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THE FUNCTION OF "DYSFUNCTIONAL" BOARDS

Franklin A. Gevurtz*

I. INTRODUCTION

For many years, there was a scholar-in-residence on the Pacific McGeorge faculty named Abbott Goldberg. Abbot told me about a classmate of his at Harvard Law School, Louis Henkin, who ultimately became a University Professor (with the right to teach in any department) at Columbia University. Recognizing Henkin’s utter brilliance, even as first year law student, Abbott asked Henkin what his approach was to studying law. Henkin answered that he outlined the substance of his courses. When Abbott seemed unimpressed, Henkin continued, “And then I outline the outlines.” After Abbott asked what the next step was, Henkin explained, “And then I outline the outline of the outlines.” Abbott then said, “Don’t tell me, you then outline the outline of the outline of the outlines?” to which Henkin replied, “Now you got it”. Henkin then explained that his goal was to continue this process until he reduced the entire first year of law school to one word. Intrigued, Abbott asked if Henkin had succeeded, and, after receiving an affirmative response, Abbott asked for the word. Playing coy, Henkin replied, “What, does Macy’s tell Gimbels its secrets for selling clothes?” Nevertheless, Henkin relented. First, however, Henkin asked Abbott if Abbott knew Yiddish, to which Abbott pointed out that Abbott’s last name was Goldberg. According to Henkin, the one word that summarized the entire first year of law school is a Yiddish word; this word is “nu”, which roughly translates as “so.”

Abbott passed away a few years ago and I have been looking for an occasion to remember him by telling this story. This Symposium finally provided the opportunity, because this one Yiddish word, “nu,” summarizes the thesis of my paper. When asked about my reaction to the boardroom “scandal” at Hewlett-Packard, as I was by a couple of reporters at that time, I confess that what I really wanted to say was “nu” or, in English, “so.” In this paper, I will explain why.

One usage of the expression nu is to convey a lack of surprise at a fact; or, perhaps more precisely, some disappointment that the person to

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whom the comment is directed is surprised by a fact. Accordingly, the first part of this paper examines whether complaints about dysfunctional boards of directors are really anything new. In fact, such complaints seem to be as old and as widespread as the institution of corporate boards themselves.

The more profound usage of the expression nu and the usage that Henkin realized underlay all of legal education is to communicate the need, in every situation, to reexamine fundamental premises. In the context of this Symposium, we cannot examine the causes or cures of board dysfunction unless and until we agree on what is dysfunctional; and we cannot agree on what is dysfunctional until we agree on what the board’s function is. It turns out, however, that it is by no means clear just what the board’s real function is supposed to be, and therefore it is not clear when we should consider a board to be dysfunctional. This is the subject of the second part of this paper.

II. The Universality of Non-functional Boards: Or so What Else Is “Nu”

Prompted by the corporate scandals of 2001 and 2002, with the examples of somnolent directors at Enron and Worldcom, there was a great gnashing of teeth and wailing of complaints about what had gone wrong with corporate boards. This led me to ask how the basic model of corporate governance throughout the world, came to call for management under a board of directors elected (normally) by the shareholders. As I researched the historical origins of the corporate


4. E.g., Model Bus. Corp. Act § 8.03(c); Del. Code Ann. tit. 8, § 211(b) (2008). The
board, and how this mode of corporate governance spread throughout the world, it soon became clear that wherever and whenever corporate board have existed, boards have provoked complaints about their failure to function properly.

I should not have been surprised to find that the history of corporate boards is marked by the evident failure of the institution to function as envisioned. Not long before I entered the field of corporate law, scholars, such as my former teacher, Melvin Eisenberg, argued that the limited time available to outside directors; management’s control over the agenda and information received by the board; biases introduced by various relationships between directors and management; and management’s control over the process of director selection, combined to undermine the effectiveness of corporate boards either as a decision making institution or as an institution that monitors management. Studies by Robert Gordon in the 1960s and Miles Mace in the 1970s provided empirical support for the conclusion that boards were largely passive pawns of management, and had no real role in running the corporation.

There is nothing in either the Gordon or the Mace studies to suggest that director passivity was a recent phenomenon in the 1960s or 1970s. In 1934, William Douglas wrote a classic article complaining about directors who did not direct. Furthermore, such complaints are not limited to boards in the United States; similar complaints are heard about boards in Japan, Germany, and France—hardly undeveloped primary exception to the shareholder election of directors is the German invented system of co-determination, under which employees elect up to half of the corporation's directors. See, e.g., FRANKLIN A. GEVURTZ, GLOBAL ISSUES IN CORPORATE LAW 63–64 (2006).

