"A valuable contribution to understanding America at a critical moment."
—BRYAN STEVENSON

# AMERICA UNFINISHED

## 250 YEARS OF LAW AND GOVERNANCE

AN ESSAY COLLECTION FROM HARVARD LAW SCHOOL FACULTY

EDITED BY Alexandra Natapoff and Guy-Uriel E. Charles

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## An Essay Collection from Harvard Law Faculty

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We dedicate this book to the principles and promise of academic freedom, and to all the people who have risked and sacrificed so much over the centuries so that we may still exercise it.

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# Corporate Governance and Private Power

Mariana Pargendler

Two and a half centuries after the Declaration of Independence, U.S. law faces a paradox the Founders could scarcely have imagined: The nation built to resist concentrated power has created private institutions whose reach can rival the state itself. Corporate law is thus a constitutional problem in miniature, allocating power and structuring accountability. The checks and balances that have been a hallmark of the system's capital markets success, and of social ordering more generally, today are under enormous strain. U.S. law is now moving toward developing-world cronyism, where controlling shareholders face few constraints and shape laws in their favor. Paradoxically, these same powerful institutions, capable of shaping their own legal environment, have largely accommodated rather than resisted new concentrations of executive power, suggesting that private and public power may be mutually reinforcing rather than countervailing.

The modern business corporation—so ubiquitous it seems natural—is, in historical terms, a recent invention. In 1776, business corporations were rare, chartered sparingly for special purposes. The Constitution does not mention them. That same year, Adam Smith's *The Wealth of Nations* warned that when managers administer "other people's money," "negligence and profusion" would inevitably follow. Smith identified two enduring risks in the early corporations of that time: they might fail through mismanagement; and they might embody monopolies harming consumers. Now, add environmental degradation challenging planetary limits and the sheer concentration of private power challenging democratic control.

The past 250 years defied Adam Smith's skepticism. Corporations became the dominant engine of economic life. State law endows corporations with their basic attributes—including legal personality, limited liability, entity shielding, and regulatory partitioning—enabling large-scale enterprise and constraining the regulatory powers of the state itself. Law does not merely regulate corporations; it constitutes them. And law remains indispensable to managing the agency costs and the social costs of corporate activity.

By 2026, American corporations stand at the center of our era's defining challenges: artificial intelligence, climate transition, social media's influence on minds and democracy, and geopolitical competition with China. Yet the U.S. corporate landscape is shifting dramatically. Public markets have grown more concentrated, both in terms of the market value commanded by the largest firms and in the prevalence of controlling shareholders among them. Private markets have exploded while remaining opaque. Dual-class structures increasingly cement founder control. The dispersed shareholders of mid-century textbooks have given way to the "Big Three" institutional investors, introducing a different form of concentration in firms that lack controlling shareholders. U.S. capital markets increasingly host foreign firms and investors.

American corporate law can be understood through two seemingly opposed but ultimately complementary narratives. The *market-centric view* emphasizes private ordering and regulatory competition. Corporate law is viewed as a product, which states effectively "sell" in exchange for franchise fees. Delaware has long dominated by offering flexibility and predictability, as well as substantial discretion for corporate boards in the name of shareholder interests. The "genius of American corporate law," in this view, lies precisely in responsiveness to shareholders' and managers' interests without democratic accountability.

The corporate accountability view tells a different story. Far from *laissez-faire*, the United States developed the world's most elaborate regulatory and enforcement apparatus for public companies. The SEC, created during the New Deal, became a model exported globally. U.S. markets demand unusual transparency, and a sophisticated plaintiffs' bar makes litigation frequent and consequential.

Delaware's equity tradition further complicates the purely permissive story. Corporate action is "twice tested": not only for technical compliance but for conformity with equity. U.S. courts developed veil-piercing, fiduciary duties for controlling shareholders, and derivative suits earlier and more extensively than peer jurisdictions. As Mark Roe has famously argued, state competition operates in the shadow of federal power: the threat of federalization disciplines states toward minority shareholder protection and other concerns.

