Blue Skies for 100 Years: Introduction to the Special Issue on Corporate and Blue Sky Law

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I. Introduction

Kansas enacted the first state securities law in the United States on March 10, 1911, thereby ushering in a new era of financial regulation. House Bill 906 ("1911 Act"), entitled "An Act to provide for the regulation and supervision of investment companies and providing penalties for the violation thereof,"[1] was the product of disparate forces, including the ongoing struggle over Kansas' new bank guaranty act, progressive pressures within the Republican Party, strong agricultural markets, the increasing prevalence of traveling securities salesmen, and the work of the charismatic Kansas Commissioner of Banking Joseph Norman Dolley.

This year marks the 100th anniversary of the Kansas "blue sky" law, and this issue of the *Washburn Law Journal* uses the occasion to look back on the genesis of securities regulation and to think about its future. It is true that the financial markets in 2011 are profoundly different from the markets in 1911. Moreover, the 1911 Act was passed under a specific combination of politics, economics, technology, and social forces at work in Kansas in 1911. Although a lot has changed in 100 years, the persistence of the regulatory systems established during the early twentieth century, with respect to securities and corporate governance more generally, suggests that era may have more to interest us than "mere" history.

II. The Kansas Blue Sky Law and Its Significance

A. *How Kansas Drove Out a Set of Thieves*

The historical backdrop to the blue sky laws is fascinating. The early 1900s in Kansas was a time of bank robberies[2] and speculative

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1. 1911 Kan. Sess. Laws 210.

2. *See How's This for a Trade*, Kan. City J., Dec. 31, 1910 (reporting that Kansas bank robberies "seemed to have come to stay" because twenty-five financial institutions had been

schemes.[3] The state was dominated by the Republican Party, which, as Professor Smythe explains in his Article, incorporated a strong progressive faction. In 1908, the reformist Walter Stubbs was elected governor. Gov. Stubbs appointed Joseph Norman Dolley, a successful merchant who had served both as the Chairman of the Republican Party and as the Kansas Speaker of the House, to be Commissioner of Banking.

One of the state's key challenges was the financial system and, in particular, the problem of speculative securities sales to its citizens.[4] The rapid growth of the railroads and heavy manufacturing created a demand for capital, while strong agricultural and land markets[5] had contributed to the growth of a middle class with funds to invest.[6] The banking system was growing,[7] though not comprehensively regulated.[8] As the first decade of the twentieth century closed, securities were widely available with promoters traveling throughout the country selling everything from railroad and municipal bonds to more speculative patent development promotions.[9] Kansans were characterized as "fat picking" for fraudulent securities transactions.[10]

In 1909, Kansas passed the controversial[11] Bank Depositors' Guaranty Act ("Bank Guaranty Law") to reimburse depositors for failed or fraudulent banking practices.[12] It was challenged almost im-

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ransacked by burglars from October to December 1910) (on file with the Office of the Kansas Securities Commissioner).

3. *After the Fakirs*, TOPEKA ST. J., Apr. 8, 1910, at 1 (discussing Commissioner Dolley's investment information bureau). The term "fakirs" in this and other articles about the blue sky laws was clearly intended to mean "charlatans" and not used in a religious context.

4. *See, e.g.*, Will Payne, *How Kansas Drove Out a Set of Thieves*, THE SATURDAY EVENING POST, Dec. 2, 1911 (discussing sales of speculative securities); *The Plan Works*, TOPEKA ST. J., Jun.9, 1910, at 1 (discussing various speculative schemes reported to Commissioner Dolley's new investment information bureau); *see also* THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION § 1.2[2] (6th ed. 2009) (noting the many questionable promotional practices in the era).

5. WALTER V. HASLETT, RISK MANAGEMENT: FOUNDATIONS FOR A CHANGING WORLD 703 (2010) (noting that the price of farmland doubled between 1900 and 1910).

6. Jonathan R. Macey & Geoffrey P. Miller, *Origin of the Blue Sky Laws*, 70 TEX. L. REV. 347, 353-54 (1991) (explaining that sales of speculative securities "surged" in 1910 and 1911 because high inflation made higher yields more attractive and strong agricultural markets resulted in profits for farmers).

