GLOBAL WARMING AND THE MANAGEMENT-CENTERED CORPORATION

*Thomas Joo**

INTRODUCTION

Recent years have seen an interest in increasing shareholder power. This has led to talk of the potential for shareholder power to address social problems, including global warming, through corporate governance. Unfortunately, such proposals tend to overestimate the power, not to mention the willingness, of shareholders to affect corporate decision making directly. In fact, corporate-governance power is heavily concentrated in upper management. And that may be a good thing. Public company shareholders are investors who are unlikely to see themselves as responsible for a corporation's effect on society. Corporate managers, in contrast, have personal reasons to care, and the weakness of shareholders gives managers room to make social choices without shareholder input. Their power gives them at least some degree of moral accountability for industry's effect on climate, as well as self-interested reasons to care about the shape of regulation.

Whether and how corporations respond to the challenge of global warming, then, will not depend primarily on shareholder participation in governance. Rather, it will depend on outside forces that appeal to both the moral conscience and self-interest of corporations' leaders, who are typically their top executives. Chief among these forces will be regulation. The current financial crisis has finally taken some air out of long-running arguments that shareholders, or more generally, "the market," are better suited than government to control corporate behavior. That, combined with the recent change of power in Washington, will probably improve the chances of a federal regulatory response to climate

* Professor, University of California, Davis, School of Law. I would like to thank my fellow symposium participants, Alan Palmiter, Wake Forest School of Law, and the Wake Forest Law Review for a fascinating and productive conference. I would also like to thank Holly Doremus for her invaluable suggestions and the UC Davis School of Law and Dean Kevin Johnson for support of this project.

change. (By the same token, however, if the federal bailouts and stimulus legislation fail to revive the economy, it may spell political doom for regulatory solutions generally.)

In addition, developments at the state level may erode industry resistance to such regulation. State governments are leading the way with lawsuits and regulatory initiatives.[1] Private parties have also filed lawsuits against major greenhouse-gas emitters.[2] Lawsuits and state-level regulation by themselves are of course insufficient to address global, systemic problems like climate change. But they may pave the way for a comprehensive regulatory approach. First, lawsuits and state laws may increase public awareness, increasing political support for regulation and moral pressure on the individual executives and directors who are the public face of corporations. Second and moreover, the specter of piecemeal state regulation and state and private litigation may convince corporate leaders to cooperate with federal and perhaps global regulation.

I. THE GRASS IS ALWAYS GREENER: THE LIMITS OF SHAREHOLDER ACTIVISM AND EMPOWERMENT

A few years ago, the flurry of post-Enron corporate-governance reform proposals included many efforts to increase the power of shareholders in corporate governance. Although there were ultimately no major changes in statutes or regulations in this regard, corporations and stock exchanges (perhaps in part to forestall new laws) adopted a number of changes. For example, the New York Stock Exchange passed rules requiring shareholder approval of equity compensation for directors.[3] And although proposals to reform laws to facilitate shareholders' ability to nominate candidates to the board of directors ultimately failed, many corporations changed their charters or bylaws to require directors to be elected by a majority vote (as opposed to the statutory default of a plurality vote) in uncontested elections.

Some commentators argue that shareholders' governance power has the potential to make corporations serve social interests.[4] I think this view, which I have elsewhere labeled "democratic

1. *See* discussion *infra* Part II.B.2.

2. *See* discussion *infra* Part II.B.1.

3. NYSE, Inc., Listed Company Manual § 303A.08 (2003), *available at* http://www.nyse.com/pdfs/finalruletext303A.pdf.

4. *See, e.g.*, Lisa Fairfax, *Making the Corporation Safe for Shareholder Democracy*, 69 OHIO ST. L.J. 53, 86–91 (2008); Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 441 (2001); Larry Ribstein, *Accountability and Accessibility in Corporate Governance*, 81 NOTRE DAME L. REV. 1431, 1432 (2006); Perry E. Wallace, *Climate Change, Fiduciary Duty and Corporate Disclosure*, 26 VA. ENVTL. L.J. 293, 293–94 (2008).

aspirationalism," is excessively optimistic.[5] There are two reasons for this. First, shareholders' actual governance power is too limited to change corporate policy directly. Second, if shareholder power were increased beyond its current limits, it is far from clear that shareholders would use that power in any significant way to curtail carbon emissions or for any other socially beneficial purpose.

The reality is that corporate-governance power is heavily concentrated in upper management. Thus, I have argued elsewhere that improving corporate social responsibility through corporate-governance mechanisms should incorporate the perspective of what I have called "hierarchical realism"—that is, acknowledging and taking advantage of the fact that corporations are run not by shareholders, but by a small core of top executives, under the supervision of a board of directors.[6] This Part will discuss this hierarchical structure and its implications for climate change reform. Here I will focus on three aspects of corporate governance that seem to have captured the imagination of social-responsibility activists: "corporate democracy," management's fiduciary duty to shareholders, and management's duty to disclose material information. Unfortunately, while each one of these features seems to empower shareholders, in fact each one has significant built-in limitations that render it unsuitable as a vehicle for shareholder-led corporate reform.

A. *"Corporate Democracy"*

Shareholders participate in and vote on corporate affairs in two primary ways: first, by making and voting on policy proposals, and second, by electing directors. These ostensible powers, however, are largely formalistic and have little direct impact on corporate policymaking.

1. *Shareholder Proposals*

First of all, shareholder resolutions are typically non-binding;[7] even if a majority of shareholders were to approve a resolution, a corporation could choose to ignore it. Second, the securities laws give management a number of grounds to exclude proposals from the proxy based on their content.[8] When management receives a proposal and wishes to exclude it, it must submit its reasons to the

5. *See* Thomas W. Joo, *Corporate Hierarchy and Racial Justice*, 79 ST. JOHN'S L. REV. 955, 956–57 (2005).

6. *See id.* at 957.

7. Thomas W. Joo, *A Trip Through the Maze of "Corporate Democracy": Shareholder Voice and Management Composition*, 77 ST. JOHN'S L. REV. 735, 753 (2003).

8. *See* Shareholder Proposals, 17 C.F.R. § 240.14a-8(i) (2008); *see also* FRANKLIN A. GEVURTZ, CORPORATION LAW 266–67 (2000).

Securities and Exchange Commission ("SEC").[9] At the same time, management typically requests a "no-action letter" from the Division of Enforcement—that is, an informal assurance that the Division will not advise the SEC to take action against the corporation for the exclusion.[10]

If a proposal were to ask management to take some action with respect to global warming, the most relevant ground for excluding the proposal would probably be that it "deals with a matter relating to the company's ordinary business operations."[11] The SEC has vacillated in its interpretation of this rule. In 1976, the SEC announced that the "ordinary business" rule did not allow exclusion of proposals regarding "matters which have significant policy, economic or other implications inherent in them."[12] In 1992, the SEC repudiated that interpretation on the ground that it was too difficult to apply, and stated that all proposals relating to ordinary business would be excludible.[13] In 1998, however, the SEC reversed itself yet again and returned to the 1976 interpretation: "[F]rom time to time, in light of experience . . . and reflecting changing societal views, the Division [of Enforcement] adjusts its view with respect to 'social policy' proposals involving ordinary business."[14]

Whether a global-warming-related proposal raises "significant policy, economic or other implications" remains unclear, however.[15] In 2004, the Nathan Cummings Foundation, a shareholder of The Ryland Group, Inc., one of the nation's largest homebuilders, submitted a proposal requesting that Ryland's board appoint a committee to "assess how the company is responding to rising regulatory, competitive, and public pressure to increase energy efficiency and reduce greenhouse-gas emissions and report to shareholders."[16] Ryland sought to exclude the proposal on "ordinary

9. 17 C.F.R. § 240.14a-8(j).

10. *See* U.S. Sec. & Exch. Comm'n, No Action Letters, http://www.sec.gov/answers/noaction.htm (last visited July 11, 2009).

11. *See* 17 C.F.R. § 240.14a-8(i)(7); Sung Ho (Danny) Choi, Note, *It's Getting Hot in Here: The SEC's Regulation of Climate Change Shareholder Proposals Under the Ordinary Business Exception*, 17 DUKE ENVTL. L. & POL'Y F. 165, 173–74, 178–79 (2006).

12. *See* N.Y. City Employees' Ret. Sys. v. SEC, 45 F.3d 7, 10 (2d Cir. 1995) (quoting Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 12,999, 41 Fed. Reg. 52,994, 52,998 (Dec. 3, 1976)).

13. Cracker Barrel Old Country Store, Inc., SEC No-Action Letter, 1992 WL 289095, at *1 (Oct. 13, 1992).

14. Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 40,018, Investment Company Act Release No. 23,200, 63 Fed. Reg. 29,106, 29,108 (May 28, 1998).

15. *See N.Y. City Employees' Ret. Sys.*, 45 F.3d at 10; *see also* 17 C.F.R. § 240.14a-8(i)(7); Choi, *supra* note 11, at 191–92.

16. The Ryland Group, Inc., SEC No-Action Letter, 2005 WL 313709, at *4 (Feb. 1, 2005).

business" grounds.[17] In February 2005, the SEC refused to issue a no-action letter to Ryland.[18] Only four days earlier, however, it had granted Wachovia Bank a no-action letter with respect to its planned exclusion of a similar shareholder proposal by the Service Employees International Union ("SEIU") Master Trust, also on "ordinary business" grounds.[19]

Because neither response included a statement of reasons, there is no way to know whether the differing results were simply inconsistent or grounded in differences between the companies' "ordinary business."[20] In practice, the SEC's responses to no-action requests often contradict each other or the announced official position of the SEC.[21] Although no-action letters are the work of individual staff members and do not represent the official position of the SEC as an agency, they are often the only available interpretation on a given topic and are thus in effect treated as the law.[22] The uncertainty about the viability of proposals may discourage shareholders from incurring the expenses related to developing and submitting proposals. Note that the Wachovia proposal was excluded even though it did not ask management to take any substantive action with respect to global warming. It merely requested that Wachovia management report to shareholders "on the effect on Wachovia's business strategy of the risks created by global climate change."[23]

Even when socially-oriented shareholder proposals are included on the corporate proxy, they tend to fail by significant margins. Indeed, for such proposals, support of ten, sixteen, and twenty-seven percent is considered "impressive."[24] Less than eight percent of the shares voted were cast in favor of the 2005 Ryland proposal.[25] It has been argued that shareholder proposals, even if they fail, shape public opinion by calling attention to social issues.[26] Thus, it might

17. *Id.*

18. *Id.* at *1.

