare that encouragement be given to the creation and maintenance of institutions engaged in community fund, hospital, charitable, philanthropic, educational, scientific or benevolent activities or patriotic or civic activities conducive to the betterment of social and economic conditions.

came "to recognize that their salvation rests upon a sound economic and social environment which in turn rests in no insignificant part upon free and vigorous nongovernmental institutions of learning."<sup>64</sup>

The court went further:

But even if we confine ourselves to the terms of the common law rule in its application to current conditions, such expenditures may likewise readily be justified as being for the benefit of the corporation; indeed, if need be the matter may be viewed strictly in terms of actual survival of the corporation in a free enterprise system.<sup>65</sup>

The shareholders' claims were dismissed and in a chastising tone, the court stated:

Clearly then, the [shareholders] whose private interests rest entirely upon the well-being of the . . . corporation, ought not be permitted to close their eyes to present-day realities and thwart the long-visioned corporate action in recognizing and voluntarily discharging its high obligations as a constituent of our modern social structure.<sup>66</sup>

The benefit identified in this case, the preservation of free enterprise, obviously was neither an immediate nor direct one. Indeed, the relationship between the act and its goal (a \$1,500 gift to Princeton and the strengthening of "free enterprise"), while perhaps perceptible, is still remote, almost fanciful.

In *Union Pac. R.R. Co. v. Trustees, Inc.*,<sup>67</sup> the corporation adopted a resolution authorizing a \$5,000 contribution of corporate funds to the Union Pacific Railroad Foundation, a non-profit entity organized by the corporation, and dedicated to charitable, scientific, religious and educational purposes.<sup>68</sup>

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N.J. REV. STAT. § 14:3-13.1 (1950).

In 1968, the New Jersey statute was amended to delete the previous 5 percent of surplus limit on contributions and to provide that a corporation has such power to make charitable contributions "irrespective of corporate benefit." N.J. REV. STAT. § 14A:3-4 (1968).

64. A.P. Smith, 13 N.J. at 150, 98 A.2d at 586.

65. *Id.*

66. *Id.* at 154, 98 A.2d at 590.

67. 8 Utah 2d 101, 329 P.2d 398 (1958).

68. *Id.*

Here, as in *A.P. Smith*, the court found the concept of implied powers to be fluid, one defined by the prevailing social and economic conditions. Thus, in the present era, the effect of increasing tax burdens on individuals who had long supported private institutions to which corporations looked for their supply of business executives, was significant. Such conditions initiated new calls upon business corporations for financial support of these institutions, and led to a "new concept of corporate responsibility."<sup>69</sup> This new conception had achieved the status of business policy,<sup>70</sup> which seemed to be nurtured by legislative, corporate and judicial thinking.<sup>71</sup> It followed that under this new concept of corporate responsibility, corporations necessarily had the implied power to make contributions to charity if they appeared reasonably designed to assure a present or foreseeable future benefit to the corporation.<sup>72</sup>

The "benefit" to the corporation here was goodwill engendered by the contributions.<sup>73</sup> It was

not too much unlike the sponsoring of a baseball team, subsidizing promising scholars with a view toward possibly employing them later on, giving to the local community chest, paying the salary of public relations expert, sponsoring a concert or television program, or conducting a newspaper or radio advertising program. Such actions seldom produce any immediate and direct corporate benefits, but all involve use of corporate funds that otherwise could have gone to shareholders had such funds remained unspent.<sup>74</sup>

While the type of goodwill identified presented a closer connection to the business than the distant goal of preserving free enterprise identified in *A.P. Smith*, the *Union Pac. R.R. Co.* court was willing to embrace a much broader conception of implied powers:

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69. *Id.* at 102-3, 329 P.2d at 400-1.

70. The court credited the testimony of several business executives that it was sound business policy to contribute to charitable causes. *Id.* at 102, 329 P.2d at 401.

71. *Id.*

72. *Id.* at 105, 329 P.2d at 402.

