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**PANEL FOUR: CORPORATE PHILANTHROPY FROM THE
PERSPECTIVE OF CORPORATE AND SECURITIES LAW |
QUESTIONING PHILANTHROPY FROM A CORPORATE
GOVERNANCE PERSPECTIVE**

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PANEL FOUR:
CORPORATE PHILANTHROPY FROM THE PERSPECTIVE OF
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QUESTIONING PHILANTHROPY FROM A
CORPORATE GOVERNANCE PERSPECTIVE

JILL E. FISCH*

I. INTRODUCTION

The panels in this program have described a variety of research projects on the topic of corporate philanthropy, but until this conference, corporate philanthropy had not received much attention from corporate lawyers. There are a number of reasons for this. First, corporate charitable donations and other philanthropic endeavors constitute a tiny percentage of a corporation's overall operations.¹ In the aggregate, corporate philanthropy rarely amounts to more than pennies per share. By comparison, corporate tender offers, which have been the focus of extensive legal and academic scrutiny, can involve premiums of as much as fifty percent over market price. The relative insignificance of corporate philanthropy, in dollar terms, means few investors are likely to complain about the manner in which this money is spent.

Second, society is unlikely to be receptive to shareholder complaints that charitable giving is inappropriate. In an age marked by the selfishness of the "me generation" and scarred by the claims of Wall Street that "greed is good," it seems churlish for shareholders to object to the social responsiveness of a corporation that donates money to health, welfare, or the environment. Charitable organizations, plagued by the shortage of private donations, look to corporations as the last potential source of funding. Moreover, corporate decision-makers, reasonably enough, view philanthropy as a means to counter the popular image of the corporation as a heartless and opportunistic Frankenstein's monster.²

* Professor of Law, Fordham Law School. Copyright 1996, Jill E. Fisch. I am grateful to Steve Thel and my mother for their helpful comments on earlier drafts and for the stimulating discussion by participants in the Symposium proceedings.

1. See David R. Morgan, *Trends in Corporate Charitable Contributions*, 41 N.Y.L. SCH. L. REV. 771, 786 (1997) (describing corporate giving patterns as ranging from one to two percent of profits since the 1950s).

2. See *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 567 (1933) (Brandeis, J., dissenting) (describing corporation as a "Frankenstein monster").

Even if shareholders find corporate giving inappropriate, it is difficult to object when philanthropic activity has become a norm of business practice. Management scientists like Rikki Abzug explain that companies imitate their peers with respect to giving patterns, a practice she terms institutional isomorphism.³ If donating at a specified level is standard operating procedure, how can shareholders complain about any particular company's decision to follow that procedure?

Similarly, although regulators have taken the lead in initiating changes in some corporate governance practices,⁴ corporate philanthropy is unlikely to generate objections from government authorities. Increasingly, government is looking for ways to downsize, and in particular, to replace social services provided by government agencies with efforts by the private sector.⁵ Corporate giving provides the funding for private sector charity work that allows the government to reduce its role in financing social programs and, in an era of scarce tax dollars, reduce the demand for public funds.

Corporate philanthropy deserves more attention however than it has traditionally received, because the questions of how and whether corporations should donate are relevant to many modern themes in the corporate governance debate. Corporate law has attempted to evaluate appropriate business expenditures and the most effective way to run a business, most visibly in connection with research and development expenditures,⁶ but also in areas such as political lobbying.⁷ Charitable

3. See Rikki Abzug & Natalie J. Webb, *Rational and Extra-Rational Motivations for Corporate Giving: Complementing Economic Theory with Organization Science*, 41 N.Y.L. SCH. L. REV. 1035, 1056-57 (1997).

4. See, e.g., Sec. Exchange Act Release No. 29796, 56 Fed. Reg. 51,953, 51,953-54 (Oct. 16, 1991) (approving American Stock Exchange rule change requiring all listed companies to have at least two independent directors and an audit committee comprised of a majority of independent directors); N.Y. STOCK EXCH., N.Y. STOCK EXCH. LISTED CO. MANUAL § 303.00 (1995) (requiring all domestic companies listed on the New York Stock Exchange to have at least two outside directors and to have an audit committee comprised of independent directors); Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312, 469-71 (codified at 26 U.S.C. § 162(m)(1993)) (adopting a deductibility cap for executive compensation that is not performance based); Joel Seligman, *The Fifth Abraham L. Pomerantz Lecture: The New Corporate Law*, 59 BROOK. L. REV. 1, 40-41 (1993) (describing history of amendments to the SEC requirement that corporations disclose executive compensation).

