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# MADE IN THE U.S.A.: CORPORATE RESPONSIBILITY AND COLLECTIVE IDENTITY IN THE AMERICAN AUTOMOTIVE INDUSTRY

BENJAMIN LEVIN\*

**Abstract:** This Article challenges the corporate-constructed image of American business and industry. By focusing on the automotive industry and particularly on the tenuous relationship between the rhetoric of automotive industry advertising and doctrinal corporate law, this Article examines the ways that social and legal actors understand what it means for a corporation or its products to be American. In a global economy, what does it mean for a corporation to present the impression of national citizenship? Considering the recent bailout of American automotive corporations, the automotive industry today becomes a powerful vehicle for problematizing the conflicted public/private nature of the corporate form and for examining what it means for a corporation to be American. By examining the ways in which consumable myths of the American corporation interact with the institutions and legal regimes that govern American corporations, this Article argues that the advertised image of the national in the global economy serves as a broad corporate veil, obscuring the consumer's understanding of corporate identity and corporate accountability. This Article situates the identification of corporate nationality within a broader framework of debates on corporate social responsibility and interrogates long-held cultural conceptions of the American corporation and corporate decision making.

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## INTRODUCTION

*[Corporations] cannot commit treason, nor be . . . outlawed, nor excommunicate[d], for they have no souls.*<sup>1</sup>

*Americanism is to the American not a tradition or a territory, not what France is to a Frenchman or England to an Englishman, but a doctrine . . . .*<sup>2</sup>

*Americanism can appear like a form of make-up, a superficial foreign fashion.*<sup>3</sup>

It is 1988 and a non-descript, middle-aged, neatly dressed, white man stands on a well-lit soundstage. In a smarmy, nasal voice, he explains that he will describe the difference between the Isuzu Trooper, a sport-utility vehicle, and a “Cherokee.”<sup>4</sup> Behind him, instead of the popular Jeep Cherokee 4x4, a dark-skinned man sits on a horse in traditional, Native American garb.<sup>5</sup> During the thirty-second television spot, the suit-clad pitch-man plays on the Native American’s outdated means of transportation and inability to speak English to sing the praises of the Trooper and mock the competition’s shortcomings.<sup>6</sup> For instance, unlike the horse (and presumably the Cherokee 4x4), the advertised vehicle comes with standard power steering.<sup>7</sup>

Viewed through a contemporary lens, the 1988 truck commercial appears highly dated. Overt racism (at least at the expense of Native Americans) is generally considered sufficiently tasteless to be unacceptable for mainstream television advertising. And the idea of promoting a car by showing it immobile on a soundstage has largely been rejected by an advertising culture that values frenetic camera work, action-shot montages, and vignettes that emphasize the vehicle’s assumed appeal to certain demographic or social groups.<sup>8</sup>

<sup>1</sup> Case of *Sutton’s Hospital*, (1612) 77 Eng. Rep. 960 (K.B.) 973.

<sup>2</sup> Leon Samson, *Americanism as Surrogate Socialism*, in *FAILURE OF A DREAM? ESSAYS IN THE HISTORY OF AMERICAN SOCIALISM* 426, 426 (John H.M. Laslett & Seymour Martin Lipset eds., 1974).

<sup>3</sup> *SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI* 318 (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 1971) [hereinafter *GRAMSCI*].

<sup>4</sup> Isuzu, *Isuzu Truck Commercial with Cherokee*, YOUTUBE (June 2, 2008), <http://www.youtube.com/watch?v=4ynXNzRNZpI&feature=related>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Compare HEON STEVENSON, *AMERICAN AUTOMOBILE ADVERTISING, 1930–1980: AN ILLUSTRATED HISTORY* 214–39 (2008) (displaying automobile advertisements from the 1960s

In light of the Trooper commercial's obvious American cultural references (Native Americans and disingenuous car salesmen), what is most striking is that the Trooper is not an American car. The advertisement was part of a hugely successful campaign by Japanese manufacturer Isuzu Motors Limited to market trucks and sport-utility vehicles to an American market by appealing to the quintessentially American automotive culture by creating a stereotypically sleazy Anglo car salesman, "Joe Isuzu."

More than twenty years later, Joe Isuzu no longer sells cars to American consumers.<sup>9</sup> In fact, Isuzu has withdrawn from the American passenger car market.<sup>10</sup> The Jeep Cherokee is no longer on the market; it has been replaced by smaller, more fuel-efficient or larger, more family-friendly alternatives.<sup>11</sup> Also, Native Americans on horseback are not popular with the twenty-first century marketing machine, having been replaced by different stereotypes and cultural outsiders. What remains the same, however, is the domestic success of non-American automobiles and the drive to appeal to American consumers; in fact, with the rise of global capital markets and increased trade with other industrial and manufacturing hubs in the wake of the Soviet Union's demise,

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and 1970s demonstrating a focus on the automobile as a stationary, practical collection of features geared to consumers interested in the actual technical specifications of vehicles), and TONY SWAN, *RETRO RIDE: ADVERTISING ART OF THE AMERICAN AUTOMOBILE* 156–63 (2002) (displaying automotive advertisements from the 1960s that generally show cars at rest, frequently without drivers or passengers, and often simply set against landscapes or colorful backdrops), *with* MGM, Inc. v. Am. Honda Motor Co., 900 F. Supp. 1287, 1291, 1303–04 (C.D. Cal. 1995) (denying defendant Honda's motion for summary judgment in MGM's suit alleging that a Honda commercial featuring a spy-movie-styled car chase captured the essence of James Bond infringed MGM's copyright in that character), and LIZABETH COHEN, *A CONSUMERS' REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA* 301 (2003) (describing the growth of demographic and sociological research in marketing automobiles to consumers).

<sup>9</sup> See, e.g., Ken Bensinger, *Isuzu Quitting U.S. Car Market*, L.A. TIMES, Jan. 31, 2008, at C1.

Joe Isuzu, meanwhile, made Isuzu a very popular brand. After building pickups for GM in the 1970s, Isuzu began selling its own vehicles in the U.S. in 1981, with low-cost vehicles such as the Pup pickup and the Trooper. Aside from the Jeep Cherokee, the Trooper was the only four-door SUV available for years, and it helped build a market for what would become a hugely successful category.

*Id.*

<sup>10</sup> *Id.*

<sup>11</sup> See, e.g., David Kiley, *Chrysler's New Owner Has Serious Marketing Work to Do*, BLOOMBERG BUS. WK., May 23, 2007, [http://www.businessweek.com/the\\_thread/brandnewday/archives/2007/05/chryslers\\_new\\_o.html](http://www.businessweek.com/the_thread/brandnewday/archives/2007/05/chryslers_new_o.html).

there has been an influx of non-American automobiles.<sup>12</sup> Where Isuzu was fighting an uphill battle against a well-established, firmly entrenched, domestic truck market in the eighties, trucks and sport-utility vehicles produced and marketed today by Asian corporations have sold widely, winning over numerous American consumers.<sup>13</sup> One thing has remained constant during this period of upheaval in our consumer culture: the drive to appeal to the American buyer on the buyer's own terms. In other words, it may be that today's consumers have shown themselves willing to buy vehicles made, designed, assembled, or financed abroad, but the subscript (or perhaps superscript) of the car as the "American" product and the car company as the "American" corporation has not lost its significance.

As one of the central recurring tropes in American automotive advertising, "Americanness"—whether in the form of Presidents' Day sales,<sup>14</sup> patriotic vehicle names,<sup>15</sup> or even nationally directed apologies or product recalls<sup>16</sup>—is a crucial component of our understanding of how we, as a society, conceive of the corporation as a cultural and socio-legal entity. This Article seeks to challenge this corporate-constructed image of American business and American industry. By focusing on the automotive industry, and particularly on automotive-industry advertising, the Article examines the ways that we—as social actors, legal actors, and (perhaps above all) consumers—understand what it means for a corporation or a corporation's product to be American. In a global

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<sup>12</sup> See, e.g., *Toyota Announces Best Sales Year in Its 46-Year History, Breaks Sales Record for Eighth Year in a Row*, AUTO CHANNEL (Jan. 5, 2004), <http://www.theautochannel.com/news/2004/01/05/175869.html>.

<sup>13</sup> See, e.g., *id.*; *Toyota Sets Sales Record for Sixth Year in a Row*, AUTO CHANNEL (Jan. 3, 2002), <http://www.theautochannel.com/news/2002/01/03/034042.html>.

<sup>14</sup> See Peter DeMarco, *Behind the Presidents' Day Car Sales Push*, BOS. GLOBE, Feb. 11, 2010, [http://www.boston.com/cars/newsandreviews/overdrive/2010/02/behind\\_the\\_presidents\\_day\\_car\\_sales\\_push.html](http://www.boston.com/cars/newsandreviews/overdrive/2010/02/behind_the_presidents_day_car_sales_push.html) (describing Presidents' Day as a holiday for the automotive industry, exemplified by "red, white and blue balloons, salesmen dressed in colonial garb and whatever other gimmicks dealers use to hype the day").

<sup>15</sup> Over the past decade, for instance, the Jeep division of Chrysler supplemented its already frontier-themed product lineup—the Cherokee, the Grand Cherokee, and the Wrangler—with more explicitly "American"-named vehicles—the Patriot and the Liberty. See, e.g., James M. Flammang, *Time to Say Goodbye in Many Languages*, CHI. TRIB., Sept. 30, 2001, § 12, at 23B (discussing the Liberty's arrival on the market); James R. Healey, *2007 Patriot No Wimp in the Wild*, USA TODAY, May 25, 2007, at 5B (reviewing the newly released Patriot).

<sup>16</sup> See, e.g., "Restore" TV Commercial, TOYOTA, <http://www.toyota.com/recall/videos/restore-commercial.html> (last visited Apr. 6, 2012) (showing pictures of early industrial America while describing the importance of the corporation's commitment to consumers and consumer safety).

economy where labor, profits, and environmental effects reach across national borders, what does it mean for a corporation to present the impression of national citizenship? When we “buy American,” are we acting in hopes of affecting our domestic situational forces, or are we simply being manipulated by broader situational forces and allowing corporations to profit by refusing to internalize their externalities, both in the domestic and the global spheres?

Because our legal system ostensibly controls corporate behavior that affects non-shareholders, not by means of corporate law but by means of other regulatory structures,<sup>17</sup> the global nature of many modern corporations would complicate or perhaps even confound any sort of meaningful domestic regulation. In other words, even if we were to concede that corporate law’s macro script—the corporation’s sole responsibility should be to create greater profits for its shareholders—is acceptable (because other areas of law protect non-shareholder interests), how should our understanding of this macro script change in a climate in which those other areas of law may cease to have any clout?

Certainly, stream of commerce doctrine and other jurisdictional rules would allow some suits against corporations that operate in the domestic economy or do business with American consumers.<sup>18</sup> But

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<sup>17</sup> See, e.g., ROBERT CHARLES CLARK, *CORPORATE LAW* 692 (1986) (“These currently available controls include market forces, for example, corporate behavior is powerfully affected by consumer choices; legal mechanisms, for example, consumers can sue under existing tort law and consumer protection laws; and the right to lobby governments to tax and regulate corporations in certain ways.”).

[T]he most efficacious legal mechanisms for protecting the interests of non-shareholder constituencies—or at least all constituencies other than creditors—lie outside of corporate law. For workers, this includes the law of labor contracting, pension law, health and safety law, and antidiscrimination law. For consumers, it includes product safety regulation, warranty law, tort law governing product liability, antitrust law, and mandatory disclosure of product contents and characteristics. For the public at large, it includes environmental law and the law of nuisance and mass torts.

Henry Hansmann & Reinier Kraakman, Essay, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 442 (2001); see also Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1, 57 (2004) (“Relatedly, Allen and Kraakman, in their just-published casebook, note that ‘[t]he laws of taxation, education, environmental and labor policy, product safety, and other issues of health, safety, and welfare’ exist to ‘address the distribution of risks and rewards in society.’” (quoting WILLIAM T. ALLEN & REINIER KRAAKMAN, *COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION* 2 (2003))).

<sup>18</sup> See, e.g., FED. R. CIV. P. 4; *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 108–13 (1987); *Parry v. Ernst Home Ctr. Corp.*, 779 P.2d 659, 662 (Utah 1989). Jurisdictional issues arising in suits against global or foreign corporations have been addressed under the Alien Tort Statute rubric. 28 U.S.C. § 1350 (2006). Recent case law interpreting

does the lack of strictly enforced international regulations on labor practices or environmental impacts allow for a significant degree of immunity for many of these increasingly global corporations? Is the concept of the American corporation governed by democratically created American law ultimately anything more than an illusion in a global economy without shared norms or enforcement mechanisms to regulate behavior or practices?<sup>19</sup>

By examining the ways in which consumable myths of the American corporation interact with the institutions and legal regimes that govern American corporations, this Article argues that the advertised image of the nation-state in the global economy serves as a broad corporate veil. It clouds the consumer's understanding of corporate identity and corporate accountability—a legal fiction that obscures responsibility and deflects blame.

Although this Article deals primarily with the automotive industry, it does not suggest that concepts of Americanness are unique to automobile advertising or that questions of corporate citizenship or national identity are exclusive to the automotive industry. The ideal of America—whether represented by appeals to increased public engagement in liberal democracy, participation in free markets, or simply evocation of national icons and myths—is prevalent in domestic mass culture and modern advertising. This appeal to some collective consciousness that employs specific images, demographic reference points, and images that trigger broader cultural or psychological associations has been a staple of mainstream corporate advertising since at least the end of the Second World War.<sup>20</sup> Indeed, this technique has led to a presentation of the corporation and the American way of life as symbiotic to the point that the corporate form is viewed as crucial to the functioning of the domestic economy and the national way of life.<sup>21</sup>

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the Alien Tort Statute, however, suggests that it might be difficult to use traditional tort principles to address corporate misfeasance abroad or with foreign consequences. See *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 149 (2d Cir. 2010) (rejecting arguments that corporations could be held liable for tortious acts under the Alien Tort Statute), *cert. granted*, 132 S. Ct. 472 (2011).

<sup>19</sup> Here, and throughout, this Article borrows from Ronald Chen and Jon Hanson the concept that corporate regulation is largely illusory, commonly referred to as the “illusion of law.” Chen & Hanson, *supra* note 17, at 3–5.

<sup>20</sup> See COHEN, *supra* note 8, at 299–300; STUART EWEN, PR!: A SOCIAL HISTORY OF SPIN 131–45 (1996); ROLAND MARCHAND, CREATING THE CORPORATE SOUL: THE RISE OF PUBLIC RELATIONS AND CORPORATE IMAGERY IN AMERICAN BIG BUSINESS 88 (1998).

<sup>21</sup> See MARCHAND, *supra* note 20, at 88. Michael Denning has provided a broader discussion of the role of American exceptionalism in the study of mass culture and political economy. See MICHAEL DENNING, CULTURE IN THE AGE OF THREE WORLDS 169–92 (2004);

That being said, certain industries in which domestic manufacturers have long enjoyed a particular market share—whether because of supply, demand, cost, quality, or some other intangible factor—demonstrate a more marked reliance on the corporate advertiser’s nationality in branding and marketing its products. Like the tobacco industry,<sup>22</sup> the automotive industry has generally been dominated by American corporations.<sup>23</sup> Also, with the rise of suburbia and commuter culture, the car, perhaps more than any other modern invention, has become synonymous with and essential to the national way of life.<sup>24</sup> Additionally, and perhaps more importantly for the sake of understanding the effects on consumers and, in turn, the national identity of a corporation, the automotive industry has a storied and tenuous relationship with organized labor, environmental regulation, and products liability tort claims.<sup>25</sup> Finally, considering the recent bailout of the major American automotive corporations, the automotive industry today is a powerful vehicle for problematizing the conflicted public/private nature of the corporate form.<sup>26</sup>

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*see also* SACVAN BERCOVITCH, *THE RITES OF ASSENT: TRANSFORMATIONS IN THE SYMBOLIC CONSTRUCTION OF AMERICA* 353–76 (1993) (observing the lack of consensus on what “Americanness” stands for in contemporary American society and discussing this issue through the lens of American literary criticism).

<sup>22</sup> I refer to the tobacco industry here by way of analogy because it has been a frequent target of critics of corporate irresponsibility and has frequently been addressed in terms of or in conjunction with the role of consumer advertising in American society. *See* Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1422, 1466–1502 (1999) (addressing the role of advertising in the tobacco industry).

<sup>23</sup> *See* STEPHEN COONEY & BRENT D. YACOBUCCI, *U.S. AUTOMOTIVE INDUSTRY: POLICY OVERVIEW AND RECENT HISTORY I* (2007) (“In the immediate post-World War II era, the auto industry was seen as both a pillar and a beneficiary of American growth and economic achievement. . . . Among foreign producers, only Volkswagen and a few luxury and sports cars had even small niches in the U.S. marketplace.”).

<sup>24</sup> *Cf.* Robert J. Antonio & Alessandro Bonanno, *A New Global Capitalism?: From “Americanism and Fordism” to “Americanization-Globalization,”* 41 AM. STUD., Summer/Fall 2000 at 33, 36, *available at* <https://journals.ku.edu/index.php/amerstud/issue/view/252> (click “pdf” link associated with article title) (“While most major capitalist societies were forced to rebuild after the war, U.S. manufacturing firms dominated their huge home market and much of the world market in the 1950s and 1960s. Despite major growth of the service sector, manufacturing still drove the U.S. postwar expansion. Explosive growth of federally subsidized suburbs (single-family homes and highway systems) and of the standard middle-class consumer package (e.g., autos and home appliances) forged a new mass consumer society.”).

<sup>25</sup> *Cf.* RALPH NADER, *UNSAFE AT ANY SPEED: THE DESIGNED-IN DANGERS OF THE AMERICAN AUTOMOBILE* 327, 332 (1965).

<sup>26</sup> *See* David E. Sanger et al., *Bush Aids Detroit, But Hard Choices Wait for Obama*, N.Y. TIMES, Dec. 20, 2008, at A1.



With these overarching issues and questions as a guide, this Article employs the language of situationism<sup>27</sup> and cultural studies<sup>28</sup> to situate the identification of corporate nationality within a broader framework of debates on corporate social responsibility and interrogates the way that we conceive of the American corporation and corporate decision making. The Article will proceed in three Parts that are loosely chronological but will overlap significantly in places.