7. *Deposits in State Banks of Kansas Near $100,000,000*, TOPEKA DAILY CAPITAL, Feb. 3, 1910, at 1 (reporting an increase in deposits of $2.25 million in a three-month period).

8. Kansas passed its first general banking law in 1891. Banks, 1891 Kan. Sess. Laws 85.

9. Macey & Miller, *supra* note 6, at 353. This began to impact the banking sector in Kansas, as the promised high yields made it more difficult for banks to attract and retain customer deposits. This in turn was reducing the credit available to local borrowers. *Id.* at 350.

10. Payne, *supra* note 4.

11. Opponents of the Bank Guaranty Law were concerned that a guaranty that reimbursed depositors for fraudulent banking practices would encourage "wildcat banking." *See Wildcat Banking Will Grow, They Predict*, KAN. CITY STAR, Jan. 16, 1908; *The Bank Deposit Law: Should the State Encourage Wildcat Banking*, TOPEKA ST. J., Jan. 13, 1908, at 8. Using a kind of moral hazard argument, opponents argued that reimbursing failed banks would encourage speculative behavior, the cost of which would be borne by the more circumspect institutions.

12. 1909 Kan. Sess. Laws 96.

mediately as unconstitutional.[13] That same year, the energetic and enterprising Commissioner Dolley took office, pursuing a number of banking reforms. He first targeted bank robberies: He sought a reward of $1,000 per robber's head[14] and placed armed men at each of the Kansas banks.[15]

Commissioner Dolley also went after the sale of speculative and fraudulent securities. He set up an investor information bureau to collect information about investments for which stock was sold in the state.[16] As Rick Fleming describes in his Article, Commissioner Dolley took out newspaper advertisements soliciting information about securities. He tirelessly promoted the need for more investor protection, telling of plans to bilk widows out of their savings,[17] and schemes by "smooth gentlemen" who persuaded farmers to invest in land so high up that "the only way to irrigate it would be from the moon." [18] Most importantly for our purposes, however, he successfully promoted the first blue sky law: the 1911 Act. [19]

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13. Kansas had been considering a bank guaranty law since the late 1890s, when the State confronted a series of devastating bank failures. Between 1890 and 1900, seventy-five state-chartered and thirty-two nationally chartered banks failed in Kansas, losing more than $1 million in investor profits. When it was finally passed, the Bank Guaranty Law was immediately challenged and a temporary injunction was issued blocking its enforcement, but it was upheld in *Abilene National Bank v. Dolley*, 228 U.S. 1, 5 (1913) (rejecting claims that the Kansas Bank Guaranty Law discriminated against national banks) and *Assaria State Bank v. Dolley*, 219 U.S. 121, 127 (1911) (holding that the Kansas Bank Guaranty Law did not discriminate against unincorporated banks and banks not having a surplus of ten percent). In addition, the temporary injunction was reversed. Dolley v. Abilene Nat'l Bank, 179 F. 461, 466 (8th Cir. 1910) (reversing the temporary injunction).

14. *A Price of $1,000 on Robbers' Heads*, TOPEKA DAILY CAPITAL, Dec. 18, 1910, at 1; *21 Bank Robbers Caught in 2 Years*, TOPEKA DAILY CAPITAL, Jan. 2, 1913, at 4 (reporting that as a result of Dolley's campaign against bank robbers, there was not a single bank robbery in Kansas in 1912).

15. *Open Season for Bank Robber*, TOPEKA DAILY CAPITAL, Oct. 28, 1911, at 4 (stating that, at night, men armed with rifles were placed in every Kansas town with a bank).

16. *After the Fakirs*, *supra* note 3, at 1; *Mr. Dolley's Investment Information Bureau*, TOPEKA DAILY CAPITAL, Jan. 6, 1911, at 4. Dolley published an announcement inviting Kansans to contact his department if they were offered stock and wanted information about the company before investing. Payne, *supra* note 4.

17. *To Censor Stock Sales: Commissioner Dolley Says Some Brokers Prey on Widows*, KAN. CITY J., June 4, 1910 (describing brokers' systems of monitoring obituaries and contacting widows to convince them to invest in speculative ventures); *The Plan Works*, *supra* note 4, at 1 (describing the case of a widow who was offered a 30% return on her investment).