19. Wachovia Corp., SEC No-Action Letter, 2005 WL 267915, at *1 (Jan. 28, 2005); *see also* Choi, *supra* note 11, at 175–76.

20. The Wachovia no-action letter refers only to "ordinary business operations (i.e., evaluation of risk)." Wachovia Corp., SEC No-Action Letter, *supra* note 19, at *1.

21. *See* Alan Palmiter, *The Shareholder Proposal Rule: A Failed Experiment in Merit Regulation*, 45 ALA. L. REV. 879, 882 (1994).

22. *See* Donna Nagy, *Judicial Reliance on No-Action Letters*, 83 CORNELL L. REV. 921, 923–27, 949–51 (1998).

23. Wachovia Corp., SEC No-Action Letter, *supra* note 19, at *1.

24. Fairfax, *supra* note 4, at 87.

25. The Ryland Group, Inc., Quarterly Report (Form 10-Q), at 31 (May 12, 2008), *available at* http://www.sec.gov (follow the "Search for Company Filings" hyperlink under the "Forms and Filings" heading; then enter "Ryland Group" to bring up a list of company filings).

26. *See, e.g.*, W. Trexler Proffitt, Jr. & Andrew Spicer, *Shaping the*

be argued, even if the proposal process cannot directly change corporate behavior, it might help educate the public about global warming, thereby influencing voting and consumer behavior for the better. But it is just as likely, if not more so, that proposals, and shareholders' votes on them, *reflect* rather than cause changes in social norms. The SEC espouses this view: as noted above, it periodically "adjusts" its position with respect to "socially significant" shareholder proposals in order to "reflect[] changing social views."[27] Furthermore, SEC rules restrict shareholders' ability to resubmit a proposal that receives limited support.[28]

In 2008, the Nathan Cummings Foundation submitted yet another proposal to Ryland.[29] This proposal was more aggressively worded (and thus more likely to qualify for exclusion). Nonetheless, Ryland apparently did not seek to exclude this proposal. It did, however, file a statement in opposition (routine practice when a shareholder proposal is included in the corporate proxy) claiming the proposal was unnecessary because Ryland was already doing its best to reduce energy consumption.[30] The 2008 proposal also failed. It did, however, fare better than the 2005 proposal, receiving 25.4% of the shares voting.[31]

Does the increase in shareholder support illustrate the importance of shareholder proposals as a tool for education? It seems unlikely. The corporate proxy is a poor forum for education on new topics. Proxy rules limit a proposal's supporting statement to 500 words[32] and allow the corporation to print a rebuttal.[33] Moreover, despite the copious ink spilled on the topic by academics (myself included), shareholder proposals are an obscure and esoteric forum compared to television, newspapers, and the Internet. Even among shareholders, shareholder proposals are unlikely to rank

Shareholder Activism Agenda: Institutional Investors and Global Social Issues, 4 STRATEGIC ORG. 165, 173 (2006).

27. Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 40,018, Investment Company Act Release No. 23,200, 63 Fed. Reg. 29,106, 29,108 (May 28, 1998).

28. Shareholder Proposals, 17 C.F.R. § 240.14a-8(i)(12) (2008).

29. The Ryland Group, Inc., Quarterly Report (Form 10-Q), at 44 (Aug. 1, 2008) [hereinafter Ryland, Aug. 1, 2008 Quarterly Report], *available at* http://www.sec.gov/ (follow the "Search for Company Filings" hyperlink under the "Forms and Filings" heading; then enter "Ryland Group" to bring up a list of company filings).

30. The Ryland Group, Inc., Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934 (Schedule 14A), at 46–47 (Mar. 5, 2008), *available at* http://www.sec.gov/ (follow the "Search for Company Filings" hyperlink under the "Forms and Filings" heading; then enter "Ryland Group" to bring up a list of company filings).

31. Ryland, Aug. 1, 2008 Quarterly Report, *supra* note 29, at 44.

32. 17 C.F.R. § 240.14a-8(d).

33. 17 C.F.R. § 240.14a-8(m)(1).

highly as a source of information and opinion shaping. While the 2005 proposal could conceivably have contributed to the greater support for the 2008 proposal, media attention and public awareness of climate change also increased dramatically over that period, and the political landscape also changed significantly. In its first term, the Bush administration had dismissed the very existence of man-made global warming.[34] It slowly began to reverse course during its second term, and by 2008, both major parties' presidential candidates acknowledged the importance of climate change. Furthermore, states took aggressive action on climate change, leading to the Supreme Court's 2007 *Massachusetts v. EPA* decision, which rejected the Environmental Protection Agency's ("EPA") refusal to treat greenhouse gases as pollutants.[35] Pervasive, high-profile developments such as these seem far more likely than the 2005 proposal to have influenced the opinions of Ryland shareholders and the general public. Consider also that even after many years and multiple incarnations, the Ryland proposal still gathered only a quarter of shareholder votes and does not seem to have gathered any significant media attention or to have affected policy at Ryland or elsewhere.

The public is unlikely to be aware of the results of votes on proposals. They are not widely reported unless they are dramatic. After a shareholder vote takes place, the company is required to report the results on a Form 10-Q.[36] An interested party would have to know that the vote had taken place, that the results are reported on the 10-Q, and that 10-Q filings are available on the SEC website. The report would not be filed until the end of the quarter and would not be available for some time after filing.

2. Voting

A shareholder can theoretically inflict punishment indirectly by withholding his or her votes when a director stands for reelection. Incumbent directors typically run unopposed for reelection, however, so there is rarely an alternative candidate to vote for. A large corporation typically sends out a corporate ballot at election time, but shareholders have no right to place on this ballot a proposal for voting against a director.[37] Nor can they use the corporate ballot to nominate alternative directors.[38] Such political

34. *See, e.g.*, Rupert Cornwell, *Is America Finally Getting Real About Climate Change?*, INDEPENDENT (London), May 26, 2009, at 30.

35. 549 U.S. 497, 504–05, 528 (2007).

36. *See* Quarterly Reports on Form 10-Q, 17 C.F.R. § 240.13a-13; General Instructions (Form 10-Q), at 6–7, *available at* http://www.sec.gov/about/forms/form10-q.pdf.

37. Shareholder Proposals, 17 C.F.R. § 240.14a-8(i)8.

38. *Id.*

campaigns would have to be arranged, paid for, and disseminated to voting shareholders by the shareholder dissidents themselves, even though the corporation uses corporate funds to pay for the mailing of the "official" (that is, management-supported) corporate ballot. The cost and logistics of such a private mailing are usually prohibitive.

In the wake of the Enron-era scandals, the SEC proposed reforms that would allow shareholders to use the corporate proxy to nominate directors. Five years of vociferous debate ended quietly in 2007 with a rule amendment that clarified the status quo. Since 1976, SEC Rule 14a-8(i)(8) had allowed a company to exclude from its proxy any shareholder proposal that "relates to a nomination or an election for membership on the company's board of directors or analogous governing body."[39] Despite the Rule's broad language, it was typically interpreted to allow exclusion of proposals relating to the election of a specific director (such as a nomination), but not of proposals relating to election procedures.[40] More recently, the SEC had revised its interpretation to allow exclusion of procedural proposals if they would tend to result in "contested elections," such as proposals to amend a company's bylaws to require the inclusion of shareholder nominations on the company proxy.[41] In 2007, the SEC amended the Rule to codify this interpretation.[42]

The SEC's attitude toward shareholder participation in elections seems to have changed with the new presidential administration. In 2009, the Commission advanced a proposal that would empower shareholders in two ways.[43] First, it would revise Rule 14a-8(i)(8) to allow only the exclusion of election-related proposals that would interfere with an upcoming election; this change would implicitly reverse the broader "contested election" interpretation of the current Rule.[44] Second, the proposal would add a new Rule 14a-11 requiring a corporate proxy to include certain shareholder nominations of director candidates.[45] This proposed

39. *Id.*

40. *See, e.g.*, Quality Systems, Inc., SEC No-Action Letter, 1999 WL 376097, at *1, *16, *28 (June 9, 1999).

41. *See, e.g.*, Wilshire Oil, SEC No-Action Letter, 2003 WL 1738828, at *1 (Mar. 28, 2003).

42. The amendment added to the above language, "or a procedure for such nomination or election." Oddly, while the language seems very clearly to allow exclusion of any proposals relating to election procedures, the SEC insisted that it was meant only to codify the "contested elections" interpretation. *See* Shareholder Proposals Relating to the Election of Directors, Exchange Act Release No. 56,914, Investment Company Act Release No. 28,075, 72 Fed. Reg. 70,450, 70,453–54 (Dec. 11, 2007). *See also* 17 C.F.R. § 240.14a-8(i)(9).

43. *See* Facilitating Shareholder Director Nominations, Securities Act Release No. 9046, Exchange Act Release No. 60,089, 74 Fed. Reg. 29,024 (June 18, 2009).

44. *Id.* at 29,082.