Part I briefly traces the rise of the automotive industry as the quintessential American industry, linking ideas of Fordism and Second World War-era, national consumer solidarity with the postwar boom in consumerism and public relations.<sup>29</sup>

Part II examines the postwar challenges American automotive corporations faced.<sup>30</sup> This Part addresses the attempts to regulate and check undesirable elements of the industry—from the rise of the United Auto Workers to the work of Ralph Nader—occurring at the same time as the automobile continued to captivate the collective consciousness.<sup>31</sup> Using the “illusion-of-law hypothesis”<sup>32</sup> and the idea of deep capture,<sup>33</sup> this Part begins to describe the conflict between the macro schema that the American corporation is good for American society and the micro schemas that reject the idea of corporate responsibility to American societal concerns.<sup>34</sup>

Finally, Part III addresses the rise of the “foreign” automotive corporation.<sup>35</sup> This Part examines American corporations’ attempts to

<sup>27</sup> See Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 747 (1999); Hanson & Kysar, *supra* note 22, at 1571–72; Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 136–37 (2003).

<sup>28</sup> See DENNING, *supra* note 21, at 148–51; FREDERIC JAMESON, *THE CULTURAL TURN: SELECTED WRITINGS ON THE POSTMODERN 1983–1998*, at 17–20 (1998); RAYMOND WILLIAMS, *PROBLEMS IN MATERIALISM AND CULTURE: SELECTED ESSAYS 177–95* (1980); *THE CULTURES OF GLOBALIZATION*, at xi–xvii (Frederic Jameson & Masao Miyoshi eds., 1998); Richard Maxwell, *Why Culture Works, in CULTURE WORKS: THE POLITICAL ECONOMY OF CULTURE 1*, 1–20 (Richard Maxwell ed., 2001).

<sup>29</sup> See *infra* notes 39–98 and accompanying text.

<sup>30</sup> See *infra* notes 99–161 and accompanying text.

<sup>31</sup> See *infra* notes 99–161 and accompanying text.

<sup>32</sup> See Chen & Hanson, *supra* note 17, at 3–5.

<sup>33</sup> See Hanson & Yosifon, *supra* note 27, at 218–85. Hanson and Yosifon describe “deep capture” as “the disproportionate and self-serving influence that the relatively powerful tend to exert over all the exterior and interior situational features that materially influence the maintenance and extension of that power—including those features that purport to be, and that we experience as, independent, volitional, and benign.” *Id.* at 218.

<sup>34</sup> See *infra* notes 99–161 and accompanying text.

<sup>35</sup> See *infra* notes 162–256 and accompanying text.

protect their turf by invoking patriotism and nationalist themes as well as the efforts of foreign manufacturers to exploit their otherness while appealing to popular domestic sentiments.<sup>36</sup> It also examines the current state of the automotive market and the cultural conceptions of nationality, industry, and responsibility that it has shaped.<sup>37</sup> By describing the illusions of nation, nationality, and national control in the regulatory context, Part III argues that we can view the automotive market as a microcosm of broader global markets, where corporate actors can exploit the façade of the national at the expense of the ultimate third-party beneficiary, non-contractual creditor, and non-share-holding stakeholder: humanity.<sup>38</sup>

## I. CRUISING: THE PUBLIC/PRIVATE MERGER AND THE HEYDAY OF THE AMERICAN AUTOMOTIVE CORPORATION

### A. *Fordist Fantasies*

*The idea of the “American dream,” as reflected in automobile advertising, is an elusive construct. It points to a social disposition, a corpus of ideas and aspirations, variously personal and abstracted, that are in a permanent state of flux.*<sup>39</sup>

*[I]t was relatively easy to rationalise production and labour by a skillful combination of force (destruction of working-class trade unionism on a territorial basis) and persuasion (high wages, various social benefits, extremely subtle ideological and political propoganda) and thus succeed in making the whole life of the nation revolve around production.*<sup>40</sup>

*For years I thought that what was good for our country was good for General Motors, and vice versa.*<sup>41</sup>

Although the patriotic imagery and American themes that permeate contemporary automotive advertising may have become so entrenched that we largely take them for granted as custom or industry language, it is important to recognize that these images and concepts—

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<sup>36</sup> See *infra* notes 162–256 and accompanying text.

<sup>37</sup> See *infra* notes 162–256 and accompanying text.

<sup>38</sup> See *infra* notes 162–256 and accompanying text.

<sup>39</sup> STEVENSON, *supra* note 8, at 240.

<sup>40</sup> GRAMSCI, *supra* note 3, at 285.

<sup>41</sup> *Armed Forces: Engine Charlie*, TIME, Oct. 6, 1961, at 24, 24 (quoting Charlie Wilson, Secretary of Defense under President Dwight Eisenhower).

Chevrolet as “The Heartbeat of America”<sup>42</sup> or Saab as embodying the “State of Independence”<sup>43</sup>—have been carefully crafted and have evolved over decades. Therefore, before confronting the current state of the American automotive industry and the illusory nature of contemporary legal and cultural representations of Americanism, this Part examines and attempts to establish the underlying schemas of Americanism, American regulation, and the closed American economy as they relate to the domestic car market.<sup>44</sup> This Part suggests that, by looking more closely at American car culture and particularly mass cultural and commercial representations, we can better understand the situational market forces that have shaped the evolution of the automotive corporation and society’s attempts to regulate it.<sup>45</sup>

From the “birth” of the Ford Motor Company in 1903,<sup>46</sup> the automotive industry enjoyed a privileged position in the United States as a quintessentially American industry, an industry tied not only to employing the American worker and to providing consumable goods, but also to a democratic empowerment of the individual. It was not sufficient for manufacturers to sell a “luxury” item that might enjoy a stable but limited market.<sup>47</sup> Rather, the automobile was marketed as a component of a democratic society—an entitlement for the working class that was framed in terms that evoked the Jeffersonian promise of “Life, Liberty and the pursuit of Happiness.”<sup>48</sup> As Henry Ford himself stated, “I will build a motor car for the great multitude. . . . [I]t will be so low in price that no man making a good salary will be unable to own one—and enjoy with his family the blessing of hours of pleasure in God’s great open spaces.”<sup>49</sup> Driving was a way for the individual to exercise self-determination and to control freedom of movement and access to

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<sup>42</sup> See Chevrolet, *Heartbeat of America* (1987), YouTube (July 8, 2007), <http://www.youtube.com/watch?v=0Tf4Zz-1jIU&feature=related>; Chevrolet, *1989 Chevrolet—HeartBeat Commercial [Long Ver]*, YouTube (May 26, 2008), [http://www.youtube.com/watch?v=N5FC\\_o10N2w&feature=related](http://www.youtube.com/watch?v=N5FC_o10N2w&feature=related).

<sup>43</sup> See, e.g., Saab USA “Welcome to the State of Independence” Ad, SAAB HIST. (Jan. 25, 2009), <http://www.saabhistory.com/2009/01/25/saab-usa-welcome-to-the-state-of-independence-ad/>.

<sup>44</sup> See *infra* notes 46–98 and accompanying text.

<sup>45</sup> See *infra* notes 46–98 and accompanying text.

<sup>46</sup> See HENRY FORD WITH SAMUEL CROWTHER, *MY LIFE AND WORK* 90 (1922). For a discussion of the concept of the corporation as a person and the idea that a corporation can be born and therefore have a nationality or local/regional identity, see *infra* notes 162–256 and accompanying text, which address the globalization of the American corporation.

<sup>47</sup> See FORD, *supra* note 46, at 72.

<sup>48</sup> See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>49</sup> FORD, *supra* note 46, at 73.

goods, services, and opportunities available across the growing national landscape. The automobile, then, in its initial Fordist conception (or at least in its initial rhetorical packaging) was to be a commodified form of liberty, a man-made vehicle for the American Dream.

Given the close rhetorical nexus between car production and sales and the well-being of the “common man,” the relationship between the automotive corporation and society becomes very important. If the corporation, instead of dealing in steel or iron, is dealing in freedom or is selling something intrinsically linked to a consumer’s independence and identity as an American, then there necessarily must be a close nexus between the corporation and the public interest. According to such a public welfare-oriented view of the corporate form, “Whether the corporate privilege shall be granted or withheld is always a matter of state policy.”<sup>50</sup> Indeed, as Justice Louis Brandeis expressed in his 1933 dissent in *Louis K. Liggett Co. v. Lee*, the metric for determining whether a company deserved the protection of the corporate form would, therefore, be the relationship of the company to “the public welfare.”<sup>51</sup>

Such an attempt to conceptualize the corporation as a public entity (with profits derived from and obligations owed to society as a whole) had significant historical backing.<sup>52</sup> The English corporate form had initially been closely tied to an ideal of publicly beneficial business; this concept was generally accepted in the Early Republic.<sup>53</sup> In the con-

<sup>50</sup> *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 545 (1933) (Brandeis, J., dissenting).

<sup>51</sup> *See id.*

<sup>52</sup> *See, e.g.,* *Charitable Corp. v. Sutton*, (1742) 2 Atk. 400 (Ch.) 406 (describing the King’s purpose in granting a particular charter as an attempt “to assist poor persons with sums of money by way of loan [and] to prevent their falling unto [sic] the hands of pawn-brokers”); Douglas Arner, *Development of the American Law of Corporations to 1832*, 55 *SMU L. REV.* 23, 26 (2002) (explaining that early mercantilist guilds in England had been required to demonstrate the importance of their business to the public in order to enjoy the benefits of something akin to incorporation). Morton Horwitz has provided a more detailed evolution of the history of the corporate form in American jurisprudence. *See* MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 65–107 (1992).

<sup>53</sup> *See* Arner, *supra* note 52, at 26. Even in the late nineteenth century, the U.S. Supreme Court referred to a general duty of private corporations to act in ways that served the public interest. *See Munn v. Illinois*, 94 U.S. 113, 126 (1877).

When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.

text of the 1930s, however, when *Liggelt* was decided, this public/private debate had a specific political valence. To enact regulatory reforms and expand state power in reaction to the Great Depression, President Franklin D. Roosevelt and his supporters needed to legitimize regulatory authority and diminish claims that governmental intervention in business deprived citizens of their rights.<sup>54</sup> Although frequently framed in terms of debates about private property<sup>55</sup> and freedom of contract,<sup>56</sup> specifically in the realm of employment and workplace regulation,<sup>57</sup> the vernacular of pro–New Deal legal realists and their concern for the public effects of private law infiltrated the corporate context.<sup>58</sup> There was a significant academic and judicial debate between those who believed that the corporation was strictly a private entity whose exclusive responsibility was to make a profit for the benefit of its shareholders<sup>59</sup> and those who believed that the corporation was ultimately a public entity that, by its existence, implicated the public interest and had broader social responsibilities.<sup>60</sup>

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<sup>54</sup> See HORWITZ, *supra* note 52, at 213–47; Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 13 (1927) (challenging the view that private property did not have a public effect in structuring personal and political power relations); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 474–75 (1923) (objecting to the idea that markets are free and non-coercive and that, as a result, private transactions do not have broader public consequences).

<sup>55</sup> See, e.g., Cohen, *supra* note 54, at 13; Hale, *supra* note 54, at 474–75.

<sup>56</sup> Compare *Adkins v. Children's Hosp.*, 261 U.S. 525, 554–62 (1923) (striking a state minimum wage law as interfering with freedom of contract as protected by the Fifth Amendment), with *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 397–400 (1937) (overturning *Adkins* and upholding a Washington statute providing minimum wage protections for women).

<sup>57</sup> Compare *Lochner v. New York*, 198 U.S. 45, 64–65 (1905) (holding that a New York law that imposed restrictions on bakers' work hours was unconstitutional and that the Fourteenth Amendment guaranteed a substantive due process right to freedom of contract), with *W. Coast Hotel*, 300 U.S. at 397–400 (denying that the Constitution guaranteed freedom of contract).

<sup>58</sup> Cf. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809–12 (1935) (critiquing the reasoning in *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915, 918 (N.Y. 1917) and *Bank of America v. Whitney Central National Bank*, 261 U.S. 171, 173 (1923) as demonstrating a methodological preoccupation with “transcendental nonsense” at the expense of logic or actual analysis of the facts—the concrete effects of the law).

<sup>59</sup> See, e.g., ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 293 (Transaction Publishers 1991) (1932). See generally A.A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931) (emphasizing the corporation's obligations to shareholders); A.A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932) (responding to critics of the shareholder-primacy conception of corporate responsibility).

<sup>60</sup> See, e.g., E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932) (arguing that corporations owed a duty to shareholders as well as to

An alternative view of the role of the corporation in society—often referred to as Fordism—relied on an understanding of the domestic economy as a closed system.<sup>61</sup> In other words, Ford’s ideal that “no man making a good salary [would] be unable to own” a car can be seen as a response to concerns that the automotive industry would be inherently limited like other markets for luxury goods;<sup>62</sup> unless there were consumers, there could be no profits. The corporation’s existence and profitability would, therefore, be reliant not only on the state as a vehicle of legitimation,<sup>63</sup> but also on the existence of a consumer class that would provide a steady source of demand. Thus, the corporation was vital to the American public because it provided goods and jobs. But at the same time, the public was vital to the corporation because it provided the actual revenue stream that drove profits. Whether we view the corporation positively as an outgrowth of society or negatively as an uncontested sovereign (epitomized by the specter of the “company store” or the forceful exercise of managerial hegemony)<sup>64</sup>, the public conception meshes well with an understanding that “what was good for our country was good for General Motors, and vice versa.”<sup>65</sup>

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stakeholders generally, often including the public); cf. Cohen, *supra* note 54, at 13 (arguing that property rights transcend a public/private distinction because they implicate fundamental issues of public social ordering and existence). Other scholars have discussed this debate over the scope of corporate responsibility in greater detail. See LAWRENCE E. MITCHELL, *CORPORATE IRRESPONSIBILITY: AMERICA’S NEWEST EXPORT* 186 (2001); Chen & Hanson, *supra* note 17, at 33–37; C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L. REV. 77, 82–99 (2002).

At least one other group, oddly enough, also agreed that corporations wielded great power across broad swathes [sic] of American life: corporate leaders. As in the 1920s, so in the postwar era, renewed corporate success led many business executives back to the ideal of business statesmanship. At least in public pronouncements, few corporate leaders failed to make a nod to their firms’ “social responsibilities.”

Chen & Hanson, *supra* note 17, at 36 (quoting Wells, *supra*, at 100).

<sup>61</sup> Cf. GRAMSCI, *supra* note 3, at 285.

<sup>62</sup> See FORD, *supra* note 46, at 72–74 (discussing Ford’s ideal of the automotive corporation in contrast to fears about the limited market and limited potential for profitability).

<sup>63</sup> See, e.g., *Liggett*, 288 U.S. at 545 (Brandeis, J., dissenting); cf. *Shelley v. Kraemer*, 334 U.S. 1, 18–23 (1948) (holding that the state’s enforcement of an otherwise private restrictive covenant was public and satisfied the state action doctrine once a homeowner sought legal recognition of the private agreement); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 747–50 (1917) (distinguishing between a right and a privilege in the sense of property ownership based on an owner’s ability to call on the state to intercede).

<sup>64</sup> Cf. GRAMSCI, *supra* note 3, at 285–86.

<sup>65</sup> See *Armed Forces: Engine Charlie*, *supra* note 41.

Indeed, throughout the 1930s, this narrative of corporate-individual symbiosis was reflected in media ranging from General Motors (GM) sponsored magazines<sup>66</sup> to National Association of Manufacturers propaganda films.<sup>67</sup> In an era when appeals to labor and populist pro-worker sentiment reached a peak of cultural acceptability and resonance,<sup>68</sup> GM's public relations gurus became "more and more obsessed with the idea that there is a vast neglected area for effective propaganda [o]n behalf of the capitalistic system—along the lines of something low-brow instead of high-brow."<sup>69</sup> This ideological shift toward appeals to the common man can be seen most strikingly in GM's decision to advertise in the official journal of the American Federation of Labor.<sup>70</sup> "What happens to General Motors happens to me!," proclaimed one of the advertisements, before describing the importance of the corporation in situationist terms:

What happens to General Motors happens to more people than you can call to mind. For General Motors is a symbol of America at work, and of the American system whereby the cooperation of all promotes the welfare and prosperity of the whole nation. Think of General Motors—and you must think in terms of many hundreds of thousands of Americans who find occupation in supplying raw materials, building General Motors products, and servicing those products after sale.<sup>71</sup>

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<sup>66</sup> See MARCHAND, *supra* note 20, at 240–41. The magazine *GM Folks* mimicked the format of *Life Magazine*, but focused exclusively on GM employees. *Id.* As one commentator observes, "The role of each of the close-ups of individual employees was to contribute to one, central conclusion—that, 'all told,' the company was made up of ordinary American folks." *Id.* at 241.

<sup>67</sup> The film *Your Town*, which the National Association of Manufacturers produced in 1939, for instance, reminded workers and consumers that "every man, woman, and child had a stake in the success of [the] factory." EWEN, *supra* note 20, at 319–20.

<sup>68</sup> See MICHAEL DENNING, *THE CULTURAL FRONT: THE LABORING OF AMERICAN CULTURE IN THE TWENTIETH CENTURY*, at xvi–xx (1998). In his discussion of mass culture in Depression-era America, Michael Denning describes the cultural trends and transformations that accompanied the social and political workers' movements of the 1930s as a "laboring" of culture. *See id.* As Denning explains, this usage "refers to the pervasive use of 'labor' and its synonyms in the rhetoric of the period," as well as to "the increased influence on and participation of working-class Americans in the world of culture and the arts." *Id.* at xvi–xvii; *see also* Benjamin Levin, *Blue-Collar Crime: Conspiracy, Organized Labor, and the Anti-Union Civil RICO Claim*, 75 ALB. L. REV. 559, 586–604 (2012).

<sup>69</sup> MARCHAND, *supra* note 20, at 239 (quoting a GM sales manager).

<sup>70</sup> *See id.* at 238.

<sup>71</sup> *Id.* The rest of the advertisement lays out in greater detail the case for corporate success as an unmitigated public good.

GM executives might have vehemently opposed the legal implications of classifying the corporation as a public entity, but they had no qualms about adopting the lexicon of the New Deal and progressive, labor politics in branding and selling their automobiles and corporate culture.

Regardless of whether we choose to read the melding of the corporation and the American psyche in advertising and public relations as simply a ploy by a private corporation to exploit consumers or as a genuine attempt to create a public (or at least semi-public) commercial entity that was symbiotic with society as a whole, the rhetorical association of automobile sales and Americanness is undeniable.

In the 1920s, before the Second World War honed and reshaped the United States into a true consumer culture,<sup>72</sup> writer and advertising executive Bruce Barton crafted a ubiquitous series of advertisements evoking nationalist iconography and symbolism for GM in an effort to create a “corporate consciousness” and a perception of a “corporate family.”<sup>73</sup> For instance, with the headline “Making the nation a neighborhood” and an illustration of George Washington on horseback, a two-page GM magazine advertisement from 1923 evokes colonial concerns about “Distance” in explaining the higher calling that Chevrolet automobiles serve.<sup>74</sup> According to Barton’s logic, the corporation, by an odd, indirect analogy, becomes a quasi-governmental entity or at least a crucial, unifying social force. That is, the diffuseness of colonial society could only be overcome by building roads that, in turn, ultimately required a federal government. Similarly, at least according to GM, to take advantage of these roads and “mak[e] the nation a neighborhood,” contemporary society required “economical transportation” that, in turn, the automotive corporation could provide.<sup>75</sup>

Here in Detroit, we who work in the automobile industry see train after train of raw materials rolling constantly through the factory gates and think of them only as the stuff from which cars are made.