18. Payne, *supra* note 4 (quoting Commissioner Dolley's tale of an old farmer who had come to him for advice after investing the proceeds of the sale of his farm in a supposedly magnificent tract in New Mexico). Commissioner Dolley also complained of "plans of fakirs to get farmers to sign notes for stock." *The Plan Works*, *supra* note 4, at 1.

19. Investment Companies—Providing for Regulation and Supervision, 1911 Kan. Sess. Laws 210. Of course, the blue sky laws also benefitted Kansas bankers. "It protected banks from competition in the securities business by regulating the activities of nonbank securities firms [and] . . . reduced the danger that depositors would withdraw their funds from banks and invest them in higher yielding securities." Macey & Miller, *supra* note 6, at 362. Professors Macey and Miller go on to explain that in 1911, Commissioner Dolley also limited state banks to a maximum interest rate of three percent on time deposits. For this reason, the elimination of competition from speculative securities promising high returns was particularly welcome. *Id*. *But see* Amanda J. Kiefer, Note, *Kansas Blue Sky Is Not on the Market: The Deconstruction of Public Choice Theory Through the Lens of the Kansas Blue Sky Law*, 42 WASHBURN L.J. 281, 297 n.167 (2003) (arguing that Professors Macey and Miller may understate the honest or unselfish motivation behind the blue sky law).

B. *The 1911 Act*

The 1911 Act required companies[20] to obtain authorization from the Commissioner of Banking before selling securities in Kansas. Before attempting to sell stocks, bonds or other securities to persons, or transacting any business in Kansas, an investment company was required to submit: (1) a detailed statement showing the plan upon which it proposed to transact business, (2) copies of all contracts, bonds, and other instruments that it proposed to make with or sell to the contributors, and (3) a document containing its name, address, and itemized financial statements.[21] All documents submitted to the Commissioner of Banking had to be "verified by the oath" of a qualified member or duly authorized officer of the company, and all paper on file publicly had to be certified as correct by the company officer in charge of those particular records or archives. [22]

The 1911 Act instructed the Commissioner of Banking to examine the statements and documents filed by companies, and in some cases to examine the company's affairs at the company's expense, to determine whether: (1) the investment company was solvent, (2) the company's constitutive documents, business plan, and proposed contracts provided for a "fair, just and equitable plan for the transaction of business," and (3) in the Commissioner's judgment, the investment promised a fair return.[23] If the Commissioner of Banking made such a determination, then he was to issue a statement announcing that the company had complied, the detailed information was on file with his office, and the company was authorized to do business in Kansas.[24] Nevertheless, that announcement would include the disclaimer, in bold, that "the bank commissioner in no wise recommends the securities to be offered for sale by such security company."[25]

After gaining authorization to sell securities in the state, a company was then required to file semiannual statements, verified under oath by an authorized officer, containing its financial condition, "the

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20. The 1911 Act applied to domestic investment companies, defined as every corporation, co-partnership, company and association organized in Kansas that sold or negotiated for the sale of any stocks, bonds, or other securities. Section 1 of the 1911 Act exempted state and national banks, trust companies, real estate mortgage companies dealing exclusively in real estate mortgage notes, building and loan associations, and non-profit corporations. 1911 Kan. Sess. Laws 210, 210. Sales of bonds issued by the U.S. Government, the State of Kansas, and Kansas municipalities, as well as notes backed by mortgages on real estate located in the Kansas, to any person in Kansas were exempted from the securities covered by the 1911 Act. *Id.* Investment companies organized in other states, territories, and countries doing business or offering securities in Kansas also were covered and were required to consent to the jurisdiction of the State. § 4, 1911 Kan. Sess. Laws at 211–12.

21. § 2, 1911 Kan. Sess. Laws at 210–11.

22. § 3, 1911 Kan. Sess. Laws at 211.

23. § 5, 1911 Kan. Sess. Laws at 212–13.

24. *Id.* If a company subsequently amended its documents, it had to re-file and get approval from the Commissioner of Banking. § 6, 1911 Kan. Sess. Laws at 213.

