The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-first Century

C.A. Harwell Wells[*]

I. Introduction

What do corporations owe to society? Recent scandals may have brought these questions to the fore,[1] but they have a long history. Since the late nineteenth century Americans have debated what duties large business organizations might have to their workers, customers, neighbors, and the public at large. These debates have taken an astonishing variety of forms. Americans have argued (among other issues) whether corporations should be allowed at all, what their nature is, whether government should regulate their size or activities, whether work in such corporations is dehumanizing, whether corporations wield too much political power, whether their activities inevitably pollute the natural environment, whether they can compete on the world stage absent government assistance, whether they corrupt or improve Americans' habits, and what duties if any they owe to their owners, workers, and communities. Even isolating the debate over "the corporation" seems impossible, for as corporations have taken a central role in American life, debates on topics ranging from foreign affairs to political campaigns to education inevitably touch on the role of corporations.

Unsurprisingly, the corporation has also been central to legal thought. What is unusual, however, is how the question of a corporation's larger responsibilities has come to occupy a narrow, carefully de-

---

∗ J.D. (Vanderbilt) Ph.D. (University of Virginia). Law clerk to the Honorable Gilbert S. Merritt of the U.S. Court of Appeals for the Sixth Circuit, 2001–02. My thanks to Robert Thompson, Wyatt Wells, and especially Randall Thomas for help with this article.

1. As this article went to press, a wave of corporate scandals struck American business, leading to the bankruptcy of several huge firms, restatements of earnings for many others, and at least a brief disillusionment with American business. Following this came a set of federal laws imposing new duties on corporate officers, directors, and accounting firms. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 ("[a]n Act to protect investors by improving the accuracy and reliability of corporate disclosures"). Although these developments are extremely important, they touch only peripherally on this article's concerns, as most focus on protecting stockholders and the financial markets, not "society" in general or a broad array of nonshareholder corporate stakeholders. It is significant that, when President Bush spoke to the New York Stock Exchange on the subject of corporate fraud, the banner behind him read "corporate responsibility"—not "corporate social responsibility."

Electronic copy available at: http://ssrn.com/abstract=1121899

marcated niche in American legal thought. For many scholars, corporate law is really the law dealing with the internal structure of the corporation.[2] But when legal scholars wish to discuss the corporation's role in society, they find themselves in an anteroom of corporate law, discussing "corporate social responsibility."[3] While the issue is addressed in detail below, the legal debates over corporate social responsibility revolve around whether the directors and managers of large, publicly held corporations should have a legal duty, when making decisions for the corporation, to take into account not only the needs of the shareholders but also other groups affected by the corporations' actions, such as its employees, customers, or the communities in which they are based.

Legal debates over corporate social responsibility stretch from the 1930s to the twenty-first century.[4] They have engaged some of the leading legal minds of the century, and advocates and enemies of corporate social responsibility still win publication in the country's most prestigious legal journals.[5] Contemporary works on corporate social responsibility touch on deep and important questions: what does the corporation owe to its shareholders? to its workers? to the larger community? But there is a problem with these debates: they rarely seem to go anywhere. Viewed in historical perspective, it is clear that each new round of debate on corporate social responsibility largely recapitulates the earlier debate in a slightly altered form.

The first clear debate over corporate social responsibility, the 1931–

---

2. *See, e.g.*, J. Mark Ramseyer, *Corporate Law*, *in* 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 503, 503 (Peter Newman ed., 1998) ("Corporate law governs the internal affairs of the corporation. More specifically, it governs the ties among a firm's shareholders and its senior managers—its officers and directors.").

3. Even working social issues into introductory courses on corporate law has proven controversial. *See* Kent Greenfield, *There's a Forest in Those Trees: Teaching About the Role of Corporations in Society*, 34 GA. L. REV. 1011, 1011 (2000) ("Corporate law is primarily about the relationships among shareholders, boards of directors, managers, and, occasionally, bondholders and other creditors; questions surrounding the role of corporations in society arise only at the periphery of the dominant narratives of corporate law, if at all.").

4. *See, e.g.*, A.A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931) [hereinafter Berle, *Corporate Powers*] (arguing that corporate managers should be legally controlled so that all shareholders may benefit from their decisions); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932) [hereinafter Dodd, *For Whom*] (countering Berle by arguing that corporate managers only owe a duty to their stockholders to make a profit); A.A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932) [hereinafter Berle, *A Note*] (countering Dodd by arguing that in practice corporate managers affect more than just their stockholders and should be under legal control).

5. *See, e.g.*, Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999) (discussing the role corporate boards play in corporate governance); Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197 (1999) (evaluating the SEC's power to require corporations to provide a public social disclosure).

Electronic copy available at: http://ssrn.com/abstract=1121899

32 discussion between A.A. Berle and E. Merrick Dodd,[6] was a sharp exchange over the responsibilities corporate managers and directors owed their shareholders and other groups directly influenced by the corporation. In retrospect, their debate is very much a part of the debates over management overreaching and corporate power that began in the 1920s.[7] Later debates, which crested in the early 1960s, mid-1970s, and the years around 1990, were similarly products of those decades' specific legal and social developments.[8] Each debate was the product of its time, but each also closely resembled its predecessor.

Though separate in time, all these debates shared conceptual foundations. They all were premised on the idea that the American economy was dominated by a relatively small number of enormous, powerful, and stable business corporations that were qualitatively different from their smaller competitors, and the debates all assumed that the solution to pressing social ills was neither to eliminate corporations nor let them alone, but rather to implement legal mechanisms that would lead corporate managers and directors to take into account the needs not only of shareholders but of workers, consumers, and communities when making business decisions.

This article begins as a history of the debates over corporate social responsibility, situating them in their historical contexts and showing how individual debates were responses to specific conditions of their time. It also shows why each debate echoed previous ones. Other scholars have sketched out parts of this story, or noted in passing the links between different debates in different decades,[9] but this article aims to provide a more detailed genealogy of corporate social responsibility. But the article's ultimate goal is not historical. By following the course of debates over corporate social responsibility, it provides contemporary students of corporate social responsibility a vantage point from which to

---

6. *See infra* Part II.
7. *See infra* Part II.B.
8. *See infra* Part III.
9. Stephen M. Bainbridge has noted this:

> Just as sunspots come in cycles, so too does the corporate social responsibility debate. In the 1930s, we had the Berle-Dodd debate. In the 1950s, Berle and others revisited the issue. In the 1970s, there was a major fracas over corporate social responsibility. Finally, today we have the nonshareholder constituency debate. . . . [E]ach iteration adopts a new terminology, focuses on a slightly different facet of the problem, and develops some new ideas. But all-in-all, we have been here before.

Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship, 82 CORNELL L. REV. 857, 902–03 (1997) (citations omitted). For a brief account of the historical development of corporate social responsibility, see Douglas M. Branson, *Corporate Governance "Reform" and the New Corporate Social Responsibility*, 62 U. PITT. L. REV. 605, 608–17 (2001).

evaluate critically their ancestors, a perspective from which they can separate the still-vital elements in those debates from lost causes.[10] Specifically, this article makes four claims about the long discourse over the social responsibilities of corporations.

First, corporate social responsibility is about big business. The initial debate over corporate social responsibility emerged out of, and cannot be understood apart from, a vision of the American economy that first took root in the 1920s. That vision sees the American economy dominated by a small number of gigantic, stable corporations that essentially control the nation's business. Not only do these corporations dominate American business, but they will, if left unchecked, continue to accrue economic, political, and social power. Such firms are qualitatively different from smaller counterparts, distinguished not only by size but by their market dominance and the potential political and social power they wield. When legal commentators discuss corporate social responsibility, they really mean the social responsibility of giant corporations.

Second, advocates of corporate social responsibility aim to reform corporate power, not eliminate it. However much critics might decry the power of these corporations, few propose to eliminate them. In this sense, none of the proponents of corporate social responsibility were genuinely radical, for each believed that the corporation's power could be tamed through legal change that would leave the corporate form largely intact.

Third, the apparently diverse legal debates over corporate social responsibility share a deep underlying structure. Since at least the 1920s, it has been accepted doctrine that a corporation's managers and directors have a paramount legal duty to make decisions that will increase the wealth of the company's owners: the shareholders. Advocates of greater corporate social responsibility challenge this notion of "shareholder primacy."[11] They want to impose on corporate decision-makers a legal duty to take into account the interests of the corporation's other constituen-

---

10. Several recent works on corporate law have similarly used historical analysis to open up new perspectives on current developments. *See generally* Robert W. Gordon, *Foreword: The Arrival of Critical Historicism*, 49 STAN. L. REV. 1023 (1997) (discussing the way history can provide a critical perspective on legal doctrine).

11. As I shall show, the debate over corporate social responsibility is often conducted between advocates of "shareholder primacy" and those who believe the interests of other constituencies should be weighed along with the demands of shareholders. Whether or not shareholder primacy is itself influential in corporate law is another matter altogether. *See* D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277 (1998) (discussing the relevancy of the shareholder primacy norm in ordinary business decisions of corporations).

cies, most often their employees and the communities where they are based.[12] Benefiting shareholders would remain a goal, but not an overriding one. From debate to debate, to be sure, the exact legal means for forcing managers and directors to assume a legal duty to nonshareholders changed, but the general form remains: duty to owners alone versus duties to many constituencies.

Fourth, while the deep structure of the debate over corporate social responsibility remains constant, each decade supplies its own reason why corporations should assume greater responsibility. Corporate social responsibility is not a novel solution to an unchanging problem; quite the contrary, it is an unchanging solution to an ever-new problem. In the 1960s, corporate social responsibility was a solution to problems of consumer safety and the Vietnam War; in the early 1990s, an answer to takeovers and plant closings. The solution remains the same while the problem to be solved constantly changes.

This article has three parts. Part I examines the first modern legal debate over corporate social responsibility. In 1931 and 1932, two of the nation's leading experts on corporate and securities law, A. A. Berle, Jr. and E. Merrick Dodd, debated the social responsibilities of corporate officers in the pages of the Harvard Law Review. There they first set out the two positions still encountered in debates over corporate social responsibility, Dodd arguing that corporate officers should be given leeway to take into account the needs of a corporation's different constituencies when making decisions, Berle attacking this notion and arguing for the primacy of shareholder responsibility. Part I also traces their debate back to its roots in corporate and securities law of the 1920s. In this way we can see how economic and legal developments of the 1920s were the essential preconditions to the Berle-Dodd exchange—and indeed to the entire line of debates over corporate social responsibility that followed.

Part II extends the historical analysis by examining three major exchanges over corporate social responsibility in the early 1960s, mid-1970s, and late 1980s. These debates are representative of the larger debates over corporate social responsibility that have sprung up intermittently since the 1950s. Seen from our perspective, each debate is very much a product of its times. In the early 1960s, the heyday of America's corporate liberal consensus, legal commentators saw large corporations as permanent fixtures on the economic landscape and looked to corporations to balance the competing demands of shareholders, workers, and

12. Referring to a corporation's workers or customers as "constituents" is, of course, itself a rhetorical device for characterizing the relationship.

the communities where they were based. In the 1970s, advocates of corporate social responsibility (most notably Ralph Nader) saw corporations as wielding disproportionate political and social power, and advocated new measures to protect Americans in their roles as citizens and consumers. To proponents of corporate social responsibility in the late 1980s and early 1990s, the problem was a wave of corporate mergers and downsizings that left shareholders enriched and workers on the street. The solution was corporate constituency statutes that enabled corporate managers to take into account nonshareholder interests when making decisions.

In each debate, however, the assumptions of the debaters—that large corporations dominated American society—remained the same, as did their proposed solution—new legal mechanisms to make corporate leaders answerable to constituencies beyond shareholders.[13]

Finally, Part III examines two recent proposals for corporate social responsibility, the "team-production" model proposed by Professors Margaret Blair and Lynn Stout, and the new proposal for SEC-enforced "corporate social transparency" developed by Professor Cynthia Williams.[14] Here history is used to shed light on contemporary issues. Williams' article, I argue, ultimately does not advance the argument about corporate social responsibility, in part because she does not address many of the important questions raised by the corporate social responsibility literature over the past two decades. Blair and Stout's article, in contrast, puts forward genuinely innovative suggestions for corporate law by building on the long history of corporate social responsibility.

II. BERLE, DODD, AND THE ORIGINS OF THE DEBATE

Modern legal debates over corporate social responsibility date back to a 1930s debate between the legal scholars Adolf A. Berle and E. Merrick Dodd over whom directors should serve.[15] The exchange was brief, and soon lost the attention of legal scholars.[16] In laying out the

---

13. *See infra* Part III.

14. *See infra* Part IV.

15. *See* Berle, *Corporate Powers*, *supra* note 4; Dodd, *For Whom*, *supra* note 4; Berle, *A Note*, *supra* note 4.

16. Berle's work has continued to attract attention, especially his book with Gardiner Means, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932). *See also* JORDAN A. SCHWARZ, LIBERAL: ADOLF A. BERLE AND THE VISION OF AN AMERICAN ERA 64–66 (1987) [hereinafter SCHWARZ, LIBERAL] (discussing Berle's ideas on corporate social responsibility); Symposium, *Corporations and Private Property: A Conference Sponsored by the Hoover Institution*, 26 J. L. & ECON. 235 (1983) (discussing corporate social responsibility); William W. Bratton, *Berle and Means Reconsidered at the Century's Turn*, 26 J. CORP. L. 737 (2001) (discussing Berle and Means's THE

extremes of managerial duty to shareholders against duties to other constituencies, and in asking deep questions about the role of corporations in modern society, however, the debate set the stage for the rest of the century's exchanges over corporate social responsibility.[17]

It is not enough, however, to date the legal debate over corporate social responsibility back to Berle and Dodd. In recovering the origins of these debates, a new set of questions arises: why did the modern debate over corporate social responsibility emerge at this particular time, the end of the 1920s, and in this particular form, as a debate over to whom corporate managers owed legally enforceable duties? Understanding why the debate over corporate social responsibility emerged in this form and when it did will provide us a better insight not only into the historical development of these ideas, but also into why ongoing debates have echoed the Berle-Dodd debate for much of the twentieth century.

A. *Settings*

Berle and Dodd waged their debate in the early 1930s, but its genesis lay in changes in American business that took place during the 1920s. For Berle, the changes played out on Wall Street. After graduating from Harvard Law School at age 21—the school's youngest graduate since Louis D. Brandeis—Adolf A. Berle, Jr. (1895–1971) spent the 1920s as a wunderkind of corporate law, moving back and forth between a law practice downtown and, after 1925, professorships at Columbia Law School and the Harvard Business School.[18] His law practice exposed him to much of the worst of corporate legal abuses in the 1920s, abuses made

---

MODERN CORPORATION AND PRIVATE PROPERTY); Thomas K. McCraw, *In Retrospect: Berle and Means*, 18 REVS. AM. HIST. 578 (1990) (reviewing the history of Berle and Means's THE MODERN CORPORATION AND PRIVATE PROPERTY). The Berle-Dodd debate, however, has garnered less sustained study. *But see* David Millon, *Personifying the Corporate Body*, 2 GRAVEN IMAGES 116, 119–22 (1995) (discussing Berle and Dodd's characterization of the corporation); A.A. Sommer, Jr., *Who Should the Corporation Serve? The Berle-Dodd Debate Revisited Sixty Years Later*, 16 DEL. J. CORP. L. 33 (1991) (discussing constituency statutes and corporate social responsibility); Joseph L. Weiner, *The Berle-Dodd Dialogue on the Concept of the Corporation*, 64 COLUM. L. REV. 1458 (1964) (discussing the debate between Berle and Dodd).

17. A few later scholars do recognize that it all began with Berle and Dodd. *See, e.g.*, David L. Engle, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1, 7 n.26 (1979) (discussing the Berle-Dodd debates on corporate social responsibility); David Millon, *New Game Plan or Business as Usual? A Critique of the Team Production Model of Corporate Law*, 86 VA. L. REV. 1000, 1002 n.5 (2000) [hereinafter Millon, *New Game Plan*] (summarizing the corporate social responsibility idea of the Berle-Dodd debates).