They are not only that. They represent the work of hundreds of thousands of men and women in all sorts of industry in every state of the union. Farmers, steel puddlers, glass makers, leather-workers, miners, lumbermen—a whole cross-section of working America shares in the creation of a General Motors car.

When business is good for this corporation, business is good for them. When cars stream off the assembly lines, orders stream forth for more raw materials to keep them busy earning good money.

*Id.*

<sup>72</sup> See COHEN, *supra* note 8, at 112–33.

<sup>73</sup> MARCHAND, *supra* note 20, at 130–48.

<sup>74</sup> *Id.* at 139.

<sup>75</sup> *Id.*



This parallel to the government of the Early Republic is striking as a legitimating schema in part because of an implicit understanding of and rebuttal to the potential opposition to the large, powerful, and impersonal governing form. Like the federal government, the corporation as a powerful entity clearly made some people uncomfortable and could easily be seen as impeding the potential for American society's direct democratic functioning.<sup>76</sup> By linking the corporate form to Washington, however, GM was able to suggest that its very existence was critical to the realization of the American dreams of community, ownership, and independence. It might be overstating the point to argue that Barton was suggesting that GM and the federal government should be viewed as parts of the same extended corporate (or perhaps capitalist) family. But, it certainly appears that the gist of the GM campaign was that the corporate family was essential to the achievement of the State's fundamental purpose of providing and protecting freedom.

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<sup>76</sup> Shareholders might be able to vote on certain decisions made by the corporate board, but that universe of shareholders was limited and depended on the wealth and savvy necessary to purchase stock. Therefore, while corporate decision making for publicly traded corporations—at least in theory—was still subject to a degree of public accountability, the right to hold corporate leadership accountable was a much more exclusively held right than the general right to vote. On the fear of the corporation's potential for distorting democracy, see *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 509 (2007) (Souter, J., dissenting), which outlines the historical objections to corporate involvement in American elections for political office. See also *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990) (discussing “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas”); Chen & Hanson, *supra* note 17, at 135–45 (discussing historical fears about over-broad corporate power as deleterious to American society); Timothy K. Kuhner, *The Separation of Business and State*, 95 CALIF. L. REV. 2353, 2366–68 (2007) (describing the history of concerns about and hostility towards corporate interests in politics); Letter from Thomas Jefferson to George Logan (Nov. 12, 1816), in 12 THE WORKS OF THOMAS JEFFERSON 42, 44 (Paul Leicester Ford ed., 1905) (“I hope we shall take warning from the example and crush in its birth the aristocracy of our monied [sic] corporations which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country.”); Letter from Abraham Lincoln to William F. Elkins (Nov. 21, 1864), in 2 EMANUEL HERTZ, ABRAHAM LINCOLN: A NEW PORTRAIT 954, 954–55 (1931) (“[C]orporations have been enthroned and an era of corruption in high places will follow, and the money power of the country will endeavor to prolong its reign by working upon the prejudices of the people until all wealth is aggregated in a few hands, and the Republic is destroyed.”).

### B. *The Best Years of Their Lives*

*Americanism is looked upon not patriotically, as a personal attachment, but rather as a highly attenuated, conceptualized, platonic, impersonal attraction toward a system of ideas, a solemn assent to a handful of final notions—democracy, liberty, opportunity, to all of which the American adheres rationalistically . . . because it does him good, because it gives him work, because, so he thinks, it guarantees him happiness.<sup>77</sup>*

*To bring this dream into line, for a national emergency, and adapt it to the exigencies of federal finance is an American miracle of imposing . . . proportions.<sup>78</sup>*

The massive industrialization and production boom that defined the homefront during the Second World War solidified the rhetorical schema of the automobile as central to the American experience and the success of the American automotive corporation as essential to maintaining the national way of life. The metascript of automotive industrialization as vital to the national well-being that GM employed began to seep into the realm of official, government-funded propaganda,<sup>79</sup> marking a rhetorical merger of public and private in the public understanding of American industry that would become characteristic of this period. As the result of broader social and political forces, the formation of legal rules regarding the governance, privileges, and responsibilities of the corporate form should not be addressed in a vacuum. That is, in order to appreciate the significance and evaluate the appropriateness of the decisions corporate lawmakers made, it is important to address these legal decisions as “imbricated” in a broader cultural and social climate,<sup>80</sup> a climate shaped by a set of publicly disseminated myths and assumptions about the corporate form and its place in the U.S. political economy.

Using this understanding of law and culture as mutually constitutive,<sup>81</sup> we can gain substantial insight into the shaping of the public un-

<sup>77</sup> Samson, *supra* note 2, at 426.

<sup>78</sup> E.B. White, *Bond Rally*, in 1 REPORTING WORLD WAR II: AMERICAN JOURNALISM 1938–1944, at 359, 363 (1995).

<sup>79</sup> See, e.g., AUTOBIOGRAPHY OF A JEEP (United Films 1943), available at [http://www.archive.org/details/autobiography\\_of\\_a\\_jeep](http://www.archive.org/details/autobiography_of_a_jeep).

<sup>80</sup> See Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 69–70 (1984).

<sup>81</sup> Many scholars have adopted analogous but varied methodological treatments of law and social or cultural forces as mutually constitutive. See, e.g., JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 10–11, 65 (1983); GARY MINDA, BOYCOTT IN AMERICA: HOW IMAGINATION AND IDEOLOGY SHAPE THE LEGAL MIND 52–54 (1999); RICH-

derstanding of the American corporation by examining the mass cultural texts that reflected and were reflected in the formal legal treatments of American industry. Indeed, when viewed through the lens of post-Cold War, Western economic and political ideologies, much of the mass culture of the 1940s homefront is striking in its representations of industry and collectivism. With their unabashed celebrations of the collective action of Americans,<sup>82</sup> renunciation of class distinctions,<sup>83</sup> and romanticized scenes of factory life and industrial production,<sup>84</sup> many of the films of this period evince a sensibility not dissimilar to Soviet-era socialist realism.<sup>85</sup> The trope of the privately produced automobile as part and parcel of the needs and wants of the American people was therefore easily integrated into the wartime narratives.

Strikingly, in the propaganda film, *Autobiography of a Jeep*, Barton's mythic revisionism of America as a nation defined by roads (and the cars that drove on them), which had been used before the war as a blatantly commercial device, was incorporated into the official government narrative of patriotism and civic responsibility.<sup>86</sup> "I come from a country of roads," the narrator states over panoramic views of America.<sup>87</sup> The narrator further proclaims that "because of the automobile, Americans who live a hundred miles from each other are as close

ARD D. PARKER, "HERE, THE PEOPLE RULE": A CONSTITUTIONAL POPULIST MANIFESTO 53–115 (1994); E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 258–69 (1975); CHRISTOPHER L. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC, at xii–xiii, 231 (1993); Peter Gabel, *The Mass Psychology of the New Federalism: How the Burger Court's Political Imagery Legitimizes the Privatization of Everyday Life*, 52 GEO. WASH. L. REV. 263, 268–70 (1984); Levin, *supra* note 68, at 568–72.

<sup>82</sup> See, e.g., *IT'S A WONDERFUL LIFE* (Liberty Films 1946) [hereinafter *WONDERFUL LIFE*] (focusing on the importance of friendship and community to the American way of life); *LIFEBOAT* (Twentieth Century Fox Film Corporation 1944) (telling the story of a group of shipwrecked Americans of assorted classes and backgrounds who unite to survive and kill an enemy soldier).

<sup>83</sup> See, e.g., *THE BEST YEARS OF OUR LIVES* (Samuel Goldwyn Company 1946) [hereinafter *BEST YEARS*] (following the lives of three soldiers from vastly different social backgrounds who bond over their shared service); *SABOTEUR* (Universal Pictures 1942) (featuring a fascist-sympathizer villain who framed and murdered working-class Americans, whom he refers to as "the great masses, the moron millions," and who refers to totalitarianism as nothing more than a "more profitable type of government").

<sup>84</sup> See, e.g., *SWING SHIFT MAISIE* (Metro-Goldwyn-Mayer 1943) (focusing on female workers on the homefront); *THIRTY SECONDS OVER TOKYO* (Metro-Goldwyn-Mayer 1944) (emphasizing the mechanical prowess of the bomber plane).

<sup>85</sup> The paean to the collective, the worker, and the industrial product was a central component of Soviet, socialist realist film-making. See, e.g., *BALLAD OF A SOLDIER* (Mosfilm 1959); *THE BATTLESHIP POTEMKIN* (Goskino 1925); *EARTH* (VUFKU 1930); *THE FALL OF BERLIN* (Mosfilm 1949); *OCTOBER* (Sovkino 1927); *STRIKE* (Goskino 1925).

<sup>86</sup> See *AUTOBIOGRAPHY OF A JEEP*, *supra* note 79.

<sup>87</sup> *Id.*

neighbors as the man next door.”<sup>88</sup> As the film closes with the narrator proclaiming over shots of rows of Jeeps transporting soldiers that “the Jeep is here to stay,” this merger of the private and public, or at least the ambiguity of the distinction, becomes apparent. Are we to think that the Jeep—a tool in the war effort—will continue to be manufactured as long as there is a war to fight, or that the Jeep—an exciting new automobile model—will be there for consumers when the war finally ends?

During wartime, corporate advertisers eagerly embraced the government narrative of the automobile as central to America’s success and identity. In fact, automakers’ wartime advertising heavily emphasized the link between buying American and supporting the war effort.<sup>89</sup> In magazine and newspaper spreads that featured a bald eagle perched above the words “To serve the vital needs of today’s America!,” Oldsmobile advertised its “Hydra-Matic Drive,” a purportedly fuel-efficient feature, as a way to “Help[] you save America’s gasoline.”<sup>90</sup> Just like the soldiers overseas, American consumers could fight the good fight: “‘Use less gas!’ says Uncle Sam. ‘Drive the Hydra-Matic Way!’ is Oldsmobile’s answer.”<sup>91</sup> Evoking an interesting blend of dispositionist and situationist rhetoric,<sup>92</sup> the Oldsmobile campaigns emphasized the

<sup>88</sup> *Id.*

<sup>89</sup> See, e.g., SWAN, *supra* note 8, at 67–70.

<sup>90</sup> *Id.* at 69.

<sup>91</sup> *Id.*

<sup>92</sup> See Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 6–34 (2004). See generally Hanson & Yosifon, *supra* note 27 (describing the dichotomy between dispositionism and situationism—two conflicting theories of human decision making). Hanson and Yosifon contend that much of legal thought and political discourse has been shaped by a view of the human as a dispositionist actor—that is, the belief that individual decision making is based on the individual’s preferences and dispositional characteristics. See Hanson & Yosifon, *supra*, at 6–34; see also Laura R. Bradford, *Parody and Perception: Using Cognitive Research to Expand Fair Use in Copyright*, 46 B.C. L. REV. 705, 710 (2005) (discussing how cognitive and behavioral research has been used successfully in the past to reform contract, tort, and property law). Under this theory, for instance, a person who tortures another presumably does so because of some aspect of character or set of personal preferences that would lead that person to favor torturing over not torturing. See Hanson & Yosifon, *supra*, at 7–8 (discussing the behavioral work of researcher Stanley Milgram).

Hanson and Yosifon also argue, however, that the dispositionist understanding of human decision making demonstrates a fundamental attribution error. Hanson & Yosifon, *supra* note 27, at 136–37. They argue that the mind sciences have disproven the dispositionist model and that decision making should be understood as reflecting a situationist framework. See *id.* As opposed to personal preferences, therefore, it is important to focus on broader social, economic, cultural, and political factors that make up *the situation* that really drives the decisionmaker. See *id.*

situational constraints of the wartime economy as limits on consumers (gas was expensive and needed to be conserved) and also made a powerful dispositionist statement that consumers could fight the war at home by exercising their purchasing powers.<sup>93</sup>

Oldsmobile was far from alone in mimicking the language of public propaganda for private ends. Mercury advertisements juxtaposed bright, red convertibles with American bombers, claiming, “Like Uncle Sam’s Newest Planes[,] Mercury Has More Power Per Pound!”<sup>94</sup> Chevrolet, for its part, boasted of building “[h]undreds of thousands of military trucks aiding our fighting men everywhere . . .”<sup>95</sup> And Buick advertisements from 1941 featured cars against a backdrop of war bond slogans,<sup>96</sup> creating a strong visual association between buying American cars and buying into the American war effort. Supporting the American corporation by purchasing an automobile made in Michigan, therefore, not only supported the corporate shareholders, managers, or even workers; but also, through the lens of these corporate rhetorical schemas, purchasing an American automobile was an act of solidarity with the soldiers, the war machine, and ultimately democracy itself.

Within this framing of the automotive corporation as inextricably tied to the American economy and American democratic culture, the next Part traces the challenges to this narrative of corporate/national symbiosis posed by the “Big Scare”<sup>97</sup> of muckraking, consumer activism,

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Such an understanding of the decision-making process—especially when viewed in the context of legal or economic decisions (contracting, purchasing, etc.)—flows naturally from the New Deal-era realists’ concern with background rules as essential to understanding how legal rules function. *See, e.g., supra* note 54. This Article, therefore, employs the critical realist approach to argue for a broader, situational understanding of how corporate national identity is constructed.

<sup>93</sup> *See* SWAN, *supra* note 8, at 69. Using the situationist framework, we can identify this juxtaposition as a powerful profit-making mechanism. *See* Hanson & Yosifon, *supra* note 27, at 197–98. By emphasizing the situational constraints on corporate manufacturers (e.g., the price of goods must go up because the war causes shortages) and focusing on the dispositionist nature of the consumer’s decision making (e.g., you should buy American because you prefer democracy to totalitarianism), corporate advertisers were able to tap into a powerful marketing device. *See id.* Such a framing shifts the burden for the proper functioning of the economy (and, by extension, of the national economy and the war) from those with substantial power to effect change and control prices—major corporations—to those who could more easily be made to feel pressure, both financially and personally—the consumers. *See id.*

<sup>94</sup> SWAN, *supra* note 8, at 69.

<sup>95</sup> *Id.* at 70.

<sup>96</sup> *Id.* at 67.

<sup>97</sup> I am borrowing the term “Big Scare” to refer to an era of challenges to the general acceptance of corporate hegemony. *See* Hanson & Kysar, *supra* note 22, at 1484–85 (refer-

labor regulation, and other assaults on the ostensibly “free market,” shareholder-primacy approach to corporate law.<sup>98</sup> It will further examine the ways in which corporate rejection of public, legal responsibility contradicts these corporations’ continued use of commercial narratives of patriotism to combat foreign incursion in the domestic market.

## II. “POST WAR BREAKDOWN”: CHALLENGES TO MARKET SECURITY AND MARKET SUPREMACY

### A. *Fork in the Road: Separating Public Costs from Private Benefits*

*We view with real concern the warmth with which the Administration has embraced the multinational corporations as being “good for America.” These international runaway firms, however, don’t have the same sense of warmth for America. Their heart is the profit dollar. These companies insist they are not American . . . .*<sup>99</sup>

*Morality has to do with people. If an action is viewed primarily from the perspective of its effect on people, it is put into the moral realm. Business in America, however, is impersonal.*

. . . .

*There wasn’t a man in top GM management who had anything to do with the Corvair who would purposely build a car that he knew would hurt or kill people. But, as part of a management team pushing for increased sales and profits, each gave his approval to decisions which produced the car in the face of the serious doubts that were raised about its safety . . . .*<sup>100</sup>

The reaction of the automobile industry to increasing public concerns about the need for regulation and the legal theories American corporations advanced, rejecting the call for public responsibility blatantly cut against the narrative of industry and public as mutually invested and symbiotic entities. Although corporations implicitly ap-

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ring to internal corporate memos that term a period of public concerns about cigarette advertising and the danger of cigarettes as the “Big Scare”).

<sup>98</sup> See *infra* notes 99–161 and accompanying text.

<sup>99</sup> AFL-CIO, THE AFL-CIO PLATFORM PROPOSALS PRESENTED TO THE DEMOCRATIC AND REPUBLICAN NATIONAL CONVENTIONS 23 (1972). For the inspiration for the Part heading, see *Post War Breakout*, WOODY GUTHRIE, [http://woodyguthrie.org/Lyrics/Postwar\\_Breakout.htm](http://woodyguthrie.org/Lyrics/Postwar_Breakout.htm) (last visited Apr. 6, 2012) (lyrics).

<sup>100</sup> John Z. De Lorean & J. Patrick Wright, *How Moral Men Make Immoral Decisions—A Look Inside GM*, in THE BIG BUSINESS READER: ESSAYS ON CORPORATE AMERICA 36, 38, 43 (Mark Green & Robert Massie, Jr. eds., 1980).

pealed to a shared set of values through their evocation of Americanness, in the legal and political arenas, they largely disregarded such values in favor of a profit motive that was purely private.<sup>101</sup>

As an instructive example of the tension between the meta script of corporate advertising that casts the interests of the corporation as the interests of America and the macro script of corporate law that elevates shareholders' interests above all others, this Part first looks to the 1919 Michigan Supreme Court case *Dodge v. Ford*.<sup>102</sup> In *Dodge*, the Dodge brothers (Ford's future competitors) sued the Ford Motor Company as aggrieved shareholders, demanding that it declare a dividend payout based on an increase in the corporation's profits.<sup>103</sup> The Dodges claimed that Henry Ford, by attempting to drop automobile prices and failing to work directly to maximize profits available to shareholders, was attempting to run the corporation "as a semi-almshouse institution and not as a business institution."<sup>104</sup>

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<sup>101</sup> There is substantial literature suggesting that a certain amount of corporate car advertising that began around the time of the Second World War was, in fact, the product of a whole new level of engagement with psychological and demographic theories on the public relations front. See, e.g., COHEN, *supra* note 8, at 294–98 (discussing the practices of planned obsolescence and market fragmentation as enhanced by sociological and economic studies), 298–301 (analyzing shifts in marketing strategy as a reflection of trends in social scientific study); MARCHAND, *supra* note 20, at 229–45 (discussing GM's attempts to appeal to the psyche of the "working man"); THE CENTURY OF THE SELF (BBC Four 2002) (discussing the contribution of psychological appeals in advertising and marketing to the public relations world).