8. ROBERT AARON GORDON, BUSINESS LEADERSHIP IN THE LARGE CORPORATION 143 (1966) (the board of directors in the typical large corporation does not actively exercise an important part in the leadership function).
9. See MYLES L. MACE, DIRECTORS: MYTHS AND REALITY 107 (1971) (study finding that directors rarely challenged or monitored CEO performance, but instead often served as little more than "attractive ornaments on the corporate Christmas tree"); Myles L. Mace, Directors: Myth and Reality—Ten Years Later, 32 Rut. L. Rev. 293 (1979) (study reaffirmed results of earlier study as to director passivity).
10. This discussion focuses on the board in the widely held, rather than the closely held, corporation. In the case of a closely held corporation, the board commonly consists of the major shareholders, who often run the firm much as partners. See F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL AND THOMPSON'S CLOSE CORPORATIONS AND LLCs § 1.07 (3d ed. 2004).
12. E.g., Oxford Analytica Ltd., BOARD DIRECTORS AND CORPORATE GOVERNANCE: TRENDS IN
nations that one would assume have weak institutions of corporate governance. Such dissatisfaction with corporate boards and directors is not a twentieth century phenomenon. In the nineteenth century the notion of directors being blindly oblivious to stock swindles had sufficiently pervaded the public consciousness to form part of a classic work of English literature. Likewise, at around the same time, half a world away, one could read criticisms in Japanese economic journals about inaction by directors of Japanese companies.

Of course, the fact that large corporations have prospered, and have contributed to modern economic prosperity, suggests that there must be something right about the management structure of corporations—withstanding complaints arising from periodic corporate meltdowns. Still, it is difficult to read the work of economic historians without concluding that the managerial developments that made corporations work are those—like the development of the U-form and M-form organizational structure—that occurred below the level of the board of directors.

G7 COUNTRIES OVER THE NEXT TEN YEARS (1992), reprinted in ROBERT A. G. MONKS & NELL MINNOW, CORPORATE GOVERNANCE 267 (2d ed. 2001) (stating that in Japan formal authority is held by the company president and the board of directors; board meetings are infrequent and decisions are rubber stamped; real authority is held by the president and the operating committee composed of the president’s immediate subordinates).

13. E.g., Mark J. Roe, Political Preconditions to Separating Ownership from Control, 53 STAN. L. REV. 539, 568 (2000) (German corporate supervisory boards meet infrequently and their information has been weak).

14. E.g., MONKS & MINNOW, supra note 12, at 292 (the president-director-general (PDG) of French companies wields almost unchecked control over the enterprise without the counter power of the board, whose composition and agenda the PDG controls; indeed, it is regarded as bad manners for the board to vote on a management decision).

15. E.g., ANTHONY TROLLOPE, THE WAY WE LIVE NOW 298–309 (1875). “Melmotte [the chief executive officer of the company, and perpetrator of a fraudulent promotion,] would speak a few slow words… always indicative of triumph, and then everybody would agree to everything, somebody would sign something, and the ‘Board’… would be over.” Id. at 138.

16. Tsunehiko Yui, The Development of the Organizational Structure of Top Management in Meiji Japan, in 1 JAPANESE Y.B. ON BUS. HIST. 1, 7 (1984). (referring to Ukichi Taguchi, the publisher of the Tokyo Keizai Zasshi, then Japan’s most influential economic journal, who wrote in 1884, “directors [of Japanese banks] might as well be retired… [T]he president handles everything himself.”)

17. See RICHARD S. TEDLOW, THE RISE OF THE AMERICAN BUSINESS CORPORATION 13–24, 56–60 (1991). While the universal adoption of board governance for public corporations makes it difficult to perform an empirical study on the impact of proceeding without a board, various recent studies attempt to assess the impact of board composition and other corporate governance practices on corporate performance. Much of the results have been inconclusive. See, e.g., Sanjai Bhagat & Bernard Black, The Uncertain Relationship Between Board Composition and Firm Performance, 54 BUS. LAW. 921 (1999) (reviewing over 100 studies and finding no convincing evidence that independent directors improve firm performance); Robert W. Hamilton, Corporate Governance in America 1950–2000: Major Changes but Uncertain Benefits, 25 J. CORP. L. 349, 359–73 (1999) (studies have not produced consistent positive results from changes in corporate governance, such as increased use of independent directors). Studies in
III. THE FUNCTION OF CORPORATE BOARDS: OR, “NU,” WHAT DO YOU THINK THE BOARD IS SUPPOSED TO DO?