18. He was a full-time teacher at Columbia Law School after 1925, and taught corporate finance part-time at Harvard from 1927 to 1929. *See generally* SCHWARZ, LIBERAL, *supra* note 16, at 45–51 (from which I draw much of my account of Berle's career); 7 WHO WAS WHO 1971–1980 65 (1981).

possible by new-ownership structures of larger firms. In the nineteenth century, even very large firms were often run by their owners, and were either closely-held firms or partnerships.[19] In the twentieth century, however, large industrial firms were increasingly owned by stockholders, who gained ownership by purchasing relatively small amounts of publicly-traded stock, and managed by a cadre of professional managers with little ownership interest in the firms. Control of the corporations had passed from owners to managers.[20]

The shift in power was gradual, and had been recognized by commentators,[21] economists, and legal scholars.[22] What was new in the 1920s was the erosion of legal safeguards that once put strict limits on managers, and management's increased willingness to transfer corporate wealth and power from shareholders to themselves.[23]

Statutory defenses, in particular, had largely disappeared. Transfer of wealth and control among stockholders was made easier by alteration of state corporation statutes to permit large-scale stock-watering, the issuance of stock for property or services worth far less than the stock itself.[24] Control over the firm could be moved from one group of stockholders to another by the issuance of "blank stock" whose voting power could be fixed by a corporation's board of directors, a change ratified in

---

19. For instance, in 1900 two of the nation's largest industrial firms, Singer Manufacturing and McCormick Harvesting, were closely held, *see* PETER L. BERNSTEIN, CAPITAL IDEAS: THE IMPROBABLE ORIGINS OF MODERN WALL STREET 28 (1993), and the nation's largest manufacturer of railroad engines, the giant Baldwin Locomotive company, was a partnership, *see* JOHN K. BROWN, THE BALDWIN LOCOMOTIVE WORKS 1831–1915, at 96–97 (1995).

20. *See generally* ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 416 (1977) (tracing the growth of "center firms" and managerial expertise in the American economy).

21. One of the era's most notable books, by one of its most influential public intellectuals, made the point directly. In his famous *Drift and Mastery*, Walter Lippmann wrote that "[t]he real news about business is that it is being administered by men who are not profiteers. The managers are on salary, divorced from ownership . . . ." THOMAS K. MCCRAW, PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, ALFRED E. KAHN 140 (1984) [hereinafter MCCRAW, PROPHETS] (quoting WALTER LIPPMANN, DRIFT AND MASTERY 42 (1914)).

22. *See* MORTON J. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 74 (1992) (discussing how late nineteenth-century corporate law "tend[ed] to shift power away from shareholders, first to directors and later to professional managers."); HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW 1836–1937, at 106 (1991) (citing economists who predated Berle, including John R. Commons and Thorstein Veblen, who noted the shift in power in large businesses from owners to managers).

23. *See* JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE 43 (2d ed. 1995) ("[B]y the 1920s, the ability of the judiciary to protect noncontrolling shareholders from management self-favoritism had been outrun by a series of statutory innovations that allowed corporate insiders to achieve profits from securities distributions without risking a fraud suit.").

24. *See id.*

Delaware's Corporation Act in 1927.[25] These were only two of the most radical means by which power in the corporation came to rest with its managers. Such mechanisms, Berle wrote in 1930, effectively gave corporate managers "the power of confiscation," allowing them with impunity to shift "the profits of the enterprise and also in a considerable measure the underlying assets . . . from one group of stockholders to another."[26]

In 1927, Berle, then still torn between practicing law and researching it, received a grant from the Laura Spelman Rockefeller Foundation to study the modern corporation. Berle's sponsor for the grant was William Z. Ripley, a prominent Harvard economist who had, like Berle, been angered by the spectacle of managers taking advantage of stockholders, and who in 1927 sparked a brief wave of protest when he published his exposé, *Main Street and Wall Street*.[27] For assistance in his research, Berle hired Gardiner Means, an old friend who had recently left a business career to earn a doctorate in economics. In the beginning, all three men saw their study as an examination of management abuse of shareholders.[28] Only in the next few years would Berle become concerned with broader issues of corporate power over American society.[29]

It was a promising moment for such a project. In the 1920s the modern economy, dominated by large corporations, reached maturity.[30] The 1910s saw the end of the long wave of industrial consolidations that had resulted in domination of many sectors of the economy by relatively few large, integrated, industrial enterprises.[31] Equally important, the giant corporation won new economic respect, as most economists concluded

---

25. *See id.* at 43–44; *see also* A.A. Berle, Jr., *Investors and the Revised Delaware Corporate Act*, 29 COLUM. L. REV. 563 (1929) (examining the late 1920s amendments to the Delaware Corporation Act).

26. SELIGMAN, *supra* note 23, at 44 (quoting A.A. Berle, Jr., *Corporations and the Public Investor*, 20 AM. ECON. REV. 65 (1930)).

27. *See* SCHWARZ, LIBERAL, *supra* note 16, at 51–52 (discussing Berle's association with Ripley); WILLIAM Z. RIPLEY, MAIN STREET AND WALL STREET (1927) (discussing the role of the corporation in the American economy); *see also* 5 JOSEPH DORFMAN, THE ECONOMIC MIND IN AMERICAN CIVILIZATION, 1918–1933, at 557–59 (1966) (discussing Ripley's MAIN STREET AND WALL STREET).

28. *See* SCHWARZ, LIBERAL, *supra* note 16, at 52 (discussing the three men's research and Berle's focus on the lack of defined rights for stockholders).

29. *See id.* at 55–56 (discussing Berle's concerns that so much of the national wealth was controlled by so few corporations).

30. *See* MORTON KELLER, REGULATING A NEW ECONOMY: PUBLIC POLICY AND ECONOMIC CHANGE IN AMERICA, 1900–1933, at 89 (1990) ("It was in the 1920s that the modern corporate economy, dominated by large, publicly financed companies servicing a massive consumer market, came of age.").

31. *See* CHANDLER, *supra* note 20, at 345–76 (dating 1917 as the end of the formative growth of large-scale business enterprise in the United States).

that large corporations attained economies of scale and so helped consumers,[32] and new legal legitimacy, as a series of Supreme Court decisions concluded that bigness alone was not grounds for challenge under the antitrust laws.[33]

The large corporation also won new legitimacy in the eyes of the public.[34] The stock manipulations that Berle and Ripley decried were not a major issue to many Americans, for whom ownership of common stock held out the promise that all would soon share in the wealth generated by Wall Street.[35] Herbert Hoover's election in 1928 put into office a pro-business candidate, one who fervently believed that real improvement in the country would come from private enterprise.[36] Some business leaders even held out the hope that in the future large corporations would take over many of the social-welfare functions once performed by government through employment agreements, profit-sharing plans, and generous pension schemes, so-called "welfare capitalism."[37]

All these observations are of more than merely historical interest. The 1920s displayed in extreme form tensions that still shape debates over corporate social responsibility. Widespread stock ownership produced the promise that industry's wealth would flow to all, balanced by

---

32. *See* MCCRAW, PROPHETS, *supra* note 21, at 139–40 (stating the views of Charles R. Van Hise); OLIVIER ZUNZ, MAKING AMERICA CORPORATE, 1870–1920, at 35–36, 68 (1990) (stating the belief that large corporations were more efficient). The great exception to this view is Justice Brandeis, who held fast to the belief that large enterprises had no economic advantages over their smaller competitors. *Id.* at 108. *See generally* Louis K. Liggett Co. v. Lee, 288 U.S. 517, 568–72 (1933) (Brandeis, J., dissenting) (stating Brandeis's view that states should be able to charge large interstate corporations high license fees).

33. *See* KELLER, *supra* note 30, at 36 (noting that in the 1920s antitrust doctrine, "[a]cceptance of large enterprises with little regard for the extent of its market control came to be the norm").

34. *See* LOUIS GALAMBOS, THE PUBLIC IMAGE OF BIG BUSINESS IN AMERICA, 1880–1940, at 220 (1975) (stating middle-class Americans' acceptance of the corporation); MCCRAW, PROPHETS, *supra* note 21, at 143 (explaining the growth of "center-firm powerhouses" and the disappearance of "preoccupation with the underside of business practice . . . .").

35. Congressional investigators in the 1930s estimated that approximately 1.5 million Americans individually owned stock by 1929, still far more than owned stock in 1920. *See* JOHN KENNETH GALBRAITH, THE GREAT CRASH 1929, at 83 (3d ed. 1972) ("The striking thing about the stock market speculation of 1929 was not the massiveness of the [popular] participation. Rather it was the way it became central to the culture.").

36. Hoover did not believe, strictly speaking, in *no* government action to improve the economy, but he did believe that the best action government could take was to assist the positive actions of corporations in peripheral ways. *See* ELLIS W. HAWLEY, THE GREAT WAR AND THE SEARCH FOR A MODERN ORDER: A HISTORY OF THE AMERICAN PEOPLE AND THEIR INSTITUTIONS, 1919–1933, at 100 (1979) (explaining Hoover's views towards business and government influence); WILLIAM LEACH, LAND OF DESIRE: MERCHANTS, POWER, AND THE RISE OF A NEW AMERICAN CULTURE 349–58 (1993) (discussing Herbert Hoover's life and views towards business).

37. *See generally* STUART D. BRANDES, AMERICAN WELFARE CAPITALISM, 1880–1940 (1976) (explaining the idea of "welfare capitalism"); SANFORD M. JACOBY, MODERN MANORS: WELFARE CAPITALISM SINCE THE NEW DEAL 11–34 (1997) (describing the origin and growth of "welfare capitalism").

the fear that stock-market speculators would hoodwink small speculators. Lack of legal controls over corporate managers could result either in visionary programs produced by corporate statesmen, or theft by corporate managers lining their own pockets. The benefits to be gained by efficient large corporations would flow to consumers in the form of cheap consumer goods, but might be offset by the power that large corporations could wield over shareholders, workers, and customers. Proposals for greater corporate social responsibility have attempted to resolve such tensions ever since.

B. Berle and Dodd's Debates

Between 1927 and 1932, Berle conducted two, separate research projects reflecting two aspects of control and corporate power in modern America. In his legal articles and treatises, he focused chiefly on problems related to corporate governance, and sought in particular to protect stockholders from what he saw as managers' machinations.[38] As his collaboration with Means ripened, however, Berle increasingly became concerned with not merely the balance of power between stockholders and managers, but the balance of power between corporations and the rest of society.[39] In his debate with Dodd, however, Berle in the exchange sought chiefly to protect shareholders from managers while Dodd would seek to protect the nation from corporations.

The article that began the debate was written without Dodd in mind. Berle's *Corporate Powers as Powers in Trust*, published in the *Harvard Law Review* in 1932, was composed during the same period Berle and Means were finishing *The Modern Corporation and Private Property*.[40] By the time he was writing his article, Berle had clearly developed his overarching idea about the separation of ownership and control that marked the modern corporation. *Corporate Powers as Powers in Trust*, however, was not written to address the problems of corporate power over society, but rather of managerial overreaching. It was a product of

---

38. *See, e.g.*, ADOLF A. BERLE, JR., STUDIES IN THE LAW OF CORPORATION FINANCE v–vi (1928) [hereinafter BERLE, STUDIES] (stating that the prime questions in corporate finance were no longer about intra-corporate relations but rather "questions of stockholders' rights"). Berle developed his ideas further in a second collection. *See* ADOLF A. BERLE, JR., CASES AND MATERIALS IN THE LAW OF CORPORATION FINANCE 62–122, 126–203 (1930) (presenting cases and materials which influenced the relationship between manager and stockholder).

39. *See* SCHWARZ, LIBERAL, *supra* note 16, at 55–56 (describing Berle's concerns about the concentration of economic power).

40. Berle, *Corporate Powers*, *supra* note 4, at 1049.

the 1920s more than the 1930s, the end-product of Berle's campaign to defend shareholders against managers.

The problem Berle's article addressed was the same one he had fought over the previous decade—how to protect disorganized and collectively weak shareholders from managers with strong incentives and opportunities to transfer corporate wealth and power to themselves. Statutory defenses held little hope; Berle himself had fought unsuccessfully against the pro-management changes made in 1929 to Delaware's General Corporation Laws.[41] Since law could not protect shareholders, Berle turned for assistance to the other branch of Anglo-American law: equity.

Specifically, in *Corporate Powers as Powers in Trust* Berle put forward an unorthodox theory of corporate managers' responsibility. Corporate directors had long been held to have some fiduciary duty towards their corporation and shareholders.[42] Most legal opinions, however, held that these duties were limited—directors were not trustees of corporate property in the strict sense, instead having different responsibilities and a wider range of action than did true trustees.[43] In the 1920s, mechanisms to enforce these fiduciary duties had become attenuated, as alterations in statutes and corporate charters granted corporate managers and directors broad powers to act as they saw fit in the management of corporations.[44]

Below these changes, however, Berle claimed to see a new doctrine emerging. Courts, he contended, were showing a new willingness to use their equitable powers to force directors, or indeed any group that dominated a corporation, to exercise the powers granted to them not only for their own benefit, but for "the ratable benefit of all the shareholders as their interest appears."[45] More important, courts were willing to intervene to bring about a fair result. Thus, he concluded:

---

41. *See id.* at 1050 ("for years corporate papers and general corporation laws have multiplied [management] powers and made them increasingly absolute"); SCHWARZ, LIBERAL, *supra* note 16, at 55 (describing Berle's role in the Delaware law).

42. *See* WALTER CLEPHANE, THE ORGANIZATION AND MANAGEMENT OF BUSINESS CORPORATIONS § 324 (2d. ed. 1913) ("[t]he directors of a corporation are trustees for the benefit of the stockholders collectively"); CHARLES B. ELLIOTT & HOWARD S. ABBOTT, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS § 502 (4th ed. 1911) ("directors . . . occupy a fiduciary relation toward the corporation and to stockholders . . . ."); Harold Marsh, Jr., *Are Directors Trustees? Conflict of Interest and Corporate Morality*, 22 BUS. LAW. 35, 39–43 (1966) (discussing approval criteria for contracts between a director and his corporation).

43. *See* Note, *Restrictions on the Power of a Director to Contract with His Corporation*, 29 COLUM. L. REV. 338, 345 (1929) (stating that a corporate director is not in the legal sense a trustee of corporate property).

44. *See* Berle, *Corporate Powers*, *supra* note 4, at 1050 *passim* (introducing five broad powers given to managers and directors).

45. *Id.* at 1049.

> [I]n every case corporate action must be twice tested: first, by the technical rules having to do with the existence and proper exercise of the power; second, by equitable rules somewhat analogous to those which apply in favor of a *cestui que trust* to the trustee's exercise of wide powers granted to him in the instrument making him a fiduciary.[46]

In the future, Berle suggested offhandedly, corporation law would become "in substance a branch of the law of trust."[47] Directors and managers (Berle used the terms almost interchangeably) would now work subject to the implied oversight of a court's equity jurisdiction.[48]

Berle wove his doctrine from several isolated strands of corporate law. He began by cataloguing specific judicial exceptions to the general discretionary power of corporate directors, instances where courts had invoked their equitable powers to prevent shareholder oppression. Courts had prevented boards from issuing non-par stock while asking for nothing in return[49] and from issuing additional shares simply to protect their majority position.[50] In some cases, they had ordered corporations to pay dividends unreasonably withheld.[51] From these rare exceptions to the general rule of director autonomy, Berle claimed to deduce a new principle: the powers of a board were always subject to supervision by courts of equity.[52]

Buried at the bottom of his argument was a brilliant bit of wish-fulfillment. Hundreds of years before, trustees had held absolute power over the property granted in a deed of trust.[53] In early modern England such absolute power was eventually tamed by courts using their equitable powers to impose fiduciary duties on legal trustees.[54] In 1931, Berle reasoned, corporate boards had near-absolute power over property technically belonging to their stockholders.[55] So he hoped that courts would

---

46. *Id.*

47. *Id.*

48. *Id.* at 1071. Berle did admit that this oversight should be exercised with some restraint, since "the business situation demands greater flexibility than the trust situation." *Id*. at 1074.