25. § 5, 1911 Kan. Sess. Laws at 212–13.

amount of its assets and liabilities," and any other information that the Commissioner of Banking required, accompanied by a filing fee of $2.50.[26] In between such periodic filings, a company was required to balance its books monthly and make them available for inspection by stockholders and investors, as well as the Commissioner of Banking and his deputies, during business hours.[27]

The 1911 Act invested the Commissioner of Banking with general supervision and control over all investment companies, domestic and foreign, and the power to examine them at his discretion and their expense,[28] much in the manner that state banks were examined. If the Commissioner of Banking determined that a company appeared insolvent, or was conducting business in a way that was unsafe or inequitable, or was jeopardizing the interest of the investors, then the Commissioner was empowered to communicate the information to the Kansas Attorney General, who then would apply to the court to appoint a receiver.[29]

The 1911 Act also included an antifraud provision that made it a felony to "knowingly or willfully subscribe to or make or cause to be made false statements" about, or to make false entry into any book of, such investment company, or to exhibit any false paper with the intent of deceiving a person authorized to examine the company's affairs.[30] Violations were subject to a fine of up to $10,000 and imprisonment of up to ten years in the state penitentiary.[31] Any person convicted of selling unregistered securities was to be deemed guilty of a misdemeanor and fined up to $5,000 and/or imprisoned for up to 90 days.[32]

C. *A Good Idea Catches On*

With the passage of the blue sky law, Kansas gained a reputation as a strong enforcer of investor rights.[33] By July 1912, Commissioner Dolley was quoted as claiming that Kansas had received about 800 applications to do business under the blue sky law and had approved

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26. § 8, 1911 Kan. Sess. Laws at 213–14. An initial filing fee of $2.50 also was required. § 2, 1911 Kan. Sess. Laws at 210–11.

27. § 9, 1911 Kan. Sess. Laws at 214.

28. § 10, 1911 Kan. Sess. Laws at 214. The fee was not to exceed $5 per day plus traveling and hotel expenses. *Id.* Refusal to pay the fees upon the demand of the Commissioner of Banking was to result in the forfeiture of the investment company's right to do business in the state. *Id.*

29. § 11, 1911 Kan. Sess. Laws at 214–15.

30. § 12, 1911 Kan. Sess. Laws at 215.

31. *Id.*

32. § 13, 1911 Kan. Sess. Laws at 215–16.

33. *Dolley Says Look Out*, TOPEKA ST. J., Mar. 27, 1911, at 5 (publishing an open letter from Commissioner Dolley to blue sky merchants); *A Kansas Crusade Against Looters*, TOPEKA DAILY CAPITAL, Apr. 20, 1911, at 1, 8 (detailing Commissioner Dolley's action against robbers and fraudulent investments).

about seventy.[34] *The Saturday Evening Post* ran a story about the law entitled "How Kansas Drove Out a Set of Thieves."[35] The law attracted overwhelming interest,[36] and a number of other states, as well as several foreign countries, wrote and asked for copies.[37] By the time the Securities Act of 1933[38] and the Securities Exchange Act of 1934[39] were passed, all states, except Nevada, had blue sky laws on their books.[40] Although many of the other state blue sky laws differed from the Kansas act, the importance of the law as a model was undeniable.

This new kind of financial regulation did not go unchallenged. State blue sky laws, many of which were modeled on the Kansas statute, were the subject of numerous constitutional challenges based on allegations that they were beyond the power of states. However, in a series of 1917 decisions authored by Justice McKenna,[41] the U.S. Supreme Court ruled that the state blue sky securities laws were a valid use of the police power of the states "to protect the public against the imposition of unsubstantial schemes and the securities based upon them."[42]

D. *The Law Adapts and Coexists*

For more than twenty years, state blue sky securities laws were the primary regulation of sales of securities in the United States. The Kansas law was revised slightly in 1913 to include a mechanism to license persons to sell securities and to add a Charter Board[43] and then was amended substantially in 1915, 1919, and 1929.