5. See, e.g., Kim Nevin-Gattle, *Predicting the Philanthropic Response of Corporations: Lessons from History*, BUS. HORIZONS, May-June 1996, at 15; *When Welfare Cases Land on State Playing Fields*, N.Y. TIMES, Aug. 11, 1996, at E12.

6. See, e.g., Steven S. Cheresky, *Shareholders, Managers, and Corporate R&D Spending: An Agency Cost Model*, 10 SANTA CLARA COMPUTER & HIGH TECH. L.J. 299, 301 (1994); Martin Lipton, *Corporate Governance in the Age of Finance*

giving raises similar questions. Is corporate philanthropy properly characterized as serving a business purpose? If so, does it demonstrate that corporations are not focused exclusively on short term profit maximization? If philanthropy is not an ordinary business expense, should philanthropic decisions be treated with the same deference accorded to other business decisions?⁸

The propriety of judicial deference to corporate philanthropic decisions also depends on the extent to which charitable giving creates a conflict of interest in the corporation and encourages management self-dealing. As Faith Kahn explains, charitable giving has been subject to less judicial scrutiny than more traditional business expenditures.⁹ Yet Jayne Barnard cites egregious examples of management using corporate funds to further their personal, political, and social objectives.¹⁰

More generally, corporate philanthropy can be used as a vehicle for reconsideration of corporate purpose in general and the shareholder primacy model in particular.¹¹ Potential shareholder objections to corporate giving can be addressed by invoking stakeholder models of corporate social responsibility, under which a corporation's decision to do good need not be defended on the basis that the corporation will thereby do well.¹² Charitable giving is a particularly useful model for examining the social responsibility question because it requires a more detailed analysis of the source of a corporation's imputed moral obligations.

Finally, corporate philanthropy stimulates an examination of the corporation's political role in society. Social welfare spending—what should be spent and who should spend it—is an explosive political issue. The demarcation between government and private spending on public welfare is at the forefront of current debate. Although corporations can

Corporatism, 136 U. PA. L. REV. 1, 8-9 (1987).

7. See generally Miriam Galston, *Lobbying and the Public Interest: Rethinking the Internal Revenue Code's Treatment of Legislative Activities*, 71 TEX. L. REV. 1269 (1993) (describing current tax treatment of corporate lobbying activity as favorable).

8. Corporate law generally protects the decisions of management from judicial scrutiny through application of the business judgment rule. See generally DENNIS J. BLOCK ET AL., *THE BUSINESS JUDGEMENT RULE* 6-7 (4th ed. 1993).

9. See Faith Stevelman Kahn, *Pandora's Box: Managerial Discretion and the Problem of Corporate Philanthropy*, 44 UCLA L. REV. 579, 594-609 (1997) (describing existing corporate law statutes that authorize charitable donations irrespective of corporate benefit).

10. See Jayne W. Barnard, *Corporate Philanthropy, Executives' Pet Charities and the Agency Problem*, 41 N.Y.L. SCH. L. REV. 1147 (1997).

11. See ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* 2-3 (1993) (defending the shareholder primacy model of corporate governance).

12. See *infra* notes 37-47 and accompanying text.

be viewed as pawns in the effort to coopt additional private funds for the public good, the result of funding social welfare expenditures through corporate philanthropy is to shift the responsibility for deciding which projects are worthy of funding into the hands of corporate decision-makers. The effect of this shift is both to hide the decision-making process from shareholders in particular and the public more generally, and to create a system of social spending which is profoundly undemocratic.

II. THE RATIONALE FOR PHILANTHROPY FROM A CORPORATE PERSPECTIVE

Corporate law's primary difficulty in formulating a methodology for evaluating corporate philanthropy is in understanding why corporations donate to charity. Nancy Knauer characterizes corporate philanthropy as a paradox: if corporations exist to maximize profits, and donations reduce profits, why do corporations donate money to charity?¹³ From a law and economics perspective, corporate charitable giving appears irrational.¹⁴

Fund-raisers and their counterparts in corporate giving departments offer a traditional response: charitable giving benefits the corporation.¹⁵ As Hildy Simmons explained, corporations donate because of enlightened self-interest.¹⁶ There is no reason to be concerned about corporate philanthropy because corporations do well by doing good. This argument has held sway with the few courts that have considered the propriety of corporate philanthropy. These courts upheld discretionary corporate giving on the theory that donating to charity benefits the corporation.¹⁷

It is possible to identify many examples of donations that benefit the corporate donor. Corporate sponsors of the Olympics, for example, used charitable giving as an alternative to other forms of advertising and marketing and enhanced their reputations at the same time. To the extent that charitable donations provide a direct corporate benefit, however, they are not really philanthropic. Rather, donations that benefit the corporation

13. See Nancy J. Knauer, *The Paradox of Corporate Giving: Tax Expenditures, the Nature of the Corporation, and the Social Construction of Charity*, 44 DEPAUL L. REV. 1, 4 (1994).

