Articles

"CORPORATION LAW IS DEAD": HEROIC MANAGERIALISM, LEGAL CHANGE, AND THE PUZZLE OF CORPORATION LAW AT THE HEIGHT OF THE AMERICAN CENTURY

Harwell Wells*

In 1962, the corporation law scholar Bayless Manning wrote, in a passage famous to corporate law scholars, that "[C]orporation law, as a field of intellectual effort, is dead in the United States." Looking back, most scholars have agreed, concluding that corporation law from the 1940s to the 1970s was stagnant, only rescued from its doldrums by the triumph of modern finance and the theory of the firm in the 1980s. What a strange time, though, for corporation law to be "dead"—the same decades that the American corporation had seized the commanding heights of the world economy, and gripped the imagination of social and political theorists. This Article takes a new look at mid-century corporation law, situating it within larger economic and political developments, in order to explain the distinctive features of corporate law in the "long 1950s," why the field appeared vibrant at the time, and how later changes in the American political economy led most to eventually agree with Manning's diagnosis. In the process, it aims not merely to restore a lost episode to the history of American law but to tell readers something about the nature of corporate law and how it changes from era to era.

* Associate Professor of Law, Temple University James E. Beasley School of Law. Ph.D. (University of Virginia), J.D. (Vanderbilt University Law School). My thanks to Willie Forbath, Robert Gordon, David Hoffman, Lyman Johnson, Greg Mark, Eric Orts, Clyde Spillenger, Wyatt Wells, and to audiences at the Conference on the Firm in History at Tel Aviv University, the Columbia/Georgetown/UCLA/USC Law and Humanities Junior Workshop, the University of Illinois College of Law, and the University of Virginia School of Law for many helpful comments. Financial support was provided by Temple University's Beasley School of Law.

INTRODUCTION 306
I.PRELUDE: THE RISE OF MODERN CORPORATE LAW 313
II.POSTWAR POLITICAL ECONOMY 316
A. The Long 1950s: Economics, Ideology, and the Cold War....316
B. Heroic Managerialism 326
III.CORPORATE LAW AT MID-CENTURY 331
A. Managerial Theory and Corporate Law.....331
1. Corporate Charitable Contributions.....333
2. Constitutionalizing the Corporation.....336
3. Shareholder Democracy.....339
B. Change and Continuity in Corporate Law 345
1. Heroic Managerialism in Theory and Practice 345
2. Understanding the Divide 347
IV.BEFORE THE REVOLUTION IN CORPORATE LAW 352
CONCLUSION.....355

INTRODUCTION

In 1962, Yale Law professor Bayless Manning wrote, in a passage well-known to corporate law scholars, that:

> [C]orporation law, as a field of intellectual effort, is dead in the United States. When American law ceased to take the 'corporation' seriously, the entire body of law that had been built upon that intellectual construct slowly perforated and rotted away. We have nothing left but our great empty corporation statutes—towering skyscrapers of rusted girders, internally welded together but containing nothing but wind.[1]

Manning's striking comment—buried in a footnote!—was aimed specifically at elements of American corporate law that, he believed,

1. Bayless Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker*, 72 YALE L.J. 223, 245 n.37 (1962). The best reflections on Manning's comment that I have found are in J. WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780-1970 10, 154–58 (1970).

remained mired in nineteenth-century formalism, reflecting an obsession with corporate personhood long discarded by more sophisticated students of the American corporation.[2] Yet his comment has been taken more generally as the final word on the corporate law scholarship that held sway in the decades around the mid-century.

Between Adolf A. Berle and Gardiner Means' 1932 book *The Modern Corporation and Private Property*, which identified the problem of "separation of ownership and control" as central to corporate law, and the law-and-economics work of the 1970s, so the story runs, nothing much happened in corporation law, certainly nothing worth remembering.[3] With the subsiding of debates over corporate personhood in the 1920s,[4] the nigh-universal adoption by the 1930s of enabling statutes that gave corporate framers broad powers to vary the corporate form,[5] and the abandonment of many of the hopes and illusions surrounding shareholder democracy,[6] it appeared that corporation law's foundational issues had been settled. By mid-century, as Delaware Chancellor William Allen concluded years later, "nothing remained to engage the wit and the energy of those with a taste for discovery and construction."[7] Writing in 1984, Roberta Romano noted that corporation law had long been "an uninspiring field for research even to some of its most astute students,"[8] while others have said that as of the early 1970s "corporation law was more or less dead,"[9] and that for decades

2. This is addressed more in Section III, *infra*. On corporate personhood debates, see Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1478–82 (1987); David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 205–20 (1990).

3. ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 4 (1932); *see also* Roberta Romano, *After the Revolution in Corporate Law*, 55 J. LEGAL ED. 342 (2005) (discussing why the revolution in corporate law during the 1980s was not fortuitous, and also discussing the impact of that revolution on corporate legal scholarship and practice). Some groundbreaking work in corporate law and economics, notably that of Henry Manne, was done in the 1960s, but the field as a whole only caught fire a decade later. William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1476 (1989); Brian R. Cheffins, *The Trajectory of (Corporate Law) Scholarship*, 63 CAMBRIDGE L. J. 456, 481 (2004).

4. *See* Mark, *supra* note 2, at 1478–82.

5. *See, e.g.*, Wilber G. Katz, *The Philosophy of Midcentury Corporation Statutes*, 23 LAW & CONTEMP. PROBS. 177, 187–88 (1958).

6. *But see infra* Part IV.A.

7. William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 263 (1992).

8. Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 923 (1984).

9. Richard Booth, *Five Decades of Corporation Law: From Conglomeration to Equity Compensation*, 53 VILL. L. REV. 459, 460 (2008).

before the 1980s it was "the sleepiest of legal fields,"[10] or worst of all, "simply boring."[11] Only the development of law–and–economics approaches to the corporation in the 1970s and 1980s, drawing on the theory of the firm and modern finance, would revitalize the field.[12]

So goes the conventional wisdom, but is it right? To some extent, the judgment is subjective and so can't be questioned; if the field was intellectually dead to Manning in 1962, or uninspiring to Romano in the 1970s, then that's what it was. But it is also an objective judgment: that corporate law scholarship during this period was dull, uninspired, and well forgotten. And this poses a significant historical puzzle, for in the 1950s the American corporation seemed to bestride the world. Corporations (or at least large, public ones), many believed, controlled the American economy, dictated its politics, imposed a conformist straitjacket on American society, and manipulated individual tastes and mores. Many of the nation's best-known economists and social theorists, from Peter Drucker and John Kenneth Galbraith to David Riesman and C. Wright Mills, took "corporate power" as a central concern. In political science, pluralist theories of politics held sway, which explained political outcomes as the result of competition between "countervailing powers," chief among them corporations. Why then was corporate *law*, a field devoted to studying power relationships within the corporation,[13] perceived as moribund from World War II to the 1970s? And what might this tell us about corporation law as "a field of intellectual effort" during this era, and perhaps our own as well?[14]

This Article tries to answer that question by examining the structure, contexts, and concerns of corporation law—or, to use a term equivalent to

10. Jason Scott Johnston, *The Influence of the Nature of the Firm on the Theory of Corporate Law*, 18 J. CORP. L. 213, 219 (1993) (quoted in Cheffins, *supra* note 3, at 483 n.166).

11. Ronald J. Gilson & Reinier Kraakman, *Clark's Treatise on Corporate Law: Filling Manning's Empty Towers*, 31 J. CORP. L. 599, 599 (2006).

12. Bratton, *supra* note 3, at 1471.

13. I recognize that some will disagree with this characterization, but I think it describes the prevalent view of corporation law, and even those who challenge it must acknowledge its ubiquity.

14. A few scholars have examined this period, notably William Bratton, Gregory Mark, and Dalia Tsuk Mitchell, and I have learned much from each. *See, e.g.*, Bratton, *supra* note 3, at 1491–98; Gregory Mark, *The Corporate Economy: Ideologies of Regulation and Antitrust, 1920-2000, in* 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 613, 635–44 (Michael Grossberg & Christopher Tomlins, eds., 2008); Dalia Tsuk Mitchell, *From Pluralism to Individualism: Berle and Means and 20th-Century American Legal Thought*, 30 LAW & SOC. INQUIRY 179, 195–205 (2005). I see this Article as expanding on their work, especially by linking the corporate law theory they examine with broader intellectual movements, outside of corporate law, and with corporate law doctrine of the period.

"corporate law as a field of intellectual effort," corporate law scholarship–during the "long 1950s" (basically, from the end of World War II to the mid-1960s). It begins with the perhaps necessary presumption that corporate law scholarship during this period was not, at least to its practitioners, intellectually dead;[15] indeed, it seeks to show that such scholarship engaged some of the era's leading scholars, who conducted significant exchanges with other major intellectuals, whose work was published in the nation's major legal publications and who, apparently, had significant readerships. If corporate law was dead as a field of intellectual effort, most corporate law scholars did not know it at the time.

Corporate law scholarship was also deeply woven into, and influenced by, the period's broader intellectual and political trends. While it is popular to see interdisciplinary scholarship as a recent development in law,[16] corporate law theory during this period reflected scholarly developments in related intellectual fields, especially sociology and economics. Indeed, the scholarship discussed here cannot be understood apart from a set of underlying assumptions largely borrowed from those fields: that modern American corporations had, through economies of scale and scope, come to win permanent oligopolistic positions in many industries, thus sharply curbing traditional competition; that large corporations were qualitatively different from both their predecessors and smaller business units, and wielded not only economic but social and political power in ways that other business units did not; that they were not merely economic entities but "social institutions" sharing much in common with other dominant institutions, notably labor unions; and that the consequence of these developments was that corporate management's role had evolved (or was in the process of evolving) so that it should serve not only shareholder interests but the competing interests of different corporate constituencies, and indeed society as a whole.[17] It was within this matrix of

15. Perhaps it was just "mostly dead." THE PRINCESS BRIDE (Twentieth Century Fox 1987).

16. Others know better. *See generally* BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT (1998) (examining the first law and economics movement in the early part of the twentieth century); HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937 (1991) (exploring the development of the legal framework for American business enterprise).

17. *See, e.g.,* Edward S. Mason, *The Apologetics of "Managerialism,"* 31 J. BUS. 1, 2 (1958). Other legal scholars have noted this line of ideas. *See, e.g.*, Jeffrey N. Gordon, *Corporations, Markets, and Courts*, 91 COLUM. L. REV. 1931, 1982 (1991); MELVIN ARON EISENBERG, THE STRUCTURE OF THE CORPORATION: A LEGAL ANALYSIS 24–28 (1976). A thorough account of the thought of three major managerial thinkers can be found in SCOTT R. BOWMAN, THE MODERN CORPORATION AND AMERICAN POLITICAL THOUGHT: LAW, POWER, AND IDEOLOGY 185–236 (1996).

ideas that the era's corporation law scholarship developed, and even opponents of these views found their arguments framed by them. When the intellectual underpinnings of this worldview were abandoned in the 1960s and 1970s, so was this strand of corporate law, and shorn of its larger context it appears today as peripheral or pointless.

Corporate law scholarship was also shaped by the politics of the time, most significantly the overarching political struggle of the Cold War. During these decades few issues were not touched by the political and economic competition between communist East and free enterprise West,[18] and the corporation was the preeminent representative of the free enterprise system. Thus, study of the corporation found itself implicated in a defense of the political-economic system as a whole.

In this Article, I borrow a phrase from the legal historian Gregory Mark and call the set of assumptions that framed such corporate law scholarship during the long 1950s "heroic managerialism."[19] It's an unwieldy phrase, but serves its purpose. Just calling these assumptions "managerialism" would also be acceptable, at least to historians, but modern corporate law scholars use "managerialism" to cover a broader array of concepts—basically, any theory of the corporation that presents the corporation as a hierarchical entity run by managers with loyalties running chiefly to the corporation rather than shareholders, a view that has its adherents today.[20] In contrast, the heroic managerialism I discuss here flourished during the decades around 1950 and then largely disappeared, and carried an optimism about the role management could play that faded and then largely disappeared. "Corporatism" is another term sometimes used to cover a related set of assumptions, but that term also applies to more formal governmental-business-labor arrangements that flourished in twentieth-century Europe and does not fit the looser and more

18. *See generally* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS (2000) (discussing the influence of the Cold War on domestic debates over civil rights).

19. Mark, *supra* note 14, at 642.

20. *See, e.g.*, Bratton, *supra* note 3, at 1471 (noting that the idea of the firm as a "management power structure" was widely accepted in corporate law scholarship until 1980); Mark S. Mizruchi & Daniel Hirschman, *The Modern Corporation as Social Construction*, 33 SEATTLE U. L. REV. 1065, 1067 (2010) (asserting that the separation of ownership and control in the post war era gave managers the ability to accommodate government intervention and accept the rights of labor). That said, "managerialism" was used during the 1950s, has been used by scholars since, and seems at least as appropriate as any other term. It probably dates to Burnham's 1941 classic work MANAGERIAL REVOLUTION. The earliest usage recorded in the Oxford English Dictionary is from a 1942 review of Burnham's book in the *American Economic Review*. *Managerialism Definition*, OXFORD ENGLISH DICTIONARY, http://www.oed.com/view/Entry/245246?redirectedFrom=managerialism& (subscription required) (last visited Nov. 18, 2012).

intellectualized vision of mid-century America.[21]

This Article also aims to make a second contribution by asking why high managerial corporate theory did not make more of an impact on everyday corporate law. For all its visibility, corporate law scholarship during this era was surprisingly far removed from most of corporate law *doctrine*—the set of established legal rules and procedures regulating corporations. There is, of course, some division between theory and practice in almost any area of law, but the divergence between theory and doctrine is especially striking here. Corporate law doctrine did not remain completely untouched by developments in what we can see as high legal theory, but neither, for all the theorists' efforts, were the ground rules and operating procedures of corporation law significantly reworked by theoretical developments; at best one can say that corporate doctrine was inflected by the work of the heroic managerial corporate law theorists. Why so much talk of change and so little change?

Finally, in resurrecting a largely forgotten episode in corporate law scholarship, this Article may also shed light on perennial issues in corporation law. As more than one scholar has observed, corporation law, both doctrine and scholarship, contains within itself divergent views about the nature of the corporation.[22] As William Allen has put it, over the past century we have lived with a "schizophrenic conception of the business corporation," in which a property model, which depicts the corporation as the property of its shareholders and run for their benefit, has lived uneasily alongside a "social" conception, which sees the corporation as an institution "tinged with a public purpose."[23] In legal scholarship, it is

21. *Compare* William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and The Modern Corporation*, 34 J. CORP. L. 99, 112 (2008) ("[C]orporatism is not well known in the United States . . . due to its association with the fascist politics of the European countries that formally adopted corporatism during the 1920s and 1930s."), *with* Martin Lipton, *Corporate Governance in the Age of Finance Corporatism*, 136 U. PA. L. REV. 1, 3 n.1 (1987) ("[T]he term 'corporatism' refers to the interaction between a corporation and its various constituencies.").

