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Shareholder Primacy's Corporatist Origins: Adolf Berle and The Modern Corporation

William Wilson Bratton

Michael L. Wachter

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Shareholder Primacy's Corporatist Origins: Adolf Berle and *The Modern Corporation*

William W. Bratton* and Michael L. Wachter**

I. INTRODUCTION.....	100
II. EARLY TO MIDDLE BERLE: FROM CORPORATE LAWYER TO CORPORATIST.....	105
<i>A. Early Berle: From Self-Regulation to Judicially Enforced Shareholder Primacy</i>	105
<i>B. Middle Berle: The New Deal and Corporatism</i>	109
1. <i>The “New Individualism”</i>	110
2. <i>Corporatist Theory</i>	113
3. <i>Berle’s Corporatism in Practice: The National Industrial Recovery Act.</i>	114
<i>C. Summary</i>	118
III. THE MODERN CORPORATION AND PRIVATE PROPERTY	118
IV. THE BERLE-DODD DEBATE.....	122
<i>A. Dodd’s Attack</i>	124
<i>B. Berle’s Response</i>	128
<i>C. Dodd Redux</i>	131
<i>D. Berle’s Closing Concession</i>	133
<i>E. Summary of Berle-Dodd</i>	134
V. LATE BERLE: MODIFIED CORPORATISM	135
<i>A. The American Economic Republic</i>	136
<i>B. Economic Planning</i>	138
<i>C. Political Processes and Controls</i>	139

* Peter P. Weidenbruch, Jr., Professor of Business Law, Georgetown University Law Center, and Research Associate, European Corporate Governance Institute.

** William B. Johnson, Professor of Law and Economics, University of Pennsylvania Law School, and Co-Director, Institute for Law and Economics, University of Pennsylvania. For comments on previous drafts, our thanks to Dan Ernst, Tom Joo, David Millon, Mark Roe, and Leo Strine, participants at the Columbia Law School Conference on Berle and Means, as well as workshop participants at the Fordham, Georgetown, Miami, University of Pennsylvania, Vanderbilt, and Western Ontario law schools. For research assistance, our thanks to Meghan Hungate, Neela Mookerjee, Lauren Murphy Pringle, and Veena Viswanatha. This research was supported by the Dean of the Georgetown University Law Center and by the University of Pennsylvania’s Institute for Law and Economics.

D. Corporate Power	140
1. The Political Position of Management	140
2. The Role of Shareholders	142
E. Summary	143
VI. BERLE (AND DODD) TODAY	144
A. The Contemporary Gestalt	144
B. Dodd Today	146
C. Berle Today	147
1. Shareholder Primacy	147
2. Corporate Social Responsibility	149
VII. CONCLUSION	150

I. INTRODUCTION

A continuing and longstanding debate has been waged in corporate law scholarship among those who favor shareholder primacy, those who favor management discretion, and those who believe that corporations have a social responsibility to other constituencies, such as the corporation's employees, and the wider public interest.¹ Although the battle lines wax and wane, shareholder primacy prevails today as the dominant view,² with management discretion advocates in the minority, and with advocates of corporate social responsibility (CSR) as a rearguard.³ Many discussants

1. See, e.g., William W. Bratton, *Welfare, Dialectic, and Mediation in Corporate Law*, 2 BERKELEY BUS. L.J. 59, 66–76 (2005) (discussing the different paradigms with which to address corporate law); Jill Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637, 638 (2006) (challenging the shareholder primacy position); David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 220–29 (describing the different positions in this debate as arguing over the fundamental nature of corporate activity and the appropriate goals of corporate law). The scheme described in the text is simplified. Many writers traverse the categories. For example, management discretion can be coupled with social responsibility. Shareholder value, if not shareholder primacy, can be coupled with management discretion.

For a useful categorization of the shareholder primacy versus management discretion debate, see William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261 (1992). Allen describes shareholder primacy as the “property conception” view: since the corporation is owned by its shareholders and the directors are the agents of the shareholders, the duty of the directors is to maximize the value of the corporation and thus the shareholders’ residual interest. *Id.* at 266–70. Allen situates the management discretion view in the “entity conception” of the firm: since managers will act in the firm’s best interests, granting managers greater discretion is better for corporations—and thus ultimately for shareholders—in the long run. *Id.* at 270–72.

2. See, e.g., Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001) (“There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.”); Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063, 2065 (2001) (noting that “[s]hareholder wealth maximization is usually accepted as the appropriate goal in American business circles” without normatively endorsing the proposition).

3. See Bratton, *supra* note 1, at 72–74 (noting that each generation revives the social responsibility

think of themselves as picking up where Adolf A. Berle, Jr. and E. Merrick Dodd left off in their famous, precedent-setting debate of the 1930s.⁴ The generally-accepted historical picture puts Berle in the position of being the grandfather of shareholder primacy.⁵ Dodd, on the other hand, is cast as the original ancestor of CSR.⁶ But this categorization of Berle and Dodd is mistaken—an example of failing to understand old texts in their original context.

This Article corrects these mistakes and offers a new reading of these fundamental texts of corporate law, texts that recently reached their 75th anniversaries: Berle's 1931 article, *Corporate Powers as Powers in Trust*,⁷ Dodd's 1932 response, *For Whom Are Corporate Managers Trustees?*,⁸ Berle's subsequent 1932 rebuttal *For Whom Corporate Managers Are Trustees: A Note*,⁹ and, finally, Berle's famous book with Gardiner C. Means, *The Modern Corporation and Private Property*,¹⁰ also published in 1932.¹¹ Our

critique despite its rearguard status). We note that concern for constituent interests does not necessarily imply a rejection of shareholder primacy. See Jeffrey N. Gordon, *Employees, Pensions, and the New Economic Order*, 97 COLUM. L. REV. 1519 (1997) (recommending changes in pension fund investment practices).

4. See, e.g., Fisch, *supra* note 1, at 647 ("The origins of the shareholder primacy norm can be found in the classic debate between Merrick Dodd and Adolph Berle in the 1930's. . . ."); Millon, *supra* note 1, at 220–23 (beginning its discussion of shareholder primacy with an evaluation of the debate between Berle and Dodd); Donald E. Schwarz, *Defining the Corporate Objective*, 52 GEO. WASH. L. REV. 511, 521 (1984) (incorporating a brief discussion of the Berle-Dodd debate); C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility*, 51 U. KAN. L. REV. 77, 81–91 (2002) (discussing the Berle-Dodd debate in depth).

5. See, e.g., Stephen Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 561 (2003) ("Berle thought the law should put renewed emphasis on managers' fiduciary duty to maximize shareholder wealth."); Ronald Chen & Jon Hanson, *The Illusion of Law*, 103 MICH. L. REV. 1, 34 (2004) ("Berle described the protection of shareholders as the critical challenge facing corporate law. . . ."); John H. Matheson & Brent A. Olson, *Corporate Law and the Long-Term Shareholder Model of Corporate Governance*, 76 MINN. L. REV. 1313, 1330 (1992) (substantiating Berle's status as grandfather of shareholder primacy); Lynn Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1189 (2002) ("Berle argued for what is now called 'shareholder primacy'—the view that the corporation exists only to make money for its shareholders."); Adam Winkler, *Corporate Law or the Law of Business?: Stakeholders and Corporate Governance at the End of History*, 67 LAW & CONTEMP. PROBS. 109, 115–16 (2004) (describing briefly the Berle-Dodd debate).

6. See, e.g., Bainbridge, *supra* note 5, at 561 ("Dodd argued that corporations have a 'social service [responsibility] as well as a profit-making function.'") (quoting E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1148 (1932)); Bratton *supra* note 1, at 74 (noting that the CSR position originated with Dodd); Chen & Hanson, *supra* note 5, at 35 ("Merrick Dodd framed the corporate law problem in terms . . . emphasizing the threat posed by corporations to nonshareholders."); George Dent, Jr., *Corporate Governance: Still Broke, No Fix in Sight*, 31 J. CORP. L. 39, 50 (2005) (noting that the CSR position originated with Dodd); Matheson & Olson, *supra* note 5, at 1330 (same); Stout, *supra* note 5, at 1189 (noting Dodd's advocacy of the CSR position); Winkler, *supra* note 5, at 115–16 (noting that the CSR position originated with Dodd).

7. Adolf A. Berle, *Corporate Powers As Powers In Trust*, 44 HARV. L. REV. 1049 (1931) [hereinafter Berle, *Powers in Trust*].

8. E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932) [hereinafter Dodd, *Trustees*].

9. Adolf A. Berle, *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932) [hereinafter Berle, *Trustees Note*].

10. ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (Macmillan 1933) (1932).

11. One of us has appraised the book through a more modern theoretical lens. See William W. Bratton, *Berle and Means Reconsidered at the Century's Turn*, 26 J. CORP. L. 737 (2001) (comparing Berle and Means

reading resituates these texts in the historical and intellectual context in which they were written.

The time was the Great Depression, then believed to have resulted from the inherent instabilities of a capitalist system. The consensus was that emerging, modern corporate institutions were an integral part of the flawed system and thus part of the problem. The question of social responsibility was whether corporations should be treated as public institutions with obligations to mitigate the system's inherent instability, even if these obligations conflicted with maximizing shareholder returns. Parties to today's debate between shareholder primacy and management discretion ignore that question, even as it continues to be posed by the social responsibility rearguard. Today's mainstream assumes maximal returns to the firm as the only end and debates solely about the means,¹² with the dispute centered on the allocation of authority between managers and shareholders.¹³

In contrast, both Berle and Dodd answered yes to the question of CSR. The legal allocation of authority within the firm did come up in their discussion at a secondary level, but in a convoluted posture that can be made intelligible only by reference to the evolution of Berle's thinking in the rapidly changing political environment of the early 1930s. Any resemblance between the normative issues Berle and Dodd discussed and those in today's debate between management discretion and shareholder rights is more apparent than real.

For Berle and Dodd, the normative issue was the appropriate policy response to the crisis of the Great Depression. In 1932, when Berle and Dodd started their debate, it was abundantly clear that the job of formulating that policy would fall into the hands of a new Democratic administration likely to be headed by Franklin Delano Roosevelt (FDR). It was expected, although not yet certain, that FDR would follow the lead of many European leaders of the time and adopt a form of corporatism as the political economy of the United States.

Corporatism sharply differs from the pluralism that dominated political thinking both before and after the New Deal. Under pluralism, only the preferences of individuals in their role as citizens count in the welfare calculus of government policy, and competition for the votes of individuals in a political marketplace determines policy outcomes. Corporatism privileges cooperation over competition and emphasizes group over individual interests.¹⁴ It assumes that government, through consultation with the

with corporate legal theories presented by John Dewey and William O. Douglas).

12. Compare Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (2005) (discussing the allocation of power between boards of publicly traded companies and their shareholders), and Lucian A. Bebchuk, *Reply: Letting Shareholders Set the Rules*, 119 HARV. L. REV. 1784 (2006) (proposing arguments to increase shareholder decision-making power), with Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735 (2006) (critiquing Bebchuk's proposal to increase shareholder power).

13. For an account that connects the increased institutional importance of the board of directors in governance to market-based opportunities for more aggressive protection of the shareholder interest, see Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950–2005: Of Shareholder Value and the Stock Market Prices*, 59 STAN. L. REV. 1465 (2007). For a recent article advocating institutional reform for the purpose of enhancing shareholder power, see Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675 (2007).

14. One of us recently described the corporatist context of the New Deal. See Michael L. Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 U. PA. L. REV. 581 (2007) (discussing the

major groups in society, can articulate an objectively cognizable "public interest." Once the public interest is expressed, government calls on the various groups, with the corporation being one of the most important, to adapt their positions in support of it.

Corporatism implies a radical restatement of the purpose of the business corporation. It does assume capitalism and a system of private property rights and has no trouble accepting the legal model under which directors must maximize the value of the corporation. But it does this only at the threshold, the point at which corporations come to the state-directed table where the groups determine the public interest. Given a determination, the calculus of corporate rights and duties must adjust and recognize a public interest constraint. Specifically, corporate directors have a duty to manage the business and affairs of the corporation in accordance with clearly articulated public policies, even if those policies interfere with the property interests of shareholders. Putting this in the terms of the theory of the firm, corporatism views the corporation as an entity that operates as an organ of the state and assumes social responsibilities.

Both Berle and Dodd brought these corporatist assumptions to their debate. That alone inserts a normative barrier between their discussion and today's back-and-forth between shareholder primacy and management discretion in a pluralist and market-oriented political context. It also introduces a significant contextual barrier between Berle and Dodd and modern CSR. Two questions arise in light of this barrier: first, what exactly were Berle and Dodd fighting about, and, second, whatever that was, how can it be that today's corporate legal theorists so casually assume the Berle-Dodd debate's continuing pertinence? By hypothesis, there must be a theoretical account that gets us over the barrier and explains the connection between the Berle-Dodd debate and the subsequent evolution of corporate legal theory. There is, but the answers to the two questions are much more complicated than they appear to the modern reader.

This Article works through the complications, holding out solutions to a number of puzzles long unsolved in corporate legal theory. The binary picture of Berle as shareholder primacy and Dodd as CSR appears on a noisy historical screen. Some modern writers do acknowledge Berle as a CSR ancestor,¹⁵ introducing a conflicting characterization. The conflict follows from contradictions in Berle's texts, with parts of *The Modern Corporation* and the 1932 rebuttal supporting a shareholder primacy reading, while other passages in *The Modern Corporation* presage CSR. Compounding the confusion, Dodd can also be read in different ways. Although most align him with modern CSR, others see him more as an advocate for management discretion, with social responsibility as just another area inside the zone of business judgment. Berle himself made the latter characterization of Dodd,¹⁶ as do a small number of modern writers.¹⁷ A

changes in the political economy and its effect on labor unions over the last 50 years).

15. See, e.g., Bratton, *supra* note 1, at 68 (arguing that proponents of Berle expanded his theories to include public interests); Millon, *supra* note 1, at 222 (quoting an acknowledgement by Berle that another legal system may require corporate social responsibility); Terry A. O'Neill, *Toward a Theory of the Closely Held Firm*, 24 SETON HALL L. REV. 603, 619–20 (1993) (claiming that Berle predicted future firms would be socially responsible).

16. Adolf A. Berle, *Modern Functions of the Corporate System*, 62 COLUM. L. REV. 433, 442–43 (1962) [hereinafter Berle, *Modern Functions*].

17. See LAWRENCE E. MITCHELL, CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT 186–87 (2001) (demonstrating that Dodd believed business people with power would act responsibly); Thomas W. Joo, *Race, Corporate Law, and Shareholder Value*, 54 J. LEGAL EDUC. 351, 353 (2004) (stating that Dodd believed

third puzzle stems from changes of position in both authors' later writings. Dodd reversed his 1932 position in 1941,¹⁸ to be followed by Berle's concession in 1954 that Dodd's debate position had been proven correct.¹⁹

This Article shows that these complications followed from adjustments of position made by both Berle and Dodd as events unfolded in their own time, a context so far removed from that which exists today as to block either side from a legitimate claim to direct ancestry. Part II looks at Berle's evolution from a 1920s corporate lawyer to a 1930s academic and public intellectual. We call this the transition from Early Berle, who did indeed articulate a version of shareholder primacy, to Middle Berle, a corporatist on the national political stage. The discussion details the basic terms of corporatist political theory and their brief appearance in federal law in the National Industrial Recovery Act of 1933. Part III takes up *The Modern Corporation*,²⁰ distinguishing the parts of the book that set out Early Berle positions from the parts that anticipate Middle Berle, fleshing out the latter by reference to Berle's contemporaneous political writing. Part IV unpacks the Berle-Dodd debate, including rebuttals and later recantations. Part V moves on to Berle's post-war modification of his Depression-era corporatism, which we call Late Berle, highlighting the minor role he accorded to corporate governance in a scheme that integrated the legal firm within a broader theory of economics, politics, and society. Part VI relocates Berle and Dodd in the context of today's debates with indeterminate results.

Our restatement of Berle and Means and Berle and Dodd poses a question as to modern day implications: if the modern shareholder primacy position is indeed rooted in Berle, then does the shareholder primacy viewpoint gain coherence once Berle's true position is understood? The same question can be asked of the coherence of the viewpoint of the CSR rearguard with respect to the contextualized depictions of Berle and Dodd. The Conclusion addresses these questions.

Our contextualization of Berle and Means and Berle and Dodd may also hold lessons for the future. This is a story about corporate law at a time of regime change. Berle, as a political figure and corporate law scholar, was at the center of this change in regime. The question was whether the capitalist system could survive outside of the regulated state. For Berle, the challenge then was to find a way for corporate law to deal constructively with regulatory issues. Because those issues arose outside of the corporate law box, thinking inside of the corporate law box could not adequately address them. Accordingly, the narrowly drawn fiduciary duty that protects only the residual claim of the shareholders was inadequate. Berle widened the scope of the duty so that directors could not only address and comply with a broad, new set of government-specified rules, but also be cooperative participants in a common enterprise with the regulators. In today's shareholder primacy world, corporations are compliant, but not cooperative

corporations serve certain segments of society); Dalia Tsuk, *Corporations Without Labor: The Politics of Progressive Corporate Law*, 151 U. PA. L. REV. 1861, 1894–95 (2003) (illustrating that Dodd believed business practices would support social goals).

18. See generally E. Merrick Dodd, Jr., *The Modern Corporation, Private Property, and Recent Federal Legislation*, 54 HARV. L. REV. 917, 925–27 (1941) [hereinafter Dodd, *Modern Corporation*] (explaining his views on American corporations).

19. ADOLF A. BERLE, JR., *THE 20TH CENTURY CAPITALIST REVOLUTION* 169 (1954) [hereinafter BERLE, 20TH CENTURY].

20. BERLE & MEANS, *supra* note 10.

players of the regulatory game. When the existing regime runs its course and a new regime dawns, as at some point it certainly will, Berle's cooperative model of corporate duties may become relevant once again.

II. EARLY TO MIDDLE BERLE: FROM CORPORATE LAWYER TO CORPORATIST

Adolf Berle received a Rockefeller Foundation grant for an "interdisciplinary" study of corporations in 1927,²¹ a project that five years later would result in *The Modern Corporation and Private Property*. The performance of the American economy would change rapidly and radically during the five-year period of research and composition, and so would Berle's ideas about regulation and corporate law. He began the period as an advocate of corporate self-regulation. He soon shifted to a view favoring judicially enforced shareholder primacy. He also was reflecting on the broader political economy, emerging in 1932–1933 as an advocate of corporatist solutions to the national economic crisis. His views registered strongly both in FDR's 1932 campaign and in the legislative program of the Hundred Days of 1933, when corporatism came to the fore in national regulatory policy. This Part recounts this development, laying the groundwork for our reconsideration of *The Modern Corporation* and the Berle-Dodd debate in Parts III and IV.

A. Early Berle: From Self Regulation to Judicially Enforced Shareholder Primacy

At the time of the Rockefeller Foundation grant, Berle was a Wall Street lawyer with an academic bent. Strictly speaking, that description fit him for the rest of his career: although he took up an academic appointment at Columbia Law School in 1928, Berle never closed his downtown law office. At the same time, Berle the lawyer published a well-known series of commentaries on corporate law.²² Berle focused on management power and the shareholders' inability to control it even in these early writings.²³ The separation of ownership and control, then a new phenomenon, was occasioning reexamination of settled matters of law. Management power had traditionally been restricted in the articles of incorporation, or, alternatively, by owner-shareholders. By the time ownership dispersed in the early decades of the twentieth century, the large corporations had general charters that omitted the restrictions. Managers emerged with new powers—they could enter new businesses and issue new stock to fund the ventures at will. Courts and legislatures were grappling with how to treat the inherited legal framework in light of this development.²⁴ Should charters be interpreted as complete

21. JORDAN A. SCHWARZ, *LIBERAL: ADOLF A. BERLE AND THE VISION OF AN AMERICAN ERA* 51 (1987).

22. For a summary of this series, see ADOLF A. BERLE, JR., *STUDIES IN THE LAW OF CORPORATE FINANCE* (1928) [hereinafter BERLE, *CORPORATE FINANCE*].

