FROM MERCANTILISM TO MONOPOLY: THE EVOLUTION OF MODERN CORPORATIONS THROUGH THE ENGLISH EAST INDIA COMPANY AND U.S. STEEL POSSIBLE IMPLICATIONS FROM THE HISTORY OF CORPORATE LAW FOR CONTEMPORARY CORPORATE GOVERNANCE

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ABSTRACT

Contemporary debate in corporate and company law discusses shareholder primacy, Corporate Social Responsibility (CSR), and Environmental, Social, and Corporate Governance (ESG). The trajectory of corporate law and its ability to adapt to these initiatives vary in form, substance, and practice in the United Kingdom and the United States. While many factors shape this debate, one element often neglected is history. In both countries, companies and corporations were originally designed as an exchange of services for privileges. The public sector, whether a monarch, the national government, or a province or state, granted privileges to private investors in exchange for quasi-public services, such as opening new trade routes, resource exploitation, and expanding the economic power of government. Companies and corporations in the United Kingdom and the United States varied in their levels of public service. Each country now finds itself entrenched in the debate of corporate governance. Today, some scholars surmise that American corporations may be more inclined to shareholder primacy than British companies. I argue that history plays a delicate role in this discourse. By canvassing the history of two major

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conglomerations, the English East India Company in the United Kingdom and U.S. Steel in the United States, I propose that the history of corporate law is an undervalued and overlooked element in this debate

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I. INTRODUCTION

The contemporary corporate governance debate discusses the inclusion of Corporate Social Responsibility (CSR) and Environmental, Social, and Corporate Governance (ESG) into the ever-changing theory of corporate purpose.[1] Common factors in this analysis include reporting standards,[2] social capital,[3] and investor behavior.[4] Other scholars delve into country–or state-level characteristics and industry–specific practices.[5] I argue another factor should be included in this dialogue: the historical development of the corporate form. Through case studies of the English East India Company in the United Kingdom and U.S. Steel in the United States, I suggest history reveals possible implications on the discussion surrounding corporate governance.

The central, founding tenet of traditional corporate law materialized in a barter: corporations received privileges, namely limited liability, as compensation for providing public services.[6] While corporations imparted varied services from country to country, like territorial governance and taxes, they furnished governments with the will, capital, and expertise to develop and broaden the economic, administrative, and imperial power of government.[7] The corporate form, on the other hand, became a tool to protect

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[1] Corporate Social Responsibility is the idea that corporations should "engage in socially responsible" business practices while ESG demands corporations promote policy objectives relating to environmental, social, and governance matters. Elizabeth Pollman, *Corporate Social Responsibility, ESG, and Compliance*, *in* THE CAMBRIDGE HANDBOOK OF COMPLIANCE 662-63 (Benjamin van Rooij & D. Daniel Sokol eds., 2021); *see also* Mark J. Roe, *Corporate Purpose and Corporate Competition*, 99 WASH. U. L. REV. 223 (2021); Arielle Sigel, *CSR Statements: Incentives and Enforcement in the Wake of the Business Roundtable's Statement on Corporate Purpose*, 101 B.U. L. REV. 803 (2021).

[2] *See generally* HANS BONDE CHRISTENSEN ET AL., ECONOMIC ANALYSIS OF WIDESPREAD ADOPTION OF CSR AND SUSTAINABILITY REPORTING STANDARDS: STRUCTURED OVERVIEW OF CSR LITERATURE 1 (2018), http://dx.doi.org/10.2139/ssrn.3313793.

[3] Social capital relates concepts such as trust and corporate culture to firm value and stock market performance. Henri Servaes & Ane Tamayo, *The Role of Social Capital in Corporations: A Review*, 33 OXFORD REV. ECON. POL'Y 201 (2017).

[4] Other analysis delves into whether institutional investors incorporate ESG and CSR into their investment analysis and decision-making process. Stuart L. Gillan et al., *Firms and Social Responsibility: A Review of ESG and CSR Research in Corporate Finance*, 66 J. CORP. FIN. 1 (2021).

[5] *See generally* Alexandre Sanches Garcia et al., *Sensitive Industries Produce Better ESG Performance: Evidence from Emerging Markets*, 150 J. CLEANER PROD. 135 (2017).

[6] *See* Samuel Williston, *History of the Law of Business Corporations Before 1800*, 2 HARV. L. REV. 105, 108-10 (1888).

[7] Andrew Phillips & J.C. Sharman, *Company-States and the Creation of the Global International System*, 26 EUR. J. INT'L RELS. 1249, 1250 (2020).

investors from personal liability in the event of bankruptcy.[8] Indeed, corporations helped pave the way for colonial empires and the explosion of capitalism in the nineteenth and twentieth centuries.[9]

In the United Kingdom, the evolution of company law helped transform the Crown into a colonial empire.[10] The Crown provided groups of investors and entrepreneurs the gift of limited liability through the grant of a company "charter."[11] In turn, the chartered companies, namely and prominently the English East India Company (EIC), forged new trade routes and established colonial rule in India.[12] The EIC acted as a hybrid "company-state" in India throughout the seventeenth century.[13] Further, at one point in the eighteenth century, the EIC's armed forces totaled 260,000 soldiers, almost twice the amount of the British Army.[14] In the United States, however, the corporation served a different purpose to society. While the American corporation created and *de facto* governed company towns, the primary function of the American corporation, exemplified by Andrew Carnegie's U.S. Steel, was to exploit the vast quantities of natural resources and evolve the fledgling national economy.[15]

Today's discourse surrounding corporate governance challenges the historical role of the corporation. Traditionally, the corporate form served a public purpose.[16] But the gradual emergence of capitalism as the predominant economic system revealed its "dark side." In the United States, corporations shopped among states to find corporate environments willing to grant desirable and less restrictive charters.[17] Most found their home in

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8 *See* Bruce Brunton, *The East India Company: Agent of Empire in the Early Modern Capitalist Era*, 77 SOC. EDUC. 78, 78 (2013).

9 *See* Subhabrata Bobby Banerjee, *Corporate Social Responsibility: The Good, the Bad, and the Ugly*, 34 CRITICAL SOCIO. 51, 52 (2008).

10 *See id.*

11 Andrew Phillips & J.C. Sharman, *Company-States and the Creation of the Global International System*, 26 EUR. J. INT'L RELS. 1249, 1252-53 (2020).

12 Brunton, *supra* note 8, at 78-79.

13 Michael Wagner, *Profit and Surety: The British Chartered Trading Companies and the State, in* A HISTORY OF SOCIALLY RESPONSIBLE BUSINESS, C. 1600–1950, at 107 (W.A. Pettigrew & D.C. Smith eds., 2017).

14 Dave Roos, *How the East India Company Became the World's Most Powerful Monopoly*, HISTORY (June 29, 2023), https://www.history.com/news/east-india-company-england-trade.

15 Gavin Wright, *The Origins of American Industrial Success, 1879-1940*, 80 AM. ECON. REV. 651, 661 (1990).

16 Mark S. Blodgett et al., *Social Enterprise: Reaffirming Public Purpose Governance through Shared Value*, 16 J. BUS. & SEC. L. 305, 306, 308 (2016).

17 The state of incorporation is important to corporations because of the internal affairs doctrine, to which "'the law of the state of incorporation normally determines issues relating to the internal affairs of the corporation.'" In disputes over corporate governance, litigations

Delaware, a state traditionally prepared to uphold what some corporations value most: shareholder primacy.[18] The landmark 1919 Michigan Supreme Court case *Dodge v. Ford* succinctly states the theory behind shareholder primacy: "'The shareholders forming an ordinary business corporation expect to obtain the profits of their investments in the form of regular dividends. To withhold profits . . . would defeat their just expectations.'"[19] In today's society, shareholder primacy means that:

> [S]tockholders have first priority over all corporate stakeholders. Jobs can be cut, and wages reduced, so long as stockholders benefit. Corporate leaders are incentivized to avoid taxes, health and safety regulations, and environmental guidelines so long as taking such actions will increase the company's stock price.[20]

While the United Kingdom and the United States traditionally have preserved shareholder interest as the central tenet of corporate law,[21] the emergence of "stakeholderism" in the late twentieth and twenty-first centuries challenges this notion.[22] Stakeholderism, in stark contrast to shareholder primacy, asserts that "corporations should be operated with a view towards benefitting all stakeholders as well as the broader community."[23] To stakeholderists, a corporation's obligations extend beyond its shareholders to a "community of interests," or anyone impacted by the corporation's activities.[24] Stakeholders include employees, creditors, and broader society.[25]

However, the history of corporate law in the United States and the United Kingdom possibly suggests the countries will remain committed to

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involving corporations in Delaware are adjudicated by Delaware law. Pierluigi Matera, *Delaware's Dominance, Wyoming's Dare. New Challenge, Same Outcome?*, 27 FORDHAM J. CORP. & FIN. L. 73, 76, 80 (2022) (citing *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 621 (1983)).

[18] Shareholder primacy is also known as the "shareholder value doctrine" or "stockholder primacy." *Id*. at 110-11; David J. Berger, *Reconsidering Stockholder Primacy in an Era of Corporate Purpose*, 74 BUS. LAW. 659, 659 (2019).

[19] Dodge v. Ford Motor Co., 170 N.W. 668, 682 (Mich. 1919) (quoting VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS § 447 (Little Brown & Co. 2d Ed. 1886)).

[20] Berger, *supra* note 18, at 659-60.

[21] John Armour et al., *Shareholder Primacy and the Trajectory of UK Corporate Governance*, 41 BRIT. J. INDUS. RELS. 531, 531 (2003).

[22] *See id*. at 531-32.

[23] Lisa M. Fairfax, *Stakeholderism, Corporate Purpose, and Credible Commitment*, 108 VA. L. REV. 1163, 1166 (2022) (citing Larry Fink, *2018 Letter to CEOS: A Sense of Purpose*, BLACKROCK (Jan. 17, 2018)).

[24] *Id.* at 1167 (citing E. Merrick Dodd Jr., *For Whom Are Corporate Managers Trustees*, 45 HARV. L. REV 1145, 1147-48 (1932)).

[25] *Id.*

shareholder primacy. This emerges from an analysis of the historical development of the corporate form in the United States and the United Kingdom, using U.S. Steel and the English East India Company as two examples.

Two opposing legal theories of corporate law posit the framework for this Note: the contractual theory and the entity theory. The contractual theory originates corporate law to a developed form of contract law, where a complex set of contracts, or a "nexus of contracts," governs relationships among individuals, agents, directors, and managers to form a corporation.[26] Therefore, the prime directive of corporate law under the contractual theory is to govern the legal relationships among the parties to those contracts.[27]

The entity theory rejects this notion and instead asserts that the corporation is a "real, naturally occurring being with characteristics not present in their human members."[28] Entity theory portrays the corporate form as something more than the sum of the relationships among its participants, but rather a real, state-created entity.[29] The corporate entity does not share the same interests as its shareholders.[30] Thus, the entity theory allows the corporation to pursue other interests beyond shareholder profit maximization, such as stakeholder interests. From this perspective, the entity theory allows the corporation to consider employee, environmental, and social interests in its corporate governance.

I argue the historical development of the corporate form in the United States, used as a tool to exploit resources and grow the national economy, is one factor in the possible preservation of shareholder profit maximization in accordance with the contractual theory of corporations. On the other hand, the state-sponsored company history in the United Kingdom has played an important role in generating an entity theory of corporate governance, giving rise to stakeholderism and corporate social responsibility as potential challenges to shareholder primacy.

In Part II, I describe the history of the corporate form in the United Kingdom and the United States through two early successful corporations, the East India Company and U.S. Steel. I provide an overview of their (1) corporate strategy and (2) relationship with government. The analysis continues by suggesting the historical development of the East India

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[26] Marios Koustasis, *Shareholder Primacy in a Nexus of Contracts: A Nexus of Problems*, 38 BUS. L. REV. 136, 136-37 (2017).

