Legal Aspects of Corporate Governance in Early American Railroads

Charles W. Wootton

School of Business
Eastern Illinois University

Christie L. Roszkowski

School of Business
Eastern Illinois University

Although the concept of a corporate entity is centuries old, corporations were uncommon in the United States until the early 1800s. Prior to the nineteenth century, few American businesses were incorporated [Friedman, 1985, p. 188]. Beginning in the 1800s, business corporations slowly began to emerge in the United States [Rogers, 1902, p. 227]. During the early part of the century, these corporations primarily were banks, insurance companies, turnpike or canal companies established under a special charter granted by the state. Special charters also were used to incorporate the first railroad corporations in the late 1820s. However, by the late 1840s, the demand for railroad charters became so common that many states enacted a "general law" of incorporation that allowed a railroad to incorporate without a special charter.

As the corporate form evolved, it came to serve both as a vehicle for managing a firm's administrative tasks and a system for organizing the corporation's powers. From the foundations laid out in the corporate charter, the corporate form transmuted to accommodate business needs. Over time, the duties and rights of those responsible for managing the tasks were modified to meet changing needs. The resulting framework has come to be described as "corporate governance."

> What is corporate governance? It is the relationship among various participants in determining the direction and performance of corporations. The primary participants are (1) the shareholders, (2) the management (led by the chief executive officer), and (3) the board of directors [Monks and Minow, 1995, p. 1].

The Corporate Charter

Nearly all early business corporations were established by special state charters. The charter itself was integral both to the corporation and to corporate gov-

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ernance. As pointed out by James Willard Hurst [1970, pp. 15-16] in *The Legitimacy of the Business Corporation in the Law of the United States*, the charter was not merely an official license to operate; "in its details it [the charter] was more like a constitution, fixing the internal structure of the corporation."

Dartmouth College v. Woodward,[1] one of the earliest American corporate law cases, considered the fundamental role of the corporate charter.[2] In this landmark case, the United States Supreme Court held that a corporate charter is a contract between the state and the corporation. Writing for the Court, Chief Justice Marshall analyzed the very nature of the corporate entity:

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created [4 Wheat. 636].

As suggested by Justice Marshall, later courts addressing issues of corporate governance often scrutinized the charter to determine the powers conferred on the corporation. In *Taylor v. Griswold*, for example, the New Jersey Supreme Court considered whether a corporation had the power to make a bylaw allowing shareholders to vote by proxy. After discussing general corporate powers, the court determined that adopting bylaws is incidental to the operation of all corporations. The court held that the corporation was empowered to allow proxy voting only if the charter expressly granted that authority. In the absence of such a provision, neither the shareholder nor the directors could authorize voting by proxy. Election rights, which establish the shareholders' powers, are a critical element of corporate governance. Election procedures generallywere defined by the charter; however, voting rights varied widely by state and corporation. Two early U. S. railroad charters, for example, created significantly different voting rights. The 1826 New York act incorporating the Mohawk and Hudson Rail Road Company provided that "either in person or by lawful proxy, each share of the capital stock [entitles] a stockholder to one vote" [*Laws of New York*, 1825 [sic], p. 287]. Also in 1826, Pennsylvania authorized incorporation of the Danville and Pottsville Rail Road Company. In contrast to the one share/one vote rule, the Pennsylvania act established a proportional voting mechanism: one or two shares (one vote per share), from three to ten shares (one vote for each two shares), eleven to thirty shares (one vote for each four shares), thirty-one to one hundred shares (one vote for each ten shares), and no votes on all shares above one hundred shares [*Acts of General Assembly of Pennsylvania*, 1826, p. 245]. As James Willard Hurst [1970, p. 49] points out, proportional voting along with the preemptive right

[1] The full legal citation for each named case is presented in the references section of the paper.

[2] The charter in this case was for an educational institution, Dartmouth College. Nevertheless, the principles of the case subsequently have been applied to business corporations.

to subscribe "emphasized the stockholder's role in the power structure of organization." With proportional voting, individual shareholders were assured of retaining a greater voice in corporate governance.

Directors, Officers, and Shareholders

In his 1856 Treatise upon the Law of Railroads, Isaac F. Redfield [1856, p. 16] stated that under statute or common law railways "may act in either of three modes: First, By the general assembly of the shareholders . . . Second, By its directors. Third, By its duly constituted agents. "In the following sections, we focus on case law to see how powers were distributed among these three groups.