Interestingly, one reporter who contacted me after the Hewlett-Packard scandal broke did so because he read my article on the history of the board of directors. He was the editor-at-large for *Fortune* Magazine, and he explained that he and other reporters working on the Hewlett-Packard story had gotten into a conversation about why corporations have boards of directors. These reporters had hit upon a critical insight: One cannot assess the significance of the so-called scandal at Hewlett-Packard without understanding the role of the board, and one cannot understand the role of the board without understanding the board’s history.  

A. Ostensible Functions

The earliest general corporation laws called upon the board to manage the corporation. Recognizing that boards can hardly conduct day-to-day management of any business, modern corporate statutes call for management of the corporation “by or under the direction of” the board. Traditionally, it is said that the board sets corporate policy, makes the major decisions, and delegates to management the task of carrying out policy and those decisions. The Gordon and Mace studies demonstrated that this “tradition” is a myth: Management sets policy and even makes major decisions, the role of the board is reduced to...
providing formal approval (almost never disapproval) of those policies and decisions.23

The fact that corporate boards do not actually manage the corporation, or make business decisions, has led many to ask what then is the function of the board. Borrowing, consciously or unconsciously, from the German supervisory board,24 the view that arose in the 1970s was that the primary function of the board was to monitor corporate management.25 This view of the board observes that in the publicly held corporation there are too many scattered shareholders for the shareholders themselves to efficiently monitor whether senior corporate managers are running the company honestly and competently on the shareholder’s behalf. This, in turn, suggests that the purpose for having a corporate board elected by the shareholders is to perform such monitoring on shareholders’ behalf.26 Yet, to say that the board’s function is to monitor management does not say precisely what the board is supposed to do. If all the board does is to observe, then what does this accomplish? Borrowing from the German model, perhaps the key action accompanying the monitoring model is the hiring and firing of senior management, particularly the chief executive officer.27

The monitoring model seems to provide an elegant rationale for a shareholder-elected board. Yet, the model rests upon a rather curious assumption, specifically, that shareholders, who are too numerous and disengaged to monitor management on their own behalf, will become sufficiently engaged and organized to select vigilant directors to perform the monitoring. As has been recognized since the famous work by Berle and Means,28 however, the reality is that management, and not shareholders, generally selects the directors.29 Needless to say, management has limited incentives to select directors who will aggressively monitor management. The predictable result has been that boards traditionally have been only slightly more active in monitoring


25. See PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 3.02 (1994); EISENBERG, supra note 7, at 169–70.


27. See, e.g., GEVURTZ, supra note 4, at 67 (discussing rights of the German supervisory board); GEVURTZ, supra note 22, § 3.1.5h(2), at 233 (suggesting that corporate boards might do better to focus their attention on hiring and firing the CEO).


than they have been in managing. Optimists may respond by pointing to high profile sackings of CEOs in recent years, suggesting that boards are finally taking their monitoring role seriously—at least after a CEO has been given plenty of time to wreak corporate havoc. Whether or not this turns out to be a true renaissance for the corporate board, this illustrates at least one unquestioned residual function of corporate boards. Like the College of Cardinals selects the successor Pope, the board selects the successor CEO.

Occasionally, another function has been claimed for the corporate board: to mediate among shareholders and other corporate constituencies such as managers, other employees, creditors, and perhaps even the community at large. While strains of this notion go back, at least in the United States, to the famous Berle-Dobbs debate in the Harvard Law Review, a recent article by Lynn Stout attempts to find empirical evidence that shareholders grant power to the board for this reason. Specifically, Professor Stout argues that shareholder acquiescence in devices, such as poison pills, that insulate boards from shareholder
control is evidence that shareholders themselves have concluded that boards exist for this purpose.