[27] *See* Henry N. Butler, *The Contractual Theory of the Corporation*, 11 GEO. MASON U. L. REV. 99, 100 (1989).

[28] Michael J. Phillips, *Reappraising the Real Entity Theory of the Corporation*, 21 FLA. ST. U. L. REV. 1061, 1062 (1994).

[29] *Id.*

[30] Lynn Buckley, *The Foundations of Governance: Implications of Entity Theory for Director's Duties and Corporate Sustainability*, J. MGMT. GOVERNANCE 29, 46 (2021).

Company and U.S. Steel impacts contemporary corporate governance trends in the United Kingdom and the United States. In Part II, I review the entity and contractual theories of corporate law and argue that the history of the EIC and U.S. Steel are case studies to demonstrate the possible characterization of entity theory in the United Kingdom and contractual theory in the United States.

II. THE HISTORY OF THE CORPORATE FORM

The history of the corporate form proposes insights into contemporary corporate governance in the United Kingdom and the United States. In the United Kingdom, the Crown dominated the East India Company's corporate strategy.[31] The EIC administered public services and governed over land for the Crown in India.[32] In return, the Crown gave the EIC privileges formerly uncommon in business, namely limited liability, monopolistic controls, and tax exemptions.[33] This fostered a close and at times turbulent relationship between the EIC and the Crown until the EIC's nationalization in 1874.[34] In the United States, U.S. Steel assumed a markedly different corporate strategy by acquiring competitors and integrating production.[35] The relationship between U.S. Steel and the American government proved fraught with anti-trust legislation, culminating in the federal government's prosecution of U.S. Steel under the Sherman Anti-Trust Act in *United States v. U.S. Steel Corporation*.[36]

A. The United Kingdom: The East India Company

An exchange of privileges for public service was a critical factor in corporate development in the United Kingdom.[37] The Crown granted charters in exchange for exclusive privileges, namely limited liability for investors, monopoly trading rights, and tax benefits.[38] In turn, the EIC provided quasi-

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31 BANKEY BIHARI MISRA, THE CENTRAL ADMINISTRATION OF THE EAST INDIA COMPANY 1773-1834, at 52 (1959).

32 1 RAGHBENDRA JHA, FACETS OF INDIA'S ECONOMY AND HER SOCIETY 128 (2018).

33 DAN BOGART, *The East Indian Monopoly and the Transition from Limited Access in England, 1600-1813 in* ORGANIZATIONS, CIVIL SOCIETY, AND THE ROOTS OF DEVELOPMENT 23, 24 (Naomi R. Lamoreaux & John Joseph Wallis eds., 2017).

34 East India Company's Stock (Redemption of Dividend) Bill 1873, 36 & 37 Vict. c. 217 (Eng.).

35 KENNETH WARREN, BIG STEEL: THE FIRST CENTURY OF THE UNITED STATES STEEL CORPORATION 1901-2011, at 1-3 (2001).

36 Guy B. Maseritz, *"No Inventions, No Innovations": Reassessing the Government's Antitrust Case Against United States Steel Corporation*, 7 J. BUS. & TECH. L. 247, 250-52 (2012).

37 *See* EDWARD S. MASON, THE CORPORATION IN MODERN SOCIETY 16 (1960).

38 Williston, *supra* note 6, at 109.

public services to the Crown.[39] Companies opened new trade routes, produced revenue for the Crown, provided public utilities, and expanded colonialism.[40] The modern history of the corporate form in the United Kingdom began with "joint stock companies."[41] Partners interested in a business expenditure pooled assets to fund trade voyages.[42] In 1551, Queen Mary I granted the first joint-stock charter to the Muscovy Company, which received a monopoly on trade between England and Russia.[43] However, other scholars argue the corporate form truly began with the establishment of the East India Company (EIC) in the 1600s.[44] The EIC serves as one example of the historical purpose of the British corporate form: an exchange of exclusive privileges for public services.[45]

1. Corporate Strategy: Privileges from the Crown

The first core privilege the EIC received from the Crown was limited liability for its investors.[46] At the time, limited liability was not endowed through incorporation as is currently, but granted through a charter.[47] Joint-stock companies, like the EIC, did not commonly enjoy limited liability.[48] In the United Kingdom, the charter had to explicitly state the joint-stock company had limited liability until the Limited Liability Act of 1855.[49] While the legal term "limited liability" was mostly absent from the EIC's seventeenth-century sources, the notion became clear over time: the EIC was a separate corporate legal personality according to the 1600 charter.[50] The

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[39] JHA, *supra* note 32, at 128.

[40] *See* BOGART, *supra* note 33, at 35.

[41] M. Schmitthoff, *The Origin of the Joint Stock Company*, 3 U. TORONTO L. J. 74, 90 (1939); *see also* Leonardo Davoudi et al., *The Historical Role of the Corporation in Society*, 6 J. BRIT. ACAD. 17, 18, 29-30 (2018).

[42] Leonard W. Hein, *The British Business Company: Its Origins and its Control*, 15 U. TORONTO L. J. 134, 143 (1963).

[43] Davoudi et al., *supra* note 41, at 30.

[44] Dan Vermeer, *In Search of a Grand Reset*, DUKE CORP. EDUC. (Dec. 2022) (quoting RUPALI MISHRA, A BUSINESS OF STATE: COMMERCE, POLITICS, AND THE BIRTH OF THE EAST INDIA COMPANY (Harvard University Press 2018)).

[45] MASON, *supra* note 37, at 16.

[46] Brunton, *supra* note 8, at 78.

[47] Binda Preet Sahni, *A Legal Analysis of the British East India Company*, 54 ACTA JURIDICA HUNGARICA 317, 320 (2013). Limited liability is a principle in corporate law that prohibits investors in a corporation from being liable for more than the amount they invest. Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 89-90 (1985).

[48] Frederick G. Kempin, Jr., *Limited Liability in Historical Perspective*, 4 AM. BUS. L. ASS'N. 11, 12-13 (1960).

[49] Sahni, *supra* note 47, at 320.

[50] East India Company Charter, 1600, at 2, *reprinted in* JOHN SHAW, CHARTERS RELATING

charter stated that the EIC "shall be one [b]ody [c]orporate and [p]olitik."[51] The charter separated the legal personality of the EIC from that of its members.[52] Therefore, EIC investors enjoyed limited liability and did not share in the debts of the company.

Limited liability encouraged the EIC to raise large amounts of capital to fund its voyages.[53] Previously held together by insurance contracts among directors, managers, and investors, the legal articulation and statutory realization of limited liability did not dominate the EIC's corporate form until the 1650s.[54] The ingenuity of limited liability gradually emerged from the demands of the financial capital markets of the time.[55] Limited liability promoted risk-taking because shareholders and managers knew that if a voyage was unsuccessful or lost at sea, they would only lose the capital allocated to the voyage.[56] To maintain exclusive trading routes through one enterprise, and subsequently a monopoly, business enterprises required large, fixed investments and diverse funding sources to create economies of scale to facilitate trade between Europe and Asia.[57] Limited liability provided the legal form to successfully do so without risking the financial collapse of private investors.

The second central privilege enjoyed by EIC was a monopoly. In 1600, Queen Elizabeth I granted a charter to the EIC.[58] The charter provided the EIC with a fifteen-year monopoly to trade to "lands east of the Cape of Good Hope and west of Cape Horn."[59] Every ten or fifteen years, the EIC renewed the charter, and therefore, had a monopoly.[60] Entrepreneurs created the EIC as an import and export company between India and England to trade goods, namely spices, cotton, and silk.[61] While investors initially pooled funds for

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TO THE EAST INDIA COMPANY FROM 1600 TO 1761 (1887) [hereinafter East India Company Charter].

51 *Id.*

52 *Id.*

53 Brunton, *supra* note 8, at 78.

54 Oscar Gelderblom et al., *The Formative Years of the Modern Corporation: The Dutch East India Company VOC, 1602-1603*, 73 J. ECON. HIST. 1050, 1051 (2013).

55 *Id.* at 1072.

56 Daisuke Asaoka, *A Behavioral-Economic Perspective on Conflicts of Interest Among Shareholders, Debtholders, and Directors*, 33 J. INTERDISC. ECON. 7, 10 (2021).

57 KIRTI N. CHAUDHURI, THE TRADING WORLD OF ASIA AND THE ENGLISH EAST INDIA COMPANY: 1660-1760, at 61 (1978).

58 EMILY ERIKSON, BETWEEN MONOPOLY AND FREE TRADE: THE ENGLISH EAST INDIA COMPANY, 1600-1757, at 3 (2014).

59 *Id*. at vii; William Dalrymple, *The East India Company: The Original Corporate Raiders*, THE GUARDIAN (Mar. 4, 2015), https://www.theguardian.com/world/2015/mar/04/east-india-company-original-corporate-raiders.

60 BOGART, *supra* note 33, at 25.

61 Brunton, *supra* note 8, at 78-79.

each voyage, the EIC became a permanent joint-stock corporation in 1657 and allowed "continuous unlimited investment [to] tak[e] place without reference to individual voyages."[62] Individual investors could then purchase and exchange EIC shares at its headquarters in London.[63] The EIC would then distribute profits proportional to the capital invested.[64] From 1609 to 1612, seven voyages of the EIC returned an average return of 174%.[65] The EIC would remain profitable for much of its history until its nationalization and dissolution by Parliament in the East India Stock Dividend Redemption Act of 1873.[66]

The EIC was not the only powerful joint-stock company with a monopoly—the States General of the Netherlands granted a charter to the Dutch East India Company in 1602.[67] The Dutch East India Company would overshadow the EIC well into the eighteenth century with its larger trade volume.[68] Despite its main competitor, the EIC grew to rival the Dutch East India Company in the 1780s by a number of ships.[69] As explained previously, the extent to which the Crown upheld the EIC's monopoly varied greatly over the centuries.[70] Regardless, through political connections to the Crown, the EIC officially maintained a monopoly over trade with the East Indies until 1813.[71]

Finally, the Crown bestowed considerable privileges to the EIC—like tax exemptions—which facilitated exclusive trading rights over local competitors.[72] While this pattern persisted throughout the EIC's history, the Crown provided the EIC with a notable tax break in the Tea Act of 1773, the precursor to the Boston Tea Party.[73] The EIC received the tax exemption in 1772 following a speculative banking scheme throughout Europe which

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[62] NICK ROBINS, *This Imperious Country, in* THE CORPORATION THAT CHANGED THE WORLD 24 (2006); ERIKSON, *supra* note 58, at 3-4.

[63] ROBINS, *supra* note 62, at 24.

[64] *See* Williston, *supra* note 6, at 109.

[65] Gelderblom et al., *supra* note 54, at 1065. Further, voyages between 1610 and 1613 issued dividends ranging from 320% to 222%. 2 WILLIAM ROBERT SCOTT, THE CONSTITUTION AND FINANCE OF ENGLISH, SCOTTISH, AND IRISH JOINT-STOCK COMPANIES TO 1720, at 101 (1912).

[66] Sahni, *supra* note 47, at 327.

[67] NIALL FERGUSSON, THE ASCENT OF MONEY: A FINANCIAL HISTORY OF THE WORLD 128 (2008).

[68] Brunton, *supra* note 8, at 78.

[69] Jan Lucassen, *A Multinational and Its Labor Force: The Dutch East India Company, 1595-1795*, 66 INT'L LAB. WORKING CLASS HIST. 12, 12 (2004).

[70] *See* ERIKSON, *supra* note 58, at xii.

[71] ROBINS, *supra* note 62, at 22.

[72] *Id.* at 38.