Directors

Many of the early railroad or other corporate charters granted the general authority to the board of directors and "most of the statutes vested in such boards broad managerial powers" [Dodd, 1954, p. 100]. The 1829 *Revised Statutes of New York* [1829, p. 599], for example, emphasized the directors' management function; "The term 'directors,' as used in this Title shall be construed to embrace all persons having by law, the direction of management of the affairs of such corporation, by whatever name they may be described in its charter, or known in law."

Some corporate charters granted sole authority for overall operation of the firm to the directors while others assigned authority to both the president and directors. The special act incorporating the Illinois Central Rail Road in 1836, for example, placed the overall responsibility for the railroad in the hands of the directors. The act [*Laws of Illinois*, 1836, p. 130] read: "the immediate government and direction of the affairs of said company, shall be vested in a board of not less than five directors . . . and the said directors . . . shall elect one of their number to be a president of the board, who shall also be president of the company." The Illinois Act then imposed on the president and directors (and their agents) the responsibility for construction and operation of the railroad:

> That the President and Directors, for the time being, are hereby authorised [sic] and empowered, by themselves, or their agents, to exercise all the powers herein granted to the company, for the purpose of locating, constructing and completing said rail road. . . . for the management of the affairs of the company, not heretofore granted, as may be necessary and proper to carry into effect the objects of the company [*Laws of Illinois*, 1836, pp. 130-131].

Although many state charters entrusted the board of directors with the overall management, the board's authority and responsibility for specific actions largely were established through common law of both the federal and state court systems. The federal court cases provided broad guidance for gov-

ernance decisions but it was the state courts that addressed the specific issues of corporate governance.

Courts often looked to *Bank of Columbia v. Patterson,* an early United States Supreme Court case, as precedent on two critical issues: whether a corporation could appoint an agent to act for it and whether corporate contracts required the corporate seal. The Court held that corporations had the power to appoint agents whose actions would bind the corporation. The Court further concluded [7 Cranch 305-306] that contracts made without the corporate seal could be binding on the corporation:

> [W]herever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents, are express promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which, an action may well lie.

These early cases thus enabled corporate boards to begin delegation of managerial responsibility to corporate agents.

The authority of individual directors to bind corporations further clarifies the directors' role in corporate governance. In *Soper v. Buffalo and Rochester Rail Road Company,* the board of directors authorized the board's executive committee and the railroad superintendent to review proposals for construction contracts submitted by the plaintiffs and others, to select which proposals to accept, and to execute a contract. Plaintiffs alleged that certain directors individually had announced acceptance of plaintiffs' proposal. In rejecting the plaintiffs' claim that the declarations of those directors were binding, the New York Supreme Court set forth reasoning later followed by several courts:

> [B]ut as it does not appear that those directors were clothed with any authority in the matter, their declarations cannot affect the defendants. The declarations or acts of a director, will not bind, or affect in any manner, the corporation, unless they are within the scope of his ordinary powers, or some special agency [19 Barb. 312].

Even acts clearly within the scope of directors' authority sometimes were questioned because of the procedures by which a decision was reached. In *Ex Parte Willcocks,* the court invalidated the actions taken when only two of nine directors purported to meet as a board. The New York Supreme Court [7 Cow. 170] stated that in order for directors to transact business, there must be a competent board, which "we think there must, at least, a majority of the Directors be present to constitute a board."

A common issue concerned the validity of decisions made by a board outside a formal meeting. State courts generally held that directors were not required to meet in formal session for actions within their authority to be con-

sidered acts of the corporation. In *Cram v. Bangor House Proprietary*, for example, a corporation tried to avoid liability on a contract made on its behalf by a majority of the directors. The plaintiffs argued that actions taken by the directors were binding even though no formal vote had been taken or recorded. In ruling in the plaintiffs' favor, the Supreme Court of Maine [3 Me. 360] held that, so long as the directors acted within their scope of authority, "we doubt not that the corporation are bound by any verbal order or direction, in which a majority of the board concurred, in relation to any business deputed to them." Similarly, the Supreme Court of Vermont in *Bank of Middlebury v. Rutland and Washington R. R.* held that necessity and practicality require that certain actions taken by the corporation or its agents be recognized as acts of the corporation whether or not approval was given in a formal meeting.