23. See *id.* at v–vi, 26–34 (arguing that allowing managers to determine the property rights of shareholders eroded their ability to control corporations); *id.* at 37 (stating that shareholders cannot afford to enforce their rights).

24. Statutes of general incorporation became common in the 1870s and 1880s. JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780–1970*, at 56 (1970). However, this first generation of general incorporation statutes carried numerous restrictions on the form a corporation could take. *Id.* at 56–57. Over the next several decades, there was debate over how strong these restrictions should be. *Id.* A second generation of incorporation statutes that made the corporate purpose provisions a default rather than a mandatory provision became common in the 1930s. *Id.* at 69–71.

contracts and enforced according to their literal terms, or were there implied fiduciary constraints that required judicial enforcement?

The Berle of the 1920s favored a contractual approach. He expressed skepticism respecting prospects for constructive judicial intervention: “[C]ourts cannot be expected to work out rules of conduct for the business community except with the guidance and assistance of business men themselves, and for this purpose business standards themselves must be made apparent.”²⁵

For this Berle, the problem was that the sources of corporate regulation—corporate charters and statutes—were not helping to make “business standards” apparent. Then, as now, the standard practice favored broad drafting toward the end of according management discretion to run the business. Berle, looking to protect the interests of the holders of shares in publicly traded firms, saw a need for constraints on management discretion. He wanted the problem to be solved by “business men themselves,” and looked to self-regulatory reforms.²⁶ More particularly, he suggested: (1) that investment bankers organize themselves into an enforcement body to facilitate scrutiny (and screening) of firms making public securities offerings; (2) that the stock exchanges withhold listing from firms whose managers abused their power and demand disclosure of corporate information; and (3) that large institutional shareholders like insurance companies position themselves to obtain accurate information about issuers and to protect shareholder rights.²⁷ With respect to institutional shareholders he had a more specific suggestion:

Suppose . . . trust companies were in the habit of accepting, on “custodian account,” deposits of stocks from small shareholders, thereby gathering many small holdings into an institution commanding a block so large that protection was worth while, and that they also provided themselves with power to represent the depositors of stock. Such institutions could easily keep themselves informed as to the affairs of the corporation . . . and, as representing their clients, could take the action necessary to prevent or rectify violations of property rights²⁸

Ironically, each of the items on Berle’s list has shown up prominently in recent governance debates.²⁹ Those advancing these positions today do so from the deregulatory wing of the corporate law academy, inviting the label “contractarian.”³⁰ The political

25. BERLE, *CORPORATE FINANCE*, *supra* note 22, at 36.

26. For a contemporary articulation of this position rooted in the economic theory of the firm, see Edward Rock & Michael L. Wachter, *Islands of Conscientious Power: Law, Norms and the Self-Governing Corporation*, 149 U. PA. L. REV. 1619 (2001).

27. BERLE, *CORPORATE FINANCE*, *supra* note 22, at 37–39.

28. *Id.* at 39.

29. See, e.g., Bernard Black & Reinier Kraakman, *A Self Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1910 (1996) (arguing that large outside shareholders could self-enforce corporate governance standards); Paul G. Mahoney, *The Exchange As Regulator*, 83 VA. L. REV. 1453 (1997) (suggesting self-regulation by the securities exchanges); Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359 (1998) (advocating a market-oriented approach of competitive federalism to securities regulation).

30. For an exposition of the contractarian point of view, see FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 1–39 (1991) (explaining contractarianism).

implications were quite different in the 1920s, however. Berle was staking a position as a reformer. Indeed, his approach had a precise analogue in the industrial pluralism of the institutional economist John R. Commons, with its view of the state as the enforcer of bargains entered into by self-constituted groups representing adverse economic interests.³¹ Berle, in fact, contemporaneously published short opinion pieces that speculated about movement toward worker ownership.³²

Berle's attitude toward regulation would change even before the stock market crashed.³³ The catalyst was Gardiner Means. Berle's Rockefeller grant required the participation of an economist. This prompted Berle to engage Means, an economics graduate student and childhood friend,³⁴ as a "statistical and economics research assistant."³⁵ Means contributed *The Modern Corporation's* empirical studies of corporate concentration and dispersed share ownership.³⁶ His empirical results showed that one-third of the national wealth lay in the hands of 200 large corporations. Means projected that, given continuation of the present rate of growth of that relative share, 70% of economic activity would be carried on by 200 corporations by 1950, even as share ownership became more and more dispersed.³⁷ The upshot was that economic power was concentrating in the hands of a cluster of corporate managers, the same group whose level of responsibility already had come to concern Berle. (These projections of increasing concentration would prove to be fundamentally wrong, but only much later; classical economics was still in its infancy.)³⁸ At the time, Means' projections sent a loud and clear message: something had to be done about corporate power, something more than Berle had thought previously. Berle changed his views accordingly. What he formerly saw as a governance problem to be treated contractually within the financial community, he now came to see as a case for judicial control in the name of the shareholder interest.³⁹

Berle stated this position in *Corporate Powers as Powers in Trust* in the *Harvard Law Review* in 1931,⁴⁰ an article that previewed legal points in the upcoming *The Modern Corporation* without a hint as to the political-economic framework in which the book would encase them. More particularly, the article restates what was then considered the problem of corporate power: "Of recent years aggregations of capital have been collected from the public sale of stock in corporations with paper powers which are broad enough to permit them to rove the world at will."⁴¹ The article then launches into a

31. See Daniel R. Ernst, *Common Laborers? Industrial Pluralists, Legal Realists, and the Law of Industrial Disputes, 1915-1943*, 11 *LAW & HIST. REV.* 59, 66-68 (1993).

32. SCHWARZ, *supra* note 21, at 65.

33. The change had occurred by the spring of 1929. *Id.* at 55.

34. *Id.* at 51.

35. ADOLF A. BERLE, JR., *NAVIGATING THE RAPIDS, 1918-1971*, at 21 (Beatrice Bishop Berle & Travis Beal Jacobs, eds. 1973) [hereinafter BERLE, RAPIDS].

36. Berle eventually conceded co-authorship and one-third of the royalties. SCHWARZ, *supra* note 21, at 58-59.

37. BERLE & MEANS, *supra* note 10, at 9, 37, 40.

38. Berle would later be forced to adjust his numbers as the prediction failed to prove out. See *infra* text accompanying note 267-68.

39. BERLE & MEANS, *supra* note 10, at 56.

40. Berle, *Powers in Trust*, *supra* note 7.

41. *Id.* at 1066.

discussion of fiduciary duty as a means of addressing the problem, asserting that the arguably archaic and longstanding rule that a corporation was for the benefit of its owners remained true when ownership and control were separated.⁴² Managers were trustees of the shareholders and so might only exercise their wide ranging powers for the benefit of the shareholders. More particularly, “the use of the power is subject to equitable limitation when the power has been exercised to the detriment of [shareholder] interest, however absolute the grant of power may be in terms, and however correct the technical exercise of it may have been.”⁴³ The role of the judiciary was to enforce this principle.

This was by no means a settled principle of law. Berle accordingly marshaled the cases, pointing to a variety of rules that constrained exercises of managerial authority. For example, the directors’ power to issue stock was limited by the requirement that the ratable interest of existing and prospective shareholders be protected.⁴⁴ The power of directors to withhold dividends provided a second example: while directors generally had freedom to withhold dividends, courts would force distribution when the reason for the withholding was a non-business purpose.⁴⁵ Third, the power to acquire stock in another corporation had to be used for the benefit of the acquiring corporation and not for managerial interests.⁴⁶ A final example involved the power to amend the certificate of incorporation. In this setting, the power rested with the majority of shareholders rather than the directors, but the rule remained the same—majority power was subject to equitable limitations.⁴⁷ The only distinction between the exercise of shareholder power and that of directors was that the “vote of shareholders would at least tend to create a presumption that action taken benefits all of such shareholders.”⁴⁸ But the presumption could be rebutted by a showing that the majority was a group that had interests adverse to the corporation as a whole.

All of these cases presupposed an active judiciary that would evaluate business decisions on a fact-specific basis. Berle looked to a principles-based rather than rules-based jurisprudence. His remarks on the law of preemptive rights reflected his view of corporate law generally:

The only conclusion that can be drawn from the tangled history of preemptive rights is that the doctrine arose from an attempt to impose an equitable limitation on an apparently absolute power of directors to issue stock; that it should never have hardened into a rigid rule of law, and that it should revert to its original status as a remedy, available in equity and possibly, by

42. *Id.* at 1066–74.

43. *Id.* at 1049.

44. *Id.* at 1050–60.

45. Berle, *Powers in Trust*, *supra* note 7, at 1060–63. Examples of this include *Dodge v. Ford*, 170 N.W. 668 (Mich. 1919), where the Ford board withheld dividends purportedly to share the wealth the company had created with its customers rather than its stock owners, or, more starkly, when the father-owner of a close corporation withheld dividends to discipline his family.

46. Berle, *Powers in Trust*, *supra* note 7, at 1063–66. Thus, a cross-stock ownership scheme between the Prudential and Fidelity corporations that was implemented for the purpose of management entrenchment was struck down. *Robotham v. Prudential Ins. Co.*, 53 A. 842 (N.J. Ch. 1903).

47. Berle, *Powers in Trust*, *supra* note 7, at 1066–69.

48. *Id.* at 1067.

transposition, at law.⁴⁹

Berle summed up with a two-prong test to assess the legitimacy of actions taken by managers: first, whether the technical power for the action existed, and second, whether the action was consistent with the managers' role as a fiduciary to the shareholders.⁵⁰ The latter prong was to be guided by the analogous rules of trust law.⁵¹ This logic of the proposed test resonates in modern Delaware corporation law, which also looks first for power to act and thereafter asks whether the fiduciary duty to act in the interest of the shareholders has been violated.⁵² Delaware also imposes special duties on controlling shareholders, but the resemblance occurs only at this high level of generality. Berle's article also evinces his deep distrust of managers and his belief that their power needed some form of significant, substantive constraint. Here, *Powers in Trust* loses its resonance with today's Delaware jurisprudence even as it can be tied to the line of contemporary corporate legal theory stressing shareholder primacy.⁵³ Berle would continue to distrust managers and advocate their constraint for the rest of his career. But that distrust would very soon reconstitute itself in a form utterly alien to today's advocates of shareholder primacy.

B. Middle Berle: The New Deal and Corporatism

Thus did Berle make his mark as a corporate law academic in 1931. He also had an interest in national policy issues. *The Modern Corporation and Private Property*, still in preparation, would synthesize both areas of interest. Before turning to that text, we follow Berle, the public intellectual, to the national political stage.

Governor Franklin Roosevelt reached out to academics for assistance with policy positions early in his 1932 presidential campaign. Roosevelt recruited Raymond Moley, a government professor at Columbia. Moley then recruited Berle for expertise on credit and corporations along with a Columbia economics professor, Rexford Tugwell, for expertise on agriculture. Together they made up the core of what came to be called Roosevelt's "Brains Trust."⁵⁴

49. *Id.* at 1050–59.

50. *Id.*

51. *Id.*

52. The requirement of power to act follows from Delaware General Corporation Law sections 141(a) and 142(a). The former section vests management authority in the board of directors and the latter section mandates the appointment of officers to execute the board's business decisions. See DEL. CODE ANN. tit. 8, §§ 141(a), 142(a) (2001 & Supp. 2006). Formal approval and delegation must occur case by case. Subsequent fiduciary scrutiny follows from section 144 and the common law. See *id.* § 144 (providing for scrutiny of conflict of interest transactions); see also *id.* § 102(b)(7) (permitting opting out in limited circumstances).

53. Berle's positions would echo strongly for the rest of the twentieth century in academic work advocating a more restrictive fiduciary regime than that imposed by Delaware. See, e.g., William L. Cary, *Federalism and Corporate Law: Reflections on Delaware*, 83 YALE L.J. 663 (1974) (suggesting federal intervention in formulating fiduciary standards); Marvin A. Chirelstein, *Towards a Federal Fiduciary Standards Act*, 30 CLEV. ST. L. REV. 203 (1981) (discussing whether Congress should act in the field of managerial conduct and arguing that the idea of federal legislation is instrumental in solving fiduciary problems).

54. SCHWARZ, *supra* note 21, at 70–73.

1. The "New Individualism"

Berle sketched out his position even before joining the campaign, pitching it to Louis Brandeis in a letter dated February 22, 1932.⁵⁵ Brandeis was a prominent "New Freedom" progressive who advocated aggressive antitrust enforcement for the restoration of market competition, prohibition of unfair trade practices, and protection for small business.⁵⁶ Berle, in contrast, thought market competition was part of the problem. Although corporate concentration had gone too far, he wrote, the antitrust platform did not provide a viable approach to the economic crisis of 1932.⁵⁷ Better to accept the large economic units and mold them so as to make them useful to the people. State capitalist planning could address the economic crisis even as the individual was protected.

Once inside the campaign, Berle promptly set out these ideas in a memorandum to Roosevelt entitled *The Nature of the Difficulty*.⁵⁸ Success with Roosevelt was by no means guaranteed. Although Moley and Tugwell were of one mind with Berle,⁵⁹ Roosevelt liked to surround himself with advisors espousing competing positions. One such advisor was Felix Frankfurter, an old nemesis of Berle's,⁶⁰ who, along with a cadre of acolytes, still hewed to the economic liberalism of decades before.⁶¹

Berle's star ascended, however, and he received the go-ahead from Roosevelt to draft a campaign speech that would represent a philosophical statement of the candidate's economic policy. The speech, *New Individualism*, was delivered by Roosevelt on September 23, 1932 to the Commonwealth Club of San Francisco, a prestigious club of nonpartisan individuals interested in matters of government.⁶² The speech—by all accounts the most radical of FDR's campaign⁶³—was received tepidly, if not with some hostility.⁶⁴ It has since received a good deal of attention among political scientists, even making a list of the 100 most important political speeches in American history.⁶⁵ The speech naturally did not carry Berle's signature, but it is generally agreed that Berle (and

55. *Id.* at 74–75.

56. See DONALD R. BRAND, *CORPORATISM AND THE RULE OF LAW: A STUDY OF THE NATIONAL RECOVERY ADMINISTRATION* 65 (1988) (summarizing the political agenda of New Freedom progressives).

57. SCHWARZ, *supra* note 21, at 74–75

58. *Id.*

59. See BRAND, *supra* note 56, at 74–79 (summarizing Moley and Tugwell's economic and political stance).

60. It might be more accurate to say that Berle was an old nemesis of Frankfurter's. Berle had Frankfurter as a teacher during his first year at Harvard Law School and reportedly harassed Frankfurter rudely and mercilessly during their class sessions. Frankfurter was rumored to have played a role in Berle's not being invited to join the *Harvard Law Review* after his second year. Although Berle's grades were higher than those of some who made the *Review* in that second round, his biographer sees no reason to infer professorial interference, suggesting that Berle had been as unpopular with his classmates as he had been with his professors. See SCHWARZ, *supra* note 21, at 14–15.

61. *Id.* at 76.

62. *Id.* at 78.

63. *Id.* at 79; Franklin Delano Roosevelt, Address Before the Commonwealth Club (Sept. 23, 1932), available at <http://www.americanrhetoric.com/speeches/fdrcommonwealth.htm> [hereinafter Roosevelt, Address] (containing the text of the speech).

64. Davis W. Houck, *FDR's Commonwealth Club Address: Redefining Individualism, Adjudicating Greatness*, 7 RHETORIC & PUB. AFF. 259, 262 (2004).

65. It ranked 78th. See University of Wisconsin-Madison, Top 100 American Speeches of the 20th Century, <http://www.news.wisc.edu/misc/speeches>.

his wife Beatrice) wrote it and that Roosevelt accepted it with very minor changes.⁶⁶ It is also agreed that the speech in fact represented its author's views and presaged the economic program of the New Deal. That the speech may not have represented Roosevelt's views is less important for our purposes.

The "new individuals" of the speech were ordinary citizens. They had economic rights—the right to make a comfortable living and the right to own property. Those rights needed to be protected in order to ensure the safety of savings.⁶⁷ The parties infringing the rights were corporate managers, the "princes of property,"⁶⁸ who exercised "powers in trust."⁶⁹ Note that the text at this point diverges from the shareholder primacy of *Corporate Powers as Powers in Trust*. Even as the phrase "princes of property" bespeaks concern about management power, Berle displaced the shareholder as his trust beneficiary with the "new individuals." That accomplished, Berle reached the punch line: private property rights would need to give way in the face of the public interest. Where a year and half earlier the managers' private economic power had implied a private trust, the implied trust was now public.

The speech went on to call for government controls. Continued sufferance of management power depended on the trust's fulfillment: the "princes of property" had to assume responsibility for the public good, end their internecine disputes, come together as industrial groups, and cooperate toward a common end. Should any such group defect from cooperation, the government would intervene with punishment.⁷⁰ Thus coordinated, firms could serve the people—adjusting production to consumption and distributing wealth more equitably.⁷¹ The chaotic marketplace would be disciplined by "an economic constitutional order."⁷² Said Berle: "The day of the manager has come."⁷³

Although that last point was debatable, Roosevelt's day would come soon enough and the *New Individualism* would find its way into public policy. Berle used "new" individualism to contrast with the "old" individualism of Frankfurter and the other New Freedom progressives and its stress on small business and strict antitrust enforcement.⁷⁴ "Collectivism" was the more common term at the time.⁷⁵ We prefer the more precise term "corporatism."⁷⁶ Corporatist policies had been debated in European political circles

66. SCHWARZ, *supra* note 21, at 78.

67. BERLE, RAPIDS, *supra* note 35, at 69.

68. *Id.*

69. See Berle, *Powers in Trust*, *supra* note 7 (summarizing powers in trust exercised by corporate managers).

70. BERLE, RAPIDS, *supra* note 35, at 69.

71. SCHWARZ, *supra* note 21, at 78–79.

72. BERLE, RAPIDS, *supra* note 35, at 67.

73. *Id.*

74. SCHWARZ, *supra* note 21, at 78.

75. *Id.* at 79 (quoting Tugwell); see also ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY 35 (1966) (commenting on the emergence of a "cooperative collectivist democracy" as one of three schools of thought in the political struggle of the NIRA period). Schwarz describes Berle's approach in two conjoined phrases: "state capitalism" and "corporate liberalism." SCHWARZ, *supra* note 21, at 68. "Corporatism" effectively merges the two.

76. We do not claim an original observation. Roberta Romano also interprets Berle as a corporatist. Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 936 (1984); see also Wells, *supra* note 4, at 103–04 (explaining that Berle's 1950s vision of society based on the corporation was a variant of corporatism).

and had impacted European government policy since the late nineteenth century. They came to the fore of policy discussions in the United States in the early 1930s as the depth of the economic crisis became apparent. Berle explained it as follows in a memorandum to Roosevelt in the summer of 1932:

[I]t is necessary to do for this system what Bismarck did for the German system in 1880, as result of conditions not unlike these. . . . Otherwise only one of two results can occur. Either these handful of people who run the economic system now will get together making an economic government which far outweighs in importance the federal government; or in their struggles they will tear the system to pieces. Neither alternative is sound national policy.⁷⁷

Berle's *New Individualism* speech thereafter brought corporatism to the forefront of American electoral politics.