45. *Id.*

nomination power would apply only to a shareholder or group of shareholders holding from one to five percent of the corporation's shares, depending on the size of the corporation.[46] The SEC's 2007 proposal, which placed further conditions on shareholder nominations, failed after meeting industry opposition. The 2009 proposal remained open for public comment as of the time of this writing in July 2009.[47]

In any event, the focus on who elects directors may be misplaced, as that power entails only very indirect control over governance. Although boards of directors technically have the power to manage the corporation, and state corporate-law codes and cases focus on the relationship between shareholders and directors, in actual fact boards delegate most of their management authority to CEOs and other executive officers. Executives are hired and fired by the board, not by the shareholders. This places an additional layer of insulation between shareholders and a corporation's actual policymakers. I will return to the topic of executives in Part II.A.

B. State Law Fiduciary Duty Litigation

State corporate governance law is routinely criticized for supposedly centering on management's duty to enrich shareholders. Advocates for socially responsible corporate behavior have periodically tried to leverage that supposed duty by arguing that socially responsible reforms would improve the corporate bottom line.[48] But even assuming that an environmental reform, such as producing products with smaller carbon footprints, could increase profitability, that fact would do no more than provide a bit of amateur business advice to management. It would not implicate any legally actionable duty. Although there are some references to management's supposed "duty" to enrich shareholders in corporate case law,[49] it is not a legal duty in any proper sense, because shareholders have no cause of action against management for failure to maximize corporate profits or shareholder wealth.

The central tenet of state corporation law is the "business judgment rule." More of a general orientation than a doctrinal rule, it means that courts are highly deferential to the business decisions

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46. *Id.* at 29,083.

47. *Id.* at 29,024. The public comment deadline was set for August 17, 2009.

48. Robert Clark termed this equation of profit and social responsibility "monism." ROBERT C. CLARK, CORPORATE LAW 681 (1986). For some examples, see Maria O'Brien Hylton, *Doing Well Versus Doing Good in an Inefficient Market*, 42 AM. U. L. REV. 1, 14, 23–27 (1992); Steven Ramirez, *Diversity in the Boardroom*, 6 STAN. J.L. BUS. & FIN. 85, 85–86 (2000) ("[Racial] diversity is a source of strategic strength that can enhance competitiveness.").

49. The obligatory citation is to *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (1919).

of corporate directors and officers.[50] This concept has deep ideological roots in the libertarian aversion to government interference in business. Courts will not review the substantive merits of a business judgment, and thus shareholders have no cause of action against management for an incorrect or unwise business decision.[51] Furthermore, the decisions of managers are presumptively informed, good-faith exercises of business judgment; shareholders must upset this firm presumption (typically by alleging self-serving or otherwise disloyal acts by management) to sustain a cause of action.[52]

Thus, while much is made lately of the supposed profit potential in "going green," no corporation has a legal obligation to pursue such opportunities. As long as they remain legal, "dirty" products and services will remain in great demand. Regardless of whether it would be a poor business judgment to forego the "green" market, it would nonetheless be a business judgment and as such it would not be actionable by shareholders under state corporation law.

If greenhouse-gas regulation were to pass, shareholders might conceivably assert fiduciary duty claims against management for failure to anticipate and prepare for regulation. But given the business judgment rule and the permissiveness of the duty of care, such an argument would have to assert not just an error or even poor judgment, but an abject failure, even a refusal, to become informed, as will be discussed below. And after establishing that management failed to prepare for regulation, shareholders would have to assert that management failed to act after the shape of impending regulation became reasonably clear. Such clarity is likely to remain elusive until the eleventh hour, however. In March 2009, the EPA proposed a rule with the hope of establishing an emissions registry system by fall 2009 as a prelude to possible future emissions regulation.[53] As of this writing in July 2009, however, it remains unclear whether the government can successfully implement a regulatory regime (or even a registry), and if so, what form it will take and how long it will take to implement. In June 2009, the House of Representatives narrowly passed the American Clean Energy and Security Act, a climate change bill that included a cap-and-trade system.[54] At this time, the Senate had placed the bill on its legislative calendar but had taken no further

50. *See, e.g.*, Auerbach v. Bennett, 393 N.E.2d 994, 1000 (N.Y. 1979).
51. *See, e.g.*, Brehm v. Eisner, 746 A.2d 244, 264 (Del. 2000); GEVURTZ, *supra* note 8, at 278–79.
52. Aronson v. Lewis, 473 A.2d 805, 811–12 (Del. 1984).
53. *See* Mandatory Greenhouse Gas Reporting, 74 Fed. Reg. 16,609 (Apr. 10, 2009).
54. American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009).

action.[55] White House economic advisers have expressed fears that aggressive carbon regulation will slow the economy, while the administration's environmental advisers, and President Obama himself, support faster action.[56] Furthermore, the economists tend to prefer a carbon tax, while the environmentalists favor a cap-and-trade regime.[57] Meanwhile, California and other states have attempted to implement their own carbon regulations.[58]

In light of the uncertain regulatory future, many corporations might choose to wait before voluntarily reducing emissions. Indeed, the EPA's pending registry proposal may present a good reason *not* to cut emissions in the near future. Caps are likely to be derived from an emitter's existing emissions levels. Thus cutting emissions before a registry begins documenting emissions levels may subject an emitter to emissions reduction targets that are lower and harder to satisfy if and when a regulatory scheme is eventually established.[59]

Even *after* the shape of regulation was to become clear, indeed even after it was implemented, shareholders would still have difficulty asserting a cause of action against management for failing to reduce emissions. For example, under a cap-and-trade scheme, by its very nature, any given corporation could choose to emit and buy credits rather than reduce its emissions.[60] That choice would implicate precisely the kind of business decision typically protected under the business judgment rule (regardless of whether management actually engaged in a sophisticated cost-benefit analysis). Thus, shareholders would almost certainly be unable to challenge such a decision as a corporate-governance matter.

Nor would hard emissions caps (whether independent of, or as an adjunct to, cap-and-trade) necessarily empower shareholders to sue management for failing to reduce emissions. Even when a corporation's actions violate the law, it is extremely difficult for shareholders to hold management liable for failing to prevent the violation. Delaware case law nominally imposes upon directors a

55. *See* Library of Congress, http://thomas.loc.gov/bss/111search.html (search "Clean Energy and Security Act;" then choose the seventh item from the results list.)

56. *See* John M. Broder, *In Obama's Team, Two Camps on Climate*, N.Y. TIMES, Jan. 2, 2009, at A10.

57. *See id.*; *see also* Lawrence Summers, *Practical Steps to Climate Control*, FIN. TIMES, May 29, 2007, at 15 ("I prefer carbon and/or gasoline tax measures to permit systems or heavy regulatory approaches because the latter are more likely to be economically inefficient and to be regressive."). Summers is Director of the Obama administration's National Economic Council.

58. *See infra* Part II.B.3.

59. John C. Dernbach & Seema Kakade, *Climate Change Law: An Introduction*, 29 ENERGY L.J. 1, 18 (2008).

60. John M. Broder, *From a Theory to a Consensus on Emissions*, N.Y. TIMES, May 17, 2009, at A1.

duty to monitor the corporation's compliance with its legal and regulatory obligations and its directors' and officers' fiduciary obligations.[61] But this nominal duty in fact adds little or nothing beyond the duty of loyalty and the lenient duty of care.[62] The cases discussing the duty to monitor, with apparently only one exception, find no liability.[63] Moreover, the cases emphasize that the standard is a very lenient one with respect to corporate management.

In the leading case, *In re Caremark International, Inc. Derivative Litigation,* employees of Caremark, a health-care company, violated federal law by paying doctors kickbacks to induce them to prescribe drugs and devices it distributed and to refer Medicare and Medicaid patients to its facilities.[64] The corporation and two of its officers were indicted.[65] The corporation ultimately pled to a reduced charge of mail fraud, for which it paid criminal and civil damages.[66] It also paid $98.5 million to settle a lawsuit brought by private insurance companies based on Caremark's practices.[67]

The *Caremark* opinion did not find a violation; indeed, it was not even a judgment on a failure-to-monitor claim. Rather, it was merely the approval of a settlement of such a lawsuit. The settlement awarded no monetary damages; instead, it required the company to institute compliance procedures.[68] The *Caremark* court acknowledged that the settlement provided only "modest benefits" to the plaintiffs, but was appropriate "given the weakness of the plaintiffs' claims."[69]

While *Caremark* nominally posits a management duty to establish and maintain compliance procedures,[70] the case has been properly criticized for finding this duty satisfied by Caremark's "incredibly weak system of corporate monitoring."[71] The court found there was "essentially no evidence" to support a finding of failure to

61. *In re* Caremark Int'l, Inc. Derivative Litig., 698 A.2d 959, 970 (Del. Ch. 1996).

62. *But see* Hillary A. Sale, *Monitoring* Caremark's *Good Faith*, 32 DEL. J. CORP. L. 719, 720–21 (2007) (arguing that *Caremark* increased the standards for directors' fiduciary duty).

63. *See* Gordon Smith, *More on* Caremark, THE CONGLOMERATE, Jan. 9, 2007, *available at* http://www.theconglomerate.org/2007/01/more_on_caremar.html.

64. 698 A.2d at 961–62.

65. *Id.* at 963–64.

66. *Id.* at 965.

67. *Id.* at 966.

68. *Id.*

69. *Id.* at 972.

70. *See id.* at 970.