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34. *Protecting the Investor*, 15 TR. COMPANIES 318, 318 (1912) (quoting Commissioner Dolley as asserting that the blue sky law was saving investors in the state at least $6 million per year). Commissioner Dolley also claimed that many companies reconsidered their plans to offer securities in Kansas after being informed of the authorization requirements. J.N. Dolley, *Blue Sky Law*, 77 AM. BANKER 1705, 1705 (1912). The numbers of rejected stock offerings differ and are impossible to verify. In other reports, the Commissioner's office is credited with rejecting more than 500 securities offerings in the first nine months. Payne, *supra* note 4.

35. Payne, *supra* note 4.

36. *The Kansas Blue Sky Law*, 75 CENTRAL L.J. 221, 221(1912) (citing an article written by Commissioner Dolley in the *Bankers Home Magazine* explaining the operation of the Kansas blue sky law).

37. *Want Copies of "Blue Sky" Law*, TOPEKA CAP. J. (reporting that England and Germany, as well as numerous states, had asked for copies of the law) (on file with the Office of the Kansas Securities Commissioner).

38. Securities Act of 1933, 15 U.S.C. §§ 77a *et seq.* (Supp. 2010).

39. Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.* (Supp. 2010).

40. *See* Russell A. Smith, *"Blue-Sky" Laws and the Federal Securities Acts*, 34 MICH. L. REV. 1135, 1137 (1936).

41. *See generally* Caldwell v. Sioux Falls Stock Yards Co., 242 U.S. 559 (1917) (upholding the South Dakota blue sky law); Hall v. Geiger-Jones Co., 242 U.S. 539 (1917) (upholding the Ohio blue sky law); Merrick v. Halsey & Co., 242 U.S. 568 (1917) (upholding the Michigan blue sky law).

42. *Hall*, 242 U.S. at 550.

43. Investment Companies—Relating to Sale of Stocks, Bonds and Other Securities, §§ 2–3, 1913 Kan. Sess. Laws 233, 234–36.

The 1915 amendments[44] completely overhauled the 1911 Act. Senate Bill 431 ("1915 Act"), entitled "Unfairness, imposition or fraud in the sale of securities—so-called 'blue sky' law," maintained the system of registering securities for a merit-based review to be conducted by the Charter Board on the Commissioner of Banking's recommendation, but the standards were articulated differently. If the Charter Board found that: (1) the makers or guarantors were insolvent, in failing circumstances, or untrustworthy, (2) the promoter's business plan was unfair, inequitable, dishonest, or fraudulent, (3) the promoter's business plan did not protect the investors from "unlawful dissipation or misapplication of the funds of the enterprise or business," (4) the promoter's advertising was "misleading and calculated to deceive purchasers or investors," (5) the securities offered were in excess of the reasonable value of the asset, (6) the enterprise or business of the promoter was unlawful or against public policy, or (7) the enterprise was "a mere scheme of a promoter or promoters to get rich quick at the expense of the purchasers" of the securities; then sales of such securities would be unlawful.[45]

The 1915 Act applied to a newly defined class of "speculative securities," which, for example, advertised or promised "profit, gain or advantage unusual in the ordinary course of legitimate business" or based their value on "chance or hazard of speculative profit or possible loss equal or predominate over the elements of reasonable certainty, safety, and investment."[46]

The 1919 amendments, Senate Bill 280 ("1919 Act"), entitled "Unfairness, imposition or fraud in the sale of securities; amendment to so-called 'blue-sky' law," made several adjustments to the 1915 Act.[47] For example, it strengthened the Charter Board, which was given the power to make an independent investigation and revoke a promoter's permit,[48] and added interests in oil leases "where the value . . . materially depends on . . . future development" to the definition of speculative securities.[49]

Kansas securities law was again revamped and expanded in 1929 by Senate Bill 218 ("1929 Act"), entitled "Relating to Speculative Securities,"[50] in part in response to the increasing complexity of the securities being sold. "Security" was defined in more detail, as were

44. Unfairness, Imposition or Fraud in the Sale of Securities—So-called "Blue Sky" Law, 1915 Kan. Sess. Laws 195 (repealing and replacing the 1911 Act).
45. § 4, 1915 Kan. Sess. Laws at 197–98.
46. § 1, 1915 Kan. Sess. Laws at 195–96.
47. 1919 Kan. Sess. Laws 207 (amending the 1915 Act).
48. § 4, 1919 Kan. Sess. Laws at 212.
49. § 1, 1919 Kan. Sess. Laws at 207–08.
50. 1929 Kan. Sess. Laws 212.