That the deception of consumers is intentional, however, is not essential to the arguments proffered in this Article. Indeed, as an extension of the deep capture and illusion of law hypotheses, this Article is much more concerned with the current state of the law, the corporation, and the public's understanding of how these concepts interact than it is with determining or assigning intentionality in the process of shaping these societal and cultural understandings. Thus, the issue in determining how to restructure or reconceptualize corporate law is not which (if any) corporate or commercial entities have acted in bad faith or have harmed society by privileging profits over the public interest. Rather, the goal of this Article is to argue that, assuming such a broad-reaching illusion of law and regulation *does* exist, corporate scholars should be willing to pierce this broader veil of corporate law and examine the underlying structures that have led to the disconnect between the interests that the public believes the law advances and those that the law actually advances.

<sup>102</sup> 170 N.W. 668, 685 (Mich. 1919).

<sup>103</sup> See *id.* at 683.

<sup>104</sup> *Id.* Interestingly, in the context of Second World War-era mass culture, this distinction between the corporation as profit driven and the corporation as altruistic was a trope that was frequently invoked as a means of distinguishing cultural villains from heroes. See, e.g., BEST YEARS, *supra* note 83 (featuring a conflict between board members of a bank in which the protagonist argues for giving a loan to a fellow veteran while other members oppose it as a matter of fiscal policy); WONDERFUL LIFE, *supra* note 82 (contrasting George Bailey, the director of a savings and loan company who gives high-risk loans and even donates his own money to allow fellow townspeople to afford homes, with Henry F. Potter,

In their complaint, the Dodges explicitly cited the sort of language that Ford employed with consumers in presenting his corporation as an institution concerned with the well-being of the public, not just the bottom line.<sup>105</sup> Rather than being rooted in a legitimate (profit-motivated) business judgment, the Dodges argued that Henry Ford's decision not to declare dividends was a direct result of his "ambition . . . to employ still more men, to spread the benefits of this industrial system to the greatest possible number, [and] to help them build up their lives and their homes."<sup>106</sup> In response, Ford argued that "[a]lthough a manufac-

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the stereotypical soulless businessperson who objects to the way Bailey runs his company, at one point asking, "Are you running a business or a *charity ward*?"). The negative framing of the profit motive in popular culture takes on striking significance, however, when we consider that the legal system (purportedly a set of social and economic rules derived from the will of the people) has specifically codified the profit motive as business's only acceptable purpose. If popular films like *The Best Years of Our Lives* and *It's a Wonderful Life* accurately reflected the public's understanding of society's operation, then we can also conclude that the structure of corporate law expressly forbade a corporation from behaving as the public thought it "should." This tension between scripts will be discussed further in conjunction with the illusion-of-law hypothesis. See *infra* notes 111–114 and accompanying text.

<sup>105</sup> See *Dodge*, 170 N.W. at 683.

<sup>106</sup> *Id.* (quoting Henry Ford, President of Ford Motor Company as excerpted in the Dodges' brief). Based on the critique of Fordism as an entrenchment of existing class distinctions and socioeconomic hierarchies discussed in Section I.A., we could argue (or perhaps Ford could have argued) that, by reinvesting in the business and spreading the benefits, Ford, in fact, had a profit motive. That is, in order to maintain a capitalist, consumer economy, it is necessary to have consumers. Allowing workers to have higher wages or shorter work days simply strengthens the markets for luxury goods and helps to expand the market for leisure-time activities. Cf. LIZABETH COHEN, *MAKING A NEW DEAL: INDUSTRIAL WORKERS IN CHICAGO, 1919–1939*, at 100 (1990) ("The shorter work day and week would not only make workmen more content but also give them more time . . . [to] develop new consumer desires. Manufacturing companies in turn would benefit from the increased demand for products generated by this mass market.").

Far from marking the places outside capital's empire, culture was itself an economic realm, encompassing the mass media, advertising, and the production and distribution of knowledge. Moreover, it came to signify not only the cultural industries and state cultural apparatuses but the forms of working-class subsistence and consumption, both the goods and services supplied by the welfare state or purchased in the market, and the time of leisure and social reproduction outside the working day.

DENNING, *supra* note 21, at 80; *id.* at 93 ("This accumulated mental labor appears to be the property of separate classes, leisured or cultured or intellectual classes, or of a separate time . . . hence the centrality of the struggles for the eight-hour day, the weekend, the paid vacation, and the rights to adolescent education and adult retirement.").

I reference a Gramscian reading of the role of the cultural industry as a supplement to the non-leisure labor market not to suggest that *Dodge* was wrongly decided as a matter of shareholder primacy, nor that this sort of complex analysis of the interaction of leisure and non-leisure markets provided the real impetus for the board's decision not to declare a



turing 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>107</sup> Ultimately, though, the Michigan Supreme Court upheld the supremacy of the corporation's interest in maximizing shareholder profits over all other concerns and rejected Ford's ideal of the corporation as a beneficent (paternalistic), socio-legal entity.<sup>108</sup>

What is remarkable about the opinion in *Dodge*, then, when viewed through the lens of corporate culture's advertising schemas discussed in the previous Part, is not just that it represents the most direct judicial statement of a manager's duty to maximize shareholder profits.<sup>109</sup> Rather, *Dodge* serves as a powerful judicial declaration that corporations simply could not do exactly what they proudly professed to consumers that they were doing. Although a corporation could claim that, by purchasing its products, consumers were buying into their own well-being and the well-being of their nation, corporate managers were forbidden—under the holding of *Dodge*—from practicing what they preached and elevating broader social concerns above immediate shareholder profits.<sup>110</sup>

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dividend. See *supra* note 3. Rather, I mean to suggest that the view that shareholder primacy is essential to the acquisition of profit in a market system disregards the ways in which short-term and long-term or direct and indirect gains actually operate in our economy. It is completely plausible, for instance, that the use of a Fordist model that sacrifices short-term profits (in the form of dividends) for long-term profits in the form of an eventual, thick market for luxury automobiles will ultimately produce a more affluent share-holding class than will a system that seeks to exploit resources (in this case labor) to achieve the greatest immediate capital return.

<sup>107</sup> See *Dodge*, 170 N.W. at 684. In contrast, the Supreme Court of New Jersey stated, in the 1953 case *A.P. Smith Manufacturing Co. v. Barlow*, that ostensibly non-profit-driven motives can be essential to a corporation's profitable operation. 98 A.2d 581, 590 (N.J. 1953). In holding that a donation to Princeton University was an acceptable use of corporate funds, the court stated that "[m]ore and more [corporations] have come to recognize that their salvation rests upon sound economic and social environment which in turn rests in no insignificant part upon free and vigorous nongovernmental institutions of learning." *Id.* at 586.

<sup>108</sup> See *Dodge*, 170 N.W. at 685.

<sup>109</sup> See, e.g., Stephen M. Bainbridge, *Executive Compensation: Who Decides?*, 83 TEX. L. REV. 1615, 1616 (2005); Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385, 1418 (2008); Mae Kuykendall, *No Imagination: The Marginal Role of Narrative in Corporate Law*, 55 BUFF. L. REV. 537, 571–72 (2007).

<sup>110</sup> This critique of the tension between the legal macro script of profit maximization and the cultural meta script of corporate/social interdependence is not intended to suggest that corporate philanthropic activity should be a normative goal of corporate law or that incentivizing corporate giving should be the focus of legislative reform efforts. The anti-Fordist stance, see *supra* Section IA and note 106, provides a compelling case for why,

When read as a counterpoint to the public/private merger in corporate advertising narratives (addressed in Part I), *Dodge* can be seen as a powerful statement of the illusion-of-law hypothesis.<sup>111</sup> Essential to the hypothesis is the idea of conflicts between schemas (or “incoherence”) as reflecting false expectations of what groups the law will actually protect.<sup>112</sup> On the one hand, we are told that corporations are important to our nation and our national well-being and that we should

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in fact, it might be harmful for the corporation to be a public entity in this way. From a democratic theory or simply a political accountability perspective, it would also be exceedingly problematic to create a society in which individuals were reliant upon unaccountable corporate boards for public benefits such as education, child care, or health care. As one commentator states in a discussion of corporate philanthropy as potentially detrimental to communities,

DuPont, therefore, represents the problem of the dominant local firm contributor. Its philanthropic monopoly encourages civic dependence and its donations can be an unspoken *quid pro quo* for property tax and other regulatory leniency. Thus, a firm can take more out of a community through tax underpayment than it returns, although publicity over its generosity convinces communities they are net beneficiaries.

Mark Green, *The Corporation and the Community*, in *CORPORATE POWER IN AMERICA* 42, 58 (Ralph Nader & Mark J. Green eds., 1973). In other words, there is no reason to think that public-minded corporations would necessarily be wholly altruistic or that expecting corporations to act altruistically (without actually strictly regulating this “altruism”) would be without unintended, negative consequences.

As a point of comparison, it is useful to look to the debate about the public versus private nature of the employment relationship. Since the Progressive Era transition from a conception of the employment contract as a private, at-will relationship to a public contract that has an impact on society and can therefore be regulated by the State, there has been an ongoing debate about the extent to which the government can intercede in employment relationships. See *supra* note 56. In part, perhaps because of a societal resistance to expansive, public social welfare policies, legislators have used the employment relationship as a vehicle for installing minor social safety net provisions, ranging from unemployment insurance to paid family leave. It may be that the treatment of the employment contract as an exceptional contractual relationship is politically necessary—that without this elevation of employment, we would have been unable to advance many socially advantageous programs or policies. But by focusing on employment as the vehicle for social change, we run a great risk and we ignore many of those most in need of benefits.

By tying unemployment or child-care benefits to the employment relationship, we fail to protect those who are chronically unemployed or underemployed and, by focusing on the public conception of employment as a panacea for social ills, we risk increasing the enormity of the impact of losing a job. Cf. BARRY BLUESTONE & BENNETT HARRISON, *THE DEINDUSTRIALIZATION OF AMERICA: PLANT CLOSINGS, COMMUNITY ABANDONMENT, AND THE DISMANTLING OF BASIC INDUSTRY* 61–72 (1982). Like the employment relationship, then, the corporate philanthropic model places the burden of providing societal needs on private actors and risks under-inclusiveness as well as chronic mismanagement or misallocation of resources.

<sup>111</sup> See Chen & Hanson, *supra* note 17, at 77–99.

<sup>112</sup> See *id.* at 77–83.

therefore support them and refrain from regulating them. On the other hand, we are told by courts and commentators<sup>113</sup> that the sole purpose of the corporation is to turn a profit and its sole duty is to shareholders and not to the nation, society, or some intangible concept of democracy.<sup>114</sup> In *Dodge* (and, by extension, in general corporate law doctrine purportedly upholding shareholder primacy),<sup>115</sup> the idea that corporations could operate in the public interest rather than in the interest of private shareholders was roundly rejected.<sup>116</sup> Nonetheless, the automotive industry's dominant rhetorical framework of self-portrayal in postwar culture remained the image of the corporation invested in America.

Although *Dodge* represented a situation in which the court prevented an automotive corporation from acting in accordance with its purported public conscience, corporations themselves often fought vehemently against the very ideals they peddled to consumers.<sup>117</sup> Generally, in prewar America, labor issues provided the arena in which cor-

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<sup>113</sup> See Hansmann & Kraakman, *supra* note 17, at 440–43 (discussing shareholder primacy as the “standard” model of corporate legal governance); see also *Churella v. Pioneer State Mut. Ins. Co.*, 671 N.W.2d 125, 132 (Mich. App. 2003) (“[T]he purpose of a business corporation is to provide profit to its shareholders.”); *Long v. Norwood Hills Corp.*, 380 S.W.2d 451, 476 (Mo. App. 1964) (“Plaintiff cites many authorities to show that the ultimate object of every ordinary trading corporation is the pecuniary gain of its stockholders and that it is for this purpose the capital has been advanced. . . . Neither defendant nor this court has any quarrel with plaintiff insofar as these authorities and the rules announced therein are concerned.”); *E.I. Du Pont De Nemours & Co. v. Clark*, 88 A.2d 436, 444 (Del. Ch. 1952).

<sup>114</sup> See, e.g., Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 122.

<sup>115</sup> See Hansmann & Kraakman, *supra* note 17, at 440–43.

<sup>116</sup> Although it is not explicitly a “corporate law” case and is primarily noteworthy for its illuminations on judiciable constitutional limits on the President’s powers, the widely-cited case of *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, like *Dodge*, provides useful judicial insight into the public/private distinction in the corporate context. See 343 U.S. 579, 587–89 (1952); see also Adam J. White, *Justice Jackson’s Draft Opinions in The Steel Seizure Cases*, 69 ALB. L. REV. 1107, 1107 (2006). The case limited the right of the President to seize private property in times of emergency to serve the public interest. See *Steel Seizure*, 343 U.S. at 587–90. Where the realist, pro-regulatory decisions of the New Deal era expanded the idea of public interest in private rights, see *supra* notes 55–58 and accompanying text, the *Steel Seizure* case sets a limit on the public interest in private rights. See *id.*

<sup>117</sup> See, e.g., *Fisher v. Ford Motor Co.*, 224 F.3d 570, 572–73 (6th Cir. 2000) (reproducing the argument that Ford owed a lesser duty of care to consumers than the plaintiff claimed); MITCHELL, *supra* note 60, at 69 (describing GM’s decision not to add inexpensive safety features to the Chevrolet Malibu because of a prioritization of profit over other values, such as drivers’ safety); Richard Weingroff, *President Dwight D. Eisenhower and the Federal Role in Highway Safety*, U.S. DEPARTMENT OF TRANSP., FED. HIGHWAY ADMIN., <http://www.fhwa.dot.gov/infrastructure/safetyep.cfm> (last visited Mar. 17, 2012) (chronicling the legislative battle to pass the Highway Safety Act).

porations fought to ward off regulatory intrusions that sought to protect public interests from private, profit-centric decision making.<sup>118</sup> Despite the automotive industry's public statements about its concern for the success, happiness, and quality of life of American workers, corporate employers remained strongly committed to preventing their workers from organizing to demand higher wages or better working conditions.<sup>119</sup> In fact, Henry Ford is often quoted as having said that workers "would organize Ford over [his] dead body."<sup>120</sup>

Once again, then, these labor debates reveal the internal inconsistencies between the varied scripts of corporate law. If we were to view Ford's hostility to organized labor in its most positive light, it may be that Ford opposed unionization because he believed that the corporation as a beneficent, paternalist entity would naturally take care of its workers.<sup>121</sup> But, as discussed with respect to *Dodge*, corporate law had deemed that the corporation owed a duty to its shareholders—not its workers.<sup>122</sup> In other words, the distinct legal and social spaces in which workers' interests could be protected operated under a different set of stated assumptions or ideological convictions. Regardless of how earnest or disingenuous the resulting tension might have been, the real

<sup>118</sup> See, e.g., *NLRB v. Ford Motor Co.*, 114 F.2d 905, 908 (6th Cir. 1940) (discussing Ford's alleged anti-union actions); FRANKLIN FOLSOM, *AMERICA BEFORE WELFARE* 301–09 (1991) (discussing the Ford Hunger Strike of 1932 that involved unemployed workers taking action against Ford Motor Company); Vivian M. Baulch & Patricia Zacharias, *The Historic 1936–37 Flint Auto Plant Strikes*, *DETROIT NEWS*, June 23, 1997, <http://apps.detnews.com/apps/history/index.php?id=115>; Editorial, "Victory" Redefined, *ST. LOUIS POST-DISPATCH*, Oct. 12, 2007, at C12, available at <http://www.tmcnet.com/usubmit/2007/10/12/3011447.htm>.

<sup>119</sup> See, e.g., ARTHUR M. SCHLESINGER, JR., *THE AGE OF ROOSEVELT: THE COMING OF THE NEW DEAL* 405 (1958); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 *MINN. L. REV.* 265, 266 (1978).

<sup>120</sup> See "Victory" Redefined, *supra* note 118.

<sup>121</sup> See *supra* notes 106–107 and accompanying text. This view of Ford and of corporatized industrialization as a paternalistic (and indeed patriarchal) public force can also be seen in Aldous Huxley's *Brave New World*. ALDOUS HUXLEY, *BRAVE NEW WORLD* (Harper-Collins 1998) (1932). In Huxley's dystopic vision of the future, an omnipotent state that is ever-concerned with the happiness and well-being of its citizens has also stripped individuals of any choice and prescribed their behavior in such a way as to suppress human emotions. Strikingly, the society has abandoned religion and has replaced it with a reverence for science and a deification of Henry Ford; all colloquial expressions that traditionally feature a reference to "God," in Huxley's world refer to "Ford." See *id.* at 83, 119, 122.

<sup>122</sup> See, e.g., Hansmann & Kraakman, *supra* note 17, at 440–43; Ian B. Lee, *Efficiency and Ethics in the Debate About Shareholder Primacy*, 31 *DEL. J. CORP. L.* 533, 535 (2006) ("With the rise to dominance of the economic analysis of corporate law, a nearly overwhelming chorus of academic voices endorsed 'shareholder primacy,' the view that managers' fiduciary duties require them to maximize the shareholders' wealth and preclude them from giving independent consideration to the interests of other constituencies."); Friedman, *supra* note 114, at 122.

world effect of these conflicting regimes was a lack of substantive protections for American workers and non-shareholding stakeholders (e.g., consumers)—an illusion of public protection from private action built into the illusions of both the public and private realms.

### B. *An Illusion Under Fire?*

*But what now concerns us is quite new in the history of America. We are not dealing with sporadic or isolated attacks from a relatively few extremists or even from the minority socialist cadre. Rather, the assault on the enterprise system is broadly based and consistently pursued. It is gaining momentum and converts.*<sup>123</sup>

*When indeed we reflect on an organized conspiracy against the public, one which reaches into every corner of our daily lives and our political structures to exercise a wanton ecocidal and genocidal violence at the behest of distant decision-makers and in the name of an abstract conception of profit—surely [The Godfather] is not about the Mafia, but rather about American business itself that we are thinking, American capitalism in its most systematized and computerized, dehumanized, “multinational” and corporate form. What kind of crime, said Brecht, is the robbing of a bank, compared to the founding of a bank?<sup>124</sup>*

Following the Second World War, particularly during the social upheaval of the 1960s, the macro script suggesting that the corporation was a private entity obligated to act exclusively in the interest of its shareholders’ profits began to come under fire once again. In a 1971 memorandum entitled “Attack of American Free Enterprise System” and directed to the Chamber of Commerce, Justice Lewis Powell (prior to his Supreme Court nomination) warned of a new generation of leftists, radicals, and consumer advocates who were waging a war on American corporations’ profit-centric philosophy.<sup>125</sup> Justice Powell described the work of Ralph Nader as an egregious assault on the “American” economic model<sup>126</sup> and, in so doing, identified the automotive industry as a prominent victim of these assaults.<sup>127</sup>

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<sup>123</sup> Memorandum from Lewis F. Powell, Jr. to Eugene B. Sydnor, Jr., Chairman, Educ. Comm., U.S. Chamber of Commerce 1 (Aug. 23, 1971) (on file with author).