71. *See* Lawrence E. Mitchell, *The Sarbanes-Oxley Act and the Reinvention of Corporate Governance?*, 48 VILL. L. REV. 1189, 1203 (2003).

monitor.[72] But the only compliance measure cited in the opinion (other than measures implemented *after* the investigations began) was an internal "Guide to Contractual Relationships" meant to educate employees on permissible behavior.[73] Indeed, the court made clear that the opinion was *not* meant to increase directors' liability exposure but rather to subject *shareholder lawsuits* to "a demanding test."[74] Setting the bar high for shareholder suits, according to the court, would benefit shareholders overall by making board service more attractive to qualified candidates.[75] *Caremark* indeed set the bar high, stating that "only a sustained or systematic failure . . . to exercise oversight—*such as an utter failure to attempt* to assure a reasonable information and reporting system exists," will make directors liable for "ignorance of liability creating activities within the corporation."[76] Thus any nontrivial compliance program, indeed, even a modest *attempt* to establish one, would seem to satisfy directors' duty to monitor.[77]

Caremark created some uncertainty as to whether the "duty to monitor" was contained within one of the two basic duties of care or loyalty, a distinct duty, or a subset of a separate duty to act in "good faith," a phrase that appeared in the opinion several times.[78] The concept of a separate duty of "good faith" was further encouraged by the Chancery Court in its 2003 *In re Walt Disney Co. Derivative Litigation* opinion.[79] Shareholders sued directors for damages on the ground that the directors had failed to inform themselves of the generous severance terms in Disney executive Michael Ovitz's employment contract and because of the way Ovitz's severance terms were applied upon his separation from the company.[80] This appeared to be the kind of "duty of care" claim that Delaware courts routinely dismiss, but the Chancery Court rejected a motion for dismissal, in part on the ground that the directors' alleged inaction was severe enough to constitute a failure to act in good faith.[81] Although this opinion precipitated much breathless speculation about a new "good faith" standard that in effect raised the standard of care, the same judge's opinion after trial, *Disney 2005*, found that

72. 698 A.2d at 971.
73. *Id.* at 962.
74. *Id.* at 971.
75. *Id.*
76. *Id.* (emphasis added).
77. The word "reasonable" does not mean that a court will evaluate the content of compliance procedures. The opinion also stated that such content is a business decision subject to the deference of the business judgment rule. *Id.* at 970.
78. *See, e.g.*, *id.* at 970–71.
79. 825 A.2d 275 (2003).
80. *Id.* at 277–78.
81. *Id.* at 278.

the directors had breached no fiduciary duties, even as it excoriated their conduct.[82] The court made clear that the minimum legal duties of corporate fiduciaries do not require ideal governance; or to put it another way, those duties countenance a good deal of bad governance.

The Delaware Supreme Court restated and further clarified *Caremark*'s lenient treatment of compliance and "good faith" in its 2006 *Stone v. Ritter* opinion.[83] Unlike *Caremark* itself, *Stone v. Ritter* actually adjudicated a "*Caremark* claim" of failure to monitor.[84] But it also found the directors had *not* violated that duty.[85] In *Stone*, two individuals set up bank accounts with AmSouth Bancorporation ("AmSouth") in connection with an illegal Ponzi scheme.[86] AmSouth was not accused of involvement in the scheme, but federal prosecutors alleged its employees had violated federal banking and anti-money-laundering regulations by failing to file "Suspicious Activity Reports" with respect to the accounts.[87] AmSouth entered into a deferred prosecution agreement with the government, under which the government filed a one-count criminal information and the bank paid a $40 million fine.[88] Federal and state banking regulators issued a cease-and-desist order requiring AmSouth to improve its compliance programs and to hire an independent consultant to conduct a review and make recommendations. AmSouth hired KPMG Forensic Services ("KPMG") for this purpose.[89] The Treasury Department's Financial Crimes Enforcement Network ("FinCEN") found that AmSouth's anti-money laundering compliance program "lacked adequate board and management oversight."[90] FinCEN and the Federal Reserve imposed a $10 million civil penalty.[91]

Despite FinCEN's findings and penalty, the Delaware Supreme Court found that AmSouth's compliance programs had been sufficient under *Caremark*. In keeping with the deferential spirit of the business judgment rule, the court based its factual findings[92] entirely on the report of KPMG—a report commissioned and paid for by AmSouth. Assuming the reliability of the report, the court found

82. *In re* Walt Disney Co. Derivative Litig. (*Disney 2005*), 902 A.2d 693, 756–79 (Del. Ch. 2005).
83. 911 A.2d 362, 369–70 (Del. 2006).
84. *Id*. at 369–73.
85. *Id.* at 373.
86. *Id.* at 365.
87. *Id.*
88. *Id.* at 366.
89. *Id.*
90. *Id.*
91. *Id.*
92. The Delaware Supreme Court made its own factual findings because the case was an appeal from the dismissal of a derivative suit by the Court of Chancery, which the Supreme Court reviews de novo. *Id.* at 371.

far more evidence of compliance efforts than was present in *Caremark*.[93] But the court nonetheless took pains to underscore the leniency of the duty to monitor. It also backed away from the suggestion that "good faith" is an independent duty, suggesting instead that it is but an aspect of the duty of loyalty.[94] The court abandoned *Caremark*'s phrase "duty to monitor" and instead referred to "oversight liability," which it characterized as a part of the duty of loyalty.[95] The term "loyalty," unlike "monitor," implies *knowing* misconduct, and indeed the court made this explicit:

> We hold that *Caremark* articulates the necessary conditions predicate for director oversight liability: (a) the directors utterly failed to implement *any* reporting or information system or controls; *or* (b) having implemented such a system or controls, *consciously* failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention. In either case, imposition of liability requires a showing that the directors *knew* that they were not discharging their fiduciary obligations. Where directors fail to act in the face of a *known* duty to act, thereby demonstrating a *conscious disregard* for their responsibilities, they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith.[96]

Perhaps the only Delaware case ever to find a violation of the duty to monitor was the Chancery Court's unpublished opinion in *ATR-Kim Eng Financial Corp. v. Araneta.*[97] This exception only proves the rule: the directors' failure there was so egregious that no significant duty of monitoring or oversight was necessary to support liability. Indeed, the opinion relied on the stunningly mild proposition that "[o]ne cannot accept the important role of director in a Delaware corporation and thereafter *consciously avoid any attempt to carry out one's duties*."[98]

The plaintiffs, minority shareholders, alleged that the directors had failed to monitor Araneta, the chairman and majority shareholder, who had violated his fiduciary duty by transferring company assets to his family.[99] Both director defendants "testified that they entirely deferred to Araneta" in corporate matters.[100]

93. *Id.* at 371–72.
94. *Id.* at 369–70.
95. *Id.* at 370.
96. *Id.* (emphasis added).
97. No. CIV.A. 489-N, 2006 WL 3783520, at *19–21 (Del. Ch. 2006), *aff'd*, 930 A.2d 928 (Del. 2007). *See also* Smith, *supra* note 63.
98. *Araneta*, 2006 WL 3783520, at *19 (emphasis added).
99. *Id.* at *7.
100. One stated that "to him Araneta and the [corporation] were basically one and the same." The other, Araneta's niece, stated that in a dispute between Araneta and the plaintiff shareholders, "she would take Araneta's word as

Consistent with *Stone,* which had been decided just weeks earlier, the *Araneta* court justified liability for failure of oversight in terms of deliberate disloyalty rather than lack of care: "Their behavior was not the product of a lapse in attention or judgment; it was the product of a willingness to serve the needs of their employer, Araneta, even when that meant intentionally abandoning [their] important obligations [to the minority shareholders]."[101]

The minimal obligation to monitor compliance shows that neither an impending nor an established emissions regulation scheme would give *shareholders*, in their capacity as shareholders, any actionable state-law right to demand that a corporation reduce its emissions. My point here is not at all to suggest that a registry or subsequent emissions regulation will fail to reduce carbon emissions, but that corporate management's duties to shareholders will be irrelevant to the success or failure of such a system, should it come into being. Its fate will turn, rather, on the market value of emissions reduction (or, more precisely, on management's unilateral assessment of that value), the EPA's ability to establish and police the scheme, and management's voluntary compliance.

C. Disclosure Duties Under Federal Securities Law

Unlike state corporate law, federal securities law deals primarily with disclosure. That is, it does not generally provide remedies for corporate *conduct*, but only for certain kinds of misleading or incomplete *information* companies may provide about their conduct. The primary cause of action under the securities laws has been implied by courts under section 10(b) of the 1934 Securities Exchange Act and SEC Rule 10b-5 promulgated thereunder.[102] While the Rule prohibits untrue statements, as well as omissions, of "material fact,"[103] this does *not* mean corporations are required to disclose every fact that an investor might find material. Rather, it prohibits a misstatement or omission *only if* it is material.[104] "Material" in this context is a term of art, as will be discussed below.

authoritative." *Id.* at *20.

101. *Id.* at *21.

102. Courts have refused to recognize private causes of action under most other sections of the securities laws. *See*, *e.g.*, Touche Ross & Co. v. Redington, 422 U.S. 560, 579 (1979) (holding that there is no private cause of action under section 17 of the 1934 Securities Exchange Act and stating that courts should not imply any private causes of action under the securities law unless Congress clearly so intended). The most notable exception is the recognized private cause of action under section 14(a) of the 1934 Securities Exchange Act and Rule 14a-9 promulgated thereunder. This rule pertains only to fraud in proxy solicitations, however, and thus would have only a marginal effect on climate change activism given the weaknesses of shareholder proposals already discussed.

103. Determination of Affiliates of Banks, 17 C.F.R. § 240.10b-5 (2008).

104. *Id.*

Further, outside of certain specified financial disclosures, even a material omission is prohibited *only if* the omitted information is "necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading."[105] That is, merely withholding material information is not actionable unless it affects the accuracy of statements the corporation has made.