22. *See* Allen, *supra* note 7, at 264–65 (discussing inconsistent conceptions of the corporation); Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385, 1386 (2008) ("[I]t is perhaps asking too much to expect us as a people—or our law—to have a single view of the purpose of an institution so large, pervasive, and important as our public corporations." (quoting Allen, *supra* note 7, at 280 (1992))); Andrew S. Gold, *Theories of the Firm and Judicial Uncertainty*, 35 SEATTLE U. L. REV. 1087 (2012) (noting that academic theories of the firm do not necessarily correspond with judicial conceptions of the firm); Adam Winkler, *Corporate Law or the Law of Business?: Stakeholders and Corporate Governance at the End of History*, 67 LAW & CONTEMP. PROBS. 109, 109 (2004) (exploring the "long battle between the conservative, private, shareholder-wealth-maximization school of corporate legal thought").

23. Allen, *supra* note 7, at 264–65.

tempting to believe that one side or the other in these debates is finally right, and the other wrong, and that the schizophrenia of corporate law will end when one side or the other finally comes to its senses. But this view seems to assume that the corporation's essence and its contexts are fixed, and one view or the other must finally be right for all time. This Article suggests another possibility: that the two approaches wax and wane as the corporation and its surrounding political economy change over time.[24] Simply put, heroic managerialism may have been an accurate, or at least somewhat accurate, view of the corporation and corporate management in the 1950s, and it declined when larger social and economic changes rendered its assumptions no longer tenable. The divergent views of the corporation contained in corporate law may thus be the products of different historical moments, accurate at some times and not others.

The Article proceeds as follows. Part I surveys the development of recognizably modern corporate law before World War II. Paying particular attention to the 1930s, it shows how corporate law slowly reoriented itself from being chiefly concerned with corporate power over groups *outside* the corporation to a newfound focus on the *internal* relationship between shareholders and managers, while also arguing this reorientation was not complete even at the end of the 1930s. Part II sets the stage for discussing postwar corporate law by examining postwar American economic developments and social thought, demonstrating how a range of interconnected developments—including the Cold War, re-found prosperity, rapid economic growth, labor-management-government accords, and a deliberate rejection of conflict-based theories of politics—served to produce a more beneficent vision of the modern corporation and especially, modern corporate managers, who now took on the guise of "industrial statesmen."[25] Part III turns back to corporate law, discussing how major strands of corporate legal scholarship shared in these broader societal assumptions about the corporation and politics, and why this led corporate law scholars to direct their attention to issues that seem, in retrospect, puzzling. Part III continues to then examine the distance that existed between heroic managerial corporate law scholarship and what could be called mundane corporate law doctrine, and why the theory did not significantly change practice—which is one reason the theory seemed

24. To be sure, other scholars have recognized that corporate law scholarship is determined by larger historical contexts, and that believing there is a single "corporation" to be described for all time is wrong. *See, e.g., generally*, Bratton, *supra* note 3, at 1471 (chronicling the rise of the contractual theory of the firm after 1980); Mark, *supra* note 14 at 613 (describing how government involvement in the economy in World War II accelerated the growth of the administrative state).

25. Walter Lippmann, Drift and Mastery 328 (1961).

so insubstantial to Manning and later observers, and has left little impact on present-day debates. Part IV essays the decline of heroic managerialism–how, as faith in the giant corporation and, especially, the manager-statesman waned, so did the belief that managers could successfully and legitimately balance societal aspirations and govern corporations for the common good. The Article concludes by drawing larger lessons about corporate law from this episode.

I. PRELUDE: THE RISE OF MODERN CORPORATE LAW

Modern U.S. corporate law took recognizable shape between 1890 and 1930.[26] In some form, corporations have existed since before the nation's founding, and by late in the nineteenth century the corporate form was a commonplace frame for business organizations, its adoption made easy by the passage of general incorporation statutes during the century, and giant corporations had become an increasingly common feature of the economic landscape, beginning with the railroads.[27] Even late in the nineteenth century, however, the law did not provide incorporators complete freedom. Corporation law still retained some of the regulatory function it played earlier in the century, and in 1890 forming a corporation meant accepting significant state-imposed limitations on business, from size requirements to restrictions on corporate purpose.[28] By 1930, these had largely fallen by the wayside, as most states adopted "enabling" statutes that would essentially enable incorporators to organize largely as they saw fit. So, too, the purpose of corporate law seemed to shift, and along with it the idea of just what a corporation was. In the previous century, corporate law was seen as a way to, among other things, constrain the corporation, a presumption tied up with the idea that the corporate franchise meant the state had created the corporation. As the corporate form was a privilege given to incorporators, the reasoning went, limits on the corporation were the state's prerogative. In contrast, the enabling acts characteristic of the twentieth century began with the presumption that the corporation was the

26. *See* E. Merrick Dodd, Jr., *Statutory Developments in Business Corporation Law, 1886-1936*, 50 HARV. L. REV. 27 (1936) (analyzing the development of corporation law in Massachusetts and Illinois over a fifty-year period); Wiley B. Rutledge, Jr., *Significant Trends in Modern Incorporation Statutes*, 22 WASH. U. L.Q. 305, 310–12 (1937) (finding that the prevailing trend among states was less regulation and more autonomy for the corporation).

27. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 390–403 (3d ed. 2005) (describing the rise of corporation law and large corporations in the mid to late nineteenth century).

28. *See supra* note 26. This brief account simplifies a complex period in the evolution of corporate law.

creation of its incorporators, who should be substantially free to organize it as they saw fit.[29]

Undergirding these changes were changes in the way corporations impinged on public consciousness. In the 1890s, Americans vigorously debated whether there should be large corporations at all, and if they *should* be allowed to exist, how they were to be prevented from harming constituencies, such as communities and small competitors. By the 1930s, Americans had grown more comfortable with the existence of large corporations—at least, fewer critics wanted to eliminate them altogether—and other bodies of law, notably antitrust, had been developed to tame corporate power over consumers and small competitors.[30] And as mass shareholding grew in the 1920s, corporate law found a new purpose: to address not corporations' power over outsiders, but the balance of power within the corporation between corporate managers and dispersed, largely powerless, shareholders.[31]

It was a slow and incomplete transition. While the 1920s saw corporate power decline as a central concern in corporate law, it did not disappear. Berle and Means' *The Modern Corporation and Private Property*, the foundational work of modern corporate law scholarship, demonstrates this. While much of it dissects power within the corporation, particularly the power that non-owner managers had gained over shareholders' property ("the separation of ownership and control"), it also touches on the power the corporation wielded over employees, communities, and others. In Berle and Means' eyes, the nation's two hundred largest corporations were growing in power and size so fast that the corporation would soon hold a place as dominant as that of the church in medieval Europe. Given this, it would soon be incumbent on corporate managers to run their corporations not merely for shareholders' benefit. Managers, Berle and Means wrote, could be expected to evolve into a "purely neutral technocracy, balancing a variety of claims by various groups in the community and assigning each a portion of the income stream on the basis of public policy rather than private cupidity."[32]

29. *See* Rutledge, *supra* note 26, at 310–12 (finding that state incorporation laws in the early twentieth century had moved away from state regulation and towards freedom of contract).

30. *See* Winkler, *supra* note 22, at 133 ("In the 1920s and 1930s, securities laws and collective bargaining laws were adopted to protect the American economy and its workers from the corruption of Wall Street.").

31. JULIA C. OTT, When Wall Street Met Main Street: The Quest for an Investors' Democracy (2011).

32. BERLE & MEANS, *supra* note 3, at 356 (1932). Note that Berle and Means saw this as a future development, not one that the corporation was currently ready for. A. A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932).

Through the Depression and New Deal, fears of corporate power battled with the desire to harness it. As Ellis Hawley noted in his book *The New Deal and the Problem of Monopoly*, New Deal policies concerning corporations sometimes attempted to reach the contradictory goals of both containing large businesses (through more vigorous enforcement of antitrust laws) and harnessing their power (through proposals for large-scale economic planning and cartelization).[33] In other words, planners couldn't make up their minds. The early New Deal saw numerous proposals floated for restraining the power and even size of large corporations, and some were adopted, such as a progressive corporate income tax.[34] Though proposals for energetic government involvement in business faded by the end of the New Deal, as Keynesian spending won favor as the chief tool of economic management,[35] proposals to tame or break up corporations still gained traction. As late as 1937, Congress held hearings on a bill for federal licensing of corporations as a way to protect not only shareholders, but labor, consumers, and small competitors of the giant corporations.[36] And at the end of the decade, Roosevelt launched the investigations of the Temporary National Economic Commission (TNEC), charged with producing a "thorough study of the concentration of economic power" in America, though the subsequent hearings and report were equivocal and, as Alan Brinkley has noted, lacked the "populist resentment of corporate power" one might have expected.[37]

However limited all these steps were in practice—none significantly shrunk the size of giant businesses or greatly curbed their power—they demonstrate that corporate power was still a major concern in the 1930s, and that corporation law had not completely ceded concern with that power to other subfields. Corporate power would still be an issue after the war, but in very different forms.

33. *See generally* ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE (1966).

34. STEVEN A. BANK, FROM SWORD TO SHIELD: THE TRANSFORMATION OF THE CORPORATE INCOME TAX, 1861 TO PRESENT (2010).

35. Hawley, *supra* note 33, at 485; *see also* ALAN BRINKLEY, THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR 123–32 (1995) (describing how the TNEC investigations aided the shift towards Keynesian economic policy).

36. Federal Licensing of Corporations: Hearing on S. 10 Before a Subcomm. of the S. Comm. on the Judiciary, 75th Cong. 2 (1937).

37. BRINKLEY, *supra* note 35, at 123–32; HAWLEY, *supra* note 33, at 412.

II. POSTWAR POLITICAL ECONOMY

A. The Long 1950s: Economics, Ideology, and the Cold War

After World War II, both the American economy, and the ways Americans thought and talked about it, changed sharply. In retrospect, the period from the end of the war to the late 1960s seems an economic golden age.[38] The basic facts are well-known. While the 1930s marked the economy's low point, World War II revived it. Wartime government spending boosted production, while industry's vital role in the war effort helped rehabilitate the image of corporations tarred with the economic failures of the previous decades.[39] At war's end, a feared recession did not materialize, and instead pent-up consumer demand ignited economic growth. Between 1945 and 1973, real per capita income doubled,[40] and to a great extent this new wealth was spread widely, as wage inequality fell sharply in the 1940s and did not begin to increase significantly again until the 1970s.[41]

At the center of this economic success story was the American corporation, more specifically the few hundred giant corporations perceived as dominating most major industries.[42] Analyses of the American economy often began with the vision of a corporation-centered economy offered in *The Modern Corporation and Private Property*. Based on data assembled by Means, *The Modern Corporation and Private Property* had made two big claims about the American economy: that

38. A Golden Age appears only in retrospect, and of course in many ways the 1950s were deeply imperfect, but the economic growth and dispersion of wealth in this period has not been matched since.

39. *See* LOUIS GALAMBOS & JOSEPH PRATT, THE RISE OF THE CORPORATE COMMONWEALTH 127–29 (1988) (stating that World War II began the reconciliation process between corporations and American society); ROLAND MARCHAND, CREATING THE CORPORATE SOUL 312–56 (2001) (detailing the attempts of large corporations during the second world war to improve their public image by tying their operations to the war effort).

40. WYATT WELLS, AMERICAN CAPITALISM, 1945-2000: CONTINUITY AND CHANGE FROM MASS PRODUCTIONTO THE INFORMATION SOCIETY 27–28 (2004).

41. *See* Claudia Goldin & Robert A. Margo, *The Great Compression: The Wage Structure in the United States at Mid-Century*, 107 Q. J. ECON. 1, 3 (1992) (outlining the decrease in wage inequality in the 1940s and its subsequent reversal in the 1970s).

42. "Perceived" because, as Alfred Chandler pointed out long ago, concentration came in some industries but not in others, a fact overlooked by many critics of the American economy. *See* Alfred D. Chandler, Jr., *The Structure of American Industry in the Twentieth Century: A Historical Overview*, 43 BUS. HIS. REV. 255, 255 (1969) (noting the failure of many economists to emphasize the lack of uniformity in corporate concentration across industries). As used here, "corporation" generally applies to the large, public corporations perceived as economically and politically dominant.

control of corporations was shifting from stockholders to managers,[43] and that more and more of the nation's wealth was gravitating to approximately two hundred of the nation's largest corporations, which no longer engaged in fierce competition but existed in a comfortable oligopoly. In 1932, Berle and Means had estimated that those corporations controlled half the nation's corporate wealth.[44] In the postwar era, both assertions were still alive,[45] though Berle and Means retreated a bit from their claim that corporations were accruing larger percentages of national wealth.[46] In particular, the belief that competition was weakening, a longheld belief of antitrust advocates, became the conventional wisdom. The era of *laissez-faire*, it was said, was past, and the time where industries contained many small manufacturers battling for market share had been succeeded by one where more and more industries were controlled by a small number of dominant corporations locked in oligopolistic competition. This in turn gave those firms greater ability to set prices higher than they would have in perfect competition, leading some to speak of the postwar shift "from competitive to administered prices."[47] Indeed, economic pressures on giant corporations weakened along other dimensions as well; they also appeared insulated from demands of the capital markets, as internally generated funding came to replace the securities markets as a prime supplier of

43. More precisely, the claim was that control of corporations was shifting to whatever group had the power to name the board of directors. But for many readers, that equated to the company's senior managers.

44. This excludes business wealth controlled by banks. BERLE & MEANS, *supra* note 3, at 32.

45. *See, e.g.*, Robert J. Larner, *Ownership and Control in the 200 Largest Nonfinancial Corporations, 1929 and 1963*, 56 AM. ECON. REV. 777, 777 (1966) (explaining the general acceptance of Berle and Means' thesis in the literature); Clair Wilcox, *On the Alleged Ubiquity of Oligopoly*, 40 AM. ECON. REV. 67, 67 (1950) (analyzing studies that measured the accumulation of wealth by corporations in the post-war era). This is not to say there were no dissenters, just that their basic conclusions were generally accepted.

46. ADOLF A. BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION (1954); John Lintner, *The Financing of Corporations*, *in* THE CORPORATION IN MODERN SOCIETY 170–71 (Edward S. Mason, ed., 1960).

47. W. T. Easterbrook, Book Review, 67 J. POL. EC. 425, 425 (1959) (reviewing THOMAS COCHRAN, THE AMERICAN BUSINESS SYSTEM (1957)). On "administered prices," *see also* JOHN KENNETH GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER 196–200 (1952) (comparing the risk of inflation in a competitive market with a market in which government influences demand); GARDINER C. MEANS, PRICING POWER & THE PUBLIC INTEREST: A STUDY BASED ON STEEL (1962) (arguing that the government should administer prices by altering the tax incentives of large businesses). The late 1950s did see Congressional hearings on administered prices. *See* Meg Jacobs, "*Pocketbook Politics*", *in* THE DEMOCRATIC EXPERIMENT 250, 267 (Meg Jacobs et al. eds. 2003) (outlining Senate investigations between 1957 and 1963 into pricing practices by large businesses).

investment capital.[48]

In retrospect, there was good reason to think the economy had fundamentally changed. According to the economic historian Louis Galambos, "[i]n most sectors of the American economy . . . oligopoly prevailed and with it, competitive practices that downplayed short-term price competition and emphasized competition through product and process innovation and through new forms of marketing."[49] As Alfred Chandler showed, many of the corporations that grew to industrial dominance by the 1910s held their commanding positions into the 1970s, which suggested that competition was not alive and well in the upper reaches of the economy.[50] Defense spending effectively sponsored many industries, which operated less in an environment of fierce competition than as part of an "administered economy," with steady profits guaranteed by cost-plus contracts.[51] Other industries, including railroads, airlines, finance, and energy production, were so heavily regulated that competition there, too, was muted at best.[52]

Given the decline of competition, and the apparent entrenchment of the largest firms, one might have thought that corporate power would return as a major public issue. There were, certainly, some limits on corporations; regulated industries were, after all, regulated. Postwar administrations did not, however, appear eager to impose further limits on giant corporations, at least not the draconian limits sometimes envisioned in the New Deal. A memorable sign of business's new eminence came during the confirmation hearings of Eisenhower's nominee for Secretary of

48. BERLE, *supra* note 46, at 25–40. This view was widespread, but was not universal. *See, e.g.*, Lintner, *supra* note 46, at 166 (discussing the internal financing of corporations in the period). For more on capital markets at mid-century, see Brian R. Cheffins, Steven A. Bank & Harwell Wells, *Questioning "Law and Finance": U.S. Stock Market Development, 1930-1970*, 55 BUS. HIST. ___ (forthcoming 2013) (examining corporate law's protection of shareholders and the effect of that protection on capital markets during the period of 1930 to 1970).