73. *Id.*

74. *Id.*

[T]o illustrate a type of corporate power that we would consider implied, that within the first decade of its existence, on the occasion of the San Francisco earthquake, . . . the Union Pacific, without charge, shipped in 1,600 carloads of food and material and gave \$200,000 cash to, and evacuated a quarter of a million persons from the stricken area gratis.<sup>75</sup>

The court seemed to say that to the extent that the corporation, by these magnanimous acts, will improve the corporation's reputation and promote favorable public attitudes toward it, the corporation achieves a benefit that is legally sufficient.

In *Theodora Holding Corp. v. Henderson*,<sup>76</sup> the corporation resolved to make a contribution of \$528,000 to a charitable foundation, which was authorized to operate exclusively in the fields of "religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals."<sup>77</sup> The corporation previously had made smaller cash gifts to the foundation and had donated a large tract of land valued at nearly \$500,000 for the purpose of establishing a camp for under-privileged boys.<sup>78</sup>

The gift was upheld on the basis of the Delaware statute which specifically empowered corporations to make charitable contributions.<sup>79</sup> In contrast to the New Jersey statute at issue in *A.P. Smith*, the Delaware statute contained no limitations on the amount of any gift that might lawfully be made or on the permissible donees.<sup>80</sup> The court therefore had only common law

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75. *Id.* at 103, 329 P.2d at 400 (footnote omitted).

76. 257 A.2d 398 (Del. Ch. 1969).

77. *Id.* at 404.

78. *Id.* It was interesting, yet apparently not significant to the court, that Henderson, who held voting control of the corporation, also controlled the affairs of the charitable foundation and maintained an underground home at the camp. The plaintiff might well have argued the impropriety of the gift as a "pet project" of the controlling shareholder. There was no doubt, however, that the foundation was recognized as a legitimate charitable trust by the Internal Revenue Service. *Id.*

79. *Id.* at 404. The Delaware General Corporation Law provided that every corporation created thereunder "shall have the power to make donations for the public welfare or for charitable, scientific or educational purposes, and in time of war or other national emergency in aid thereof. . . ." *Id.* (Citing DEL. CODE ANN. TIT. 8, § 122(9) (1974)).

80. *Id.*



principles as its guide and concluded that the test to be applied was one of reasonableness.<sup>81</sup> Accordingly, three facts were decisive: the gift represented less than 2% of the corporation's total income; it fell within the amount allowed as a deduction by the Internal Revenue Code; and it actually produced a reduction in capital gains taxes.<sup>82</sup> The court concluded:

It is accordingly obvious, in my opinion, that the relatively small loss of immediate income otherwise payable to plaintiff and the corporate defendant's other stockholders, had it not been for the gift in question, is far out-weighted by the overall benefits flowing from the placing of such gift in channels where it serves to benefit those in need of philanthropic or educational support, thus providing justification for large private holdings, thereby benefiting plaintiff in the long run.<sup>83</sup>

Only in the most abstract sense, can the "long-run benefit" identified by this court be translated into the economic terms that the common law rule contemplated.<sup>84</sup> Surely, the theory of these holdings is so broad that it would not be frivolous to say that under it, any gift can be justified.<sup>85</sup> The range and amount of corporate charitable contributions today suggest that the com-

81. *Id.* at 405.

82. *Id.*

83. *Id.*

84. One economist recognized the theoretical difficulty of such a task: It may be argued that all this amounts to long-run profit maximization and thus that management in the modern corporation does no more than business management has always tried to do, allowing for changed circumstances. But the uncertainty attached to some benefits (say those of being a high-wage employer), the difficulty of translating into cash terms others (such as maintaining good community relations), the remoteness in time of still others (such as supporting liberal arts education) indicate that profit maximization must be given a very elastic interpretation indeed to cover all these activities. . . . See Kaysen, *The Social Significance of the Modern Corporation*, 47 AM. ECON. REV. 311, 313-14 (1957).