14. See *id.* at 5.

15. See *id.* at 49-79.

16. See Hildy Simmons, *Luncheon Address*, 41 N.Y.L. SCH. L. REV. 1013, 1014 (1997).

17. For cases upholding corporate philanthropy against shareholder challenges see *Kahn v. Sullivan*, 594 A.2d 48, 61 (Del. 1991); *Theodora Holding Corp. v. Henderson*, 257 A.2d 398, 405 (Del. Ch. 1969); *A.P. Smith Mfg. Co. v. Barlow*, 98 A.2d 581, 590 (N.J. 1953).

should perhaps be recognized as an alternative form of business expense.¹⁸ This characterization renders the intellectual debate over the legitimacy of corporate contributions relatively superficial; no one questions the propriety of business expenditures that produce a corporate benefit. Although some of the value derived from charitable giving may be intangible or difficult to quantify, evaluating contributions that benefit the corporation from a legal perspective is similar to evaluating any other business expenditure.

This analysis fails to explain the distinctive legal treatment of corporate philanthropy. If corporate donations are simply an alternative form of business expense, they require no independent authority under either corporate or tax law. Given that corporate business expenses are deductible from gross income, there is little need to resort to the charitable contribution analysis of § 170¹⁹ for the corporation to claim a tax deduction.²⁰ Although there are some differences between the tax treatment of corporate charitable contributions and that of business expenses, in general the choice of classification will have no tax consequences for the corporation.²¹

The explicit tax deduction for corporate charitable giving has been explained on political grounds. Providing an explicit deduction for corporate charitable contributions reflects a legislative endorsement of corporate philanthropy. Importantly, Congress initially issued this endorsement at a time when the legal status of corporate philanthropy under state law was unclear and when commerce clause concerns would have impeded direct federal efforts to authorize corporate philanthropy as a matter of substantive corporation law.²²

From a corporation law perspective, the need for explicit statutory authorization for charitable giving may have stemmed from the difficulty early cases demonstrated in assessing the nature and amount of corporate

18. See Joseph Galaskiewicz, *Corporate Contributions to Charity: Nothing More than a Marketing Strategy*, in *PHILANTHROPIC GIVING: STUDIES IN VARIETIES AND GOALS*, 246, 247 (Richard Magat ed., 1989) (arguing that advertising and contributions cannot be distinguished).

19. Section 170 of the Internal Revenue Code provides corporations with a deduction for charitable contributions. For an analysis of the operation of § 170, see Linda Sugin, *Theories of the Corporation and the Tax Treatment of Corporate Philanthropy*, 41 N.Y.L. SCH. L. REV. 835, 854-55 (1997).

20. Indeed, the charitable deduction may be inconsistent with § 170's requirement of charitable intent. See *id.* at 854-55.

21. See Knauer, *supra* note 13, at 41-45.

22. See *id.* at 15-20 (describing the history behind the adoption of § 170 by Congress).

benefit generated by philanthropy.²³ It was unclear whether corporate spending to generate goodwill or enhance the corporation's reputation would be viewed as a legitimate exercise of corporate power. If a corporation were specifically empowered to donate money to charity, it would be unnecessary to establish the degree to which the corporation benefitted from the donation. Thus the statutes may be viewed as resolving legal uncertainty and difficult issues of proof.

The evolution of the business judgment rule has rendered this objective obsolete, however. Corporate expenditures today are judged under the business judgment rule, a standard that accords substantial deference to management's judgment.²⁴ The fact that a perceived benefit is intangible, noneconomic, or uncertain will not invalidate a corporate expenditure.