<sup>124</sup> Fredric Jameson, *Reification and Utopia in Mass Culture*, Soc. TEXT, Winter 1979, at 130, 145 (1979).

<sup>125</sup> See Memorandum from Powell to Sydnor, *supra* note 123, at 1–2.

<sup>126</sup> See *id.* Considering this Article’s focus on the intersection of Americanness as the central trope in corporate advertising and popular understandings of the legal status and

Indeed, in this moment of potential crisis for corporate America—the breakdown in communication between dominant narratives and receptive consumers—the automotive industry became a prominent target for criticism.<sup>128</sup> Just as it had served as a lightning rod for labor conflicts, so too it became the public battleground for advances by the nascent environmental and products liability movements.<sup>129</sup> Although any explanation of why the automobile industry became such a frequent target of this new generation of regulatory efforts would require substantial speculation, it does not seem far-fetched that this focus owed at least a certain amount to the American automotive industry's reliance on tropes of nationalism and patriotism.

With a cultural zeitgeist suddenly questioning traditional orderings of American society—whether racial, sexual, or political—it seems only natural that an industry that had cloaked its behavior in the language of patriotic deference to high ideals of freedom and democracy would face a certain degree of hostility or, at the very least, heightened skepticism. As the dominant narratives of American culture came under fire and as the war in Vietnam and the Watergate scandal undermined faith in leadership, cultural tropes of legitimation that once formed the groundwork for the advertising schemas of the American automotive corporation no longer reigned uncontested. For example, Justice Pow-

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regulation of corporations, it is also worth noting that Justice Powell identified the target of criticism and assault not as “capitalism” or “the market system”—both descriptively accurate statements of an economic model that focuses on profits derived from bargaining parties setting prices efficiently—but rather as the “American” system. *Id.* By particularizing this description of the threat, Justice Powell tapped into narratives of patriotism and nationalism as well as latent (and often not so latent) fears of Cold War America. If the memorandum were simply describing threats to capitalism—an economic theory—the threats might not have appeared so vital and so immediate. But as threats to something “American,” they became threats to the everyday people whose indoctrination the memorandum also discusses. It may have been that the average workers—the “GM Folks”—had no particularly detailed understanding of Adam Smith's or David Ricardo's theories, but they certainly could relate to a threat to the American, the quotidian, and the intrinsically *theirs*. Although the memorandum is labeled “confidential,” the use of this rhetorical framework demonstrated the same sort of system-legitimizing rhetoric that corporate advertisers had employed for decades and would employ for decades more. *See id.*

<sup>127</sup> *See id.*

<sup>128</sup> *See, e.g.,* Irving S. Bengelsdorf, *A Potential Danger on Man's Horizon*, L.A. TIMES, Sept. 25, 1962, at A5 (discussing both the car and the use of pesticides as issues that raised grave concerns for humanity's future); Drew Pearson & Jack Anderson, *Big Industry Stifles Air Pollution Fight*, WASH. POST, Nov. 16, 1966, at D19 (“It looks as if cleaning up the air we breathe has developed into the same hassle between industry and the public as cleaning up auto safety.”).

<sup>129</sup> *See* NADER, *supra* note 25, at 147–69; “Tame Auto,” *Warns Head of Architects*, WASH. POST, Dec. 11, 1965, at E13; Weingroff, *supra* note 117.

ell melodramatically warned that “[i]t is still Marxist doctrine that the ‘capitalist’ countries are controlled by big business. This doctrine, consistently a part of leftist propaganda all over the world, has a wide public following among Americans.”<sup>130</sup>

Justice Powell’s outcry against “Marxist doctrine” identifying corporations as controlling societal interests seems not only sensational, but also hypocritical considering its delivery in a memo explaining how corporations can surreptitiously reshape and manipulate public opinion. Yet, it is true that this historical moment demonstrated a public re-imagining of the corporate form as fertile ground for corruption and injustice. Mass culture evinced this trend with the rise of the widespread, genre-subverting revisionism that defined the film-making of New Hollywood cinema.<sup>131</sup> *Easy Rider*—one of the key films demonstrating the viability of countercultural cinema and helping to spark a renaissance in American filmmaking—was explicitly marketed to a country that had lost its way and its identity.<sup>132</sup> A veritable ode to the inability of the individual, dispositionist actor (the drug dealer) to succeed when confronted with situational forces (e.g., corrupt law enforcement, prejudice), the film’s posters stated that “[a] man went looking for America. And couldn’t find it anywhere . . . .”<sup>133</sup> The schemas of nationhood, national legitimacy, and happiness through the dispositionist actor’s reliance on the market (albeit an unlawful and informal market) were clearly under attack.

At the risk of overemphasizing the ways that lack of faith in the symbiotic wielders of power—the State and the corporation—had infected the national psyche, it seems worth taking note of the ways that the same narratives of betrayal that defined the work of Nader and other 1960s corporate critics seeped into the popular understanding of

<sup>130</sup> Memorandum from Powell to Sydnor, *supra* note 123, at 6.

<sup>131</sup> See, e.g., 9 DAVID A. COOK, HISTORY OF THE AMERICAN CINEMA, LOST ILLUSIONS: AMERICAN CINEMA IN THE SHADOW OF WATERGATE AND VIETNAM, 1970–1979, at 162–72 (Charles Scribner’s Sons 2000) (1990); THE LAST GREAT AMERICAN PICTURE SHOW: NEW HOLLYWOOD CINEMA IN THE 1970s, at 347 (Thomas Elsaesser et al. eds., 2004); BONNIE AND CLYDE (Warner Brothers 1967); BUCK AND THE PREACHER (Columbia Pictures 1972); HOMBRE (Twentieth Century Fox 1967); LITTLE BIG MAN (Cinema Center Films 1970); THE LONG GOODBYE (United Artists 1973); MCCABE AND MRS. MILLER (Warner Brothers 1971); PAT GARRETT AND BILLY THE KID (Metro-Goldwyn-Mayer 1973); SERPICO (Paramount Pictures 1973); THIEVES LIKE US (United Artists 1974).

<sup>132</sup> EASY RIDER (Columbia Pictures 1969); see also PETER BISKIND, EASY RIDERS, RAGING BULLS: HOW THE SEX-DRUGS-AND-ROCK ‘N’ ROLL GENERATION SAVED HOLLYWOOD 61–75 (1998).

<sup>133</sup> Posters for *Easy Rider*, INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt0064276/posters> (last visited Apr. 12, 2012).

corporatized, industry power. In public media texts, we can see an inversion of traditional morality, where dominant social forces (e.g., the State, the police, the law) and characters (e.g., the sheriff, the politician, the cowboy) are recast as villains, while the marginalized characters (e.g., the Indians, the outlaws) are excused as victims of their situational forces.<sup>134</sup> Even more significant to our understanding of the place of the corporation in American society is a subset of films that explicitly address some sort of vague, unholy alliance between business and injustice, between the corporation and criminality.<sup>135</sup> Because the historic, advertised image of the American corporation revolved around a positive evocation of the “American Dream,” at a time when the very notion of the American Dream was under fire, so too were the corporate forms that exploited these schemas. This was particularly so for the automotive corporations that had wrapped themselves in the ostensibly unchallengeable guise of Americanness.

In exploring the mass culture of postwar and Vietnam-era America, it is important to consider why these critiques of the American political economy did not, in fact, lead to greater systemic reform in the corporate context. To this end, it is worth noting that most of the films and cultural works of this period cited in this Section have widely been interpreted as statements on Watergate or the Vietnam War and have, in turn, been seen as focused on specific individuals and events.<sup>136</sup> Instead of giving rise to a systemic reexamination of fundamental background conditions—the economic *situation* of corporate social supremacy—the critiques became identifiers of bad actors. Consistent with the scripts that continued to dominate corporate law,<sup>137</sup> these cultural texts

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<sup>134</sup> See, e.g., *supra* note 131; see also *BAD COMPANY* (Paramount Pictures 1972); *BADLANDS* (Warner Brothers 1973); *THE WILD BUNCH* (Warner Brothers 1969).

<sup>135</sup> See, e.g., Drehli Robnik, *Allegories of Post-Fordism in 1970s New Hollywood: Countercultural Combat Films, Conspiracy Thrillers as Genre Recycling*, in *THE LAST GREAT AMERICAN PICTURE SHOW*, *supra* note 131, at 333, 347 (suggesting that a certain cycle of Watergate-era films “show attempts at investigating the [political and social] order’s hidden inside, emphasizing its systemic character, obstinacy and near invisibility”); *CHINATOWN* (Paramount Pictures 1974); *THE CONVERSATION* (Paramount Pictures 1974); *THE PARALLAX VIEW* (Paramount Pictures 1974).

<sup>136</sup> See, e.g., Dennis P. Altman, *The Passing of the Dream*, 22 *AUSTL. J. INT’L AFF.* 218, 221 (1968) (discussing American disillusionment during the Vietnam War); Phillip Novak, *The Chinatown Syndrome*, 49 *CRITICISM* 255, 255 (2007); J. Hoberman, *Nashville Contra Jaws: Or “The Imagination of Disaster” Revisited*, in *THE LAST GREAT AMERICAN PICTURE SHOW*, *supra* note 131, at 195, 216–17 (describing the corrupt, profit-driven mayor in *Jaws* as reminiscent of President Nixon during the Watergate scandal).

<sup>137</sup> See *supra* note 100.



can be read simply as societal condemnations of bad apples.<sup>138</sup> Whether that of Presidents Lyndon Johnson or Richard Nixon, Secretary of Defense Robert MacNamara, or the General Motors executives who green-lighted the Corvair,<sup>139</sup> the fault being identified was not primarily systemic (or situational); instead, it was rooted in the flawed character of the individual.

Through a non-systemic reading that encourages the scapegoating of individual power players, these crises fall onto the narrative arc that most recently focused on the corporate fraud of Enron<sup>140</sup> or the public outrage at Michael Milken,<sup>141</sup> Bernard Madoff,<sup>142</sup> and the AIG executive board.<sup>143</sup> The issue with this narrative is not that the actors involved are blameless, but rather that such a reading encourages a superficial fix (individual punishment), while deflecting broader, systemic reform. If, however, we view instances of executive misfeasance as emblematic of systemic flaws instead of personal failures, a broader critique of the post-Fordist economy emerges and we are left with another illusion-of-law moment—another point where our schemas conflict, leaving the major problems unresolved and the veneer of systemic legitimacy untarnished.

In fact, despite heightened awareness of corporate irresponsibility, misfeasance, and insensitivity to the public welfare, there has been little reaction in the corporate law context. Nader's legislative successes, the rise of consumer activism among the general public and on Capitol Hill, and some expansion of tort liability in certain contexts indicated a limited integration of the anti-corporate sentiment; these changes, however, did little to reshape corporate law either doctrinally or in its judicial application.<sup>144</sup> Just as in the prewar context of *Dodge* and in

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<sup>138</sup> Cf. Chen & Hanson, *supra* note 17, at 79 n.285; Scott Harshbarger & Goutam U. Jois, *Looking Back and Looking Forward: Sarbanes-Oxley and the Future of Corporate Governance* 40 AKRON L. REV. 1, 41 (2007).

<sup>139</sup> See *supra* note 100.

<sup>140</sup> See BETHANY MCLEAN & PETER ELKIND, *THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON*, at xxv (2003) ("The tale of Enron is a story of human weakness, of hubris and greed and rampant self-delusion; of ambition run amok . . . and of smart people who believed their next gamble would cover their last disaster—and who couldn't admit they were wrong.")

<sup>141</sup> See *United States v. Milken*, No. (S) 89Cr.41(KMW), 1990 WL 264699, at \*5-7 (S.D.N.Y. Nov. 21, 1990).

<sup>142</sup> See Robert Frank et al., *Madoff Jailed After Admitting Epic Scam*, WALL ST. J., Mar. 13, 2009, at A1.

<sup>143</sup> See Juliet Lapidus, *Can Paulson Fire Naughty Executives?*, SLATE (Oct. 8, 2008, 5:14 PM), <http://www.slate.com/id/2201853/>.

<sup>144</sup> This Article highlights the distinction between "corporate law" and other legal regimes (e.g., tort law, administrative law, criminal law), not to suggest that the legal system

some scholars' writings,<sup>145</sup> the legal community remained largely unwilling to reconceptualize corporate law as a space where public concerns about business organizations could be expressed.<sup>146</sup>

In 1971, for instance, the Supreme Court of Minnesota held, in *State ex rel. Pillsbury v. Honeywell, Inc.*, that a shareholder's political (and perhaps moral) objections to a corporation's manufacture of fragmentation bombs for use in the Vietnam War was not a "proper purpose" sufficient to allow access to corporate records.<sup>147</sup> Although lacking the specific automotive tie of *Dodge*, *Pillsbury* is instructive for understanding the disjuncture between what many thought individuals should be allowed to do to check corporate power and what courts concluded individuals had the right to do. That is, the *Pillsbury* court went beyond the *Dodge* court. By selecting a very specific form of shareholder primacy—a protection available only for the shareholder acting explicitly in the interests of maximizing profits<sup>148</sup>—the court in *Pillsbury* endorsed a specific view of the American corporation. That view was of an entity that had a duty to provide wealth to its shareholders but had no

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actually operates or ought to operate in practice in such a fragmented manner. Rather, I mean to suggest that these alternative legal regimes may often be dominated by different ideological commitments or may have different guiding principles. By continuing to emphasize these distinctions—in the way that the law is taught in classrooms and the way that commentators and lawmakers segregate legal treatments of the corporate form—we fall victim to internal tensions in the law. These tensions exacerbate the issues raised by the illusion-of-law hypothesis. That is, by treating some issues as the province of corporate law and others as the province of other areas of the law, lawmakers and corporate law scholars may perpetuate a system rooted in deflecting responsibility that is fiercely resistant to reform efforts. This insight into the fragmentation of legal regimes and its costs owes substantially to the work of scholars in other legal areas—particularly labor law and family law—who have pushed back against the tendency to quarter specific regimes closely and discount the need for and reality of different areas' interdependence. See, e.g., Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163, 166–69 (2007); Janet Halley, *What Is Family Law?: A Genealogy, Part I*, 23 YALE J.L. & HUMAN. 1, 5 (2011); Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753, 756–57 (2010); Fernanda G. Nicola, *Family Law Exceptionalism in Comparative Law*, 58 AM. J. COMP. L. 777, 792–98 (2010) (describing two conflicting approaches to comparative family law); Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2688–89 (2008).

<sup>145</sup> See *supra* notes 59–60 and accompanying text.

<sup>146</sup> See, e.g., *State ex rel. Pillsbury v. Honeywell, Inc.*, 191 N.W.2d 406, 411–13 (Minn. 1971) (holding that political or moral objections to corporate activities are not proper purposes for a shareholder to access information about other shareholders); Walter B. Stuart IV, Note, *Corporations—Shareholder Inspection of Corporate Records—Political Motivation Not “Proper Purpose,”* 46 TUL. L. REV. 1002, 1002–03 (1972).

<sup>147</sup> 191 N.W.2d at 411–13.

<sup>148</sup> See *id.* at 411–12.

duty to advance the values, ideals, or policies that its shareholders advocated.<sup>149</sup>

The decision in *Pillsbury* is particularly striking when considered in light of the contemporary public relations campaigns of American automotive corporations. Through its advertising rhetoric, the automobile industry emphasized its importance to the American way of life.<sup>150</sup> And, by insinuating into the collective consciousness a view of the automobile as both a consumer good and a social necessity,<sup>151</sup> the American automotive corporations assumed a greater responsibility (at least in the eyes of consumers, if not in the eyes of the law) beyond turning a profit. Using a traditional, dispositionist framework for analyzing corporate liability and consumer protection issues, we would presumably conclude that a consumer who purchased a Corvair<sup>152</sup> or a Pinto<sup>153</sup> had assumed the risks associated with owning and using an inferior product. According to this line of reasoning, by paying a comparatively small amount for a car, a consumer must have concluded that avoiding the potential for malfunction was not worth the additional cost required to purchase a safer vehicle. The dispositionist approach—viewed as an extension of the will theory of contracts—would not identify anything disturbing about two rational actors entering into such a sales contract.

<sup>149</sup> See *id.* at 411–13.

<sup>150</sup> See *supra* notes 39–98 and accompanying text. It is also worth noting that, in the increasingly suburbanized landscape of postwar America, the automobile became not only a symbol of freedom but also a practical necessity. With public transportation failing to link suburban home-dwellers to urban labor and commercial centers, individual and family car ownership became a vital means of maintaining communities and livelihoods. See COHEN, *supra* note 8, at 199. In other words, one might argue that, rather than making the nation a neighborhood (as GM promised), the rise of the highway, the suburb, and the personal automobile in fact dispersed neighborhoods into car-dependent sprawl. See *supra* notes 74–75. As a result, instead of liberating Americans, the automotive culture simply bound American consumers more inextricably to their cars and to their consumerism.

<sup>151</sup> The availability of automobiles in the prewar years had indeed been presented as a sign of freedom, a linkage of consumer choice to democratic values. See MARCHAND, *supra* note 20, at 233. In a 1930s public relations campaign, National Association of Manufacturers published a *Pocketbook of Knowledge*, featuring newspaper cartoons that promoted corporate interests and boasted that “[i]n the United States there is one automobile for every 5 people . . . France has one for every 22; England, one for every 23, Italy, one for every 109 . . . Poland can boast but *one car* for every 1,284 of its population!” EWEN, *supra* note 20, at 313 (alterations in original).

<sup>152</sup> See NADER, *supra* note 25, at 3–41 (providing more on the Corvair and its well-documented safety issues); see also Douglas Litowitz, *Are Corporations Evil?*, 58 U. MIAMI L. REV. 811, 837 (2004) (“Consider the Corvair, a General Motors car that was produced and marketed to the public despite evidence that it was unsafe . . .”).

<sup>153</sup> See *The 50 Worst Cars of All Time: 1971 Ford Pinto*, TIME, [http://www.time.com/time/specials/2007/article/0,28804,1658545\\_1658498\\_1657866,00.html](http://www.time.com/time/specials/2007/article/0,28804,1658545_1658498_1657866,00.html) (last visited Apr. 12, 2012) (discussing Ford’s famously dysfunctional (and flammable) answer to the Corvair).