85. Corporate managers may nonetheless be constrained by the common law doctrine of waste, that is, the diversion of corporate assets for improper or unnecessary purposes, such as where the corporation does not receive adequate consideration for its assets. See *Michelson v. Duncan*, 407 A.2d 211, 217 (Del. 1979) (executive stock option plan); *Rapoport v. Schneider*, 29 N.Y.2d 396, 328 N.Y.S.2d 431, 278 N.E.2d 642 (1972). Further, the fiduciary obligations of corporate officers and directors would preclude application of corporate assets to their personal use or benefit. See generally, CARY & EISENBERG, *supra* note 34, at 563-64.

mon law rule imposes little constraint upon corporations in the selection of charitable objects. Our examination of the actual giving practices as reported by a variety of sources, including corporations, support this view. While the following summaries are by no means offered as an empirical analysis of the philanthropic practices of all business corporations, they are nonetheless instructive as to the need for concrete reform.

#### IV. THE OBJECTS OF THE CORPORATIONS' PHILANTHROPY

As the quoted sponsorship acknowledgment suggests, Mobil Oil Corporation has been a long-standing supporter of public television. In its own words, Mobil explains that it

is committed to the support of cultural and community programs for many reasons, one of which is the sincere belief that corporations must be socially responsible in every aspect of their business. A corporation exists within a society and Mobil believes that as a corporation enriches a society — preserving and enhancing society's best values — it helps create a more beneficial environment for all.<sup>86</sup>

In 1987, Mobil Foundation made charitable contributions to culture and the arts totalling \$1.4 million.<sup>87</sup> Of the \$2.10 million given to civic causes,<sup>88</sup> several are noteworthy in that it is difficult to view them as anything but the product of pure altruism. Consider a \$50,000 grant to the Bedford-Stuyvesant Restoration Corporation; a \$1,500 grant to the Fifth City Human Development, Inc.; a \$2,500 gift to the Orphan Asylum Society of the City of Brooklyn; and a \$2,000 gift to St. Francis Friends of the Poor, Inc.<sup>89</sup>

The charitable giving of Exxon Corporation was similar to Mobil's, although Exxon's total contributions of more than \$39.7

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86. MOBIL CORPORATION, A GUIDE TO MOBIL'S SUPPORT OF ARTS AND CULTURE 1 (1986).

87. See MOBIL STATEMENT, *supra* note 2, at 10.

88. *Id.* at 14.

89. *Id.* at 10-14. In addition, Mobil gave \$1.4 million to community causes; \$3.99 million to education; and \$1.06 million to health agencies and hospitals. *Id.* at 17, 22-24.

million far exceeded Mobil's.<sup>90</sup> Exxon's giving was divided into 5 program areas: environment, public information and policy research; education; health, welfare and community services; arts, museums, and historical associations; and public broadcasting programming.<sup>91</sup> Most of these grants would meet the common law test because the gifts were made to entities within the communities in which the corporation operates, to institutions of higher learning that offer research degree programs related to the corporation's operations, to activities and events likely to result in publicity for the corporation, or to conservative public policy research organizations designed to influence public opinion and laws.<sup>92</sup>

Many of the earmarked grants, however, would be highly questionable under the common law rule. Consider a \$9,000 grant to the American Antiquarian Society for a conference on "Teaching the History of the Book;"<sup>93</sup> a \$37,500 gift to Johns Hopkins University "[i]n support of a doctoral program in Political and Moral Thought;"<sup>94</sup> and a \$49,000 gift to the University of Minnesota, "[f]or an effort to identify the knowledge and competencies that beginning secondary school teachers should have."<sup>95</sup>

Under its Environment, Public Information and Policy Research Program, Exxon gave \$5,000 to Partners for Livable Places, Washington, D.C. for forums entitled, "Cities in Transition" and "Hispanics in America"<sup>96</sup> and \$15,000 to Ms. Foundation for Women, Inc., New York "[t]o assist a national economic development and technical assistance program for organizations serving low-income, rural and minority women."<sup>97</sup> In the Health and Human Services Program, Exxon gave \$25,000 to Johns Hopkins University Center for Alternatives to Animal Testing,<sup>98</sup>

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90. EXXON REPORT, *supra* note 3, at 3.

91. *Id.* at 3.