Securities law is narrowly designed and interpreted to protect investors *qua* investors. Those who would use securities law to address social-responsibility issues such as climate change must contend with this fact. For example, while it may seem obvious that climate change is a material issue, information is "material" in the context of securities fraud only if there is a "substantial likelihood that a reasonable shareholder would consider it important" in deciding whether to buy or sell.[106] The rule's applicability is further limited to misrepresentations or omissions made "in connection with the purchase or sale of [a] security."[107] Courts have derived from this language a requirement that only a purchaser or seller of securities has standing to bring a securities fraud action under section 10b-5.[108] Perhaps even more important for present purposes, a plaintiff in such an action must establish that a misrepresentation or omission caused her to suffer *economic* loss, which typically derives from distortions in the stock price caused by the misinformation.[109] This requirement would be satisfied, for example, if a corporation's misrepresentation about its carbon impact caused its stock price to inflate *and* the plaintiff purchased at such inflated price *and* the revelation of the truth subsequently caused the price to fall *and* the plaintiff sold thereafter at a loss. All of these requirements must be satisfied; if, for example, the plaintiff sold before the stock price fell, or the stock price fell for some other reason, she would fail to establish causation and her lawsuit would fail.[110] This focus on a plaintiff's investment loss shows that harm to the environment caused by the misrepresentation or omission is

105. *Id.*

106. Basic v. Levinson, 485 U.S. 224, 231 (1988) (quoting TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)).

107. 17 C.F.R. § 240.10b-5.

108. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 735–36 (1975). While this portion of this Article focuses on shareholder litigation, it is worth noting here that agency enforcement (by the SEC) and criminal enforcement under the securities laws also hold little promise. As noted in the text, the main purpose of the laws is the protection of investors. Furthermore, violations of securities law are underenforced due to resource limitations. Finally, penalties are typically very mild: SEC civil enforcement actions often result in nothing more than a cease-and-desist order and an injunction against future violations. *See, e.g.*, *In re* Caterpillar, Inc., 50 S.E.C. 903 (1992).

109. *See* Dura v. Broudo, 544 U.S. 336, 338 (2005).

110. *See id.*

unlikely to be a relevant factor.

Like the harm required to support a cause of action, the mandated content of securities disclosures also reflects the law's focus on investment value over other harms. The SEC's Regulation S-K provides an integrated list of corporations' disclosure obligations under federal securities regulations.[111] Most required disclosures pertain to specific, backward-looking quantitative data about a firm's finances. Unsurprisingly, the list includes no specific obligations to disclose a corporation's carbon footprint or other environmental impact. Item 303, entitled "Management Discussion and Analysis" ("MD&A"), imposes the most open-ended disclosure obligations.[112] MD&A requires management to make certain narrative disclosures, many of which are *forward* looking. It requires management to, for example, "[i]dentify any known trends, or any known demands, commitments, events or uncertainties that will result in or that are reasonably likely to result in the [corporation's] liquidity increasing or decreasing in any material way" and to "[d]escribe any known trends or uncertainties that [the corporation] reasonably expects will have a material favorable or unfavorable impact on net sales or revenues . . . [including] events that will cause a material change in the relationship between costs and revenues . . . ."[113]

Professor Wallace has argued extensively that MD&A potentially obligates corporations to make disclosures about their greenhouse-gas emissions.[114] I am far less optimistic. Professor Wallace bases his aggressive interpretation of MD&A on the SEC's opinion in *In re Caterpillar* and a 2003 SEC release that sought to improve MD&A disclosures.[115] The 2003 release states that MD&A requires companies to "identify and disclose known trends, events, demands, commitments and uncertainties that are *reasonably likely to have a material effect* on financial condition or operating performance."[116] This language must be read in the context of the regulation it interprets; that is, the 2003 release cannot have created an obligation to disclose *everything* that might have a material effect, but only those things relevant to liquidity, revenues, costs, and other areas specifically required by MD&A. Moreover, as both the 2003 release and Item 303 itself state, the corporation need disclose only that which is "*reasonably likely*" to have a material

111. SEC Regulation S-K, 17 C.F.R. § 229 (2008).
112. *Id.* at § 229.303.
113. *Id.* at § 229.303(a)(1), (a)(3)(ii).
114. Wallace, *supra* note 4, at 300–21.
115. *Id.* at 307–09.
116. Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations, Securities Act Release No. 8350, Exchange Act Release No. 48,960, 68 Fed. Reg. 75,056, 75,057 (Dec. 29, 2003) (emphasis added).

effect on these areas, not everything that *might* have a material effect.[117]

Additionally, in light of its factual background, *Caterpillar* does not seem to expand the meaning of MD&A significantly. The Caterpillar corporation did not disclose the significant contribution its Brazilian subsidiary made to its overall earnings; nor did it disclose its advance knowledge that "sweeping economic reforms" were forthcoming in Brazil that would cut the earnings of the subsidiary and thus put a significant dent in overall earnings.[118] Thus, the SEC stated that the board had violated MD&A.[119] The corporation failed to disclose known facts "reasonably likely" to "materially" reduce its earnings. While science is making it increasingly clear that greenhouse-gas emissions are environmentally destructive, and there is a possibility of future regulation, there are as yet no "reasonably likely" material consequences for that destruction (such as tort liability or regulatory fines) that would materially affect liquidity, revenues, or costs. Indeed, corporate activities routinely generate legal levels of socially costly negative externalities with no such material effects—externalities such as pollution, trash, illness, injuries, etc. While a company's carbon impact is certainly likely to affect *the environment,* it is a stretch to say such emissions are "reasonably likely to have a material effect" on the *company* under current law.[120] Even if regulations were passed in the future, which remains uncertain, it would be unlikely they could impose ex post facto liability for current emissions.

Caterpillar suggests that *if* a corporation had special knowledge of forthcoming greenhouse-gas regulations and those regulations were reasonably likely to have a material impact, then the corporation would have to disclose that knowledge and the extent of the expected exposure (which might include, for example, current levels of emissions, how critical they were to revenues and liquidity, as well as the expected cost of complying with the new regulations).[121] But *Caterpillar* hardly seems to suggest that today's

117. *Id.*; 17 C.F.R. § 229.303(a)(1), (a)(3)(ii).

118. *In re* Caterpillar, Inc., 50 S.E.C. 903, 904–05 (1992).

119. *Id.* at 911–13.

120. However compelling the normative arguments in favor of a certain rule interpretation, the relevant agency, here the SEC, always gets the first cut at interpretation, and courts will tend to defer to an agency's own interpretation. I am not aware of any interpretations with respect to climate change and MD&A. As discussed above, the SEC's Division of Enforcement has considered climate change in the context of a different rule in its responses to the Ryland and Wachovia no-action requests; there we saw a split in opinion. *See* discussion *supra* Part I.A.1.

121. *Caterpillar*'s obligation to disclose knowledge about forthcoming regulation may create a perverse incentive for some corporations to avoid learning too much about regulations in advance (particularly if they consider

corporations would have to disclose the possibility that their greenhouse-gas emissions *could* someday be grounds for costs or liability of some unknown type. And since most investors can receive the same vague information from other sources, it is unclear what such disclosure would accomplish.

Indeed, MD&A may not even require a corporation to disclose its plans for dealing with carbon regulations after those regulations become known. A few years after *Caterpillar,* a federal district court held that a retailer did not violate MD&A by not disclosing its reliance on marketing plans that eventually failed:

> It would defy reason (and long-established business practices) to interpret a regulation concerned with analyzing "operations" and "financial condition" and furnishing a "narrative form of the financial data" as requiring such disclosure. [MD&A's] mandate to disclose material "trends and uncertainties" does not contemplate furnishing competitors with an analytical blueprint of a company's business strategies.[122]

One leading commentator thus argues that MD&A has only a very narrow purpose: not to disclose a corporation's plans, but "to pressure companies to give their shareholders advance warning of earnings downturns whenever possible."[123] This is of course consistent with the orthodox view that securities disclosure is narrowly focused on enabling investors to make the most profitable decisions and not on the dissemination of information per se.[124]

Thus, it is unlikely that existing securities fraud law provides a cause of action against a corporation for failure to disclose information about its carbon impact. As noted above, disclosure about a corporation's carbon impact is unlikely to be required, and thus the materiality of an omission will be a moot point. Materiality would only be relevant if a corporation were to make an affirmative misrepresentation or were to fail to correct earlier statements that later became misleading. While carbon-impact information might be important to the buying and selling decisions of some, even many, environmentally concerned individuals, the legal standard is that of

themselves unable to influence them or prepare for them). Note also that *Caterpillar* did not impose any penalties for the violation. Rather, it approved a modest settlement: as in many SEC settlements, Caterpillar refused to admit or deny any of the allegations in the opinion and paid no fines or damages. It agreed only to cease and desist from future disclosure violations and to implement compliance procedures.

122. *In re* Canandaigua Sec. Litig., 944 F. Supp. 1202, 1211 (S.D.N.Y. 1996).

123. Paul G. Mahoney, *Technology, Property Rights in Information, and Securities Regulation*, 75 WASH. U. L.Q. 815, 821 (1997).

124. *See* discussion *supra* Part I.C.

an objective "reasonable shareholder,"[125] who is presumed to invest in order to make money. Even in such a situation, the omissions or misstatements would have to be made in connection with a purchase or sale of securities, and only a person who actually bought or sold securities in reliance could bring suit.[126]

To support a cause of action, the definition of "materiality" would have to be significantly broadened, or MD&A would have to be recast to require carbon-related information. But such reform seems far beyond the traditional scope of the securities laws. Securities law gives shareholders limited ability to make proposals and requests of management with respect to social concerns, but historically, it has not prescribed any specific disclosures of that kind. It seems much more realistic to look to other regulatory agencies, such as the EPA, for climate-related regulations, whether disclosure-related or substantive.