[73] Ray Raphael, *Tea Party Myths*, 97 AM. HIST. 61, 62 (2010).

inflated EIC stock while debt skyrocketed.[74] In response, Parliament exempted the EIC from any duties on tea arriving in Britain or the American colonies.[75] In the colonies, the tax break allowed the EIC to sell directly to consumers with only a small duty on American imports.[76] In essence, the British government decided to prop up the struggling EIC to the benefit of American consumers.[77]

2. The EIC's Quasi-Governance: Public Services

The privileges extended to early corporations did not come for free. To receive tax exemptions, monopoly, and limited liability, the Crown required the EIC to exercise its economic weight in service of the British Empire.[78] The EIC waged war to expand the Crown's imperial rule, collected the Crown's revenues, and provided public utilities to its colonized subjects.[79] Indeed, the EIC exercised quasi-governmental power, mandated by its 1600 charter.[80] This power was generally expansive and only limited in specific circumstances. The EIC could enact laws if they were (1) justifiable and reasonable, (2) not inconsistent with parliamentary laws, British customs, and orders, and (3) "necessary, requisite, and convenient."[81]

The 1600 charter explicitly granted governance powers to the EIC. The EIC could "purchase [l]ands, without any [l]imitation . . . ." and "'wage war.'"[82] Notably, the EIC exercised its military power on its maiden voyage in 1601, where it captured a Portuguese ship replete with provisions.[83] However, the inception of the EIC as a quasi-government truly began in 1608, when Captain William Hawkins set foot on Indian soil to conquer the Mughal Empire.[84] At the time in present-day India, the Mughal Emperor

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[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] Johnathan P. Eacott, *Making an Imperial Compromise: The Calico Acts, the Atlantic Colonies, and the Structure of the British Empire*, 69 WM. & MARY Q. 731, 761 (2012).

[78] *See* Md. Awal Hossain Mollah, *Growth and Development of Civil Service and Bureaucracy in Bangladesh: An Overview*, 18 S. ASIAN SURV. 137, 138 (2011).

[79] *See id.*

[80] East India Company Charter, *supra* note 50, at 3; Erin Blakemore, *How the East India Company Became the World's Most Powerful Business*, NAT'L GEOGRAPHIC (Sept. 6, 2019), https://www.nationalgeographic.com/culture/article/british-east-india-trading-company-most-powerful-business.

[81] East India Company Charter, *supra* note 50, at 7-8.

[82] *See id.* at 3, *see also* WILLIAM DALRYMPLE, THE ANARCHY: THE RELENTLESS RISE OF THE EAST INDIA COMPANY xxiv (Michael Fishwick ed., 2019).

[83] Cheryl Fury, *The First English East India Company Voyage, 1601-1603: The Human Dimension*, 24 INT'L J. MAR. HIST. 69, 73-74 (2012).

[84] CAPTAIN WILLIAM HAWKINS, THE HAWKINS' VOYAGES DURING THE REIGNS OF HENRY VIII, QUEEN ELIZABETH, AND JAMES I 389-90 (Clements Roberts Markham ed., 1878).

ruled approximately 150 million people, who produced about a quarter of global manufacturing.[85] Moreover, the Emperor retained a standing army of more than 4,000,000 soldiers.[86] The EIC understood direct military conquest was unfeasible—the primeval corporate takeover of India did not begin with a massive battle between soldiers, but a trade war: early EIC officials negotiated commercial agreements dealing in jewels, pepper, and textiles.[87] These agreements set the foundation for the eventual subjugation of the Indian subcontinent.

In 1634, the EIC established Madras, the first successful English fort in India with permission of the region's governor.[88] The trading post flourished, inducing the Crown and the EIC to establish a civil administration over the 40,000 inhabitants.[89] The success of Madras eventually created a snowball effect, where the Crown encouraged the EIC to acquire more land and establish additional settlements.[90] Confronted with the power of the Mughal empire, the EIC lay in wait for an opportune time to strike.[91] The Mughals' succession issues drove the empire into chaos.[92] The Persians invaded and sacked Delhi, in essence overthrowing the Mughal empire.[93] After witnessing the Persians conquer the weak Mughal Empire, London stockholders decided to swing the full economic and military power of the EIC into India.[94]

The EIC's decisive victory over the Nawab of Bengal and his French allies in the Battle of Plassey in 1757 opened the door for the EIC's official rule in India.[95] By 1800, the EIC's standing army reached 200,000 men.[96] During this time, the EIC became the *de facto* ruler over Bengal, the prosperous

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85 1 IRFAN HABIB, THE CAMBRIDGE ECONOMIC HISTORY OF INDIA 166 (Tapan Raychaudhuri & Irfan Habib, eds., 1982); Ikram Segal & Bettina Robotka, *The Aessa Plan*, 22 DEF. J. 65, 65 (2020).

86 *See* HABIB, *supra* note 85, at 166.

87 DALRYMPLE, *supra* note 82, at 20.

88 *Id.* at 21.

89 *Id.* at 22.

90 *See id.*

91 *Id.* at 20.

92 Jorge Flores, *'I Will Do As My Father Did': On Portuguese and European Views of Mughal Succession Crises*, 3 E-JOURNAL PORTUGUESE HIST. 1, 11 (2005).

93 DALRYMPLE, *supra* note 82, at 44.

94 *Id.* at 48.

95 Mohd Tahir, *Plassey: The Battle in Name, but the Revolution in Nature*, 10 AARHAT MULTIDISCIPLINARY INT'L ED. RSCH. J. 29, 30 (2021); *see also* Mark T. Berger, *From Commerce to Conquest: The Dynamics of British Mercantile Imperialism in Eighteenth Century Bengal, and the Foundation of the British Indian Empire*, 22 BULL. CONCERNED ASIAN SCHOLARS 44, 55 (1990).

96 Stewart Clegg, *The East India Company: the First Modern Multinational?*, 49 RSCH. SOCIO. ORG. 43, 52 (2017).

region of modern-day India.[97] In the early years of the rule over Bengal, the EIC placed puppet governors on the Bengal throne and extracted massive wealth, amounting to six million pounds.[98] Due to internal pressures from the British government, the EIC reluctantly invested in its shipping assets and fortified trade routes, posts, and towns.[99] The relationship between the EIC and the Crown would not improve.

3. A Turbulent Relationship between the East India Company and the Crown

While the initial relationship between the government and the EIC was intermittently symbiotic, the EIC periodically paid bribes and provided favorable loans to the monarchy to maintain its monopoly.[100] Loans to the British Treasury allowed the EIC to extend and renew its exclusive trading privileges of most goods, namely tea.[101] The EIC's charter renewals also coincided with favorable loans—its 1677 charter renewal came with a £150,000 loan to Charles II from 1676 to 1678.[102] In 1730, the fee to the Crown rose to £200,000.[103]

The Crown's level of involvement in the EIC largely depended on the internal politics and economy of Great Britain.[104] During the 1770s, Parliament began levying additional taxes on the EIC.[105] It is important to note that while the EIC and its shareholders received a vast quantity of this revenue, the Crown used the EIC to generate taxes.[106] Known as the "Home Charges," the periodic remittances sent to Great Britain amounted to £16,000,000.[107] After the acquisition of Bengal, Parliament passed the Regulating Act of 1773, requiring the EIC to pay the Crown an additional £400,000 annually.[108]

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97 Tahir, *supra* note 95, at 29, 33.

98 *Id.* at 33.

99 Dan Bogart, *Policy Uncertainty and Investment: Evidence from the East India Company* 4 (World Econ. His. Cong., Working Paper, 2016) [hereinafter Bogart Working Paper].

100 Luigi Zingales, *Towards a Political Theory of the Firm*, 31 J. ECON. PERSP. 113, 115 (2017); Bogart Working Paper, *supra* note 99, at 6.

101 Bogart Working Paper, *supra* note 99, at 6.

102 *Id.*

103 *Id.* at 7.

104 *See* Dan Bogart & Marco Del Angel, *Monarchs, Institutions, and the East Indies Trade*, NAT'L BUREAU ECON. RSCH, 1, 2 (unpublished manuscript), https://sites.socsci.uci.edu/~dbogart/eic_shipping_oct212019.pdf

105 *See* Bogart Working Paper, *supra* note 99, at 9.

106 *Id.* at 12.

107 1 ROMESH DUTT, THE ECONOMIC HISTORY OF INDIA xv (1902).

108 Bogart Working Paper, *supra* note 99, at 9.

The Crown levied taxes on commerce as well. Throughout the late eighteenth century, the British government levied duties on EIC imports and collected a portion of its monopoly profits.[109] However, the EIC did not exclusively generate revenue for the Crown from trade taxes. The British government also forced the EIC to pay shares of captured ships.[110] Moreover, taxation extended to the properties held by land-owners in India.[111] The EIC were to be the tax collectors.[112] No longer was the EIC a trade organization, but a governing body:

> Tax rolls replaced business ledgers. Arsenals replaced warehouses. C.N. Parkinson summarised how far it had strayed, by 1800, from its commercial purpose: "How was the East India Company controlled? By the government. What was its object? To collect taxes. How was its object attained? By means of a standing army. What were its employees? Soldiers, mostly; the rest, Civil Servants."[113]

Through the EIC, the United Kingdom governed India until the passage of the Government of India Act of 1858, whereby the Crown assumed administrative control over India.[114] The EIC lost its land holdings and armed forces to the United Kingdom, leading to a dramatic reduction in its power and influence.[115] The EIC's nationalization culminated in its formal dissolution by Parliament in 1874.[116]

Thus, the quasi-governing EIC became the British Raj, and the direct imperial rule of India began. From 1600 to 1874, the East India Company received privileges, namely limited liability, monopoly rights, and tax exemptions.[117] In turn, the EIC created trade routes, produced revenue, and governed over territory for the Crown.[118] The joint-stock company, the early form of the corporation, provided the legal framework for this exchange.[119]

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[109] BOGART, *supra* note 33, at 40.

[110] *Id*. at 24.

[111] DUTT, *supra* note 107, at 85.

[112] "The Company are merchants as well as sovereigns of the country. In the former capacity they engross its trade, whilst in the latter they appropriate the revenues." *Id.*

[113] *The Company that Ruled the Waves*, THE ECONOMIST (Dec. 17, 2011), https://www.economist.com/christmas-specials/2011/12/17/the-company-that-ruled-the-waves.

[114] *See* Government of India Act 1858, 21 & 22 Vict. c. 106, § 1 (Eng.).

[115] REV. ROBERT HUNTER, THE HISTORY OF INDIA, FROM THE EARLIEST AGES TO THE FALL OF THE EAST INDIA COMPANY, AND THE PROCLAMATION OF QUEEN VICTORIA IN 1858, at 275 (2016).

[116] East India Company's Stock (Redemption of Dividend) Bill 1873, 36 & 37 Vict. c. 217 (Eng.).

[117] Brunton, *supra* note 8, at 78; BOGART, *supra* note 33, at 24.

[118] Brunton, *supra* note 8, at 78-79.

[119] Schmitthoff, *supra* note 41, at 90.

B. The United States: U.S. Steel

While early American corporations in the United States performed a limited governing function by way of company towns, they primarily exploited the vast quantities of natural resources and developed the fledgling national economy to produce shareholder value.[120] The corporate form contributed to the legal framework guiding the United States through the Industrial Revolution in the 1820s and the Gilded Age in the late nineteenth century.[121] However, unlike the United Kingdom's relationship with the EIC, the American government did not endorse "big business."[122] Congress enacted anti-trust laws at the turn of the twentieth century to combat the dominance of major industrialists, such as Andrew Carnegie and John D. Rockefeller.[123]

An exchange of privileges for public service did not entirely characterize the early American corporation. Carnegie's U.S. Steel, unlike the East India Company, demonstrated the capacity for corporations to innovate and thrive in *laissez-faire* regulatory environments.[124] Through vertical and horizontal integration, Carnegie sought to maximize profit retention by reducing construction costs and absorbing competitors.[125] While the United States as a nation benefitted from U.S. Steel's resource exploitation and industrial dominance, the American government did not directly supervise U.S. Steel like the Crown's management of the EIC.[126] Rather than endorsing U.S. Steel, the American federal government actively attempted to undermine U.S. Steel's power through the passage of the Sherman Anti-Trust Act, the Clayton Act, and the Federal Trade Commission Act.[127] U.S. Steel did not receive government-sanctioned monopoly rights but actively and

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[120] *See* Les Hannah, *Corporations in the U.S. and Europe 1790-1860*, 56 BUS. HIST. 865, 878 (2014).