49. Louis Galambos, *The U.S. Corporate Economy in the Twentieth Century, in* 3 THE CAMBRIDGE ECONOMIC HISTORY OF THE UNITED STATES 927, 942 (2008). In other industrial sectors characterized by batch production and customized products, such oligopolies did not arise. *See id.* at 938.

50. This was also the view at the time; one 1958 study of the one hundred largest firms indicated that the movement of firms out of the "top 100," and particularly out of the top of the "top 100," was decreasing over time, and that there was "considerable reason to believe that firms now at the top of the industrial pyramid *are* more likely to remain there . . . [and] large-scale corporations enjoy an increasing amount of entrenchment of position by virtue of their size." Norman R. Collins & Lee E. Preston, *The Size Structure of the Largest Industrial Firms, 1909-1958*, 51 AM. ECON. REV. 986, 1001 (1961) (emphasis omitted).

51. GALAMBOS & PRATT, *supra* note 39, at 137.

52. *See id.* at 153–54 (describing the cross-industry regulatory initiatives from 1940 to 1969).

Defense, General Motors President Charles Wilson, who told Congress that "for years I thought what was good for our country was good for General Motors and vice versa."[53] The antitrust laws were strengthened a bit in 1950, and their enforcement did prevent some horizontal and vertical mergers in some industries, but they did not challenge industry concentrations as a whole.[54]

So the fear of corporate power so widespread in the 1930s did not return after the war. Indeed, the postwar era presents a paradox: Even as corporations were perceived as more powerful than ever, fears of their power receded and changed, while not completely disappearing. Part of the explanation for this lies in the success of business and government in World War II—the war "generally softened Americans' historically suspicious attitudes toward large[-scale] organizations and their management."[55] But it is also to be found in new understandings of American politics that flourished after the war, understandings that depicted American society as characterized not by conflict but consensus, and that saw corporations as only one of several competing powers jostling for space at the commanding heights of American politics.

During the Great Depression American society was riven by, and was perceived as riven by, fundamental disagreements.[56] The 1930s' sometimes violent conflicts, particularly battles between labor and management over unionization, as well as the "vitriolic rhetoric" deployed by different interest groups, reinforced the vision of a deeply divided nation. As the decade drew to a close, however, both foreign and domestic influences discouraged class-based hostility and vituperative political discourse.[57] The rise of fascist governments abroad, and their persecution of minorities, led to public campaigns that emphasized Americans' common traditions and commitments. These campaigns were particularly encouraged by business interests, as organizations such as the National Association of Manufacturers (NAM) sought to convince Americans that,

53. MORRELL HEALD, THE SOCIAL RESPONSIBILITIES OF BUSINESS: COMPANY AND COMMUNITY, 1900-1960, 276 n.8 (1970) (quoting *Excerpts From Two Wilson Hearings Before Senate Committees on Defense Appointment*, N.Y. TIMES, Jan. 24, 1953, at 8).

54. *See* TONY FREYER, REGULATING BIG BUSINESS: ANTITRUST IN GREAT BRITAIN AND AMERICA 1880-1990, 300–04 (1992) (describing the antitrust laws of the 1950s and their policies); GALAMBOS & PRATT, *supra* note 39.

55. RAKESH KHURANA, FROM HIGHER AIMS TO HIRED HANDS: THE SOCIAL TRANSFORMATION OF AMERICAN BUSINESS SCHOOLS AND THE UNFULFILLED PROMISE OF MANAGEMENT AS A PROFESSION 200 (2007).

56. This paragraph draws heavily on Wendy L. Wall, INVENTING THE "AMERICAN WAY": THE POLITICS OF CONSENSUS FROM THE NEW DEAL TO THE CIVIL RIGHTS MOVEMENT (2008).

57. *Id.*

contra the widespread impression left in the 1930s, industrialists' interests were not so different from those of ordinary people. Once World War II began, groups on "both ends of the political spectrum"[58] had further reason to adopt rhetorical strategies that emphasized commonalities over disagreements, as they sought to distinguish the United States from its enemies and avoid accusations they were impeding the war effort. After the war, the pressures of the Cold War further encouraged a measure of ideological uniformity; it was not that different American political groups abandoned all disagreement, so much that they came to see the essence of the American system as pragmatic compromise between different interest groups sharing fundamental assumptions. Alongside popular visions of harmony appeared intellectual approaches that depicted America as blessedly free of the deep social and ideological antagonisms that characterized other nations. A "decentralized, non-ideological, interest-group theory of politics"[59] was attractive as an American way of repudiating pre-war Europe's ideological polarization. It was in this climate that the "consensus" school of American history flourished, and such prominent public intellectuals as Daniel Boorstin, Richard Hofstadter, Louis Hartz, and Lionel Trilling could assert that America, far from being a battleground of competing ideologies, had essentially a single belief system since the Founding: classical liberalism.[60]

American politics were also depicted as rooted in broad societal consensus. While conflict was not absent from the dominant "pluralist" school of American politics, political scientists depicted the nation's political competitions as the largely beneficent contest between well-organized interest groups, with none predominating. As Daniel Rodgers has pointed out, the touchstone of this approach, Robert Dahl's *Who Governs?*, depicted local politics in New Haven as composed of so many competing social and economic groups that "no single interest or interlocking set of interests, no power elite or ruling class, was capable of monopolizing it all."[61] This summary nicely captures the pluralists' vision of national politics as well.

At the national level, this produced a vision of the politics of

58. *Id.* at 105.

59. *See* NELSON LICHTENSTEIN, THE STATE OF THE UNION: A CENTURY OF AMERICAN LABOR 150 (Princeton Univ. Press 2002) (analyzing political trends in America after World War II).

60. *See* KEVIN MATTSON, INTELLECTUALS IN ACTION: THE ORIGINS OF THE NEW LEFT AND RADICAL LIBERALISM, 1945-1970 65, 182, and *passim* (2002) (describing the views of various New York intellectuals and writers on the ideology of American political thought in the 1950s). This consensus did not survive the 1960s.

61. DANIEL RODGERS, AGE OF FRACTURE 82 (2011).

"countervailing power," as John Kenneth Galbraith dubbed it.[62] This power came into play particularly to tame the power of large corporations. Whereas earlier in the century political struggle had often been seen as a battle between the people and the interests, with "the interests" usually meaning big business, the dominant postwar account of economic politics, and of business' role in it, was far less threatening. American politics were no longer, Galbraith and others argued, dominated by big corporations (if they ever had been)—they had been joined by other large organized interest groups, most visibly big labor and big government (and, in some versions, still others, such as giant foundations or organized retailers).[63] Galbraith's *American Capitalism* argued that, in postwar America, corporations were now merely one of a number of jockeying interest groups, their power offset not by direct competition with rivals but by the "countervailing power" of other large institutions, ranging from other large corporations (for instance, retail chains countering producers) to unions, which served to mobilize the economic power of otherwise powerless individuals and small groups.[64] While Galbraith's account was cast in the language of economics, it was clear that he believed countervailing powers also served to limit the political power of corporations. As one scholar puts it, Galbraith's analysis not only confirmed that contemporary American democracy was dominated by powerful social and economic groups rather than by an omnipotent state or a large number of free individuals, it also implied that the state of affairs was "not nearly so dangerous as often supposed."[65] Countervailing powers, and America's presumed competitive public sphere, contrasted sharply with the totalitarianism against which the nation struggled.

Unions (or "Big Labor") deserve special comment. Before passage of the National Labor Relations Act in 1935, workers' right to form unions was often challenged and unions themselves struggled to win legitimacy. The late 1930s saw an enormous rise in union membership, and many firms that had long held out against unionization were forced to allow it, but this

62. GALBRAITH, *supra* note 47.

63. *See* RODGERS, *supra* note 61, at 80–81 ("The dominant reading of power in mid-twentieth century America has been interest-group pluralism. On the fields of economy and politics, it was said, the best organized social interests competed ceaselessly for influence.")

64. GALBRAITH, *supra* note 47, at 108–134; *see also* RICHARD PARKER, JOHN KENNETH GALBRAITH: HIS LIFE, HIS POLITICS, HIS ECONOMICS (2008) (a biography of Galbraith which describes his views on countervailing power).

65. Wolfgang G. Friedmann, *Corporate Power: Government by Private Groups, and the Law*, 57 COLUM. L. REV. 155, 171 (1957); *see also* Nelson Lichtenstein, AMERICAN CAPITALISM: SOCIAL THOUGHT AND POLITICAL ECONOMY IN THE TWENTIETH CENTURY 5 (Nelson Lichtenstein, ed., 2006) (at mid-century "most theorists worried far more about a claustrophobic bureaucratism than an uncontrolled market capitalism").

did not necessarily augur a truce between labor and management. As soon as the war ended, significant labor conflict broke across the nation, and the late 1940s often saw bitter strikes.[66] By the end of that decade, though, the endemic struggle between capital and labor was replaced, at least in the public eye, by a labor-management concordat in which corporate managers were left to run their businesses as they saw fit, and, in return, labor unions received income and benefits sufficient to carry their members into the middle class. The exemplar of this new industrial harmony was the UAW's 1950 agreement with the Big Three automakers, which guaranteed union workers "pensions, health insurance, the union shop, and a 20 percent increase in the standard of living," an agreement now remembered as the "Treaty of Detroit."[67] While no one would deny corporations had considerable power in society, it was believed to be power held in check.

These economic and intellectual developments, helped along no doubt by pro-business advertising campaigns, produced a new vision of the American corporation in the postwar era. No longer, many argued, was the corporation merely an economic entity, it had become a "social institution."[68] What exactly this meant can be hard to pin down. Berle and Means described the corporation as a "major social institution" in *The Modern Corporation and Private Property*, claiming that the corporation (by which they meant the 200 largest American corporations) had accrued so much economic power, at the same time ownership of the corporation had become so attenuated, that the "larger interests of society" now had a claim on corporate wealth at least equal to that of shareholders.[69] They also speculated that the corporation's power meant it might eclipse even the state as the dominant institution of modern society.[70] Postwar, these views were a little more muted—the countervailing powers theory described the corporation as being countered by other power blocks such as Big Labor—but there was still a sense that the largest corporations, by virtue of their size, stability, and economic influence, had taken on a new social role, and corporate management a new social responsibility.

It is tempting, particularly for a corporate law scholar, to find the intellectual roots of this view in Berle & Means (or just Berle, who was still

66. LICHTENSTEIN, *supra* note 59, at 103–04. As Lichtenstein notes, what we remember as a relatively harmonious labor compact in the 1950s was not perceived as that by labor at the time. LICHTENSTEIN, *supra* note 59, at 99 ("During the first two decades after World War II few unionists could have been found to declare their relationship with corporate America particularly agreeable or stable.").

67. LICHTENSTEIN, *supra* note 59, at 123.

68. LICHTENSTEIN, *supra* note 59, at 351.

69. BERLE & MEANS, *supra* note 3, at 351, 356.

70. BERLE & MEANS, *supra* note 3, at 351, 356.

active in the 1950s).[71] That act of compression, though, would misrepresent the complex origins and widespread acceptance of the managerial worldview that gave managers a broader, some would say iconic, social role. As early as 1914 Walter Lippmann had prophesied in *Drift and Mastery*, that the separation of ownership and control would turn workaday managers into "industrial statesmen," managing corporations in the broader social interest.[72] In the 1920s corporate leaders such as Owen Young of GE had insisted on the corporation's larger social role and instituted programs of welfare capitalism for workers.[73] In 1940 James Burnham had published his enormously influential *The Managerial Revolution*, where he drew on Berle & Means, among others, to argue that a "social revolution" was underway that would see "an unusually rapid rate of change [in] the most important economic, social, political, and cultural institutions of society," and that would conclude with a new, managerial class seizing control of the major institutions of society.[74] In 1946, Peter Drucker, whose position as a major social theorist was only later eclipsed by his role as pop-management guru, described his study of General Motors, *The Concept of the Corporation*, as taking a "social and political approach to the problems of industrial society—as distinct from economics."[75] In the postwar United States, he wrote, "[o]nly now have we realized that the large mass-production plant is our social reality, our representative institution, which has to carry the burden of our dreams."[76] And this new view of the corporation and its management was not limited to social theorists; managerialist conceptions came to dominate business education in the 1950s, and even the Harvard Business School made room for "a certain notion of stewardship on [its] definition of the manager's

71. For a thought-provoking reconsideration of Berle's later works, see Marc T. Moore & Antoine Rebérioux, *Corporate Power in the Public Eye: Reassessing the Implications of Berle's Public Consensus Theory*, 33 SEATTLE U. L. REV. 1109 (2010).

72. *See* William Leuchtenberg, *Walter Lippmann's 'Drift and Mastery,' in* WALTER LIPPMANN, DRIFT AND MASTERY 8–9 (1961) (positing that a bright future rested in replacing business leaders driven by the profit motive with industrial statesmen who put societal interests first).

73. MARY O'SULLIVAN, CONTESTS FOR CORPORATE CONTROL 85 (2001).

74. JAMES BURNHAM, THE MANAGERIAL REVOLUTION 71–77 and *passim* (1940). Burnham had been influenced by Berle and Means. *See* DANIEL KELLY, JAMES BURNHAM AND THE STRUGGLE FOR THE WORLD 93 (2002). In important respects, it should be noted, Burnham's vision was *sui generis*; he also believed that one consequence of the managerial revolution would be state ownership of the means of production.

75. PETER DRUCKER, CONCEPT OF THE CORPORATION xxvi (1946). Drucker certainly did not agree with Burnham or the other "managerial" authors on everything; for instance, he believed the corporation had to be guided by the profit motive.