Of course, environmental degradation potentially has a material effect on everyone, but for most corporations, it has no company-specific immediate effect of the type that might qualify as "material." Climate change may, however, have direct bottom-line significance for some industries, most notably insurance. Climate change may be increasing the likelihood of immense claims due to hurricanes, flooding, and other severe weather events.[127] It is difficult to reflect these costs in future premiums accurately; climate change is by definition a break from known weather patterns, and thus the increased likelihood of catastrophes is difficult to estimate.[128] Risk models based on past experience are not necessarily helpful in evaluating risks imposed by changed conditions. Indeed, as we have painfully learned from the current credit crisis, risk modeling based entirely on past experience may be dangerously misleading. Models did not predict the housing collapse and the severity of its ripple effects, and their inability to calculate risk in the changed environment going forward is contributing to the ongoing credit crunch.[129]

The bottom-line effect on insurers will not directly lead to the reduction of emissions, however, as insurance companies themselves have a relatively low carbon profile. But it may be helpful in winning insurance companies' political support for carbon regulation. In this regard, it may be significant that insurers are regulated primarily on the state level, and thus their political

125. *See, e.g.*, TSC Indus. v. Northway, Inc., 426 U.S. 438, 449 (1976).

126. Determination of Affiliates of Banks, 17 C.F.R. § 240.10b-5 (2008).

127. Howard C. Kunreuther & Erwann O. Michel-Kerjan, *Climate Change, Insurability of Large-Scale Disasters, and the Emerging Liability Challenge*, 155 U. PA. L. REV. 1795, 1796–97 (2007).

128. *See id.* at 1807–10.

129. *See, e.g.*, Joe Nocera, *Risk Management*, N.Y. TIMES MAG., Jan. 4, 2009, at 24.

capital is probably concentrated there. As a result, they may have more influence on state reforms than on federal reforms. As will be discussed below, states have led the way in legal action on climate change.

II. A SILVER LINING?

The concentration of decision-making power at the top of the corporate hierarchy is a key reason why reformers cannot rely on shareholders to address global warming. Shareholders do not run the corporation; they are simply "along for the ride." But this hardly requires us to give up hope of reform. Rather, understanding and acknowledging the hierarchical nature of corporate governance can help create more realistic (if imperfect) approaches to reform. The myth of corporate democracy is not only inaccurate, but also dangerous in that it lends an undeserved legitimacy to destructive corporate behavior. The myth that management is under a legal "duty" to enrich shareholders is similarly dangerous insofar as it may provide an excuse for executives who put profits above moral responsibility.

A. Hierarchy, Moral Accountability, and Self-Interest

Shareholders are atomized and anonymous. They cannot be easily identified with the companies in which they invest. Shareholders also tend to have diversified portfolios made up of relatively small holdings in many different companies. All of this distances them from the companies they nominally "own" and insulates them from personal moral responsibility for the acts of these companies. Shareholders' inability to influence policy further insulates them from responsibility. Shareholding is conceived of primarily as a mechanism for building wealth, rather than as a position of influence that engenders a social responsibility. While there are certainly many "socially responsible" funds and shareholder proposals, these are relatively rare exceptions that prove the general rule.

The lack of personal moral accountability means that even as social norms change to condemn the conduct of corporations, such as carbon pollution, indeed even as shareholders themselves voice objections in their nonshareholding capacity, shareholders *qua* shareholders simply do not feel responsible for the conduct. Thus, reforming corporate governance to empower shareholders may be precisely the wrong approach to increasing corporate social responsibility.[130] Even as society arrives at consensus on the threat

130. *See* Lawrence E. Mitchell & Theresa A. Gabaldon, *If I Only Had a Heart: Or, How Can We Identify a Corporate Morality*, 76 TUL. L. REV. 1645, 1668 (2002).

of climate change, individual behavior is unlikely to change without some visible leadership. Because climate change is so heavily influenced by industrial production and the consumption of those products, corporate executives may be useful normative leaders.

Many reformers have argued that hope for corporate social responsibility lies in management's independence from a duty to enrich shareholders.[131] The orthodox response to this position is that freeing management to consider interests other than shareholders "is essentially vacuous, because it allows management to justify almost any action on the grounds that it benefits some group."[132] This critique, however, assumes that management is currently restrained by a legal duty to shareholders, and that relaxing this duty would be a radical and dangerous change. But as argued above in Part I, this assumption is mistaken. Based on an aversion to government control of business, corporate law does not review the actions of management (unless they are disloyal); thus, allowing management "to justify almost any action" is a fundamental aspect of corporate law. The question then, is not to whom management owes fiduciary duties, but how to restrain management discretion in the absence of any meaningful fiduciary duties. The pressure to enrich shareholders does not come from the law, but from the capital markets (including the market for corporate control). Moral accountability (together with regulatory prescriptions) can mitigate that pressure and push management to use its discretion in socially beneficial ways.

Public backlash may contribute to changes in corporate executives' behavior. Politicians can also lead reform in accordance with public opinion. But leadership from our elected officials is most likely if corporate America is also on board. The private financing of political campaigns leaves our political and corporate leaders deeply interdependent.

As argued above, the existence of profit opportunities in low-carbon production does not give management any corporate-law duty to pursue them. Shareholder pressure for profits will of course motivate some management to pursue green innovations, but dirty technology will offer its own profit opportunities as long as the lack of regulation allows producers and consumers to externalize the environmental costs. Market forces and shareholder empowerment will therefore be woefully insufficient to make corporations reduce carbon emissions unless regulation reduces the profitability of carbon-intensive business activity through taxes, fines, and the like, and/or by reducing the relative costs of cleaner technology through tax breaks or direct subsidies.

131. *See* discussion *supra* Part I.B.
132. Oliver Hart, *An Economist's View of Fiduciary Duty*, 43 U. TORONTO L.J. 299, 303 (1993).

Thus, the entire project of shareholder empowerment and social-responsibility disclosure may be misguided. Individuals who profess to be socially concerned may think differently when privately and anonymously making choices that would affect their retirement savings or their children's college funds. Fund managers for institutional investors may lack the anonymity of individual investors, but their jobs and compensation are dependent on attracting and satisfying anonymous, morally shielded investors who are mainly concerned with profits. Perhaps even more so than corporate officers, fund managers are typically evaluated by the short-term (quarterly) profits they generate.

As the public face of corporations, executives are much more likely to be charged with, and accept, moral accountability.[133] During the protracted bull market that began in the 1990s (or even the 1980s, by some accounts), CEOs of successful corporations were celebrated for their supposed acumen and the wealth they collected from it.[134] With the downturn, the spotlight, now negative, remains on them. When executives are truly culpable moral agents, they will feel both public pressure and, hopefully, the pangs of conscience. In other situations, they may merely be scapegoats, but public pressure will operate nonetheless. In either case, the focus indicates that our social norms hold executives, and not directors or shareholders, morally accountable for corporate behavior. This may not always be fair, for even CEOs' power has limits, but it seems the most fair and workable generalization to be made about moral accountability for corporate behavior.

Placing moral obligation on CEOs is clearly on the rise in post-meltdown America. Politicians and the public have mobilized moral outrage (justified or not) against individual executives. The former CEO of General Motors, Rick Wagoner, took symbolic blame when the Obama administration forced his resignation as a condition of bailout assistance for GM in March 2009.[135] The response to the bonuses paid to AIG executives in March 2009 was an even more powerful example of moral outrage.[136] Note that the anger of politicians and the public was directed at CEO Edward Liddy (who

133. *See* Einer Elhauge, *Sacrificing Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 734–47 (2005); Mitchell & Gabaldon, *supra* note 130, at 1668. These authors focus on the accountability of directors; I would amend the argument to focus on CEOs and other top officers, who wield more direct control than directors.

134. *See, e.g.*, ROBERT SLATER, THE NEW GE: HOW JACK WELCH REVIVED AN AMERICAN INSTITUTION *passim* (1993).

135. *See* Bill Vlasic & Nick Bunkley, *Humbling a Giant*, N.Y. TIMES, Mar. 31, 2009, at B1.

136. Pallavi Gogoi, *AIG Chief Liddy, On Job for 8 Months, to Step Down; CEO Took Post When Giant Insurer Was Near Failure*, USA TODAY, May 22, 2009, at 6A.

had come out of retirement, at the government's request, to take over the job at a salary of $1) and the recipients of the bonuses, and not at AIG's board of directors or its (nongovernment) shareholders.[137]

Because the AIG incident involved executive compensation, the public outrage was consistent with traditional corporate-governance notions of loyalty to shareholders. After all, each American is, very nearly literally, an investor in AIG and other bailed-out institutions. The challenge is transferring that notion of moral accountability for profits to a social issue like climate change. This may not prove to be so difficult. Anger about AIG does not appear to be based only on the belief that our bailout investment has been squandered. It stems more fundamentally from the reason the government bailed out institutions in the first place: the fact that their enormous power meant their failure threatened the U.S. and global economies.[138] U.S. society tolerated such power in private hands as long as it generated social benefit (mainly in the form of material wealth). Now, however, there is momentum toward holding corporate and financial America, and particularly its top executives, more responsible for abusing its power over the economy and society. At the same time, we are also coming to realize that industry has power over climate change, and it may be the moment to impose moral responsibility for the use of that power. After all, the stakes are far higher than any financial crisis. Admittedly, much of the moral responsibility currently being assigned to the financial and industrial leaders for the economic crisis is symbolic and may be too little, too late. Hopefully that need not also be true with respect to climate change.

My argument does not suppose that CEOs will spontaneously take moral responsibility and change corporate behavior. Rather, my argument is that their visibility makes them susceptible to pressure for change and that regulators should take this into account. The concentration of power at the top of the corporate hierarchy creates a focal point not only for moral accountability, but also for self-interest. That is, rather than trying to please the hypothetical shareholder—an abstract, disembodied demand for corporate profits—regulatory strategy can focus on pressuring the small group of corporate hierarchs by appealing both to their consciences and to their desire to maintain their grip on power and wealth.