[121] *See* Ballard C. Campbell, *Understanding Economic Change in the Gilded Age*, 13 ORG. AM. HISTORIANS MAG. HIST. 18, 19 (1999).

[122] Paul Nolette, *Litigating the "Public Interest" in the Gilded Age: Common Law Business Regulation by Nineteenth-Century State Attorneys General*, 44 POLITY 373, 397 (2012).

[123] Maseritz, *supra* note 36, at 251-52.

[124] *Laissez-faire* regulation asserts that the market adequately corrects corporate behavior. *See* William H. Page, *Standard Oil and U.S. Steel: Predation and Collusion in the Law of Monopolization and Mergers*, 85 S. CAL. L. REV. 657, 673-74 (2012). The cost of innovation and big business' success resulted in the economic exploitation of American labor. *See* 7 HAROLD U. FAULKNER, THE DECLINE OF LAISSEZ-FAIRE 1817-1917, at 20 (1951).

[125] *See* John Steele Gordon, *Andrew Carnegie and the Creation of U.S. Steel*, BILL OF RTS. INST. (2023), https://billofrightsinstitute.org/essays/andrew-carnegie-and-the-creation-of-us-steel.

[126] Brunton, *supra* note 8, at 78.

[127] *See* Harold J. Adam, *Anti-Trust (Anti-Monopoly) Policy and Application 1920-1929*, 4 AM. ECON. 9, 10 (1960).

successfully defended against monopoly charges brought by the government under the Sherman Anti-Trust Act.[128]

The American federal government's distrust of U.S. Steel extended to state governments.[129] Eventually, the federal government collaborated with the state government to create the Multistate Tax Commission, an auditing body to ensure big businesses like U.S. Steel paid their corporate income and sales taxes.[130] Furthermore, states like Minnesota enacted tonnage and *ad valorem* taxes directed at U.S. Steel.[131] In turn, U.S. Steel did not furnish the American government with revenue or govern over vast territories like the EIC. Finally, U.S. Steel was not nationalized by the government like the EIC. In 2023, Japan's Nippon Steel agreed to acquire U.S. Steel for $14.9 billion.[132]

1. Inception and Commitment to Shareholder Returns

U.S. Steel was the largest corporation in the world at the time of incorporation in September 1898.[133] J.P. Morgan and Company executed a consolidation of the Carnegie Company, Federal Steel Company, Minnesota Iron Company, and other fabricators and transporters to create U.S. Steel.[134] In effect, U.S. Steel was a holding company owning all outstanding stock of Carnegie, Federal, Minnesota, and ten other iron and steel-related operating companies.[135] The pre-merger capitalization of the firms was estimated to be $700 million in 1911, while U.S. Steel's post-merger value amounted to $1.4 billion, or twenty-five percent of the 1901 gross national product.[136] U.S. Steel's consolidation led to tremendous returns for its subsidiaries' shareholders and debt holders. Holders of its subsidiaries, like Carnegie Steel, received almost $500 million in stock and bonds.[137] From 1901 to

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128 *See* United States v. U.S. Steel Corp., 251 U.S. 417, 457 (1920).

129 *See* W. BARTLEY HILDRETH ET AL., COOPERATION OR COMPETITION: THE MULTISTATE TAX COMMISSION AND STATE CORPORATE TAX UNIFORMITY 15 (2005).

130 *Id.*

131 ARNOLD ROBERT ALANEN, MORGAN PARK: DULUTH, U.S. STEEL, AND THE FORGING OF A COMPANY TOWN 26 (2007).

132 Jonathan P. Hicks, *U.S. Steel: New Name Ends an Era,* N.Y. TIMES*,* July 9, 1986, at D1; Shivansh Tiwary & Anirban Sen, *Japan's Nippon Steel to Acquire U.S. Steel for $14.9 Billion*, REUTERS (Dec. 18, 2023), https://www.reuters.com/markets/deals/japans-nippon-steel-plans-acquire-us-steel-7-bln-nikkei-2023-12-18/.

133 Marvin Gelhausen, *A Brief History of Pittsburgh and U.S. Steel: Reflections of our 2001 Keynote Speaker*, 43 COST ENG'G 55, 55 (2001).

134 Donald O. Parsons & Edward John Ray, *The United States Steel Consolidation: The Creation of Market Control* 18 J. L. & ECON. 181, 182 (1975).

135 *Id.*

136 *Id.* at 182-183.

137 *Id.* at 183.

1910, common stockholders of U.S. Steel enjoyed an average nine percent return in dividends and continually rising share prices.[138] During this same period, a stock index by Alfred Cowles and Associates estimated that an "investment in U.S. Steel common stocks with subsequent cash dividends reinvested would have been more profitable than a similar investment program in a composite portfolio of all stocks, industrials, railroads, utilities or steel companies other than U.S. Steel."[139] From its inception, U.S. Steel became dedicated to returning above-average dividends to its shareholders.[140]

2. Trust Organization

U.S. Steel's size provided the basis for its economic prosperity.[141] It achieved an economy of scale by acquiring other firms and attracting top managers, engineers, and innovators.[142] To do this, U.S. Steel adopted the trust, an innovative form of corporate management first conceived by John D. Rockefeller's Standard Oil.[143] While state regulation of corporate charters prevented corporations from buying stock in other companies within a state, Rockefeller created a legal entity to hold his various oil properties across states—in essence creating a loophole untouched by state regulation.[144] The trust, or holding company, would become the commanding form of corporate organization during America's rise to industrial dominance.[145]

To maintain its dominance, U.S. Steel acquired competition at the cost of profit maximization. While U.S. Steel's profits suffered throughout its history, the corporation acquired, maintained, and eliminated enterprises to enhance its industrial capacity, critical to market growth during the age of the trust.[146] The corporate form proved valuable to surviving these profit-reducing organizational tactics geared towards maintaining long-term supremacy over steel production.[147] While other leading firms attempted to create "pools" aimed at streamlining production and fixing prices, pooling arrangements proved unwieldy in the face of political and market

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[138] *Id.*

[139] *Id*.

[140] Parsons & Ray, *supra* note 134, at 183.

[141] WARREN, *supra* note 35, at 1.

[142] *Id.* at 1-2.

[143] MATT STOLLER, GOLIATH: THE 100-YEAR WAR BETWEEN MONOPOLY POWER AND DEMOCRACY 8 (2020).

[144] *Id.*

[145] *See* Elizabeth A. Laughlin, *The Rise of American Industrial and Financial Corporations*, 6 GETTYSBURG ECON. REV. 42, 43 (2012).

[146] WARREN, *supra* note 35, at 7.

[147] *Id.* at 9.

pressures.[148]

Thus, long-term corporate strategy and market tendencies lent themselves to U.S. Steel's trust organization.[149] Combination processes allowed U.S. Steel to maintain its monopoly while allowing the acquired company's shareholders to maintain equity in the company.[150] The growth of the industrial nation and the growing conglomerate of production companies allowed U.S. Steel to continue expanding and diversifying its products.[151] While most of U.S. Steel's early steel production focused on infrastructure creation, like rails and shipbuilding, construction companies used U.S. Steel's wires and plates to create multistory apartment buildings and bridges.[152] In the 1880s, rail production comprised of eighty-five percent of its output, but by 1900, this percentage fell to twenty-five percent.[153] To capture a larger market share, U.S. Steel executives not only manufactured a wide range of products but also maintained a high degree of flexibility in their manufacturing process, allowing the corporation to efficiently exploit market shifts and demands for certain products.[154] By diversifying its production, acquiring other firms, and vertically integrating, U.S. Steel's evaluation ballooned without strong competitors. Estimates approximate that its profits would have been half their value in a competitive market.[155]

This corporate strategy proved effective even in periods of economic downturn. U.S. Steel retained profits earned in periods of market growth to expand during bear markets.[156] While recessions harmed smaller competitors who could not maintain operating costs in light of decreased consumer demand, U.S. Steel used its saved profits to acquire competitors at lower prices.[157] For example, during the Great Depression of the 1930s, U.S. Steel

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[148] *Id.*

[149] Edward Sherwood Meade, *The Genesis of the U.S. Steel Corporation*, 15 Q. J. ECON. 517, 517 (1901).

[150] Notably, shareholders of U.S. Steel more than doubled between 1900 and 1928: from less than 50,000 to between 100,000 and 150,000. Julian Franks & Colin Mayer, *Evolution of Ownership and Control Around the World: The Changing Face of Capitalism*, *in* 1 THE HANDBOOK OF THE ECONOMICS OF CORPORATE GOVERNANCE 685, 709-10 (Benjamin E. Hermalin & Michael S. Weisbach eds., 2017).

[151] *The Founding of U.S. Steel and the Power of Public Opinion*, HARV. BUS. SCH. (2022), https://www.library.hbs.edu/us-steel/exhibition/the-founding-of-u.s.-steel-and-the-power-of-public-opinion.

[152] WARREN, *supra* note 35, at 9-10.

[153] *Id*. at 9.

[154] Harland Prechel, *Irrationality and Contradiction in Organizational Change: Transformation in the Corporate Form of a U.S. Steel Corporation, 1930-1987*, 32 SOCIO. Q. 423, 430 (1991).

[155] Parsons & Ray, *supra* note 134, at 214-15.

[156] Prechel, *supra* note 154, at 430.

[157] Gordon, *supra* note 125.

forwardly integrated by merging with the largest steel distribution company in the United States and acquiring a sheet metal products manufacturer.[158]

Thus, the trust organization helped U.S. Steel achieve long-term success. U.S. Steel acquired competitors and retained profits to maintain its dominance.[159] Some may argue this is evidence against U.S. Steel's commitment to shareholder primacy. However, by sacrificing short-term, immediate returns for the long-term interest of the corporation and its shareholders, U.S. Steel became a dominant corporation in American history.

3. Anti-trust Legislation: The Sherman, Clayton, and Federal Trade Commission Acts

Unlike the EIC, which operated under a government-sanctioned monopoly, the size of large holding companies like U.S. Steel and Standard Oil attracted public scrutiny and oversight from the American government.[160] At the turn of the twentieth century, the federal government enacted three statutes to combat corporate trust organization: the Sherman Anti-Trust Act of 1890, the Clayton Anti-Trust Act of 1913, and the Federal Trade Commission Act of 1914.[161] Anti-trust legislation demonstrates a marked difference between the United Kingdom and the United States: while the Crown actively sought price-fixing, restriction of competition, and trade incentives for the EIC, the United States combatted against U.S. Steel's trust organization. John Sherman, United States Senator from Ohio and namesake of the Sherman Anti-Trust Act, famously declared:

> Monopolies are inconsistent with our form of government . . . . If we will not endure a king as a political power, we should not endure a king over production, transportation, and sale of any of the necessaries of life. If we would not submit to an emperor, we should not submit to an autocrat of trade.[162]

Comparing large conglomerates to kings, Sherman succinctly proclaimed American anti-trust policy during the early twentieth century.[163]

The Sherman Anti-Trust Act passed the House of Representatives by a

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158 Prechel, *supra* note 154, at 430.