49. *Id.* at 1055 nn.13–15 (citing Stone v. Young, 206 N.Y.S. 95 (1924), Hodgman v. Atlantic Refining Co., 300 F. 590 (D. Del. 1924), and Atlantic Refining Co. v. Hodgman, 13 F.2d 781 (3d Cir. 1926)).

50. *See id*. at 1059 (citing Luther v. Luther Co., 94 N.W. 69 (Wis. 1903)).

51. *See id.* at 1061 (citing Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919)). All the cases Berle cited were either from the nineteenth century, concerned closely held corporations, or dealt with attempts to shortchange holders of preferred stock. *See id*. at 1059–61 and accompanying notes (citing specific examples).

52. *Id.* at 1074.

53. *See id.* at 1073–75.

54. *See id.*

55. Berle, of course, was well aware both of the parallel and of the fact that his legal ideas had raced ahead of established doctrine. *See id.* at 1073 ("corporation law is substantially at the stage in which equity was when it faced the situation of a trustee who had been granted apparently absolute

again intervene, this time using their equitable powers to impose strict duties on corporate managers.[56] His approach is one that would recur in the literature of corporate social responsibility, as scholars rooting for legal change would optimistically find isolated comments in case law and take them as signs of a new consensus forming on the expanded duties of corporations or directors.[57]

Berle's approach was, to put it mildly, counter to generally accepted doctrine. Indeed, the year Berle's article appeared the standard work on corporate directors' powers had reported that, far from imposing new duties, "modern decisions tend[ed] toward an emphasis of the directors' absolutism in the management of the affairs of large corporations."[58] Berle was not writing of corporate law as it was, but as it should be.

Berle's article had little immediate effect. Apart from the response of E. Merrick Dodd, contemporary commentators ignored it.[59] Nor have legal commentators since the 1930s advocated such a broad fiduciary duty for directors.[60] For one, the legal climate has changed; as other scholars have noted, Berle wrote in a day where there was both federal and state common law, and thus two possible avenues for the equitable imposition of new duties on corporate managers. Since then, the impact of *Erie Railroad Co. v. Tompkins*,[61] and the continued migration of corporate law to arguably pro-business Delaware state courts, have made it

---

powers in his deed of trust."); *see also* BERLE, STUDIES, *supra* note 38, at vi (admitting that "[c]orporate transactions and financial methods are invariably some years ahead of court interpretations.").

56. BERLE, CORPORATE POWERS, *supra* note 4, at 1073–74.

57. *See, e.g.*, *infra* text accompanying notes 138–42 (discussing the insistence of Berle and other scholars in the 1950s that courts were about to decide that corporations could divert spending to benefit the community), 171–74 (discussing the prediction of Schwartz and other scholars that shareholders would soon have regular access to proxy machinery for social issues proposals).

58. *See* HORWITZ, *supra* note 22, at 100 (quoting H. SPELLMAN, A TREATISE ON THE PRINCIPLES OF LAW GOVERNING CORPORATE DIRECTORS 4–5 (1931)); *see also* Dodge v. Ford Motor Co., 170 N.W. 668, 682 (Mich. 1919) ("Courts of equity will not interfere in the management of the directors unless it is clearly made to appear that they are guilty of fraud or misappropriation of the corporate funds") (citation omitted); Marsh, *supra* note 42, at 39–43 (discussing approval criteria for contracts between a director and his corporation).

59. *See* Weiner, *supra* note 16, at 1459 ("no one, at least in print, arose to challenge the thesis"). It is possible this relative neglect was due largely to the overwhelming attention that Berle and Means's book, published soon after the article, garnered.

60. Certainly, managers owe a range of duties to employees and stockholders, but except in isolated instances, the duty does not reach the level of fiduciary duty a trustee owes to a trust beneficiary. *See* JAMES D. COX ET AL., CORPORATIONS, §§ 11.1–11.10 (Richard A. Epstein et al. eds., 1997) (explaining the duties owed by majority shareholders to minority shareholders). But the debate isn't dead. *See* William W. Bratton, *Game Theory and the Restoration of Honor to Corporate Law's Duty of Loyalty*, *in* PROGRESSIVE CORPORATE LAW 139, 140–41 (Lawrence E. Mitchell ed., 1995) [hereinafter Bratton, *Game Theory*] (discussing competing views on fiduciary duty).

61. 304 U.S. 64 (1938).

even less likely the trust model would be imposed on corporate managers and directors.[62]

Berle's trust model also ignored the important differences between beneficiaries and shareholders. As Bratton has pointed out, while beneficiaries are often stuck with their trustees, shareholders are rarely stuck with shares of a publicly held corporation, for they can exit the relationship by selling them.[63] Finally, Berle's idea that judges should have oversight over all corporate decisions seems completely impracticable.[64]

Before leaving *Corporate Powers as Powers in Trust*, we should take note of one more peculiarity of the article. It appeared when Berle and Means were hard at work on their masterpiece, *The Modern Corporation and Private Property*. Yet, whereas that book spoke to new worries about managers wielding corporate power over the broader society, Berle's article was intended to prevent corporate managers from oppressing shareholders. As Berle put it, his doctrine of powers in trust was designed for situations "where one group within the corporation [was] to be sacrificed for the benefit of another."[65] The idea that corporations had a general social responsibility was nowhere in Berle's article.

The modern debate over corporate social responsibility was really sparked the next year with the publication of E. Merrick Dodd's article *For Whom Are Corporate Managers Trustees?*[66] In it Dodd made a conceptual advance that is a necessary precondition for all later debates. When Berle saw the gap open between ownership and control, he perceived it as a problem and aimed to close the gap by imposing new duties on managers that would make them act as if they were owners.[67] Dodd, however, saw the gap as an opportunity.[68] If directors could have new duties to shareholders imposed on them, could they not equally well assume duties to other groups that also had a stake in the corporation? So long as ownership and control were one, it made no sense to argue that the "control" should treat owners as only one of many constituencies.

62. *See* Bratton, *Game Theory*, *supra* note 60 and *infra* text accompanying notes 177–89 (discussing large corporations' social responsibility and economic impact).

63. *See infra* text accompanying notes 160–61. Minority shareholders in closely held corporations do not have this option, which is one reason why majority shareholders in such situations have been held to owe a fiduciary duty to their fellow owners.

64. *See* Weiner, *supra* note 16, at 1459 (criticizing Berle's thesis by suggesting that judges were not equipped for such roles).

65. Berle, *Corporate Powers*, *supra* note 4, at 1050.

66. Dodd, *For Whom*, *supra* note 4.

67. The gap between ownership and control, first articulated by Berle & Means, remains a central concern of corporate law. BERLE & MEANS, *supra* note 16.

68. *See* Dodd, *For Whom*, *supra* note 4, at 1148 (proposing the expansion of corporate fiduciary duty to the public).

With the separation of ownership from control it became possible to imagine those controlling corporations taking on responsibilities to groups besides owners.

Dodd's article began with an attack on any strengthening of directors' duties to shareholders.[69] The current structures of corporate governance worked well, protecting shareholders without unduly constraining managerial discretion. The chief reason Dodd opposed Berle's proposals, however, was not that they were unworkable, but that they would instead interrupt a recent trend in corporate behavior. Under the current legal constraints, Dodd argued, corporate directors were already beginning to run their corporations for the general good of society.[70]

Dodd had taken a very different lesson from the 1920s than had Berle. For Dodd, the 1920s was the era not of stock-market fraud but of "welfare capitalism," a moment in time when corporations had finally begun to take responsibility for their employees and communities.[71] The growth of corporate power, in his eyes, had elevated corporate leaders to a new ethical level, for often "[p]ower over the lives of others tends to create on the part of those most worthy to exercise it a sense of responsibility."[72] One impetus for this new sense of responsibility was the realization that the new wealth had to be widely distributed to assure social stability. As directors well knew, capitalism would not survive "unless it treat[ed] the economic security of the worker as one of its obligations and [was] intelligently directed so as to attain that object."[73]

The separation of ownership from control had made it possible for corporate leaders to establish programs to benefit workers and communities. To be sure, there was a strong element of self-interest in such programs; in the 1920s many business leaders concluded that future growth would come from a stable workforce paid high wages.[74] Such a workforce would provide both dependable workers and expanding markets for consumer goods, forming a virtuous circle of rising prosperity.[75] Lumi-

---

69. *Id.* at 1147 (arguing that directors have many powers without the accountability of stockholder supervision). He did not dispute the idea that directors were fiduciaries for their corporations. *See id*. at 1147 n.6 (explaining the roles of the directors that make them fiduciaries for the shareholders and the corporations).

70. *See* Dodd, *For Whom*, *supra* note 4, at 1148 (explaining that the public perceives corporations as "economic institution[s]" that affect law, which has affected the way corporations operate).

71. *See supra* note 37 for more on "welfare capitalism."

72. *See* Dodd, *For Whom*, *supra* note 4, at 1157 (discussing managers' power over employees and consumers and the accompanying responsibility).

73. *See id.* at 1152 (suggesting that the public would force corporations to provide for the economic security of its workers).

74. *See* JACOBY, *supra* note 37, ch.1, at 11–34 (summarizing the coming of welfare capitalism in America).

75. *Id.*; *see* OLIVIER ZUNZ, WHY THE AMERICAN CENTURY? 80–85 (1998) (discussing the

naries like Wallace Donham, Dean of the Harvard Business School, and Gerard Swope, GE's president—both quoted by Dodd—believed that such developments would lead corporations to assume new social responsibilities. Swope summed up the decade's business ethos when he wrote that "organized industry should take the lead, recognizing its responsibility to its employees, to the public, and to its stockholders."[76] In adopting this view, Dodd differed from many later advocates of corporate social responsibility. He opposed shareholder primacy because he believed corporations were already poised to assume duties to their nonshareholder constituencies.

In 1932, however, there was no clear-cut legal doctrine setting forth just how corporate managers could favor community interest over shareholder wealth. While a corporation could rationalize the occasional charitable gift, Dodd wrote, it could not "be successfully maintained that the sort of industrial planning which may be found desirable to protect the employee is necessarily under all circumstances in line with the interest of the stockholders of each individual corporation."[77] As the well-known case of *Dodge v. Ford Motor Co.* had shown, the possibility existed that under current rules a court would step in to curb a firm's attempt to devote assets to the public interest.[78]

Dodd's legal solution to this problem was for the corporation to be treated as a distinct legal person and for directors of corporations to be recognized as trustees, not for shareholders but for their corporations.[79] Adopting an expansive view of what corporate personhood entailed, Dodd contended that the directors, as "agents" of the corporate person, could "employ its funds in a manner appropriate to a person . . . with a sense of social responsibility without thereby being guilty of a breach of trust."[80] The separation of ownership from control would then become a separation of the corporation from its owners, and the corporate person would have the option of serving several masters.

Berle quickly responded, in an article that showed the tensions that advocates of corporate social responsibility had to navigate.[81] When

"high wage–low price formula for national prosperity").

76. Dodd, *For Whom*, *supra* note 4, at 1155 (quoting GERARD SWOPE, THE SWOPE PLAN 22 (1929)).

77. *Id.* at 1152.

78. *See id.* at 1157 n.31 (citing Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919)). Of course, *Dodge* raised complex issues of self-interest, oppression, and social responsibility, but the ruling still threatened future attempts to act in nonshareholder interests.

79. *See id.* at 1160 (explaining "the unity of the corporate body").

80. Dodd, *For Whom*, *supra* note 4, at 1161.

81. *See* Berle, *A Note*, *supra* note 4 (discussing corporate social responsibility in response to Dodd's article).

Dodd's article appeared, Berle and Means's *The Modern Corporation and Private Property* was already in press.[82] Much of the book would expand on Berle's insight that ownership and management was separated in the modern corporation.[83] But Means's research had uncovered a second, troubling trend: more and more property was accruing in relatively few, fast-growing corporations.[84] If the trend continued, Berle and Means predicted that by 1950 at least half the nation's wealth would be under the control of the nation's 200 largest corporations.[85] It was those 200 corporations, whose directors wielded enormous power over property belonging to others, that Berle and Means meant when they discussed the modern corporation. And because they would wield so much power, Berle and Means wrote, the directors of the modern corporation would have responsibilities not only toward their stockholders but also toward "the workers, the consumers, and the State."[86]

It was this realization that caused Berle problems in his reply to Dodd, for while his work in the 1920s showed how corporate managers took advantage of shareholders, his research in the 1930s suggested that corporate managers should manage their firms for the benefit of society.[87] Berle was ready neither to renounce his support of shareholder primacy nor abandon his future hopes for corporate social responsibility.

Berle began *For Whom Corporate Managers Are Trustees: A Note*, with a dose of clear-eyed realism about the kindness of corporate directors. While they might "function today more as princes and ministers than as promoters or merchants,"[88] he wrote, corporate directors had not thereby gained any sense of social responsibility. The typical manager "does not now think of himself as a prince; he does not now assume responsibilities to the community; his bankers do not now undertake to recognize social claims; his lawyers do not advise him in terms of social responsibility."[89] Nor was there any legal mechanism in sight to impose such a social conscience on them.

Without either a better-formed social conscience, or a legal mechanism strong enough to balance competing claims to corporate wealth, the

---

82. *See id.* at 1366 n.4, 1370 n.10 (pointing to Berle and Means's book and discussing "the economic distinction between active and passive property").

83. *See* BERLE & MEANS, *supra* note 16, at 112–18 (examining the functions of ownership and the groups performing such functions).

84. *See id.* at 41 (discussing the growth of large corporations).

85. *Id.*

86. *Id.* at 7.

87. Berle, *Corporate Powers*, *supra* note 4, at 1049.

88. Berle, *A Note*, *supra* note 4, at 1366–67.

89. *Id.* at 1367 (emphasis omitted).

result of any relaxation of directors' duties to shareholders would be the enforcement of claims by only one group: management. Property once managed for the benefit of stockholders would be, in effect, "simply handed over . . . to the present administrators with a pious wish that something nice will come out of it."[90] For the present, the only way to prevent directors from diverting assets to themselves was to impose on them a strict fiduciary duty to shareholders.

But the problem of corporate power could not be resolved by a simple restoration of shareholder primacy. The problem with Dodd's proposal was not that it replaced shareholder primacy with broader responsibilities, but that it replaced shareholder primacy with nothing at all.[91] A workable doctrine would be torn down and nothing erected in its place.[92]

Berle was not opposed to the idea of corporate social responsibility. Even as he attacked Dodd's proposal, Berle held out a slim hope for legal innovations that would one day make corporate social responsibility a reality.[93] In the future, he thought it likely that new canons for corporate governance would be developed that would supersede the present requirement of absolute fidelity to the shareholder.[94] Perhaps those canons would rein in director mismanagement by giving the shareholder equal status with a number of other claimants on corporate wealth, or by assigning shareholders a primary claim over the corporation's residual income, but subordinating this to claims of employees, customers, and the general community.[95] Recognizing the need for both shareholder protection and social control over corporate power, Berle tried to have it both ways, calling for shareholder primacy for now while looking to a future

---

90. *Id.* at 1368.

91. *See generally* Dodd, *For Whom*, *supra* note 4 (suggesting the need for new priorities and responsibilities for corporations).

92. Berle described it in this way:

> [Lawyers] must meet a series of practical situations from day to day. They are not . . . in a position to relinquish one position—here, the idea of corporate trusteeship for security holdings—leaving the situation in flux until a new order shall emerge. Legal technique does not contemplate intervening periods of chaos.

Berle, *A Note*, *supra* note 4, at 1371.

93. This is why it is a mistake to paint Berle as simply the negative side of a debate over corporate social responsibility. *See, e.g.*, Sommer, *supra* note 16, at 37 (explaining Berle's belief that corporations were beginning to be viewed as "economic institutions"); Weiner, *supra* note 16, at 1461 (discussing Berle's support of corporate social responsibility, but recognizing that it was "theory, not practice"). *See also infra* Part II.C (summarizing and comparing the views of Berle and Dodd).