76. *Id.* at 142.

role."[77]

This different vision of the corporation also meant a different vision of corporate power. As noted, it is not that corporate power disappeared from the agenda; Galbraith, for instance, believed corporate power had been tamed but certainly had not completely disappeared. Rather, as the corporation increasingly was seen as a social institution, increasing concern was paid to its social, and not merely economic, power. In 1957, the Harvard economist Carl Kaysen published an essay in the American Economics Review entitled *The Social Significance of the Modern Corporation* that opened by claiming that in "the evolving giant corporation, managers possess great scope for decision making unconstrained by market forces . . . ."[78] Such unconstrained power could be dangerous, and not just for economic reasons; "the modern corporation," he continued, "operates to spread business valuations and business ideas widely through the whole of society . . . most obviously through the mass media, the tone of which is set by the themes of sales promotions. But the more subtle effect of membership in the corporate institution is probably more important."[79] Modern corporations had almost guaranteed workers and executives permanent employment, but this meant that "membership in the modern corporation becomes the single strongest social force shaping its career members in the whole hierarchy above the production line."[80] Harvard law professor Abram Chayes wrote shortly thereafter that the corporation was:

> the dominant nongovernmental institution of American life. The university, the labor union, the church, the charitable foundation, the professional association—other potential institutional centers—are all, in comparison, both peripheral and derivative.[81]

Making the point about the corporation as a "social institution" more explicit, a 1959 collection of essays on the corporation (including Chayes'), most written by law professors and economists, was not entitled, say, the *Corporation and the Economy* but *The Corporation in Modern Society*.[82]

---

77. KHURANA, *supra* note 55, at 291.

78. Carl Kaysen, *The Social Significance of the Modern Corporation*, 47 AM. ECON. REV. 311, 316 (1957).

79. *Id.* at 318.

80. *Id.*

81. Abram Chayes, *The Rule of Law*, *in* THE CORPORATION IN MODERN SOCIETY 27 (Edward S. Mason, ed., 1959). An interesting comment, as it suggests that Chayes was not fully won over by the countervailing power thesis.

82. THE CORPORATION IN MODERN SOCIETY (Edward S. Mason, ed., 1959). Out of fourteen contributors, three were law professors, six economists or business-school professors, two political scientists, and one sociologist.

The concept of the corporation as a major social institution, with consequent social power, had at least two further effects. First, it created some affinities between "managerial" writers such as Berle, Drucker, and Kaysen, and more popular critics of the corporation such as the journalist Vance Packard, author of an attack on advertisers, *The Hidden Persuaders,* or William Whyte, who wrote the classic critique of corporate conformism, *The Organization Man*—each of whom focused their fire on the subtle ways that corporations could affect society. In the above essay, for instance, Harvard economist Kaysen does not sound so far from Packard.

Second, the emphasis on the corporation as a social institution led some observers to blur the specific economic and legal nature of the corporation. Once the (dominant, large, public) corporation was perceived as a significant social institution, it was often categorized and analyzed along with other giant social institutions such as unions, the multiversity, or the emerging giant foundations, losing some of its distinctiveness in the process. American society, in this view, became a network of large institutions, with the corporation as the most prominent, tied together atop a society and economy they managed. Galbraith, for instance, would count unions as one of the "countervailing powers" scrutinized in *American Capitalism*.[83] Speaking further from the left, the radical sociologist C. Wright Mills in his classic, *The Power Elite*—admittedly a more thoroughgoing critic of corporations than most discussed in this Article—depicted the corporation, which he saw as controlling the "economic domain" of modern society, as only one of society's "big three" hierarchies, alongside the state and the military, and further argued that all were deeply entwined: "[t]here is no longer, on the one hand, an economy, and, on the other hand, a political order containing a military establishment unimportant in politics and money-making. There is a political economy linked in a thousand ways, with military institutions and decisions."[84] Even Bayless Manning, when criticizing studies of "corporate power" published in the 1950s, argued that the problem under consideration was not the power of the "generic" corporation – which was merely a legal form – but

83. *See* GALBRAITH, *supra* note 47, at 196–200 (describing the power of unions to influence markets by seeking and obtaining increases in prices or wages). Note that Galbraith was by no means equating the two, just noting that through certain analytic lenses, they played much the same role.

84. C. WRIGHT MILLS, THE POWER ELITE 7-8 (1956). Mills deserves mention here, but he was an outlier in managerialism, taking a far more pessimistic view of the development of a managerial class than did the other thinkers discussed here. He is probably more usefully classified with critics of bureaucratic society from the right (James Burnham) or the left (the Frankfurt School). *See* Howard Brick, *The Postcapitalist Vision in Twentieth-Century American Thought, in* AMERICAN CAPITALISM 26 (Nelson Lichtenstein ed., 2006) (exploring Mills' critical views on "new order of politically regulated markets").

rather the power wielded in modern America by any "vast centralized economic and social organization," including giant corporations.[85] Looking back, the historian Richard Pells would write of the view of the "harmonious marriage of government, business, the military, and the unions that became an accustomed feature of American life after 1945."[86]

Berle and Means, Drucker, Kaysen, and Manning did not speak for everyone, nor did they agree on every point, but their comments do mark out a distinctive approach in economic and social thought that influenced how the corporation was understood during the long 1950s. Moving towards the main subject of this Article, we can ask how this broad view shaped understandings of corporate management, and how this in turn shaped legal scholarship on the corporation.

B. Heroic Managerialism

At the core of mid-century managerialism was not only the belief that large corporations were rapidly developing into, or already were, dominant economic and social institutions, but that they were being run by a new kind of controller. Both those optimistic and pessimistic about managerialism pointed to corporate managers as a central element of the new system, individuals who were responsible no longer for shareholders alone, but for other constituencies and, indeed, society at large. As the historian Charles Maier observed, "[w]ith the participation of the businessman in a fabric of social responsibility and national policy making, management ideology claimed a new inclusiveness. No longer could the managerial function be conceived of in terms of the firm alone. In the era of the Cold War it involved a national mission . . . ."[87]

To critics, the managers' new role signaled the rise of a new ruling class; Burnham and C. Wright Mills, for instance, saw corporate managers as helping constitute a new ruling class, supplanting the proprietor-capitalists of a previous era.

More sympathetic students of the corporation did not see senior managers in such a sinister light, but they agreed that managers' roles had fundamentally changed. Managers, they believed, were no longer merely agents of their shareholders. Berle and Means had said something similar in 1932,[88] but the idea became widespread in the postwar era, as corporate

85. Bayless Manning, *Corporate Power and Individual Freedom*, 55 NW. L. REV. 38, 40 (1960).

86. RICHARD PELLS, THE LIBERAL MIND IN A CONSERVATIVE AGE 55 (1985).

87. Charles Maier, *Society as Factory*, *in* IN SEARCH OF STABILITY 66 (1988).

88. They foresaw management becoming a "neutral technocracy" in 1932; this does not mean they though management as it actually existed in 1932 had yet achieved this. *See*

leaders were increasingly depicted as taking responsibility to multiple constituencies, at minimum labor and consumers as well as shareholders and, in a more expansive view of their role, to society generally.[89] In 1950, Drucker wrote of the need for a business enterprise to have "management whose responsibility is to the enterprise rather than to any one group: owners, workers, or consumers,"[90] and a decade later Berle, who remained a formidable intellectual presence through the 1950s, did him one better by speaking of modern directors who were no longer "limited to running business enterprises for maximum profit, but are in fact . . . administrators of a community system."[91] Economists voiced similar beliefs; in his 1957 essay, Kaysen wrote that management, no longer constrained by fierce competition or the need for outside capital, "sees itself as responsible to stockholders, employees, customers, the general public, and, perhaps most important, the firm itself as an institution,"[92] while his Harvard colleague, Edward S. Mason, wrote shortly thereafter of "managerial voices . . . raised to deny th[e] exclusive preoccupation with profits and to assert that corporate managements are really concerned with equitable sharing of corporate gains among owners, workers, suppliers, and customers."[93]

The last comment is slightly jarring, for it hints that this managerialism was the ideology not only of the managerial theorists, but of corporate managers themselves. The evidence suggests that this is the case—or at least that in their public pronouncements, corporate leaders believed they had taken on new responsibilities to corporate constituencies and the broader society.[94] Clearly, many business leaders accepted some or all of the economic underpinnings of managerialism; by the 1950s, for instance, many senior managers had concluded that pure competition was in the past, and that the kind of competition facing large corporations was

C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility*: *An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L. REV. 77, 89–90 (2002) (highlighting Berle-Dodd debate regarding the role and powers of directors and managers).

89. See id. at 100–10 (2002), for a survey of this development.

90. PETER F. DRUCKER, THE NEW SOCIETY 40 (1950).

91. Adolf A. Berle, *Foreward, in* THE CORPORATION AND MODERN SOCIETY XII (Edward S. Mason, ed., 1959).

92. Kaysen, *supra* note 78, at 313.

93. Edward S. Mason, *Introduction, in* THE CORPORATION AND MODERN SOCIETY 11 (Edward S. Mason, ed., 1959); *see also* Edward S. Mason, *The Apologetics of 'Managerialism*," 31 J. BUS. 1, 3 (1958) (noting that management must "'conduct the affairs of the enterprise in such a way as to maintain an *equitable and working balance* among the claims of the various directly interested groups—stockholders, employees, customers, and the public at large.'" (quoting J.K. GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER (1952))).

94. The sources discussed in this paragraph and the next examine the public statements of businessmen; their private beliefs are more difficult to plumb.

imperfect or oligopolistic competition, not the competition of:

> "a peddler with a pack of pots and pans on his back and a different price to every customer [but] . . . the competition of pricing policies, of quality, of consumer surveys, of mass advertising and of mass distribution devices, of research, and of production practices and conditions of employment."[95] Nor did many object to the notion that prices were "administered," only to the "implication that administered prices were arbitrary, sinister, evil, and anti-social."[96]

Managers seemed to welcome this new public role. In 1948, the Harvard Business School's alumni association announced that "[t]oday most managements operate as trustee in recognition of the claims of employees, investors, consumers, and government."[97] In 1951, *Fortune* magazine announced in a special survey of the American economy that the United States had produced a new "kind of capitalism that neither Karl Marx nor Adam Smith ever dreamed of."[98] Quoting Standard Oil of New Jersey President Frank Abrams, it reported that managers were increasingly conducting the "affairs of the enterprise in such a way as to maintain an *equitable and working balance* among the claims of the various directly interested groups—stockholders, employees, customers, and the public at large."[99] Expanding on this, the magazine's editors insisted that "[m]anagement is no longer occupied exclusively with the interests of the stockholder, who often has become a kind of contingent bondholder rather than a part owner, and who rarely exerts any direct influence on the affairs of the company."[100]

This view was echoed several years later in a large-scale sociological study of the public ideology of American business, *The American Business Creed*.[101] Drawing on the public statements of business leaders, spokesmen, and organizations, its authors identified a "managerial" view as

95. HERMAN E. KROOSS, EXECUTIVE OPINION: WHAT BUSINESS LEADERS SAID AND THOUGHT ON ECONOMIC ISSUES, 1920'S-1960'S 311 (1970) (quoting U.S. Steel Chairman Roger Blough).

96. *Id.* at 327.

97. Maier, *supra* note 87, at 66.

98. THE EDITORS OF FORTUNE MAGAZINE, U.S.A. THE PERMANENT REVOLUTION 68 (1951). The chapters in this book originally appeared in a special issue of *Fortune* magazine.

99. *Id.* at 80.

100. *Id.* It did continue, however, that management could also not "flagrantly disregard stockholders' interests." *Id.*

101. The authors were clear to note that theirs was a study of ideology, the "system of beliefs publicly expressed with the manifest purpose of influencing the sentiments and actions of others." FRANCIS X. SUTTON ET AL., THE AMERICAN BUSINESS CREED 2 (1962).

one of the two major strands of business ideology (the other being a "classical" strand).[102] The managerial view emphasized "the role of professional managers in the large business firm who consciously direct[ed] economic forces for the common good."[103] This was, its adherents believed, a new form of American capitalism, one born as "the whole system is moving toward a new kind of homogeneity—of large, professionally managed, socially oriented corporations" (note again responsibilities not merely to other corporate constituencies but society or the "common good").[104] As described by the study's authors, this view held by businessmen could easily have been shared by Berle or Drucker:

> [T]he enterprise is not conceived in the narrow terms of its legal model. Instead emphasis is placed on the enterprise as a social system. Employees, customers, and suppliers are not regarded as outsiders but as integral parts of the organization; their relations to management are not purely, or even mainly, contractual and economic. . . . [I]n the managerial view [stockholders] are on a par with other groups that have stakes in, and just claims on, the organization. Managers are assigned a more important and more autonomous role than that of agents for the owners. Theirs is the statesman's function of mediating among the groups dependent on the enterprise, satisfying just claims and preserving the continuity of the organization.[105]

In the authors' analysis, deeply suffused with the sociological views of the time, the managerial ideology was a response to managers' discomfort with the implied selfishness of businessmen, as it denied "that private profit is or ought to be the principal orientation of the business enterprise."[106] A nice summary of this public creed was provided by General Foods President Clarence Francis, who told a Congressional committee in 1949 of his

> "three-way responsibility to the American consumer, to our associates in this business, and to the 68,000 men and women whose faith has been shown by their investment in General

102. *Id.* at 34. The "classical" strand centered around the "model of a decentralized, private, competitive capitalism, in which the forces of supply and demand, operating through the price mechanism, regulate the economy in detail and in aggregate." *Id.* at 33. The classical strand would undergo a resurgence in the 1970s, and it seems fair to claim it is dominant today.

103. *See id.* at 34.

104. *Id.* at 36.

105. *Id.* at 57–58.

106. *Id.* at 357.

> Foods. We . . . would serve (the company's) interests badly by shifting the fruits of the enterprise too heavily toward any one of those groups."[107]

The ubiquity of heroic managerial assumptions was displayed as well in the renewed popularity of "social responsibility" during this era.[108] Few businessmen failed to at least give a nod to the concept during the 1950s, and by 1959, so popular was it that the business writer Theodore Levitt launched an assault on the concept in the *Harvard Business Review*, writing that the movement had left "the profit motive . . . compromised in both word and deed. . . . Today's profits must be merely adequate, not maximum." It was, he continued, "not fashionable for the corporation to take gleeful pride in making money. . . . [it was] fashionable . . . for the corporation to show that it is a great innovator; more specifically, a great public benefactor; and, very particularly, that it exists 'to serve the public.'"[109]

Some skepticism is, of course, due these statements, designed as they were for public consumption. The persona of the "corporate statesman" was, in part, the deliberate creation of publicists for business interests, who sought to challenge 1930s images of business leaders as either malevolent or incompetent.[110] After World War II, both the National Association of Manufacturers and the Advertising Council launched publicity campaigns that told consumers that, since the Depression, corporate leaders had "seen the light and were now among the most civic-minded and responsible of American citizens."[111] Looking back, there is also little evidence to support a claim that managers of large public corporations in the 1950s actually governed their firms for the benefit of multiple constituencies or cared less about profits than their predecessors or successors (they might have been complacent about them, but that is a different matter).[112] What the above

107. *Id.* at 64 n.31 (citation omitted).

108. *See, e.g.*, KROOSS, *supra* note 95, at 50–58 (examining how corporate managers in the 1920s-1960s envisioned a wider role for business than had been traditional). Despite Levitt's polemic, it's not clear that businessmen were actually less interested in making profits during this period. *See id.* at 55–57.

109. Theodore Levitt, *The Dangers of Social Responsibility*, 36 HARV. BUS. REV. 42, 42 (1958) (citation omitted).

110. *See generally* ROLAND MARCHAND, CREATING THE CORPORATE SOUL: THE RISE OF PUBLIC RELATIONS AND CORPORATE IMAGERY IN AMERICAN BIG BUSINESS (1998) (suggesting that the corporate quest for social and moral legitimacy spurred an array of public relations initiatives); WALL, *supra* note 56 (describing how corporations developed imagery to build their own corporate culture).