particular types of securities that would not be subject to registration requirements of the 1929 Act.[51]

Thus, during its first few decades, the Kansas blue sky law evolved and was steadily enforced.[52] In the absence of federal measures, Kansas law protected investors and assured responsible capital formation in the state. Nevertheless, there was pressure almost from the beginning for federal preemption of state financial, and in particular securities, regulation. [53]

The federal securities laws enacted in response to the 1929 Stock Market Crash changed the legal landscape. The Securities Act of 1933[54] and the Securities Exchange Act of 1934[55] established a disclosure-based regime as opposed to a merit-based regime and created the dual state and federal securities regulatory system that exists today. The Kansas blue sky law was again amended in 1933 by Senate Bill 322 ("Kansas 1933 Act"), entitled "An Act relating to securities and permits for sale thereof," to reflect the new regulatory environment.[56] Nevertheless, the state retained its requirement that securities sold in Kansas be vetted and approved, and added additional procedures for such authorizations.[57]

State and federal securities laws have coexisted since 1933 but in an increasingly uneven arrangement. As Professors Campbell and Steinberg discuss in their pieces, preemptive measures such as the Private Securities Litigation Reform Act of 1995 ("PSLRA"),[58] the 1998 Securities Litigation Uniform Standards Act ("SLUSA"),[59] the National Securities Markets Improvement Act of 1996 ("NSMIA"),[60]

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51. §§ 1–2, 1929 Kan. Sess. Laws at 207–09.

52. *See, e.g.*, Daniels v. Craiglow, 292 P. 771 (Kan. 1930) (holding that a purchaser of speculative securities that did not have the permit required by the blue sky law could recover the price paid for the shares from the president, secretary, and treasurer of the company when the investment proved worthless); Kansas v. Short, 247 P. 114 (Kan. 1926) (holding, in an action against a seller of securities, that it is unlawful to sell or offer for sale speculative securities without prior filing with the Commissioner of Banking and without a permit issued by order of the Charter Board); Weisendanger v. Lind, 220 P. 263 (Kan. 1923) (invalidating a promissory note because the payee did not obtain a valid permit under the blue sky law); Lilley v. Sterling Oil & Refining Co., 197 P. 201 (Kan. 1921) (upholding the Charter Board's decision to cancel the unlawful issue of capital stock to a company's secretary); Kansas v. Bell, 193 P. 373 (Kan. 1920) (involving the prosecution and conviction of R.J. Bell for obtaining money under false representations made to several investors about the financial condition of an oil company); Harbor Business Blocks Co. v. Gregory, 169 P. 191 (Kan. 1917) (ruling that plaintiffs who violate the blue sky law could be served copies of affidavits even if they were located outside of Kansas).

53. Robert R. Reed, "*Blue Sky" Laws*, 88 ANNALS AM. ACAD. POL. & SOC. SCI. 177, 184 (1920) (arguing that a federal blue sky law was needed).

54. *See* 15 U.S.C. §§ 77a *et seq.* (Supp. 2010).

55. *See* 15 U.S.C. §§ 78a *et seq.* (Supp. 2010).

56. 1933 Kan. Sess. Laws 208. Also in 1933, responsibility for the law was transferred from the Commissioner of Banking to the Kansas Corporation Commission. Creating a State Corporation Commission, 1933 Kan. Sess. Laws 418.

57. § 1, 1933 Kan. Sess. Laws at 208–12.

58. Pub. L. No. 104-67, 109 Stat 737 (1995).

59. Pub. L. No. 105-353, 112 Stat. 3227 (1998).

60. Pub. L. No. 104-290, 110 Stat. 3416 (1996).

and additional measures in the 2002 Sarbanes-Oxley Act ("SOX"),[61] and the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank")[62] have rendered securities and, to a lesser extent, corporate regulation increasingly federal.

As a result, the centennial of state blue sky securities regulation is a fitting time to celebrate state regulation of the markets, as well as to take stock of the status of state regulation and its future. The five Articles that follow are an excellent effort to do just that.