159 *Id.*

160 *See* WARREN, *supra* note 35, at 2.

161 Evertte MacIntyre, *Small Business and Antitrust Laws*, 39 U. DET. L.J. 169, 171-72 (1961); *see generally* Sherman Antitrust (Sherman) Act of 1890, 15 U.S.C. §§ 1-38; Clayton Antitrust (Clayton) Act of 1914, 15 U.S.C. §§ 12-27; Federal Trade Commission (FTC) Act, 15 U.S.C. §§ 41-58.

162 Press Release, Eric Holder, Att'y Gen., Off. of the Att'y Gen., Attorney General Eric Holder Speaks at the Sherman Act Award Ceremony (Apr. 20, 2010), https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-sherman-act-award-ceremony.

163 *Id.*

unanimous vote and passed the Senate by a vote of fifty-one to one.[164] Enacted in 1890, the Sherman Act was the first federal statute outlawing monopolistic business practices.[165] It constituted part of a larger policy decision by the federal government to expand corporate regulation from state control and close the loophole Rockefeller exploited by creating the trust form of business organization.[166] The Sherman Act, left intentionally vague, marked a turn in federal economic policy: while most American citizens and politicians believed that the free market and state regulation would sufficiently control private enterprises, corporate trust organizations proved untenable with free market competition.[167] The government's limited interference in the market became secondary to desirable economic policy.[168] The Sherman Act declared any combination "in the form of a trust or otherwise . . . in restraint of trade or commerce among the several States, or with foreign nations" unlawful.[169] Under the Sherman Act, the federal government could institute proceedings against trusts. However, the Supreme Court dismantled the Sherman Act in 1895 in *United States v. E.C. Knight Company* by determining that the Sugar Refining Company, which controlled ninety-eight percent of the country's sugar refining, was not a trust.[170]

Congress responded to the Court's unwillingness to find anti-trust violations following the government's defeat in *E.C. Knight* by passing the Clayton Anti-Trust Act ("Clayton Act") and the Federal Trade Commission Act in 1914.[171] The Clayton Act specified what constituted "illegal business practices" outlawed by the Sherman Act.[172] The Clayton Act defined and prohibited actions like price fixing and exclusive dealing arrangements, created new compliance mechanisms, and allowed the issuance of injunctions against trusts.[173] Section seven, the anti-merger provision of the Clayton Act, prohibited any corporation from acquiring stock, but not assets, of other corporations.[174] This flaw in the Clayton Act was known as the "purchase-

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[164] *Sherman Anti-Trust Act (1890)*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/sherman-anti-trust-act (last visited May 12, 2024).

[165] *Id.*

[166] *See id.*

[167] WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 8 (1965).

[168] *Id.* at 10.

[169] 15 U.S.C. § 1 (West).

[170] Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 8 (2003).

[171] *Id.* at 74; William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSPS. 43, 46 (2000).

[172] *See* Roger D. Blair & James M. Fesmire, *Antitrust Treatment of Hospital Mergers*, 2 U. FLA. J.L. & PUB. POL'Y 25, 33 (1988-1989).

[173] W.H.S. Stevens, *The Clayton Act*, 5 AM. ECON. REV. 38, 39 n.2 (1915).

[174] *See* Gilbert H. Montague, *The Celler Anti-Merger Act: An Administrative Problem in*

of-assets loophole" and proved ineffective at stopping corporate consolidation.[175]

Congress then passed the Federal Trade Commission Act to supplement the Clayton and Sherman Anti-Trust Acts.[176] This Act created the Federal Trade Commission (FTC) and endowed it with the power to proscribe "unlawful methods," or business practices, beyond conduct prohibited by the Sherman and Clayton Acts.[177] The creation of the agency introduced an administrative mechanism capable of responding to innovative legal forms, like the trust, that sought to evade enforcement with anti-trust statutes.[178]

However, the Sherman Anti-Trust Act remained the government's central tool in combating trusts, including U.S. Steel.[179] The government charged U.S. Steel and its subsidiaries in violation of the Sherman Anti-Trust Act by unlawfully attempting to monopolize the steel industry in restraint of trade.[180] In a watershed opinion, the Supreme Court dismissed all charges against U.S. Steel and rejected the Government's proposed dissolution of the company.[181] The Court grounded its holding in the absence of predatory practices by U.S. Steel.[182] Justice McKenna delivered the opinion of the Court: "It did not secure freight rebates; it did not increase its profits by reducing the wages of its [employees]—whatever it did was not at the expense of labor. . . ."[183] Indeed, the Court determined that U.S. Steel's consolidations were necessary to achieve the benefits of an economy of scale.[184]

The unsuccessful application of the Sherman Anti-Trust Act against U.S. Steel signaled a return to limited government interference in mergers and acquisitions throughout the twentieth century.[185] While the "trust-busting"

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an Economic Crisis, 37 AM. BAR ASS'N J. 253, 253 (1951) (citing Clayton Act, ch. 323, § 7, 38 Stat. 730, 731-32 (1914), *amended by* 64 Stat. 1125 (1950)).

175 Richard C. Clark, *Conglomerate Mergers and Section 7 of the Clayton Act*, 36 NOTRE DAME L. REV. 255, 257 (1961).

176 *See* Herbert Hovenkamp, *The Federal Trade Commission and the Sherman Act*, 62 FLA. L. REV. 871, 871-72 (2010).

177 William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 929 (2010).

178 *Id.* at 931.

179 *See* LETWIN, *supra* note 167, at 3-4.

180 Maseritz, *supra* note 36, at 247.

181 *Id.*

182 United States v. U.S. Steel Corp., 251 U.S. 417, 441 (1920).

183 *Id.*

184 Maseritz, *supra* note 36, at 247. Economies of scale allow a firm to lower costs when producing a large number of goods. Production costs are inversely correlated to industrial size. *See* John McGee, *Economies of Scale*, *in* WILEY ENCYCLOPEDIA OF MANAGEMENT 1, 1 (3d ed. 2015).

185 Marc Winerman, *Antitrust and the Crisis of '07*, 1 J. TERRITORIAL SURV. DIRECTORATE 80, 81 (2009).

movement under President William Howard Taft had some success by breaking up Standard Oil in 1911, it ultimately failed against U.S. Steel and lost momentum by the World War I.[186] Big business was here to stay.

4. Resource Exploitation and American Dominance

The corporation proved to be the crucial legal form of business organization to develop the United States' economy from a primarily agrarian to an industrial powerhouse in the nineteenth century.[187] U.S. Steel proved critical in the United States' development as a global superpower in the twentieth century:

> Arguably, America's emergence as an economic superpower was marked by the organization of United States Steel in 1901. This event projected America to the world as the premier manufacturing nation. But there was another aspect to America's development that made the manufacturing base possible: its extractive industry, including coal and metal ore mining, petroleum, and timber.[188]

By the early twentieth century, the United States emerged as the world's largest producer of iron and steel.[189] To control the market, U.S. Steel created barriers to entry in the steel industry by acquiring high quality ore supplies.[190] The corporation located much of these ore deposits in Minnesota.[191] Minnesota ore output increased from 864,508 tons in 1889 to 15,137,650 tons in 1902, almost half of total U.S. ore production.[192] Technological advancements following the creation of the Bessemer refining process greatly expanded the amount of usable ore with no appreciable increase in cost.[193] By 1907, U.S. Steel's acquisition of ore deposits tripled its initial holdings.[194]

The economic recovery following the Great Depression in the late 1930s proved critical to U.S. Steel's contribution to the rise of American

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[186] Carl T. Bogus, *The New Road to Serfdom: The Curse of Bigness and the Failure of Antitrust*, 49 U. MICH. J.L. REFORM 1, 61 (2015).

[187] *See* MASON, *supra* note 37, at 2.

[188] Richard P. Mulcahy, *Mining and Extraction*, GALE 1 (2008), https://www.gale.com/binaries/content/assets/gale-us-en/primary-sources/newsvault/gps_newsvault_19thcentury_usnewspapers_mining_essay.pdf.

[189] JAMES CECIL CARR & WALTER TAPLIN, HISTORY OF THE BRITISH STEEL INDUSTRY 169 (1962).

[190] SEAN DENNIS CASHMAN, AMERICA IN THE GILDED AGE 45 (3d ed. 1993); THOMAS J. MISA, A NATION OF STEEL: THE MAKING OF MODERN AMERICA, 1865-1925, at 153 (1998).

[191] Parsons & Ray, *supra* note 134, at 196.

[192] *Id.*

[193] Ramesh Rudrapati et al., *A Review on Steel Production and Development of Steelmaking Technologies*, 4 INT'L J. MECH. DYNAMICS & ANALYSIS 13, 15 (2018).

[194] Parsons & Ray, *supra* note 134, at 199.

dominance.[195] U.S. Steel's executives implemented tactics to take advantage of the profit-generating potential and the increased wartime demand for steel.[196] The corporation acquired further iron ore and coal deposits to maximize the ownership of raw material subsidiaries.[197] Acquiring raw material manufacturers kept iron ore and coal prices down in periods of high demand while maintaining the capacity to sustain elevated utilization levels.[198]

By the end of World War II, America emerged as a world superpower, partly due to its industrial capacity and ability to extract the nation's vast quantities of natural resources.[199] The United States, led by U.S. Steel, produced nearly three quarters of the world's steel.[200] However, the United States' dominance in steel production would not last: by the late 1950s, U.S. Steel fell victim to a "rising tide" of cheaper imports in the late 1950s.[201] Indeed, the United States became a net importer of steel in 1959.[202] Other areas of the world assumed the increased demand for steel. Europe tripled its steel production between 1950 and 1970 and Japan also emerged a major producer.[203]

Since the 1970s, American government enacted a flurry of regulations and tariffs on imports to protect domestic steel production.[204] However, U.S. Steel continued to suffer a decrease in profit margins through the recession of the early 1980s.[205] Increased competition from subsidized imports and a decline in worldwide steel demand resulted in tremendous losses for U.S. Steel and several other domestic steel producers. Seven major steel producers accounted losses of $3.2 billion in 1982 and $9.5 billion from 1983 to 1986.[206] U.S. Steel has continued to decline to present day. The 1990s

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195 *See* Prechel, *supra* note 154, at 431-32.

196 *Id.* at 431.

197 *Id.*

198 *Id.*

199 Joseph S. Nye, Jr., *The Changing Nature of World Power,* 105 POL. SCI. Q. 177, 179-80 (1990).

200 Stephen Mihm, *How the U.S. Squandered its Steel Superiority*, BLOOMBERG (Mar. 5, 2018), https://www.bloomberg.com/opinion/articles/2018-03-05/steel-history-shows-how-america-lost-ground-to-europe.

201 Hicks, *supra* note 132.

202 David G. Tarr, *The Steel Crisis in the Unites States and the European Community: Causes and Adjustments*, *in* ISSUES IN US-EC TRADE RELATIONS 173, 175 (Robert E. Baldwin et al. eds., 1988).