111. WALL, *supra* note 56, at 189.

112. Indeed, as the *American Business Creed* made clear, the "classic" ideology of small business and competitiveness did not disappear during the 1950s. SUTTON, *supra* note 101, at 34–36.

discussion does show is that a surprisingly wide swathe of individuals, from leftist social critics, to moderate theorists of the corporation, to senior executives themselves, shared a set of assumptions about the corporation that varied both from what was believed earlier in the century and what is believed today: They saw the corporation as having developed into a "social institution," run by managers who had taken on responsibility to (at minimum) employees and consumers as well as shareholders, or (at maximum) all of society. As I will argue in the next section, this managerial ideology also structured the discourse of mid-century corporation law.

III. CORPORATE LAW AT MID-CENTURY

A. Managerial Theory and Corporate Law

An initial point to be made about corporation law scholarship in the long 1950s is that its practitioners didn't act as though it was dead. In 1959, New York University school of law professor Miguel A. de Capriles published a retrospective piece entitled *Fifteen-Year Survey of Corporate Developments, 1944-1959*, where he made what might seem a surprising claim: "The post-World War II years hold a particular fascination for corporation lawyers."[113] In Manning's account, postwar corporate law was at best moribund, characterized by absurd doctrines, in the grip of a formalism abandoned in other areas of law. To de Capriles, however, the 1950s were a particularly vital time for corporation law, not least because the corporation, and corporation law, had been called to play a role in the long ideological struggle in which America now found itself. "The end of armed conflict in the shadow of the atomic bomb was but the beginning of the cold war between East and West,"[114] de Capriles wrote. "The battle for men's minds overshadowed the conquest of territories. And in a very real sense the corporate system of economic activity became a symbol of the 'American way of life' for a large sector of our population."[115] The Cold War thus made it important to defend America's corporate capitalism, and the spokesman and image of that capitalist system was the corporate-statesman of managerialism. "[T]he notion that the corporate system should be a 'socially responsible' capitalism has . . . gained broad acceptance," de Capriles wrote, while the "steady rise of professional

113. Miguel A. de Capriles, *Fifteen-Year Survey of Corporate Developments, 1944-1959*, 13 VAND. L. REV. 1, 1 (1959).
114. *Id.*
115. *Id.*

management has also seen its leaders publicly express views concerning the obligations of modern corporate enterprise that before World War II were largely limited to academicians and New Dealers."[116] In the years after World War II, he continued, "[c]ontrol of corporate management for the protection of the investor and the public is a central theme; its counterpoint is the demand of management for freedom to manage."[117]

Managerialism had helped define the grand themes of corporation law in these decades, but what did that mean? Did this kind of heroic managerialism actually have an impact on how the law regulated and ordered corporations? Certainly, corporate law doctrine was not transformed during the 1950s; it evolved in various mundane ways, but the ground rules for corporate governance in 1965 were not so terribly different from that of 1945 (a point to which we will return). Nor did heroic managerialism resurrect the debate within corporate law as to what the corporate "person" really was—a creation of the state or of its incorporators?[118] To measure managerialism's impact, we must look instead to specific debates over the corporation's purpose, power, and governance that flourished in the 1950s. In this Part, I survey the impact managerialism had on corporate law theory and practice (or, perhaps, corporate law scholarship high and low). In the first section, I show how corporate law theory of this era was threaded through with the ideas and ideals of heroic managerialism. Indeed, some of the era's main scholarly interests and preoccupations only make sense against the background of high managerialist ideas.[119] The managerial vision appears with greatest force in three issues seen as vital then, and either treated as peripheral or changed utterly, today: corporate charitable contributions, proposals to "constitutionalize the corporation," and the struggles over shareholder democracy. A later section will essay managerialism's impact on more

116. *Id.*

117. *Id.* at 2.

118. This is surprising, since discussing the corporation as a "social institution" hearkens back to earlier debates over whether the corporation was a "real" or "artificial" entity. There are isolated instances of such discussions—one observer, for instance, spoke of the modern corporation's transformation into a "social organism conscious of its public functions, its social responsibilities, and of the force of public opinion," but I found no evidence of greatly renewed interest in corporate personhood. Friedmann, *supra* note 65, at 171.

119. I do not want to say these ideas constituted a "paradigm" for corporation law, as the term is overused and makes it appear that I am applying wholesale Thomas Kuhn's model to an area, corporate law scholarship, where it may be inappropriate. *See* Cheffins, *supra* note 3, at 478 (2004) (observing that legal scholarship cannot conform both to a Kuhnian framework and a scientifically-oriented cumulative model). The set of ideas discussed here are neither as fixed nor coherent as I understand a natural scientific paradigm to be but I am employing a similar concept.

ordinary corporate law doctrine.

1. Corporate Charitable Contributions

Corporate charitable contributions were a major scholarly issue during the 1950s. Nowadays, such contributions are specifically provided for in statute, and when justified at all are typically tied to some form of long-term benefit, however tenuous, claimed to inure to the corporate donor.[120] They were still a comparative novelty in the postwar era, however; before the war, the general assumption, and majority common-law rule, had been that corporate charitable donations were outside the corporation's power (*ultra vires*), though gifts made with "a view of [the corporation] receiving material benefits therefrom" were sometimes permitted.[121]

The landmark postwar case that broke with this tradition was *A. P. Smith Mfg. Co. v. Barlow*, in which the New Jersey Supreme Court upheld, under the common law, A. P. Smith Manufacturing's donation of $1500 to Princeton University.[122] Though the New Jersey court repeated the perennial justification for corporate charity–that it would ultimately redound to benefit the giver[123]–the court also put forward additional, very different justifications for corporate charity, ones unconnected to self-benefit but closely allied to the times and the vision of the corporation as a "social institution." "[M]odern conditions require that corporations acknowledge and discharge social as well as private responsibilities as members of the communities within which they operate."[124] Citing *The Modern Corporation and Private Property*, and looking back to the classic defense of corporate social responsibility offered by Merrick Dodd's 1932 article *For Whom Are Corporate Managers Trustees?*, the court noted that, during the twentieth century, "[c]ontrol of economic wealth has passed

120. *See, e.g.*, JAMES COX & THOMAS LEE HAZEN, CORPORATIONS § 4.03, at 63-64 (2d ed. 2005); *see also* Nancy J. Knauer, *The Paradox of Corporate Giving: Tax Expenditures, the Nature of the Corporation, and the Social Construction of Charity*, 44 DEPAUL L. REV. 1 (1994) (positing that legal scholarship does not correctly explain corporate giving).

121. *See, e.g.*, HENRY W. BALLANTINE, BALLANTINE ON CORPORATIONS § 58, at 207–08 (1927) (rule to be drawn from cases cited was that that corporations had leeway to make donations, so long as there was a persuasive "material benefit" accruing therefrom); *see also* A. P. Smith Mfg. Co. v. Barlow, 98 A.2d 581, 584 (N.J. 1953) (deciding that corporate gift-giving is permissible under certain circumstances).

122. *A. P. Smith* 98 A.2d at 581. The Supreme Court of New Jersey also made sure to note that the gift could also be defended as providing long-run benefits to the corporation. *See id.* at 583–85.

123. *Id.* at 585 ("[C]orporations are permitted to make substantial contributions which have the outward form of gifts where the activity being promoted by the so-called gift tends reasonably to promote the good-will of the business of the contributing corporation.").

124. *Id.* at 586.

largely from individual entrepreneurs to dominating corporations," justifying new demands on the corporation.[125] With the "transfer of most of the wealth to corporate hands," the court reasoned, individuals have "turned to corporations to assume the modern obligations of good citizenship in the same manner as humans do."[126] This justification offered was tied up with the managerial vision dating back to Berle & Means in which "dominating corporations" had gathered up the bulk of the nation's wealth and thus found themselves with new responsibilities, called upon to assume new duties not only to shareholders but the communities within which they operated.[127] The decision also reflected faith in the managers of those corporations, who, as Gregory Mark later characterized it, would know "what [was] good for the United States."[128]

A second justification also wove through the case—one that linked corporate good citizenship to the Cold War and the need to demonstrate the success of the nation's economic system. In World Wars I and II, the court stated, corporations made charitable donations to "insure survival."[129] Now, continued the court, when "we are faced with other, though nonetheless vicious, threats from abroad, which must be withstood without impairing the vigor of our democratic institutions at home," donations were again justified "in terms of the actual survival of the corporation in a free enterprise system."[130] Communist threats to free enterprise, in other words, justified corporate donations.

A. P. Smith was not quite as groundbreaking as it may have appeared at the time; after all, one of the court's justifications for upholding the gift to Princeton was that New Jersey and twenty-eight other states had adopted statutes permitting corporate charitable giving.[131] It did, however, give corporation scholars another example to hammer their argument that the corporation was evolving into a social institution and to assert that new legal rules were, or soon would be, evolving along with it. Berle contended

125. *Id.* at 584.

126. *Id.* at 586. In a fascinating and odd twist, A. P. Smith Manufacturing Company. appealed the decision of the Supreme Court of New Jersey to the U.S. Supreme Court, where *certiorari* was denied. Its attorney on appeal was A. A. Berle. Mitchell, *supra* note 14, at 206–07. Tsuk Mitchell speculates, no doubt correctly, that Berle took this on so he could argue the question of a corporation's powers in front of the highest court in the land. *Id.*

127. *A. P. Smith*, 98 A.2d at 586. The court upheld the grant apart from the statute, but also held that the statute operated to alter the corporation's preexisting charter. *See id.* at 589–90.

128. Mark, *supra* note 14, at 638.

129. *A. P. Smith*, 98 A.2d at 586.

130. *Id.*

131. *See id.* at 587. The MBCA included a provision allowing charitable gifts in its 1950 revisions.

that *A.P. Smith* showed that "the state has authorized corporations to withhold from their shareholders a portion of their profits, channeling it to schools, colleges, hospitals, research, and other good causes."[132] Richard Eells, a Columbia Business School professor, claimed that the decision, and corporate charitable contribution statutes more generally, demonstrated that the modern corporation was no longer merely an economic unit but a social and political one as well, a "basic unit in our multigroup society" with its powers "an expression of a method for implementing the needs of society."[133]

Even some more skeptical of the growth of corporate charity agreed that its acceptance in legal doctrine showed that the corporation was evolving from a purely economic institution, devoted to shareholder wealth, to a more benevolent social institution. In his 1960 article, *Love and the Business Corporation*, New York University corporate law professor Bert Prunty sketched, in familiar managerial terms, the connection between changes in the corporation's social role and corporation law: "Social and economic evolution in our society inexorably brought about a mutation in the public image of one of its most important institutions—the business corporation . . . . As fear of the corporate Titan began to wither, legal doctrine rooted in that fear began to atrophy."[134] That same year attorney Louis Kelso, writing in the *Business Lawyer*, attacked the new model: "'corporate good citizen,'" which was "coming to focus [its] institutional attention upon their duty (as [its] executives see it) to serve mankind."[135] Corporate charitable gifts, and more generally the use of the business corporation to carry out "social objectives," were, he feared, "another step towards the conversion of the business corporation from an economic entity into a political entity."[136] This view was not universal. Some scholars argued (in retrospect, correctly) that corporate charity did not augur a change in corporate purpose and that a gift could be justified as benefitting shareholders, but the fact that so many took corporate charity to herald a fundamental change in corporations' orientations illustrates the pervasiveness of managerial beliefs and the way they infiltrated corporation law discourse.[137]

---

132. BERLE, *supra* note 46, at 168.

133. RICHARD EELLS, CORPORATION GIVING IN A FREE SOCIETY 83 (1956).

134. Bert S. Prunty Jr., *Love and the Business Corporation*, 46 VA. L. REV. 467, 468 (1960). It should be noted that Prunty seriously doubted that corporate charity would be as disinterested as its advocates hoped. *See id.* at 476.

135. Louis O. Kelso, *Corporate Benevolence or Welfare Redistribution*?, 15 BUS. LAW. 259, 259 (1960).

136. *Id.* at 260.

137. For one skeptic about the larger import of corporate charity, see Wilber G. Katz, *Responsibility and the Modern Corporation*, 3 J. L. & ECON. 75, 82 (1960) ("The only

2. Constitutionalizing the Corporation

The belief that the large corporation had become a dominant social institution gave rise to another proposal powerful in the 1950s, "Constitutionalizing the Corporation."[138] As with much else, this can be traced back to Berle & Means, who hinted in *The Modern Corporation and Private Property* that the corporation might supplant the state, but by the 1950s proposals to somehow impose constitutional limits on the corporation also meshed with broader social and legal currents. By then, many accepted that the corporation would soon be as powerful as the state, if it wasn't already. Drucker, for instance, had written in the *Concept of the Corporation* that the corporation was now "the institution which sets the standard for the way of life and the mode of living of our citizens; which leads, molds, and directs; which determines our perspective on our own society; around which crystallizes our social problems and to which we look for their solution."[139] Amherst College political scientist Robert Latham, whose work appears in law reviews, seems to have made a career of insisting that the corporation had become chief rival to the state, claiming that it "governs as surely as the state in the formal literature,"[140] and therefore there needed to be applied to corporations "*the whole pattern of controls* laid upon the states when the Federal Republic was created under the Constitution of 1787."[141]

This argument that constitutional limits should apply to corporations was one aspect of a movement to impose those limits on a range of large institutions, deriving from pluralist theories that saw Big Business, Big Labor, and sometimes other organized groups as growing to rival the traditional state.[142] According to Columbia law professor Wolfgang

statutes or cases which suggest any departure from [the standard set out in *Dodge v. Ford Motor Co.*] are those relating to corporate gifts.").

138. This movement was most popular in the 1950s and early 1960s, though it did not disappear immediately. *See, e.g.*, RALPH NADER, MARK GREEN, & JOEL SELIGMAN, CONSTITUTIONALIZING THE CORPORATION: THE CASE FOR THE FEDERAL CHARTERING OF GIANT CORPORATIONS (1976) (arguing for federal charting of corporations).

139. DRUCKER, *supra* note 75, at 6–7 (quoted in Friedmann, *supra* note 65, at 170).

140. Robert Latham, *The Commonwealth of the Corporation*, 55 NW. U. L. REV. 25, 32 (1960).

141. *Id.* at 35 (1960) (emphasis omitted). Latham's statements appear extreme, but he was a respected voice in debates over the corporation in the 1950s. *See, e.g.*, ROBERT LATHAM, *The Body Politic of the Corporation*, *in* THE CORPORATION IN MODERN SOCIETY 218 (Edward S. Mason, ed., 1959).