92. See generally *id.* Contributions included grants to such organizations as the American Enterprise Institute for Public Policy, Washington, D.C. (\$130,000); Brookings Institution, Washington, D.C. (\$145,000); and the Heritage Foundation, Washington, D.C. (\$30,000). *Id.* at 6-7.

93. *Id.* at 41.

94. *Id.* at 42.

95. *Id.* at 48.

96. *Id.* at 5.

97. *Id.* at 9.

98. *Id.* at 14.

\$12,000 to Harvard University, School of Public Health "toward research into uses of mass media to help prevent adolescent substance abuse,"<sup>99</sup> and, under its Curriculum and Teaching Program, a \$30,000 to the Linguistic Society of America "[t]o allow innovative programming to be incorporated into the plans for its Linguistic Institutes."<sup>100</sup>

In 1987, Gannett Foundation, which is funded by contributions from Gannett Company, Inc.,<sup>101</sup> gave \$1.24 million to the homeless;<sup>102</sup> \$415,000 to the mentally disabled;<sup>103</sup> and \$1.13 million to the poor.<sup>104</sup> Its contributions to charity totalled more than \$29 million.<sup>105</sup> While the human concern behind these gifts is clear, donations to the Gannett Foundation's Adult Literacy Program of \$1.15 million<sup>106</sup> and donations to journalism education programs of \$6.59 million<sup>107</sup> reveal a measure of self-interest, as Gannett's business depends on the literacy of both its audience and employees.

In 1987, AT&T Foundation made contributions of \$14.9 million to educational institutions and programs, which went to well-known colleges and universities for liberal arts as well as science and engineering programs.<sup>108</sup> In addition, grants to various health centers and hospitals, included causes with no particular relationship to the corporation, such as \$50,000 to American Red Cross Disaster Fund; \$10,000 to Evangelical Health Sys-

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99. *Id.* at 15.

100. *Id.* at 42.

101. Gannett Company, Inc. is a publicly held corporation engaged in various media related activities including newspaper publishing and radio and television broadcasting.

102. GANNETT FOUNDATION, 1987 ANNUAL REPORT (1987).

103. *Id.*

104. *Id.*

105. *Id.* In general, Gannett Foundation donated \$11.94 million in local grants (which included programs in community development, conservation, crime prevention, culture, disaster assistance, economy, education, health, recreation, and social services); \$3.5 million to Community Priorities Program (such as the Addison County Community Action Group, Burlington, Vermont, Community Services Resource Corporation, Los Angeles, California and the Children's Aid Society, New York, New York); \$2.99 million in journalism grants; \$3.84 in special grants (such as to the Library of Congress, Hope for a Drug-Free America, Washington, D.C. and the United Negro College Fund, New York, New York); \$1.73 million to Adult Literacy; \$3.61 to Operating Programs; and \$1.53 to Scholarship and Matching Gifts. *Id.*

106. *Id.* at 29.

107. *Id.* at 42.

108. AT&T, PUBLIC SERVICE ACTIVITY 1986/1987, A BIENNIAL REPORT 11 (1988).

tems, Illinois; and \$12,500 to the Fund for Human Dignity, New York.<sup>109</sup>

Under its "Social Action" category, AT&T gave \$12,500 to the National Adoption Exchange; \$5,000 to the Wilderness Society; \$20,000 to the Colorado Amateur Sports Corporation; and \$30,000 to the National Puerto Rican Coalition, Virginia.<sup>110</sup>

In 1987, ARCO Foundation made grants totalling \$11.39 million.<sup>111</sup> Of this total \$3.56 million or 31 percent went to colleges and universities in liberal arts and science and technical programs and \$5.66 million or 50 percent went to community programs<sup>112</sup> such as \$25,000 to the Alliance for Aging Research, Washington, D.C., for Public Education and Policy Studies on the Aging Process;<sup>113</sup> \$5,000 to the National Trust for Historic Preservation, Washington, D.C.;<sup>114</sup> \$5,000 to Projects, Hermosa Beach, California, for Emergency Shelter Program;<sup>115</sup> \$10,000 to Community Food Resources Council, Pasadena, California, for Surplus Food Distribution for Low-Income People;<sup>116</sup> \$3,000 to Human Resources Council, San Andreas, California, for Legal Assistance Services;<sup>117</sup> \$1,200 to the Peninsula Learning Resource, Kenai, Alaska, to Purchase Books and Materials for Students and Tutors;<sup>118</sup> and \$14,500 to Brothers Redevelopment, Denver Colorado, for "Paint-a-Thon" Low Income Housing Rehabilitation.<sup>119</sup>