We acknowledge that the term corporatism is not well known in the United States. Indeed, those who do know it tend to avoid it,⁷⁸ no doubt due to its association with the fascist politics of the European countries that formally adopted corporatism during the 1920s and 1930s.⁷⁹ But those associations can be put aside here, not only as regards the context of 1932, but as regards the views Berle expressed for the remainder of his career. At the same time, we make only a limited descriptive claim for corporatism. We use it as a heuristic for the texts under discussion and for one subset of New Deal legislation.⁸⁰ Thus employed, it highlights the magnitude of the conceptual gulf that separates what Berle, Means, and Dodd talked about from what we talk about today. Corporatism does

We also note that Berle has been characterized as a "pluralist." See Dalia Tsuk, *From Pluralism to Individualism: Berle and Means and 20th-Century American Legal Thought*, 30 LAW & SOC. INQUIRY 179, 185–94 (2005) (arguing that Berle and Means helped re-shape a legal pluralist vision of the modern state in their collaborative work during the 1920s and 1930s). Tsuk situates Berle by reference to early twentieth-century political theorists she terms "legal pluralists." *Id.* We have no quarrel with her description of the ideas in circulation and their application to Berle, but we think the term corporatism and the associated bundle of concepts describe him better. We also think that the transition from Early to Middle Berle effected a break—Early Berle was influenced by ideas descended from the European legal pluralists of the nineteenth century; Middle Berle was not. For a description of the European legal pluralists, see Anna Di Robilant, *Genealogies of Soft Law*, 54 AM. J. COMP. L. 499, 527–45 (2006). See also Ernst, *supra* note 31, at 60–61 (describing group-oriented reformers of the early twentieth century as "liberal pluralists" and going on to distinguish within the group industrial pluralists who favored contractual solutions among empowered groups without strong state intervention from a more interventionist group of legal realists). In Ernst's description, the legal realists differed one from the other depending on their willingness to turn away their critical eyes and back the social welfare formulations of an interventionist state. *Id.* at 69–71. Early Berle can be associated with the former subgroup, see *supra* Part II.A., while Middle Berle's affinities lay strongly with the latter subgroup, in particular, Thurman Arnold (prior to his entry into government). Ernst, *supra* note 31, at 90–97.

77. SCHWARZ, *supra* note 21, at 78.

78. A leading historian of the New Deal describes the early New Deal corporatists as, alternatively, advocates of a vision of a "business commonwealth" and advocates of a "cooperative, collectivist democracy." See HAWLEY, *supra* note 75, at 35 (outlining the two alternative ideologies as part of a three-cornered system that also included the old, established market-driven ideology).

79. The first full adoption of a corporatist policy was in Benito Mussolini's Italy in 1922, with a few other European countries following suit during the 1920s. HOWARD J. WIARDA, CORPORATISM AND COMPARATIVE POLITICS 40 (1997).

80. We do not claim that the New Deal was broadly corporatist. New Deal policies and legislation developed in reaction to events and drew on a range of ideologies. See DANIEL T. RODGERS, ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE 409–12 (1998) (referring to Italian corporatism).

this particularly well precisely because its operative concepts fell from favor in this country in the wake of pluralism's triumph after World War II. It also facilitates explication of the texts without an unnecessary diversion of attention to the nuances of early twentieth century political-economic thinking. The next subsection sets out our descriptive template.

2. Corporatist Theory

As described by one commentator, corporatism⁸¹ is one of the three great "isms" of the twentieth century, along with Marxism and liberal pluralism.⁸² Although pure forms of any of the three movements do not exist, pure forms serve as useful reference points. In terms of jurisprudence, the three can be differentiated in terms of two core questions: 1) who is enfranchised and thus able to address the sovereign, and 2) whose preferences count when the sovereign makes its policy decisions?

Liberal pluralism stands at the individualist extreme. Here, only the preferences of individuals in their role as citizens get counted in the welfare calculus of government policy. Policy outcomes are determined by competition for the votes of individuals in a political marketplace. While individuals with shared interests form advocacy groups to compete for favorable policy outcomes, the interest groups themselves have no political status beyond the aggregation of their members' interests. Although corporations, unions, and interest groups count and express their official views, they count only to the extent that they offer informed judgments, political donations, or control votes. Communism stands at the opposite, collectivist extreme. Here, only the party gets to address the state, and only its preferences matter. Firms and unions are instruments to carry out the party's political agenda. Advocacy groups keep a low profile if they exist at all. The people's democracies are democracies only in the sense that the party claims knowledge of what the people should want.

Corporatism stands between the two extremes with a more complex structure. The pivotal distinction between corporatism and pluralism is that in corporatism, groups are enfranchised as well as individuals.⁸³ An individual who belongs to a group in a sense gets two votes, with group participation being the more important of the two. Individuals are identified by their group, whether it be their parish, occupational association, industry association, or union organization.⁸⁴ The groups then operate as the political actors. Rather than one person-one vote, it is the groups' votes that determine government policy, with the more powerful groups having the most votes.⁸⁵ Those outside the shield of a recognized negotiating group have only "the devalued currency of electoral representation,"⁸⁶ to use one commentator's words.

Corporatism emphasizes cooperative relationships among groups and between the state and the different groups. This is based on two principles. The first is the conception

81. This Article's presentation of corporatist theory and the failure of the National Industrial Recovery Act draws on Wachter. See generally Wachter, *supra* note 14.

82. WIARDA, *supra* note 79, at 5.

83. ALAN CAWSON, CORPORATISM AND POLITICAL THEORY 145 (1986).

84. WIARDA, *supra* note 79, at 18.

85. *Id.*

86. CAWSON, *supra* note 83, at 145.

of some sort of objectively cognizable “public interest” articulated by the government with consultation from the major groups. Once the public interest is expressed, the various groups are expected to adapt their policies so as to support it.⁸⁷ In Berle’s *New Individualism* variant, the public interest is described in terms of the economic rights of individuals.⁸⁸

The number of groups with access to the state is limited in corporatism. Where pluralism envisions an unlimited number of interest groups acting as extensions of many atomistic actors and operating in a competitive political marketplace, corporatist theory sees a limited number of groups, each wielding substantial political power.⁸⁹ Groups are assembled into hierarchies, and the “peak associations” at the top hold the most influence with government policymakers. The peak associations are groups like industry-wide business associations or national labor federations whose broad membership is thought to discourage narrow conceptions of political interest.

To function properly, corporatism requires group discipline. The peak groups are expected to exert discipline among their constituent local groups so as to maintain cohesive support for national policies. With that accomplished, the peak associations then battle with or serve as counterweights to rival peak associations. For example, union federations are pivotal because they offer a counterweight to the largest corporations, perhaps the most powerful of the peak associations.

While Berle did not stress corporatist modes of political organization, he otherwise fully embraced the corporatist vision, most notably the emphasis on government management of the economy. Corporatism views free competition as a destructive force that has to be both controlled and channeled through institutions that practice fair, but not free, competition under the watchful, mediating power of the government. In corporatism, fair competition means the “stabilization of business” with prices at levels that simultaneously assure fair wages, yield an adequate return on invested capital, and support high levels of employment.⁹⁰ Berle would stress these points during the 1932 campaign, the early New Deal, and for the rest of his academic career.

3. Berle’s Corporatism in Practice: The National Industrial Recovery Act.

Berle continued to promote the corporatist program in public venues after Roosevelt won the election.⁹¹ He also kept it on the inner circle’s agenda during the transition period, generating a legislative research file on antecedent stabilization regimes⁹² and, in a memorandum sketching the terms of statutes to be enacted immediately after the inauguration, a brief description of possible legislation.⁹³ A statute did follow during the

87. HARMON ZEIGLER, PLURALISM, CORPORATISM, AND CONFUCIANISM 22–23 (1988).

88. Roosevelt, Address, *supra* note 63.

89. CAWSON, *supra* note 83, at 35.

90. HAWLEY, *supra* note 75, at 14, 26–27 (describing the aspirations of the NIRA’s creators).

91. SCHWARZ, *supra* note 21, at 84–85.

92. The United States had experimented with corporatism in order to mobilize the country to fight the Great War. With the War Industries Board, President Wilson established an “essentially corporatist, tripartite (business, labor, and the state) arrangement to protect against strikes during the war, and to ensure the necessary massive and uninterrupted production.” WIARDA, *supra* note 79, at 135.

93. BERLE, RAPIDS, *supra* note 35, at 78–79. It would not rise to priority on the new administration’s agenda until after the first month however. See HAWLEY, *supra* note 75, at 21–22 (stating that “the new

Hundred Days—the National Industrial Recovery Act (NIRA).⁹⁴ Berle did not, however, participate in its preparation. He had chosen to stay in New York, declining a seat on the Federal Trade Commission.⁹⁵ Moley and Tugwell—who had both accepted posts in the Administration—served on a drafting team. Roosevelt, pursuant to his usual practice, commissioned a competing draft, in this case from Senator Robert Wagner, whose team included Jerome Frank.⁹⁶ The two groups hammered out the final draft in a locked door session on May 10, 1933. The statute, passed by the Congress in June, represented the adoption of corporatism by the United States.⁹⁷ It was the centerpiece of the First New Deal.

The NIRA was administered by the National Recovery Administration (NRA). Like Berle, the NRA's leaders were committed corporatists who sought to replace a perceived individualistic, selfish, hyper-competitive system with a system built around concerted activity under government supervision. Also like Berle,⁹⁸ the first head of the NRA, General Hugh Johnson, believed that capitalism had brought the United States to the brink of collapse.⁹⁹

At the core of the NIRA were codes of fair competition for individual industries. Trade associations, as the hierarchical peak groups for business, could ask that the federal government approve codes of practices for their industries.¹⁰⁰ The codes, once approved by the NRA, were legally binding on all the firms in the industry. If the trade association proved reluctant to come forth with a code, the NRA could adopt one for it.¹⁰¹

The codes offered business firms an unusual plum, namely, legalized concert of action as a way out of the disastrous price cutting that had led to alarming numbers of bankruptcies. In short order most of the major industries were covered by codes. The companies that belonged to associations with approved codes were allowed to display the Blue Eagle symbol, which publicly advertised their good standing with the NRA.¹⁰²

The NIRA held out an even bigger plum for one of its major beneficiaries—the unions. At the start of the New Deal, labor was largely unorganized, weak, and entirely unable to serve the functions required for the business-labor cooperation envisioned by the NIRA. NIRA section 7(a) provided a new platform, augmenting the previously

Administration had no plans for broad changes in the business structure”).

94. National Industry Recovery Act, 48 Stat. 195, 196 (1933).

95. He took a position as a counsel to the Reconstruction Finance Corporation. SCHWARZ, *supra* note 21, at 68.

96. The drafting teams encompassed an array of competing interests, including business. The bill emerged as a compromise, holding out items for all and leaving much open to later administration. HAWLEY, *supra* note 75, at 19–26.

97. It was recognized at the time as drawing from the models being created in Europe. BRAND, *supra* note 56, at 83–85. In addition to the NIRA, the Robinson-Patman Act (1936), the Davis-Bacon Act (1931), the Miller-Tydings Act (1937), as well as state and local price-maintenance laws, were elements of the move toward a corporatist economy.

98. SCHWARZ, *supra* note 21, at 87.

99. BRAND, *supra* note 56, at 99–100.

100. National Industry Recovery Act, ch. 90, § 3, 48 Stat. 195, 196 (1933) (invalidated by *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)) (“Upon the application to the President by one or more industrial associations or groups, the President may approve a code or codes of fair competition for the trade or industry . . .”).

101. BRAND, *supra* note 56, at 235.

102. *Id.* at 94.

acknowledged right of labor to organize¹⁰³ with the right to do so free from interference by employers.¹⁰⁴ In addition, the industry codes, before being approved “had to meet specific conditions regarding the rights of employees to participate in union activities and requirements of employers to comply with maximum work hours and minimum rates of pay.”¹⁰⁵

The NIRA got off to a fast start, but it fell apart almost as quickly.¹⁰⁶ The cooperative alliances to which it looked never fully coalesced. Absent cooperation, its economic plan foundered on internal contradictions. The NIRA leadership wanted a system where, “fundamentally decent businessmen would not be forced by competitive pressures to exploit their employees.”¹⁰⁷ For the system to succeed, unions and businesses had to exercise self-restraint in their bargaining demands and be responsible by supporting national priorities over their own priorities. This did not happen.¹⁰⁸ Neither management nor labor was willing to play within the new corporatist structure. Strikes and lockouts spread.¹⁰⁹ Corporations were unconvinced that the relaxation of the antitrust laws was sufficient to compensate for the cost of Section 7(a). Union leaders were in a similar position as members’ aspirations and militancy increased along with workers’ new organizational rights. And unions, more than business, were willing to gamble that the National Labor Board or the President himself would intervene and support their claims in order to restore labor peace.¹¹⁰

The new social ethic propagated by the system had not caught on. Nor did the organizational hierarchies envisioned by the corporatist theory appear in practice. Neither the Chamber of Commerce nor the AFL could successfully force member firms or union locals to bring their goals in line with the Roosevelt Administration’s public policy goals. Nor is it clear that they ever tried to rally their troops.¹¹¹

103. Roos explained that under NIRA section 7(a):

[E]mployees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection

CHARLES F. ROOS, *NRA ECONOMIC PLANNING* 484 (Da Capo Press 1971) (1937).

104. The exact scope of the right to be free from interference was never clarified, but it did provide the basis for limiting the employer’s right to hire and fire based on an employee’s interest in unionization. BRAND, *supra* note 56, at 230.

105. FREDERICK E. HOSEN, *THE GREAT DEPRESSION AND THE NEW DEAL* 194 (1992).

106. In the rush to implement, the original drafting of the NIRA was left to Brain Trusters and progressive politicians with little input from business or labor. See BRAND, *supra* note 56, at 83–86 (describing the drafting of the NIRA).

107. *Id.* at 12.

108. *Id.* at 94 (noting that the Great Depression did not elicit the “level of virtuous self-restraint” necessary for NRA compliance).

109. There were numerous union organizing and bargaining conflicts with businesses that required the mediating skills of the NIRA leadership and often Roosevelt himself. See FOSTER RHEA DULLES, *LABOR IN AMERICA* 271–72 (3d. ed. 1966) (describing the precipitous increase in strikes under the NIRA as workers fought for higher wages and union recognition).

110. BRAND, *supra* note 56, at 258–59.

111. Henry Harriman, president of the Chamber of Commerce, claimed in May of 1933 that the NIRA was the “Magna Carta of Industry and Labor” and his legal staff would immediately begin drafting a model code of fair competition. ROOS, *supra* note 103, at 43. However, by November of 1933 the Chamber had become

Eventually, the NIRA's political base became unstable. It had rested on an alliance of New Deal corporatists and antitrusters.¹¹² Both shared a common belief that the free enterprise system had failed, but both, as we have seen, went on to offer diametrically opposed solutions. While the antitrusters supported the wage increases newly organized workers were winning, they were upset with the price increases that were necessary to cover the cost of the increased wage.¹¹³ Reflecting these internal contradictions, antitrusters in Congress began to challenge the codes' price fixing practices as illegal under prevailing law.¹¹⁴

The NIRA, in sum, was terminal even before it was put to rest by the Supreme Court in *Schechter*.¹¹⁵ But corporatism did not die with it. Full-blown corporatist policies returned with World War II in response to the need for increases in production of war machinery. Given the exigencies of the war, Roosevelt replaced the soft sanctions of the NIRA with heavy-handed, authoritarian sanctions. The war policies included wage and price controls and a low tolerance for even lawful work stoppages by unions. When dispute resolution failed, the government had a new policy option to help the parties resolve their disputes: executive orders allowing the government to seize companies. During the war, there were no fewer than 18 executive orders involving labor regulation, and all of the government's industrial seizures in this period were accomplished by executive order.¹¹⁶ From 1941 to 1945, Presidents Roosevelt and Truman conducted 71 industrial seizures.¹¹⁷

Berle himself outlined a number of dysfunctional aspects of the NRA's operation in a report he prepared for Hugh Johnson in July 1934.¹¹⁸ He viewed the NIRA as an experiment and accepted its failure, observing years later that intervention on such a scale occurred in this country only in response to an emergency.¹¹⁹ But, as we will see, he never abandoned corporatism's underlying economic and political assumptions.

concerned with the level of government involvement in industry regulation and by May 1935 had "publicly declared war on the New Deal." BRAND, *supra* note 56, at 140, 284.

112. See BRAND, *supra* note 56, at 128–29 (discussing the development of the NRA).

113. For an excellent discussion of the stresses in the progressive movement as it tried to come to terms with Roosevelt's corporatist economy, including its adherence to fair prices and acceptance of price fixing under the sponsorship of government agencies, see Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920–1940*, 90 IOWA L. REV. 1011 (2005).

114. HAWLEY, *supra* note 75, at 89–90.

115. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). In *Schechter*, the Court held that the code-making authority conferred by the NIRA was an excessive delegation of legislative power and therefore unconstitutional. *Id.* at 542. The *Schechter* Court's use of the nondelegation doctrine to overturn the NIRA is now viewed as a "legal anachronism" because equally broad grants of authority to government agencies have been consistently upheld since the New Deal. BRAND, *supra* note 56, at 291.

116. BARTHOLOMEW H. SPARROW, FROM THE OUTSIDE IN: WORLD WAR II AND THE AMERICAN STATE 73–74 (1996).

117. *Id.* at 73. In fact, the number of seizures increased during each year of the war, and peaked in fiscal years 1944 and 1945. *Id.* at 86. Of the top 100 American corporations, more than one-third were seized either in whole or in part. *Id.* at 73 n.13. Among those seized were railroads, coal mines, and even the Montgomery Ward department store. GEOFFREY PERRETT, DAYS OF SADNESS, YEARS OF TRIUMPH 303 (1973).

118. BERLE, RAPIDS, *supra* note 35, at 99–101.

119. See BERLE, 20TH CENTURY, *supra* note 19, at 59.

C. Summary

In April 1931, Berle made a case for shareholder primacy in a trust context on the pages of the *Harvard Law Review*. In so doing he abandoned his earlier contract-centered views on solutions to corporate problems. The shift stemmed from concern about growing corporate power. But the context remained that of his earlier writing—corporate law, narrowly conceived. By September 1932, Berle had transformed his trust model for the national political economy. As restated in the *New Individualism* speech, management was to act in the public interest. The shareholder beneficiary was nowhere to be seen. The context was different, of course. Where Early Berle addressed only corporate law issues, Middle Berle articulated national public policy. We are nonetheless left with two apparently inconsistent Berles. We can bring them closer together, if not merge them into a coherent whole, by reference to *The Modern Corporation and Private Property*, published in August 1932.¹²⁰

III. THE MODERN CORPORATION AND PRIVATE PROPERTY

The Modern Corporation and Private Property captures Berle in the middle of his metamorphosis from friend of shareholders to advocate of the corporation as an instrument for furthering national social welfare policy. The book thus provides a window into the evolution of his thinking. Unsurprisingly, the transition has some awkward junctures.

The Modern Corporation stood for the same proposition as *Powers in Trust*—that something had to be done about management power.¹²¹ But *Powers in Trust* remained in shareholder primacy mode as it argued that the powers of the new management class had to be exercised for the benefit of the shareholders, with no hint of higher corporatist constraints. Berle carried that point over to *The Modern Corporation* and expanded on it. Indeed, most of the book's chapters proceed in the mode of *Powers in Trust*, with Chapter VII of Book II lifted almost in its entirety from the article and reprinted without citation.¹²²

At the same time, *The Modern Corporation* sandwiched its expanded discussion of the shareholder trust model between introductory and concluding chapters that offered a more general discussion of the sources and implications of corporate power. This exposition, although still largely articulated within a narrow corporate law framework, laid theoretical groundwork for both Roosevelt's *New Individualism* and the NIRA.