94. *See* Berle, *A Note*, *supra* note 4, at 1371–72.

95. *See id.* (discussing the possible sources from which corporate responsibility and accountability might come). That Berle thought new doctrines would appear, is certain; what those doctrines might entail is much less clear.

in which corporate management acknowledged duties to all their constituents.

C. Second Thoughts and Unresolved Tensions

Dodd and Berle had seemingly staked out clear and opposing positions. Dodd wanted to give corporate statesmen leeway to help constituents beyond the shareholder, so he proposed that they be treated as agents not of shareholders but for their corporations. Berle, skeptical about the potential for abuse opened up by such a mechanism, held out for a strict fiduciary duty toward shareholders, and hoped to enlist the courts to protect shareholders' interests.

Yet each man was also acutely aware of the problems addressed by the other. Dodd's scholarly work in the 1920s had examined the ways that unfettered corporate management shifted corporate wealth and even ownership from shareholders to themselves.[96] Berle, even as he was penning his defense of shareholder primacy in his riposte to Dodd, had also been finishing *The Modern Corporation and Private Property*, where he showed that more and more of the nation's property was coming under the control of a small number of giant firms. Each saw both the need for shareholder protection and the potential benefits of corporations serving multiple constituencies. Thus a final irony of the Berle-Dodd exchange: after their initial exchange, each subsequently changed his mind about the possibilities of legal reform for corporate social responsibility.

For Berle, the change was less an about-face than a gradual evolution. In *For Whom Corporate Managers Are Trustees*, Berle pushed into the future any possibility that corporations would adopt legal mechanisms to balance the competing claims of various constituencies. That was the corporate lawyer speaking. *The Modern Corporation and Private Property*, however, was written by a man who wanted to be a social prophet.[97] It was not enough to demonstrate the separation of ownership and control, or even argue that the separation had created a new kind of property. Berle and Means wanted to show how that power should be used.[98]

---

96. *See generally* E. Merrick Dodd, Jr., *Dogma and Practice in the Law of Associations*, 42 HARV. L. REV. 977 (1929) (discussing the change in corporate wealth); E. Merrick Dodd, Jr., *Dissenting Stockholders and Amendments to Corporate Charters*, 75 U. PA. L. REV. 585 (1927) (discussing corporate management in the 1920s).

97. As Berle put it, "the American Karl Marx." SCHWARZ, LIBERAL, *supra* note 16, at 62.

98. BERLE & MEANS, *supra* note 16, at 310.

In the short term, they reasoned, "passive property" embodied in the corporation could be administered for the benefit either of its legal owners, the stockholders, or its managers. Each position had its drawbacks. The first position would send all the benefits of corporate wealth to owners who had ceased to administer "or to accept responsibility for the *active* property in which they have an interest."[99] The second proposal was no better, for it would allow the men who should act as agents of the corporation to run it for their own benefit. Were these the only two proposals, Berle and Means preferred the former; but it was "the lesser of two evils."[100]

But there was a third way forward, one opened by the separation of ownership and control. As Dodd had realized, the relative autonomy of management in the modern corporation made it possible to envision them taking on duties not just to shareholders, but to workers, customers, and the community as a whole. Indeed, Berle and Means concluded, the growth of corporate power demanded a regime in which management balanced competing demands from different constituencies. As such a regime of corporate governance evolved, courts would almost have to recognize it, "justifying it by whatever of the many legal theories they might choose."[101]

Though understandably vague on exactly how a corporation would balance the competing demands of all the groups that might make a claim on it, they still attempted a quick guess at what a corporation answerable to all constituents would look like:

> It is conceivable,—indeed it seems almost essential if the corporate system is to survive,—that the "control" of the great corporations should develop into a purely neutral technocracy, balancing a variety of claims by various groups in the community and assigning to each a portion of the income stream on the basis of public policy rather than private cupidity.[102]

This vision of the corporation run by technocrats balancing competing interests and distributing the corporation's produce to benefit all is surprisingly close to Dodd's.[103]

---

99. *Id.* at 311.

100. *Id.* Here Berle and Means are clearly rejecting an article which Berle not only put forward two years before, but which he and Means included as a chapter in the book. *Id.* at 219–43. In effect, the book's conclusion attacks an earlier chapter—something most commentators have overlooked.

101. *Id.* at 312.

102. *Id.* at 312–13.

103. It is also similar to proposals made by present-day advocates of corporate social responsibility. *See, e.g.*, Blair & Stout, *supra* note 5, at 280–81 (discussing the principal-agent approach to

Yet even as Berle was growing more enthusiastic about the potential of the corporation to balance competing claims, Dodd was backing away from his earlier faith in the beneficence of corporate managers.[104] By 1934 he was writing in defense of strong fiduciary duties binding managers to shareholders and expressing new skepticism about proposals that would let managers take into account nonshareholder interests.[105] The chief danger he foresaw was one that Berle had harped on in their first exchange—that fiduciary duties to shareholders would be weakened and nothing put in their place, leaving directors free to plunder their firms.[106] There was no more talk in Dodd's work of corporate statesmanship, or the rising ethical nature of business leadership. "If corporations generally are to be conducted in such manner as to give due regard to the interests of all classes in society, including wage earners and consumers as well as investors and management," he wrote, "it is primarily through legislation that the change can be brought about."[107]

So the lines had subtly shifted, as each realized the limitations of his own position and the strengths of his opponent's. Berle had realized that the implications of *The Modern Corporation and Private Property* were that running a corporation solely for the benefit of its shareholders was no longer enough. The corporation wielded too much power, and shareholders had too tenuous a tie to their property, to justify such an overriding duty. Dodd, meanwhile, had become disenchanted with the notion that corporations could on their own assume a new role. Only government action, he concluded, could impose on corporate management the responsibilities he believed they owed.

Unwilling either to abandon the safe harbor of shareholder primacy, or to give up hopes for a corporation answerable to all groups it affected, Berle and Dodd embodied the tensions that would underlie future debates over corporate social responsibility. Both concluded that large corporations had amassed such power in modern America that, if they were not managed in the interest of society, they would soon hold a commanding position over American society. Yet each was also intellectually honest

---

corporations).

104. *See generally* E. Merrick Dodd, *The Modern Corporation and Private Property*, 81 U. PA. L. REV. 782 (1933) (book review) [hereinafter Dodd, *Book Review*] (discussing the modern corporation where ownership is separate from control); E. Merrick Dodd, *Is Effective Enforcement of the Fiduciary Duties of Corporate Managers Practicable?*, 2 U. CHI. L. REV. 194 (1934) [hereinafter Dodd, *Effective Enforcement*] (discussing corporate directors' fiduciary duties to the shareholders).

105. *See* Dodd, *Effective Enforcement*, *supra* note 104, at 205–06 (discussing managers' legal duties to shareholders).

106. *Id.* at 206.

107. Dodd, *Book Review*, *supra* note 104, at 785.

enough to admit that no easy way existed to impose measurable social responsibilities on corporations. Even as Berle looked toward a future in which sheer need would produce legal mechanisms able to govern the modern corporation, Dodd questioned whether the mechanism existed anywhere, and called for unspecified "legislation" to solve a problem in ways he could not imagine.

III. THE DEBATE RECURS: FROM THE 1950S TO THE 1990S

A. *Musing on Power: 1954–1962*

Following the Berle-Dodd exchange, the debate over corporate social responsibility lay dormant for nearly twenty years.[108] Several factors likely contributed to its quiescence. Berle and Dodd's debate was really a product of the roaring '20s, and certainly by 1933 the deepening Depression had thrown into doubt not only the beneficence but even the survival of large corporations. In the New Deal, many of the abuses Berle and Dodd attacked were solved by legislation such as the Securities Act and the Exchange Act,[109] while the New Deal also offered new vistas for legal reform through new government programs and administrative law, drawing scholars' attention away from issues of corporate social responsibility.[110] World War II and postwar reconstruction provided their own challenges.

Beginning in the mid-1950s, however, attention again turned to corporations' social responsibility. The 1950s legal debate over corporate social responsibility was part of that decade's wider discussion of the corporation's role in American society and politics, and cannot really be understood apart from them. Despite its reputation as strait-laced, the 1950s witnessed an outpouring of critical writings on the large corporation. Journalists and social critics like Vance Packard, in *The Hidden Persuaders*,[111] David Riesman, in *The Lonely Crowd*,[112] and William H.

---

108. This is not to say that there was not a great deal of activity in other areas of the law which examined the relationship between corporations and various "constituencies," such as antitrust or labor law, merely to note that the issue of a corporation's social responsibility was not on legal scholars' agendas as such.

109. *See* McCraw, *supra* note 16, at 589 (discussing the administrative remedies enacted to address the issues brought to light by Berle and Means).

110. *See* RICHARD HOFSTADTER, THE AGE OF REFORM 311–16 (1955) ("[T]he subject of bigness and monopoly was subordinated in the New Deal era to that restless groping for a means to bring recovery that was so characteristic of Roosevelt's efforts."); *see also generally* ALAN BRINKLEY, THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR (1995).

111. VANCE PACKARD, THE HIDDEN PERSUADERS (1957).

112. DAVID RIESMAN ET AL., THE LONELY CROWD: A STUDY OF THE CHANGING AMERICAN

Whyte, in *The Organization Man*,[113] argued that large corporations had produced cultural and social conformity, while social scientists like John Kenneth Galbraith, in *American Capitalism*[114] and *The Affluent Society*,[115] and C. Wright Mills, in *The Power Elite*,[116] agreed that corporations' economic dominance had also given them disproportionate political power.[117] They differed in the details of their critiques, some emphasizing the oligopolistic economic power attained by large corporations (Galbraith), others pointing to the intellectual and cultural conformity produced by corporate life (Packard, Whyte). Taken together, however, these authors agreed that large corporations had been fantastically successful in economic terms, that they had come to wield significant economic, political, and social power, and that their power posed a dilemma for America's democratic society.

At least one other group, oddly enough, also agreed that corporations wielded great power across broad swathes of American life: corporate leaders. As in the 1920s, so in the postwar era, renewed corporate success led many business executives back to the ideal of business statesmanship.[118] At least in public pronouncements, few corporate leaders failed to make a nod to their firms' "social responsibilities." So pervasive was such rhetoric that, in 1958, one writer complained that it was no longer "fashionable for the corporation to take gleeful pride in making money. What *is* fashionable is 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.'"[119] As one of the new view's proponents, David Rockefeller, summed it up, "the old concept that the owner of a business had a right to use his property as he pleased to maximize profits, has evolved into the belief that ownership carries certain binding social obligations."[120]

CHARACTER (1950).

113. WILLIAM H. WHYTE, JR., THE ORGANIZATION MAN (1956).

114. JOHN KENNETH GALBRAITH, AMERICAN CAPITALISM (1993).

115. JOHN KENNETH GALBRAITH, THE AFFLUENT SOCIETY (1958).

116. C. WRIGHT MILLS, THE POWER ELITE (1959). Mills's work is in fact wide-ranging, but certainly includes a critique of corporate political influence.

117. One irony is that this supposedly conformist decade in fact was the heyday of America's critical public intellectuals. *See* RICHARD H. PELLS, THE LIBERAL MIND IN A CONSERVATIVE AGE 162–74, 183–261 (1985) (discussing the cultural critics of the 1950s).

118. *See* HERMAN E. KROOSS, EXECUTIVE OPINION: WHAT BUSINESS LEADERS SAID AND THOUGHT ON ECONOMIC ISSUES, 1920S–1960S, at 50–53 (1970) (summarizing business ideas of social responsibility in the 1950s); *see also generally* FRANCIS X. SUTTON ET AL., THE AMERICAN BUSINESS CREED (1956) (discussing business ideology in America).

119. Theodore Levitt, *The Dangers of Social Responsibility*, 36 HARV. BUS. REV., Sept–Oct. 1958, at 42.

120. KROOSS, *supra* note 118, at 52 (citation omitted). Rockefeller said this in 1962, but his

The implications of such new concentrations of power were unclear; most writers preferred to voice concerns over "corporate power" rather than make specific proposals for reform. Corporate leaders spoke of the corporation's new responsibility, but none seemed ready to abandon the profit-maximizing and shareholder-primacy norms that had guided their actions for many years.[121] Corporate critics decried the ways that corporations molded the lives of their employees and consumers, but most then shied away from prescriptions for radical change.[122] One critic, trying to pin down the 1950s' conversation on corporate power, was left to assert that it concerned "[i]n some rather nebulous sense . . . the political position of the modern corporation, the role it is and should be playing in the distribution and enjoyment of a great variety of the values in which the community is interested."[123]

One area where radical proposals did appear was in legal scholarship. Leading the new analysis of corporate social responsibility was a familiar figure: Adolf A. Berle. After working in the New Deal, and as ambassador to Brazil, Berle had returned to Columbia, while also keeping a high profile as a putative wise man on the economy.[124] His approach to corporate social responsibility in the postwar era differed significantly from his approach in the 1930s. Over the previous years, he had come to advocate the view once espoused by Dodd, that the corporation should use its powers not merely for shareholder profit but for the benefit of the entire community. Berle set forth this new vision in a stream of books and articles during the 1950s,[125] expressing it most suc-

---

view captures what many businessmen said in the 1950s, professing that corporations did have social duties, but carefully not enumerating any of them. *See id.*

121. Though a number did see increased charitable contributions as a part of a corporation's social role. *See infra* text accompanying notes 140–49.

122. Indeed, most of the proposals made by corporate critics were suggestions to individuals looking for ways to resist corporate hegemony, rather than proposals to change corporations. William Whyte suggested that those threatened with becoming "organizational men" not leave the organization, but learn to manipulate it better, *see* PELLS, *supra* note 117, at 236–37, and David Riesman, looking for ways to cultivate interiority, suggested acquiring hobbies and better city design, steps even he called "paltry." *Id.* at 246.

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

124. Serving for instance on various blue-ribbon panels, *see* EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY 237–38 (1975) (discussing Berle's participation in a project about democratic government).

125. *See, e.g.*, ADOLF A. BERLE, JR., POWER WITHOUT PROPERTY: A NEW DEVELOPMENT IN AMERICAN POLITICAL ECONOMY vii (1959) (stating that "at least in the field of industrial evolution, the American system must now be examined from the point of view of political science as well as from that of economics"); Adolf A. Berle, Jr., *Historical Inheritance of American Corporations*, *in* SOCIAL MEANING OF LEGAL CONCEPTS 217 (Edmond Cahn ed., 1950) (stating that the corporation's power "is increasingly conscripted to achieve certain defined public ends").

cinctly in his 1954 work *The 20th Century Capitalist Revolution*, originally delivered as a lecture series at Northwestern University Law School.[126] In the course of the series, Berle acknowledged his transformation:

> Twenty years ago, the writer had a controversy with the late Professor E. Merrick Dodd, of the Harvard Law School, the writer holding that corporate powers were powers in trust for shareholders while Professor Dodd argued that these powers were held in trust for the entire community. The argument has been settled . . . squarely in favor of Professor Dodd's contention.[127]

In *The 20th Century Capitalist Revolution*, Berle set forth his view of the corporation as a "quasi-political institution[]."[128] To some extent, he recapitulated his argument from *The Modern Corporation and Private Property*. The corporations he referred to were the same giant, publicly held corporations he and Means had studied twenty years before, the roughly 200 firms that conducted half of the nation's business.[129] They were unique not just because of their size, but because they were competing in oligopolistic or highly regulated markets and were insulated from intensive competitive pressures.[130] Capable of generating capital internally, they also were independent of capital markets.[131] Buffered from external controls, the largest firms resembled independent states: they could command an army of employees, determine what to produce, set prices, direct scientific progress, decide which communities received new investment, and even set the rate of capital expansion.[132]

So much power in the hands of unelected managers, unchecked by competition or capital markets, did not worry Berle. The skepticism he displayed about managers in the 1930s[133] was largely gone, replaced by a faith in managers' ability to use their newfound power to benefit all groups involved in the corporation. "[A] modern American corpora-

126. ADOLF A. BERLE, JR., THE 20TH CENTURY CAPITALIST REVOLUTION 5 (1954) [hereinafter 20TH CENTURY].

127. *Id.* at 169.