The judgment of the board of directors was at issue in *Hodges v. New England Screw Company*. In that case, a shareholder challenged the board's decision to expand the corporation's business and affiliate itself with another corporation. While acknowledging that directors can be held liable for breach of trust, abuse of powers, or dereliction of duty, the Rhode Island Supreme Court afforded the board broad latitude in its decisions and explained the reasons for this rule:

> We have in Rhode-Island a large number of corporations, whose affairs are managed by directors, who are generally large stockholders and act without compensation. If the innocent mistakes of these gentlemen, in cases where the law was unsettled or unknown, is to subject them for damages, great injustice would be done. The law requires of them care and discretion, such as a man of ordinary prudence exercises in his own affairs; and if they practise [sic] this, and nevertheless make a mistake, the law does not hold them answerable [1 Angell 348].

A shareholder also challenged a board's discretionary powers in *Dana v. Bank of the United States* after the Bank's President and Directors assigned corporate assets to a creditor in payment of a corporate debt. The Supreme Court of Pennsylvania rejected the plaintiff's arguments based on a provision in the state charter granting authority to the board of directors for "management of the affairs" of the corporation. Recognizing the board's broad managerial powers, the court wrote [5 Watts & Serg. 246-247]: "The stockholders therefore, have no absolute right to interfere directly with, and to exercise any immediate control over the directors in the management of its affairs."

Officers

The expanding use of corporations in the 19th century raised a number of legal questions concerning the role of officers in corporate governance. In the landmark case, *Bank of United States v. Dandridge*, differing views on the assignment and acceptance of corporate powers were set forth by two eminent

Supreme Court justices, Justice Story in the majority opinion and Chief Justice Marshall in his lone dissent.[3] The case concerned the validity of Dandridge's appointment as cashier of the Bank of the United States. The bank's corporate charter required the cashier to provide a bond and further required the board of directors to determine that the bond was satisfactory before the cashier could legally assume his duties. Although Dandridge provided the bond and began his duties, the written records of the board failed to show that they had accepted his bond and appointed him to act. The Supreme Court had to determine whether the cashier's appointment was valid in the absence of a written record. Justice Story ruled that written assignment of the officer's authority was not required to create that authority:

> If officers of the corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed. . . . and his acts . . . will bind the corporation although no written proof is or can be adduced of his appointment [12 Wheat. 70].

The Supreme Court considered the related issue of a corporation's responsibility for the acts of its officers and agents in *Phil. , Wilmington and Balt. R. Co. v. Quigley.* In that case, the plaintiff won a judgment based on his claim that the railroad had libeled him in a written report resulting from an investigation initiated by the president and directors. On appeal, the railroad argued [62 U. S. 209] that as a corporation "having only such incidental authority as is necessary to the full exercise of the faculties and powers granted by their charter; that, being a mere legal entity, they are incapable of malice, and that malice is a necessary ingredient in a libel." The Court rejected this argument[4] noting that such reasoning would shield a corporation from liability for almost all crimes and torts leaving only its agents responsible even for wrongs that had benefitted the corporation. Then, Supreme Court Justice Campbell, writing for the court, noted the interrelationship between governance and responsibility:

> As a necessary correlative to the principal of the exercise of corporate powers and faculties by legal representatives, is the recognition of the corporate responsibility for the acts of those representatives. . . . [E]ither in contractu or in delicto, in the course

[3] In his dissent, Chief Justice Marshall [12 Wheat. 92] wrote: "A corporation will generally act by its agent; but those agents have no self-existing power.It must be created by law, or communicated by the body itself. This can be done only by writing."

[4] Although the Supreme Court rejected the railroad's appeal argument in regard to corporate responsibility, the Court accepted the railroad's argument that the instruction to the jury was erroneous. Thus, the Court reversed the judgement of the Circuit Court and remanded the case.

> of its business, and of their employment, the corporation is responsible, as an individual is responsible under similar circumstances [64 U. S. 210].

State courts generally concluded that more extraordinary acts were beyond the general powers of officers and agents. In *Com'rs of Clinton and Port Hudson R. Co. v. Kernan,* for example, the Louisiana Supreme Court ruled that the cashier of a railroad lacked the power to release a corporate debtor from liability. In the absence of a charter or by-law provision authorizing the cashier's act, the court ruled [10 Rob. 175-176] that the issue was whether such action "has been sanctioned by usage and the acquiescence of the Directors." Because such acquiescence had not been proved, the cashier's actions were not valid.