But when we examine the background conditions and the situationist framework to which automotive advertisements speak—with their evocation of “higher” considerations such as gender,<sup>154</sup> class,<sup>155</sup> community,<sup>156</sup> and national economy<sup>157</sup>—it should become clear that the previously “efficient” contract is tainted. If what a consumer is buying is not simply a desired luxury good or a convenience that will increase the efficiency of transportation, but is instead a direct stake in the nation’s economy or the consumer’s own job or social status, then it seems highly implausible that the average consumer could possibly have factored all the pertinent “situational” concerns into the contract price. When viewed in a situational light, these background conditions exert a necessarily coercive force on the consumer,<sup>158</sup> making a dispositionist analysis inappropriate. In addition, when automotive advertising is so emphatic in stressing constraints on income, freedom, or traditional gender roles (all of which buying an automobile will purportedly remedy), why should we suddenly ignore these concerns in determining what risks a consumer has assumed or what liabilities a corporate manufacturer is permitted to contract away?<sup>159</sup> If the American auto-

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<sup>154</sup> See, e.g., SWAN, *supra* note 8, at 89. For example, a 1949 Ford advertisement featured a book with the words “Woman’s Place is in the Home” on the cover, but with “Home” crossed off and “FORD!” written in its place. *Id.* In addition, a 1958 Buick advertisement boasted, “We designed this car with mothers in mind . . .” *Id.* at 146.

<sup>155</sup> See, e.g., STEVENSON, *supra* note 8, at 127. One 1976 Oldsmobile advertisement reads in part: “Walt worked hard to get where he is; he thinks he’s entitled to a reward—even in the car he drives. . . . You don’t have to be a king to drive a 98 Regency. You just have to want to feel like one.” *Id.*; see also SWAN, *supra* note 8, at 151 (displaying a 1959 Dodge advertisement that appeals to a “family [that] is the kind that wants more than you get in the ‘low-priced’ field”).

<sup>156</sup> See *supra* notes 74–75 and accompanying text.

<sup>157</sup> See *supra* notes 66–71 and accompanying text.

<sup>158</sup> See Hale, *supra* note 54, at 474–75.

<sup>159</sup> Despite these clear challenges to a system that would ignore situational elements and treat car buyers as dispositionist actors, it remains difficult to find any sort of legal recognition of these background conditions. See *supra* note 92. As discussed *supra* in the context of *Pillsbury* and *Dodge*, the body of corporate law and corporate law scholarship was generally inclined to dismiss these situational issues as the province of other actors, other institutions, and other legal realms. *Cf. supra* note 144. But if we look at the products liability cases that arose out of Nader’s campaign, there is a similar tendency to emphasize market feasibility and the need to prove some greater mens rea in order to hold automobile manufacturers liable for injuries resulting from unsafe cars. See, e.g., *Dyson v. GM Corp.*, 298 F. Supp. 1064, 1073–74 (E.D. Pa. 1969) (denying GM’s motion for judgment on the pleadings in an automobile design defect case, but observing that GM was only required to design a car that was safer than other comparable cars on the market); *Ford Motor Co. v. McCamish*, 559 S.W.2d 507, 512 (Ky. Ct. App. 1977) (holding that Ford did not owe a duty to provide specific instructions for the installation of wheel cylinder bolts). That is not to say that manufacturers were never found liable for design defects. See, e.g., *Gardner v. GM*

motive industry has built an empire based on a public perception that it is working in the public interest (as a part of a broader interdependence between it and consumers), why should we discount these background conditions<sup>160</sup> when it comes to consumers and other stakeholders, especially when courts have proven willing to recognize these situational concerns in extending greater protections to corporate managers?<sup>161</sup>

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Corp., 507 F.2d 525, 529 (10th Cir. 1974) (affirming a lower court's judgment that a pickup truck's defective design caused its passengers to die from inhaling carbon monoxide); *Mickle v. Blackmon*, 166 S.E.2d 173, 192 (S.C. 1969) (stating, on appeal from a jury award against Ford, that even though Ford's liability was a question for the jury, it should be held liable only if the proposed product alterations were "feasible"); Timothy S. Robinson, *Court Tells GM to Warn of Defects*, WASH. POST, June 14, 1974, at A3. These products liability cases simply demonstrate that the idea of profitability still influences courts' decisions and that there continues to be an assumption that some other institution (presumably private insurance) rather than the corporations themselves should provide relief to accident victims.

In light of the ongoing disconnect between what consumers understand corporate regulations to be and what the law actually requires of corporations, these products liability cases that evoke something akin to the Learned Hand Test in assigning fault become quite interesting. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). The question whether it is appropriate to apply a cost-benefit analysis in tort cases is a vast topic and falls outside the scope of this paper. I raise this issue, however, to suggest that a corporation invoking business necessity (or simply "profitability") as a defense to a claim that an automobile manufacturer had not built as safe a car as possible might shock consumers. In a post-Corvair (and post-Pinto) world, where numerous publicly funded administrative agencies are responsible for regulating automobile safety and performance, it seems plausible that consumers would expect a vehicle to have been safety tested, not for compliance with market concepts of efficiency, but rather for conformance with scientific or medical requirements for reducing injury in the case of accident. Cf. *FIGHT CLUB* (Twentieth Century Fox 1999). The 1999 film *Fight Club* features a protagonist who works for a "major" automotive corporation and is essentially paid to perform a cost-benefit analysis akin to the Learned Hand Test. If a product recall would cost more than the average settlement times the average number of accidents caused by the given design defect, the protagonist instructs his employer not to recall the automobile. In the film, the protagonist explains this to an acquaintance who is shocked that this callous calculation is actually the basis for corporations' decision making. See *id.*

<sup>160</sup> See *supra* note 92.

<sup>161</sup> See, e.g., *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1386 (Del. 1995); *Paramount Comm. Inc. v. QVC Network Inc.*, 637 A.2d 34, 45-46 (Del. 1993); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 958-59 (Del. 1985).

### III. PATRIOTISM, PRAGMATISM, OR PROTECTIONISM: THE NATIONAL MYTH AND THE MULTINATIONAL CORPORATION

#### A. *Strangers in Town*

*American culture differs from that of Western Europe because it is the common property of a heterogeneous postimperial society, rather than of a nation in the European sense.*<sup>162</sup>

*The American people have a right to know how conglomerate and multinational corporations operate, at home and abroad, in their dealings with investors, consumers, their workers and governments.*<sup>163</sup>

As the previous Parts have demonstrated, it has been and continues to be a major challenge to define the role of corporations in America, both socially and economically. The second half of the twentieth century has been marked by an influx of foreign players in the automotive market and the growth of global capitalism as a philosophy of international trade, international diplomacy, and perhaps even global governance.<sup>164</sup> Defining the “American” corporation, therefore, becomes even more difficult and fraught with contradictions than it did during earlier periods of public/private crisis<sup>165</sup> and schematic contradictions.<sup>166</sup>

This Part returns to Joe Isuzu and the corporate move to commodify and reify “America” in its marketing and in its public definition. The Part also discusses the ways in which automotive corporations have relied on the meta script that has equated Americanness with freedom in order to stave off international competitors, while taking advantage of the comparatively lax regulation in the international market. First, this Part addresses the rhetorical structures that domestic and foreign corporations employ to evoke the background, situational forces of American democracy.<sup>167</sup> Then, by looking to the actual laws and institutions that govern corporate behavior in the contemporary, multina-

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<sup>162</sup> DUNCAN KENNEDY, *SEXY DRESSING ETC.* 11 (1993).

<sup>163</sup> AFL-CIO, *THE AFL-CIO PLATFORM PROPOSALS PRESENTED TO THE DEMOCRATIC AND REPUBLICAN NATIONAL CONVENTIONS* 13 (1976).

<sup>164</sup> See LOUIS ALTHUSSER, *LENIN AND PHILOSOPHY AND OTHER ESSAYS* 85–126 (Ben Brewster trans., 2001); DAVID HARVEY, *SPACES OF CAPITAL: TOWARDS A CRITICAL GEOGRAPHY* 339–44 (2001); see also *infra* notes 241, 244.

<sup>165</sup> See *supra* notes 39–98 and accompanying text.

<sup>166</sup> See *supra* notes 99–161 and accompanying text.

<sup>167</sup> See *infra* notes 203–224 and accompanying text.

tional economy, this Part argues that the nation-state has become an illusion in the corporate context. The concept of national identity is potent enough to provide a vehicle by which corporations legitimate their own actions, while remaining sufficiently permeable to allow corporate actors to shirk social responsibility and any meaningful duties to a wide swath of vulnerable interests.<sup>168</sup>

As foreign economies began flourishing after the Second World War, foreign automotive corporations saw an opportunity to flex their muscles on the international stage and prove that they could compete with the dominant producers on the American market.<sup>169</sup> Volkswagen's appearance in the United States was an impressive demonstration of the Marshall Plan's early success,<sup>170</sup> and it was not long before other European<sup>171</sup> and Japanese<sup>172</sup> manufacturers followed. In keeping with the commercial scripts of the U.S. producers that had equated the automotive industry with the national economy and the national spirit, these foreign incursions into the U.S. market were often accompanied by nationalistic sentiment.<sup>173</sup> As the Nuffield Organization, a British manufacturer, boasted, "You might think that a country with 39 million cars and a production of 6,680,000 more every year would be able to supply all its needs. But the fact remains that since the war Nuffield products have become extremely popular in the [United States] . . . ."<sup>174</sup> The language suggests derision for the American corporation's impotence—its inability to satisfy "the needs" of American consumers. Like the patriotic language of war, which tends toward the chauvinist or the jingoist to project strength and to intimidate the enemy, the rhetoric of the international corporate competitors hinted at a battle for patriarchal control of the global market and a desire to assert international dominance in a peacetime space through the violence of market supremacy.

Unlike Joe Isuzu's Americanized façade, many of the early advertisements for foreign automobiles directed toward American consum-

<sup>168</sup> See *infra* notes 225–256 and accompanying text.

<sup>169</sup> Cf. STEVENSON, *supra* note 8, at 222–26.

<sup>170</sup> See William Beaver, *Volkswagen's American Assembly Plant: Fahrvergnügen Was Not Enough*, BUS. HORIZONS, Nov.–Dec. 1992, at 19, 21–22. Implemented in the wake of the Second World War, the Marshall Plan sought to rebuild decimated European nations and revitalize and modernize European industry.

<sup>171</sup> See STEVENSON, *supra* note 8, at 222–24.

<sup>172</sup> See *id.* at 225.

<sup>173</sup> See *id.* at 223.

<sup>174</sup> *Id.*

ers relied on a celebration of otherness.<sup>175</sup> Some corporate advertisers identified a unique feature of their country of origin as an essential element of their products' appeal. The Pantera L by Ghia, for example, although actually a hybrid of an Italian-made body and American-made engine, was pictured in advertisements in front of classical architecture on Roman streets and above a description of its "aerodynamically styled body" as "pure Italian."<sup>176</sup> Similarly, in 1968, Bavarian Motor Works (BMW) evoked the image of the German Autobahn and told American consumers that "[t]his is the car that in Germany, where high-speed driving is a national sport, leads the pack."<sup>177</sup>

Interestingly, the entry of outside competitors into the domestic automotive market coincided with the rise of market segmentation as a strategy for advertising and selling consumer goods.<sup>178</sup> Central to this theory was the idea that, by appealing to classes and distinct societal groups, corporations could not only target specific niches but could also emphasize the symbolic, constitutive significance of buying a given item.<sup>179</sup> As one sociologist and proponent of this approach argued, based on situational factors, "[w]here [the consumer] buys and what he buys will differ not only by economics but in symbolic value."<sup>180</sup> This market segmentation approach meshed well with the self-othering undertaken by foreign automotive corporations because the invocation of foreignness (particularly Old World or continental foreignness) frequently jibes with an evocation of superiority, aristocracy, or sophistication.<sup>181</sup> In this way, these class-conscious advertisements for high-end European cars evoke situational factors (class, wealth, social stand-

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<sup>175</sup> See, e.g., *id.* at 227 (displaying a 1963 advertisement for the British-made MG Sports Sedan that tells consumers that "[t]his proud, defiant, staunch British grille can be yours for only eighteen hundred and ninety eight dollars"), 232 (displaying a 1967 magazine advertisement for the French-made Citroën featuring a headline, claiming that "[w]hen you're different, you'd better be special"), 233 (displaying a magazine advertisement for the German-made Porsche Gran Turismo that proclaims of Porsche drivers that "[i]t's kind of a club, an in-group of people who think they're special because they've had the good taste to buy something special").

<sup>176</sup> See *Vintage Car Ads: DeTomaso Pantera*, PRODUCTIONCARS.COM, <http://www.productioncars.com/vintage-ads.php/DeTomaso/Pantera> (last visited Apr. 12, 2012).

<sup>177</sup> STEVENSON, *supra* note 8, at 231.

<sup>178</sup> Cf. COHEN, *supra* note 8, at 295–96.

<sup>179</sup> See *id.* at 295.

<sup>180</sup> Pierre Martineau, *Social Classes and Spending Behavior*, J. MARKETING, Oct. 1958, at 121, 122–23; see also COHEN, *supra* note 8, at 295.

<sup>181</sup> Cf. Ron Rosenbaum, *On the Sophistry of "European Sophistication,"* N.Y. OBSERVER (Mar. 1, 1998, 12:00 AM), <http://www.observer.com/node/40220>.



ing),<sup>182</sup> suggesting that these factors can be achieved by dispositional actors making a rational choice (e.g., buying a car possibly out of their price range).

Despite the interesting tropes in the European luxury car commercials, for the sake of this Article (and an understanding of the illusionary aspects of corporate law), it is probably more instructive to consider the rise of Asian automakers and American corporations' efforts to defend their turf. Indeed, looking back to the Fordist concept of what the American car industry might someday become<sup>183</sup> and to marketing strategies of planned obsolescence,<sup>184</sup> it is important to recall that since its inception, the American automotive industry had been focused not on creating or blanketing a narrow market for luxury goods, but rather on creating an expansive market for mass consumption by working-class Americans.<sup>185</sup> As demonstrated by their conspicuous focus on exclusive

<sup>182</sup> In this discussion of the situational factors at play in these commercials, the role of gender is also worth noting. Whereas many of the traditional American automotive advertisements focused on women or families, these European advertisements were clearly geared towards heterosexual men. Considering that most of the advertisements in this Section were published sometime in the late 1960s or early 1970s during the rise of American feminism, it is striking that these advertisements, laden with hetero-normative images of attractive women posed on or near cars, continued to rely heavily on patriarchal visual clichés. See, e.g., STEVENSON, *supra* note 8, at 234 (featuring an Ministerstvo Gosudarstvennoi Bezopasnosti (MGB) advertisement from 1971 with a slender young woman reclining on the hood of a convertible sports car); *Austin Healey Sprite Car Advertisements*, PRODUCTIONCARS.COM, [http://www.productioncars.com/dx5/vintage\\_car\\_ads3.php?make2=Austin+Healey&model2=Sprite](http://www.productioncars.com/dx5/vintage_car_ads3.php?make2=Austin+Healey&model2=Sprite) (last visited Apr. 12, 2012) (featuring another slender young woman seated on the hood of a convertible sports car). This is especially noteworthy because most earlier, a significant number of later, (American) automobile advertisements focused either on female or family consumers as opposed to focusing on the automobile as a sexualized product. See, e.g., SWAN, *supra* note 8, at 72–73 (displaying Ford advertisements from 1946 that feature families or couples enjoying their Fords); Chrysler, *2008 Chrysler Town and Country Commercial*, YOUTUBE (Dec. 21, 2008), <http://www.youtube.com/watch?v=HRGgRORZOHy> (featuring a mother sending her children to eat at the “kids’ table” in the back of a minivan). Sports cars, like those sold by foreign corporations in the 1950s to early 1970s, continue to be marketed primarily to male buyers. See, e.g., Ford Motor Corp., *Mustang “Dreamer” Commercial*, YOUTUBE (Jan. 25, 2008), [http://www.youtube.com/watch?v=\\_IKf3twdLw](http://www.youtube.com/watch?v=_IKf3twdLw) (featuring a man dreaming of driving a Ford Mustang recklessly and impressing an attractive woman). Nevertheless, it is interesting—especially considering the later attempts to define American automotive corporations using “traditionally American” values—that the early imports can be seen as selling a more risqué product.

<sup>183</sup> See *supra* notes 49 and 106.

<sup>184</sup> See COHEN, *supra* note 8, at 294 (“In 1934 the average car ownership span was 5 years; now it is 2 years. When it is 1 year, we will have a perfect score.” (quoting GM’s head of styling)).

<sup>185</sup> This is not to suggest that the luxury car was an exclusively foreign concept, or that no American corporations had successfully sold cars that were advertised as aristocratic items geared to those with surplus spending power. See, e.g., STEVENSON, *supra* note 8, at

markets, however, it is clear that the non-Volkswagen European automakers were not aiming to create or participate in a closed, Fordist system. According to a 1958 *U.S. News and World Report* survey, for example, most import buyers lived on the East or West Coasts and were younger, wealthier, and better educated than their domestic-buying counterparts.<sup>186</sup> Therefore, even though they benefited more from the American capitalist system and (by Fordist logic) had a greater incentive to support a national economy that was presumably responsible for their success, these buyers' behavior evinced a trend toward the post-Fordist specialization of markets and away from potential cultures of solidarity that might have existed within the interdependence and commonality of a purely domestic economic system. Unlike these European luxury car manufacturers, the Japanese automotive corporations that began to enter the postwar auto market with relatively inexpensive and unassuming products seemed to be operating more within the traditional framework of American, mass-marketed, mass-consumerist culture.

Accordingly, instead of speaking the language of luxury, otherness, or exceptionalism, advertisers for Japanese automobiles spoke the language of the market, emphasizing economy, efficiency, and other traits valued by those purchasing vehicles as a necessity or a limited luxury.<sup>187</sup> Like the mass-marketed, American vehicles, the compact, Spartan Japanese automobiles were made for those who needed to drive in suburbanized, car-dependent, postwar America.<sup>188</sup> These consumers needed

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114 (displaying a Cadillac advertisement showing a Cadillac outside of the Waldorf-Astoria hotel), C2 (displaying a Pierce Arrow advertisement proclaiming it "America's Finest Motor Car for America's Finest Families"), 154 (displaying a Plymouth advertisement featuring a woman in a fur stole and describing the 1956 Plymouth as a "dream car"), 159 (Oldsmobile advertisement featuring a woman in a fur coat and the tagline, "Next to the mink, Tornado is the most exciting animal around"). Rather, this was neither a major swath of the corporate automotive culture, nor was it an area where consumers were as likely to buy with an expectation that their purchase would benefit an economy on which they were reliant. It was certainly a market that focused on the dispositional power to overcome situational hurdles (i.e., buying a Cadillac would make one appear upper class), but it was significantly less evocative, of the public conception of the corporation that this Article explores than other mainstream automobile models and advertisements.

<sup>186</sup> *Id.* at 227.