128. *Id.* at 5.

129. *See id.* at 25–27. Berle did modify his 1930s work in some ways, admitting, for instance, that it appeared industrial concentration was relatively stable, not growing rapidly.

130. Berle did not think this eliminated competition entirely, but changed its character. *See id.* at 47 ("competition within a concentrate is more a struggle for power to balance supply against demand than to secure customers by price competition.").

131. *See id.* at 40–41 ("A corporation like General Electric or General Motors which steadily builds its own capital, does not need to submit itself and its operations to the judgment of the financial markets.").

132. *Id.* at 32–34.

133. *See supra* text accompanying notes 38–41.

tion," he wrote, "understands well enough that it has a 'constituency' to deal with. If its constituents—notably its buyers—are unsatisfied, they will go to the political state for solution."[134] The legal changes Berle advocated were intended to free managers from their singular duties to shareholders and allow them to direct the corporation's resources for the general welfare.[135]

Berle appears to have done an about-face from the 1930s, but his views here grow out of *The Modern Corporation and Private Property*. In *The 20th Century Capitalist Revolution*, Berle had just accepted Dodd's realization that, once ownership and control were split, managers could take on responsibilities to constituencies other than shareholders. Indeed, Berle went Dodd one better, for in the 1950s he put forward a vision of society based on the corporation.

In his telling, the unfettered corporation would produce a kind of utopia, its managers successfully balancing all of society's competing interests. As Roberta Romano has noted, this was a variant of European-style corporatism, with free-market coordination of producers and consumers replaced by corporate and government planning.[136] Although Berle was not forthcoming on the details of just how corporate managers would bring about social harmony, he made clear his hopes in the title of the last lecture in his book: *Corporate Capitalism and the City of God*.[137]

As in *The Modern Corporation and Private Property*, so here Berle left undefined the specific legal changes needed to free corporate managers to act in the community's best interest. He was, however, able to point to one legal development as a harbinger of evolving doctrines: the growing legal space for charitable contributions. In 1953, the New Jersey Supreme Court held, in *A. P. Smith Mfg. Co. v. Barlow*, that New

134. 20TH CENTURY, *supra* note 126, at 56. Berle used constituency in the singular, but was referring to consumers, workers, and communities. *See* Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 936–37 (1984) [hereinafter Romano, *Metapolitics*] ("a persistent theme in his writing is the transformation of businessmen into politicians who could orchestrate society by harmonizing the needs of four constituencies, suppliers, customers, employees, and the outside community.").

135. *See* 20TH CENTURY, *supra* note 126, at 80–82 ("Power to deal at will with other men's property and occupation, however absolute it may be as a matter of technical contract law, is subject to certain limitations."). Berle was optimistic that such legal doctrines, empowering executives while reining in their discretion, would soon appear. *Id*. at 83 ("Is it far-fetched to predict that the rules applicable to power in a political state will reappear in modified dress when power centralizes itself around a politico-economic instead of a governmental institution?").

136. *See* Romano, *Metapolitics*, *supra* note 134, at 935–39 ("The corporation is conceived as the central social unit, and corporate operations and planning are to be coordinated by government agencies and industry associations.").

137. 20TH CENTURY, *supra* note 126, at ch.5. Another avenue into Berle's vision is provided by the role model he suggested for American businessmen: the Renaissance banker and patron of the arts Cosimo de' Medici. *Id*. at 176–77.

Jersey law allowed corporations to make charitable donations.[138] *Smith* is today often read as allowing corporate donations as an aspect of enlightened self-interest,[139] so reconciling it with doctrines of shareholder primacy, but the decision included a ringing defense of a corporation's social duties. In the course of its holding, the *Smith* court cited Berle and Means's *The Modern Corporation and Private Property*, as well as Dodd's *For Whom Are Corporate Managers Trustees?*.[140] While the court's final decision relied on a construction of New Jersey's corporations statutes, it also rested on the proposition that, "just as the conditions prevailing when corporations were originally created required that they serve public as well as private interests, modern conditions require that corporations acknowledge and discharge social as well as private responsibilities."[141] Even if, in the long run, *Smith* had only a limited impact, its immediate effect was to give heart to Berle and other proponents of still greater corporate social responsibility.[142]

Berle was far more optimistic about the corporation than many other writers, but his emphasis on the unique status and power of the large corporation did fit well with the other critiques of the 1950s. His political economy, for instance, differed little from that of John Kenneth Galbraith, who argued that large corporations possessed oligopolistic economic power.[143] Similarly, Berle would have agreed with C. Wright Mills and Vance Packard that corporations had great political power in America, though they would have differed on whether this was good or bad.[144] The author he had closest affinity with, however, and one who

138. A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581 (N.J. 1953). A good summary of the legal developments leading to *Smith* can be found in Bert S. Prunty, Jr., *Love and the Business Corporation*, 46 VA. L. REV. 467, 471–74 (1960).

139. *See, e.g.*, JAMES D. COX ET AL., CORPORATIONS 64 (1997) ("[t]he [*Smith*] court validated the gift not only as a donation to society but also as in furtherance of the free enterprise system on which the corporations' success was dependent.").

140. *Smith*, 98 A.2d at 584 (citing BERLE & MEANS, *supra* note 16; Dodd, *For Whom*, *supra* note 4).

141. *Id.* at 586.

142. For examples of proponents of corporate social responsibility who saw *Smith* as an important first step toward greater judicial support of corporate social responsibility *see* 20TH CENTURY, *supra* note 126, at 168–69; Wilber G. Katz, *The Philosophy of Midcentury Corporation Statutes*, 23 LAW & CONTEMP. PROBS. 177, 189–90 (1958).

143. JOHN KENNETH GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER 42–46 (1952). Of course, Galbraith wanted to see greater public spending, whereas Berle seemed to believe that corporations, in alliance with the government, would ultimately solve the problems.

144. *See* C. WRIGHT MILLS, THE POWER ELITE (1959); VANCE PACKARD, THE HIDDEN PERSUADERS (1957).

would have greater influence on the developing legal debate over corporate social responsibility,[145] was Peter Drucker.[146]

Known today chiefly as a pioneering management consultant, in the 1950s Drucker was viewed as a serious analyst of corporate power, having already written two classic works on corporate power, *The Concept of the Corporation*[147] and *The New Society*.[148] In each, Drucker put forward a corporatist vision much like Berle's.[149] He declared the corporation to be the "representative . . . institution" of modern society[150] and argued that its power over workers and consumers gave it a social and political, as well as an economic, dimension.[151] Indeed, it was the corporation-as-polity, comprised of different groups working in harmony, that most interested him. Drucker had a particular faith in corporate management,[152] seeing senior managers as wise men capable of balancing the needs of all a corporation's diverse divisions and employees.[153] The ideal corporation, Drucker implied, would be run by enlightened managers for the benefit of its shareholders, workers, and the wider community.

Standing in the way of this was the traditional legal structure of the corporation, run by a board of directors for the benefit of the shareholders. Thus Drucker's most dramatic proposal: that managers be freed from their legal subservience to both shareholders and directors.[154] If

---

145. For a sample of 1950s legal works that cite Drucker see, for example, Wolfgang G. Friedmann, *Corporate Power, Government by Private Groups, and the Law*, 57 COLUM. L. REV. 155, 169 n.41 (1957); Katz, *supra* note 142, at 191–92.

146. Drucker is a fascinating character who has had great influence as both a social theorist and a management consultant, but he has received frustratingly little scholarly scrutiny, though he has enjoyed several hagiographic biographies. *See, e.g.*, JACK BEATTY, THE WORLD ACCORDING TO PETER DRUCKER 3–18 (1998) (providing a biography of Drucker based almost solely on Drucker's recollections). He is not discussed in PELLS, *supra* note 117, which aspired to be a definitive intellectual history of the 1940s and 1950s. For one useful exception, see the chapter on Drucker in STEPHEN P. WARING, TAYLORISM TRANSFORMED: SCIENTIFIC MANAGEMENT THEORY SINCE 1945, at 78–103 (1991).

147. PETER F. DRUCKER, CONCEPT OF THE CORPORATION (1946) [hereinafter CONCEPT OF THE CORPORATION].

148. PETER F. DRUCKER, THE NEW SOCIETY (1950) [hereinafter NEW SOCIETY].

149. In this, Drucker was also drawing on a long tradition of German and Austrian corporatist thought, which held that societal conflict could be avoided if individuals were organized into larger economic entities that worked together to promote social harmony. WARING, *supra* note 146, at 79–82.

150. CONCEPT OF THE CORPORATION, *supra* note 147, at 5.

151. NEW SOCIETY, *supra* note 148, at 337–52.

152. *Concept of the Corporation* was Drucker's study of General Motors in its postwar heyday, when it was still run by the brilliant Alfred Sloan. CONCEPT OF THE CORPORATION, *supra* note 147, at 49–53. It is possible that Drucker's faith in corporate management developed because, by luck of the draw, he made a detailed study of what was then America's best-run company.

153. Drucker liked to analogize the manager to an orchestra conductor, charged with making sure the rest of the firm worked in harmony. *See* WARING, *supra* note 146, at 82–83.

154. *See* NEW SOCIETY, *supra* note 148, at 340 (proposing ownership shares in corporations be

shares were changed from slivers of ownership into mere claims on an enterprise's profits, he reasoned, then managers would have greater scope to fulfill the political and social roles their positions had thrust upon them.[155] He would transform the board from a governing body to a "maker of policy," with representatives not only of shareholder/investors but from management, labor, and the communities where the enterprise operated.[156] He did not reject the profit motive as a primary guide for this new-model corporation, but he believed it should be sought even as the corporation fulfilled its larger social mission.[157]

Berle and Drucker were on the far end of the spectrum in 1950s' discussions of corporate responsibility, but more clearly than other critics they articulated a legal foundation for a socially responsible corporation. The corporation, they believed, was not merely an economic assemblage but a social institution serving employees, shareholders, customers, and communities. Each group could be said to have a claim on the corporation. Berle and Drucker's legal innovation would complete the separation of ownership and control, by having the corporation treat shareholders as merely one constituency among many, and trust the managers to act for the "public good." In broad strokes their proposals differed little from Dodd's of twenty years before.

Berle and Drucker's chief failing was their inability to clearly address the problems raised by their proposals. How management would reconcile constituents' conflicting demands, or why it would not simply line its own pockets, was left largely unaddressed. They were also not able to articulate precisely what problem they were trying to solve. "Corporate power" was a generalized concern, not a specific issue readily fixed by restructuring the legal duties of director and managers. The vagueness of concerns with the corporation prevented the articulation of a clear reform program.

Initially, Berle and Drucker's ideas met a chilly reception.[158] For all the popular criticism of corporations, there was little public sentiment to reform them. By 1960, however, proposals for corporate social respon-

---

changed to "certificates of investment" entitling the holder to profits but not management power). Drucker's proposals were not framed as legal reforms, though he did have a doctorate in public law and international relations from the University of Frankfurt. *See* BEATTY, *supra* note 146, at 13–14.

155. NEW SOCIETY, *supra* note 148, at 341–42.

156. *Id.* Here Drucker anticipates some of the 1970s proposals for reconstituted boards of directors. For a further discussion, *see* notes 250–67.

157. NEW SOCIETY, *supra* note 148, at 47–48.

158. *See, e.g.*, Wolfgang G. Friedman, *Corporate Power, Government by Private Groups, and the Law*, 57 COLUM. L. REV. 155, 169–72 (1957) (noting the rise of governmental-type power wielded by private organizations including corporations, unions, and trusts); Katz, *supra* note 142, at 188–92 (discussing "social responsibility" proposals).

sibility were getting a more respectful hearing. Berle and Drucker's work, the evolution of corporate charity, and the debates on business statesmanship going on outside legal academia made it easier to ask after the legal basis for corporate social responsibility. That year two collections appeared that gave new impetus and shape to the debate. One, *The Corporation in Modern Society*,[159] was the result of a conference sponsored by the Twentieth-Century Fund, a foundation that Berle ran; the other, *Freedom in the Modern American Economy*, began as a symposium held at Northwestern University Law School.[160]

The collections are less important as innovations in legal thought than as signs that major legal scholars had begun to pay serious attention to corporate social responsibility. In both works, most authors echo ideas about the corporation already put forward by Berle, Drucker, and similar writers.[161] As Mark Roe has noted, the underlying theme to *The Corporation in Modern Society* was that corporations needed to be tamed.[162] Thus, in his introduction to the collection, Edward Mason describes the corporation as "our most important economic institution" in modern society,[163] and notes the problems raised by the conflicting demands of different "corporate publics," including labor, owners, suppliers, and customers.[164] Harvard Law School's Abram Chayes, in his contribution, attributes to corporations responsibility for the "quality and tone of American life,"[165] while his colleague Kingman Brewster speaks of the problems raised when a corporations' "other constituents," its non-shareholders and employees, have no voice in its operations.[166] In the Northwestern symposium, the corporate scholar Louis Schwartz repeats

---

159. *See* THE CORPORATION IN MODERN SOCIETY (Edward S. Mason ed., 1961) [hereinafter CORPORATION IN MODERN SOCIETY] (discussing a corporation's effect on and responsibility toward a community).

160. Symposium, *Freedom in the Modern American Economy*, 55 NW. U. L. REV. 1 (1960) (discussing the relation between the power of the corporation and the inherent freedom of American Society).

161. In *The Corporation in Modern Society*, for instance, apart from Berle and Drucker frequently cited non-lawyers include C. Wright Mills, CORPORATION IN MODERN SOCIETY, *supra* note 159, at 13, 55, 205, 228, and William H. Whyte, author of *The Organization Man*, *id*. at 9, 205, 209.

162. *See* Mark J. Roe, *From Antitrust to Corporation Governance? The Corporation and the Law, 1959–1994*, *in* THE AMERICAN CORPORATION TODAY 102–03 (Carl Kaysen ed., 1996) (compiling a series of essays reflecting on the American corporation since *The Corporation in Modern Society*).

163. Edward S. Mason, *Introduction*, *in* CORPORATION IN MODERN SOCIETY, *supra* note 159, at 1–2.

164. *Id*. at 4.

165. Abram Chayes, *The Modern Corporation and the Rule of Law*, *in* CORPORATION IN MODERN SOCIETY, *supra* note 159, at 26.

166. Kingman Brewster, Jr., *The Corporation and Economic Federalism*, *in* CORPORATION IN MODERN SOCIETY, *supra* note 159, at 73.

popular criticism of corporate culture when he speaks of the corporation's ability to "suppress individuality" and even eradicate democratic institutions.[167]

Like Berle, these contributors identified the corporation as a problem, yet were unable to propose specific mechanisms to curb its power or direct it in socially beneficial directions. Several simply trusted, along with Berle, that over time new mechanisms would evolve to lead corporate leaders to act in society's best interest, as when Chayes said what was required were new institutional arrangements to give "all those having a relationship of sufficient intimacy with the corporation or subject to its power" a say in its governance.[168] Schwartz similarly hoped that "an ethic of 'due process' and social responsibility [would develop] to moderate the exercise of power by corporate officials . . . ."[169] Others confessed themselves stymied by the issue; Mason wished for a modern-day Hobbes or Locke "to bring some order into our thinking about the corporation and its role in society."[170]

The symposium and collection also raised new issues, however, drawing out critics of the idea of corporate social responsibility. Opponents focused on the vagueness of the problems that corporate social responsibility promised to solve, the dearth of details concerning how the "socially responsible corporation" would be governed, and the lack of faith many advocates seemed to have in the free market.