III. The Special Issue on Corporate and Blue Sky Law

This issue of the *Washburn Law Journal* celebrates both the history of the securities laws and corporate governance and explores their potential future. The five Articles that follow present key inflection points in this narrative. They review the genesis not only of the blue sky laws but, also around the same time, the beginning of regulation of corporate campaign contributions. More generally, these Articles explore the corporate culture that has developed in the United States and confront head-on the tension between state and federal regulation of that culture and how such tensions might play out in the future.

A. *The Historical Context*

1. 100 Years of Securities Law: Examining a Foundation Laid in the Kansas Blue Sky Law by Rick A. Fleming

In *One Hundred Years of Securities Law: Examining a Foundation Laid in the Kansas Blue Sky Law*, Rick A. Fleming, General Counsel, Office of the Kansas Securities Commissioner, finally provides an authoritative explanation of the coining of the phrase "blue sky law." Fleming's findings, published here for the first time, describe the circumstances that brought about the phrase, and include a charming account of the derivation by Commissioner Dolley himself. It is fitting that the phrase "blue sky law" is clarified on the centennial of the law that gave rise to it.

Fleming's discussion of the circumstances surrounding the passage of the blue sky law in Kansas also provides valuable insight into why the law was enacted and why it spread so quickly. His account of the progressive forces in the United States at the turn of the century, and their expression within the Kansas Republican Party, explains Commissioner Dolley's drive to protect Kansas investors. Fleming dubs Commissioner Dolley "The Right Person at the Right Time" and

61. Pub. L. No. 107-204, 116 Stat. 745 (2002).
62. Pub. L. No. 111-203, 124 Stat. 137 (2010).

in his compelling history it is clear that Dolley, with the support of Governor Stubbs, put forward the blue sky law as part of a larger regulatory agenda and then worked tirelessly to implement and spread the law.

Finally, Fleming provides a valuable analysis of the early amendments to the Kansas blue sky law, particularly the changes made in 1915, 1919, and 1929. Already, the relationship between the state measures implemented by Kansas and many other states were facing challenges at a federal level, including the U.S. Supreme Court decision in *Hall v. Geiger-Jones Co.*[63] Fleming's history ends with the enactment of federal securities laws in 1933 and 1934 that, without explicitly preempting existing state laws, began a process of federalization that continues to this day.

2. The Rise of the Corporation, The Birth of Public Relations, and The Foundations of Modern Political Economy by Donald J. Smythe

In *The Rise of the Corporation, The Birth of Public Relations, and The Foundations of Modern Political Economy*, Professor Donald J. Smythe considers the role that corporations have come to play in our society, a powerful issue raised by last year's U.S. Supreme Court decision in *Citizens United v. Federal Election Commission*.[64] In explaining that decision, Professor Smythe takes us back to the Great Merger Movement at the turn of the twentieth century, the era in which the modern corporation emerged. A second industrial revolution in transportation, mass-production manufacturing and technology was underway. Running such mass enterprises required centralized management, and the modern corporation was born.

The emergence of vast commercial enterprises in the control of few people immediately raised concerns over corporate size, power, and political influence. A key point of conflict was, and is, the extent to which corporations are persons for the purposes of the Fourteenth and then, by extension, the First Amendment. The same progressive forces and political realignment that produced first the Kansas and then the other state blue sky laws also produced the 1907 Tillman Act, which prohibited corporations from making direct campaign contributions in federal elections.

In his discussion of the protection to be afforded to corporate speech, however, Professor Smythe adds a novel aspect. He argues that during this era, in the battle for public opinion, corporate public relations was born. With the increasing availability of newspapers and

63. 242 U.S. 539 (1917).
64. 130 S. Ct. 876 (2010).

magazines, which depended (and continue to depend) on corporate advertising revenues, the early twentieth century was the beginning of modern corporate publicity campaigns and welfare work as they explicitly sought to "humanize" their image. It is the legacy of those century old initiatives to influence the public directly, as well as through the political process, that echo in the *Citizens United* decision.