The book made a series of positive assertions about the wider political economy, all grounded in Means' numbers. Economic power was becoming concentrated in the hands of a cluster of corporate managers. The corporate system had developed certain significant attributes and powers, and it now amounted to a major social institution.¹²³

120. The book was originally published by the Corporation Clearing House, a subsidiary of the Corporation Trust Company. Apparently some of the Corporation Trust Company's affiliates expressed displeasure over the book, and an agreement was quickly struck with MacMillan to become the publisher. BERLE, RAPIDS *supra* note 35, at 21–22; Berle, *Modern Functions*, *supra* note 16, at 434.

121. See BERLE & MEANS, *supra* note 10; Berle, *Powers in Trust*, *supra* note 7.

122. BERLE & MEANS, *supra* note 10, at 247–76; Berle, *Powers in Trust*, *supra* note 7. We note that *Powers in Trust* in turn may have been lifted from the book manuscript.

123. BERLE & MEANS, *supra* note 10, at 1.

Individual property had gone into a “collective hopper” which had brought forth huge industrial oligarchies.¹²⁴ The oligarchs exercised unified control over the wealth under their charge. If Means’ predictions were accurate, the industrializing American economy could not possibly operate competitively. Each market would be dominated by only a few firms.

The Modern Corporation took pains to underscore the role corporate law played in investing this economic and social power.¹²⁵ The law had taken on this role inadvertently, based on a set of assumptions shared with classical economics. Under the shared, nineteenth century vision, production and trade were usually conducted by self-employed individuals.¹²⁶ Corporate production was an exception limited to special situations. Limitations on corporate authority were thought inevitably to accompany that special status and corporate law was thought the appropriate means of limitation.¹²⁷ But corporate law had stopped placing limits on corporate operations during the course of the nineteenth century. It had done so to facilitate the appearance and success of the large, mass-producing, management-controlled corporation. As the book noted, the change had been reactive rather than purposive—an acknowledgement of underlying economic facts.¹²⁸ Despite this, the transition from the classical economy implicated the law in the creation and perpetuation of an unsatisfactory situation.

In the classical model, profit-maximizing individual entrepreneurs both own the means of production and make all decisions respecting production and consumption. Power relations are bilateral: one actor can affect another’s behavior only indirectly, by refusing to contract. The result is market competition that effectively controls the producers, constraining both the incompetent and the greedy and legitimating private economic power. But, argued Berle and Means in *The Modern Corporation*, corporate mass production on a large capital base does not fit within the classical model’s legitimating parameters.¹²⁹ As the book pointed out, the big corporations of the twentieth century had split the classical entrepreneurial function between salaried executives who sat atop hierarchical organizations, and anonymous equity participants who held small stakes and prize market liquidity over participation. With control and ownership separated, managers were newly empowered. The interests of the owners and managers often diverged, while many “checks which formerly operated to limit the use of power” had disappeared.¹³⁰ Problems not only of competence but of responsibility followed, problems largely absent in an ideal capitalist world inhabited by self-employed individual producers.¹³¹

Consequently, what Berle had once seen as a problem for private actors in the world of finance now came to be seen as a problem for government.¹³² The collective aspect of corporate production implied that standard individualist defenses against government

124. *Id.* at v.

125. *Id.* at 2, 141.

126. *Id.* at 1, 4.

127. *Id.* at 13–35.

128. BERLE & MEANS, *supra* note 10, at 141.

129. *Id.* at 345–51.

130. *Id.* at 6.

131. *Id.* at 1–9.

132. SCHWARZ, *supra* note 21, at 56.

intervention no longer applied.¹³³ Moreover, the separation of ownership and control had a further positive implication—corporate property should no longer be deemed private property: “It is entirely possible and some students of the situation are beginning to contend, that the corporate profit stream in reality no longer is private property, and that claims on it must be adjusted by some test, other than that of property right.”¹³⁴ With this transformation of corporate profits from purely private property to property touched with a public interest, *The Modern Corporation* intersects core corporatist theory. Berle could have had the *New Individualism* and the NIRA in mind with a follow up point (save for the emphasis on judicial enforcement): “[P]rivate property may one day cease to be the basic concept in terms of which the courts handle problems of large scale enterprise and that the corporate mechanism may prove the very means through which such modification is brought about.”¹³⁵

These prescriptive projections earned *The Modern Corporation* high regard in New Deal circles. *Time* magazine would label it “the economic Bible of the Roosevelt administration” one year after its publication.¹³⁶ With the economy in severe crisis, it was reasonable to conclude that free competition carried with it a destructive curse. Something needed to be done to make free competition less threatening and *The Modern Corporation* cleared the path of free market objections.

The book otherwise had little to offer New Deal legal reformers. It nowhere recommended a pervasive system of government oversight, corporatist or otherwise. The reference to the “princes of property” in the *New Individualism* speech drew on rhetoric familiar to readers of *The Modern Corporation*, which referred to “princes of industry.” But the book coined the phrase without setting out any implications: they were “princes of industry, whose position in the community has yet to be defined.”¹³⁷ Berle reserved his definitional follow-through for the political sphere.

The book did not even suggest much in the way of corporate law reform. While it treated securities underwriting and trading in detail, describing the prevailing legal framework and predicting new regulation in the future, it made no specific suggestions.¹³⁸ Such new law as the book advocated followed from the trust model and shareholder primacy: state-level common law directed to the problem of management self-dealing. But equivocation showed up even here. On the one hand, the enforcement of the equitable limitation to exercise power for the shareholders’ benefit could be safely remitted to the judiciary in theory, the common law of fiduciary duties being the only area of corporate law that had not undergone a steady weakening process due to charter

133. BERLE & MEANS, *supra* note 10, at 345–51.

134. *Id.* at 247. Here they reflect the thinking of their Columbia colleague, Robert Hale, who thought all private property amounted to a delegation of public authority to exclude others from its use. ROBERT L. HALE, FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING LAW 366–79 (1952). The public aspects of private property were, more generally, discussed in a variety of regulatory and theoretical contexts at the time. For discussion of these regulatory and theoretical contexts, see BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT 107, 169–75 (1998).

135. BERLE & MEANS, *supra* note 10, at 247.

136. Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1685 (1988).

137. BERLE & MEANS, *supra* note 10, at 2.

138. *Id.* at 289–331.

competition. "Flexible and realistic" judges, "if untrammelled by statute," could be expected to find solutions to problems that demanded a remedy.¹³⁹ On the other hand, it was by no means certain that courts would adopt the theory. Only an "expert and courageous court [would] apply this theory to most of the corporate problems reaching litigation."¹⁴⁰ Thus the position of shareholders in large corporations remained perilous. "In fact, if not in law, at the moment we are thrown back on the obvious conclusion that a stockholder's right lies in the expectation of fair dealing rather than in the ability to enforce a series of supposed legal claims."¹⁴¹

Had the book closed with this appeal for a shareholder trust model, it could stand today as an historical monument to shareholder primacy, however far ranging its discussion of the social and economic problems posed by management power. But Berle himself prevented that result by stating the opposite position in *The Modern Corporation's* final chapter, six pages entitled "The New Concept of the Corporation."¹⁴² There Middle Berle finally appears fully formed. Breaking sharply with shareholder primacy, he redeploys the trust model for the beneficiaries of the *New Individualism* speech: since the shareholders had given up responsibility for corporate property, other constituents should join them as corporate beneficiaries; the "[r]igid enforcement of property rights" of passive shareholders would give way in the face of a "convincing system of community obligations."¹⁴³ Management, moreover, must develop into a "purely neutral technocracy."¹⁴⁴ In meeting their obligations, corporate leaders would be expected to "set forth a program comprising fair wages, security to employees, reasonable service to their public, and stabilization of business."¹⁴⁵

In this new vision of the trust model, directors' primary allegiance was to the national interest. Once a well-articulated public policy was established, the directors of the corporation should help society achieve the articulated goals. At that point, shareholders would have to take the back seat. Instead of unrestrained maximization, directors were to maximize the value of the corporation in a way that satisfied societal goals. Berle had become a corporatist.

Berle later would suggest that the last chapter was what the book was all about—a few pages for the general reader "too lazy, busy or uninterested to read three hundred pages of academic argument."¹⁴⁶ His concerns about the general reader are understandable, but we wonder whether his comment also bespeaks recognition of a compositional problem. Berle had started the book back in the 1920s as a corporate lawyer's project, a study centered on the role of corporate law fiduciary duties in controlling managerial excess. But his co-author's contribution had broader ranging, even contradictory, implications. If Means was correct, the problem of corporate power could

139. *Id.* at 221–22, 335–36.

140. *Id.* at 276

141. *Id.*

142. BERLE & MEANS, *supra* note 10, at 352–57.

143. *Id.* at 356.

144. *Id.* at 353–56.

145. *Id.* Berle did believe that shareholders remained the true owners (or at least residual claimants) of the corporation. While Berle had few good words for absolutist corporate administrators, he had a soft spot for shareholders, whom he identified with ordinary working people who needed to collect their dividend checks to make ends meet. Berle, *Trustees Note*, *supra* note 9, at 1367–68.

146. SCHWARZ, *supra* note 21, at 63.

not be cabined in a shareholder trust model, and judicial intervention certainly would not suffice as a remedy for the separation of ownership and control. We believe that Berle suspected as much himself as he wrote the book, but had not yet worked out a satisfactory, integrated approach. The last chapter's jump amounted to a temporary patch.¹⁴⁷

Berle's published, public posture did not incorporate his shift to corporatism as the book neared publication in August 1932. As we have seen, he had only recently staked out a public claim for shareholder primacy in *Powers in Trust*, a position that stood in tension with the book's more broad-ranging emphasis on the dangers of corporate power, and directly contradicted the assertions in the last chapter. However, while Berle's public face was one that today's shareholder primacy advocates would find attractive, the Berle of mid-1932 was a corporatist.

It must thus have come as a rude and unwelcome shock to Berle when E. Merrick Dodd, a Harvard Law professor, used the pages of the May 1932 *Harvard Law Review* to respond to *Powers in Trust* a year after its publication.¹⁴⁸ Dodd attacked Berle's shareholder primacy position,¹⁴⁹ forcing Berle to defend an article and a position that he himself had substantially modified and as he was about to publish a book that, somewhat awkwardly, took both positions simultaneously. Even worse, Dodd attacked from a corporatist position.

IV. THE BERLE-DODD DEBATE

To understand the Berle-Dodd debate is to see Berle and Dodd participating in a national political discussion over the outlines of the new American corporatism. How much should the United States' version of corporatism differ from that taken in many of the European countries that were becoming (or had become) corporatist? This was the key political issue at the time, and it was on this point that Berle and Dodd differed. The question went to the allocation of power as between corporate managers and the state. One faction, which Ellis Hawley describes as the advocates of a "business commonwealth," wanted to delegate planning authority to industrialists themselves (acting through trade associations), relegating government to a backstop, supporting role.¹⁵⁰ The other faction, called the collectivist democrats or "planners" by Hawley, was

147. For a contrasting reading of the book, see Tsuk, *supra* note 17, at 1886–88. For Tsuk, the book "announced that all [because ownership was separated from control] publicly held business corporations were public trustees. Their power was to be exercised to satisfy the demands of the community." *Id.* at 1888. This is an accurate characterization of the book's last chapter, but not of the book as a whole. We prefer to underscore its internal tensions. Tsuk disposes of the shareholder primacy position stated in Berle's response to Dodd as follows: "Berle himself seemed to have endorsed this position in a famous debate with E. Merrick Dodd. . . ." Tsuk, *supra* note 76, at 205. Tsuk, in effect, asserts that Berle's appearance in 1932 trumped the reality of Berle's position. For this, she relies on the change of position announced by Berle in 1954. *Id.* at 206. We prefer to describe Berle as an astute observer whose views evolve over time in reaction to events. In our view, these conflicts—evident in Berle's 1932 publications—would be resolved by later events.

148. Dodd, *Trustees*, *supra* note 8.

149. *Id.*

150. See HAWLEY, *supra* note 75, at 36–43 ("[B]usiness leaders should be entrusted with governmental powers and the making of economic decisions should be the exclusive prerogative of the managerial group."). This group's operative ideas descended from the "associationist" movement of the 1920s—a small business initiative geared toward protectionist trade associations and against antitrust. Big business co-opted the ideas

suspicious of business, questioned the empowerment of industrialists, and wanted government to hold ultimate control.¹⁵¹ There also was a subsidiary question. As we have seen, corporatism seeks coherence by limiting the number of groups with access to the state. The groups granted access come to the corporatist table wielding substantial political power. But which groups? In the business commonwealth vision, the new regime would admit only the corporate establishment to the table, respecting the prevailing power structure. The planners, who followed a progressive political agenda, included labor in the selection.¹⁵²

Berle was a planner and a progressive, and so distrusted the managerial elite,¹⁵³ or, in his terms, the “princes of property.” At the same time, as a progressive, he viewed labor unions as a critical countervailing power against corporate management. In economic terminology, the progressives’ view of corporatism followed from a particular view of society’s welfare function.¹⁵⁴ That welfare function saw unions as a public good and favored empowering the less well-off as against the “princes of property.” It was this progressive model of corporatism that Berle brought to Roosevelt.

Dodd came to corporatism as a supporter of the business commonwealth.¹⁵⁵ We do not know Dodd’s political views directly since, unlike Berle, he never became a public figure and tended to restrict himself to doctrinal matters in his scholarship.¹⁵⁶ However, in the debate with Berle, Dodd develops his position by quoting liberally and favorably from two public figures with known political positions on the business commonwealth side—Owen D. Young, chairman of the General Electric Corporation (GE), and Gerald Swope, GE’s president. Young and Swope were leaders of the “New Capitalism,”¹⁵⁷ the name given to their policy of adopting what today would be considered modern employment policies. In addition, Swope had formulated and promoted a plan for

after 1929 and took the political lead. *Id.* at 39–41. Alan Brinkley describes associationalism as follows:

Those who promoted the associational approach to economic reform . . . were much less concerned . . . about protecting capitalists from government. To them, the greater challenge was protecting the business world from excessive competition. . . . Like Europeans developing a rationale for corporatist experiments in managing industrial economies, some Americans yearned for political arrangements that could produce social and economic harmony.

ALAN BRINKLEY, *THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR* 34–35 (1995).

151. HAWLEY, *supra* note 75, at 43–46.

152. *Id.* at 45.

153. *Id.* at 44.

154. The social welfare function provides an ordering of policy and alternative states of the world in terms of their value to society. That is, the social welfare function embeds the articulated public policy goals that corporate directors should pursue in addition to shareholder wealth.

155. In our analysis, Berle as a planner stands well to Dodd’s left. This is in contrast to the accepted view that Berle is the conservative because of his support of shareholder primacy, while Dodd is the more liberal because of his support for corporate social responsibility. See Winkler, *supra* note 5 (discussing the political learnings of Berle and Dodd).

156. The one direct reference we have found to Dodd’s political views is in an obituary appearing in the *Harvard Law Review*. It states that “[h]is political and educational views were definitely on what would be called the liberal side.” Erwin N. Griswold, *Edwin Merrick Dodd*, 65 HARV. L. REV. 377, 378 (1952). We do not hazard a guess as to what constituted “the liberal side” of politics at Harvard Law School in the early 1950s.

157. See Edward A. Filene, *The New Capitalism*, in 149 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, PART 1: THE SECOND INDUSTRIAL REVOLUTION AND ITS SIGNIFICANCE 3–11 (1930) (discussing the evolution of “New Capitalism”).

confronting the economic crisis. Under this business commonwealth model, managers would be accorded a crucial role in planning and allocational decision-making not only within the firm, but within the national government. However, while activist Swope may have been advocating changes in business policy, his bottom line was to maximize the profits of the emerging modern GE.

The Berle-Dodd debate emerges as a clash between the different visions of corporatism whose advocates were then vying to capture Roosevelt's attention. Berle, vying directly as a member of the Brains Trust, ended up the political winner in 1933. But the issues persisted in the wake of the failure of the NIRA and the debate did not end in 1932.¹⁵⁸ Indeed, Dodd came back in 1935 to restate his case for management discretion in a corporatist state in a riposte aimed at Berle's instrumental case for the shareholder interest. Then, in 1941, he came back yet again with an essay that abandoned his previous positions. In this final appearance he stepped away from corporatism, withdrew his support from management, and reinstated the shareholder as corporate law's beneficiary, in effect ending up where Berle had started in 1931. Not to be outdone, Berle himself revisited the debate in 1954, conceding that Dodd had been proven right. In our reading, however, Berle's concession only applied to the political and economic context of 1954. As to the appropriate response to the crisis of 1932, he never for a second questioned himself.

Section A explicates Dodd's attack and its corporatist foundations. Section B turns to Berle's first response, explaining the nuanced place it occupied in the politics of the day. Section C takes up Dodd's rebuttal and reversal. Section D concludes with Berle's *volte face*. Section E summarizes the salient features of the Berle-Dodd debate.

A. Dodd's Attack

Dodd's *For Whom Are Corporate Managers Trustees?* started by paying brief homage to Berle's desire to constrain managers from transferring the assets of the corporation to their own pocket.¹⁵⁹ But Dodd quickly switched to the attack, stating that Berle's shareholder trustee view was problematic because "it [wa]s undesirable . . . to give increased emphasis at the present time to the view that business corporations exist for the sole purpose of making profits for their stockholders."¹⁶⁰ Instead, corporations should act as social institutions.¹⁶¹

Dodd believed, correctly, that corporatism was making its way across the Atlantic and highlighted various constitutional and statutory foundations of corporatism already in place, foundations with transformative implications for corporate law. He pointed to *Munn v. Illinois*,¹⁶² an 1877 Supreme Court case which held that the state of Illinois had the power to set maximum prices for grain storage because such enterprises were

158. Indeed, the corporatist planners' ascendancy in the Roosevelt administration would be short-lived. After the failure of the NIRA, the New Freedom trust busters would gain the upper hand. See HAWLEY, *supra* note 75, at 149–86, 325–43 (detailing the shift in thought in the aftermath of the NIRA).

159. See Dodd, *Trustees*, *supra* note 8, at 1147 ("The present writer is thoroughly in sympathy with Mr. Berle's efforts to establish a legal control which will more effectually prevent corporate managers from diverting profit into their own pockets from those of stockholders . . .").

160. *Id.* at 1147–48.

161. *Id.* at 1148.

162. *Munn v. Illinois*, 94 U.S. 113 (1877).