In the Northwestern symposium, Yale's Bayliss Manning criticized the overbroad and abstract terms too often used by critics of corporate power.[171] Attacking the symposium, he wrote that "the problem at hand is not 'Corporate,' is not one of 'Power,' and is not . . . a problem of 'Individual Freedom.'"[172] Each of those terms, he found, hid more than it revealed. Instead of tossing around generalities, he urged critics of large enterprise to isolate specific problems and suggest specific solutions for them.[173]

---

167. Louis B. Schwartz, *Institutional Size and Individual Liberty: Authoritarian Aspects of Bigness*, 55 NW. U. L. REV. 4, 4, 11 (1960) [hereinafter Schwartz, *Institutional Size*].

168. Chayes, *supra* note 165, at 41.

169. Schwartz, *Institutional Size*, *supra* note 167, at 23. Schwartz later abandoned his hopes and became an advocate of several legal devices to control corporate power, including public-interest shareholder initiatives. *See infra* Part III.B.

170. CORPORATION IN MODERN SOCIETY, *supra* note 159, at 19.

171. *See generally* Bayless Manning, Jr., *Corporate Power and Individual Freedom: Some General Analysis and Particular Observations*, 55 NW. U. L. REV. 38 (1960) (questioning whether it is the "corporation" critics should be concerned with or rather the idea of any "vast centralized economic and social organization").

172. *Id.* at 39.

173. *Id.* at 51.

Even harsher criticism was to come in an essay by Yale Law School Dean Eugene V. Rostow.[174] Rostow correctly identified much of the new push for corporate social responsibility as an outgrowth of the proposals Dodd made in 1932.[175] He mocked this "emerging ethos" which claimed that "corporate property [was] really that of the directors and management, to dispose of . . . in accordance with their own standards of business foresight, social statesmanship, and generalized good citizenship[.]"[176] Most people, Rostow noted, felt little need to radically revamp corporate law in the way Berle, Drucker, and many of the contributors to *The Corporation in Modern Society* suggested.[177] Outside academia and intellectual circles, he claimed, most people did not feel there was a problem of corporate power.[178]

Rostow's greatest contribution to the emerging debate was to offer an economic defense of modern corporate law. The new proposals, Rostow saw, would turn managers from agents for shareholders into autonomous agents free to direct corporate funds in the public interest.[179] This was, from both an economic and legal point of view, "bewildering balderdash."[180] The problem was not just that such proposals placed huge faith in ordinary men, the problem was that they ignored the economic justification for business in the first place.[181] As Rostow put it:

> The economist has demonstrated with all the apparent precision of plane geometry and the calculus that the quest for maximum revenue in a competitive market leads to a system of prices, and an allocation of resources and rewards, superior to any alternative, in its contribution to the economic welfare of the community as a whole.[182]

Allowing corporate managers to deviate from profit maximization would distort market mechanisms for distributing goods and services, and might, if pursued with enough force, produce long-run market failure.[183]

Rostow's complaint highlights a factor worth noting in the late-

174. *See generally* Eugene V. Rostow, *To Whom and for What Ends Is Corporate Management Responsible?*, *in* CORPORATION IN MODERN SOCIETY, *supra* note 159, at 46.
175. *See id*. at 61–62 (summarizing a debate between Professor Dodd and Professor Berle).
176. *Id*. at 49–50.
177. *See id*. at 59 (hypothesizing the opinion of an enlightened lay person).
178. *Id.*
179. *Id.* at 63.
180. *Id*.
181. *Id.*
182. *Id*.
183. *Id*. at 64–65. Rostow also pointed out that asking corporate managers to solve social problems would quickly bring them into the political sphere, and from there it was only a short step to government supervision of the corporation. *Id.* at 68.

1950s early-1960s debate over corporate social responsibility: it was rarely conducted in economic terms. In an era with only a rudimentary economic theory of the firm, critics of the corporation focused on its social or political role to the neglect of its economic function. As Henry Manne noted in a 1962 article, "it is quite rare in the current literature to find even a careful reference to [economic factors]. Perhaps one of the reasons for this," he speculated, "is the lack of a systematic, integrated economic analysis of the modern corporation."[184] Not until the 1970s would economic analysis become an important element in debates over corporate social responsibility, and not until the late 1980s would it win the field.[185]

By the early 1960s, a few clear lines had been drawn in the ongoing debate over corporate social responsibility. On the one side stood Berle, Drucker, and allies both inside and outside legal academia. They agreed on at least two broad propositions. First, large corporations had over the previous half-century amassed not only economic but social and political power, power that decisively set them apart from smaller firms. Second, with this new power came new responsibilities to groups beyond shareholders. Against this view stood a few scholars who voiced skepticism about both the threat of "corporate power" and the promise of business statesmanship, and who contended that shareholder primacy should not be abandoned without far better reasons than had so far been offered.

It was, to put it mildly, an unfocused debate. But its very lack of focus tells us something. In both generalities and particulars, the debate recapitulated the 1930s debate over corporate social responsibility. Through both debates run threads common to every iteration of corporate social responsibility: belief that large corporations are qualitatively different from other businesses, faith that such corporations are nonetheless economically (or socially) inescapable, and proposals to tame such corporations by changing the legal rules to make managers or directors responsible not only to shareholders but to a wider range of constituencies. The 1950s debate was also shaped by events of that decade. The "problem of corporations" in the 1950s was amorphous; so, too, were the proposals put forward to solve it. Within the next few years, however, such vagueness would largely disappear, as the debate over corporate social responsibility took a new configuration in response to the series of events we label as the Sixties.

---

184. Manne, *supra* note 123, at 430.
185. *See infra* Part III.C.

B. *Thought into Action, 1965–1976*

The debate over corporate social responsibility was transformed by the events of the 1960s.[186] Genteel discussions over how business statesmen could use their positions to improve society became—under pressure from social unrest, perceptions of environmental degradation, and protests over the Vietnam War—populist campaigns to redirect corporate power to solve looming social and political problems. In the process, the debate over corporate social responsibility underwent a reversal. In the 1950s, advocates of the socially responsible corporation demanded that managers be freed from the shackles of shareholder primacy. By the 1970s, however, reformers were no longer enamored of the "business statesman," and sought to make the corporation more responsible to other constituencies by taking away the manager's autonomy and instituting greater oversight by directors or shareholders. Out of this ferment came our contemporary debates over corporate social responsibility.

By the mid-1960s, it was conventional wisdom that public corporations owed some responsibility to society beyond making profits. One 1965 article characterized the new view by stating that, "[a]lthough some businessmen still cling to the notion that the business of the corporation is solely to make profits, their position is not a popular one."[187] As yet, though, there were few proposals to change the law to comport with this new view,[188] and for the most part the debates over businesses' social responsibility remained mired in abstractions.[189]

That would soon change. While in retrospect the Vietnam War appears to be the central event of the 1960s, it was actually domestic con-

186. When writing about the events of the late 1960s and early 1970s, one quickly enters a terminological swamp. "The Sixties" are not coterminous with the years 1960–1969. Therefore, my discussion of "sixties" corporate social responsibility covers events up to the mid-1970s.

187. David S. Ruder, *Public Obligations of Private Corporations*, 114 U. PA. L. REV. 209 (1965). *See also* MORRELL HEALD, THE SOCIAL RESPONSIBILITIES OF BUSINESS: COMPANY AND COMMUNITY, 1900–1960, at 299 (1970) (stating that in the 1950s and 1960s "[r]ecognition of the social dimensions and responsibilities of [corporations] . . . appeared, in every respect, a central feature of the evolution of modern business institutions and thought").

188. *See generally* Detlev F. Vagts, *Reforming the "Modern" Corporation: Perspectives from the German*, 80 HARV. L. REV. 23, 28 (1966) (examining German corporation law and its emphasis on the public interest).

189. *See, e.g.*, Andrew Hacker, *Introduction: Corporate America*, *in* THE CORPORATE TAKE-OVER 1 (Andrew Hacker ed., 1964) (calling for "reflection" on the rise of the corporation after the Second World War and its subsequent destruction of "time-honored theories of politics and economics").

cerns that first prodded corporations to be "socially responsible."[190] The riots that broke out in major American cities beginning in 1965 pushed business leaders to implement new programs to help resolve, as they put it, "the urban problem."[191] Large corporations launched a series of programs intended to solve urban ills, as they redirected charitable donations, started new employee training programs, targeted disadvantaged populations, and promised to support a nascent movement for "black capitalism."[192] Even the ultra-conservative National Association of Manufacturers would boast of the "growing effort of industry to help resolve basic social problems."[193] In part, corporate social activism was a response to public pressure. In 1970, *Business Week* would claim that a corporate officer could "no longer . . . live a cloistered life behind the walls of private enterprise, concerning himself solely with turning out a product and a profit . . . [because] tenacious demonstrators and persistent consumers are insisting that he do something about . . . minority rights and the environment."[194]

It was clear that corporations were claiming to have taken on new social responsibilities. Whether their programs actually meant the corporation had assumed new legal responsibilities, however, was less clear.[195] As several scholars noted, corporate social programs did not necessarily contradict policies of profit maximization and, by extension, shareholder primacy. Some corporations that opened factories in the "ghetto," for instance, were careful to characterize the move as the product of business judgments, not altruism.[196] Other highly publicized social programs were little more than charitable contributions—already allowed to all corporations—while still others were in fact funded by government

190. *See generally* JULES COHN, THE CONSCIENCE OF THE CORPORATION: BUSINESS AND URBAN AFFAIRS 1967–1970 (1971) (arguing that racial tension and urban poverty inspired corporate action). For an excellent survey of businesses' interactions with sixties social movements, *see* Terry Anderson, *The Movement and Business*, *in* THE SIXTIES: FROM MEMORY TO HISTORY (David Farber ed., 1994).

191. COHN, *supra* note 190, at ix.

192. *Id.* at 8.

193. J.A.C. Hetherington, *Fact and Legal Theory: Shareholders, Managers, and Corporate Social Responsibility*, 21 STAN. L. REV. 248, 291 (1969) (quoting NATIONAL ASSOCIATION OF MANUFACTURERS, EFFECTIVELY EMPLOYING THE HARD-CORE, at cover (1968)).

194. Anderson, *supra* note 190, at 175 (quoting *Lending a Hand With Social Ills: Stanford Volunteers Help Companies With Community Roles*, BUS. WK., Mar. 7, 1970, at 106).

195. *See generally* Phillip I. Blumberg, *Corporate Responsibility and the Social Crisis*, 50 B.U. L. REV. 157, 205 (1970) (stating that "responsibility to the community has not replaced responsibility to shareholders as the legal standard for determining the validity of corporate conduct"); Hetherington, *supra* note 193, at 291 (arguing that corporate social programs and charitable donations contribute to "long-term prosperity for society as a whole, as well as profit maximization for the single firm"); Symposium, *Business in the Ghetto*, 25 BUS. LAW. 1 (1969) (same).

196. Blumberg, *supra* note 195, at 161 n.20.

grants, and so did not cut into profits.[197] Even the most ambitious social investments could be justified as directed to a firm's long-run profits.[198] In short, the majority of corporations that adopted "socially responsible" policies did not thereby acknowledge new legal duties to nonshareholder constituents.

During the late 1960s and early 1970s, real pressures for corporations to diverge from the shareholder primacy norm would come from outside the corporation. While many on the left simply disdained business,[199] others with a more reformist bent sought to use existing legal mechanisms, or to invent new ones, to force corporations to take into account constituencies beyond their shareholders when making business decisions.[200] The two best-publicized efforts to force such legal responsibility on corporations during the 1970s were public-interest shareholder proposals, and proposals for public-interest directors.

1. Shareholder Proposals and "Campaign GM"

For activists seeking to change the behavior of large corporations, there was at least one legal mechanism already available: the shareholder proposal. Under S.E.C. Rule 14a-8, a shareholder of a public corporation, who meets certain conditions, can demand that a proposal he or she has prepared be included in the proxy mailed to shareholders before an annual meeting, to be voted on by all shareholders.[201] In the late 1960s, activists seized on the shareholder proposal as a lever to push corporations towards socially responsible actions. Strictly speaking, this did not involve any new legal tools; Rule 14a-8 was in existence well before 1968. But in the hands of social activists, shareholder proposals became

197. *Id.* at 159–60.

198. *See id.* at 162–63, 205 (noting that, while businesses do have the leeway to spend money without expectation of immediate profit, "[s]ingle-minded pursuit of shareholder interests remains the legal standard for corporate conduct"); Hetherington, *supra* note 193, at 290–91 (asserting that the social responsibility movement "seeks to solve social problems *and* make a profit") (emphasis added).

199. *See* Anderson, *supra* note 190, at 188 (stating that "[a] handful of vocal radicals . . . attacked capitalism").

200. Even the Port Huron Statement, seminal document of the New Left, seemed to envision some role for corporations in the future, though perhaps in an unrecognizable form. *See* STUDENTS FOR A DEMOCRATIC SOCIETY, THE PORT HURON STATEMENT (1962), *reprinted in* JAMES MILLER, "DEMOCRACY IS IN THE STREETS: FROM PORT HURON TO THE SEIGE OF CHICAGO" 329, 363 (1987) (demanding that economic resources be directed to "genuine human needs, not the private needs of corporations").

201. S.E.C. Solicitations of Proxies Rule, 17 C.F.R. § 240.14a-8 (2001).

a way to voice social disapproval of a corporation's actions.[202] Through their proposals, social activists hoped to mobilize shareholders into insisting there were more important things than profits.[203] Before the 1960s shareholders had occasionally attempted to use the shareholder proposal as a way of voicing disapproval of corporate policies,[204] but the surge in public-interest proposals during the 1960s appears to have begun with the Chicago organizer Saul Alinsky. In 1967, during an organizing campaign in Rochester, New York, Alinsky and an organization called FIGHT acquired several thousand shares of Rochester-based Eastman Kodak, and used them to wage a public-relations campaign against the firm by exercising their status as shareholders to gain entry to the firm's annual meeting and protest its racial hiring policies.[205] Meeting some success, Alinsky soon formed Proxies for the People, an organization dedicated to social-issues proposals.[206]

By 1970, activists had realized that shareholder status guaranteed them access to annual meetings and possible access to a publicly held corporation's proxy machinery.[207] That spring saw activist-shareholder protests at the annual meetings of publicly held corporations including BankAmerica, AT&T, and Honeywell.[208] Access to the proxy machinery was more of a challenge. Corporations were caught unprepared when protesters arrived at their annual meetings, but proxy proposals had to be filed well in advance, giving firms notice and time to mount legal challenges. It was only after significant legal battles that some activists managed to have antiwar proposals included in proxy statements,[209] and in

---

202. In some respects, the use of shareholder proposals by social activists resembles 1950s attempts to promote greater "shareholder democracy." What distinguishes the two is that advocates of shareholder democracy sought ways to make corporate managers more accountable to their shareholders; 1960s activists sought to make managers more accountable to constituencies beyond shareholders.

203. Roberta Romano suggests that shareholder proposals were geared chiefly to publicizing corporate misbehavior, rather than genuine attempts to mobilize shareholders for social change. *See* Romano, *Metapolitics*, *supra* note 134, at 1010–11. Certainly, publicity was part of the game, but advocates of shareholder proposals also seemed to believe they had a genuine chance at winning proposal votes.

204. *See, e.g.*, Peck v. Greyhound Corp., 97 F. Supp. 679 (S.D.N.Y. 1951) (refusing to include in a proxy mailing a proposal condemning Greyhound's segregation of its southern buses).

205. Anderson, *supra* note 190, at 178–79; SANFORD D. HORWITT, LET THEM CALL ME REBEL: SAUL ALINSKY—HIS LIFE AND LEGACY 495–500 (1989); Donald E. Schwartz, *The Public-Interest Proxy Contest: Reflections on Campaign GM*, 69 MICH. L. REV. 419, 422 n.12 (1971) [hereinafter Schwartz, *Public-Interest Proxy Contest*].