142. *See, e.g.*, Arthur S. Miller, *The Constitutional Law of the "Security State",* 10 STAN. L. REV. 620, 656 (1958) ("With the continuing 'pluralizing' of American society and increasing recognition of the governmental power of private groups, it can be forecast with some certainty this the trend of the Court of *public*-izing private groups will continue. It is

Friedmann, not only corporations but unions, trade associations, and even foundations, were among the "highly organized groups [that] have taken over the substance of sovereignty" and therefore needed to be tamed.[143] Yale's labor law specialist (and later Dean) Harry Wellington agreed, summing up this development in 1960 by writing that:

> [r]anging wide through society and deep into the Constitution commentators have suggested that all or most 'powerful' private groups should be subject to all or most provisions of the Constitution. The business corporation and the labor union have been the principal target of these suggestions, and the Bill of Rights and the fourteenth amendment have been envisioned as the principal instruments for control.[144]

Though the literature on corporations was not inconsiderable, even more appears to have been written on constitutionalizing unions during this period.[145]

To twenty-first century readers, there is a quixotic air to these proposals, but they fit with real developments in 1950s constitutional law.[146] As Dalia Tsuk Mitchell has noted, recent Supreme Court decisions appeared to stretch the notion of who constituted a "state actor" for purposes of constitutional protections.[147] In *Shelley v. Kramer* (1948), the Supreme Court barred state judicial enforcement of private racial covenants.[148] In *Marsh v. Alabama* (1946), it applied First and Fourteenth Amendment protections to block attempts to suppress leafleting in a company-owned town.[149] "The basic emerging concept," Berle asserted in 1951, "appears to be a restatement, in economic terms, of the constitutional requirement that every man is entitled to 'equal protection of the laws,' and

---

the important constitutional law development of the mid-twentieth century.").

143. Friedmann, *supra* note 65, at 165.

144. Harry H. Wellington, *The Constitution, the Labor Union, and "Government Action",* 70 YALE L.J. 345, 346 (1961). Wellington's article asked whether union acts were "state action" under the Fourteenth Amendment.

145. *See id.*; *see also* Clay P. Malick, *Toward a New Constitutional Status for Labor Unions*, 21 ROCKY MNTN.. L. REV. 260 (1949) (proposing a change to the political and legal theory in order to account for the complexities inherent to both political parties and trade unions); Joseph Rauh, *Civil Rights and Liberties and Labor Unions*, 8 LAB. L.J. 874 (1957) (discussing the union movement and its impact on economic democracy); Clyde W. Summers, *The Right to Join a Union*, 47 COLUM. L. REV. 33 (1947) (discussing the social and economic aspects of the exclusion from worker unions and proposing solutions to address those issues).

146. *See generally* Arthur Miller, *Constitutional Law of the "Security State",* 10 STAN. L. REV. 620.

147. Mitchell, *supra* note 14, at 204–06.

148. 334 U.S. 1 (1948).

149. 326 U.S. 501 (1946).

that no arm of the state shall deny him life, liberty or property without due process of law."[150]

But what would it mean to apply the Constitution to corporations? Here, as in many of the more theoretical debates in the 1950s over the corporation and the law, details were lacking. In a 1952 article, Berle suggested that "[i]f, for instance, a corporation dealing in goods or services essential to the life of the individual discriminates against a customer on the ground of race or in a matter which invades his Constitutional right of freedom of speech or religion," it would violate the Fourteenth Amendment.[151] Latham speculated, perhaps fancifully, on how applying constitutional provisions could change the corporation. Citing the Privileges and Immunities Clause, he asked, "[d]oes this mean that stockholders of General Motors should be given free access to the public facilities of duPont [sic] or General Electric? Can executive personnel of AT&T demand keys to the more private precincts usually reserved for the executive personnel of Metropolitan Life?"[152] Other constitutional provisions also raised questions.

Section 10 of Article I would forbid [corporations] to remit bills of credit and so centralize—nationalize—all banking in the country. Nor could they grant titles of nobility, a blow against fraternal orders, surely. And they would all be disarmed, having lost to the Federal Government the power to raise and maintain armies. This would presumably put Pinkerton's and Brink's out of business.[153]

It could be noted that the previous two topics exist in tension. The move to allow corporate charity for the general good broadened the scope of managerial autonomy, while proposals to impose new constitutional limits on the corporation limited its autonomy. Yet each grew out of the new view of the corporation as a dominant social institution, capable of wielding great power over, and therefore having obligations towards, employees, communities, and other constituencies, and the acknowledgment that managerial power was, for good or ill, increasingly unchecked. This does not, however, explain the third topic here—the movement for shareholder democracy.

150. A. A. Berle, Jr., *The Developing Law of Corporate Concentration*, 19 U. CHI. L. REV. 639, 656–57 (1952) [hereinafter *Developing Law*]; *see also* Adolf A. Berle, Jr., *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933 (1952) [hereinafter *Constitutional Limitations*] (discussing new developments in economic constitutional law and the impacts that area of law may have on legal and social thinking); BERLE, *supra* note 46.

151. *Developing Law*, *supra* note 150, at 658.

152. Latham, *supra* note 140, at 36.

153. Latham, *supra* note 140, at 37.

3. Shareholder Democracy

"Shareholder Democracy" was one of the most visible, if least consequential, issues for corporate law in the 1950s. "Shareholder democracy" (or "corporate democracy") is of course one of the perennial issues in modern corporate law.[154] No matter the balance of power between managers and shareholders, advocates for shareholders believe they should have more (and, one supposes, managers think the opposite). Yet shareholder democracy also had a particular attraction in the 1950s, for if the large corporation was increasingly transforming itself into a "social institution" to rival the state, it would seem logical to apply to it the democratic governance mechanisms of the state. In the 1950s, shareholder democracy gained widespread attention due in part to two attention-getting shareholder "gadflies," Lewis Gilbert[155] and Wilma Soss (and her Federation of Women Shareholders in American Business, Inc.), who visited dozens of annual meetings each year and loudly demanded a raft of reforms, from meetings in convenient locations, to better disclosure, to cumulative voting for directors, to a woman on the board of directors (Soss's particular issue).[156] The rhetoric of "shareholder democracy" was encouraged by publicity from the New York Stock Exchange, which commissioned studies announcing that one family in three owned stock and that the nation had entered an era of "People's Capitalism" (ironically, the NYSE campaign was intended to prevent further government intervention in corporate affairs).[157] Campaigns for shareholder democracy testify to the era's managerial ethos; while they were in some ways pushback against unchecked managerial power, they also reflected the degree to which managerialism was the dominant assumption of the time—as both the movement's hopes and disappointments show.

In the 1950s, shareholder democrats were swimming against a managerial tide. When two corporate law scholars published a work advocating *Shareholder Democracy* in 1954, they concluded not with a

154. *See* Dalia Tsuk Mitchell, *Shareholders as Proxies: The Contours of Shareholder Democracy*, 63 WASH. & LEE L. REV. 1503, 1547–60 (2006).

155. *See generally* LEWIS D. GILBERT, DIVIDENDS AND DEMOCRACY (1956) (recounting Mr. Gilbert's personal experiences as a shareholder and providing advice on how to engage corporate boards as a shareholder); LEWIS D. & JOHN J. GILBERT, ANNUAL REPORTS OF STOCKHOLDERS' ACTIVITIES AT CORPORATE MEETINGS (1939).

156. On Soss, there is a wonderful contemporary profile in the *New Yorker*. *See* Andy Logan, *Hoboken Must Go!* NEW YORKER, Mar. 17, 1951, at 34.

157. JOSEPH LIVINGSTON, AMERICAN STOCKHOLDER 27 (1958) (describing the New York Stock Exchange's efforts to publicize widespread stock ownership); *see also* WALL, *supra* note 56, at 198–200 (describing general efforts to promote the use of the term, "people's capitalism").

ringing defense of profit maximization or shareholder primacy, which one would expect, but with a nod to managerialism, conceding that "[t]he interests of shareholders are not the only interests besides management's that must be recognized by today's publicly held corporation. There are the interests of labor, of the consumer, of the country as a whole, and ultimately of the entire international community that must be considered."[158] They then defended easier shareholder access to the proxy machinery not solely as a way for shareholders to defend their own interests, but as a vehicle for "affording a broader social outlook in solving corporate issues."[159] In other words, shareholder democracy would better serve a managerial vision. Despite this concession, a reviewer of the work in the *Harvard Law Review* dismissed much of its concerns by asking whether "is it not time to recognize that shareholder democracy, with its exclusive focus on the profit-making element in corporate activity, has a slightly old-fashioned ring?"[160]

More evidence of the decline of shareholder power, and the ascent of management, comes from two areas that should have offered hopes for shareholder empowerment. One concerned Shareholder Proposals, the usually precatory shareholder statements that SEC regulations require be included in a company's proxy statement.[161] SEC Rule 14a-8, which mandates inclusion of such proposals, was first adopted in 1942, in what could be seen as a late burst of New Deal enthusiasm for grassroots (shareholder) democracy; the requirement is still sometimes referred to as the "Town Hall rule."[162] While the initial rule was broadly worded, its scope steadily eroded during the 1950s.[163] As early as 1945, the SEC's Division of Corporate Finance allowed firms to omit proposals of a "general political, social, or economic nature," an approach that justified the 1951 exclusion by Greyhound Corporation of a proposal attacking

158. FRANK D. EMERSON & FRANKLIN C. LATCHAM, SHAREHOLDER DEMOCRACY: A BROADER OUTLOOK FOR CORPORATIONS 149 (1954).

159. *Id.* at 150.

160. L. C. B. Gower, *Shareholder Democracy*, 68 HARV. L. REV. 922, 927 (1955) (reviewing FRANK D. EMERSON & FRANKLIN C. LATCHAM, SHAREHOLDER DEMOCRACY: A BROADER OUTLOOK FOR CORPORATIONS (1954)).

161. This is assuming certain requirements are met, notably SEC Rule 14a-8.

162. *See* Alan R. Palmiter, *The Shareholder Proposal Rule: A Failed Experiment in Merit Regulation*, 45 ALA. L. REV. 879, 879-80 (1994) (discussing the history and use of Rule 14a-8 and criticizing the SEC role in managing and enforcing the rule); *see also* Frank D. Emerson & Franklin C. Latcham, *The SEC Proxy Proposal Rule: The Corporate Gadfly*, 19 U. CHI. L. REV. 807 (1952). The rule was initially justified as giving shareholders notice of certain policy issues to be discussed at annual meetings. *Id.* at 893.

163. *See* Dalia Tsuk Mitchell, *The End of Corporate Law*, 44 WAKE FOREST L. REV. 703, 718–19 (2009) (discussing a series of SEC amendments that dramatically altered the original shareholder proposal rule).

segregation on its buses in the South.[164] In 1954, the Rule was further scaled back, now requiring that proposals that were resubmitted to corporations receive increasing percentage votes each year or face exclusion, and also allowing corporations to exclude proposals that impinged on their ordinary business operations.[165] As one group of critics put it, the changes could not be described as "other than imposing new restrictions on shareholders and affording further protection for management."[166]

Nor did advocates of shareholder democracy find much succor in the rare instances when shareholders' votes were actively sought: proxy contests between management and insurgents trying to seize control of a corporate board.[167] While looked down upon by many as mere struggles to see who would feed at the corporate trough,[168] proxy contests involving entrenched management and corporate "raiders" did enjoy an uptick during the decade,[169] and a few of the contests, such as that for the New York Central Railroad or Montgomery Ward, drew wide attention. The contests did not, however, produce greater shareholder empowerment. If anything, they served mainly to allow further managerial entrenchment, as they produced judicial decisions making clear that while incumbent managers could always claim reimbursement from their corporation for expenses in a proxy contest, challengers could only receive reimbursement if they won and then received shareholder approval, a precedent that would obviously discourage insurgents.[170] Far from democratizing the corporation, "the modern proxy contest [was] at best a device for tempering autocracy by invasion."[171]

---

164. JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE 270 (3d ed. 2003) (citing Peck v. Greyhound Corp., 97 F. Supp. 679 (S.D.N.Y. 1951)); *see also* Robert B. von Mehren & John C. McCarroll, *The Proxy Rules: A Case Study in the Administrative Process*, 29 LAW & CONTEMP. PROBS. 728, 738 (1964) (quoting SEC Rel. No. 34-4775 (1952)).

165. *See* David C. Bayne et al., *Proxy Regulation and the Rule-Making Process: the 1954 Amendments*, 40 VA. L. REV. 387, 427–28 (1954) (describing the new 1954 rule and the deleterious impact on individual shareholders).

166. *Id.* at 427.

167. Shareholder proxies were also, of course, sought annually for board elections, but since these elections were not contested they offered little in the way of active democracy.

168. *See, e.g.,* Eugene Rostow, *To Whom and For What Ends is Corporate Management Responsible?*, *in* THE CORPORATION IN MODERN SOCIETY 47–48 (Edward S. Mason, ed., 1959) (stating various opportunistic motives for corporate raiders).

169. *See* Mitchell, *supra* note 163, at 719.

170. *See* Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 697–98 (2007). The leading case is *Rosenfeld v. Fairchild Engine & Airplane Corp.*, 128 N.E.2d 291 (N.Y. 1955).

171. Bayless Manning, *Review*, 67 YALE L.J. 1477, 1488 (1958) (reviewing J. A.

While challenging shareholder democracy would seem akin to attacking apple pie or motherhood, advocates of heroic managerialist ideas were against it, and indeed were skeptical of shareholder suffrage altogether. This makes sense, for if the corporation were no longer to be run solely in the interests of shareholders, why should shareholders claim exclusive right to govern it? Berle had long dismissed the shareholder vote as ceremonial, seeing the possibility of shareholders voting out management as nil; "[m]anagements of the major giants," he wrote, "are for practical purposes impregnable."[172] Drucker believed that shareholder voting in large enterprises should be abolished, with shares replaced by "certificates of investment" entitling the holder only to a share in profits and in assets upon liquidation.[173]

Other legal scholars were also skeptical of schemes to empower shareholders, and pointed to managerial ideas to justify their beliefs. In a 1958 review, Bayless Manning concluded that for all of the claims of shareholder democracy, its results largely proved Berle and Means right. In 1932, he wrote, Berle and Means had found "a virtually omnipotent management and an impotent shareholdership."[174] Since then, there had come "a [new] world of SEC regulation, extensive disclosure requirements, elaborate proxy machinery, stock Exchange self-discipline, corporate Good Citizenship, People's Capitalism and Corporate Democracy."[175] And what was the end result of all this?—"a virtually omnipotent management and an impotent shareholdership."[176]

Shareholder democracy, Manning concluded, was a diversion from genuine reform based on a misunderstanding of the modern corporation:

> Thanks to the pioneering work of Berle, Drucker and a few others, we have long known that in our modern industrial system, it is the corporation as an institution which is permanent and the shareholders who are transitory. . . . We have known, too, that today's large corporation may for many purposes be best viewed as an intricate, centralized, economic-administrative structure run by professional managers who hire capital from the investor.[177]

Given that, he urged, or at least proposed as a thought experiment, that

LIVINGSTON, THE AMERICAN STOCKHOLDER (1958)).

172. ADOLF A. BERLE, JR., POWER WITHOUT PROPERTY: A NEW DEVELOPMENT IN AMERICAN POLITICAL ECONOMY 63 (1959). Berle did not necessarily believe in abolishing the shareholder vote; he just did not think it performed any real function.