“affected with a public interest.”¹⁶³ He believed that the rule of *Munn* could be broadly extended: “[I]t may well be that the law is approaching a point of view which will regard all business as affected with a public interest.”¹⁶⁴ Moreover, in the industries that were already clearly affected with a public interest—the public utilities—corporatist-like statutes had already been enacted. The Adamson Act,¹⁶⁵ which covered the railroad industry, was “a thinly disguised measure for increasing wages,” and thus clearly an example of workers’ economic security taking precedence over shareholders’ profit.¹⁶⁶ Dodd noted that “the more advanced states” had extended such legislation to other utilities, such as gas, electric, and telephone.¹⁶⁷

Dodd believed that piecemeal adoption of corporatist policies would no longer suffice—a more widespread reform was in the offing. “There is a widespread and growing feeling that industry owes to its employees not merely the negative duties of refraining from overworking or injuring them, but the affirmative duty of providing them so far as possible with economic security.”¹⁶⁸

Dodd aligned himself with the business commonwealth camp. Supporting corporatism, he noted:

is no longer confined to radical opponents of the capitalistic system; it has come to be shared by many conservatives who believe that capitalism is worth saving, but that it can not permanently survive under modern conditions unless it treats the economic security of the worker as one of its obligations.¹⁶⁹

Dodd found support for this view in his colleague from across the Charles River, Wallace Donham, Dean of the Harvard Business School, whom Dodd quotes as saying, “[t]he only way to defend capitalism is through leadership which accepts social responsibility and meets the sound needs of the great majority of our people.”¹⁷⁰

Dodd believed that the corporatist policy for the United States should be based on the presumption that the managerial elite, given the appropriate mandate, would act as trustees for the community and use their corporations to resolve the economic and social problems of the Great Depression. Extensive regulation would be unnecessary, and “[t]he principal object of legal compulsion might then be to keep those who failed to catch the new spirit up to the standards which their more enlightened competitors would desire to adopt voluntarily.”¹⁷¹

Dodd professed the utmost faith in managers and their sense of professional responsibility. He proclaimed that “[p]ower over the lives of others tends to create on the part of those most worthy to exercise it a sense of responsibility.”¹⁷² He noted:

163. *Id.* at 126.

164. Dodd, *Trustees*, *supra* note 8, at 1149. Dodd does acknowledge that decisions of the time like *Tyson v. Banton*, 273 U.S. 418 (1927), pointed to the opposite direction.

165. The constitutionality of the Adamson Act, which mandated an eight-hour day and extra pay for overtime, was sustained in *Wilson v. New*, 243 U.S. 332 (1917).

166. Dodd, *Trustees*, *supra* note 8, at 1150.

167. *Id.* at 1151.

168. *Id.*

169. *Id.* at 1152.

170. *Id.* at 1155–56 (quoting WALLACE DONHAM, BUSINESS ADRIFT 105–06 (1931)).

171. Dodd, *Trustees*, *supra* note 8, at 1153.

172. *Id.* at 1157.

[S]ome of our business leaders and students of business tell us, there is in fact a growing feeling not only that business has responsibilities to the community but that our corporate managers who control business should voluntarily and without waiting for legal compulsion manage it in such a way as to fulfill those responsibilities.¹⁷³

Such business leaders included the above-mentioned Young and Swope.

Dodd quoted Young and his constituency view of the corporation at length. Young “saw rising a notion that managers were no longer attorneys for stockholders; they were becoming trustees of an institution.”¹⁷⁴ Young acknowledged that the Great Depression was an important element in this new view of the corporation as an institution that had to serve not only the interests of its stockholders, but also the interest of its employees and customers.¹⁷⁵

Swope, as noted earlier, had actually disseminated a plan for economic recovery, known as the Swope Plan. The plan, which had received widespread media attention, had been unveiled in late September 1931 at the annual dinner of the National Electric Manufacturers’ Association in New York.¹⁷⁶ It had manifest political implications. The leading proponents of the plan, including Swope himself, had extensive political connections. Young, a strong plan supporter, was a speculative Democratic presidential candidate.¹⁷⁷ So was Silas Strawn, president of the U.S. Chamber of Commerce. Strawn’s successor, Henry Harriman also supported the plan. In fact, according to Hoover’s memoirs, Harriman advised Hoover that if he did not support the plan, big business would put its money and influence behind Roosevelt, who had purportedly signed on.¹⁷⁸ For his part, Swope shopped the plan in Congress, testifying before multiple committees, including Senator La Follette’s hearing regarding the establishment of a National Economic Council.¹⁷⁹

The business component of the plan was essentially the same as that of the later NIRA mandated cartelization through trade associations supervised by the federal government for the purpose of stabilizing prices and production. The labor component, however, differed materially. The Swope Plan called for companies themselves to establish and administer plans for workmen’s compensation, life and disability insurance, pensions, and unemployment. This paternalistic approach to worker welfare left all aspects of the recovery program firmly in the hands of business and indeed was adopted from policies already pursued by Young and Swope at GE.¹⁸⁰

173. *Id.* at 1153–54.

174. *Id.* at 1154.

175. *Id.*

176. *Swope Plan*, TIME, Sept. 28, 1931, available at <http://www.time.com/time/magazine/article/0,9171,742325-1,00.html>.

177. *Id.*

178. Harriman was a strong presence in shaping the NIRA. He submitted a plan of his own that was considered by the NIRA drafters and participated in the business advisory group that consulted with the final drafting committee. ROBERT F. HIMMELBERG, *THE ORIGINS OF THE NATIONAL RECOVERY ADMINISTRATION: BUSINESS, GOVERNMENT, AND THE TRADE ASSOCIATION ISSUE, 1921–1933*, at 203, 206 (2d ed. 1993) (1976).

179. *Id.* at 127, 131.

180. In this respect, the plan bore a strong resemblance to Bismarck’s paternalistic attempts to quell socialist stirrings in late nineteenth century Germany. Swope’s father, Isaac Swope, emigrated from Germany in 1857. Gerard Swope was active in the German utilities market through his role as president of the International

Although Swope does not appear to have taken an active part in drafting the NIRA, it safely can be assumed that his plan, as a focal point proposal from the business side, was among those reviewed by the two drafting committees during the Hundred Days.¹⁸¹ As we have seen, the statute that emerged gave considerable power to labor unions in setting the recovery agenda by effectively forcing business to sit at the same negotiating table. Big business was not pleased: the president of a leading trade association accused Senator Wagner of betraying his business supporters by accepting the amendment that added section 7a.¹⁸²

Dodd's approving discussion of Young and Swope has two implications. First, it places Dodd firmly in the corporatist camp. As was recognized at the time, Swope and Young were advocating a model of corporate activity that was very different from the traditional one. The model centered on a corporatist tradeoff: corporations would give up some portion of their market freedom in exchange for stability and relief from the destructive swings of the business cycle. Second, it aligns Dodd with the business commonwealth corporatists. Rather than view the "princes of property" with suspicion, as Berle did, Dodd saw them as the solution to the nation's economic ills.

Significantly, this business commonwealth posture did not put Dodd at variance with the goal of corporate profitability. The labor-management regime Swope¹⁸³ had instituted at GE in the 1920s had indeed featured premium wages and benefits at levels higher than necessary to clear GE's labor market. There had been no give-away, however. Swope and Young broke with the old capitalism in supporting modern employment policies. In their view, GE would have higher profits if it paid wages high enough to reduce turnover to the point where it reduced unit labor costs.¹⁸⁴ In a 1927 speech to the Harvard School of Business Administration, Young stated that "[s]lowly we are learning that low wages for labor do not necessarily mean high profits for capital."¹⁸⁵ Swope and Young were in the same mode when they accepted labor unions—they thought unions were essential to maintaining a steady, productive work force, and they feared that an alternative might be a radicalized workforce.¹⁸⁶

General Electric Company and later as president of GE.

181. Moley reviewed proposals emanating from the Chamber of Commerce; the Wagner draft centered on industrial self-governance. HAWLEY, *supra* note 75, at 23, 25.

182. HIMMELBERG, *supra* note 178, at 207.

183. Outside of the business environment, Swope was a champion of the working poor. In his early career days in Chicago, Swope worked at night as a volunteer at Hull House, teaching mathematics and electricity to immigrant workingmen. His wife, Mary Hill was one of the social workers at the settlement. Jane Addams performed the wedding ceremony. When the Swopes later moved to St. Louis, they bought adjacent houses in a working-class neighborhood, living in one and making the other a settlement house where Mary Swope taught immigrant women sewing. RONALD W. SCHATZ, *THE ELECTRICAL WORKERS: A HISTORY OF LABOR AT GENERAL ELECTRIC AND WESTINGHOUSE 1923–1960*, at 14 (1983).

184. *Id.* at 16. In their top management positions at GE, Swope and Young knew that a stable, happy work force was necessary in order to maximize company profits, and they took care to minimize conflicts between workers and management. Young sought to create an environment in which workers felt that they had a stake in the success or failure of the company, leading them to take pride in their work and enhancing productivity. *Id.*

185. *Id.* at 15.

186. Swope and Young sought friendly relations with union leaders, taking what could be characterized as an "if you can't beat them, join them" approach. It was clear that socialism was gaining popularity among the workers, and the push for union representation was strong. Kim McQuaid, *Young, Swope and General Electric's 'New Capitalism': A Study in Corporate Liberalism, 1920–1933*, 36 *AM. J. ECON. & SOC.* 323, 325

GE, then, had been pursuing efficiency effects that more than covered the incremental labor costs. The strategy had worked during the expansionary 1920s. But it left GE at a disadvantage against lower paying competitors during the Great Depression.¹⁸⁷ The Swope Plan reflected GE's interests at the time, with its national product cartel, federal subsidies for employee benefits, and tax abatement for firms vulnerable to competition from foreign firms with lower paid employees.¹⁸⁸ Even as Young and Swope talked constituent interests, there is no reason to believe that they viewed themselves as defectors against the shareholders.

B. Berle's Response

We do not know whether Dodd, as he wrote *For Whom Are Corporate Managers Trustees?*, knew that Berle already had moved away from shareholder primacy to a contrasting corporatist position. If Dodd did know, his article makes for doubly interesting reading as an exemplar of strategic academic writing.¹⁸⁹

The attack gave Berle a jolt—a progressive planner who had taken pro-labor positions in his popular writing¹⁹⁰—he had not been expecting an attack on his corporate law position from the other corporatist camp.¹⁹¹ The problem was that Berle no longer wanted to defend shareholder primacy, at least not in a framework discussing the corporation's role in the wider political economy. Nor was he keen to engage in a public debate about corporatism. We suspect he thought the timing was wrong. The battle between his progressive vision of corporatism and business commonwealth corporatism was taking place behind closed doors. Berle wanted to ensure his vision of corporatism was the one that would be adopted by the Roosevelt Administration and presumably was jealous to protect his influence. We doubt that Berle's fellow Brains Trusters would have welcomed participation by one of their number in an open academic debate between the progressive and the conservative supporters of corporatism. Roosevelt had not yet nodded in their direction; the *New Individualism* speech still lay in the future. In any event, Berle was unlikely to have seen the *Harvard Law Review* as an appropriate venue for an exposition of his full view. Although this was well enough formed for an FDR campaign speech, he may not have been ready for a structural exposition and defense in a legal academic context.

(1977). The GE approach was to push for one industrial union rather than a splintering of craft unions. When confronted with ambitious and successful union leaders, GE would offer them management positions.

In the early days of the union movement, such beliefs were reasonable. See Wachter, *supra* note 14, at 624–25 (noting the 1930s corporatist position of unions as a public good, and the subsequent decline in that belief). The leadership that replaced Swope and Young viewed them as naïve in their attitudes towards unions once it was clear that the union wage was above that paid by competing non-union firms. SCHATZ, *supra* note 183, at 170–71.

187. See PETER A. SWENSON, CAPITALISTS AGAINST MARKETS: THE MAKING OF LABOR MARKETS AND WELFARE STATES IN THE UNITED STATES AND SWEDEN 63, 182–83, 195 (2002) (describing GE and its approach as “segmentalism”).

188. *Id.* at 204.

189. Both texts read more coherently on the assumption that both authors understood all of the stakes.

190. See *supra* text accompanying note 32 (noting that Berle published short opinion pieces that speculated about worker ownership).

191. See SCHWARZ, *supra* note 21, at 65 (noting Dodd's critique of Berle's advocacy for corporate liberalism as an alternative to socialism).

Berle's answer to Dodd, *For Whom Corporate Managers Are Trustees: A Note*, appeared in the next issue of the *Harvard Law Review*.¹⁹² It was a brief but forceful counter-punch that avoided responding to Dodd's corporatism broadly, and focused only on mechanics. Berle attacked the idea that managers could be trusted to use discretionary power for the welfare of others as the naïve and out-of-touch thinking of an ivory tower academic. Berle caustically remarked that Dodd's argument "is theory, not practice" and "[corporate lawyers] know what the social theorist does not."¹⁹³ The key insight that Berle attributed to these corporate lawyers is that a management-coordinated, multiple constituency system simply would not work.

The problem was that unconstrained managers would maximize their own welfare. Specifically: "[I]t must be conceded, at present, that relatively unbridled scope of corporate management has, to date, brought forward in the main seizure of power without recognition of responsibility—ambition without courage."¹⁹⁴ The danger was that "[w]hen the fiduciary obligation of the corporate management and 'control' to stockholders is weakened or eliminated, the management and 'control' become for all practical purposes absolute."¹⁹⁵ To make managers trustees for the community would free them of any meaningful constraint because almost all corporate activity could be justified in the interests of one group or another.

In other words, Berle responded to Dodd from a progressive position strongly opposed to giving managers added discretion in the emerging corporatist society. The essay does not advocate shareholder primacy. Perhaps it gets that label because it is read together with Dodd's attack. Dodd addressed only *Corporate Powers as Powers in Trust*, a paper that by its terms addressed only corporate law writ small—managers and shareholders as against each other with no reference to the wider political economy. Dodd's attack lifted Berle's case for shareholder primacy out of the small corporate law box and attacked it as Berle's statement of priorities in the wider political economic context.

Berle's response, even as it defends the corporate law duty to shareholders, does not assert that the shareholder interest can be viewed as a political and economic proxy for the interest of the wider polity. It does, however, dance around that point. Berle saw stock ownership as a means to "provide safety, security, or means of support for that part of the community which is unable to earn its living in the normal channels of work or trade"¹⁹⁶ and estimated that half of America's savings were in the stock market.¹⁹⁷ However, shareholders got their legitimacy as passive recipients of wealth created. Shareholders thus were the legitimate and only claimants to corporate profits, not necessarily because they are the owners in the traditional property sense, but because they represented to

192. Berle, *Trustees Note*, *supra* note 9, at 1365.

193. *Id.* at 1367. One wonders whether this was an oblique reference to the fact that Dodd had practiced law for only three years before becoming an academic. See Zachariah Chafee, Jr., *Edwin Merrick Dodd*, 65 HARV. L. REV. 379, 380 (1952). Berle also might have been deflecting attention from the fact that the corporatists with real world experience were on the business commonwealth side; the planners tended to be intellectuals. See HAWLEY, *supra* note 75, at 44.

194. Berle, *Trustees Note*, *supra* note 9, at 1370.

195. *Id.* at 1367.

196. *Id.* at 1365.

197. *Id.* at 1370.

some extent the welfare of the general public. The shareholder interest, thus legitimated, easily could be confined to a secondary role if the public interest required redirection of the corporate entity's goals.

Meanwhile, discretionary managers jeopardized this legitimate flow of profits to shareholders by both allowing managerial expropriation and inviting "economic civil war."¹⁹⁸ Without clear criteria, even well-intentioned managers would have little basis for choosing among the competing interests of various constituencies. Recognizing this, many groups would use force and threats—laborers would strike, shareholders would sue, and consumers would boycott—to gain a greater share of the corporate wealth.¹⁹⁹

In any event, argued Berle, practicing lawyers were better suited than managers to develop the law needed in the new corporatist state. Despite rare examples of managerial visionaries like Mr. Swope and Mr. Young, one could not expect broad, enforceable corporate reform to come from managers.²⁰⁰ That job fell to lawyers, who were familiar with the legal system and wrestled with it every day. Berle took care to include himself in this vanguard, remarking that "as lawyers, we had best be protecting the interests we know, being no less swift to provide for the new interests as they successively appear."²⁰¹ Thus, having designated himself the drafter, Berle set the stage for his own corporatist proposal:

Either you have a system based on individual ownership of property, or you do not. If not—and there are at the moment plenty of reasons why capitalism does not seem ideal—it becomes necessary to present a system (none has been presented) of law or government, or both, by which responsibility for control of national wealth and income is so apportioned and enforced that the community as a whole, or at least a great bulk of it, is properly taken care of.²⁰²

But he went no farther. Like *The Modern Corporation*, Berle's response to Dodd signals that something new is coming without telling the reader what he expects it to be. Like *The Modern Corporation*, it only lays the groundwork. Meanwhile, the response carefully limits its attack to the managerial vision of corporatism, lest it undermine Berle's own yet-to-be-stated version.²⁰³ Berle would succeed in getting FDR to make the statement soon enough in the *New Individualism* speech. For whatever reason, he thought the timing, June 1932, and the venue, the *Harvard Law Review*, inappropriate for a statement of his full view.

Given all of this, does the response to Dodd stand for shareholder primacy? It does so only inside the narrow context of corporate law, and then only subject to the proviso that the national government still could take responsibility for stating the social welfare function and imposing it on the managers.

198. *Id.* at 1369.

199. Berle, *Trustees Note*, *supra* note 9, at 1368–69.

200. *Id.* at 1372.

201. *Id.*

202. *Id.* at 1368.

203. A later commentator suggested that Berle added the social responsibility paragraph to the final chapter of *The Modern Corporation* at the last minute to cover the flank exposed by Dodd. See SCHWARZ, *supra* note 21, at 66.

C. Dodd Redux

In 1935, Dodd fired another shot in the debate, reaffirming his position as a business commonwealth corporatist in an article entitled *Is Effective Enforcement of the Fiduciary Duties of Corporate Managers Practicable?*²⁰⁴ Although by then Middle Berle was in public view, Dodd again took aim at Early Berle. Berle's shareholder-centered vision, he argued, had no foundation because the law could not make managers faithful to shareholders (a position to which Berle himself had subscribed in the 1920s²⁰⁵). Dodd took cognizance of the last chapter of *The Modern Corporation*, but quickly dismissed it because Berle himself had already shown in 1932 that "no legal principles exist by which the managers of private enterprise can be made to serve the interests of persons other than investors."²⁰⁶

Dodd's answer to the question posed in his title was an emphatic no. Fiduciary laws would often be ineffective because management self-dealing was difficult to detect in all but the most egregious circumstances and because managers had the power and influence to limit any legislative or judicial attempts to enforce such laws.²⁰⁷ Furthermore, from an incentive standpoint, there was no reason to believe managers would selflessly forgo their own profit maximization in order to be the faithful servants of the shareholders, a group concerned only with profits.²⁰⁸

Dodd's solution is surprising to us moderns but is true to the business commonwealth view. The answer was to free management from shareholder constraints and to make managers servants of the community. But how could managers be trusted to advance social welfare when they could not be trusted with their own shareholders' capital? Dodd played the public/private card. Faithfulness of managers in the wider context could be relied on because of the "strong emotional appeal"²⁰⁹ of public service. "Service to one's fellow workers, to those who have need of one's products, or to the social and political community of which one is a member would seem a less abnormal aim than vicarious profit-seeking."²¹⁰

Dodd believed management would become a form of civil service, driven by the managers' desire for prestige rather than pecuniary interests.

Such service has in most civilized communities, from the age of Pericles to the age of Mussolini and Stalin, conferred upon the higher ranks of public servants power and prestige unequalled by that given to any other class in the community. . . . If, as has not infrequently been the case in the history of western civilization, men have been educated to regard power and prestige of

204. E. Merrick Dodd, Jr., *Is Effective Enforcement of the Fiduciary Duties of Corporate Managers Practicable?*, 2 U. CHI. L. REV. 194 (1935).

205. See *supra* text accompanying note 25 (referring to Berle's preference for the contractual approach for interpreting charters).

206. Dodd, *supra* note 204, at 205 (citing Berle, *Trustees Note*, *supra* note 9).

207. *Id.* at 198–99 ("[E]nforcement of legal rules governing the conduct of a powerful group tends to be ineffective unless the content of these rules finds approval in the minds and feelings of the more influential portion of the group affected thereby.").