206. Anderson, *supra* note 190, at 189.

207. Romano, *Metapolitics*, *supra* note 134, at 1008–13.

208. Schwartz, *Public-Interest Proxy Contest*, *supra* note 205, at 422–23.

209. In 1970 the Medical Committee for Human Rights, an antiwar organization, forced Dow Chemical to include in its proxy statement the MCHR's proposal that Dow no longer manufacture napalm. Medical Comm. for Human Rights v. SEC, 432 F.2d 659, 662–63 (D.C. Cir. 1970). The

several instances, large corporations defeated attempts by shareholder-activists to inspect corporate records.[210]

Some activists targeted firms solely to forward antiwar politics or gain publicity for their causes,[211] but many others became involved as shareholders because they saw in shareholder activism a means to force major corporations to reorient themselves and become more involved in the communities in which they were based,[212] or more sensitive to the environmental consequences of their policies.[213] Despite their opposition to the "corporate system," the activists were surprisingly optimistic, believing that, if asked, shareholders would demand that directors and managers act in a socially responsible manner. The most sophisticated example of such a campaign was 1970's Campaign GM.

Campaign GM was an amalgam of consumer advocates, antiwar activists, and legal reformers.[214] It grew out of the work of Ralph Nader, who in the mid-1960s had targeted GM's cars as "unsafe at any speed,"[215] but Campaign GM's goals went well beyond the consumer protection that Nader pioneered.[216] The Campaign's immediate aim was publicity, but its long-range goals were to transform GM from a firm guided chiefly by the profit motive to a firm governed for, as Campaign GM's organizers put it, the general social welfare.[217] As Nader said at the 1970 press conference kicking off the Campaign, its goal was "'a new definition of the corporation's constituency.'"[218] In its demand that GM's directors govern the corporation to benefit diverse constituencies,

---

proposal received less than 3% of the votes cast. SEC v. Medical Comm. for Human Rights, 404 U.S. 403, 406 (1972).

210. In 1969 a shareholder of Honeywell, motivated by a moral concern with Honeywell's military policy, attempted to use his status to gain access to shareholder lists. The Minnesota Supreme Court denied his request, holding it was not motivated by economic concerns as required by state law. Minnesota *ex rel.* Pillsbury v. Honeywell, Inc., 191 N.W.2d 406 (Minn. 1971).

211. Dow, for instance, was a major target because it made napalm. *See* Anderson, *supra* note 190, at 180–81 (discussing antiwar and student protests).

212. Thus, campaigners against Honeywell not only attacked its manufacture of munitions but also promoted "greater worker and community control of the company." *Id*. at 182.

213. In an attempt to bring environmental concerns to the forefront, the Natural Resources Defense Council waged a long and ultimately unsuccessful campaign in the 1970s to force the SEC to expand disclosure to include environmental records. *See* Williams, *supra* note 5, at 1246–53.

214. *See* Schwartz, *Public-Interest Proxy Contest*, *supra* note 205, at 423–24.

215. *See generally* RALPH NADER, UNSAFE AT ANY SPEED: THE DESIGNED-IN DANGERS OF THE AMERICAN AUTOMOBILE (1965) (advocating the need to protect the "body rights" of drivers against "the power of economic interests" in the auto industry).

216. *See id.* at 425–26 (discussing proposals to General Motors).

217. *Id.* at 423.

218. Schwartz, *Public-Interest Proxy Contest*, *supra* note 205, at 425 (quoting 116 CONG. REC. E1266 (daily ed. Feb. 24, 1970) (statement by Ralph Nader)).

Campaign GM was the latest attempt to put E. Merrick Dodd's ideas into action.

To change GM, Campaign GM initially put forward nine shareholder proposals,[219] likely crafted by Prof. Donald Schwartz, who taught corporate law at Georgetown and was counsel to Campaign GM.[220] These proposals called for, among other things, changing GM's charter so that none of its corporate purposes "be implemented in a manner which is detrimental to the public health, safety, or welfare,"[221] creating a Shareholders' Committee on Social Responsibility charged with recommending how GM could "achieve a proper balance between the rights and interests of shareholders, employees, consumers, and the general public,"[222] demanding that GM monitor the environmental effects of its cars,[223] and that GM distribute more dealerships to minority owners.[224] While GM initially refused to include any of the Campaign's proposals in its proxy materials, after a SEC decision in favor of Campaign GM[225] the auto maker agreed to include two of Campaign GM's proposals in its 1970 proxy mailings: a proposal to add public-interest directors to the GM board, and a proposal to create the Shareholder's Committee for Corporate Responsibility.[226]

The fate of Campaign GM summarizes the fate of most of the era's corporate-responsibility shareholder proposals. The corporation mounted a vigorous public-relations campaign against the proposals and shareholders decisively rejected them.[227] Along with Campaign GM's 100-word proposals, GM sent a twenty-one-page glossy brochure detailing the firm's social involvement.[228] The institutional investors that Campaign GM had hoped would support their proposals refused, some arguing their sole legal responsibility was to increase the value of their

---

219. *Id*. at 425–26.

220. *See id.* at 421 n.*. Schwartz is one link between the 1950s debate over corporate social responsibility and its 1960s incarnation. *See generally* Schwartz, *Institutional Size*, *supra* note 167 (discussing the behavior and compulsion exhibited by large-scale organizations).

221. Schwartz, *Public-Interest Proxy Contest*, *supra* note 205, app. b at 534 (reprinting Campaign GM's initial proposals).

222. *Id*. at 534–35.

223. *Id*. at 536.

224. *Id*. at 537.

225. *Id*. at 451–58. GM had initially sought to exclude all Campaign GM's proposals, citing the then-wording of SEC Rule 14a-8, which prohibited proposals offered "'primarily for the purpose of promoting *general* economic, political, racial, religious, social, or similar causes . . . .'" *Id*. at 456 n.181 (quoting SEC proxy rule 14a-8(c)(2), 17 C.F.R. § 240.14a-8(c)(2) (1969)) (emphasis in original). The SEC rejected GM's argument and ordered that the two proposals be given to GM shareholders. *Id.* at 451–58.

226. *Id.* at 424, 427.

227. *Id.* at 430.

228. *Id.* at 428.

investments.[229] Among the organizations voting their shares against Campaign GM were Harvard University, Columbia, the Rockefeller and Carnegie Foundations, and Teacher's Insurance and Annuity Association of America-College Retirement Equity Fund (TIAA-CREF).[230] Both Campaign GM proposals received less than 3 percent of the votes cast.[231]

Campaign GM, and the 1960s' move for corporate social responsibility through shareholder proposals, fit well within the broader contours of the long campaign for corporate social responsibility already sketched out in this paper.[232] Its organizers were ultimately reformers, interested in taming the corporation rather than eliminating it, and they aimed to change corporate governance machinery so that the firm was run not only for the benefit of its shareholders, but for other constituencies as well. They differed from earlier reformers in two ways. First, the problems Campaign GM sought to solve were problems defined by their particular era; in the late 1960s, they were problems like military spending, environmental pollution, and the plight of minority workers. Second, they took a new approach to gaining attention when they turned to the corporate proxy machinery and shareholder proposals.

That shareholders ultimately refused to adopt even the most-melioristic proposals highlights the problems that likely limited the success of public-interest shareholder proposals: most shareholders did not want their firms governed in the interests of the wider community.[233] The few public-interest proposals that reached shareholders' hands were overwhelmingly defeated.[234] Even had some proposals won, they would have faced more legal hurdles. It was not even clear whether shareholders could vote to abandon the shareholder primacy doctrine.[235] Yet this immediate record of failure should not obscure the longer-range impact of this movement. As the SEC's historian has written, it was "the efforts of public interest shareholder groups" that "effectively began . . . [t]he 1970s' corporate governance debate."[236] Equally important, they pio-

229. *Id.* at 500–02.

230. *Id.* at 503–07.

231. *Id.* at 430.

232. *See supra* Part I.

233. Some institutional investors were no doubt also deterred from supporting the proposals by the fiduciary duties they owed their beneficiaries. *Id.* at 511–14.

234. *See supra* text accompanying notes 209 (Dow) and 231 (General Motors). *See also* Romano, *Metapolitics*, *supra* note 134, at 1010 ("despite victories within [the SEC], the corporate democracy movement received virtually no support from shareholders").

235. As Marvin Chirelstein points out, such a vote would effectively have lowered the value of shares held by dissenting shareholders in order to satisfy the social consciences of majority shareholders. Marvin A. Chirelstein, *Corporate Law Reform*, *in* SOCIAL RESPONSIBILITY AND THE BUSINESS PREDICAMENT 41, 56–62 (James McKie ed., 1974).

236. SELIGMAN, *supra* note 23, at 535.

neered a means of bringing shareholder concerns before corporate boards that is still used today.

2. Public-Interest Directors and the Federal Chartering Solution

If shareholders were unwilling to make directors and managers serve new constituencies, activists reasoned, perhaps the federal government would help. In the early 1970s, both legal scholars and latter-day muck-rakers put forward a series of proposals for federal incorporation laws for large corporations, laws that in most instances had provisions for altered boards of directors that would include directors charged with representing interests other than shareholders.[237] Conceptually, public-interest directors and federal chartering are distinct proposals. Federal chartering has been considered on and off since the late-nineteenth century, often as a way to prevent corporate malfeasance rather than a way to make the corporation more responsive to the public.[238] So, too, one can favor a board of directors with representatives obligated to speak to the public interest, without thereby favoring federal chartering (witness Campaign GM).[239] But in the early 1970s, the two ideas became intertwined, as proposals for a federal charter usually included provisions for public-interest directors;[240] indeed, federal chartering was seen by its proponents as inevitably a measure to increase corporate social responsibility.[241] Federal incorporation in the 1970s got its impetus from Ralph Nader, who first made his case for federal chartering at a widely publicized conference on corporate accountability held in 1971.[242] Nader's critique of

237. *See, e.g.*, Alfred F. Conard, *Reflections on Public Interest Directors*, 75 MICH. L. REV. 941 (1977) (discussing various proposals to create "public interest director" positions on boards); RALPH NADER ET AL., TAMING THE GIANT CORPORATION (1976) [hereinafter NADER, TAMING] (advocating an efficient and democratic enterprise); CHRISTOPHER D. STONE, WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR (1976) (discussing a need for corporate accountability); Philip I. Brumberg, *Reflections on Proposals for Corporate Reform Through Changes in the Composition of the Board of Directors*, 53 B.U. L. REV. 547 (1973) (discussing proposals to include "'special interest' or 'public' director[]" roles on corporate boards); Donald E. Schwartz, *Federal Chartering of Corporations: An Introduction*, 61 GEO. L. J. 71 (1972) (discussing federal incorporation) [hereinafter Schwartz, *Federal Chartering*].

238. *See* NADER, TAMING, *supra* note 237, at 65–71 (providing a good summary of the history of federal incorporation proposals).

239. *See supra* text accompanying notes 214–35. Proposals to make corporate boards more responsive to a variety of needs long predated the 1960s; William O. Douglas proposed "professional directors" in 1939. WILLIAM O. DOUGLAS, DEMOCRACY AND FINANCE 46–50 (James Allen ed., 1940).

240. *See* NADER, TAMING, *supra* note 237, at 124 (discussing proposals recommending government appointed directors).

241. As opposed to, say, a proposal for the better protection of shareholders.

242. Ralph Nader & Mark J. Green, *Preface*, *in* CORPORATE POWER IN AMERICA vii (Ralph

the large public corporation differed little from that offered by reformers in the 1930s and 1950s: power in the United States had come to rest with a few large corporations, whose market power insulated them from the threat of competition and whose political power allowed them to act unchecked.[243] While Nader was chiefly concerned that corporations were not accountable to the public, he also argued that corporate managers had so much autonomy that they were not answerable to their own shareholders. According to Nader, federal chartering was needed because state corporate charters "so overwhelmingly reflect[ed] management power interests."[244] The charters Nader initially proposed would have broken management's grip through steps designed to make corporations more transparent (better reporting), more accountable to their employees (placing new protections for workers into the charters), and less economically powerful (if a firm's market share was too big, it was to be broken up).[245] Such steps, Nader insisted, would not destroy corporations but rather make them more accountable to both shareholders and the general public.[246]

Nader's proposals received some attention at the time, in part because they matched the temper of the early 1970s. The public had been battered by several years of bad news about corporate behavior—revelations that many firms had polluted the environment, mistreated workers, and bribed public officials—not to mention the end of the Viet-

---

Nader & Mark J. Green eds., 1973); Ralph Nader, *The Case for Federal Chartering*, *in* CORPORATE POWER IN AMERICA, *id.* at 69 [hereinafter Nader, *Federal Chartering*].

243. *See* Nader, *Federal Chartering*, *supra* note 242 at 82; NADER, TAMING, *supra* note 237, at 7 ("Large corporations, commanding immense political, economic, and technological power, are different in kind and in degree from their smaller counterparts."). The views of Nader and his colleagues are drawn not only from Nader's own contribution to the meeting but those of other contributors, *see, e.g.*, John Kenneth Galbraith, *On the Economic Image of Corporate Enterprise*, *in* CORPORATE POWER IN AMERICA, *supra* note 242, at 5 (claiming the large corporation has excessive power "both in markets and over the government").

244. Nader, *Federal Chartering*, *supra* note 242, at 79. Nader's complaint about the laxness of state corporate law, notably Delaware's, predates Prof. William L. Cary's attack on Delaware corporate law as launching a "race to the bottom" and his call for federal chartering. *See* William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 705 (1974) (arguing that corporate standards are deteriorating and suggesting a larger federal role in corporate affairs).

245. *See* Nader, *Federal Chartering*, *supra* note 242, 85–89. Nader also spoke of "constitutionalizing" the corporation, by which he apparently meant that employees would, at a minimum, be given expanded Free Speech rights and due process before termination. *Id.* at 87–88.

246. Indeed, Nader insisted that the proposal would ultimately benefit the corporation and promote the free market:

> [s]ince the guiding purpose of federal incorporation is to encourage corporate democracy and competition, it is the precise opposite of a centralized, planned economy. To the extent that it attempts to make private firms more accountable to their shareholders and more responsive to competitors, a federal incorporation law is a radically conservative idea.

Id. at 82.

nam War and Watergate.[247] In response, public confidence in all large institutions, including big business, plummeted.[248] In such a climate, federal chartering did not look impossible; the 1972 Democratic platform (admittedly, the most liberal in memory) included a promise to study the idea.[249]

Federal chartering became an issue for academics and policymakers following a series of well-publicized failures of corporate governance in the early 1970s. State charters, some legal scholars concluded, had allowed mechanisms of corporate oversight to rot. After the 1970 collapse of the Penn Central Railroad—a collapse blamed on a somnolent board—financial journalists and academic critics both argued that the board had largely "ceased to function as a meaningful check" on senior corporate management.[250] The 1974 and 1975 scandals over corporate overseas bribery furthered the general sense that corporate governance was not working.[251] In 1976 and 1977, Congress held hearings on proposals for some kind of federal incorporation law that would guarantee greater independence for corporate boards and, it was hoped, better oversight thereby of management.[252] Unlike Nader's proposals, though, most of these proposals focused on making the board more independent from management so it could more effectively serve shareholders. They were not proposals for making the corporate board accountable to new constituencies.[253]

Board reform, federal incorporation, and corporate social responsibility did come together in two widely noted[254] 1976 books: Nader, Mark Green, and Joel Seligman's *Taming the Giant Corporation*[255] and Chris-

247. *See* LEONARD SILK & DAVID VOGEL, ETHICS AND PROFITS: THE CRISIS OF CONFIDENCE IN AMERICAN BUSINESS 17–23 (1976).

248. Thus, in 1966, 55 percent of the public told the Harris poll they had "a great deal of confidence" in the heads of large corporations, a number that fell to 15 percent by 1975. *Id.* at 21.

249. *E.g.*, Schwartz, *Federal Chartering*, *supra* note 237, at 71.

250. SELIGMAN, *supra* note 23, at 537. My discussion of the larger concern over corporate governance in the early 1970s follows Seligman's. *See id.* at 534–51.

251. *See id.* at 541–44 (discussing several cases of corporate overseas bribery and questionable payments).

252. *See id.* at 545, 550–51 (discussing congressional hearings and SEC actions in 1976 and 1977).