In its 1987 publication, General Electric Foundation boasts of its contributions to assist in coping with the AIDS problem, to which it contributed \$28,170;<sup>120</sup> its involvement with the Na-

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109. *Id.* at 43.

110. *Id.* at 45-48.

111. ARCO FOUNDATION, 1987 ANNUAL REPORT 4 (1988).

112. *Id.*

113. *Id.* at 13.

114. *Id.* at 14.

115. *Id.* at 20.

116. *Id.* at 22.

117. *Id.* at 22.

118. *Id.* at 36.

119. *Id.* at 13. ARCO Foundation further contributed \$1.24 million (11 percent of its total contributions) to Arts and Humanities, which included grants to the Museum of Modern Art, New York (\$2,500); Corcoran Gallery of Art, Washington (\$2,500); Ford's Theatre, Washington (\$10,000); Dance Theatre of Harlem, New York (\$28,500); and Pennsylvania Academy of the Fine Arts (\$25,000). *Id.* at 4, 15, 25, 34.

120. *Id.* at 21.

tional Center for Therapeutic Riding, Washington, D.C. (through a \$10,000 contribution);<sup>121</sup> its support of the National Council on Alcoholism with a \$25,000 grant;<sup>122</sup> its \$25,000 contribution to the African Medical and Research Foundation;<sup>123</sup> its \$30,380 donation to the Lowndes County (Alabama) public schools;<sup>124</sup> and a \$49,300 grant to Young Audiences/GE Foundation Artists Award.<sup>125</sup> In all, GE contributed \$37 million to such social causes.<sup>126</sup>

## V. CONCLUSIONS

From an analysis of the judicial cases and actual charitable practices of some of the largest corporate contributors, two propositions seem valid: 1) any gift can be couched in such terms as to promise the kinds of intangible, long-run benefits held by the courts as legally sufficient and 2) any charitable contribution to generally recognized social causes thus benefits the corporation.

To achieve these benefits, the philanthropic object need not be related to the corporation. Instead, the corporation's only burden is to publish its efforts. In other words, it is simply the act of giving, when known, which generates favorable attitudes among employees, customers and the electorate. The common law benefit requirement, as such, is without meaningful content as a limitation on the power of corporate managers. To answer the initial question posed by this essay, the only limitations appear to be those imposed upon directors by their general fiduciary obligations to the corporation. Large publicly held corporations do not hesitate to declare their commitment to achieving social ends with corporate assets (even though their primary motivation may be some long-run economic benefit). Yet, for corporations with less economic and political standing than Exxon and Gannett, the benefit requirement may remain a deterrent to some managers who, fearing shareholder challenges, may follow a conservative path in making donations to charitable causes.<sup>127</sup>

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121. *Id.* at 22.

122. *Id.* at 22.

123. *Id.* at 26.

124. *Id.* at 22.

125. GENERAL ELECTRIC FOUNDATION, INC., THE GE FOUNDATIONS 1987 ANNUAL REPORTS 23 (1988).

126. *Id.* at 1.

127. Charitable contributions have been a recurring issue at the annual shareholder-

These involuntary choices may ignore social priorities, leaving many worthwhile causes wanting.

On the surface there appears some disharmony between the actual practices of corporations and the dictates of the common law rule. It is time formally to free corporate managers from the common law's lingering grasp.

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ers' meetings. See INVESTOR RESPONSIBILITY RESEARCH CENTER, CORPORATE GIVING IN THE REAGAN YEARS (1986); BERTSCH, CORPORATE PHILANTHROPY (1982).