208. See *id.* at 205 (discussing the money-making goal of business enterprises and the effect that goal inevitably has on managers).

209. *Id.* at 203.

210. *Id.*

public office as more important than material riches, the attainment of a relatively high standard of pecuniary honor on the part of public servants may be—as the integrity of the English civil servants indicates—a matter of no great difficulty.²¹¹

As a final dig at Berle, Dodd suggested in the paper's last footnote that if courts had adopted Dodd's viewpoint, rather than requiring managers to act for the benefit of shareholders as Berle wanted, then the NIRA would have fared better under judicial scrutiny.²¹²

Dodd revisited his debate with Berle once again in a 1941 article entitled *Modern Corporation, Private Property, and Recent Federal Legislation*.²¹³ This article marks two significant shifts in Dodd's thinking.

First, his flirtation with corporatism was over. He no longer emphasized the importance of management's relationships with other stakeholders, nor did he pick up his previous arguments that shareholders had no rights to demand that the corporation be managed for their benefit. It is not surprising that Dodd abandoned corporatism. Many of Young and Swope's goals including unemployment insurance and social security, had been incorporated into federal labor and employment policies. Where Berle envisioned a dramatic overhaul of most of the laws affecting corporate activity, from antitrust to labor issues to duties of the corporation, Dodd had proposed a relatively modest change in the fiduciary orientation of managers,²¹⁴ a change consonant with the *ex ante* power structure. To Dodd, corporatism was only to be favored as a way of saving the pre-existing capitalist system. But by 1941 capitalism had survived without centralized government policies to reduce competition. The crisis resolved, Dodd had no further use for corporatism.

Second, with corporatism a historical footnote, Dodd returned corporate law to its narrow, private, profit-seeking box. Within the confines of the fiduciary model, Dodd became skeptical of managers: "[A] situation in which the shareholder has to depend rather on the conscience of the management than on his own legal rights is a dangerous one."²¹⁵ This statement was a sharp contrast with Dodd's earlier arguments that the

211. Dodd, *supra* note 204, at 203. It should be noted that at the time Dodd was writing, Mussolini and Stalin were regarded as great statesmen.

212. Berle did not rise to the bait and respond this second time. But he did later consort with the business commonwealth capitalists. The New Freedom faction gained ascendancy in the second Roosevelt Administration and launched an antitrust offensive against big business when the economy collapsed again in 1937. Berle took a dim view of this, a view he expressed in correspondence with Thomas Lamont of the Morgan Bank. Lamont and Berle joined forces, determined to try to influence the administration to revert to cooperation, and formed an ad hoc committee. It met at the Century Club in New York with Berle in the chair, Lamont and Owen Young representing business, Tugwell and Charles Taussig representing the administration, and John L. Lewis of the Council of Industrial Organizations and Philip Murray of the steelworkers' union representing labor. Some political tradeoffs were agreed upon, and Tugwell arranged a meeting with FDR. FDR was receptive, but the anti-business Brandeisians in his administration were not. They arranged for bad press at the time of the meeting, embarrassing Lamont, and turned FDR away from the initiative thereafter. See RON CHERNOW, *THE HOUSE OF MORGAN: AN AMERICAN BANKING DYNASTY AND THE RISE OF MODERN FINANCE* 418–20 (1990) (detailing events and individuals contributing to the decision to hold the meeting).

213. Dodd, *Modern Corporation*, *supra* note 18.

214. It was especially modest given that, at the time of the first Dodd piece, it was not well established that managerial obligations to shareholders survived the separation of ownership and control.

215. Dodd, *Modern Corporation*, *supra* note 18, at 927.

majority of managers can be trusted. It followed that the Securities Act of 1933 and the Securities Exchange Act of 1934 had been quite necessary. Here Dodd quoted extensively from the early chapters of *The Modern Corporation*, and remarked that in 1932 the lack of power of dispersed shareholders over management “meant that to a shockingly large extent the directors could without much legal risk sacrifice the shareholders’ interests in their own financial gain.”²¹⁶ That was why the new federal laws were there:

For it is precisely because corporate owners have proved to be so largely incapable of protecting their own interests either by means of their voting power or through the ordinary processes of litigation that federal administrative machinery has been set up, not for the purpose of regimenting owners but for the purpose of furnishing them with safeguards which they are unable to provide for themselves.²¹⁷

Dodd made one further adjustment to his thinking. In his view, the new federal securities laws had successfully reset the balance of power between shareholders and managers. Passed in response to the abuses in the corporate system, they targeted precisely “those parts of the corporate system regarded as most clearly in need of regulation.”²¹⁸ The combination of statutory mandate and delegation of enforcement authority to the SEC strengthened the ability of shareholders to be informed and to use their voting rights to wield real power. This places Dodd where Berle had placed himself in the late 1920s: looking to market regulation to solve the problem of separation of ownership and control. Where Early Berle had contented himself with self-regulatory proposals,²¹⁹ now Dodd could point to a mandatory legislative intervention.

What are we to make of Dodd’s shift? With the federal securities laws in place and the economic crisis having passed, Dodd returned to normalcy, in effect agreeing with Early Berle’s contention that shareholder protection was corporate law’s guiding purpose. This probably held out little gratification for Berle, who never returned to the position of his early writings. Dodd, for his part, probably never intended to gratify.

D. Berle’s Closing Concession

Berle returned to the debate with Dodd in 1953, two years after Dodd’s death, and again in 1954. The first occasion implicated Berle in the role of corporate lawyer, this time as brief writer in an appeal to the Supreme Court on the losing side in *A.P. Smith Manufacturing Co. v. Barlow*.²²⁰ *Barlow* was the famous case in which the New Jersey Supreme Court sanctioned corporate charitable contributions on a business judgment basis without requiring a justification keyed directly to corporate profit.²²¹ The Supreme Court appeal gave Berle a chance to secure doctrinal vindication of his 1932 shareholder primacy position. His brief states:

216. *Id.* at 926.

217. *Id.* at 948.

218. *Id.* at 930.

219. See *supra* text accompanying note 25.

220. *A.P. Smith Mfg. Co. v. Barlow*, 98 A.2d 581 (N.J. 1953), *appeal dismissed*, 346 U.S. 861 (1953).

221. *Barlow*, 98 A.2d at 581.

Neither social policy nor public benefit can justify a denial of the fundamental principles that directors must manage the affairs of the Corporation as trustees for the stockholders who own it, and that a contractual obligation exists to apply corporate funds only to objects authorized by the corporate charter. A denial of these principles would strike at the very basis of our economic system of private corporate industry.²²²

It soon would turn out that this stirring call for shareholder primacy reflected only Berle's integrity as an advocate. The following year he would reverse his Berle-Dodd position in a series of lectures entitled *The 20th Century Capitalist Revolution*.²²³ Time had proven Dodd the winner, he said. He would elaborate further in a back-and-forth with Henry Manne in the *Columbia Law Review* in 1962, taking a short qualifying step backwards:

[In t]he discussion I had with the late Professor E. Merrick Dodd . . . I . . . took the same side that Professor Manne does now, though for rather different reasons. I was afraid of corporate managements as social statesmen, or possibly as controlling fund-donors for universities and other philanthropies, not because I objected to the job being done, but because I thought corporate managements were not especially qualified to do it. In doing it they might revert to their classic profit-making function, and in that case would do the job badly—or worse. Events and the corporate world pragmatically settled the argument in favor of Professor Dodd.²²⁴

Dodd, then, had been right only as a practical matter—a practical matter contingent on the course of future events. By hypothesis, Berle maintained the view that Dodd had not been correct at the time of publication in 1932. Berle's later reversal thus does not signify unqualified acceptance of Dodd's status quo vision of managers as benevolent hierarchical superiors.

What had changed? Berle believed that everything had changed upon Roosevelt's 1933 inauguration, a view he articulated in a series of post-war books and articles.²²⁵ These works elaborate on the themes of the *New Individualism* speech, setting out a political economy unique to their author. In this modified corporatist construct, two prevailing conditions render corporate power benign: first, government management of the economy from an unchallenged position of higher authority and, second, a solid political consensus in support. Absent those essential conditions, there is no basis upon which to infer from Berle an endorsement of management in a primary role as an economic and social allocator.

E. Summary of Berle-Dodd

The Berle-Dodd debate of 1932 is easily (and frequently) misread. When modern scholars read the texts out of context, Berle appears to be the supporter of modern

222. Statement as to Jurisdiction, *Barlow v. A.P. Smith Mfg. Co.* 9, No. 383 (U.S. 1953). The brief argued that the state's sanction of the gift violated the shareholders' vested rights under the Contract Clause. *Id.*

223. BERLE, *20TH CENTURY*, *supra* note 19, at 169.

224. Berle, *Modern Functions*, *supra* note 16, at 442–43.

225. See *infra* Part V (discussing Berle's post-war articles and books).

shareholder primacy, which is a position he did hold, but only prior to his political metamorphosis and only in the strict confines of corporate law. Dodd, on the other hand, is interpreted in modern terms as a supporter of CSR. In fact, neither was supporting either position. Both were speaking to the politics of their day, defending different visions of the emerging corporatist state, Berle's on the left and Dodd's on the right.

Berle thus ended up as the putative great-grandfather of shareholder primacy by happenstance, and, ironically, only because Dodd's attack placed him in that position. By the time of the debate with Dodd, Early Berle was history. Berle, now Middle Berle, saw no principal role for shareholder primacy in his political economy.

At the time Dodd mounted his attack, the printed record did not yet reflect Berle's shift. *The Modern Corporation* was only just coming to publication. So Dodd attacked the only Berle in view—Early Berle—attributing to him a political economy based on shareholder primacy. As a business commonwealth corporatist, Dodd attacked using corporatist reasoning. Hence, it is Dodd's article that staked out Berle as a shareholder primacy advocate in the political context of the national crisis. Berle responded not by defending shareholder primacy in the wider context, a position he had already abandoned, but by using the shareholder interest to attack Dodd's advocacy of management discretion to choose appropriate social goals in the new corporatist state. Berle's response thus amounts to a classic anti-managerial argument. But the shareholders figure into it as mere stalking horses in a campaign directed against business commonwealth corporatism. Berle's objective was to clear the field for the progressive version of corporatism. Even as his anti-managerial argument is interpreted today to favor shareholder primacy, the opposite was the case.

Unfortunately for modern readers, Berle did not make this explicit. Our conjecture is that his sensitive role as an advisor to Roosevelt had a disabling effect. The Berle-Dodd debate appeared in May and June of 1932 when Roosevelt, almost certainly the Democratic Party's presidential nominee, was only beginning the process of articulating the main points of his New Deal. FDR would only publicly embrace progressive corporatism in September when he delivered Berle's *New Individualism* speech. The speech is the central statement of the Middle Berle position, albeit without the usual incident of public attribution. It confirms that the final chapter of *The Modern Corporation* represented the views of its author.

Subsequent events make the 1932 debate even more problematic to modern readers, and hence more difficult to decipher. Like ships crossing in the night, each made public concessions to the other. Dodd, having abandoned corporatism and returned corporate law to its narrow box of fiduciary duty and securities laws, could concede that Early Berle, the shareholder advocate, was right all along. On the other hand, post-war Berle (who we call Late Berle) remained the progressive corporatist of 1932. The NIRA and the formal corporatism of the Roosevelt Administrations were long gone. But, in Berle's view, the post-war regulatory state nonetheless accomplished their key objectives. Hence, Late Berle could "concede" that Dodd's view of management had been proven correct over time. The next Part lays out Late Berle's political economy.

V. LATE BERLE: MODIFIED CORPORATISM

We have seen that the transition from Early to Middle Berle was rapid and radical.

No such *sturm und drang* characterized Late Berle's evolution. The difference between Middle and Late Berle is one of time and place, from the political actor in the midst of an economic crisis to the mature academic in reflection in the midst of post-war plenty. Late Berle set out to summarize and restate Middle Berle's experiences as an enduring political economy. The enterprise failed: while Middle Berle's experiences could be generalized, they endured only as long as did the political and economic gestalt of the New Deal.

Accordingly, we do not recount Late Berle's political economy merely for its own sake. We do so because it corroborates our reading of *The Modern Corporation* and of the Berle-Dodd debate. Simply put, Berle's 1954 embrace of the manager-statesman confirms the legacy of *The Modern Corporation* and Berle's continuing support for greater government intervention in the workings of corporations and the markets in which they operated. The difference between Middle and Late Berle is entirely one of context; the NIRA had failed, but a regulatory state had evolved to replace it.

Late Berle articulated a corporatism modified for the American political framework, jettisoning the theory's elaborate structure of group representation along with the unregretted NIRA. He instead described a strong American regulatory state that operated under a pragmatic political settlement toward an end point in accord with corporatist precepts. The critical assumption was that the state could and did accurately articulate the social welfare function, guiding and pushing the markets to the right result. This presupposed the cooperative engagement of interested parties. Just as in the 1932 campaign, Berle was suspicious of competing interest groups. In fact, he avoided a theory of groups altogether. Instead, he described a benign equipoise amongst strong organizations, an equipoise constrained by a wider public consensus that empowered the central government in the role of welfare maximizer.

Corporate managers emerged as quasi-public servants in this framework, as advocated by Dodd in 1932. Whether they liked it or not, they were accountable to the regulatory state on the one hand and the public consensus on the other. Failure to satisfy the public meant new regulation; avoidance of new regulation meant satisfying the public. It followed that public duties were unavoidable as a practical matter. Shareholders, in contrast, remained what they had been in the response to Dodd in 1932—passive collectors of dividends with no productive role to play in the political economy. As we will see, these characterizations were context specific. Berle provided no theory with which to project them forward to today's very different political-economic context.

Section A sets out Berle's description of the post New Deal political economic status quo. Section B goes on to Berle's picture of the capitalist economy and the state's necessary planning role. Section C takes up Berle's description of a political equilibrium grounded in public consensus. Finally, section D turns to managers and shareholders.

A. The American Economic Republic

For Late Berle the events of 1933 had a constitutional significance. Before 1933, the economy and the polity had been separated, with the economy left to go its automatic way. But the "open market" could not prevent periodically catastrophic rises or falls in

the prices of goods: "It was not designed to."²²⁶ Catastrophe had resulted. Laissez-faire responses to such market failures resulted in changes in political regimes—Hitler in Germany and FDR in the United States.²²⁷

The 1929 crash, the slow recovery of 1930, and the ensuing spiral descent into an abyss of unemployment, bank failures, and commercial paralysis was not corrected by market processes. The contemporary business captains, working desperately (as they did) to meet the situation, failed completely. Following established precepts of the American political process, the public . . . increasingly asked that the political state propose a program and act. Necessarily, this meant considerable reorganization of private business. . . . Out of the crisis was born the American economic republic as we know today.²²⁸

Although the NIRA had failed, the state and the economy nonetheless emerged in the "American economic republic"²²⁹ as interdependent, with the state taking ultimate responsibility for economic results and exercising the higher level of power.²³⁰ The old economic order, with its private property and profit maximization engine persisted,²³¹ and, incentivized by the profit motive, did the producing.²³² The state had intervened only to stabilize its organizational lines and performance.²³³ More extensive intervention in the form of full-blown corporatism, complete with state economic institutions, had been avoided, but only because sophisticated private actors had learned to moderate their conduct. They had seen that the state's regulatory power took precedence over their own economic power and accordingly had restrained the exercise of their power for the sake of its preservation.²³⁴ Writing in the 1960s, Berle expressed confidence that this modified private order would persist for the foreseeable future.²³⁵

An academic claim followed from this positive account. Berle thought that economics without politics made no sense.²³⁶ Issues like industrial concentration, financial intermediation, and capital formation needed to be studied in a political framework, because each implicated the creation and exercise of power in society, power that society inevitably would control through government economic policy. At the same time, the political system was an instrument directed to the economic end of wealth creation²³⁷ in order to satisfy the social organization's material needs.²³⁸ That

226. ADOLF A. BERLE, *THE AMERICAN ECONOMIC REPUBLIC* 82 (1963) [hereinafter BERLE, *REPUBLIC*].

227. *Id.* at 80.

228. *Id.* at 91.

229. *Id.* at 95.

230. *Id.* at 95, 99, 169.

231. BERLE, *REPUBLIC*, *supra* note 226, at 99.

232. ADOLF A. BERLE, JR., *POWER WITHOUT PROPERTY: A NEW DEVELOPMENT IN AMERICAN POLITICAL ECONOMY* 94 (1959) [hereinafter BERLE, *POWER*].

233. BERLE, *REPUBLIC*, *supra* note 226, at 98–99. Keynes, said Berle, had shown that the state could "stabilize, stimulate and direct" the economy without assuming dictatorial powers and without abolishing private property. *Id.* at 5.

234. *Id.* at 169.

235. *Id.* at 99.

236. BERLE, *20TH CENTURY*, *supra* note 19, at 11–12, 47–48; BERLE, *POWER*, *supra* note 232, at 13–14, 21.

237. BERLE, *POWER*, *supra* note 232, at 13–14.

238. *See* BERLE, *REPUBLIC*, *supra* note 226, at 5–6 (stating that the primary function of the system of political economy is to supply the materials from which a civilization is built).

accomplished, society could take over as its members attempted to realize the good life.²³⁹

B. Economic Planning

Berle remained a planner. He believed that the economic conditions that brought about the Great Depression were intrinsic to capitalism. Product markets were incomplete, and price did not match supply and demand. The industrial production machine, he asserted, could bring forth limitless goods, a capacity that had been achieved for the first time in human history in the mid 1920s.²⁴⁰ But there were persistent problems—overcapacity gave management the discretion to set the level of production wherever it wanted; at the same time, labor tended toward oversupply. This led to an unpalatable either/or: either too many goods were produced or unemployment was too high. Market correction implied catastrophic fluctuations and intolerable costs: starvation for labor and bankruptcy for firms.²⁴¹ The solution to the problem lay in a planned equation of supply to demand.²⁴² Absent planning, he asserted, the economic conditions that had brought about the Great Depression would have recurred in the early 1960s.²⁴³ And, said Berle, most of the economy was in fact planned—directly in the regulated industries²⁴⁴ and indirectly in industrial oligopolies.²⁴⁵

For Berle, increasing concentration and oligopoly conditions remained the way of the future,²⁴⁶ and the balancing of supply and demand by actors in concentrated industries had a political effect.²⁴⁷ Government oversight accordingly was necessary—the price needed to be “administered.”²⁴⁸ Whenever pricing power was abused or the

239. *Id.* at 5.

240. ADOLF A. BERLE, POWER 176 (1967) [hereinafter BERLE, POWER II]. Berle expressed no concerns about incentives to innovate within big firms—there was no way to tell whether development worked better inside or outside; the important thing was that the capital was there inside. *Id.* at 209–13.

241. BERLE, REPUBLIC, *supra* note 226, at 78–79, 82. Berle observed that, absent regulation, conditions in 1962 resembled those of 1930, heralding another depression. *Id.* at 217.

242. BERLE, 20TH CENTURY, *supra* note 19, at 11–12.

243. BERLE, REPUBLIC, *supra* note 226, at 217. Berle expressed a parallel view respecting South American economies—absent stabilization of the prices of export commodities, well-intentioned financial aid might just go to waste. See ADOLF A. BERLE, LATIN AMERICA: DIPLOMACY AND REALITY 50 (1962) (explaining that more than anything, the question was one of social organization).

244. Industry-specific regulatory mechanisms controlling entry, exit, and prices remained in place over banking, ground and air transport, public utilities, broadcasting, petroleum, and shipping. BERLE, 20TH CENTURY, *supra* note 19, at 49.