<sup>187</sup> *See id.* at 236. One Toyota Celica advertisement included the tagline, "You can get one for the price of a Toyota." *See id.*; *see also id.* at 237 (displaying a Honda Civic advertisement boasting the "[h]ighest [gas] mileage" and "lowest price"); *Toyota General Car Advertisements: 1972 Toyota General*, PRODUCTIONCARS.COM, [http://www.productioncars.com/dx5/vintage\\_car\\_ads3.php?make2=Toyota&model2=General](http://www.productioncars.com/dx5/vintage_car_ads3.php?make2=Toyota&model2=General) (click "1972 Toyota General" advertisement) (last visited Apr. 12, 2012) ("If you're looking for an economy car that doesn't have economy written all over it, see your nearby Toyota dealer.").

<sup>188</sup> *See supra* note 24 and accompanying text.

the means to take advantage of America's promise of employment, education, and freedom,<sup>189</sup> but their socioeconomic situation prevented them from being particularly selective about what they purchased and drove. The advertising campaigns, therefore, emphasized the features that automobiles provided in conjunction with their relatively low prices. The Toyota Corolla, for instance, was "loaded with reasons why it shouldn't be under \$1800,"<sup>190</sup> and "one of the nicest things about [the] Honda [Civic] is the kind of features you wouldn't expect from a car in its price range."<sup>191</sup>

The adoption of this sort of rhetoric (though clearly not unique to foreign corporations)<sup>192</sup> becomes troubling when one considers the actual quality of the purchased products. These economy Japanese automobiles—like low-end American automobiles—were also more frequently the source of products liability complaints than were their European luxury counterparts.<sup>193</sup> In other words, although the more functional, specification-focused advertising approach was a hallmark of Japanese imports and lower-end American models, this elevation of technical prowess and efficiency was largely illusory. Differences in fuel economy or engine configuration might have been (and still are) concerns for many consumers, but, through market segmentation and class stratification, these choices may often be illusory or, at the very least, may exist in very thin markets. Those deciding whether to purchase an entry level Datsun (later Nissan) probably had only a few cars to choose from that would fit within their budget. This meant that these consum-

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<sup>189</sup> See *supra* note 49 and accompanying text.

<sup>190</sup> STEVENSON, *supra* note 8, at 236.

<sup>191</sup> *Honda Advertisements 1982 Honda Civic*, PRODUCTIONCARS.COM, [http://www.productioncars.com/dx5/vintage\\_car\\_ads3.php?make2=Honda&model2=Civic](http://www.productioncars.com/dx5/vintage_car_ads3.php?make2=Honda&model2=Civic) (click "1982 Honda Civic" advertisement) (last visited Apr. 12, 2012).

<sup>192</sup> See *supra* notes 150–161 and accompanying text.

<sup>193</sup> As a somewhat cursory and imperfect way of testing this proposition, I searched on LexisNexis using Toyota as the example for Japanese automobiles and Mercedes-Benz as the example for European luxury cars. I searched for cases that referred to either of these two automobile manufacturers at least five times and also used the word "design" as a means of identifying design defect products liability suits. Although this approach is certainly not exhaustive and surely some cases settled out of court, this search returned eighteen published products liability suits against Toyota that at least went through some pre-trial stage and only one such suit against Mercedes-Benz. It also is worth noting that the claims against Mercedes-Benz were dismissed, *see* *Quirk v. Ross*, 476 P.2d 559, 562–63 (Or. 1970), yet multiple claims against Toyota were either successful or at least survived summary judgment motions. *See, e.g.,* *Thornton v. Toyota Motor Sales U.S.A.*, 397 F. Supp. 476, 482–83 (N.D. Ga. 1975); *Oltz v. Toyota Motor Sales U.S.A.*, 531 P.2d 1341, 1342 (Mont. 1975).

ers could neither fully assess the automobile market nor make a meaningfully informed decision.

In the legal context, however, the dispositionist framework that stressed the importance of allowing consumers to choose among vehicle options became a recurring theme in the National Highway Traffic Safety Administration's (NHTSA) drafting of safety regulations.<sup>194</sup> We could argue, as some scholars have,<sup>195</sup> that NHTSA decisions allowing greater corporate discretion in the implementation of safety standards demonstrated agency capture—that agencies designed to protect the public interest succumbed to corporate actors and therefore failed to satisfy their regulatory duties. Alternatively, it is possible that NHTSA decisions—for example, delaying mandatory airbag implementation<sup>196</sup> or not immediately requiring passive restraint systems<sup>197</sup>—were indicative of the more pernicious, deep capture hypothesis.<sup>198</sup> According to this view, the very regulatory structure is inherently captured; that is to say, agencies are captured without interference by the regulated corporation. This is because regulators defer to corporations to make optimal decisions, while corporations (which are only required to consider profit or business necessity in their decision making)<sup>199</sup> defer, in turn, to the regulators to make decisions about what is in the public interest.

Thus, supported by the language of corporate public relations efforts,<sup>200</sup> a regulator might assume that corporate executives view public safety as a legitimate business purpose. This assumption, however, runs counter to the rule from *Dodge* that (barring some explicit statement to the contrary) maximizing profit for shareholders (rather than maximizing public well-being) is the corporate board's sole duty. This then becomes a situation in which the law that actually governs the corporation is squarely at odds with the cultural understanding of the corpora-

<sup>194</sup> See, e.g., *Motor Vehicle Mfrs. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 34–38 (1983); Weingroff, *supra* note 117.

<sup>195</sup> See, e.g., Fred R. Harris, *The Politics of Corporate Power*, in *CORPORATE POWER IN AMERICA*, *supra* note 110, at 25, 27–29 (discussing the way the NHTSA and the Department of Transportation softened their stances on requiring airbags in cars because of Ford's vociferous objections); Simon Lazarus, *Halfway Up from Liberalism: Regulation and Corporate Power*, in *CORPORATE POWER IN AMERICA*, *supra* note 110, at 215, 233 (discussing the need to “check the regulators” in the NHTSA context).

<sup>196</sup> See Harris, *supra* note 195, at 27–29.

<sup>197</sup> See *State Farm*, 463 U.S. at 38.

<sup>198</sup> See *supra* note 33 and accompanying text.

<sup>199</sup> See *Dodge v. Ford*, 170 N.W. 668, 685 (Mich. 1919); cf. *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971); *Gimbel v. Signal Cos.*, 316 A.2d 599, 609 (Del. Ch. 1974); *Kaplan v. Centex Corp.*, 284 A.2d 119, 124 (Del. Ch. 1971).

<sup>200</sup> See, e.g., STEVENSON, *supra* note 8, at 198.

tion's methods and objectives. Like the National Labor Relations Act (NLRA)<sup>201</sup> (which has lost much of its pro-employee regulatory clout through its practical application),<sup>202</sup> automotive regulations (which were designed with an explicitly progressive purpose) have been effectively de-fanged. The result is a dangerous vacuum where an illusion of process and legal regulation legitimizes and legitimates behavior that directly conflicts with many consumers' interests.

### B. *Opportunistic Nationalism*

*It is our goal to be in every single country there is, Iron Curtain countries, Russia, China. We at Ford Motor Company look at a world map without any boundaries.*

*We don't consider ourselves basically an American company. We are a multinational company. And when we approach a government that doesn't like the U.S., we always say, "Who do you like? Britain? Germany? We carry a lot of flags. We export from every country."<sup>203</sup>*

It is this tension between the meta schema of corporate/societal symbiosis and the macro and micro schemas of profit maximization that ultimately brings us to the rhetorical use of American mythos by Japanese and American carmakers in the later part of the twentieth century. With a growing move in domestic economic policy toward deregulation, the opening of more international markets, and the Soviet Union's shift toward Perestroika and dissolution, the American automotive corporations were becoming increasingly international.<sup>204</sup> By the early 1970s, corporate exportation of jobs had become a major concern for organized labor.<sup>205</sup> By the mid-1980s, "Ford's foreign operations accounted for 20.9 percent of its profits, and 44.7 percent of its assets."<sup>206</sup> Not only were automotive corporation executives and spokespeople continuing to insist that corporations were not public

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<sup>201</sup> Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (2006)).

<sup>202</sup> Cf. Klare, *supra* note 119, at 265-70 (arguing that the NLRA was originally a progressive, if not radical, piece of legislation that was effectively stripped of its significance by its judicial interpretation and application).

<sup>203</sup> AFL-CIO, *supra* note 99, at 23 (quoting an Executive Vice President of Foreign Operations of Ford Motor Corporation).

<sup>204</sup> See, e.g., John R. Munkirs, *Technological Change: Disaggregation and Overseas Production*, 22 J. ECON. ISSUES 469, 471 (1988).

<sup>205</sup> See AFL-CIO, *supra* note 99, at 23.

<sup>206</sup> Munkirs, *supra* note 204, at 471.

entities subject to strict government regulation, they were also beginning to shirk social responsibility by arguing that corporations like Ford and GM should not be viewed as “American” or as having any special obligations to the United States or American communities.<sup>207</sup>

In the 1989 documentary *Roger and Me*, a GM lobbyist responds to a question about the corporation’s responsibility to Flint, Michigan—a town that was losing the GM factory that had provided its residents with jobs for decades—by stressing the characterization of the corporation inherited from *Dodge*:

I don’t understand, though, your connection that by saying . . . because General Motors was born here, it owes more to this community. I don’t agree with that. . . . Because I just don’t agree with it. I believe it’s a corporation. It’s in business to make a profit. And it does what it has to do to make a profit. That’s the nature of corporations or companies. It’s why people take their own money and invest . . . it in a business . . . so they can make money. It isn’t to honor their hometown.<sup>208</sup>

By stressing the shareholders and ignoring other stakeholders, this explanation plays directly into the illusion-of-law hypothesis. By claiming to focus on the shareholders, managers are able to retain discretion and disregard massive collateral damage to other constituencies.<sup>209</sup> Even more importantly, though, this explanation completely disregards a major group of “investors” whose motives in investing are much more complex: consumers. In other words, there were certainly Flint residents who bought GM cars instead of (perhaps less expensive) Toyotas because of an underlying belief in the Fordist schema by which they were, in fact, buying into their own community and their own futures.

What makes this tension between schemas all the more troubling is that, fueled by foreign competition and a constant drive to improve their market share, these same American corporations that were closing factories and exporting jobs were simultaneously ratcheting up the use of national imagery in advertising. They were emphasizing (explicitly or implicitly) the Fordist associations of buying American with supporting the domestic economy and a national way of life.<sup>210</sup> In the late

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<sup>207</sup> See *supra* note 202 and accompanying text.

<sup>208</sup> *ROGER AND ME* (Warner Brothers 1989).

<sup>209</sup> See Chen & Hanson, *supra* note 17, at 77–99.

<sup>210</sup> See, e.g., Chevrolet, *Heartbeat of America* (1991), YOUTUBE (May 25, 2008), <http://www.youtube.com/watch?v=HYThjgJZFwo> (describing American values over a montage of quintessentially American images, shots of working-class people, and, of course, Chevro-

1980s, for instance, Chevrolet ran a series of television advertisements centered on a song that featured lyrics about Chevrolet being the “Heartbeat of America.”<sup>211</sup> One of the most explicitly “American” of these commercials featured a narrator talking about “things . . . that we have come to know and trust . . . things we know we can depend on” as a montage of images of working-class Americans played on screen.<sup>212</sup> As in the wartime advertisements of the 1940s, the appeal to a shared sense of community and a shared set of values was unmistakable. Even those advertisements or public relations campaigns that did not directly reference the United States are often heavily imbued with American imagery.<sup>213</sup> When considered alongside the rise of foreign competition and during a period of extreme patriotic fervor brought on by the Cold War, these advertising tropes emphatically exploit the disconnect between Fordist rhetoric and post-Fordist (or perhaps simply profit-subsidizing) legal structures.

That foreign automotive corporations employed similar rhetorical devices also speaks to both the cultural significance of corporate “Americanness” and the ease with which these motifs could be applied. Although Joe Isuzu is perhaps the most obvious example of the Americanization of foreign corporate advertising, we can see the invocation of American mythos and the appeal to shared values throughout contemporary corporate automotive culture.<sup>214</sup> The product recall—espe-

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lets); *Chevrolet Nova Car Advertisements: 1972 Chevrolet Nova Rally*, PRODUCTIONCARS.COM, [http://www.productioncars.com/dx5/vintage\\_car\\_ads3.php?make2=Chevrolet&model2=Nova](http://www.productioncars.com/dx5/vintage_car_ads3.php?make2=Chevrolet&model2=Nova) (click “1972 Chevrolet Nova Rally” advertisement) (last visited Apr. 12, 2012) (“Chevrolet. Building a better way to see the U.S.A.”); *Ford Car Advertisements: 1983 Ford Bronco*, PRODUCTIONCARS.COM, [http://www.productioncars.com/dx5/vintage\\_car\\_ads2.php?make2=Ford](http://www.productioncars.com/dx5/vintage_car_ads2.php?make2=Ford) (click “1983 Ford Bronco” advertisement) (last visited Apr. 12, 2012) (claiming that the Bronco is “America’s Truck” and featuring a red, white, and blue stripe across the page); *Patriotic Ads Urge Consumers to Buy Cars*, GOOD MORNING AMERICA (Oct. 17, 2001), <http://abcnews.go.com/GMA/story?id=126655&page=1> (describing the rise in patriotic-themed car commercials after September 11, 2001).

<sup>211</sup> Chevrolet, *Heartbeat of America*, *supra* note 210.

<sup>212</sup> *Id.*

<sup>213</sup> Many advertisements, for instance, are set against quintessentially American frontier backdrops. See, e.g., Ford Motor Corp., *1986 Ford Bronco II Commercial*, YOUTUBE (Jan. 5, 2010), <http://www.youtube.com/watch?v=yLt782PxtPA&feature=related>; *Chevrolet El Camino Car Advertisements: 1974 Chevrolet El Camino*, PRODUCTIONCARS.COM, [http://www.productioncars.com/dx5/vintage\\_car\\_ads3.php?make2=Chevrolet&model2=El+Camino](http://www.productioncars.com/dx5/vintage_car_ads3.php?make2=Chevrolet&model2=El+Camino) (click “1974 Chevrolet El Camino” advertisement) (last visited Apr. 12, 2012). A similar theme can be seen in the use of patriotic or Western-themed vehicle model names (e.g., Jeep Cherokee, Ford Bronco, GMC Silverado).

<sup>214</sup> See, e.g., Honda, *Everybody Knows Somebody Who Loves a Honda Commercial*, YOUTUBE (June 16, 2010), [http://www.youtube.com/watch?v=Mz4PtO\\_v9dc](http://www.youtube.com/watch?v=Mz4PtO_v9dc). One Honda commercial showed people posing alongside Hondas, included voice-overs of people listing friends

cially in Toyota's recent mass vehicle recalls for faulty brakes<sup>215</sup>—becomes a powerful illustration of the way these evocations of national solidarity obscure the actual scripts of corporate law and corporate culture. In a series of advertisements designed to mollify anxious consumers, assorted Toyota employees express their concern over the widespread mechanical issues, pledge to do better next time, and remind viewers of Toyota's history of reliability.<sup>216</sup> The commercials—which often show nostalgic images of American landscapes, vintage automobiles, and assembly line workers<sup>217</sup>—stress themes of interdependence and reliability. As workers talk about how they drive Toyotas and how long they have been a part of the Toyota “family,” it is hard not to be reminded of Flint. Toyota's corporate board, therefore, is not simply apologizing to those who depend on their cars. Rather, it appears to be reminding viewers that there are other stakeholders involved. The implicit message is that, by refusing to buy more Toyotas, consumers are harming the very people (the workers) that corporations were free to ignore under *Dodge*. In other words, from a legal perspective, worker layoffs are a collateral and non-judicial side effect of managerial exercises of legitimate business judgment. But automotive corporations are quick to point precisely to these adverse effects on employees and communities as a potential consequence should consumers refuse to buy a possibly defective product.

By evoking collective values, these commercials also implicitly invoke American regulations and the shared background rules of the American legal system itself. We are all Americans, the corporate spokespeople tell us, so we all have the same interests—safe and affordable vehicles.<sup>218</sup> This Article argues therefore that, by conjuring up these ideas of shared norms, foreign corporate advertisers are suggesting their participation in a shared regulatory framework and are rhetorically embedding foreign corporations not in the largely *laissez-faire*

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and relatives who own Hondas, and closed with the tagline, “Everybody knows somebody who loves a Honda.” *Id.*

<sup>215</sup> See Ken Bensinger, *Another Massive Toyota Recall*, L.A. TIMES, Jan. 22, 2010, at A1; Claran McEvoy, *As Toyota Suits Mount, Lawyers Seek Control of Litigation Location*, SAN FRAN. DAILY J., Feb. 26, 2010, at 1.

<sup>216</sup> See, e.g., “Commitment” TV Commercial, TOYOTA, <http://www.toyota.com/recall/videos/commitment-commercial.html> (last visited Apr. 12, 2012); *Ronny—Master Diagnostic Technician*, TOYOTA, <http://www.toyota.com/recall/videos/ronny-master-diagnostic-technician.html> (last visited Apr. 12, 2012).

<sup>217</sup> See, e.g., “Commitment” TV Commercial, *supra* note 216; “Restore” TV Commercial, *supra* note 16.

<sup>218</sup> See, e.g., Toyota, *Toyota Talks to Customers About the Sticking Pedal Issue*, YOUTUBE (Feb. 1, 2010), <http://www.youtube.com/watch?v=ZCb2dEFBq7I>; *supra* note 217.



realm of the global marketplace, but rather in the ostensibly regulated and controlled space of the domestic market. This leap—from the image of shared consumer values to entry into a common legal understanding—is predicated on the legal order reflecting (at least ostensibly) the will of the people and some set of shared traditions, norms, or values.<sup>219</sup> This Article argues, however, that, as applied, corporate law may not reflect public values. It may instead reflect the renunciation of responsibility for non-shareholding stakeholder interests courts and corporate law scholars expressed, exacerbated by a sharply accelerating race to the bottom both domestically and abroad.<sup>220</sup>

In his discussion of the way in which law attempts to discipline and “normalize,” Michel Foucault explains that

if it is true that the law refers to a norm, and that the role and function of the law therefore—the very operation of the law—is to codify a norm, to carry out a codification in relation to the norm, the problem that I am trying to mark out is how techniques of normalization develop from and below a system of law, in its margins and maybe even against it.<sup>221</sup>

By employing the illusion-of-law hypothesis, this Article adopts Foucault’s critical insight to challenge the conclusion that the law does, in fact, codify community norms (regardless of whether codifying community norms is actually normatively desirable). That is, it may be that we as a society want multinational corporate actors to have the freedom to ignore non-shareholding stakeholders (e.g., workers, the environment, consumers). But, based on corporate rhetoric, and even the rhetoric of Milton Friedman<sup>222</sup> and others who oppose regulation or corporate social responsibility, this Article argues that society does not seem comfortable with these stakeholders being ignored. Further, it may be that we believe that this sort of legal action should take place in areas other than the corporate law.<sup>223</sup> But if that is not the case, then what normative goals are actually advanced by corporate law rules that allow these concerns to be subordinated to the profit motive? To use

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<sup>219</sup> See, e.g., HANS Kelsen, GENERAL THEORY OF NORMS 115–22 (Michael Hartney trans., Oxford Univ. Press 1991) (1979); cf. MICHEL FOUCAULT, SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLÈGE DE FRANCE 1977–78, at 56–57 (Michel Senellart ed., Graham Burchell trans., 2007).