The question of whether directors should have either a duty or a right to look out for the interests of stakeholders in the corporate enterprise other than the shareholders (except insofar as doing so advances the interests of the shareholders) has been a subject of considerable legal and economic policy debate. For present purposes, however, it is sufficient to ask whether the composition of the board makes the board any more likely to perform this role than that of managing the corporation or monitoring corporate management. It would if boards were composed of representatives of the various constituents, as, for example, under the German system of co-determination. Yet, it is difficult to imagine a board selected entirely by one constituency—whether it is the shareholders by virtue of their right to elect directors, or the management by virtue of its practical control over the proxy machinery—serving as the honest broker in mediating disputes between all corporate stakeholders.

All told, the corporate board seems to be an institution in search of a purpose. The nature of its selection and composition seems to preclude its effective functioning in a managing, monitoring, or mediating role.

B. What the Historical Origins of the Board Tells Us About the Purposes and Functions of the Corporate Board

Instead of trying to construct a positivist rationalization for what we observe boards doing, or theorizing about what boards should be doing, it might be more productive to ask how and why an elected board of directors came to be the accepted mode of corporate governance. In fact, the original purpose for having corporate boards was quite different from the purposes discussed above. This insight, in turn, may help explain the frustrating dissonance between what corporate law expects of boards, and what boards actually do.

While the Bank of England pioneered the term “director,” and
seemingly influenced American acceptance of corporate board governance, it is the English trading companies that occupy center stage in the story of the corporate board. The charters of the famous sixteenth and seventeenth century English trading companies (the East India Company, the Russia Company, the Eastland Company, the Levant Company, the Hudson’s Bay Company, and the South Sea Company) demonstrate the consistent use of governing boards. This shows that the use of corporate governing boards dates back almost half a millennium. More significantly, these trading companies played a critical role in establishing the use of boards as the governing mechanism for the business corporation. Interestingly, this development did not involve the boards of these companies; it involved what was going on around the boards. These companies were undergoing a metamorphosis from so-called regulated companies—essentially guilds whose membership consisted of merchants conducting independent operations under the company’s franchise—into joint stock companies, in which voting power and economic return came from investing in a common enterprise. While this evolution did not alter the structure of the governing board, it did fundamentally change what the board was supposed to do. The board transformed from a regulatory body, which preserved an exclusive franchise on behalf of a group of merchants who conducted individual businesses, into a supervisory body, which had overall responsibility for running a business.

The Eastland Company provides a good example of a regulated company. The Eastland Company’s charter granted the merchants in the company the exclusive right among English subjects to trade with Scandinavia and the Baltic region. As a regulated company, the Eastland Company did not conduct operations as a corporation. Instead, the merchants who were the members of the company conducted trading operations, either individually or in ad hoc partnerships. This fact leads to a critical question from the standpoint of the history of board governance: If a regulated company did not conduct operations as a corporation, what was the purpose of having a governing board? The answer is that the board adopted ordinances to govern the activities of

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37. E.g., Gevurtz, supra note 5, at 110.
38. For a tabular listing of the governance structures of English joint stock companies until 1720, showing predominately board governance, see 3 William R. Scott, THE CONSTITUTION AND FINANCE OF ENGLISH, SCOTTISH AND IRISH JOINT-STOCK COMPANIES TO 1720, at 462–80 (1912).
the members of the company. For example, the board of the Eastland Company adopted a prohibition on “colouring” goods. Colouring referred to selling goods of a non-member merchant as a member’s own. By operating in this fashion as undisclosed principals, non-members attempted to circumvent the company’s exclusive franchise. As this example illustrates, the role of a regulated company’s board was not to exercise overall responsibility for operating a business, but rather to impose rules on individual merchants in order to preserve a monopoly.

The Russia Company may have been the first joint stock company. In the joint stock company, instead of each merchant trading in his own stock (merchandise), the merchants subscribed to a fund that financed a combined or joint stock of merchandise for trading by agents of the company—hence, the title “joint stock company” from which the current label of stockholder is derived. The development of the joint stock company, by setting the stage for transferable ownership interests in which voting power can depend upon the number of interests purchased and in which voting power might become widely dispersed among passive investors, obviously had tremendous implications for corporate governance; it laid the groundwork for the separation of ownership from control. For purposes of this paper, however, dealing as we are with the function of the corporate board, the development of the joint stock company had another impact. The same board structure that existed to enact and enforce rules governing the conduct of independent merchants in the regulated company (such as the Eastland Company) found itself pressed into service to manage a large business venture in the joint stock company (such as the Russia and East India Companies). This occurred without any evident consideration to the different nature of these tasks, or to whether an institution developed for one task best fit the needs of the other.