245. Within a concentrated industry, competition amounted more to a struggle for power to balance supply and demand than to a struggle to gain market share through price competition. Competition continued within the industry in the limited sense that one firm could not set prices at will. BERLE, REPUBLIC, *supra* note 226, at 103–04. Meanwhile, abuse of economic power called for strong governmental responses. Monopoly pricing was appropriately regulated by the antitrust laws due to possibilities of abuse of power. BERLE, POWER, *supra* note 232, at 129. So too was private price fixing—only the government had the right to fix the price. BERLE, REPUBLIC, *supra* note 226, at 102. Unions that took advantage of a strategic position to extort special benefits by wielding the strike weapon were seen as little better than gangsters. Here, too, state intervention was necessary, but only as the occasion arose. *Id.* at 167–68.

246. See *infra* text accompanying note 267 (noting Berle’s updates of Means’ concentration figures).

247. BERLE, 20TH CENTURY, *supra* note 19, at 47.

248. BERLE, REPUBLIC, *supra* note 226, at 103. New industries would come into the system when they grew large enough to have an impact on public welfare. At that point, stabilization plans would have to be

public came to deem its exercise unacceptable in a given segment, or, alternatively, competition broke out with destructive effects,²⁴⁹ regulation or informal intervention could be expected, with informal means being preferred.²⁵⁰ Here Berle was open to a more explicit corporatist reform, advocating a post-war proposal made by Means for a government board that would monitor the “economic performance” (as opposed to the profitability) of all large firms and intervene as needed.²⁵¹

C. Political Processes and Controls

Berle built his political economy around two points: state economic management could not be avoided and, at least in the American context, the state performing the job was approximating the ideal of a benign maximizer. We turn now to the second point. Berle backed up the benign state with a theory of “political forces.”²⁵² This abstracted from history to offer a vision of natural selection of different political regimes.²⁵³ “Good” regimes built on universal application and directed towards guaranteeing “survival and growth” had superior evolutionary fitness.²⁵⁴ What a political theorist today might call “process,” Berle called “apparatus.”²⁵⁵ The better the political force, the more its apparatus would sustain it effectively over time. Berle’s exposition made no mention of the American economic republic even as the theory just happened to justify it.

It was a naïve theory, but one that kept alive the cooperative idealism of the NIRA. It also enabled Berle to present a theory with closure and make assertions about social welfare. In corporatism the social welfare function was determined by the government through a process of mediating among groups. Its implementation was brought about by the administrative control of prices and wages, an intervention that determined the income distribution.

In contrast, Berle’s American economic republic posited closure as an outcome of a well-functioning society. For Berle, the American political state had learned to take a pragmatic and flexible approach to economic management, hewing to the premise of a free society and eschewing grand theories.²⁵⁶ Political decisions that determined the social welfare function would simply emerge from the “apparatus” of public consensus.²⁵⁷ Planning was justified in response to “clear social demands.”²⁵⁸ Actors who wielded power, whether private or public, were expected to voluntarily observe the

worked out, with the unions cooperating. *Id.* at 159–60.

249. *Id.* at 160.

250. BERLE, REPUBLIC, *supra* note 226, at 41, 103; *see also* BERLE, POWER II, *supra* note 240, at 201 (noting price policing by Presidents Kennedy and Johnson). There was no problem of a Leviathan state. Government actors assumed new economic planning functions only reluctantly, because they presupposed a risk of failure (with consequent political costs) and had no upside. BERLE, REPUBLIC, *supra* note 226, at 67.

251. *Id.* at 160–61.

252. ADOLF A. BERLE, JR., NATURAL SELECTION OF POLITICAL FORCES 17 (rev. ed., Univ. of Kansas Press 1968) (1950).

253. *Id.* at 17–18.

254. *Id.* at 86.

255. *Id.* at 24.

256. BERLE, REPUBLIC, *supra* note 226, at 15.

257. In Berle’s view, the American public’s value system—“vast, silent, nonestablished but still regnant”—was the polity’s essential organizing force. BERLE, POWER II, *supra* note 240, at 294.

258. BERLE, POWER, *supra* note 232, at 127.

standards stated in the consensus.²⁵⁹ This justifying consensus in turn followed from prevailing customs respecting fair and equitable outcomes.²⁶⁰ Citizens registered these convictions through the political process. Although post-war pluralism hardly registers in Late Berle,²⁶¹ he did recognize the importance of groups. But he stressed that participation was open to all—individuals had a “solid and respected political power” in American democracy.²⁶² All it took was a sufficient number of individuals to realize that they were aggrieved, and political intervention would be “energized.”²⁶³ The political parties would listen, and then work the new input into common denominator platforms that in the end appealed to the consensus.²⁶⁴ Groups, then, provided inputs into a consensus that always came back to Berle’s corporatist starting point.²⁶⁵

D. Corporate Power

1. The Political Position of Management

Berle extended and updated *The Modern Corporation’s* picture of ever-increasing corporate power in the benign post-war context. Before 1933, in *The Modern Corporation*, Berle had seen collectivized corporate power as a problem. Now the power stemming from the concentration of productive functions in the hands of a few provided the means to realize a planned economy in which the interests of the community as a whole came to bear on economic decisions.²⁶⁶

Berle regularly brought Means’ figures on concentration to date. Unfortunately, things had not worked out quite as predicted. Means had projected that the largest 200 firms would account for 70% of production. By 1962, however, they supplied only 40% of production.²⁶⁷ Berle sidestepped accordingly, lowering the bar and stressing that in

259. BERLE, REPUBLIC, *supra* note 226, at 41.

260. *Id.* at 42–43.

261. The concept always made him suspicious. Interest group pluralism implied competition in pursuit of self-interested goals and failure to cooperate, qualities he had derided in his arguments against the Frankfurter and the New Freedom liberals in 1932. After the war, he denounced planning directed towards the defense of special interests as irresponsible. *Id.* at 127. He did, however, acknowledge that interest group competition could have the beneficial effect of preventing acquisition of excess power in any one interest. *Id.* at 92. It is at this level that Berle identified a pluralism he could embrace, but it was a pluralism consistent with his preference for cooperation. The multiplicity of empowered institutions—states, firms, and labor unions—had emerged in interdependent “equipoise,” an equilibrium relationship in which no single institution had been permitted to assume more than a handful of functions. *Id.* at 88. Berle thought this balance worked well.

262. BERLE, POWER, *supra* note 232, at 92.

263. *Id.*

264. *Id.* at 87–88.

265. Finally, Berle acknowledged that state power, like corporate power, could be abused. His yardstick was purposive: the power wielded must be appropriate given the organization’s function. *Id.* at 102. State economic power, accordingly, should be exercised only toward economic ends. Such power became dangerous to individual freedom when combined with other government functions or forms of power because combinations of power have no tangible limit. *Id.* at 97–98.

266. BERLE, 20TH CENTURY, *supra* note 19, at 32, 34–35.

267. BERLE, REPUBLIC, *supra* note 226, at 149. For earlier updates, see BERLE, 20TH CENTURY, *supra* note 19, at 27 (claiming slightly more than half of industry is owned by less than 200 corporations); BERLE, POWER, *supra* note 232, at 18 (claiming 500 corporations comprise 60% of industrial capital). Henry Manne extracted a concession in 1962. Compare Henry G. Manne, *The “Higher Criticism” of the Modern Corporation*, 62

1962 the largest 400 to 500 firms did account for 60% to 70% of production.²⁶⁸ As industrial concentration (as thus adjusted) still waxed, so did management power. Berle did acknowledge that product market competition, in particular the possibility of product substitution, still exerted some pressure on management. But this, he stressed, was not the market control mechanism expounded by Adam Smith.²⁶⁹

In any event, the political context in which managers operated had changed for the better. Now the legitimacy problems stemming from corporate power were worked out in the de facto corporatist framework—the equipoise of strong organizations. There, corporate power was constrained by the need to profit,²⁷⁰ by the residuum of competition within oligopolies, by the labor unions, and, given misuse of power or a crisis, by the state.²⁷¹ The consensus of public opinion lay behind all of these, operating slowly but, in the long run, determinatively.²⁷² It also bore on managers directly. Here Berle took a leaf from Dodd:²⁷³ for managers, as for politicians, violation of community values implied a loss of prestige and esteem that undermined their place in the organization. The corporation thus did have a conscience, one imposed by the community outside.²⁷⁴

The corporate manager emerged as a “non statist civil servant,”²⁷⁵ a non-state actor nonetheless subject to the consent of the governed.²⁷⁶ Social responsibilities followed. As a wielder of power in the interdependent system, a manager would be held to responsibilities to suppliers, customers, employees, and shareholders, along with other, more peripheral constituents. This was an unenviable position. A manager could be caught by surprise between the emergent public consensus and the responsive state, grappling in the unfamiliar territory of political accountability.²⁷⁷ The best defense was a satisfied American public. Happily, the U.S. public, unlike that in other countries, imposed no unreasonable demands. So corporate leaders could manage their political positions by honestly stating what they could and could not deliver, given their constraints.²⁷⁸

But the social role could not be avoided. Managers would exercise their business judgment, but would do so in the shadow of the desired public policies. This was different in degree but not kind with the corporatism of the NIRA. In the NIRA world, codes of behavior were intended to be formally enforced. In the American economic republic, business judgments had to anticipate social effects. Once the public consensus registered in the social welfare function, the failure of corporations to take responsibility meant forfeiture of the power to the state, and a less sound decision in the end.²⁷⁹

COLUM. L. REV. 399, 400–01 (1962) (asserting that Means' concentration prediction had not been realized), with Berle, *Modern Functions*, *supra* note 16, at 434 (admitting a flat trend since 1932).

268. BERLE, *REPUBLIC*, *supra* note 226, at 149.

269. BERLE, *20TH CENTURY*, *supra* note 19, at 43–45.

270. BERLE, *POWER*, *supra* note 232, at 90.

271. *Id.* at 89–92; BERLE, *20TH CENTURY*, *supra* note 19, at 53–59.

272. BERLE, *20TH CENTURY*, *supra* note 19, at 53–57.

273. See *supra* text accompanying note 172 (noting Dodd's claim that power leads to responsibility).

274. BERLE, *POWER*, *supra* note 232, at 90.

275. *Id.* at 8.

276. BERLE, *20TH CENTURY*, *supra* note 19, at 59–60.

277. BERLE, *POWER*, *supra* note 232, at 8.

278. BERLE, *20TH CENTURY*, *supra* note 19, at 59.

279. *Id.* at 172–73.

2. The Role of Shareholders

In Late Berle's grand scheme, shareholders continued to play a passive role. The capital allocation function had passed from the securities markets to the internal capital market. Berle pointed out in 1954 that during the preceding six years, 64% of invested capital had been financed by retained earnings and only 6% from new equity.²⁸⁰ It followed that the stock exchanges no longer served primarily as places for new investment and capital allocation, traditional functions only implicated in the rare instance of a new issue of common stock. The markets instead served as mechanisms for investor liquidity, a service provided for the benefit of the original owners' passive grandchildren or the transferees of their transferees. The connection to capital gathering and productive allocation was for the most part psychological.²⁸¹

The shareholders, earlier thrown up against Dodd as a countervailing interest, dropped out of the governance picture. Federal bureaucrats wielding the securities laws now patrolled the markets.²⁸² The annual election of directors played a minimal legitimating role in the wider political framework—a ritualized community process pursuant to a hoary legal template.²⁸³ Proxy fights, which had taken the stage in the 1950s, did not imply renewed empowerment for equity capital. Although always a possibility, such upsets would be rare and would tend to involve smaller firms.²⁸⁴ With bigger firms, the vote was getting ever more dispersed, further diminishing its importance and embedding passivity.²⁸⁵

All of this caused Berle to pose fundamental questions:

Why have stockholders? What contribution do they make, entitling them to heirship of half the profits of the industrial system . . . ? Stockholders toil not, neither do they spin, to earn that reward. They are beneficiaries by position only. Justification for their inheritance must be sought outside of classic economic reasoning.²⁸⁶

Berle repeated a point made against Dodd—passive property holders who wielded no power still might be socially justified for their distributive role in the polity. The shareholders used their wealth to provide for their families, pay their taxes, and support charitable institutions.²⁸⁷ But there was a catch: *full* justification for the shareholder interest would follow only when shareholder wealth became so widely distributed as to benefit every American family.²⁸⁸

280. *Id.* at 37–38 (acknowledging exceptions for utilities and new industries); see also BERLE, POWER, *supra* note 232, at 45 (noting that 10%–15% of new capital came from pension funds and insurance companies and 20% from bank borrowing).

281. Adolf Berle, *Property, Production and Revolution: A Preface to the Revised Edition*, in ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* xxvii, xxxiii–iv (rev. ed. 1967) [hereinafter Berle, 1967 Preface].

282. *Id.* at xxxiii.

283. BERLE, POWER, *supra* note 232, at 104–05.

284. BERLE, POWER, *supra* note 232, at 63; see also BERLE, POWER II, *supra* note 240, at 260 (giving an example of a failed proxy fight).

285. Berle, 1967 Preface, *supra* note 281, at xxxi.

286. *Id.* at xxxv.

287. *Id.*

288. *Id.*; see also Adolf A. Berle, *The Impact of the Corporation on Classical Economic Theory*, 79 Q.J.

Berle entered a caveat to this description. He noticed that more and more stock had been accumulating in pension funds, insurance company vaults, and mutual funds. These institutions, together with a handful of large New York banks operating as trust fund custodians, constituted a new nucleus of power. He saw very clearly that this small oligarchy could potentially exercise power over management as it accumulated and deployed risk capital²⁸⁹—an insight he already had noted back in the 1920s.²⁹⁰ However, so long as the investment intermediaries remained passive, they exacerbated the separation of ownership and control, extending the distance between managers and the individuals who were the ultimate beneficial owners.²⁹¹ It would be a different story if the institutions woke up and exerted power over management tenure, ending management's self-perpetuating oligarchy. But the separation of ownership and control would not thereby be solved: one set of oligarchs, the managers, would be replaced at the top by another, the self-perpetuating institutional managers.²⁹²

E. Summary

Late Berle expanded the themes of the *New Individualism* speech into a general political economy, picking up where *The Modern Corporation* left off and finally integrating the corporation into the wider framework. Although sensitive to context and new developments, Berle filtered them through a static framework set by the politics and economics of the New Deal. He interrogated but dismissed new thinking in market economics. Price would never match supply and demand in a politically acceptable mode, and that was that. The political equilibrium that favored state planning would endure because state planning was necessary because markets always failed, and that was that. Formal corporatist structures did disappear from Berle's thinking, but the political equilibrium provided a de facto substitute,²⁹³ and the assumptions and goals that had animated his Depression-era corporatism remained in place.

Corporate legal theory today is about "governance," a phenomenon in which Late Berle displayed little interest. He assumed that management adequately would play its role of directing production, and that the constraints of fiduciary and securities law assured an appropriate relationship between managers and shareholders. That accomplished, shareholders, who held consumption rather than productive property, had

ECON. 25, 39 (1965).

289. BERLE, POWER, *supra* note 232, at 49–51.

290. See *supra* text accompanying notes 26–27 (explaining the views of Early Berle). The difference was that now execution had been eased by the federal securities laws—all the investment intermediaries would have to do was combine and use the proxy process, ignoring managements' slates and substituting their own. BERLE, POWER, *supra* note 232, at 53. But they were not yet exercising this power, instead following the Wall Street rule and opting for exit over voice. For the moment, then, public opinion remained the more effective check on managers than shareholder opinion. *Id.* at 53, 55.

291. BERLE, POWER, *supra* note 232, at 55.

292. *Id.* at 59–60.

293. Berle's description had a theoretical counterpart in JOHN KENNETH GALBRAITH, *THE NEW INDUSTRIAL STATE* (1967). Galbraith's picture leaves the competing groups free to make their own rules, subject to government intervention to assure that excessive power does not accrue to one group. Free competition is allowed to operate on a day-to-day level, but in an administered economy that guards against excessive competition. The need for countervailing power precludes resort to market competition to choose the winners.

no public policy role to play. Their interest would come onto the policy screen only to the extent that shareholdings become sufficiently dispersed as to merge the shareholder and public interest into one. Berle showed remarkable prescience when he singled out financial intermediaries as potential players within the corporation. But, from his perspective, an institutional shareholder revolt that disempowered managers would not amount to a governance revolution, only a *coup d'état*—a shift from one empowered group without inherent responsibility to another.

VI. BERLE (AND DODD) TODAY

This Part looks for intersections between the corporate legal theory of Berle and Dodd and corporate legal theory today. The inquiry is counterfactual: if, based in their texts, we were to resituate the two in today's context, what positions would they take? In our view, the context has changed so much as to render the counterfactual exercise hopelessly indeterminate. Both Berle and Dodd at some point stressed shareholder protection, mentioned management empowerment with approval, and sanctioned the socially responsible corporation. It is not at all clear who can claim either as a great-grandfather. It follows that no one can. Or, alternatively, everyone can, in which event the claims lack meaning. That said, some claims are much better than others.

A. The Contemporary Gestalt

Berle died in 1971. The framework of corporate legal theory changed abruptly soon thereafter. Corporate governance was born. The precipitating economic context featured stagflation, a failing stock market, the retreat of organized labor, and a perception of national competitive decline in new global markets. Together these problematized the productive and financial performance of corporate managers. The precipitating regulatory context featured the corporate accountability scandals of the 1970s.²⁹⁴ These problematized internal governance structures.

Two touchstone publications of 1976 signaled and directed the resulting change of approach. The first is Michael Jensen and William Meckling's paper, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*.²⁹⁵ This began a new line of microeconomic theory²⁹⁶ that succeeded where classical microeconomics stopped short, modeling the governance of large firms with separate ownership and control as incidents of contracting among rational economic actors. Under the new approach, optimal economic results became the end to be attained, and in the view of most of the theory's advocates, shareholder value maximization appropriately proxied for optimal economic results.²⁹⁷ Thus was the shareholder interest situated at the economic margin as

294. See William W. Bratton & Joseph A. McCahery, *The Equilibrium Content of Corporate Federalism*, 41 WAKE FOREST L. REV. 619, 661–64 (2006) (describing the Watergate-era scandals).

295. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

296. Their predecessor was Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937), which provided the first microeconomic explanation of the choices to produce in firms rather than through independent contracts.

297. We note that not all financial economists agree. Reference is made to theoretical models addressing optimal arrangements for sharing and transferring control between debt and equity interests. See, e.g., Philippe

the search commenced for an optimal corporate incentive structure. The searchers favored market decisions over regulatory mandates and succeeded in inserting a presumption against new regulation into corporate legal theory. Today, when something needs fixing, market and self-regulatory solutions tend to be preferred.

The second publication is Melvin Eisenberg's book, *The Structure of the Corporation*,²⁹⁸ which synthesized and materially advanced a generation of thinking about the deficiencies of the received legal model of the corporation. For Eisenberg, the inherited model could not be dismissed as antique but serviceable. If structural barriers prevented shareholders from controlling managers, then the structure of the board of directors needed renovation so that the board became an effective monitor of management performance.²⁹⁹ Eisenberg's monitoring model of the board of directors has ever since been the main focus of legal corporate governance.

After Jensen and Meckling and Eisenberg published, the corporate landscape changed dramatically. Hostile takeovers came and went, bringing to the fore new conflicts between the management and shareholder interest. Institutional shareholders emerged as active governance players, disrupting power relationships. Finally, management incentives became a primary structural concern while internal controls became a primary legal concern. Through all of this, the board's makeup, processes, and performance loomed ever larger.³⁰⁰ At the same time, debate devolved on a persistent question: whether the emerging governance institutions paid adequate heed to the shareholder interest.