137. *Id.*

138. *See, e.g.*, David Reiss, *The Federal Government's Implied Guarantee of Fannie Mae and Freddie Mac's Obligations: Uncle Sam Will Pick Up the Tab*, 42 GA. L. REV. 1019, 1050–51 (2008).

B. Legal Pressure

Public pressure will play a role in changing corporate executives' behavior, but as noted above, executives remain under market pressure to create profits for their shareholders. Thus, regulation is also important. To the extent management is trapped between increasing moral and political pressure to address climate change and pressure to make profits to maintain their control of corporations, it may actually welcome carbon regulation, if only to resolve the competing pressures. While regulation obviously requires political leadership, the federal government is hindered by its political debts to carbon-emitting industries such as energy and automobiles. Lawsuits by private actors and state governments, as well as state-level regulation, are creating pressure, however. As will be explained below, they may also pave the way for federal regulation (which may eventually include national participation in a global regulatory regime).

1. Private Nonshareholder Litigation

Litigation, by itself, is poorly suited to stop a systemic problem like global warming. A few successful (or nearly successful) lawsuits could, however, contribute to wider changes in corporate activity affecting climate change by mobilizing public opinion and appealing to top managers' self-preservation instincts, aversion to social condemnation, and consciences. A significant number of climate change-related lawsuits have been filed in the past few years; most of them remain pending.[139]

A lawsuit filed in 2008, *Native Village of Kivalina v. ExxonMobil Corp.,* increases the moral condemnation factor by making fraud claims as well as nuisance claims.[140] The plaintiffs are an Alaskan native tribe and the village in which the tribe lives, near the Arctic Circle.[141] The village, located on a barrier reef, is threatened with destruction from erosion.[142] While erosion is endemic to barrier islands, the problem has been aggravated in

139. A useful list of climate change-related lawsuits, prepared by the law firm of Arnold & Porter LLP, is available at http://www.climatecasechart.com/ (last visited May 1, 2009).

140. Complaint for Damages & Demand for Jury Trial, Native Village of Kivalina v. ExxonMobil Corp., No. CV-08-01138 SBA (N.D. Cal. Feb. 26, 2008) [hereinafter Kivalina Complaint]. A copy of the complaint is available at the website for the Law Offices of Matthew F. Pawa, one of the law firms filing the complaint: http://www.pawalaw.com/assets/docs/kivalina-vs-exxon-08-1138-sba.pdf (last visited June 1, 2009). The complaint was filed by the Center on Race, Poverty & the Environment, the Native American Rights Fund, and a number of private law firms.

141. Kivalina Complaint at 1, Native Village of Kivalina v. ExxonMobil Corp., No. CV-08-01138 SBA (N.D. Cal. Feb. 26, 2008).

142. *Id.* at 4–5.

recent years due to increasingly severe storms at sea and the disappearance of the sea ice that once sheltered the village from the impact of sea storms.[143] The U.S. Army Corps of Engineers has reported that these phenomena "may be linked to long-term climate change."[144] The Corps of Engineers concluded in 2006 that the entire village would have to be relocated within five years at a cost of $123 million to $249 million.[145] The environmental changes noted above, along with the melting of the permafrost layer elsewhere, have not only threatened Kivalina, but also complicated the search for a relocation site.[146] The lawsuit seeks damages from major oil, coal, and utility corporations for the public and private nuisance allegedly caused by their massive carbon emissions.[147] Moreover, the suit alleges that some of the defendant corporations engaged in a civil conspiracy to mislead the public about the effects of greenhouse-gas emissions so they could perpetuate the nuisance without public pressure to desist.[148] The defendants allegedly funded "front groups" of "marginal" scientists to pose as experts and undermine public confidence in climate change theories that were accepted by mainstream science.[149]

The plaintiffs' clever use of a conspiracy argument illustrates the limitations of securities fraud litigation discussed above in Part I.C. However novel and risky the *Kivalina* plaintiffs' common law fraud theory may be, it is far more robust than a securities fraud suit could have been, under either a nondisclosure or misrepresentation theory. As noted previously, a much-misunderstood fact about securities law is that it does *not* require a corporation to disclose everything an investor might consider material.[150] It requires certain enumerated retrospective financial disclosures, as well as (under the "MD&A" rubric) disclosures about known trends or uncertainties likely to materially affect liquidity or costs.[151] Thus, as explained above, nondisclosure with respect to carbon impact is unlikely to constitute a violation of securities disclosure laws unless and until carbon impact has material consequences of which management is aware (such as a carbon tax or regulatory caps that carry penalties). The plaintiffs allege that emitters covered up and misrepresented their knowledge that

143. U.S. ARMY CORPS OF ENG'RS, RELOCATION PLANNING PROJECT MASTER PLAN: KIVALINA, ALASKA 102 (June 2006), *available at* http://www.poa.usace.army.mil/en/cw/Kivalina/Kivalina.html.

144. *Id.*

145. *Id.* at 103–04.

146. *Id.* at 102.

147. Kivalina Complaint, *supra* note 140, at 1.

148. *Id.* at 47, 65.

149. *Id.* at 47–62.

150. *See* discussion *supra* Part I.C.

151. *See* discussion *supra* Part I.C.

greenhouse gases have been creating a public and private nuisance.[152] Lacking a direct connection to most companies' liquidity or costs, this hardly seems the kind of information contemplated for inclusion under MD&A. So failure to disclose the truth about climate change in securities filings is unlikely to constitute an actionable omission.

The emitters allegedly went further than nondisclosure and made affirmative misrepresentations about climate change.[153] As noted above, however, misrepresentations are actionable under securities laws only when made "in connection with" a purchase or sale of securities.[154] The misrepresentations alleged by the *Kivalina* plaintiffs are almost certainly too remote from any specific purchase or sale for any private individual to have standing to bring a securities fraud action. Indeed, they are so remote from the concerns of securities law that they are also unlikely to support a securities fraud enforcement action by the SEC or prosecutors.[155]

The *Kivalina* complaint wisely avoids the securities fraud strategy in favor of a more morally resonant and potentially much more powerful argument. Regardless of the outcome of the case, the allegations of deception and conspiracy have an element of moral condemnation with the potential to shift public opinion against major carbon-emitting industries and, by extension, their executives. In the earliest litigation against tobacco companies, juries tended to treat smoker plaintiffs as having assumed the risks of smoking.[156] The conventional understanding had been that tobacco companies did not truly appreciate the dangers of smoking until relatively recently, after which they provided the public with warning labels.[157] But more recently, documents came to light showing that tobacco companies had known of the dangers for a long time and deliberately suppressed or distorted data.[158] This was likely a key factor in turning juries and the general public against

152. Kivalina Complaint, *supra* note 140, at 1.

153. *Id.* at 47–62.

154. Determination of Affiliates of Banks, 17 C.F.R. § 240.10b-5 (2008).

155. Common-law fraud, of course, does not require a connection to a securities transaction. But even a common-law fraud theory (which the complaint does not advance) would be highly attenuated. Common-law fraud requires that the defendant made a knowing misrepresentation in order to induce the plaintiff to take some action in reliance, and succeeded in doing so, causing harm to the plaintiff. The complaint clearly alleges that a conspiracy harmed the plaintiffs, but it would be difficult to allege that the conspirators intended to, and did, induce action by the plaintiffs.

156. *See* Richard L. Cupp, Jr., *A Morality Play's Third Act: Revisiting Addiction, Fraud and Consumer Choice in "Third Wave" Tobacco Litigation*, 46 KAN. L. REV. 465, 466 (1998).

157. *See, e.g.*, David G. Owen, *Inherent Product Hazards*, 93 KY. L.J. 377, 391–92 (2005).

158. *See, e.g.*, Cupp, *supra* note 156, at 484.

tobacco companies, which ultimately led to the comprehensive settlement of tobacco litigation.[159] The *Kivalina* complaint alleges a similar story about the major greenhouse-gas-emitting companies, and may induce a similar public condemnation of them. This may be effective in causing executives to see carbon reduction as a matter of personal moral responsibility (or at least a matter of the corporation's public credibility) as opposed to a short-term, bottom-line issue.

2. *State Government Regulation and Litigation*

The federal government may be too dependent on the automobile and energy industries to be an aggressive first mover in carbon regulation. State governments, however, have local concerns that may outweigh the influence of those industries, and thus states have raced ahead of an inactive federal government in climate change regulation and litigation. California, Mississippi, and Connecticut have brought public nuisance lawsuits against major emitters.[160] California, with its long coastline and parched inland areas, and Mississippi, with its exposure to Gulf Coast storms, have obvious concerns about climate change. Connecticut's leading industry is insurance, which is potentially threatened by climate change for reasons explained above.[161] The governor of Kansas recently vetoed a proposed power plant on the ground that it would pollute too much.[162] Some regional state coalitions have even discussed creating regional cap-and-trade programs.[163]

Most dramatically, two states have attempted to regulate

159. *See id.* at 466–91.

160. California v. Gen. Motors, No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007); Comer v. Murphy Oil, USA, Inc., No. 1:05-CV-436-LG-RHW (S.D. Miss. Aug. 30, 2007), *available at* http://www.bdlaw.com/assets/attachments/Comer_v_Murphy_Oil_opinion.pdf; Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005). District courts dismissed all three suits on the ground that climate change implicates nonjusticiable "political questions."
California dropped its lawsuit in light of the bankruptcies of the U.S. automakers named as defendants and the Obama administration's willingness to regulate greenhouse gases. *See* Rita Cicero, *California Drops Global Warming Suit Against Car Companies*, 29 ENVTL. LITIG. REP., July 8, 2009, *available at* http://news.findlaw.com/andrews/en/haz/20090708/20090708_people.html. The other two cases remain on appeal at the time of this writing. Comer v. Murphy Oil, USA, Inc., No. 1:05-CV-436-LG-RHW (S.D. Miss. Aug. 30, 2007), *available at* http://www.bdlaw.com/assets/attachments/Comer_v_Murphy_Oil_opinion.pdf, *appeal docketed*, No. 07-60756 (5th Cir. Sept. 17, 2007); Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *appeal docketed*, No. 05-5104 (2d Cir. Sept. 22, 2007).