B. *What Now? State and Federal*

1. Enhanced "Blue Sky" Enforcement: A Path to Help Solve Our Public School Funding Dilemma by Marc I. Steinberg

In the issue's lead Article, *Enhanced "Blue Sky" Enforcement: A Path to Help Solve Our Public School Funding Dilemma*, Professor Marc I. Steinberg explores the federal preemption of securities, and in many cases corporate, law that has been effected by PSLRA, SLUSA, NSMIA, SOX, and Dodd-Frank, and he responds with a practical proposal.

Professor Steinberg argues that, although a strong regulatory agency, the Securities Exchange Commission ("SEC") is neither equipped nor adept at the extensive regulation and enforcement it has undertaken. A review of the massive frauds and schemes that the SEC has failed to detect in recent years demonstrates the problem.

Professor Steinberg suggests that the SEC needs help to enforce financial market regulation. Who better than the states that initiated it to begin with? With blue sky laws in place already, states are in good positions to render this kind of assistance. After all, Professor Steinberg points out, states have a considerable amount at stake because their citizens are victims of the fraud and losses.

The key to Professor Steinberg's proposal, however, is his suggestion about what should be done with the proceeds of such vigorous state enforcement. Professor Steinberg argues that in the future, blue sky law fines should be used to fund public education. Professor Steinberg notes that state securities laws were enacted to protect state residents, and violations of the blue sky laws are public welfare offenses. His proposal would increase consumer protection and improve public education, bringing Kansas' legacy full circle.

2. Federalism Gone Amuck: The Case for Reallocating Authority over Capital Formation Activities of Businesses by Rutheford B Campbell, Jr.

The shifting relationship between state and federal regulation over capital formation and corporate operations is developed in Professor Rutheford B Campbell, Jr.'s *Federalism Gone Amuck: The*

Case for Reallocating Authority over Capital Formation Activities of Businesses. Professor Campbell argues that the system of dual state and federal authority over capital formation is inefficient and should be changed to remove responsibility from the states. Instead, he argues, states should concentrate their resources on enforcement of the antifraud provisions in state laws.

Professor Campbell explains that regulation of formation activities in a market economy advances two goals: promotion of capital formation and investor protection. He then argues that dual state and federal authority over registration of securities increases transaction costs, and therefore impedes capital formation, without a balancing gain in investor protection.[65] States, Professor Campbell argues, should not regulate the registration of securities; instead, states should enact and enforce tough antifraud rules. Professor Campbell points out that strong antifraud measures would have a clear benefit in terms of investor protection and would increase confidence in the market, but would not impede capital formation.

Professor Campbell's article provides a concise history of the creation and development of the state and federal regulatory regimes and their different regulatory (merit versus disclosure) approaches. He also provides insight into the forces behind passage of NSMIA and other efforts at increasing federal preemption. Professor Campbell ends with a recommendation that state authority over registration of securities should be eliminated in favor of a single federal securities registration system. With the reallocated resources, states, joined by the SEC, could then engage in vigorous enforcement of antifraud provisions.

3. Corporate Governance and CEO Dominance by Z. Jill Barclift

In the century of U.S. securities and corporate regulation, the organization and regulation of business associations have been the object of considerable and often overlapping oversight. In her Article, *Corporate Governance and CEO Dominance*, Professor Barclift explores one aspect of corporate organization that is particularly pertinent: chief executive officer ("CEO") dominance.

Professor Barclift identifies CEO dominance as a situation in which "the board permits the CEO to exert too much power and influence over corporate decision-making and abdicates its responsibility to rein in CEOs who engage in behavior contrary to the best

65. In fact, Professor Campbell argues that the burden on businesses that is created by the dual system is most pronounced in the case of small businesses, which may be important to state regulators.

interests of the corporation and its shareholders." She reviews the factors that contribute to CEO dominance and the decision-making environment it creates. The power and role of a CEO who also chairs the company's board of directors sits at the crux of federal and state corporate and securities regulations. Although state law creations, the corporations Professor Barclift focuses on are large and publicly traded, and, therefore, also subject to federal securities regulations. Thus, Professor Barclift analyzes both regulatory regimes and their application to CEO dominance and shareholder responses. She explores the advantages and disadvantages of a dual CEO/Chairman of the Board and concludes that the corporation and its shareholders are better served by prohibiting such dominance and requiring separate people to fill each office.

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