203 *Id.*

204 CHRISTOPHER D. WATSON, CONG. RSCH. SERV., R47107, DOMESTIC STEEL MANUFACTURING: OVERVIEW AND PROSPECTS 6 (2022).

205 Prechel, *supra* note 154, at 437.

206 Harry DeAngelo & Linda DeAngelo, *Union Negotiations and Corporate Policy: A Study of Labor Concessions in the Domestic Steel Industry During the 1980s*, 30 J. FIN. ECON.

solidified the decline of the corporation's dominance in the global steel industry. A recent Congressional Research Service report revealed that employment in domestic steel manufacturing declined by forty-nine percent from 1990 to 2021.[207] After changing its name to USX Corporation in 2001, Japan's Nippon Steel acquired U.S. Steel for $14.9 billion in 2023.[208]

III. LEGAL FRAMEWORK AND ANALYSIS: CONTRACTUAL AND ENTITY THEORIES OF CORPORATE ORGANIZATION

Now that the historical background of the corporate form in the United Kingdom and the United States has been presented, Part III of this note places the two case study corporations, the EIC and U.S. Steel, within a legal framework of corporate organization. The contractual and entity theories of corporate governance demonstrate remarkably contrary views of the role, purpose, and management of the corporation. The contractual theory explains that the corporation is simply a "nexus of contracts" through which a web of contracts governs relationships among stakeholders.[209] Alternatively, the entity theory asserts the corporation constitutes more than the sum of contracts among its members, but a state-created entity with interests distinct from those of its shareholders.[210] Thus, the corporation under the contractual theory primarily serves its constituents, i.e. managers, directors, and shareholders, while the corporation under the entity theory provides for other initiatives, like ESG and CSR, which serves stakeholders. By evaluating U.S. Steel under the contractual theory and the EIC under the entity theory, the historical background of these two corporations may provide support for the proposition that corporations in the United States operate under the contractual theory of corporation organization while entity theory characterizes British company law.

A. The United States: The Contractual Theory and U.S. Steel

1. The Contractual Theory and Shareholder Wealth

The contractual, or market, theory of corporate law provides the typical Anglo-American perspective of corporate governance.[211] It underscores that private contracts and market forces act as "primary restrictions on managerial

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3, 4 (1991).

[207] *See* WATSON, *supra* note 204, at 1.

[208] Gayle Marco et al., *Sustainable Case Study: United States Steel Corporation*, 8 J. BUS. CASE STUD. 543, 543 (2012); *see* Tiwary & Sen, *supra* note 132.

[209] *See* Koustsias, *supra* note 26, at 136-37.

[210] Phillips, *supra* note 28, at 1062; Buckley, *supra* note 30, at 46.

[211] Martin Lipton & Steven A. Rosenblum, *A New System of Corporate Governance: The Quintessential Election of Directors*, 58 U. CHI. L. REV. 187, 188 (1991).

discretion and thus on agency costs that reduce shareholder welfare."[212] The web of contracts among stakeholders in the corporation comprise of standard legal contracts, but also constitute informal, implicit contracts enforced by market forces like repeat dealings and reputation.[213] While the legal structure provides an incentive for acting in stakeholder interest, the market drives the corporation to one, core objective: producing shareholder wealth.[214] Market forces like hostile takeovers and proxy battles force the board of directors and management to create shareholder value.[215] If not, shareholders influenced by poor market results may remove directors and managers.[216]

The contractual theory declares that shareholders act predominantly as investors in the corporation.[217] Because shareholders are the residual risk-bearers of the corporation and are subject to the capital lock-in effect, shareholders pay to have their "pecuniary interests as the objective of the firm."[218] Contractual scholars argue that a corporation must increase wealth for shareholders to maximize its efficiency.[219] Because contractual theorists

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212 Managers, entrusted by shareholders and the board of directors to run the corporation, "should act as agents of the firm, but they have some incentive to maximize their own utility at the expense of firm profits (and thus the welfare of the firm's owners)." Henry N. Butler & Fred S. McChesney, *Why They Give at the Office: Shareholder Welfare and Corporate Philanthropy in the Contractual Theory of the Corporation*, 84 CORNELL L. REV. 1195, 1199 (1999).

213 *Id.* Corporations engage in repeat dealing by working with the same suppliers or producers, to increase trust and lower transaction costs over time. *See* Martin Ricketts, *Trust and Economic Organisation*, 21 ECON. AFFS. 18, 20 (2001).

214 Daniel J. H. Greenwood, *Fictional Shareholders: For Whom are Corporate Managers Trustees, Revisited*, 69 S. CAL. L. REV. 1021, 1095 (1996).

215 Butler & McChesney, *supra* note 212, at 1200. Hostile takeovers and proxy battles, where others attempt to gain ownership of a corporation, may occur when the firm's board of directors and management fail to produce shareholder value. *See* Anil Shivdasani, *Board Composition, Ownership Structure, and Hostile Takeovers*, 16 J. ACCT. & ECON. 167, 169 (1993).

216 Jay B. Kesten, *Managerial Entrenchment and Shareholder Wealth Revisited: Theory and Evidence from a Recessionary Financial Market*, 2010 BYU L. REV. 1609, 1621 n.37 (2010).

217 *See* Jennifer Hill, *Visions and Revisions of the Shareholder*, 48 AM. J. COMPAR. L. 39, 57 (2000); *see also* Alexander Styhre, *Trust Versus Contracts in Corporate Governance: Agency Theory, Contractual Theory and the Fortification of Shareholder Welfare Governance*, 11 MGMT. & ORGANIZATIONAL HIST. 276, 285 (2016) [hereinafter Styhre 2016].

218 In the event of bankruptcy, shareholders lose capital invested in the firm. By investing in the corporation, shareholders "pay to have their pecuniary interests as the objective of the firm." In this sense, shareholders are the residual risk-bearers. Rodrigo Lozano et al., *A Review of 'Theories of the Firm' and Their Contributions to Corporate Sustainability*, 106 J. CLEANER PROD. 430, 435 (2015).

219 *See* Alexander Styhre, *What We Talk About When We Talk About Fiduciary Duties: The Changing Role of a Legal Theory Concept in Corporate Governance Studies*, 13 MGMT. & ORGANIZATIONAL HIST. 113, 121 (2018).

argue that corporate law developed as a legal device to ensure risk-taking through capital lock-in and limited liability, non-shareholder interests detract from corporate efficiency.[220] However, the contractual theory asserts that by serving shareholders, the corporation indirectly benefits other stakeholders and the economy by achieving market efficiency:

> The duty of management is to operate efficiently and thus maximize the return to shareholders. Maximization of shareholders' wealth ultimately works to the advantage of workers and suppliers, because shareholders gain only from the firm's mutually beneficial transactions with those persons.[221]

At the same time, these ancillary ambitions must not compromise the prime objective of maximizing shareholder wealth.[222]

Contractual theorists argue that amendments to a corporation's bylaws and corporate charter are preferable to government regulation.[223] The creation of private contracts in the form of amendments allows the firm's stakeholders–managers, directors, and shareholders–to manage the corporation more efficiently than government regulation:

> If "Darwinian" forces eventually work against inefficient governance structures, sweeping government reforms . . . are not needed. Unless one is absolutely intolerant of short-run deviations from the "ideal," such reforms would not be worth the costs they would no doubt involve. More important, because various forces constrain managers from changing the basic governance structure of the corporation, the best presumption is that governance innovations reduce agency costs.[224]

Thus, contractual theorists assert that government regulation in a corporate governance structure forces stakeholders to alter their contractual relations.[225] If not, the corporation and shareholders will suffer losses in value. Because the internal and external market drives the corporation's decision-making process, government intervention upholds failed corporate governance structures, resulting in inefficiencies and losses across the wider economy.[226]

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220 *See id.* at 121-22.

221 Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1191 (1981).

222 Styhre 2016, *supra* note 217, at 285.

223 Henry N. Butler, *Corporation-Specific Anti-Takeover Statutes and the Market for Corporate Charters*, 1988 WIS. L. REV. 365, 371 (1988).

224 Barry D. Baysinger & Henry N. Butler, *Antitakeover Amendments, Managerial Entrenchment, and the Contractual Theory of the Corporation*, 71 VA. L. REV. 1257, 1282 (1985).

225 *Id.*

226 *See id.*

2. The Contractual Theory Applied: The United States and U.S. Steel

As set forth in Part I, U.S. Steel was the largest business in the world at the time of its incorporation in 1898.[227] Along with Standard Oil, U.S. Steel represents one of earliest American forms of major holding companies commonplace today.[228] This analysis evaluates U.S. Steel under the contractual theory of corporate governance to demonstrate history's role in the contemporary governance debate in American corporate law.

Over its history, U.S. Steel engaged in corporate governance strategies to maximize shareholder returns in the long-term.[229] First, U.S. Steel adopted the trust form of corporate organization. By following Rockefeller's Standard Oil, U.S. Steel became a holding company to acquire, eliminate, and develop enterprises to maintain its dominance over global steel production.[230] While some critics argue that U.S. Steel's profits suffered and dividends decreased in the short term, mergers maintained U.S. Steel's capacity to return high dividends over the long term.[231] Consolidation processes allowed U.S. Steel to preserve its monopoly while expanding into other forms of steel production.[232] Even though U.S. Steel initially produced rails and sheets, its expansion into other products enabled the corporation to exploit market shifts in demand and balloon its value.[233] Thus, U.S. Steel is an example of a corporation forming a conglomerate to survive broad periods of economic downturn like the Great Depression and crisis during the 1980s.[234]

In turn, U.S. Steel provided its shareholders with above-average dividends throughout the twentieth century, even during recessions.[235] While the corporation retained earnings to build and acquire assets, dividends and disclosures reassured investors.[236] In fact, U.S. Steel's consolidated income statements provided more detailed disclosures than its British

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[227] Gelhausen, *supra* note 133, at 55.

[228] *See* Parsons & Ray, *supra* note 134, at 182.

[229] *See id.*

[230] *Id.* at 181.

[231] *See id.* at 183.

[232] Consolidation involves the acquisition of other industry firms to streamline and expand production. *Id.* at 182.

[233] *Id.*

[234] *See* John Kenneth Galbraith & Richard D. Bartel, *The Anatomy of Power*, 26 CHALLENGE 26, 31 (1983).

[235] WARREN, *supra* note 35, at xvii, 123; *see also* Thomas K. McCraw & Forest Reinhardt, *Losing to Win: U.S. Steel's Pricing, Investment Decisions, and Market Share, 1901-1938*, 49 J. ECON. HIST. 593, 617 (1989); ARUNDEL COTTER, THE AUTHENTIC HISTORY OF THE UNITED STATES STEEL CORPORATION 204 (1916).

[236] Janette Rutterford, *From Dividend Yield to Discounted Cash Flow: A History of UK and US Equity Valuation Techniques*, 14 ACCT. BUS. & FIN. HIST. 115, 126 (2004).

counterparts.[237] British companies gave limited financial data, mostly about dividends and asset backing.[238] Alternatively, American corporations' disclosures informing shareholders of the corporation's revenues, expenses, and taxation created a more accurate picture of asset backing and potential profitability.[239] Some scholars credit this development to the consolidation of company accounts and trust organization which were not as prominent in British corporate organization at the beginning of the early twentieth century.[240]

U.S. Steel's commitment to long-term success created a multitude of benefits for the American economy.[241] Under the contractual theory, the shareholders, as investors, are the central beneficiaries from the corporation's success.[242] However, contractual scholars argue that other stakeholders in the economy may benefit by the corporation's efforts to maximize efficiency.[243] Consumers benefit from cheaper goods and services. The corporation's suppliers not only help the business achieve its production goals, but also receive a steady source of income and decreased transaction costs through long-standing business relationships.[244]

While U.S. Steel primarily served its shareholders, other stakeholders in the American economy benefitted from its success. Since the 1870s, U.S. Steel's manufacturing efficiency and corporate organization guided the United States' economic transformation:

> The corporate form does not now seem so unique and remarkable, so that its benefits might seem trivial. But it is worth exploring what it was that made the corporate form so attractive to business organizers as the US economy moved from an agrarian, small-scale production economy to a large and modern industrial economy.[245]

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237 *Id.* Consolidated income statements show assets, liabilities, income, expenses, and cash flows of a parent company and its subsidiaries. *See* Earl A. Spiller, Jr., *Teaching Consolidated Income Statements—A New Approach*, 37 ACCT. REV. 336, 337 (1962).

238 Rutterford, *supra* note 236, at 126.

239 *See id.*

240 *Id.*; *see also* Brian R. Cheffins, *Dividends as a Substitute for Corporate Law: The Separation of Ownership and Control in the United Kingdom*, 63 WASH. & LEE L. REV. 1273, 1285 (2006).