Another corporate governance question requiring judicial resolution was whether an officer had an inherent right to the office during his term of office or whether the corporation retained the authority to terminate his services. This concept was important because under some early state charters, major officers (e. g. , president, treasurer) were selected not by the board of directors but were elected by the shareholders. The issue of the authority of the shareholders to elect new officers was addressed in *Burr v. M'Donald* where the Virginia Supreme Court of Appeals held that officers as agents of a corporation have no inherent right to their offices:

> That their officers possess no private franchise in their offices, but are the mere ministerial agents of the company, to conduct its business for the benefit, and under the authority of the company . . . otherwise if the officers appointed should prove to be incompetent or faithless, the company might be subjected to irreparable loss [44 Va. 234-235].

The case law, therefore, provided a basis for officers to assume broader managerial responsibility but only through board action-formal or informal-or by charter or by-law provision.

Stockholders

Shareholders are the fundamental source of power in a corporation. It long has been accepted that shareholders have certain basic rights with respect to the corporation; one of which is the right to elect directors. By the early 1800s pursuant to either the corporate charter or common law, shareholder approval usually was required for fundamental changes in the corporate charter.

The early corporate charters established the parameters for the overall role of shareholders in corporate governance. Not surprisingly, however, shareholders sometimes wanted to assume greater involvement in corporate decision-making. Courts generally were reluctant to allow such involvement. In *Conro v. Port Henry Iron Company,* for example, the New York Supreme Court held that a lease executed by corporate officers was invalid even though the shareholders had voted to execute the lease:

> [The lease] was not made in pursuance of any act of the *directors* of the company, but was authorized to be executed at a meeting of the stockholders. . . . It is quite obvious from the charter, that the company could do no act except through its directors [12 Barb. 27, 29].

Shareholders sometimes sought greater managerial powers because of disagreement with the decisions of the directors. The plaintiffs in *Hersey v. Veazie* sued the treasurer of a corporation alleging that he personally had retained funds that should have been distributed to the shareholders. The Supreme Court of Maine affirmed dismissal of the suit commenting that the plaintiffs were attempting to assert "the right, which no member of members of a body corporate have or can have without its consent legally obtained, to call its officers and agents to account with them" [24 Me. 12].

A number of the early corporation law cases focused on a fundamental governance issue: what changes could be effected by the directors alone and what actions had to be placed before the shareholders for their approval. *Marlborough Manufacturing Company v. Smith* concerned a corporate charter vesting general management powers in a board of directors. Upon request of the directors, the state legislature granted an amendment to the corporate charter allowing the directors to assess shareholders additional amounts needed to pay corporate debts. The Connecticut Supreme Court ruled that the amendment was invalid because the directors effectively had increased their management powers and held that the amendment required approval of the shareholders.

The very nature of the railroad industry often required modification of the plans of railroad corporations. As a result, courts were asked to determine shareholders' rights when significant changes occurred within a railroad corporation. In *Kean v. Johnson,* for example, the plaintiffs were shareholders in Elizabethtown and Somerville Railroad Company, a railroad corporation chartered in 1831 that encountered a number of financial problems. A charter issued to another railroad corporation in 1847 authorized its purchase of Elizabethtown and Somerville. All shareholders except the plaintiffs agreed to the purchase. The New Jersey Chancery Court ruled that without approval of all shareholders, the merger could not take place.

The Pennsylvania Supreme Court reached a different conclusion in *Lauman v. Lebanon Valley Railroad Company.* Similar to *Kean,* the case involved two railroads that the Pennsylvania legislature had authorized to merge subject to approval of the shareholders. The court held that the dissenting shareholder could not prevent the merger but also could not be forced to accept shares in the new corporation. Instead, he was entitled to cash payment for his shares.

By mid-century, the courts had recognized that shareholder lawsuits demanding accountability of corporate management were appropriate under limited circumstances. Individual shareholder actions generally were dismissed because, as explained by the Massachusetts Supreme Court [53 Mass. 386], "an

injury done to the stock and capital, by negligence or misfeasance [of managers], is not an injury to such separate interest, but to the whole body of stockholders in common." Although the corporation, as the injured party, was entitled to bring legal action, the very officers and directors who may have been engaged in the wrongdoing were responsible for determining whether to bring suit [Friedman, 1985, p. 515]. Courts, therefore, began to recognize a limited shareholder's right to sue corporate managers on behalf of the corporation.