There emerged two dominant schools of thought. The leading school is shareholder primacy, which descends from the Jensen and Meckling model. It holds that management in the shareholder interest maximizes value, partly as a matter of correct incentive alignment³⁰¹ and partly because it deems financial markets to be better deployers of going-concern assets than actors in management suites.³⁰² The counter, managerialist

Aghion & Patrick Bolton, *An Incomplete Contracts Approach to Financial Contracting*, 59 REV. ECON. STUD. 473, 475–79 (1992) (discussing their model addressing the bilateral contracting problem); M. Dewatripont & Jean Tirole, *A Theory of Debt and Equity: Diversity of Securities and Manager-Shareholder Congruence*, 109 Q.J. ECON. 1027 (1994) (discussing their theory on the capital structure of firms); see also Michael Jensen et al., *Remuneration: Where We've Been, How We Got to Here, What Are the Problems, and How to Fix Them* 15 (European Corporate Governance Inst., Finance Working Paper No. 44/2004, 2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=561305 (“[C]onsistent with ‘stakeholder theory’ value-maximizing firms will be concerned about relations with all their constituencies. A firm cannot maximize value if it ignores the interest of its stakeholders.”).

298. MELVIN ARON EISENBERG, *THE STRUCTURE OF THE CORPORATION: A LEGAL ANALYSIS* (1976).

299. *Id.* at 162–85.

300. See Gordon, *supra* note 13, at 1472–1500 (discussing changing board composition from 1950 to 2005 in relation to the rise of independent directors).

301. See, e.g., HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* (1996) (describing the corporation as a “shareholders cooperative”); OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* (1985) (emphasizing transaction costs); OLIVER E. WILLIAMSON, *THE MECHANISMS OF GOVERNANCE* 184 (1996) (arguing that shareholders have residual claimant status with respect to both earnings and asset liquidation); Oliver E. Williamson, *Corporate Governance*, 93 YALE L.J. 1197, 1210 (1984) (emphasizing shareholder vulnerability).

302. Bengt Holmstrom & Steven N. Kaplan, *Corporate Governance and Merger Activity in the United States: Making Sense of the 1980s and 1990s*, 15 J. ECON. PERSP. 121, 122 (2001) (arguing that the growth of capital markets and shareholder value during the 1980s and 1990s stemmed from deregulation and technological advancements).

school defends management discretion, and hence the legal status quo.³⁰³ In the managerialist view, managers and boards need insulation from shareholder directives in order to deploy capital productively. Shareholder value is not necessarily rejected as the ultimate end, but what unites the school is rejection of substitution of the shareholder for management's business judgment. The flashpoint issues are tender offer defenses and proxy process reform.

Both sides claim wealth maximization for the firm as the purpose in view. A third, smaller school, CSR, rejects this single-minded focus on wealth maximization to argue that corporations should take responsibility for externalities inflicted and individuals injured in the course of business.³⁰⁴ Here the broad objective is the insertion of social welfare enhancement into the corporation's set of legal instructions, and the more particular focus is on the interests of corporate constituents other than shareholders and managers, particularly labor.

B. Dodd Today

A counterfactual re-creation of Dodd in the modern debate is made difficult due to his early death in 1951 and the relatively narrow compass of his published work.³⁰⁵ We start by modeling modern Dodd as the Dodd of the business commonwealth corporatism and the Berle-Dodd debate.

The CSR literature's references to Dodd are anchored in his advocacy of improved employment conditions and higher wages for workers. But if we link Dodd to Swope and Young, it becomes clear that CSR is not what Dodd was about. Unlike modern CSR, Dodd was not asking senior executives and directors to accept a set of external instructions that diverted resources to other stakeholders in the name of social welfare enhancement. Dodd did ask corporate leaders to be enlightened, but then to use their own discretion in deciding which stakeholders needed to be attended to in order to improve their commitment to the enterprise. Swope and Young's New Capitalism amounted to a pure management discretion position, not a CSR position.³⁰⁶ Berle was correct when he later characterized Dodd as a managerialist. But might Dodd have adjusted his stance to align with CSR in wake of the late-twentieth century return to a market dominated system? Not by the evidence of his later writing. Dodd disavowed managerial corporatism in 1941 after the capitalist crisis had passed.³⁰⁷ He pulled corporate law back from political economy and reinserted it in the small box of statutes and case law. This

303. A range of views fall into this category. Compare Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 573-74 (2003) (arguing for management empowerment under a shareholder-value maximand), with Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 274-81 (1999) (describing a hierarchical governance structure under board control without a shareholder-value maximand).

304. See David Millon, *Communitarianism in Corporate Law: Foundations and Law Reform Strategies*, in PROGRESSIVE CORPORATE LAW 1, 4-10 (Lawrence E. Mitchell ed. 1995) (discussing the communitarian view on the social costs of wealth maximization).

305. Berle, in contrast, continued to write books relevant to the debate for another 20 years.

306. In the modern literature, the position closest to Dodd's is that of MITCHELL, *supra* note 17. Mitchell accepts Dodd as a managerialist, duly noting his reservations, but adopting Dodd's managerialism as a second (or third) best alternative in a context hostile to CSR.

307. See generally Dodd, *Modern Corporation*, *supra* note 18.

makes it very difficult to make Dodd the great-grandfather of CSR either in terms of his early or late writings.

Alternatively, we might take Dodd's 1932 managerialism as a basis for placing him on the management side in the shareholder primacy debate. This is a better claim than any other. Dodd did become concerned that managers might not be faithful fiduciaries, but thought the problem largely resolved by the federal securities and state fiduciary duty laws existing in 1941. The 1941 article places Dodd in the position of a supporter of the post-New Deal legal status quo.

Finally, can we align Dodd with shareholder primacy? This is the least plausible projection. While he certainly wanted managers to protect the interest of shareholders, there is nothing in his writing that suggests that he wanted to give the shareholders more power to decide critical issues. Satisfied with the legal status quo, he resists remodeling on the shareholder primacy side.

C. Berle Today

Everything in Berle's political economy followed from two points. One point was his optimism that the machines would keep humming along productively, unburdened by management incentive problems leading to inefficiency. Managers might divert resources to their own pockets rather than to the shareholders, but they would maximize the size of the pie being baked. From a social welfare perspective, the main problem was the coordination of supply and demand to avoid macroeconomic problems. Critically, this task would be left to an activist federal government rather than to the markets.

The other point was the social consensus that provided Berle with a social welfare function. For Berle, the consensus was a salient political fact justifying government intervention for distributional purposes as well as for production efficiency. The corporation could be asked to assist in achieving the desired outcomes; if it refused, the government would impose the requirements on it. Whether the consensus ever existed is a fair question. But without a social consensus there was no social welfare function, and without a social welfare function, Berle's political economy had little to offer.

1. Shareholder Primacy

With these points in mind, we turn to Berle in relation to the shareholder primacy school. He continues to be cited as the great-grandfather, based on *Corporate Powers as Powers in Trust*, the Dodd rebuttal, and *The Modern Corporation's* exposition of the trust model.³⁰⁸ As we have seen, the citations are accurate only in reference to Early Berle, and a counterfactual Berle modeled only on Early Berle does not encompass the Berle of *The Modern Corporation* and the debate with Dodd. Once Middle and Late Berle come into view, any normative connections between his views and those of today's discussants are incidental and tenuous. Berle's corporatism followed from theoretical assumptions antithetical to shareholder primacy. Shareholder primacy privileges property rights and markets. Berle believed that social welfare should trump property rights and that central planning did better than markets in allocating economic resources.

Berle did take an anti-managerial approach resembling that motivating many of

308. See *supra* note 5 (citing sources connecting Berle to shareholder primacy).

today's shareholder primacy advocates.³⁰⁹ But even that connection is tenuous. Berle, like Dodd and most corporate law academics at all times, distrusted managers' tendency to self deal. To that extent there is a fit. But the anti-managerial tone of the Berle-Dodd debate, the one for which Berle is remembered, followed from normative concerns very different from those motivating today's discussants, concerns that took Berle to a different end point. Simply, managers were making decisions impacting social welfare that they were ill-suited to make. This called for political and regulatory constraint. Shareholder primacy, in contrast, distrusts managers because managers are not owners and accordingly have skewed incentives respecting the maximization of the value of the firm. From this perspective, the concept of a social welfare function is foreign, and anti-managerialism implies shareholder empowerment.

We can draw a stronger line between Berle and today's shareholder primacy by putting his normative framework to one side and shifting to the descriptive level. *The Modern Corporation* is remembered above all else for the positive observation that a separation of ownership and control impairs the governance of large public corporations.³¹⁰ Today's shareholder primacy/management discretion debate addresses the continuing question whether separation of ownership and control presents a governance problem calling for structural reform. Shareholder primacy advocates say yes, management defenders say no. Strictly speaking, the shareholder primacy side can cite Berle in support of this proposition.³¹¹

But the common emphasis on the separation of ownership and control does not suffice to align Berle with shareholder primacy. The connection can be made only by putting Berle's radically different normative perspective to one side, and, for Berle, the whole point of the separation of ownership and control diagnosis was normative. It meant that private property rights by themselves did not assure the corporation's responsible operation. It followed that the corporate legal entity, a construct theretofore thought to be private, should be re-characterized as public. Today's separation of ownership and control discussion proceeds in an entirely private, property rights-based context. We still use the appellation "public corporation" bequeathed by Berle and Means, but today the appellation is descriptive only, referring to public trading of a majority of the stock and nothing more.

For Middle Berle, the separation of ownership and control meant that managers amounted to an illegitimate aristocracy—they were "princes of property" rather than the "neutral technocrats" he wanted to see because they made public welfare decisions without being publicly accountable. Including shareholders in the corporate decision-making process (assuming there was a meaningful way to do so) would do nothing to solve the problem. Accountability to the general social body does not follow once the duly activated owners of property constrain their princes. The activated owners come from an elite (and, by hypothesis, empowered) segment of society—institutional fund managers, a segment that itself is not comprised of ultimate owners.

Berle admitted shareholders into his social welfare calculus only in a distributive

309. For a recent anti-managerial example, see LUCIAN A. BEBCHUK & JESSE FRIED, *PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION* (2004).

310. Bratton, *supra* note 11, at 753–59.

311. Indeed, Berle's separation of ownership and control made a significant return to salience in the 1990s after a period of eclipse by the new financial economic model. *Id.*

sense, as economic interest holders. The shareholder interest would weigh in as a positive in his social welfare calculus only to the extent shareholding was widespread among all social classes.³¹² The proliferation of pension funds has made the shareholder interest more and more distributionally salient. But “full” legitimacy in Berle’s sense certainly has not been achieved. The wealthy own most of the shares and it is an unusual social welfare function that weighs the importance of individual preferences by the number of shares owned.

Indeed, as between today’s advocates of shareholder primacy and management discretion, we can more easily imagine Berle choosing the managers from a fallback position. Today’s movement to empower shareholders would make Berle suspicious. The present environment poses a choice between governance interruptions by market-based holders and intermediaries (many of whom look for short-term gain) and governance from within the corporate institution. Given the choice, much in Berle signals that he would put his anti-managerial suspicions to one side and privilege internal, management control. He prized stability above all and mistrusted markets as deployers of capital.

2. Corporate Social Responsibility

Berle certainly can be cited for the proposition that managers should be socially responsible—that was what the “public corporation” was all about. But that still makes him only a collateral antecedent of today’s CSR advocates, not a great-grandfather. Here too there has been a change of context. Berle envisioned and sanctioned CSR only within a wider corporatist framework. His post-war consensus story specified that the public registered its demands for social responsibility only at “reasonable” levels.³¹³ He said nothing about the line between reasonable and unreasonable. Nor did he project a picture of management duties in a deregulated state in which foreign competition denuded the salience of domestic industrial oligopolies.

Berle witnessed trouble brewing to his left in his late years.³¹⁴ CSR as we know it today descends from those troublemakers. Progressives in the 1960s and 1970s were not getting all the public legislation they wanted and no longer saw the post-New Deal regulatory state as a responsive agency. In corporate law circles the result was a push to insert social welfare maximization into the legal model of the firm.³¹⁵

Berle holds out no authority for that proposition. We have described the last chapter of *The Modern Corporation* as a temporary patch.³¹⁶ Based on Late Berle, it is fair to say

312. For discussion of the progressive tradition of shareholder democracy, and its roots in Early Berle, see Dalia Tsuk Mitchell, *Shareholders as Proxies: The Contours of Shareholder Democracy*, 63 WASH. & LEE L. REV. 1503, 1528–35 (2006).

313. See *supra* text accompanying note 278 (noting Berle’s belief at the time that the U.S. public’s demands were not unreasonable).

314. The review of *Power Without Property* in the *New York Times Book Review* described the book as a “touchstone” for the problem faced by a corporate liberal at a time when the New Left was “ascendant.” SCHWARTZ, *supra* note 21, at 369. Berle, writing in 1968, dismissed the New Left as anarchistic. See BERLE, *supra* note 252, at 109–10.

315. See Elliott J. Weiss, *Social Regulation of Business Activity: Reforming the Corporate Governance System to Resolve an Institutional Impasse*, 28 UCLA L. REV. 343, 404–33 (1981) (describing and mooted various reform proposals).

316. See *supra* text accompanying note 147.

that the patch held and that Berle saw no inconsistency in a book that talked shareholder value in one part and social welfare in another. The key was the corporatist state. Middle Berle saw managers with duties to shareholder constituents going to the corporatist table as their interest representative subject to later cooperation with any overriding social welfare instruction derived by the government. Late Berle substituted the combined set of national regulatory directives and national political consensus, with its “reasonable” demands that fit neatly within management’s business judgment envelope. He grappled with neither stepped-up demands on the left, nor a countervailing shareholder voice on the right.

Berle’s progressive values do resonate with contemporary CSR. Even so, we can easily imagine Berle making the standard objection to today’s CSR³¹⁷—so far as concerns corporate pursuit of social goals, outside regulation works better than an open-ended internal social welfare instruction because it makes for a more coherent governance system and enhances political legitimacy. Labor, environmental, consumer protection and antitrust regulation all contain the discretion vested in managers by corporate law. Taxation and benefits take care of redistribution. This inside/outside settlement dates back to the early twentieth century, survived the Great Depression, and today seems more stable than ever. As to all of these points, Berle can be cited directly. Thus projected, Berle remains as progressive as ever, but argues for regulatory reform at the federal level, not for revision of the legal model of the corporation.

VII. CONCLUSION

When all is said and done, who in today’s debates legitimately can claim a great-grandfather in Dodd or Berle, and what, if anything do these texts have to say to us today?

As between Berle and Dodd, today’s jockeying claimants see Berle as the bigger prize. Berle after all, had the more distinguished public and academic career. Even more importantly, the dominant shareholder primacy school’s standing claim on Berle triggers counterclaims by opponents seeking to score points. So the question is whether the shareholder primacy side advances its cause by hitching its wagon to Berle. The answer is no. Berle can be invoked directly for the shareholders only by reference to early pronouncements he later abandoned. By the time of *The Modern Corporation*, Berle is on the opposite side from today’s shareholder primacy advocates. The only connection is at a secondary, descriptive level. The connection lies in his identification of a problematic separation of ownership and control, but the connection is weak. For Berle, the remedy, given the diagnosis, was corporatism. Had Berle’s views prevailed in history, the shareholder interest would not have benefited.

Berle addressed the question “for whom is the corporation managed” at a time when the answer had crucial implications for social welfare. In answering the question, Berle articulated a political economy that integrated a theory of corporate law within a theory of social welfare maximization. It was a corporate law and economics theory, a corporate law and politics theory, and a corporate law and society theory. It was plausible in its day, and, as stated, achieved theoretical closure. That closure of course relied on two

317. Bratton, *supra* note 1, at 71–74.

assumptions now viewed as heroic—a benign, maximizing state and an exogenous and efficient production function free of agency costs. Still, it was a great accomplishment.

Today's shareholder primacy/management discretion debate proceeds in a much narrower framework. The debate asks "for whom the corporation is managed" only inside the narrow corporate law box. Therein the theory of the firm is reduced to interactions among only three actors—managers, directors, and shareholders. There are good reasons for the reduction of scope. But, whatever the reasons, the reduction makes it impossible to claim positive social welfare consequences or even to discuss the matter at all. Shareholder primacy can acquire broad social welfare implications only outside the box, and then only if heroic and implausible assumptions are made first—for example, that shareholders are representative of the body politic.

Thus, the biggest lesson from this analysis is that the shareholder primacy school seriously impairs its own position by making a claim on Berle. Hitching your wagon to Berle, in any substantive manner, forces you to take on the broader social issues that were key to Berle's entire approach to corporate law. Not only was Berle on a side of the debate rarely heard from today, but he addressed a different and bigger question than do today's discussants. Far from being an offspring, shareholder primacy contradicts Berle rather than succeeds him.

Berle has lost the debate in history, and, at least for now, shareholder primacy has won. Simply stated, we have shareholder primacy today because corporatism lost out to pluralism and markets. With the broader political economic conflict for now resolved against Berle, his legacy is presently limited to the fact that he and Means were among the first to identify and analyze the separation of ownership and control which remains to this day corporate law's core problem. Corporate legal theory must confront the separation and hold out a cure. Shareholder primacy does that, at least within the corporate law box, and so takes over as the favored policy position in the wake of corporatism's disappearance from the wider political economy. But it has no implications for social welfare.

Meanwhile, the changed political economy throws up a formidable barrier to a CSR-based claim on either Berle or Dodd. When Berle and Dodd endorsed socially responsive management they assumed that markets did not work and government planners would be setting prices and influencing corporate policy. Suppression of the market opens a zone of allocational space for the firm. Social responsibilities follow ineluctably—they are the giveback for protection from price competition. The historical eclipse of corporatism and return of firms to the product markets shrinks the zone of discretion and enervates the give-back imperative. It becomes plausible to remit corporate responsibility to the regulatory state and the tax collector. A presumption accordingly arises in favor of leaving social responsibility and social welfare out of the legal model of the corporation. The problem for CSR is to find a way to overcome that presumption.

Our reconsideration of Berle and Dodd suggests that overcoming the presumption presupposes loss of confidence in free market capitalism and a concomitant political adjustment in a corporatist direction. Without that adjustment, CSR's social welfare maximands suffer the legitimacy problem Berle identified and lack a sovereign enforcer. CSR is left to exhort managers to be good.

If no contemporary corporate law discussant has a strong claim on Berle or Dodd, a question arises: Should we consign them to the scrap heap of old irrelevant texts? The

answer is no because regulatory regimes can change. Berle's political economy offers a framework for thinking about regime change and what it means for corporate governance. The first key for Berle was cooperative participation by regulators and managers in a common enterprise. In his first, formally corporatist vision of this, manifested in the NIRA, the state would join corporations and their constituents in a special regulatory apparatus. Later, that experiment having failed, Berle accepted a more fluid model in which state power encouraged cooperative engagement even as the state for the most part stayed its hand. Berle's model showed that property rights need not necessarily be a barrier to cooperative regulatory regime and that the public-private divide can be traversed given the right incentive alignment. All depends on Berle's second key—an empowered state with an agenda that calls on corporations to serve as means to regulatory ends and a solid base of public support. Neither key has been available for use for many years, but the future may hold out new opportunities.

The Modern Corporation leaves us with two messages. One registers today in the small box of corporate law, where the separation of ownership and control still presents an agency problem for solution. The other, a potential future message, is for the wider regulatory state: the state does not have to own and control corporations in order for corporations to serve public purposes. Corporations can serve their shareholders even as they accommodate demands registered by the wider public and channeled through the state.