Traditional corporate law standards create another problem, however, when used to evaluate contributions as business expenditures. The judicial deference accorded to such expenditures under the business judgment rule may not be appropriate in the context of philanthropic expenditures.²⁵ The business judgment rule is premised upon a presumption of management disinterestedness. It is inapplicable in situations in which there is a possible conflict of interest or self-dealing.²⁶ As Jayne Barnard explains, although defenders of corporate philanthropy claim it benefits the business, corporate giving is frequently motivated by the personal preferences of corporate executives who use their power to choose the recipients of large corporate grants in order to support preferred causes or reap the social perquisites afforded to large donors.²⁷ Corporate donations may also assuage management's moral guilt, providing well-paid corporate

23. See Kahn, *supra* note 9, at 594-602 (describing historical treatment of philanthropy by corporate law).

24. The business judgment rule creates "a presumption that in making a business decision, not involving self-interest, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Levine v. Smith*, 591 A.2d 194, 207 (Del. 1991) (citations omitted).

25. See E.C. Lashbrooke, Jr., *Internal Revenue Code Section 170 and the Great Corporate Giveaway*, 22 PAC. L.J. 221 (1991) (arguing that managers are the beneficiaries of the corporation's charitable contributions and are thereby breaching their duty of loyalty to the corporation by giving away corporate assets).

26. See *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (holding that for a transaction to be protected by the business judgment rule "directors can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing").

27. See Barnard, *supra* note 10, at 1149; see also Kahn, *supra* note 9, at 1107 (describing ways in which philanthropy can serve managerial self-interest).

executives with the opportunity to be philanthropists at shareholder expense.²⁸

The possibility that corporate giving is motivated by management self-interest rather than profit maximization is further supported by studies that fail to find a conclusive link between charitable giving and profitability.²⁹ Of course, there are many possible explanations for these results. It is difficult to obtain firm-specific data, and further obstacles are presented by the problem of classifying the data and determining what to include as corporate philanthropy.³⁰ Does cause-related marketing count?³¹ How should studies quantify gifts in kind or gifts of services?³² Should the public relations or advertising component of a donation be separated out?

It is also difficult to assess the direction in which causation runs. Hildy Simmons describes the corporate decision about how much money to donate as a function of expected profits, that is, corporations target their giving level at a specified percentage of profits.³³ If giving is a function of expected profits, there will obviously be an identifiable relationship between giving and profits, but the existence of that relationship does not support any conclusion about causality.³⁴

28. This perspective can be seen in Henry Ford's defense of his decision to reduce prices on automobiles on the altruistic basis that the Ford Motor Co. had "made too much money" and should share its profits with the public. See *Dodge v. Ford*, 170 N.W. 668, 684 (Mich. 1919).

29. See, e.g., James R. Boatsman & Sanjay Gupta, *Taxes and Corporate Charity: Empirical Evidence from Micro-Level Panel Data*, 49 NAT'L TAX J. 193 (1996) (finding data supporting the characterization of philanthropy as maximizing managers' utility rather than maximizing profits). But cf. Peter Navarro, *Why Do Corporations Give to Charity?*, 61 J. BUS. 65, 65-66, 90 (1988) (citing previous empirical studies that have failed to explain the relationship between philanthropy and profitability but concluding, based on new data, that "profit maximization is an important motive driving contributions").

30. See Michelle Sinclair & Joseph Galaskiewicz, *Corporate-Nonprofit Partnerships: Varieties and Covariates*, 41 N.Y.L. SCH. L. REV. 1059, 1065-76 (1997) (describing reasons why it is difficult to measure the extent to which philanthropy benefits individual firms); see also Navarro, *supra* note 29, at 65 (citing the absence of firm-specific data).

31. See Knauer, *supra* note 13, at 64 (describing cause-related marketing).

32. See, e.g., Karen Benezra, *Companies Take New Approaches to Charitable Giving*, GANNETT NEWS SERVICE, Oct. 25, 1993 (describing the Corporate Angel Network, which matches cancer patients with empty seats on corporate jets, as a philanthropic program that saves the patients plane fare but does not cost the corporation anything).

33. See Simmons, *supra* note 16.

34. See Navarro, *supra* note 29, at 78 (recognizing that the correlation between giving and profitability is also consistent with a "rule of thumb" method of determining contribution levels"). Studies such as that conducted by Sinclair and Galaskiewicz cast further doubt on the causal link by observing that substantial variance in corporate giving

Philanthropy is problematic for corporate law if economic studies cannot establish that philanthropic decisions are profit maximizing. The problem arises, in part, because the law recognizes that the markets in which a corporation operates constrain management discretion within permissible limits. The discipline of the market provides a substitute for extensive regulatory oversight. Market checks also reduce the agency costs of corporate decision-making without the need for extensive shareholder involvement; the market operates as a monitor.³⁵ The market operates as a poor monitor for management decisions that are not tied to profit maximization, however, and traditional deference to management creates the possibility of self-dealing.³⁶ If the extensive enterprise of corporate philanthropy is spurred by the fact that management rather than the company benefits, then corporate law should respond by regulating corporate giving.