161. *See supra* notes 127–28 and accompanying text.

162. Felicity Barringer, *Kansas Governor Vetoes Bill to Revive Two Coal-Fired Plants*, N.Y. TIMES, Mar. 22, 2008, at A10.

163. Dernbach & Kakade, *supra* note 56, at 18–19.

automotive carbon dioxide emissions directly, although the regulations have so far been stymied by litigation. In 2004, the California Air Resources Board ("CARB") passed carbon dioxide regulations for cars.[164] While automotive emissions are normally regulated by the federal government under the Clean Air Act, the Act allows California (and only California) to pass its own auto emissions regulations if it receives a waiver from the EPA.[165] The EPA had routinely granted these waivers in the past, but California had not received a waiver before passing its carbon dioxide regulations.[166] In *Central Valley Chrysler-Jeep v. Witherspoon*, automobile dealers and manufacturers sued, arguing that the California regulations were preempted by the Clean Air Act, the Energy Policy & Conservation Act,[167] and the President's power over foreign policy.[168] Under the Clean Air Act, states can choose to follow either EPA or California auto emissions standards.[169] In 2005, Vermont chose to adopt California's carbon dioxide regulations, resulting in another suit by automakers and dealers, *Green Mountain Chrysler-Plymouth v. Crombie*.[170]

In another case that reached the Supreme Court around the same time, *Massachusetts v. EPA*,[171] states sued the EPA for failing to regulate greenhouse gases. The EPA claimed it did not have authority because greenhouse gases are not "pollutants," and that even if it had authority, it would not regulate them for various policy reasons.[172] The *Crombie* court held that Vermont could regulate carbon dioxide if California received its EPA waiver.[173] In *Witherspoon*,[174] the court stayed the case pending the Supreme Court's decision in *Massachusetts v. EPA*.

The Court decided *Massachusetts v. EPA* in 2007. The Court

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164. Cent. Valley Chrysler-Jeep v. Witherspoon, 456 F. Supp. 2d 1160, 1163–64 (E.D. Cal. 2006).

165. *Id.* at 1164 (citing Clean Air Act § 209, 42 U.S.C. § 7543(b)(1) (2007)).

166. *Id.* at 1165.

167. *Id.* at 1165–66 (citing Energy Policy and Conservation Act, 49 U.S.C. §§ 32,902–32,919 (2007)). The EPCA sets federal fuel-economy standards; because CO_2 emission is directly related to fuel consumption, the plaintiffs argued California's CO_2 regulations encroached on federal authority.

168. The plaintiffs argued that climate change is a global problem best left to the President's authority. *Id.* at 1175–84.

169. *Id.* at 1164–65 (citing Clean Air Act § 209, 42 U.S.C. § 7507 (2007)).

170. 508 F. Supp. 2d 295, 300–02 (D. Vt. 2007).

171. 549 U.S. 497 (2007).

172. The Bush-era EPA argued that the science linking greenhouse gases to climate change was unclear, that addressing climate change via car emissions might result in a "piecemeal" approach to climate change, and that unilateral U.S. regulation might disincentivize developing nations from regulating their own emissions. *Id.* at 513–14.

173. 508 F. Supp. 2d at 397–99.

174. 456 F. Supp. 2d 1160.

held that the EPA did have authority to regulate CO_2.[175] Surprisingly, in light of the Court's traditional deference to agency authority, it also held that the EPA's stated policy reasons against regulation were arbitrary and capricious and did not justify its inaction.[176] The EPA nonetheless did not pass CO_2 regulations before the end of the Bush Administration.[177] The EPA considered granting a waiver to California, but denied it at the end of 2007.[178] In January 2008, California sued the EPA for its refusal to grant the waiver.[179] That lawsuit may become moot, however; in January 2009, the Obama administration ordered the EPA to begin the process of granting the waiver to California.[180]

3. *Uncertainty and Federal Regulation*

State regulations and lawsuits will only go so far. As Professor Osofsky has noted, "subnational efforts . . . provide some of the most innovative steps toward meaningful [greenhouse-gas] reductions."[181] However, leaving regulation to multiple, inconsistent jurisdictions may encourage free riding by actors in lax jurisdictions. This could result in migration of the worst emitters to the most lax jurisdictions and even cause local regulation to collapse into a race to the bottom. That is, even if, say, California and Vermont were to implement tough limits on greenhouse emissions, other states, provinces, or nations might be more permissive. Thus a comprehensive federal regime is necessary—and it must be part of a larger global regime.

The chaos of inconsistent state action may have a positive effect, however. While states and private plaintiffs are taking a variety of actions, the federal government seems to be preparing to come up with its own regulatory approach, signaled by the EPA's recent proposal to establish a carbon registry,[182] widely interpreted as a threshold step toward regulation. It is unclear what form this will take. *Massachusetts v. EPA*, and the Obama administration's response to it, suggest that the EPA will address greenhouse gases

175. 549 U.S. at 528–32.
176. *Id.* at 534.
177. Arnold W. Reitze, Jr., *Federal Control of Carbon Dioxide Emissions: What Are the Options?*, 36 B.C. ENVTL. AFF. L. REV. 1, 8 (2008).
178. *Id.* at 70.
179. *Id.*
180. *See* Press Release, Office of the Governor of the State of Cal., Gov. Schwarzenegger Applauds President Obama's Commitment to Move Swiftly to Allow California to Reduce Emissions from Cars (Jan. 26, 2009), *available at* http://gov.ca.gov/index.php?/print-version/press-release/11417/.
181. Hari Osofsky, *Local Approaches to Transnational Corporate Responsibility*, 20 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 143, 144 (2007).
182. *See* Mandatory Greenhouse Gas Reporting, 74 Fed. Reg. 16,609 (Apr. 10, 2009).

through rulemaking.[183] Congress may also pass further laws. As noted above, the House narrowly passed a bill that would establish a cap-and-trade regime. At the time of this writing in July 2009, it faced considerable opposition from Senate Republicans.

The current wave of state regulations and lawsuits may prod industry to cooperate with federal regulation in two ways. First, it may create a political groundswell that makes national regulation seem inevitable. Moral attacks like those lodged by the *Kivalina* plaintiffs may sway public opinion and enable Washington to cut some of its political ties to carbon-intensive industries. Once this point is reached, corporations may enthusiastically engage in self-regulation or collaboration with regulators in order to have some say in the shape of government regulation. This is, for example, part of the explanation of the collaborative securities-regulation regime born during the New Deal.[184] Corporations initially did not want to be regulated, but once it became clear that regulation was going to happen, they cooperated because they knew it would be better to participate in regulatory design than to let the government alone design it for them.[185]

Second, a multiplicity of state-level regulations or judgments may create incentives for industry to support, or at least acquiesce in, federal regulation in order to avoid a patchwork of inconsistent state regulation that may be more difficult to comply with than a single federal set of standards, even a strict one.[186] This realization by automakers in the 1970s contributed to the passage of the Clean Air Act.[187] In the absence of federal regulation, California had passed its own regulations.[188] Auto manufacturers, fearing a patchwork of state regulations, agreed to fairly strict federal regulation on the condition that it preempted states other than California from imposing their own standards.[189]

FINAL CAVEATS

There are clouds that lurk within the silver lining, however. Industry "cooperation" in regulatory design poses the danger of

183. *See* 549 U.S. 497, 533–35 (2007); Press Release, Office of the Governor of the State of Cal., *supra* note 180.
184. *See generally* JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET (2003).
185. *See, e.g.*, *id.* at 12–13; *see also* MARC ALLEN EISNER, REGULATORY POLITICS IN TRANSITION 106–07 (2d ed. 2000).
186. *See* J.R. De Shazo & Jody Freeman, *Timing and Form of Federal Regulation: The Case of Climate Change*, 155 U. PA. L. REV. 1499, 1536 (2007).
187. *Id.* at 1503–16.
188. *Id.*
189. *See id.* at 1504–05 (citing E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 330–33 (1985)).

capture.[190] The SEC, the EPA, and all manner of lawmakers and regulators have of course been accused of this. Given the political clout of business under our existing campaign finance system,[191] however, it will be all but impossible to effect regulation without industry cooperation. My general argument for concentrating blame at the top of the corporation carries other dangers as well. In both the economic and climate change contexts, blaming executives relieves the rest of us from responsibility for our complicity. Rank-and-file Americans' over-consumption, greed, and heedlessness contributed to the financial meltdown, and play an enormous part in the climate change problem as well. Our consumption patterns surely need to change as well. Corporate leaders can help jumpstart the change in thinking by emphasizing cleaner products and methods of production. Ultimately, however, fighting climate change will probably require not just cleaner production and consumption, but also an overall net reduction in production and consumption. Corporate America is an unlikely candidate to disseminate that part of the message.

190. *See* De Shazo & Freeman, *supra* note 186, at 1506 ("Industry will also try to undercut the most aggressive state standards by seeking a lower federal ceiling.").

191. President Obama's about-face on federal funding during the 2008 election campaign, which enabled his defeat of public-financing advocate John McCain, bodes ill for significant campaign-finance reform in the near future. *See* Michael Luo, *Campaign Spending in the Final Weeks*, N.Y. TIMES, Dec. 6, 2008, http://thecaucus.blogs.nytimes.com/2008/12/06/campaign-spending-in-the-final-weeks/#more-7747.