241 Chris Isidore, *US Steel, Once a Symbol of America's Economic Might, is Now For Sale in the Bargain Bin*, CNN (Aug. 19, 2023), https://www.cnn.com/2023/08/19/business/us-steel-steelmaking-history/index.html.

242 Styhre 2016, *supra* note 217, at 283-84.

243 Johannes Jahn & Rolf Brühl, *How Friedman's View on Individual Freedom Relates to Stakeholder Theory and Social Contract Theory*, 153 J. BUS. ETHICS 41, 45 (2018).

244 *See* Jonathan B. Baker, *Identifying Cartel Policing Under Uncertainty: The U.S. Steel Industry, 1933-1939*, 32 J.L. & ECON. S47, S57 (1989).

245 Styhre 2016, *supra* note 217, at 280 (quoting Margaret M. Blair, *Locking in Capital:*

U.S. Steel and other large holding companies marked a shift in corporate ownership.[246] U.S. Steel, a publicly traded corporation, gradually transformed the organization of ownership to allow more to benefit from the corporation's success.[247] Rather than a few individuals owning U.S. Steel, namely Andrew Carnegie through Carnegie Steel, shares were now available to the public.[248] Others could now directly benefit as shareholders of U.S. Steel. Through capital lock-in, institutions like U.S. Steel attracted large investments with limited liability to its investors, allowing them to undertake costly ventures like railroad and bridge construction.[249] U.S. Steel's corporate institutional structure empowered the creation of transport, financial, and communication industries traditionally reserved for government.[250] Thus, the economy-at-large benefitted from the efficiency of U.S. Steel and other large manufacturing corporations.

This practice aligns with the contractual theory of corporate organization. The contractual theory argues that contracts between private individuals, without government interference, best serve business interests.[251] Government oversight is unnecessary because market incentives ensure management's decisions best serve shareholders.[252] Rather than exercising an oversight function, government aids society by rigorously enforcing contracts and guarding against concentration of power through anti-trust legislation.[253]

The United States passed several anti-trust statutes at the turn of the twentieth century, namely the Sherman Anti-Trust Act, the Clayton Act, and the Federal Trade Commission Act. While neither the statutes nor legislative history mentioned U.S. Steel by name, they were directed against large conglomerates like U.S. Steel and Standard Oil. Throughout the following fifty years, U.S. Steel repeatedly combatted government intrusions into its business, especially in times of war.[254] Initially, the corporation did not resist

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What Corporate Law Achieved for Business Organizations in the Nineteenth Century, 51 UCLA L. REV. 387, 397 (2003)).

246 WILLIAM G. ROY, SOCIALIZING CAPITAL: THE RISE OF THE LARGE INDUSTRIAL CORPORATION IN AMERICA 3 (1997).

247 *See id.*

248 *See id*.

249 *See* Christian C. Day, *Dispersed Capital and Moral Authority: The Paradox of Success in the Unregulated 19th Century New York Capital Markets*, 12 LAW & BUS. REV. AM. 303, 306 (2006).

250 ROY, *supra* note 246, at 3.

251 David Antony Detomasi, *The Political Roots of Corporate Social Responsibility*, 82 J. BUS. ETHICS 807, 812 (2008).

252 *Id.*

253 *Id.*

254 Phillip E. Stebbins, *Truman and the Seizure of Steel: A Failure in Communication*, 34 HISTORIAN 1, 2-3 (1971).

and acquiesced to investigations by the U.S. Department of Commerce and Labor.[255] However, resentment of big business grew among government representatives and the public following lawsuits against Standard Oil and American Tobacco.[256] Ambitious politicians seized the public sentiment and "hit the trusts" became a slogan for political advancement.[257] This growing momentum culminated in a proposed resolution calling for an investigation of U.S. Steel proposed to the House of Representatives on May 4, 1911.[258] News outlets provided widespread publicity of the investigative committee's hearings.[259] The report released by the committee condemned U.S. Steel's operations and called for its dissolution: criticisms derived from U.S. Steel's overcapitalization and its unpopular labor practices.[260] As discussed in Part I, the prosecution of U.S. Steel under the Sherman Anti-Trust Act ultimately failed, and the corporation would continue to operate.

B. The United Kingdom: The Entity Theory and the East India Company

1. The Entity Theory and Stakeholderism

Entity theory gradually evolved from the communal and anti-individualistic Germanic corporate law, which became popular across Europe in the national mid-1900s.[261] To the Germans, a corporation's legal personality did not truly exist, but was a gift from the state.[262] German lawyers understood that the contractual theory, which delegitimized state and federal regulation, legitimized big business and could not harmonize the theory with the notions of limited liability and separation of ownership, the core features of entity theory.[263]

Justice John Marshall provided support for entity theory in *Trustees of Dartmouth College v. Woodward*, where he famously stated: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law."[264] His proposition restates the concepts of limited liability and

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[255] COTTER, *supra* note 235, at 189.

[256] *Id.* at 191.

[257] *Id.*

[258] *Id.* at 191-92.

[259] *Id.*

[260] *Id.* at 192-93.

[261] Ron Harris, *The Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Political Pluralism and American Big Business*, 63 WASH. & LEE L. REV. 1421, 1429-30 (2006).

[262] *See id.* at 1429 (citing Mark H. Hager, *Bodies Politic: The Progressive History of Organizational "Real Entity" Theory*, 50 U. PITT. L. REV. 575, 583-85 (1989)).

[263] *See id.* at 1423-24, 1470; *see also* Nicholas H. D. Foster, *Company Law Theory in Comparative Perspective: England and France*, 48 AM. J. COMPAR. L. 573, 584 (2000).

[264] Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 636 (1819).

separation of ownership.[265] The corporate person is endowed with the privileges of limited liability and independent ownership, in service of government:

> The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and in most cases, the sole consideration of the grant. In most [ ] institutions, the object would be difficult, perhaps unattainable, without the aid of a charter of incorporation.[266]

Again, the language of a "barter" or "exchange" between government and the corporation appears integral to the theoretical justification of the corporate personality.

Entity theory, closely related to stakeholderism, extends the role of the corporation beyond maximizing shareholder wealth.[267] Entity theorists argue an alternative notion of corporate efficiency than contractual theorists.[268] Indeed, corporate efficiency prioritizes not only high dividends or long-term growth, but also emphasizes efficiency in a social context by serving corporate stakeholders in tandem with shareholders.[269] Stakeholders may be employees, creditors, suppliers, customers, and communities with which the corporation has long-term relationships.[270] By involving stakeholders through constituency statutes or board representation, the corporation may foster inter-firm cooperation and employee participation, leading to more successful national performance and international competition.[271]

In stakeholderism, the corporation is a social entity with ownership dispersed and fragmented. Here, shareholders are more like investors than owners.[272] Because the corporation involves itself in numerous aspects of the public's life, like providing services and goods to consumers, the corporation should be conscious of its impact on society.[273] Entity theorists therefore argue the corporation has social obligations, like fairness, social justice, and protection of employees.[274]

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[265] *See id.*

[266] *Id.* at 637.

[267] Steve Letza et al., *Shareholding Versus Stakeholding: A Critical Review of Corporate Governance*, 12 CORP. GOVERNANCE 242, 244 (2004).

[268] *Id.*

[269] *Id.*

[270] *Id.* at 245.

[271] *Id.* Constituency "statutes explicitly permit directors to consider the effects of their decisions on a variety of nonshareholder[, or stakeholder,] interests." Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 971, 973 (1992).

[272] Letza et al., *supra* note 267, at 250.

[273] *Id.*

[274] *Id.*

Under the entity theory, the corporation represents more than a mere contractual arrangement among its stakeholders, but implies a certain moral obligation to the community.[275] Critically, the fact that the state remains the grantor of corporate charters in the twenty-first century suggests that the corporation is not only a self-interested economic entity, but a social entity providing public services and community needs.[276] By granting charters to corporations, the state provides a "subsidy" in the form of limited liability, expunging shareholders from personal debts of the business.[277]

Some entity theorists argue that stakeholderism best serves the corporation by increasing efficiency in two ways. First, the corporation reduces transactional costs by accounting for stakeholder interests, fostering trust among its stakeholders, and building longstanding business relationships among its suppliers, consumers, and employees.[278] By ethically collaborating with its stakeholders, the corporation supports "profitable investments and mutually beneficial exchanges."[279] Second, when society and government view the corporation as an enduring social institution with a public interest, the corporation contributes to greater international success of the country as a whole.[280]

Thus, incorporating stakeholder interests leads to increased business success and ensures corporate survival.[281] Because the corporation is a separate legal person, entity theory invites government regulation to ensure the corporation's ethical conduct towards its stakeholders, specifically through compliance mechanisms:[282]

> Most importantly, the [entity] theory support[s] treating the corporation as a person for purposes of criminal law. A great leap is not required to go from prosecuting corporations as though they were real people to

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[275] Corporations "enter into our identity, our understanding of the specific person we are. . . [and] they cannot be reduced to contractual alliances for the temporary pursuit of gain." *Id.* (quoting RICHARD C. WARREN, CORPORATE GOVERNANCE AND ACCOUNTABILITY 130 (2000)).

[276] *Id.*

[277] Stefan J. Padfield, *Corporate Social Responsibility & Concession Theory*, 6 WM. & MARY BUS. L. REV.1, 23 (2015).

[278] Letza et al., *supra* note 267, at 245; *see* Robert Watson & Mahmoud Ezzamel, *Financial Structure and Corporate Governance*, *in* CORPORATE GOVERNANCE: ACCOUNTABILITY, ENTERPRISE AND INTERNATIONAL COMPARISONS 45, 46 (Kevin Keasey et al. eds., 2005).

[279] Stephen Letza et al., *Corporate Governance Theorising: Limits, Critics and Alternatives*, 50 INT'L J.L. & MGMT. 17, 20 (2008).

[280] Letza et al., *supra* note 267, at 245.

[281] See Watson & Ezzamel, *supra* note 278, at 56.

[282] Tiger Lin, *Justifying the Regulation of Corporate Behaviour: A Functional Approach*, 7 BURGMANN J. 13, 16 (2019) (citing Dodd, *supra* note 24, at 1148).

seeking to "rehabilitate" them through compliance.[283]

Under the artificial entity theory, in which the corporation acts as a bridge between the state and the public, the corporation promotes the state's social goals under a compliance regime.[284] Revisiting the pronouncement in *Trustees of Dartmouth College*: "The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and in most cases, the sole consideration of the grant."[285] Thus, entity theory understands the corporation as a legal vehicle through which shareholders receive limited liability while inviting government regulation through compliance.

2. The Entity Theory Applied: The United Kingdom and the East India Company

The EIC embodied an unconventional form of stakeholderism throughout its long history. As described in Part I, the EIC performed multiple functions for the Crown by providing public services in exchange for privileges—namely government-sanctioned tax exemptions, monopoly rights, and limited liability. I evaluate the EIC under the entity theory of corporate governance to suggest that the history of company law in the United Kingdom possibly allows a deviation from shareholder primacy into stakeholderism.

The EIC's history and operations fall neatly within the entity theory of corporate governance. The core feature of entity theory is the creation of an artificial entity separate from its shareholders who enjoy limited liability.[286] The creation of limited liability, where shareholders do not share in a business' debts, supports the legal proposition that a business' debts do not result in personal liability from its investors.[287] Unlike the contractual theory, which bases limited liability on contracts among directors, managers, and shareholders, the government endows the corporation with the privilege of

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283 Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV 2075, 2133 (2016) (citing Miriam H. Baer*, Organizational Liability and the Tension Between Corporate and Criminal Law*, 19 J.L. & POL'Y 1, 10 (2010)).