This issue was addressed by the U. S. Supreme Court in *Dodge v. Woolsey.* Woolsey, the owner of 30 shares in the Branch Bank of Cleveland, sought to enjoin the State of Ohio from collecting a tax upon the Bank and named as defendants George C. Dodge (the state tax collector), the bank directors, and the bank itself. The defendants argued that Woolsey lacked standing to bring the suit because the corporate charter granted the board of directors the power to manage the corporation. In rejecting the appeal, the U. S. Supreme Court (in a majority opinion) established certain basic rights of a shareholder in regard to the governance of a corporation. The Court held [59 U. S. 341] that a court has "a jurisdiction over corporations, at the instance of one or more of their members [shareholders], to apply preventive remedies by injunction, to restrain those who administer them from doing acts which would amount to a violation of charters, or to prevent any misapplication of their capital or profits."[5] The Court further ruled that the board of directors' refusal to contest the state's tax claim against the corporation was not a mere error of judgment but constituted non-performance of official duties. Justice Wayne, writing for the majority, stated:

> Now, in our view, the refusal upon the part of the directors, by their own showing, partakes more of disregard of duty, than of an error of judgment. It was a non-performance of a confessed official obligation, amounting to what the law considers a breach of trust, though it may not involve intentional moral delinquency [59 U. S. 345].

The Supreme Court's holding was similar to the position previously adopted by the Rhode Island Supreme Court in *Hodges v. New-England Screw Company* when it held that a shareholder, on behalf of the corporation, may sue corporate directors for breach of trust.

Courts, however, routinely held that a single shareholder normally could not invalidate actions that were beneficial to the majority. In *Lauman v. Lebanon Valley Railroad,* one shareholder objected to the merger of the Lebanon Valley Railroad with the larger Philadelphia and Reading Railroad—a merger

[5] In a spirited dissent, Justice Campbell stated that the directors are not the trustees of individual stockholders. Moreover, the Justice [59 U.S. 367] stated the concept of a "legal privity" between shareholders and directors is a potentially dangerous one "for in all these cases the court of chancery will suffer a party remotely interested to institute the suit which his trustee, or other representative, should have brought, and will grant the relief on that suit which would have been appropriate to the case of him who should have commenced it."

approved by the majority of shareholders in both companies. While recognizing that shareholders may raise valid objections to prevent such a merger, the Pennsylvania Supreme Court held that the simple act of dissolution of a corporation did not violate the shareholder's rights because dissolution is a common act of corporations in trouble and one that affects the well being of all shareholders. Therefore considering this factor, the Pennsylvania court stated:

> Can one member of a corporation hold all his fellow-members, with their investments, to an unprofitable and impracticable enterprise, and prevent them from embarking in another that is more hopeful? No: their power of dissolution will relieve them from such an objection, and without it one memberof a corporation would, under some circumstances, have an almost absolute power over the investments of all the others [30 Pa. 46-47].

Thus, judicial recognition of a shareholder's right to bring a derivative suit on behalf of the corporation was very limited. Shareholders who merely disagreed with managers' decisions still were foreclosed from using the courts to resolve individual differences.

Conclusion

In their classic work, *The Modern Corporation and Private Property,* Berle and Means [1933, p. 135] stated that at the turn of the 19th century, the stockholders of a typical corporation were few, "they could and did attend meetings; they were businessmen; their vote meant something. "During the subsequent century, however, significant changes occurred, also described by Berle and Means:

> The gradual breaking up of this rigid [governance] situation, always in the direction of granting to the management or to a small proportion of the owners a wider latitude of power, roughly accompanies the appearance of large scale production and the growth in number of shareholders [Berle and Means, 1933, p. 135].

As the 19th century progressed, the corporate form of organization gained interest, particularly following the emergence of the railroads during the late 1820s. The corporate charters of many early railroads accommodated the need for a changing governance structure. Although under state charters, stockholders were assigned the authority for the election of the directors and for approval of changes in the corporate charter, the charter often granted the authority for the management of the railroad to the directors or directors and officers. Thus, direct corporate governance could be shifted from the shareholders to the directors/managers of the corporation. Through the common law, courts enforced management by directors and many courts accepted assignment of broad discretionary powers to the board of directors. Thus, shareholder consent was not needed for most management actions.

Although most charters assigned the authority for management to the board of directors or directors and president, the charters normally permitted delegation of this authority to other agents. Originally, the assignment of such authority required a corporate seal or the written approval of the directors in a formal meeting. Pursuant to several United States Supreme Court cases, however, the need for these formalities was eliminated. As a result, many corporate officers possessed the authority originally conceived as the right of the board or directors.

Thus, by the mid-1800s, fundamental changes had occurred that would enable significant modifications in corporate governance. While thecase law and corporate charters of the first half of the century demonstrated reduced management responsibilities of owners, these powers initially were shifted to boards of directors. The stage was set, however, for further shifts of power when officers and other employees would assume primary responsibility for corporate management.

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