Defenders of corporate philanthropy in terms of corporate social responsibility offer an alternative explanation. They suggest that corporate giving is not motivated by either management self-dealing or the quest for profit. Instead, corporate philanthropy has been described in terms of moral obligation. If corporations are viewed as moral actors with an obligation to serve society as well as shareholders, charitable donations may be viewed as part of that obligation.³⁷ This conception of corporate objectives is consistent with the stakeholder model of corporate governance, in which the obligations of a corporation run to a variety of nonshareholder constituencies including employees, customers, and members of the community.³⁸ Early supporters of broad fiduciary obligations for corporate management, the forerunners of the stakeholder

patterns exist among firms with similar levels of profitability. See Sinclair & Galaskiewicz, *supra* note 30.

35. See generally Ralph Winter, *State Law, Shareholder Protection and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977) (describing the manner in which market checks offer a substitute for regulation as a means of monitoring corporate decision-making).

36. See Kenneth B. Davis, Jr., *Discretion of Corporate Management to Do Good at the Expense of Shareholder Gain—A Survey of, and Commentary on, the U.S. Corporate Law*, 13 CANADA-U.S. L.J. 7, 29-32 (1988) (questioning the degree to which market discipline operates as an adequate check on management discretion in the context of corporate philanthropy).

37. See generally Lawrence E. Mitchell, *Cooperation and Constraint in the Modern Corporation: An Inquiry into the Causes of Corporate Immorality*, 73 TEX. L. REV. 477 (1995) (describing a conception of the corporation as moral actor).

38. See, e.g., John H. Matheson & Brent A. Olson, *Corporate Cooperation, Relationship Management, and the Triological Imperative for Corporate Law*, 78 MINN. L. REV. 1443, 1466-68 (1994).

movement, defended their positions similarly in terms of a corporation's moral or social responsibility.³⁹

The source of a corporation's moral obligations is unclear, however. Even if natural persons have obligations to "give something back to society," stemming from the nature of the human condition, the social contract, or religious principles—a question beyond the scope of this essay⁴⁰—the existence of individual obligations does not resolve the question for the corporation. Corporations are not individuals, nor do they, by virtue of the corporate form, inherit all the rights and responsibilities of natural persons.⁴¹ It is unnecessary to assume that the aggregation of investment funds and use of the corporate form for the purpose of pursuing a business objective necessarily carry social responsibilities apart from the obligations of the individual participants.

Advocates of the stakeholder model of corporate governance disagree. Extrapolating from the arguments for corporate social responsibility articulated in the famous Dodd-Berle debate,⁴² they claim that a corporation is legally and morally obliged to consider the interests of the society in which it operates and to conduct its operations with a view toward serving those interests.⁴³ This position is supported by the proliferation of "other constituency" statutes which allow and in some cases require directors to broaden their objectives in corporate decision-making beyond profit maximization toward a consideration of the interests of nonshareholder constituencies.⁴⁴

39. See E. Merrick Dodd, Jr., *For Whom are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932).

40. For analysis of individual giving patterns based on prestige and "warm glow" see William T. Harbaugh, *What Do Donations Buy?* (working paper on file with the author).

41. See Jill E. Fisch, *Frankenstein's Monster Hits the Campaign Trail: An Approach to Regulation of Corporate Political Expenditures*, 32 WM. & MARY L. REV. 587, 630 n. 227 (1991) (describing the academic debate over the appropriate characterization of a corporation, including the "personhood" theory). *But cf.* Gregory Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441 (1987) (discussing conception of corporation as a person);

42. See Dodd, *supra* note 39; Adolph A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932); *see also* Davis, *supra* note 36, at 17-19 (describing the debate).

43. See Davis, *supra* note 36; *see also* Mark E. Van Der Weide, *Against Fiduciary Duties to Corporate Stakeholders*, 21 DEL. J. CORP. L. 27 (1996) (describing the development of the stakeholder model).