The use of boards by the sixteenth and seventeenth century English trading companies appears to derive from a pattern set by two of the earliest companies of English merchants engaged in foreign trade: The Company of the Merchants of the Staple and the Company of Merchant

41. Id. at 20.
43. Id.
44. E.g., SCOTT, supra note 36, at 17.
45. For a discussion of the meanings ascribed to the word “stock” in the early joint stock companies, see SCOTT, supra note 36, at 158.
46. WILLAN, supra note 40, at 19–21.
Adventurers. As suggested by the charter of the Merchant Adventurers, the boards of the Company of Merchant Adventurers and of the Company of the Merchants of the Staple existed to pass ordinances regulating the conduct of the members, as well as to resolve disputes among the members.\textsuperscript{47} Having traced the corporate board to these early trading companies, the question becomes from where did these companies get the idea for board governance?

Corporate governance by a representative board, working with a chief executive officer (the “governor” in the typical parlance of the early corporate charters), is a reflection of political practices and ideas widespread in Western Europe in the late middle ages. Specifically, while fictional literature often pictures medieval Europe as a place of autocratic governance by kings, European political ideology and practice in the late middle ages, although hardly democratic, often called for the use of collective governance by a body of representatives. Examples of such representative governance ideas and practices are found in the assemblies or parliaments of medieval European kingdoms,\textsuperscript{48} in town councils,\textsuperscript{49} in governing councils for guilds,\textsuperscript{50} and in the Church.\textsuperscript{51} The unifying theme behind medieval parliaments, town councils, guild councils, councils of the Church, and the boards of the trading companies, is that they provided the means to comply with the “corporate law” rule that “what touches all shall be consented to by all” in circumstances when consent by assembly of the entire group was impractical.\textsuperscript{52} Given this prevalent practice and the ideology that underlay this practice, it was natural for the early corporations to use board governance.

In sum then, corporate boards originally were not about running a business, or monitoring those who run a business, they were about providing political legitimacy through a representative body. Moreover,
the functions of this representative body were more legislative, or even judicial, than they were executive.

IV. CONCLUDING THOUGHTS ON WHAT IS A DYSFUNCTIONAL BOARD: NO

Once we rethink the function of the corporate board in terms of its historic origins, the analysis of what is a dysfunctional board, and whether the Hewlett-Packard board was dysfunctional, changes.

To the extent that the function of the board is simply to provide institutional legitimacy by its very existence as an elected institution, then as long as an elected board is in place, the board has served its function. Under this analysis, the only board that is dysfunctional is a board that carries over following a deadlocked election. Indeed, corporate statutes that call for corporate dissolution in the event of repeated failure by evenly divided shareholders to elect new directors embody this view of the board’s function.

Perhaps, however, this view is too minimalist. Hence, one might ask when is an institution, whose principle purpose is to represent others, dysfunctional? In the context of Hewlett-Packard, the board members were at odds. Nevertheless, the same was true of the shareholders. If the function of the board is to represent the shareholders, did the dissention on the board render the board dysfunctional, or functional? True, the tactics of the competing sides had surpassed efforts at rational persuasion, as one side apparently engaged in leaking information to reporters, while the other engaged in illegal efforts to plug the leaks. Yet, except for the illegal pretenses, this seems to be ordinary to rough-and-tumble politics. Indeed, one might even compliment the board on being engaged.

Interestingly enough, this same issue of when a divided representative body should be condemned as “dysfunctional” pervades much of our current political discourse. Congress’ approval rating hovers at record low levels, as politicians, pundits, and ordinary citizens all complain about the inability of Congress to get anything done. And yet, if Congress, a board, or any elected body truly represents a closely divided electorate, what is it supposed to do? In such cases, perhaps it is not the

53. Medieval European Parliaments, town councils, and guild councils—often composed of a number of members that was some multiple of twelve—commonly adjudicated disputes, thereby providing the foundations of the jury system. See, e.g., REYNOLDS, supra note 49, at 23–34. The reintroduction of Roman law in the twelfth century led to the increasing use of single presiding judges in lieu of adjudication by collective groups, as had been characteristic of earlier medieval Europe. Resistance to this trend occurred in the preservation of trial by jury in England, and in mercantile matters, in which assemblies or groups of merchants continued to try disputes. Id. at 51–58.

elected body that is dysfunctional.