<sup>220</sup> See *infra* notes 241–244 and accompanying text.

<sup>221</sup> FOUCAULT, *supra* note 219, at 56.

<sup>222</sup> See Friedman, *supra* note 114, at 122.

<sup>223</sup> See *supra* note 17.

Foucault's language, such an order may be *normalizing* us to accept the profit motive and corporate irresponsibility, but is that actually a codification of norms?<sup>224</sup> Looking to the rhetoric of Americanness and the public corporation, this Article concludes that it most certainly does not appear to be.

### C. *The Illusion of the Nation as the Illusion of Law*

*The nation-state is no longer an adequate or even a very relevant economic unit. Conflict will increase between the world corporation, which is a modern concept evolved to meet the requirements of the modern age and the nation-state, which is still rooted in archaic concepts unsympathetic to the needs of our complex world.*<sup>225</sup>

In a sense, the issue that unites the myth of corporations' "Americanness" and the illusion of law is the disconnect between general, societal norms and norms in the corporate context.<sup>226</sup> That is, underlying both is a disconnect between the background, regulatory structures and the policy priorities that consumers, workers, and other stakeholders mistakenly believe exist and the *actual* legal/regulatory structures and policy priorities that govern corporate behavior and decision making. This Article argues that the rhetoric of corporate advertising campaigns—that stress the automotive corporation as symbiotic with both the working class communities and the American economy—

<sup>224</sup> See FOUCAULT, *supra* note 219, at 56.

<sup>225</sup> AFL-CIO, U.S. MULTINATIONALS—THE DIMMING OF AMERICA—A REPORT PREPARED FOR THE AFL-CIO MARITIME TRADES DEPARTMENT EXECUTIVE BOARD MEETING, reproduced in *Multinational Corporations: Hearings Before the Subcomm. on Int'l Trade of the S. Comm. on Finance*, 93d Cong. 450 (1973) (quoting a former Under Secretary of State and senior partner at Lehman Brothers).

<sup>226</sup> *But cf.* T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932).

Indeed in most cases reasonable prudence [in equipping a boat] is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.

*Id.* In *T.J. Hooper*, the U.S. Court of Appeals for the Second Circuit acknowledges the potential danger in allowing corporate actors to set the regulatory standards for their own behavior when it affects the health and well-being of others. Looking at the tensions prevalent throughout corporate law, the lack of accountability the law imposes, and the wide-reaching effects of deep capture, however, it appears that this lesson has not generally been internalized in the regulation of corporate behavior.

should be seen as reflecting or (at least in part) helping to shape a cultural understanding of the corporation *not* as Milton Friedman's<sup>227</sup> or the *Dodge* Court's profit-driven private entity,<sup>228</sup> but rather as Justice Brandeis's<sup>229</sup> or Ford's<sup>230</sup> legally-created conglomeration of public values and concerns. That is to say, the American corporation is understood and framed culturally (and perhaps, falsely) as an embodiment of American norms and American values—the fundamental unit of the modern American economy, controlled by American laws and serving American interests.

The law tells us that corporations are individuals, that they have many of the same rights and burdens of natural persons, and that their existence is governed by the same rules, norms, and values that govern the lives of other Americans.<sup>231</sup> But unlike flesh and blood individuals, the major automotive corporations are not really citizens of any one nation. When we look at the fine print of any of the “foreign” automotive advertisements,<sup>232</sup> we find an address in the United States for the “American” incarnation of the corporation. Some of these corporations have assembly plants in the United States and use U.S. labor;<sup>233</sup> others do not.<sup>234</sup> A *New York Times* piece from 2009 that attempts to clarify what it actually means to “buy American” in the automobile context states:

“[D]omestic content” is not domestic at all. For the purposes of the window sticker, the government has decided that domestic content will include parts made in Canada. Under the North American Free Trade Act, domestic is even less clear because it also includes Mexico.

Meanwhile, the labor of autoworkers assembling the vehicles is excluded from the calculation. Therefore, foreign car-makers with assembly plants in the United States are penal-

<sup>227</sup> See *supra* note 114 and accompanying text.

<sup>228</sup> See *supra* notes 102–107 and accompanying text.

<sup>229</sup> See *supra* notes 50–51 and accompanying text.

<sup>230</sup> See *supra* notes 47–49 and accompanying text.

<sup>231</sup> See *Citizens United v. FEC*, 130 S. Ct. 876, 900 (2010). See generally *Santa Clara Cnty. v. S. Pac. R.R.*, 118 U.S. 394 (1886) (implying that corporations are protected by the Equal Protection Clause of the Fourteenth Amendment).

<sup>232</sup> See, e.g., *supra* notes 173–175 and accompanying text.

<sup>233</sup> See Matthew Dolan, *To Outfox the Chicken Tax, Ford Strips Its Own Vans*, WALL ST. J., Sept. 22, 2009, at A1.

<sup>234</sup> See Cheryl Jensen, *For Baffled Buyers, a Guide to Cars Made in North America*, N.Y. TIMES, June 19, 2009, at A1.

ized because they cannot factor in the value of their American workers' labor.<sup>235</sup>

In short, if buying American—as presented in corporate rhetoric since the dawn of the Ford Motor Corporation—revolved around supporting local business, what does it even mean for an automotive corporation today to be “American”? Under Chapter 11 of the North American Free Trade Agreement, member nations may be sued by corporations from other member nations if domestic regulations cause injury to corporate interests.<sup>236</sup> That is, multinational or foreign corporations are afforded the same sorts of protections against invasive regulation as domestic citizens. Therefore, looking back at *Dodge* and reexamining the state of international legal guidance as embodied by multilateral trade organizations,<sup>237</sup> it is hard to argue that the law imposes anything “stricter than the morals of the market place”<sup>238</sup> on corporate actors. Because of an acceptance of consumers as dispositionist actors and a failure to consider background rules,<sup>239</sup> the corporate law as applied suggests that, short of fraud or quasi-fraudulent behavior,<sup>240</sup> corporations are generally not held liable for the consequences of their profit-maximizing behavior.

In the automotive context, as in other realms occupied by the modern multinational corporation, broader duties extending beyond short-term profit-enhancement—to the extent they exist—are largely illusory. Over the past few decades, the doctrinal embrace of free movement of capital across national borders has generally not been accompanied by any similar concern for free movement of labor and regulatory controls.<sup>241</sup> In the context of these background rules, the domestic, corporate law rules underpinning the private, profit-centered

<sup>235</sup> *Id.*

<sup>236</sup> See North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289, 642–47 (1993) [hereinafter NAFTA] (creating a right of action against governments for investors if governmental regulation has harmed investor interests).

<sup>237</sup> Cf. NAFTA, 32 I.L.M. at 289–456; *id.* at 605–703; Conference, *Working Borders: Linking Debates About Insourcing and Outsourcing of Capital and Labor*, 40 TEX. INT’L L.J. 691, 694–96 (2005).

<sup>238</sup> *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

<sup>239</sup> See *supra* notes 154–161 and accompanying text.

<sup>240</sup> See, e.g., *Sea-Land Servs. v. Pepper Source*, 941 F.2d 519, 522–23 (7th Cir. 1991); *Van Dorn Co. v. Future Chem. & Oil Corp.*, 753 F.2d 565, 570 (7th Cir. 1985).

<sup>241</sup> See, e.g., ROBERTO MANGABEIRA UNGER, *FREE TRADE REIMAGINED: THE WORLD DIVISION OF LABOR AND THE METHOD OF ECONOMICS* 193–98 (2007); David Graeber, *The Globalization Movement: Some Points of Clarification*, in *THE ANTHROPOLOGY OF DEVELOPMENT AND GLOBALIZATION: FROM CLASSICAL POLITICAL ECONOMY TO CONTEMPORARY NEOLIBERALISM* 169, 169–70 (Marc Edelman & Angelique Haugerud eds., 2005).

conception of the corporation further accentuate the state of corporate irresponsibility and the difficulty of instituting meaningful checks on corporate power. Decades before the birth of the truly multinational corporation, Justice Brandeis expressed concern in *Louis K. Liggett Co. v. Lee* about a “race to the bottom” in which States would compete to provide the most business-friendly laws, thereby thwarting other States’ ability to regulate corporate behavior.<sup>242</sup> Just as Justice Brandeis expressed concern about a race to the bottom in the domestic sphere,<sup>243</sup> in the international arena, the presence of China and developing countries that lack labor or environmental protections renders American regulatory structures largely superficial.<sup>244</sup>

Where this Article extends the illusion-of-law hypothesis is in suggesting that it is not just the illusion of corporate law and corporate regulation that allows for mass collateral damage to non-shareholding stakeholders. In our contemporary global economy, it is the myth of the nation-state, the myth of America itself as a governing and controlling legal and economic unit that is the ultimate illusion. Scholars have argued that this public conception of an idealized Americanism is one of the greatest forces hampering more egalitarian or redistributive policies and political movements in the United States.<sup>245</sup> These critics contend that, when political ideologies or policies that challenge the status quo have been raised, the specter of America—as metonymic for “democracy, liberty, opportunity”—has prevented those who would benefit most from reform or social upheaval from advocating for it.<sup>246</sup> In other words, when the status quo is framed in terms of a quasi-spiritual ideology of freedom, equality, and democracy, most Americans who identify with the American ideal become hostile to ideas and policies that would destabilize the existing sociopolitical order. The rhetorical narratives of Americanism—or, phrased more broadly, identity rooted in the nation-state—become powerful situational forces,<sup>247</sup> means of evoking the background rules, values, and traditions of democratic society.

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<sup>242</sup> See 288 U.S. 517, 557–67 (1933) (Brandeis, J., dissenting).

<sup>243</sup> See *id.*

<sup>244</sup> See RAPHAEL KAPLINSKY, *GLOBALIZATION, POVERTY, AND INEQUALITY: BETWEEN A ROCK AND A HARD PLACE* 163–232 (2005).

<sup>245</sup> See, e.g., DENNING, *supra* note 21, at 169–73; LEON SAMSON, *TOWARD A UNITED FRONT: A PHILOSOPHY FOR AMERICAN WORKERS* 16, 117 (1933); Seymour Martin Lipset, *American Exceptionalism Reaffirmed*, in *IS AMERICA DIFFERENT?: A NEW LOOK AT AMERICAN EXCEPTIONALISM* 1, 16–22 (Byron E. Shafer ed., 1991); Samson, *supra* note 2, at 426.

<sup>246</sup> Samson, *supra* note 2, at 426.

<sup>247</sup> See Chen & Hanson, *supra* note 17, at 4.

For a century, American automotive corporations have benefited from this very conception of “America” as an interdependent set of shared cultural and economic values. Facing staggering financial losses in 2008, executives from the “Big Three” American automotive manufacturers appealed to this broader situational narrative and requested federal funding, insisting that their survival was essential to the American automotive industry.<sup>248</sup> In time for the 2011 Super Bowl, Chrysler unveiled an advertising campaign focusing on Detroit, Michigan and the potential for urban renewal through the purchase of American-made cars.<sup>249</sup> The initial advertisement in the “Imported from Detroit” campaign featured Michigan-born rapper Eminem and images of the city’s history, as a voice over delivers a paean to the depressed, blue collar city:

It’s the hottest fires that make the hardest steel. Add hard work and conviction and the know-how that runs generations deep in every last one of us. That’s who we are. That’s our story. . . . [W]hen it comes to luxury, it’s as much about where it’s from as who it’s for.<sup>250</sup>

The message was clear: for working people and communities struggling with widespread unemployment, foreclosure, and economic hardship, rebirth and renewal could come in the form of a re-invigorated, American automotive industry—an industry for and from American communities. Chrysler’s message was powerful and compelling, a restatement of the importance of corporate drivers of industry to the health of a domestic economy. Indeed, in the follow-up commercial aired during Halftime of the 2012 Super Bowl, the narrator, actor Clint Eastwood, never even mentions Chrysler by name, and the commercial shows more cityscapes than cars.<sup>251</sup> Referring repeatedly to “Detroit” and “America,” places beset by hardship and proud of their “resiliency,” Eastwood urges viewers to regroup and show the world how strong “we” can be. But, despite its gritty façade and appeal to the real and to

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<sup>248</sup> See Bill Vlasic & David M. Herszenhorn, *Detroit Chiefs Plead for Aid, to Little Avail*, Nov. 18, 2008, N.Y. TIMES, at A1.

<sup>249</sup> Chrysler, *Chrysler Eminem Super Bowl Commercial—Imported from Detroit*, YOUTUBE (Feb. 5, 2011), [http://www.youtube.com/watch?v=SKL254Y\\_jtc](http://www.youtube.com/watch?v=SKL254Y_jtc) [hereinafter *Chrysler 2011 Super Bowl Commercial*]; see also Stephanie Condon, *Chrysler’s “Imported from Detroit” Super Bowl Ad Inspires Political Debate*, CBS NEWS (Feb. 7, 2011, 4:02 PM), [http://www.cbsnews.com/8301-503544\\_162-20030905-503544.html](http://www.cbsnews.com/8301-503544_162-20030905-503544.html).

<sup>250</sup> *Chrysler 2011 Super Bowl Commercial*, *supra* note 249.

<sup>251</sup> Chrysler, *Halftime in America: OFFICIAL Chrysler Super Bowl 2012 Commercial*, YOUTUBE (Feb. 5, 2012), [http://www.youtube.com/watch?v=\\_PE5V4Uzobc](http://www.youtube.com/watch?v=_PE5V4Uzobc).

community, the advertising campaign is just as much a work of fiction as Joe Isuzu. Chrysler's closed view of the economy has been rejected by legislation and treaty.<sup>252</sup> Corporations owe no special duty to American workers and other U.S. stakeholders, and, through international maneuvering, businesses are often able to circumvent legislative and regulatory efforts to shape domestic economic and labor policy.<sup>253</sup> The end result, then, is that "America" as a metonymic device for a set of shared values and laws has become yet another form of corporate veil—legitimizing profit-driven behavior and shielding the individuals responsible from being forced to address the collateral damage resulting from corporate activity.

### CONCLUSION

By highlighting the tension between the macro scripts of corporate law and the meta script of corporate cultural construction, this Article argues that legal and regulatory constraints that define the collective consciousness of "America" have become largely illusory. Although this Article has refrained from making an explicit, normative argument about the appropriate socio-legal or political response to its primarily, descriptive conclusion, there is an implicit (albeit tacit and insubstantially formulated) policy response lurking between the lines. Because the law is the product of judicial and legislative actors who, in turn, are meant to represent the collective will and well-being of the American people, it seems only logical that Americans should want the law in its application to better reflect our collective understanding of shared values and duties.

In closing, however, we can look to the profit-driven factory shutdown as perhaps the quintessential case of the betrayal of the "American" ideal, of corporate decision making coming home to roost and impacting non-shareholding stakeholders. Like the ideal of The Law, the operation of a factory becomes an ostensibly immutable background condition, a situational factor responsible for employment and

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<sup>252</sup> See, e.g., *Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 319 (2d Cir. 2010); *McLemore v. Hyundai Motor Mfg. Ala.*, 7 So. 3d 318, 332–34 (Ala. 2008); David Kennedy, *The Mystery of Global Governance*, 34 OHIO N.U. L. REV. 827, 840 (2008); Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 82–85 (2005) (discussing the basic terms of bilateral investment treaties in which countries agree to rules that will govern investments between residents of the two nations); Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT'L L. 283, 325 (2004).

<sup>253</sup> See, e.g., Dolan, *supra* note 233.

for lending underlying stability to an entire community's way of life.<sup>254</sup> Nevertheless, those directly affected by these factory closures rarely have any legal recourse,<sup>255</sup> any means of gaining restitution for the loss of their jobs, livelihoods, and communities. It may be that corporate law is not the ideal or appropriate place to address such a problem. It may even be that our legal institutions are irreparably subject to deep capture and that legal solutions to these problems—capital flight, greed trumping humanity, and progress and efficiency being incompatible with equality and equity—would inevitably be insufficient or unsatisfactory.<sup>256</sup> Yet, in a cultural climate where corporations operate against a background of assumptions about America as a shared space of values and ideals, it is worth considering whether corporate decisionmakers owe some greater duty to neglected stakeholders, the American legal system, and the American society that has created and supported them.

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<sup>254</sup> See *Local 1330, United Steel Workers of Am. v. U.S. Steel Corp.*, 631 F.2d 1264, 1265–66 (6th Cir. 1980); *THE LAST TRUCK: CLOSING OF A GM PLANT* (HBO 2009); ROGER AND ME, *supra* note 208. Other scholars have written more on the community's reliance interest in plant closure situations. See Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283, 284–86 (1998); Duncan Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 630 (1982); Marleen A. O'Connor, *Promoting Economic Justice in Plant Closings: Exploring the Fiduciary/Contract Law Distinction to Enforce Implicit Employment Agreements*, in *PROGRESSIVE CORPORATE LAW* 219, 228–30 (Lawrence E. Mitchell ed., 1995). See generally Harris Freeman, *The First of Thousands? The Long View of Local 1330's Challenge to Management Rights and Plant Closings*, 7 UNBOUND 55 (2011); Karl Klare, *Teaching Local 1330—Reflections on Critical Legal Pedagogy*, 7 UNBOUND 81 (2011); Staughton Lynd, *Remembering Local 1330*, 7 UNBOUND 63 (2011); Brishen Rogers, *Dead Man's Town: Violence and Legal Interpretation in Local 1330*, 7 UNBOUND 118 (2011); Joseph W. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988); Joseph William Singer, *The Reliance Interest in Property Revisited*, 7 UNBOUND 112 (2011); Mike Stout, *Remembering Pittsburgh*, 7 UNBOUND 70 (2011).

<sup>255</sup> See *supra* note 254.

<sup>256</sup> Cf. *Roquet v. Arthur Andersen LLP*, 398 F.3d 585, 589–90 (7th Cir. 2005) (applying the Worker Adjustment and Retraining Notification Act that required large corporate employers to give workers advance notice of layoffs so as not to require advance warning when it might interfere with profitable business operation).