44. See Committee on Corporate Laws, ABA, *Other Constituencies Statutes: Potential For Confusion*, 45 BUS. LAW. 2253, 2261-63 (1990); *see generally* Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579 (1992) (defending the use of other

Even in states which have legislatively endorsed the stakeholder model of corporate governance, the characterization of philanthropy as a corporate obligation is inconsistent with existing practice. If philanthropy is based on a corporation's moral or social obligation—perhaps justified by the grant to corporations of special powers and legal rights, such as limited liability—why is it optional? Corporations vary tremendously in their giving patterns,⁴⁵ from IBM, which donated \$118.3 million to charity in 1992 alone,⁴⁶ to Sunbeam, whose CEO Albert Dunlap has publicly stated his opposition to corporate giving and who, in his previous position, eliminated the charitable foundation at Scott Paper.⁴⁷ Why do regulators make no effort to monitor the degree to which corporations adhere to their obligation to society and to enforce noncompliance with societal norms? The laxity of the current regime allows complete free-riding by some corporations on the philanthropic efforts of others, free-riding that may well put socially responsible corporations at a competitive disadvantage in the marketplace if charity does not produce a benefit to the corporation.

There are also problems with entrusting corporate moral obligations to the discretion of corporate management. In addition to the agency costs created by this delegation, it is not clear that shareholders would willingly grant management discretion to choose how much to give and which philanthropic causes to serve. The exercise of this discretion, removed from the oversight of disclosure to or approval by shareholders, need have no connection to shareholder values or widely-held social priorities.⁴⁸

Evidence on charitable giving provides some reason to doubt that corporate donations reflect the charitable objectives of individual shareholders. Studies show that most individual giving goes to religious organizations.⁴⁹ Similarly, when Berkshire Hathaway, the one publicly-traded company to allow shareholders to designate charitable recipients,

constituency statutes).

45. See Sinclair & Galaskiewicz, *supra* note 30, at 1076-79.

46. See Benezra, *supra* note 32, at 4.

47. See David Altaner, *Dunlap: No Charity Here*, SUN-SENTINEL, Aug. 25, 1996 at 1F (describing Dunlap as advocating an end to corporate support of charities).

48. Corporate giving to elite institutions, such as funding for the arts, suggests corporate decision-making may not reflect general societal needs. As Linda Sugin has observed, corporations may also be more conservative than individual shareholders in their giving patterns, leading to a decrease in the range of philanthropic causes that are served. See Sugin, *supra* note 19, at 851.

49. Comment, *Must God Regulate Religious Corporations? A Proposal For Reform of the Religious Corporation Provisions of the Revised Model Nonprofit Corporation Act*, 42 EMORY L.J. 721, 721-22 (1993) (stating that religious organizations are the largest overall recipients of charitable contributions).

instituted "The Berkshire Program,"⁵⁰ it found that a large number of gifts were made to charities with a religious affiliation.⁵¹ The contribution policies of most publicly-held corporations, however, explicitly prohibit donations that are to be used for religious purposes.⁵²

Moreover, to the extent that corporate social responsibility is defended by attacking the private property model of the corporation and defining the corporation as something of a public resource, voluntary charitable giving seems a poor substitute for the traditional method of collecting and distributing funding for the public interest—the tax system. If society views charities as serving general social needs, the process of funding these needs through tax revenues and allocating the revenues through the legislative process allows majoritarian decision-making about the appropriate spending priorities. Corporate contributions substitute the decisions of management for those of the voting public and its elected representatives.

The defense of charitable giving in terms of the public interest, raises a troubling dimension to corporate philanthropy: the political nature of some charitable spending. Many prominently philanthropic corporations are those involved in heavily regulated industries. Philip Morris and Exxon exemplify the efforts of companies subject to extensive regulation to display their public-spiritedness through charitable giving.⁵³ Donations of this type, which attempt to buy not merely public but also legislative goodwill, may be analogized to lobbying. Indeed, corporations may direct their giving to the causes favored by those politicians viewed as likely to impose greater regulatory restrictions, in an effort to deter intrusive regulation. This rationale might explain why Exxon is a prominent donor

50. Berkshire Hathaway instituted the Berkshire Program in 1981. For a description of the program see Warren Buffett's Letter to Shareholders, The Berkshire Hathaway Annual Report (1981), reprinted in *The Essays of Warren Buffett*, 19 CARDOZO L. REV. ___ (forthcoming 1997) [hereinafter *Essays*].

51. See Warren Buffett's Letter to Shareholders, The Berkshire Hathaway Annual Report (1993), reprinted in *id.*

52. See, e.g., EXXON CORP. APPLICATION INFORMATION SHEET (on file with the *New York Law School Law Review*) (stating that Exxon does "not provide funds to be used for religious or political purposes"); MOBIL FOUNDATION, INC., GRANT GUIDELINES 3 [hereinafter MOBIL GRANT GUIDELINES] (stating that grants are not made to "religious organizations for religious purposes"). Corporate giving is subject to other restrictions. For example, Mobil also chooses not to support organizations "concerned with specific diseases" and "veterans and military organizations." See MOBIL GRANT GUIDELINES, *supra* at 3.