This accountability infrastructure arose from diverse pressures. In Roe's account, a tradition of American populism has historically curbed the power of financial institutions. Nonprofit activism shaped corporate behavior and laws toward social and environmental goals. What I have called a "corporate governance obsession" promised checks and balances within firms to address problems from corruption to systemic risk. These narratives are best understood as complements, reflecting an uneasy compromise between enabling markets and constraining the abuse of private power.

That already-imperfect compromise now faces further strain. Delaware's 2024 and 2025 amendments represent a troubling retreat from American corporate law's accountability tradition. Responding to judicial constraint of controlling shareholder power and equitable policing of conflicted transactions (including an extraordinary pay package for the world's richest man), the Delaware legislature moved toward bright-line rules making a wide array of potentially problematic transactions unreviewable, leaving fewer constraints on controlling shareholders, and creating more obstacles to shareholder litigation. These reforms were not merely technocratic endeavors. They followed attacks on judges, credible reincorporation threats to Texas and Nevada, and intense lobbying by increasingly powerful controlling shareholders and the private equity industry—reflecting the subversion of the existing legal order by powerful interests.

This shift marks a major departure from longstanding U.S. corporate governance principles. U.S. law is rolling back corporate accountability mechanisms and regulations across the board. As I have argued elsewhere, in other nations controlling shareholders appeal to nationalism to justify their control and role in society. Here, a similar trend is dismantling legal constraints that once aimed to confine controllers' power. At the federal level, proposals to route securities disputes into arbitration would neutralize much of the private enforcement machinery. Efforts to weaken shareholder proposals on social and environmental matters further reduce accountability. Together with the Delaware retreat, these developments suggest a broader unwinding of the regulatory and judicial infrastructure built over decades which constitutes a key pillar of the U.S. system.

This unwinding has a political context. The international rise of authoritarian regimes has often transformed corporate governance both through the direct exercise of state power and through the cooptation of private enterprise. In the U.S., corporations appear increasingly entangled with government as well. Ironically, to fight China, the U.S. is abandoning its arm's-length tradition and moving closer to China in key respects. Recent breaks include new strategic state shareholdings and even the adoption of a "golden share" in connection with a foreign acquisition. Whereas earlier experiments with U.S. state ownership came in times of crisis, such as when the federal government took shares in major financial institutions and car companies following the 2008 financial meltdown, current state incursions are occurring without an acute crisis. The government is pressing corporate leaders to favor government policies through a combination of political carrots and sticks. Corporate leaders' abrupt shifts in public posture suggest dependence when political risk becomes existential. Concerns about cronyism, selective intervention, and politicized enterprise are mounting.

The 250th anniversary of American law arrives as U.S. corporate and capital markets law, often celebrated as the envy of the world, faces these daunting new challenges. Legal scholars have overwhelmingly favored a narrow, "modular" view of corporate law focused on investor protection alone, with other social concerns outsourced to other areas of law. This view is untenable: it has long had its share of critics and is incomplete in its own terms. Even standard corporate rules aimed at protecting shareholders from managers have broader social consequences. Expropriation by controlling shareholders is economically regressive and further concentrates wealth and power. Derivative suits for failure of oversight serve to strengthen the bite of sanctions imposed by other areas of law. Transparency aimed at investors produces broader positive externalities in terms of social control. Social concerns are not fully separable, and distortions created by corporate law—the field governing residual discretion—are not easily addressed elsewhere. The narrowing of the field's scope by the law-and-economics tradition has reduced our ability to resist the ongoing backlash.

The task ahead is to preserve corporations' vitality and capacity for innovation for the social good in the face of these societal challenges. Much remains to be done in perfecting democratic controls and legitimacy of corporations, which have long been unsatisfying. Law, including corporate law, has an important role to play. The first step is resisting the erosion of basic principles that have distinguished U.S. corporate governance and inspired jurisdictions worldwide.