173. DRUCKER, *supra* note 90, 341.

174. Manning, *supra* note 171, at 1485.

175. *Id.*

176. *Id.*

177. *Id.* at 1489 (citation omitted).

the law be made to conform more closely to (managerialist) reality and that shareholders be deprived of voting rights, their interests to be protected by some mechanism overseeing "management's behavior in corporate matters affecting their personal interests . . . ."[178] Other legal scholars voiced equal skepticism; in 1960, Abram Chayes attacked shareholder democracy because, he argued, "[o]f all those standing in relation to the large corporation, the shareholder is least subject to its power."[179] Far better, he claimed, would be a system that gave power to other constituencies more directly affected by corporate power.[180]

Managerialist assumptions also found their way into more popular writings about shareholder power. In 1958, James Livingston, long-time business editor of the *Philadelphia Inquirer*, opened his study of *The American Stockholder* by referencing two touchstones of managerialism, *The Modern Corporation and Private Property* and Burnham's *Managerial Revolution*.[181] Those works, he said, demonstrated the overwhelming power of managers. "[M]anagers of corporations control the proxy machinery, the ballot, even as a politician dominates a ward, a county, or a city. . . . Further, through their control of men, materials, machinery, and money—the corporate organization—these managers exert great power in American affairs—politics, society, and business."[182] In his book, Livingston demolished the claims of shareholder democracy, arguing that shareholders were not and would not become a self-conscious class, and that their power was illusory. While gadflies might insist that managers were just shareholders' hirelings, the fact was "that the stockholder hires nobody. He is the hireling—or, at least, his money is. A cynical economist would say, 'Capital doesn't hire management, management hires capital.'"[183] While shareholders were the ostensible subject of Livingston's book, management loomed over it. Citing Drucker, Livingston concluded that corporations' main concerns were their "permanent relatives," including unions, customers, and suppliers, and not shareholders, whom they treated like "poor relations."[184] Livingston was no friend of corporate management—he particularly attacked what he believed was excessive

178. *Id.* at 1491. Manning was clear that he did not actually believe in abolishing shareholder voting, but that he thought that entertaining the possibility would bring into focus what protections and rules were actually needed. *See id.* at 1491–93.

179. Chayes, *supra* note 81, at 40.

180. *Id.* at 41.

181. LIVINGSTON, THE AMERICAN STOCKHOLDER 14–16. Livingston had one advantage other journalists may have lacked; he was a friend of Bayless Manning. *See* Manning, *supra* note 171, at 1477 n.1.

182. *Id.* at 15.

183. *Id.* at 23.

184. *See id.* at 220–21.

compensation—but he did not think empowering small shareholders would change management's behavior.[185] In the struggle between shareholders and management, management had long since won.

The language and assumptions of managerialism, and of the corporation as a "social institution," were pervasive enough that even critics of specific managerialist proposals began with its assumptions, and those who dissented from managerialism depicted themselves as an embattled minority. In 1960, for example, Manning published an article replying to recent works in "[t]he political sociology of the business corporation," focusing his ire on their habit of reifying the "corporation," which was after all only a legal form, and of treating corporate "power" as an undifferentiated lump, available to be used in any way managers desired.[186] Even this skeptic, however, shared many of the managerialists' assumptions. He decried vague attacks on "corporate power," while conceding that the United States contained many giant institutions (he dubbed them "Alpha Institutions"), apparently including business entities, unions, and foundations, whose main features were "centralized control, large scale organization, substantial capital resources and relative independence of formally constituted government."[187] He was all for analysis and criticism of such institutions; he just disliked what he perceived as the intellectually lazy path followed by others.[188] Another example is provided by Yale Law School's Dean, Eugene V. Rostow, who in *To Whom and For What Ends is Corporate Management Responsible?*, his essay in *The Corporation in Modern Society*, blasted advocates of managerialism and called, on economic grounds, for a return to a doctrine requiring directors to maximize profits on behalf of shareholders.[189] But Rostow acknowledged in his essay that he was pushing against "the emerging ethos of the second half of the twentieth century . . . [that] corporate property [is] really that of the directors and the management, to dispose of, as many suggest, in accordance with their own standards of business foresight, social statesmanship, and generalized good citizenship . . . ."[190]

185. Livingston held somewhat greater hopes for institutional investors. *See id.* at 245–48.

186. Manning, *supra* note 85 at 40.

187. *Id.* at 43.

188. *Id.*

189. *See* Rostow, *supra* note 168, at 70–71. One of Rostow's major concerns was that managerialism would lead to pricing decisions divorced from economic requirements, leading to serious economic malfunctions.

190. *Id.* at 49–50.

B. *Change and Continuity in Corporate Law*

Heroic managerial ideas threaded through corporate law scholarship and theory as well as popular discourse over the corporation. But they did surprisingly little to change the doctrines and practices of everyday corporate law. Which raises the question: Why?

1. Heroic Managerialism in Theory and Practice

If one looks hard enough, some aspects of corporate law appear to have been at least inflected by managerial assumptions. When the law did bend in the 1950s, it often bent towards managerial autonomy. Certainly, the evolution of corporate charitable giving and the SEC's shareholder proposal rules, both discussed above, fit with managerial assumptions.

Another area where managerial assumptions fit well with doctrinal developments was the Business Judgment Rule. Since at least the late nineteenth century, the rule, a judicial assumption that in the execution of their duties directors have exercised reasonable diligence and care, has been the first line of defense for corporate directors against shareholder challenges to their decisions.[191] As Gregory Mark has pointed out, the 1950s were the heyday of the Business Judgment Rule; the two decades after the war's end "include the highest points of judicial deference to managerial discretion in the history of corporate law."[192] In New York's courts, according to Dalia Tsuk Mitchell, the Business Judgment Rule was expanded during this period so that it no longer just blocked judicial inquiry into decisions made with ordinary care, but even shielded grossly negligent decisions.[193]

Statutory developments also made it more difficult for shareholders to challenge managers' decisions. Derivative suits, long the avenue for shareholders to attack self-dealing by managers, were sharply limited in the 1940s. As a reaction to the perceived problem of frivolous "strike suits" in the 1930s, legislatures in a number of jurisdictions, beginning with New York, passed laws making such suits more difficult.[194] New York's law,

191. *See, e.g.*, BALLANTINE, *supra* note 121, § 58 (indicating the instances in which a board of directors is allowed to use its discretion and business judgment in making certain donations and gifts, which would normally be a violation of the rights of stockholders).

192. Mark, *supra* note 14, at 636. A similar point is made in Dalia Tsuk Mitchell, *Status Bound: The Twentieth Century Evolution of Directors' Liability*, 5 N.Y.U. J. L. & BUS. 63, 116–20 (2009). My account of the Business Judgment Rule here depends on their work.

193. *See* Mitchell, *supra* note 192, at 118–20 (discussing Everett v. Phillips, 43 N.E.2d 18 (N.Y. 1942)).

194. *See* George D. Hornstein, *The Death Knell of Stockholders' Derivative Suits in*

which required small shareholders (those owning less than $50,000 or 5% of a corporation's shares) suing a corporation derivatively to post security for the corporation's expenses and attorneys' fees, drove down the number of suits in that state and was soon copied in many others.[195] Only in the early 1960s would there be seen a revival of derivative suits.[196] It is illustrative of how managerial ideology seeped into legal thought during this period that, when derivative suits began a comeback in the 1960s, one scholar attributed their increased popularity to the continuing power of the Berle-Means corporation, noting that corporate dominance of the American economy, and managers' domination of the corporation, made all the more important the retention of the derivative suit, especially considering how few other checks remained on managerial power.[197]

Similar issues arose in the period's more thoroughgoing statutory reform, the Model Business Corporation Act ("MBCA").[198] First mulled at the end of the 1930s, the American Bar Association began work on the MBCA in 1943 and issued a first draft in 1946, with revisions in 1950, 1953, and 1955.[199] As a Model Act, it was intended to provide flexible guidance for states revising corporate statues that had, in some instances, not been thoroughly updated since the late nineteenth century. It was also intended as a more straightforward alternative to Delaware's corporation statute, which the Model Act drafters rejected as excessively pro-management, making "little or no effort to protect the rights of investors."[200] The Model Act was not, however, a radical departure from

---

New York, 32 CALIF. L. REV. 123 (1944) (describing laws passed to prevent strike suits). After New York's 1942 act, similar statutes were adopted by a number of other states, including New Jersey, Pennsylvania, Wisconsin, *see id.*, and in 1949 California, *see* Henry W. Ballantine, *Abuses of Shareholders' Derivative Suits: How Far is California's New "Security for Expenses" Act Sound Regulation?*, 37 CALIF. L. REV. 399 (1949).

195. George D. Hornstein, *New Aspects of Stockholders' Derivative Suits*, 47 COLUM. L. REV. 1, 5 (1947) (noting that in the two and a half years following the law's adoption, only four derivative suits were filed in New York County, three of which were immediately dismissed for failure to comply with the statute). New York's statute also imposed a requirement for contemporaneous ownership and shortened the statute of limitations. *See id.* at 5–7.

196. Daniel J. Dykstra, *The Revival of the Derivative Suit*, 116 U. PA. L. REV. 74 (1967).

197. *See id.* at 78–80.

198. Though the MBCA's evolution was towards greater managerial power, and deserves discussion here, it is probably less marked by the period than some other developments discussed in this Article, as statutes seem to have consistently evolved over the century toward greater managerial power.

199. Whitney Campbell, *The Model Business Corporation Act*, 11 BUS. LAW. 98, 98–99 (1955).

200. *Id.* at 100. The MBCA was in turn modeled on Illinois' 1933 corporation act. *See id.* The MBCA was also a successor to the 1920s Uniform Corporation Act, perceived as unsuccessful by the 1940s. *See* Harwell Wells, *The Modernization of Corporation Law*

existing statutes; like them, it was an enabling act, intended to provide some investor protections, along with a more up-to-date template for incorporators.[201]

Whatever its original intentions, though, the MBCA soon came under fire as successive revisions ceded power to management.[202] The first version of the Model Act, for instance, provided for mandatory cumulative voting, a strong protection for minority shareholders, but, when revised in 1953, this was watered down both by making cumulative voting permissive and by allowing for "classifi[ed]" boards of directors.[203] The 1950 Model Act barred loans to directors and officers, while allowing loans to employees; the 1953 Act, through a subtle change in wording, opened the door to such loans by allowing a corporation to "assist its employees, officers and directors."[204] While the 1946 Model Act required that the rights of shareholders be printed on stock certificates, the 1953 revision omitted this in favor of a weaker provision giving shareholders the right to request such information from the corporation.[205]

By themselves, these revisions were merely further steps in the long march of limitations on shareholders' rights; they may have reflected faith in management power, but such revisions were not unique to the 1950s. Yet, even battles over these changes show the spread of managerial concepts. When corporate law scholar Frank Emerson (also an advocate of shareholder democracy) attacked the MBCA revisions, he cited work by Berle and C. Wright Mills to argue that there was greater need than ever for shareholder power because, as others had shown, "management power is . . . becoming increasingly dominant . . . ."[206]

2. Understanding the Divide

But for all the ubiquity of managerial precepts during the 1950s, for

1920-1940, 11 U. PA. J. BUS. L. 573, 595 (2009) (identifying the Uniform Business Corporation Act as a source for the era's state corporate law reforms).

201. Katz, *supra* note 5, at 187–88.

202. *See* Frank D. Emerson, *The Roles of Management and Shareholders in Corporate Government*, 23 LAW & CONTEMP. PROBS. 231 (1958) (arguing that contemporary corporation statutes, as exemplified by the Model Act, substantially restrict shareholders' rights by allowing management power to become increasingly dominant); Benjamin Harris, Jr., *The Model Business Corporation Act—Invitation to Irresponsibility?,* 50 NW. U. L. REV. 1 (1955) (pointing out that the MBCA's successive revisions have tended to free the hand of management in the use of corporate assets).

203. Emerson, *supra* note 202, at 233.

204. Harris, Jr., *supra* note 202, at 3.

205. *See id.* at 11.

206. Emerson, *supra* note 202, at 238.

all their invocation by corporate theorists and corporation law scholars, it must be concluded that heroic managerialism did not radically change the substance of corporate law. The statutes and rules governing the organization of the corporation, and the relationship between the corporation's three acknowledged constituencies—shareholders, officers, and directors—changed little between the 1930s and the 1960s. Nor were the presuppositions of corporate law transformed. Neither of what now appear as the most significant changes in corporate law during this period, the MBCA and the development of close corporation statutes, were products of managerialism (though the MBCA may have been influenced a bit, as discussed above).[207] Berle himself noted the disjunction between corporate theory and traditional corporate law in 1951, when, discussing constitutionalizing the corporation, he wrote that the developments he heralded were not based on "formal . . . 'corporation law,' the state statutes by which the creation and administration of a corporation are regulated."[208] Almost a decade later, Dean Rostow, in his attack on managerialism, pointed out that for all the claims that managers should balance the interests of various constituencies, the "law books have always said that the board of directors owes a single-minded duty of unswerving loyalty to the stockholders,"[209] while a few years later, a review of mid-century corporation acts noted that, apart from authorizing charitable gifts, the "'social responsibility' philosophy . . . had almost no influence upon recent statutes."[210] Looking back a decade later, Willard Hurst concluded that managerialism failed to change the basic assumptions of corporation law; except for allowing charitable donations, "the law added no definition of standards or rules to spell out for what purposes or by what means management might properly make decisions other than in the interests of shareholders."[211]

Why? Considering the visibility of heroic managerial ideas in the 1950s, and their presence in the discourse of corporate law scholarship, some explanation is needed for why they had so little impact on the legal rules by which corporations were actually run. A number suggest themselves. For one, it may be too much to ask that corporation law change radically in the span of less than two decades. Corporation law has

207. On close corporation law, see Harwell Wells, *The Rise of the Close Corporation and the Making of Corporation Law*, 5 BERKELEY BUS. L.J. 263, 263 (2008) (examining the process by which close corporations adopted a range of agreements and arrangements designed to privately order the close corporation).

208. *Constitutional Limitations*, *supra* note 150, at 934.

209. Rostow, *supra* note 168, at 63.

210. Katz, *supra* note 5, at 189.

211. O'SULLIVAN, *supra* note 73, at 102 (quoting HURST, *supra* note 1, at 107).

always been a conservative, not to say entrenched, field; and there may not have been time for high managerialist ideas to change the law significantly before they fell from favor in the 1960s.

It may also be that ideas have never been the main drivers in the evolution of corporation law. As David Kershaw has noted, the explanations most offered for the development of corporation law during the twentieth century, especially those that give pride of place to jurisdictional competition, emphasize political jockeying as producing legal change: "These accounts share a theory of legal change which, in different guises, views legal change as the product of pressure exerted by economic and financial needs and interests of the market place and its constituent players."[212] Corporation law may change only in response to interest group pressures, or crises in economics and corporate governance, and lacking a good crisis, the mere existence and even popularity of managerial thought may not have been sufficient spur to alter the ground rules of corporation law, which existed not merely in the law reviews but in the statutes, case law, and legal practices of many separate jurisdictions.

Perhaps as well corporation law did not change because it was fairly managerial to begin with—that is, corporation law already shielded managers from shareholders and, in practice if not in theory, gave managers remarkable leeway to direct corporate revenues to any one of a number of groups (shareholders, employees, themselves) they saw fit. This was, after all, one of the critiques of corporation law advanced in Berle & Means and even before—that managers effectively controlled the corporation and had the power to direct its revenues as they wished.[213] As shown above, shareholder power was thin in the 1950s, with voting, then as now, largely a formality, and few external checks on managerial power.[214] But this is insufficient to explain the theory's lack of influence; corporation law may have been management-friendly, but shareholders still had some recourse against managers, and the more radical proposals of managerialist thinkers, such as the elimination of the board or shareholder voting, or transformation of managers' fiduciary duties, never gained traction.