53. In 1995, for example, Exxon made contributions totalling \$55 million directly and through the Exxon Foundation. DIMENSIONS 95, A REPORT ON EXXON'S 1995 CONTRIBUTIONS IN THE PUBLIC INTEREST INCLUDING THE EXXON EDUCATION FOUNDATION REPORT 3 (1996).

to environmental causes.⁵⁴ Unlike direct political expenditures, charitable giving rarely incurs the negative public opinion response associated with lobbying. Moreover, in an era in which political contributions are subject to increasing scrutiny, we should not overlook the potential of charitable spending to influence the political process.⁵⁵

To the extent that corporate philanthropy has a political dimension, it may also create internal corporate conflict. Controversy about AT&T's donations to Planned Parenthood⁵⁶ and Domino Pizza's support for the Right to Life movement⁵⁷ demonstrates the potential political problems associated with corporate philanthropy.⁵⁸ Neither tax regulations nor corporate governance guidelines designate appropriate beneficiaries of corporate largess, relying instead upon the tax exempt status of charitable recipients as a proxy for their suitability. However, charitable donations that allow corporations to take political positions inconsistent with those of their shareholders pose similar First Amendment questions to those that have been raised in the debate over regulation of corporate political speech.⁵⁹

54. See *id.* at 8-10 (listing Exxon's contributions to environmental causes in 1995). See also Craig Smith, *The New Corporate Philanthropy*, HARV. BUS. REV., May 1994, at 105 (describing concern that Arco might develop too close a relationship with the environmental groups to which it contributes).

55. See, e.g., Barry D. Karl, *The Evolution of Corporate Grantmaking In America*, in THE CORPORATE CONTRIBUTIONS HANDBOOK 20 (James P. Shannon ed., 1991) (stating that corporate giving has allowed corporations to influence "public policy directly through the power to decide how their contributions to public well-being would be spent rather than leaving such decisions to political negotiations").

56. See Gregory E. David, *Of Grants and Grief: Trying to Do Good can Sometimes Keep a Company from Doing Well*, FIN. WORLD, Aug. 3, 1993, at 64 (describing controversy generated by AT&T's donations to Planned Parenthood and subsequent decision to end that support in response to pressure from pro-life organizations as "the mother of all philanthropic controversies").

57. The donations to the Right to Life movement are actually made by Domino's Pizza founder and CEO Thomas Monaghan. See *Just Say No: Boycotts at the Barricades*, NEWSWEEK, Aug. 14, 1989, at 21 (describing boycotts of Domino's Pizza by the National Organization for Women).

58. See Smith, *supra* note 54, at 105, 111 (describing Planned Parenthood's response to AT&T's decision to deny funding as a "costly embarrassment for AT&T").

59. See, e.g., *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 792-95 (1978) (rejecting protection of First Amendment rights of dissenting shareholders as justification for statute restricting corporate political speech); see also Fisch, *supra* note 41 at 635-42 (1991) (examining the degree to which existing corporate law doctrines can and should address shareholder concerns about corporate political speech); see generally Alan J. Meese, *Limitations on Corporate Speech: Protection for Shareholders or Abridgment of Expression?*, 2 WM. & MARY BILL OF RTS. J. 305 (1993) (examining shareholder

The political dimension of corporate giving is particularly relevant to Faith Kahn's proposal that the SEC mandate more extensive disclosure of charitable giving by corporations.⁶⁰ Although many corporations voluntarily disclose their charitable donations in separate philanthropy literature such as charitable giving pamphlets, as Faith observes, there is virtually no disclosure about charitable donations in investor-related information such as annual reports.⁶¹ If corporations donate because giving creates goodwill and favorable publicity beneficial to the corporation or out of a sense of moral obligation or altruism, we would expect to see extensive publicity associated with corporate philanthropy even in the absence of SEC-mandated disclosure. Greater publicity for corporate giving would appear to further the objectives behind the donations. Moreover, even if corporations did not direct disclosure of their philanthropy to the investment markets, if a corporation's philanthropic practices were relevant to its profitability, we would expect to see securities analysts research and distribute the information as material to investors.