284 Mark Boadu, *Literature Review on Corporate Governance Models*, 2 INT'L J. ICT & MGMT. 134, 136 (2014). A compliance regime is the "instrument or instruments that governments use to secure compliance." Common examples include statutes and rules from regulatory bodies. *See* R. Kent Weaver, *Compliance Regimes and Barriers to Behavioral Change*, 27 GOVERNANCE 243, 252 (2014).

285 Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 637 (1819).

286 *See* Harris, *supra* note 261, at 1424.

287 Ahmad Alsharqawi & Abed Alkarim Alsharqawi, *Separation of Ownership and Control in Corporate Governance*, 84 J.L. POL'Y & GLOBALIZATION 65, 66 (2019).

limited liability under the entity theory.[288] In other words, limited liability is not a private invention, but a public conferral of power.

The EIC and the Crown exchanged services for privileges. The Crown allowed a pool of investors to create the EIC in the form of a joint-stock company.[289] These investors did not share the debts of the EIC. The EIC, "one Body Corporate and Politik," used limited liability to fund risky ventures like expanding trade routes, establishing trading posts, and maintaining its monopoly.[290] Further, the EIC required large, fixed investments to fund voyages, pay its soldiers, and create trade settlements.[291] By moving from a corporate governance model governed by insurance contracts to limited liability, the EIC streamlined the accessibility to capital markets by allowing "continuous unlimited investment [to] tak[e] place without reference to individual voyages."[292] By transitioning shareholder investments from funding individual voyages to financing the EIC itself, the EIC could consistently accumulate capital to finance and expand its operations.[293] Thus, limited liability and separation of ownership under the entity theory characterized the EIC's corporate governance model.

Unlike the contractual theory, the entity theory does not view government intervention as an intrusion into private agreements among the constituents of the corporation.[294] Because the state remains the grantor of corporate charters, entity theory perceives government involvement in private affairs as part of a larger exchange between the state and the corporation.[295] The corporation's obligation to act as a bridge between the state and the public represents the "sole consideration of the grant."[296] In the present day, the corporation must comply with state of incorporation's laws, federal statutes, and sustainability goals.

Here, Queen Elizabeth I granted a charter to the East India Company in 1600.[297] The Crown granted the EIC corporate powers such as limited

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[288] David Ciepley, *Neither Persons Nor Associations: Against Constitutional Rights for Corporations*, 1 J.L. & CTS. 221, 221 (2013); Robert Hessen, *A New Concept of Corporations: A Contractual and Private Property Model*, 30 HASTINGS L. J. 1327, 1331 (1979).

[289] Philip J. Stern, *The East India Company and the Modern Corporation: Legacies, Lessons, and Limitations*, 39 SEATTLE U. L. REV. 423, 429 (2016) (citing Schmitthoff, *supra* note 41, at 88-96).

[290] East India Company Charter, *supra* note 50, at 2.

[291] *See* CHAUDHURI, *supra* note 57, at 61.

[292] ROBINS, *supra* note 62, at 24.

[293] *Id.*

[294] *See* Padfield, *supra* note 277, at 23.

[295] Letza et al., *supra* note 267, at 250.

[296] Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 636 (1819); *see* Boadu, *supra* note 284, at 136.

[297] East India Company Charter, *supra* note 50, at 3.

liability, monopoly trading rights, and tax exemptions.[298] The consideration for this grant obligated the EIC to govern territory in service of the Crown, produce revenue, and open trade routes.[299] The Crown unabashedly exerted its dominance over the EIC by requiring the EIC to periodically renew its charter with fees attached, remit "Home Charges," and pay annual fees to maintain its monopoly.[300] This relationship, though tumultuous at times, resulted in the corporation's survival from 1600 to its nationalization in 1873.[301]

Closely related to entity theory is stakeholderism, which stands in stark contrast to shareholder primacy.[302] According to stakeholderism, the corporation is not only an artificial legal entity but a social entity as well.[303] The social entity has an obligation to account for the interests of its employees, consumers, and others impacted by the corporation's operations.[304] By attending to its stakeholders, the corporation builds longstanding business relationships, cultivates talent, and other mutually beneficial exchanges to increase the business' efficiency and success.[305]

The EIC served stakeholder interests, namely the interests of the Crown, throughout its history. While the EIC's first voyages generally resulted in profitable returns to its shareholders,[306] its non-trade operations dramatically increased costs for the EIC.[307] In the years preceding and following the Battle of Plassey of 1757, where the EIC became the *de facto* ruler of India,[308] military and fortification expenditures increased by £9,069,684.[309] By 1772, the EIC was in economic decline.[310] In the same year, the Governor of Bengal acknowledged that "[t]he Treasury was empty; the [EIC] was involved in debt, [and] its revenue was declining. . . ."[311] Rising purchase prices of goods

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298 *See* Bogart & Del Angel, *supra* note 104, at 9.

299 BOGART, *supra* note 33, at 35.

300 Bogart Working Paper, *supra* note 99, at 6, 9; DUTT, *supra* note 107, at xv.

301 Sahni, *supra* note 47, at 327.

302 Fairfax, *supra* note 23, at 1167-68.

303 William T. Allen, *Our Schizophrenic Conception of the Business Corporation,* 14 CARDOZO L. REV. 261, 265 (1992).

304 *See* Letza et al., *supra* note 267, at 245.

305 *See id.* at 243.

306 *See* Gelderblom et al., *supra* note 54, at 1065.

307 *See* Sashi Sivramkrishna, *From Merchant to Merchant-Ruler: A Structure-Conduct-Performance Perspective of the East India Company's History, 1600-1765*, 56 BUS. HIST. 789, 789 (2014).

308 *See* Tahir, *supra* note 95, at 30; *see also* Berger, *supra* note 95, at 55.

309 *See* Sivramkrishna, *supra* note 307, at 789 (citing Sylvanus Urban, 53 GENTLEMAN'S MAG. at 341-343 (1783)).

310 *Id.* at 790.

311 *Id.* (citing WILLIAM MILBURN, ORIENTAL COMMERCE iv (1813)).

in India and lower selling prices in England further decreased profits.[312] The EIC developed into "a state in the guise of a merchant."[313]

In this way, the EIC adopted a twisted form of stakeholderism. Rather than building economic relationships with its governed people in India, it promoted a discourse justifying oppression and subjugation under the guise of economic prosperity. Rising costs and falling profits forced the EIC to change its corporate strategy to assert sovereign rule and expand its territory.[314] Economic success no longer became the EIC's guiding mission but transformed from a "merchant to merchant-ruler in the latter half of the eighteenth century."[315]

However, this transformation from merchant to merchant-ruler may not have resulted from decreasing profits, but rather represented a larger corporate strategy by the EIC in light of increasing competition from international business:

> The Spaniards and Portuguese had harbours, of which they were absolute masters, and which they had secured garrisons and fortifications. The Dutch . . . had begun to fortify themselves in different places . . . the will of the Dutch and other powers, who, in consequence of their forts, could exclude them from their ports.[316]

After the Battle of Plassey in 1757, the EIC adopted coercive tactics to remain afloat.[317] Merchants rebuilt their factories and Company agents pressured local merchants and cultivators to extract profits.[318]

This strategy hardly resembles stakeholderist theory, where corporations fairly treat its employees, protect business relationships, and confer benefits on the community. Here, the 'social benefit' was a 'civilizing mission,' geared towards justifying the subjugation of the Indian subcontinent.[319] Company agents, like Alexander Dow, believed that the EIC bestowed upon the Indian people a "British sense of good government and civil society" replacing the 'inferior' Indian administration of the territory:[320]

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312 *Id.* at 791 (citing DAVID MACPHERSON, THE HISTORY OF THE EUROPEAN COMMERCE WITH INDIA 123 (1812)).

313 DALRYMPLE, *supra* note 82, at 3.

314 *See* Sivramkrishna, *supra* note 307, at 793.

315 *Id.* at 790.

316 *Id.* at 798 (quoting MILBURN, *supra* note 311, at ix).

317 *Id*. at 806 (citing CHAUDHURI, *supra* note 57, at 461).

318 *Id.*

319 *See* Mark Tunick, *Tolerant Imperialism: John Stuart Mill's Defense of British Rule in India*, 68 REV. POLITICS 586, 587-88 (2006) (citing UDAY SINGH MEHTA, LIBERALISM AND EMPIRE 82 (1999)).

320 Michael Mann, *Dealing with Oriental Despotism: British Jurisdiction in Bengal, 1772-93*, *in* COLONIALISM AS CIVILIZING MISSION: CULTURAL IDEOLOGY IN BRITISH INDIA 30 (Harald Fischer-Tiné & Michael Mann eds., 2004).

> The history now given to the public, presents us with a striking picture of the deplorable condition of a people subjected to arbitrary sway; and of the instability on empire itself, when it is founded neither on law, nor upon the opinions and attachments of mankind . . . . In a government like that of India, public spirit is never seen, and loyalty a thing unknown. The people permit themselves to be transferred from one tyrant to another, without murmuring . . . .[321]

Coupled with a Christian mission, the EIC's 'civilizing' and 'liberating' discourse justified its continuous rule over India until its nationalization in 1873.[322]

IV. CONCLUSION

The English-speaking world nearly condemned corporations after a collapse of the West's financial institutions during the South Sea Bubble Crash in 1790, which lead to a global diminution of the corporate form as a legal entity.[323] However, throughout the nineteenth century, the corporation filled the needs of businesspeople and became a "commercial instrument of formidable effectiveness, feared because of its power, hated because of the excesses with which that power was used, suspect because of the extent of its political manipulations within the political State, admired because of its capacity to get things done."[324] Two of the earliest modern corporations, the East India Company and U.S. Steel, reveal possible insights for contemporary discussions on corporate governance in the United Kingdom and the United States, respectively.

Queen Elizabeth I facilitated the creation of the East India Company with a charter in 1600, creating "one Body Corporate and Politik."[325] In exchange for this charter—which allowed private investors to receive limited liability, tax exemptions, and monopoly—the EIC furnished the Crown with revenue, trade routes, and governed over large swaths of Indian territory. Similar to the EIC in the United Kingdom, U.S. Steel was a modern corporation which greatly expanded the power of the United States. At its time of incorporation in 1898, U.S. Steel was the largest corporation in the world.[326] However, U.S. Steel and the American government did not have a productive relationship like the Crown and the EIC. U.S. Steel, while exploiting natural resources to guide the United States through industrialization, underwent anti-trust

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321 *Id.* (quoting *Report of the Health Officer, Bombay, 1873*, *in* MAHARASHTRA STATE ARCHIVES, 76 GENERAL DEPARTMENT VOLUMES 165 (1875)).

322 *See id.* at 7; *see also* Sahni, *supra* note 47, at 327.

323 Adolf A. Berle, Jr., *Foreword* to MASON, *supra* note 37, at x.

324 *Id.*

325 East India Company Charter, *supra* note 50, at 2.

326 Gelhausen, *supra* note 133, at 55.

investigations culminating in *United States v. U.S. Steel Corporation*.

I endorse a possible interpretation of the discussion of modern corporate governance through the lens of history, an element overlooked in this analysis. After presenting an overview of the contractual and entity theories of corporate law, I used the East India Company and U.S. Steel to illustrate a historical legal analysis of corporate governance in the United Kingdom and the United States. The EIC, as a corporate personality, possibly suggests that corporate governance in the United Kingdom will proceed under the entity theory of corporations. Further, the historical relationship between the EIC and the Crown viewed under the entity theory may serve as evidence that British companies are generally more predisposed to stakeholderism than American corporations. On the other hand, the history of U.S. Steel, including its mistreatment of its employees and unwarranted exoneration by the Supreme Court, may alternatively propose that corporations in the United States could remain more committed to the contractual theory of corporate governance, and subsequently shareholder primacy.