A final possibility suggests itself: that there was not merely a gap between high corporate theory and everyday corporate doctrine, but that the gap was particularly wide due to unusual features of both the theory and the

212. David Kershaw, *The Path of Fiduciary Law* 2 (London Sch. of Econ. – Law Dep't, Working Paper No. 6/2011, 2011) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1874763.

213. *See* BERLE & MEANS, *supra* note 3 (exploring the increased power and influence of managers in corporations when compared to other corporate entities).

214. See *supra* text accompanying notes 154–67 (describing the loss of shareholder power and increased managerial influence).

doctrine. The critique that legal scholars are largely disconnected from doctrinal work is of fairly recent vintage,[215] but it seems to apply remarkably well to the situation of corporation law in the 1950s. Bayless Manning's own work tends to reflect and critique this split. In *The Shareholder's Appraisal Remedy*, where he wrote that "corporation law, as a field of intellectual effort, is dead,"[216] Manning attacked corporate law statutes and doctrine that he believed were divorced from the economic realities of the day. The essay focused on the appraisal remedy—the right of dissenting shareholders to demand valuation and payment for their shares following certain "fundamental corporate transactions" such as a merger—to argue that much of corporate law was mired in rigid and long-abandoned concepts of corporate personhood dating from the nineteenth century.[217] Corporation law gave shareholders appraisal rights, he argued, because it clung to outmoded notions of the corporation as a freestanding and almost metaphysical entity "quite separate from the economic enterprise, three dimensional, virtually alive, a little bit sacred because of its 'immortality' and connection with the 'sovereign,' and withal terribly important."[218] The appraisal remedy was a product of that notion, for if the corporation was an "entity" akin to a Platonic idea, then a merger would transform it into something new, and shareholders should no more be forced by the law to trade their shares in the old corporation for shares in the new one, a wholly different entity, than the owner of a horse should be forced to exchange it for a cow.[219] Of course, the notion that the corporation was a metaphysical entity had been abandoned by, at latest, the 1920s, but Manning believed that the appraisal remedy, and so much else of corporate law, had not progressed since then. The remedy was "a pure anachronism—a residual adaptation to an extinct theological problem."[220] In other words, too much of corporate doctrine, too much of its rules and great corporation statutes, remained mired in intellectualized formalisms which the law needed to shake off.

While corporate law statutes were trapped in the past, ossified survivors of the nineteenth century, contemporary thought about the corporation was bewitched by different but equally misguided notions. In

215. *See, e.g.*, Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992) (criticizing law schools and law firms for abandoning their duty to produce ethical scholarship and practitioners, thus creating a disjunction between the legal education and legal profession.).

216. Manning, *supra* note 1, at 245 n.37.

217. Manning, *supra* note 1, at 245.

218. Manning, *supra* note 1, at 245.

219. Manning, *supra* note 1, at 245–46.

220. Manning, *supra* note 1, at 248.

his review of Livingston's *American Stockholder*, Manning laced into the proponents of corporate democracy for being seduced by political models of the corporation. "Our historical absorption with the democratic process . . . ," he wrote, "tempts us always to describe our environment in the verbal categories of democracy."[221] But infatuation with political metaphors led theorists to their own misunderstandings of the corporation and misguided policies, as "[t]he forms and mechanisms of shareholder democracy divert attention from the real problems of holding business managements to a desirable standard of responsibility."[222] In other words, contemporary legal theory of the corporation was equally wrong-headed, utilizing political language that masked the economic structure of the corporation which should, Manning believed, be the real concern of corporate law scholars. In Manning's accounts, corporate law scholars appear either stuck in doctrinal dead-ends or beguiled by wispy metaphors, in neither instance seriously engaging with the economic realities of the modern business organization. It should be noted, of course, that Manning's diagnosis was not universally shared; many corporate law scholars of the 1950s apparently practiced their trade without despairing of either corporation law's statutes and doctrine or of its theorists' ideas.

At least in retrospect, there is much that is right in Manning's diagnosis; at times the pronouncements of heroic managerialism appear hopelessly optimistic and divorced from economic reality, while doctrinal work that dwelled on the finer points of appraisal or par value seems pointless and stultifying.[223] Yet even this explanation for managerialism's lack of impact seems less than completely satisfying. Manning's image of corporate law professors bewitched by one unsatisfactory metaphor or another may well capture an important aspect of corporate law in the 1950s—and may help explain why later scholars found attractive neither the 1950s' doctrine nor its theory—but it still does not explain the gap between the two, nor why later scholars so decisively rejected what had occurred during the 1950s. The larger explanation likely lies in the transitory nature of Heroic Managerialism itself. The product of a particular moment, the long 1950s, it flourished only so long as the larger societal and economic presuppositions on which it rested held. When those

221. Manning, *supra* note 171, at 1492.

222. Manning, *supra* note 171, at 1489.

223. Par value was another of Manning's peeves, like the appraisal remedy a survivor of the nineteenth century that he found played a significant part in the everyday working of corporate law while lacking any real justification. It is perhaps a testament to Manning's diligence and character that he wrote an entire treatise on par value, while claiming that the topic was neither "very real [nor] very important." BAYLESS MANNING, A CONCISE TEXTBOOK ON LEGAL CAPITAL X (2d ed., 1986).

larger presuppositions faded, so did heroic managerialism, and proposals and visions that once appeared prophetic were left looking utopian or merely foolish.

IV. BEFORE THE REVOLUTION IN CORPORATE LAW[224]

The optimistic version of managerialism did not survive the 1960s. Heroic managerialism was not merely the notion that the corporation is a social entity, or that its managers should run it for the benefit of constituencies in addition to shareholders. That more narrow conception lurked in Berle and Means, survived the 1960s, and can be discerned in the anti-takeover statutes of the 1980s, the Progressive corporate law scholarship of the 1990s and today's team production theories of corporation law.[225] The managerialism prevalent in the 1950s required something more—a faith that statesman-managers, either today's or some future incarnation, could truly run the corporation in the interests of all, linked to the belief that the corporation was a stable, indeed permanent, "social institution," whose existence would continue into the distant future (recall Manning's statement that the corporation is now permanent, the shareholders transitory). Both these views would erode in the 1960s, and managerialism would contract "toward a less celebratory mode."[226] Waning faith in corporate management—in managers generally—is so clear across the 1960s as almost not to require elaboration. A broad disaffection with giant institutions was one of the hallmarks of protests that had become widespread by mid-decade, not only shown by lack of faith in corporations but also in a reaction against the other giant institutions valorized in the 1950s. It is telling that the student revolt at the University of California at Berkeley in 1964 took as its bête noire Clark Kerr, who was

224. *See* Romano, *supra* note 3, at 324.

225. *See generally* Allen, *supra* note 7, at 271–72 (citing the 1980s as a period in which corporate law was revolutionized). Similar, though by no means identical, ideas appear for instance in some of the essays in PROGRESSIVE CORPORATE LAW (Lawrence Mitchell ed. 1995). Contemporary "stakeholder" theories of corporation law do bear resemblances to managerialism, but I think they lack the optimism about management, and the vision of the corporation as dominant and "embedded," that characterized managerialism at its height. One could argue that more recent ideas repackage managerialism, notably Margaret Blair and Lynn Stout's team production theory of corporate law, which depicts a public corporation's board of directors as acting as mediator among different groups, shareholder and not, participating in corporate wealth-creation, but under this theory, boards only mediate among direct contributors to the corporation and lack the "social ethos" of 1950s managerialism. For an example of managerialism in production theory, see Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 251–52 (1999).

226. Maier, *supra* note 87, at 69.

not only Chancellor of the University but a prophet of managerial society in his 1960 work *Industrialism and Industrial Man*.[227] By the early 1970s, corporate management was no longer seen as heroic; few outside managerial ranks clamored for "business leadership." The idea that corporations should be managed to benefit many constituencies had not disappeared, but management appeared more often as villain than hero in these stories, now a group that had to be pressured to run the corporation to help various groups, or which sought to shore up its public image by emphasizing the role that corporations had to play in solving various social problems.[228] In 1970, when J. Willard Hurst published his still-unequalled history of corporation law, *The Legitimacy of the Business Corporation*, it was the corporation's "legitimacy" that featured in the title, a legitimacy no longer assumed but that had become an open question.[229]

Reasons for the passing of heroic managerialism can also be found in the evolution of the corporate economy. Drucker's *Concept of the Corporation*, a touchstone of managerialism, took as its focus General Motors, a "social institution" if ever there was one, with a seemingly permanent place atop the industrial order, an army of workers, foremen, and middle managers, and factories and factory towns that appeared embedded in the landscape. GM was also, of course, the epitome of the multidivisional, decentralized corporation, with a central management staff overseeing the activities of fairly autonomous units.[230] As large as GM was, though, it was still chiefly involved in one business—auto manufacture—and its different units still appeared to be permanent parts of the firm.

In the 1960s, new currents appeared in business, as managerial entrepreneurs increasingly formed a new kind of business, the conglomerate, pieced together from businesses with little obvious connection. Textron, for example, sold "zippers, pens, snowmobiles, eyeglass frames, silverware, golf carts, machine tools, helicopters, rocket engines, ball bearings, and gas meters," among other things.[231] Managers of these transitory assemblages did not resemble the corporate statesmen of the previous decades, and their specialty was fluid financial acumen that

227. *See* Paddy Riley, *Clark Kerr: From the Industrial to the Knowledge Economy, in* AMERICAN CAPITALISM 82–84 (Nelson Lichtenstein, ed., 2006) (explaining the importance of Kerr's Industrialism and Industrial Man).

228. *See* Wells, *supra* note 88, at 111–23 (detailing the historical changes in the view of the directors of corporation and the social responsibilities of an organization).

229. HURST, *supra* note 1, at 1.

230. *See* ALFRED D. CHANDLER, JR., THE VISIBLE HAND 457–63 (1977) (detailing the management structure of GM).

231. WELLS, *supra* note 40, at 64 and *passim*.

would allow them to manage seemingly any business while buying and selling business units as they saw fit. The conglomerate was many things, but it was not the kind of stable "social institution" that was the imagined corporation of the 1950s. As Charles Maier has pointed out in a slightly different context, by the 1960s, a new kind of managerial ideal was emerging for a new kind of business:

> [T]he twentieth-century manager entertained an implicitly homeostatic vision. His task was to preserve or restore a high-level equilibrium, within a firm buffeted by its wider environment, or within the firm and the economic environment simultaneously. By the 1970s the assurance of equilibrium faded, and a new doctrine of business in constantly cyclical evolution became persuasive.[232]

The kind of heroic managerialism characteristic of the mid-century faded from the legal-academic field during the 1960s,[233] and it left corporation law, if possible, even deader than before. Without guiding assumptions about corporations as permanent social institutions, and managers as potential statesmen, the arguments that gripped many scholars in the 1950s over issues such as constitutionalizing the corporation, or shareholder democracy, seemed in later decades either trivial or simply incomprehensible. Heroic managerial ideas were not very useful for corporations attempting to navigate the economic problems caused by global competition and the decline of American management in the 1970s or 1980s. Searching for more useful tools, corporation law scholars—even those still holding onto a more chastened form of managerialism—would eventually turn to developments in economics and finance that promised to illuminate the corporation in turbulent times, and the ascent of law-and-economics approaches began.[234] Only in the late 1970s, when the new economic theory of the firm, and innovations from financial economics, began to be widely adopted by corporate law scholars, did corporation law "as a field of intellectual effort" again stir to life.[235]

But a turning point may be discerned a bit earlier. The transition between the old corporate law and the new was foreshadowed in 1962, when heroic managerialism brushed up against its successor. That year,

232. Maier, *supra* note 87, at 69.

233. It did not disappear all at once. *See, e.g.*, David S. Ruder, *Public Obligations of Private Corporations*, 114 U. PA. L. REV. 209 (1965) (providing an example of the continuance of heroic managerialism during the 1960s).

234. *See* Romano, *supra* note 3, at 342 (detailing the changes that law and economics brought to corporate law during the 1980s).

235. *See* Cheffins, *supra* note 3, at 482 (detailing a change in intellectual treatment of the corporate model beginning in the 1970s).

Henry Manne published a groundbreaking attack on managerialism, *The Higher Criticism of the Modern Corporation*, in the *Columbia Law Review*.[236] Though not fully appreciated at the time—it was published with a condescending reply from Berle, and apparently little valued for some years thereafter[237]—Manne's article insisted that corporation law had to be understood in "traditional economic terms"[238] and decisively rejected the notion that corporations or managers had escaped the pressures of the market. He argued for the importance of both managerial markets and the market for corporate control in shaping managerial and corporate behavior.[239] The same year, then, that Manning declared the death of corporation law as an intellectual enterprise, what we could call green shoots of its intellectual successors were beginning to appear.

CONCLUSION

In his study of recent American thought, the historian Daniel Rodgers speaks of his topics as "ideas laid across the messier realities of experience, helping to construct its character and possibilities, framing and polarizing its meanings."[240] So with the ideas of corporate law. As much as we hope those ideas will correctly reflect the legal and economic world as it is (and perhaps change it as well), they inevitably abstract from it, and invariably abbreviate and distort the messier realities they overlie. So, too, they inevitably change as the legal and economic contexts change, and ideas and theories that seemed plausible and even welcome in one era can baffle the next. We can see this in the career of midcentury corporate law.

As a historical matter, it is of some worth to restore heroic managerialism to our account of the development of corporation law, for it reminds us that there are very different ways to do corporation law. While Bayless Manning and Henry Manne may have doubted the value of corporate law scholarship during the long 1950s, and may even have been proven right, they did not appear to speak for most scholars, who busied

236. Henry G. Manne, *The "Higher Criticism" of the Modern Corporation*, 62 COLUM. L. REV. 399 (1962).

237. *See* Adolf A. Berle, Jr., *Modern Functions of the Corporate System*, 62 COLUM. L. REV. 432 (1962). On the initial reception of Manne's work, see Romano, *supra* note 3, at 343 (explaining how Manne's article went largely unnoticed at the time).

238. Manne, *supra* note 236, at 407.

239. Manne, *supra* note 236, at 407. Manne would expand on this in a series of articles during the 1960s. On The "Higher Criticism" and its times, see William J. Carney, *The Legacy of "The Market for Corporate Control" and the Origins of the Theory of the Firm*, 50 CASE W. RES. L. REV. 215, 221–32 (1999) (explaining how Manne fit into contemporary scholarship on corporate law).

240. RODGERS, *supra* note 61, at 2.

themselves with questions and concerns shaped or at least inflected by managerialism, or simply continued to tinker with the ordinary mechanisms of the law. Corporation law lacked an economic theory of the firm, but it is not clear that many scholars thought it needed one. Seeing the corporation as a political and social institution, insulated from competition and wielding enormous power, they concluded that political and sociological analyses were more useful and timely. Looking back, and judging that corporation law in the 1950s fell short because its practitioners did not take approaches more useful in another era, or devote themselves to questions that preoccupy us now, we are in danger of failing to understand it on its own terms, or to appreciate that every theory of corporate law reflects the age within which it was made.

The account can also remind us that questions corporate law scholars now too often cabin off or leave to others[241] were once central to corporation law—questions of the social role and impact of corporations, of corporate power, of corporations' ability to undermine or eclipse government. At the end of a tumultuous decade, these questions deserve new consideration.

241. To say that many scholars cabin off these questions, or do not see them as a valid part of "corporate law," is of course not to say that all do so, and there are certainly scholars within corporate law whose work interrogates corporations' social influence or political power.