The failure of corporate giving practices to draw investor attention may result from the relatively limited disclosure provided by corporations.⁶² The political aspect of philanthropy suggests a reason for corporations to limit disclosure. If corporations donate to politically controversial sources or the gifts are made in an attempt to obtain political influence, disclosure may generate negative publicity and be adverse to the interests of the corporation.⁶³

III. CONCLUSION

Understanding why corporations donate to charity is an important first step in evaluating corporate philanthropy and formulating an appropriate response from the perspective of corporate governance. Faith Kahn has furthered this endeavor substantially with her organization of this symposium. As the preceding analysis indicates, the manner in which corporate law should regulate corporate philanthropy requires further exploration of a number of issues, many of which benefit from the interdisciplinary work demonstrated in this conference. The research

protection justification for regulating corporate speech).

60. See Kahn, *supra* note 9, at 623.

61. See *id.*

62. See JAMES T. BENNETT, PATTERNS OF CORPORATE PHILANTHROPY 10 (1989) (describing corporate managers as "secretive" about corporate philanthropy).

63. See David, *supra* note 56, at 64-65 (describing "political firestorms" that may result from corporate contributions to controversial recipients).

efforts taking place in business schools, non-profit organizations, and government agencies, are creating a more integrated picture of the role of philanthropy in for-profit business.

This conference, and this essay, offer suggestions about where to start in creating a framework within which to understand corporate philanthropy. Ultimately, whether the law should allow or encourage corporate giving requires corporate lawyers to address three distinct questions.

First, is corporate giving good for business? Even under a narrow characterization of business objectives as profit maximization, existing studies have been unable to determine the relationship, if any, between corporate philanthropy and profitability. Further research in this area, to the extent it can overcome the technical difficulties noted above, is sorely needed. Empirical evidence may allow us to weigh the claim that philanthropy is good for business against the alternative characterization of corporate giving as management self-dealing.

Second, is giving good for shareholders? Although the status of the shareholder primacy model in corporate law is unclear, shareholder interests remain a principal reason for the adoption of regulatory standards. Even if corporate philanthropy has no discernable effect on the bottom line, corporate giving may further shareholders' interests under a social responsibility, altruism, or common objective model of the corporation. Here too, further research avenues exist. Would shareholders voluntarily vote to authorize corporate philanthropy? What efforts have shareholders made to prevent corporate giving? Do shareholders view corporate giving as a substitute for their own giving and, if so, does corporate giving provide a satisfactory substitute?

This analysis extends beyond the question of whether corporations should donate and suggests issues about the manner in which corporations set their donation policy. Although Berkshire Hathaway has innovated a procedure for shareholders to designate the recipients of corporate philanthropy, there is no evidence that this portends a general trend for corporations to provide shareholders with greater control over giving policies or the choice of charitable beneficiaries. Particularly, if corporate philanthropy is justified as derivative of shareholders' moral obligations, it is unclear that the existing managerial structure of the firm offers an appropriate vehicle for shareholders to delegate the satisfaction of these obligations. Indeed, the broad discretion traditionally afforded to management may pose a risk to shareholders' interests analogous to that presented by management's control over corporate political activity.

Third, is corporate giving good for society? The justifications for corporate philanthropy based on principles of social responsibility rest upon the view that, whether or not corporate giving causes a corporation to do well, giving money to charity constitutes doing good. This perspective is reflected in the existing treatment of corporate philanthropy

under both tax and corporate law. The substantive conclusion that corporate giving is good for society is premised on two distinct components: 1) charitable giving is generally good, and 2) some charitable giving should take place at the corporate, as opposed to the individual, level.

Analysis of the first point is beyond the scope of this essay. Accepting the premise that charitable giving is good however, does not automatically lead to the conclusion that charitable giving by corporations is desirable. It is possible to hypothesize that corporate contributions raise overall societal giving levels, that corporations are able to donate more efficiently, or corporate decision-makers are better able to determine societal needs than individuals. Addressing these hypotheses suggests a need for corporate law to recognize the quasi-public role created for management in allocating funds generated by private property and enhanced through the tax subsidy, to social programs.

It is difficult to see why corporate executives are particularly qualified to prioritize social expenditures. The attributes that qualify an individual to manage a corporation are not obviously linked to the ability to identify social needs and structure spending decisions to address those needs. Nor is it likely that corporate shareholders, in choosing boards of directors, believe they are selecting for these qualities. Most importantly, the selection of corporate decision-makers is a private decision made exclusively by the corporation's shareholders. Corporate managers, unlike political officials, are not accountable to the general public. Delegating discretion over the funding of social programs to the private sector creates a risk that the results will differ from the priorities set through the democratic process.