253. While some of these proposals may be spoken of as making the corporation more "socially responsible," this was generally in the sense of preventing illegal behavior or behavior such as overseas bribery. Today's "corporate responsibility" measures similarly aim to protect shareholders and financial markets, not the public at large.

254. *See* David L. Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1, 1 (1979) (calling them "the two most widely discussed books of recent years that purport to call for 'more' corporate social responsibility"); *see also* Conard, *supra* note 237 (critically examining both books and treating them as a piece).

255. NADER, TAMING, *supra* note 237.

topher Stone's *Where the Law Ends*.[256] Both treated federal incorporation as a first step to public-interest directors and, through them, to making the corporation accountable to constituencies beyond the shareholders. Stone's proposal was the more modest: upset that corporate boards were representing neither shareholders[257] nor the larger public, he proposed that boards have no inside directors, require some directors to be financially disinterested, and have an independent staff to help oversee the corporation.[258] More radically, Stone proposed that large corporations should be assigned so-called "general public directors," appointed by a federal agency and charged with acting in the public interest.[259] While Stone was vague on what these directors would do, he placed his greatest faith in their very presence. They would serve as a "superego" for the board, urging members to act in the public interest, while also making sure they performed their governance functions. Stone seemed to believe that corporations harmed nonshareholder constituents and the general public chiefly because they were able to operate without public scrutiny. Thus, his proposal stopped short of creating new legal responsibilities for other board members; it was a means of making the corporate board more responsive to new constituencies by, in essence, putting a gadfly in their midst.

Nader, Green, and Seligman's proposals were more radical. After launching a wide-ranging indictment of corporations and the harm they did to American society,[260] the Nader authors proposed a federal chartering law that had at its center a new model of the corporate board. The new board would be composed entirely of outside "professional" directors, working full-time and provided with an independent staff to oversee

---

256. STONE, *supra* note 237.

257. Stone makes the point that boards rejecting public-interest shareholder proposals were not exactly acting as "agents" for shareholders in a passage worth quoting:

> If the managers truly considered themselves agents of the shareholders, as agents they would be expected to show an interest in determining how their principals wanted them to act—and to act accordingly. In the controversy over Dow's production of napalm, for example, one would expect . . . that Dow's management would have been glad to have the napalm question put to the shareholders at a shareholder's meeting.

Id. at 83.

258. *Id*. at 139–45.

259. *Id*. at 157–73. Stone, like other critics of corporate irresponsibility, focused on large corporations. His 1976 proposal was that a corporation be required to have a board where 10% of the directors are public directors for every $1 billion in assets, up to a predetermined limit. *Id*. at 158–59.

260. In their telling, large corporations bore major responsibility for industrial pollution, toxic substances, discrimination, white-collar anomie, inappropriate government expenditures, false advertising, unsafe products, unchecked technology, wealth disparities, and white-collar crime. *See* NADER, TAMING, *supra* note 237, at 15–32.

the firm.[261] While these professional directors would continue to have legal responsibilities to shareholders, each director would also have "a separate oversight responsibility, a separate expertise, and a separate constituency so that each important public concern would be guaranteed at least one informed representative on the board."[262] One director would be specially responsible for employee welfare, another for consumer protection, another for community relations, and so on.[263] Large corporations, Nader, Green, and Seligman seemed to promise, would be run by a board answerable simultaneously to shareholders, other constituencies, and the general public.

In their books, Stone, and Nader, Green, and Seligman had apparently closed the loop in the academic debate over corporate social responsibility, finally putting forth a clear legal proposal for what Berle and Means had, some forty-years before, suggested would appear in time: "a purely neutral technocracy, balancing a variety of claims by various groups in the community and assigning to each a portion of the income stream on the basis of public policy rather than private cupidity."[264] Their new-model corporate boards promised to balance the needs of competing constituencies, profiting shareholders while also looking out for the interests of employees, consumers, communities and the general public.[265]

Unsurprisingly, it never came to pass. Most of the reason surely lies with the sheer weight of inertia, the incredible difficulty that faced any proposal, made at any time, to alter such a fundamental aspect of corporate law, irrespective of whether the proposals are wise or not.[266] In hindsight, it also becomes clear that all these authors' proposals were not as cleanly crafted as they seemed at the time; how exactly a director was supposed to fulfill simultaneous legal responsibilities to shareholders, the

---

261. *Id.* at 120–22. Directors could neither be officers of the firm, nor hold any other directorates, thus eliminating one of the bugbears of Nader and conspiracy theorists everywhere: interlocking corporate directorates. *See id.* at 128–29 (indicating that directors could only serve in that capacity).

262. *Id.* at 125.

263. *See id.* (listing individual director responsibilities).

264. BERLE & MEANS, *supra* note 16, at 312–13; *see also* text accompanying notes 38–107.

265. Surprisingly, none of the above authors, all law professors, gave much thought to the problem of how directors' legal duties should be modified if they were to be made answerable to so many different constituencies. *See* Conard, *supra* note 237, at 947 ("It would be a cruel hoax to appoint directors with a mandate to sacrifice shareholders' interests in favor of those of consumers, and then to hold them liable for damages because they have violated their duty to the corporation.").

266. Congress passed the two major federal laws severely regulating corporations, the Securities Act of 1933 and the Exchange Act of 1934, in the depths of the nation's worst economic depression, and the most recent corporate responsibility legislation passed while the stock market was plummeting and a close midterm election approached.

general public, and another constituency as well was not made clear.[267] So, too, the antibusiness atmosphere of the mid-1970s had partly lifted by the end of that decade, and the economic boom of the 1980s served further to dissolve it. But there is yet another reason the proposals lost steam in both legal academia and government: a sophisticated opposition arose to the idea of corporate social responsibility, one that in time would put advocates of the responsible corporation on the defensive.

3. "The Social Responsibility of Business Is Profits"

There had always been opponents to the idea of corporate social responsibility, who argued that business's job was business and it should avoid taking on tasks better performed by charities or government.[268] In the early 1960s, several legal scholars argued that corporate social responsibility made little economic sense, promising as it did to distort the price function and so make corporations less efficient, while saddling them with an ill-suited social role.[269] In 1970, this view received its most forceful statement, not in a law review, but in a *New York Times Magazine* article, written by the era's best-known free-market economist, Milton Friedman.[270]

Friedman's attack on corporate social responsibility was based on both economics and morality. In part, he noted, advocates of corporate social responsibility ultimately believed in replacing market mechanisms with political mechanisms when determining how resources should be used, a process guaranteed to produce economic inefficiency.[271] But it was also, he believed, immoral. In the law, corporate executives were employees of the owners of the business—in the case of large corporations, the shareholders.[272] Asking those employees to take on social responsibility was asking them to act in a way that was not in the best interest of the shareholders.[273] The funds spent on social projects were funds that could not be distributed to the shareholders; they were in ef-

---

267. As Roberta Romano notes, Nader's plan was "little more than a pastiche of ideas that are mutually inconsistent." Romano, *Metapolitics, supra* note 134, at 971.

268. *See generally* Levitt, *supra* note 119; Manne, *supra* note 123; Rostow, *supra* note 174.

269. Two legal scholars, Henry Manne and Dean Rostow, made this economic argument. Manne, *supra* note 123; Rostow, *supra* note 174.

270. Milton Friedman, *Social Responsibility of Business*, N.Y. TIMES MAG., Sept. 13, 1970, *reprinted in* MILTON FRIEDMAN, AN ECONOMIST'S PROTEST: COLUMNS IN POLITICAL ECONOMY 177 (1972).

271. *See id*. at 180 (arguing political mechanisms are economically inefficient).

272. *Id*. at 178. Friedman wasn't quite right about this—corporate employees are not direct employees of shareholders—but his moral point was clear.

273. *Id*. at 179.

fect "taxed" from the shareholder and then used by the corporate executive as he judged best, "all this guided only by general exhortations from on high . . . ."[274] In Friedman's view, corporate social responsibility was not only inefficient, it was theft.

Initially, proponents of corporate social responsibility found it easy to belittle Friedman's article. The Nader group dismissed his criticism by arguing that the real corporate economy was not the competitive marketplace Friedman seemed to presuppose,[275] while Stone argued that Friedman did not understand corporate law.[276] Much of the disagreement between Friedman and his opponents grew out of their deeper disagreements over how the economy worked. Friedman believed that large corporations were much like any other businesses, engaged in fierce competition and run for the benefit of their shareholders.[277] Proponents of corporate social responsibility, in contrast, held a view going back to Berle: due to their size and resulting disproportionate social, political, and economic power, large corporations were not just small firms writ big, and their shareholders were not their owners, at least in the same sense that a small proprietor owned his or her shop.

Although Friedman's was a lonely voice in 1970, over the rest of the decade legal scholars would join the attack on corporate social responsibility, also using economic theory to throw doubt on the proposals offered by Stone and Nader. In 1972 Henry Manne questioned whether corporations could ever spend on programs in a truly altruistic spirit, rather than spending the funds to either increase profits or benefit managers.[278] In 1979 David Engel launched a wide-ranging attack on the decade's social responsibility proposals, arguing that they were not only wrongheaded but incoherent, skipping over major procedural issues,[279] assuming away perhaps intractable problems,[280] and presuming that cor-

274. *Id.* at 179–80.

275. NADER, TAMING, *supra* note 237, at 259.

276. *See* STONE, *supra* note 237, at 82–83 (stating that Friedman was wrong as to the state of the law in that "directors are not mere agents of the shareholders").

277. Friedman states in his article that he focuses on corporate executives, not individual proprietors, but it is clear from his article he does not believe the large corporation differs decisively from smaller firms. Friedman, *supra* note 270, at 178.

278. HENRY G. MANNE & HENRY C. WALLICH, THE MODERN CORPORATION AND SOCIAL RESPONSIBILITY 32–33 (1972). Manne seemed to see corporate social responsibility as the first step towards a cartelized economy run by the government and large corporations—an arrangement, he pointed out, accepted in Nazi Germany. *Id.* at 32–33.

279. Engel provides a laundry-list of questions unanswered by advocates of direct constituency representation, addressing issues ranging from which constituencies should be included to how the constituencies will be prevented from pursuing their own goals instead of social goals. Engel, *supra* note 254, at 33–34 n.100.

280. *See id.* at 89–92, *passim* (discussing the problems with the solutions for corporate social

porate management would somehow prove better than elected officials at deciding which social goals a firm should pursue.[281]

Public enthusiasm for corporate social responsibility flagged after the mid-1970s. Academic criticism certainly had a role to play in this. At least as important in cooling enthusiasm for corporate reforms, however, was the changing climate of public opinion concerning government and business. The public trust evinced in business leaders in the early 1960s never returned, but it was not replaced by renewed faith in government. Increasingly, the free market and private ordering were preferred to any legislative or court-ordered economic planning.[282] One sign of this anti-government mood was the 1978 passage in California of the anti-tax (and anti-big government) Proposition 13.[283] The 1980 election of Ronald Reagan, the quintessential small-government candidate, sealed the fate of programs that advocated increased government intervention in the economy. Corporate social responsibility would not disappear, but the ambitious agendas of its proponents would no longer appear realistic in the 1980s.

C. Other Constituency Statutes and the "Progressive" Critique

From the late 1970s to the mid-1980s, the academic debate over corporate social responsibility dwindled and splintered. Isolated articles still appeared, some evincing a good deal of intellectual sophistication, but there was no clear debate over the larger responsibilities of corporations. Articles that were published were either remnants of the debates that flourished in the previous decade,[284] or addressed to subjects tangential

---

responsibility created by the Nader Group and Professor Stone).

281. *See id.* at 2–3, 59–63 (pointing out that corporations are being asked to be "socially responsible" in areas where the legislature has not chosen to speak, meaning the firms are left with no political guidance as to how they should act). *See generally* Romano, *Metapolitics*, *supra* note 134 (discussing the lack of guidance given to corporations in how to act socially responsible).

282. This anti-government tendency had an impact across many fields of law. *See, e.g.*, G. Edward White, *The Unexpected Persistence of Negligence, 1980–2000*, 53 VAND. L. REV. 1337, 1361–64 (2001) (connecting trends in tort law to public mistrust of government in the 1980s).

283. *See* KIM MCQUAID, UNEASY PARTNERS: BIG BUSINESS IN AMERICAN POLITICS 1945–1990, at 154–58 (1994).

284. *See, e.g.*, Christopher D. Stone, *Corporate Social Responsibility: What It Might Mean, If It Were Really to Matter*, 71 IOWA L. REV. 557, 557–58 (1986) (describing recent contributions to the debate over corporate social responsibility as "not very good" or "hopelessly vague"); Elliott J. Weiss, *Social Regulation of Business Activity: Reforming the Corporate Governance System to Resolve an Institutional Impasse*, 28 U.C.L.A. L. REV. 343, 344 (1981) (adding dialogue to the corporate social responsibility debate of "almost a half century ago"); *see generally* Louis D. Solomon, *Restructuring the Corporate Board of Directors: Fond Hope—Faint Promise?*, 76 MICH. L. REV. 581 (1978) [hereinafter Solomon, *Restructuring*] (discussing the shortfalls of various corporate board reforms).

to the debate over corporate social responsibility, most notably, the "corporate governance movement."[285] One sign of the lull in this area is that Roberta Romano's 1984 article *Metapolitics and Corporate Law Reform*, perhaps the most significant scholarly work from this period, was a reply to David Engel's 1979 dissection of corporate social responsibility.[286] Two articles in five years does not a lively debate make. Neither business developments outside the academy, nor methodological developments within, were sufficient to energize a new debate over corporate social responsibility. As in earlier cycles of scholarly effort, it would take economic and legal developments outside the legal academy to give impetus and form to the next iteration of the debate.

This time, the external impetus was the 1980s' boom in corporate takeovers, the first since the 1960s.[287] Mergers and acquisition activities began to increase in 1980, a year that saw $44.6 billion in takeovers, and grew throughout the decade until, in 1988, the year's value of M&A was $226 billion.[288] Producing huge profits for the takeover artists, and significant gains for shareholders of firms bought,[289] the takeovers also resulted in unemployed managers and—at least in public perceptions—shuttered factories and downsized workers.[290] In response, corporations developed anti-takeover defenses and states that feared takeovers and decimation of locally based firms adopted laws aimed at preventing such

285. Of course, corporate governance was a major topic in its own right, but it touched only peripherally on corporate social responsibility. Corporate governance chiefly concerned the internal governance of the corporation rather than the corporation's social responsibility or relationship to "nonshareholder constituencies." *See generally* Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259 (1982) (discussing the history and direction of the Corporate Governance Movement); Romano, *Metapolitics*, *supra* note 134, at 956–63 (discussing a pluralist approach to board composition).

286. Romano, *Metapolitics*, *supra* note 134, at 924–25. Another sign of the meandering nature of the scholarly discussion over corporate social responsibility in this period is that Romano's article, a wide-ranging and thoughtful contribution, is less a foray in an ongoing argument than an attempt to provide some methodological coherence and scholarly depth to debates over corporate social responsibility. *See id*. at 924 ("My aim is to construct a typology of democratic ideals that is of sufficient generality to be helpful in assessing the major policy recommendations of participants in recent debates over corporate law reform.").

287. *See* JAMES B. STEWART, DEN OF THIEVES 98–99 (1991).

288. *See* SELIGMAN, *supra* note 23 (discussing the history and growth of the S.E.C. and modern corporate finance up to the early 1980s).

289. *See* ROBERT SOBEL, THE GREAT BOOM 320–24 (2000) (discussing the huge gains by Dupont when it purchased Conoco in 1981).

290. Thus producing a whole new journalistic subgenre: the account of the ruthless corporate buccaneer. *See, e.g.*, CONNIE BRUDE, THE PREDATOR'S BALL (1988) and BRYAN BURROUGH & JOHN HELYAR, BARBARIAN AT THE GATE (1990).

takeovers.[291] Particularly popular were so-called "corporate constituency statutes."[292]

The legal core of these new laws was straightforward. Under state law before the statutes, a corporation's board of directors had a fiduciary duty toward the corporation's shareholders, and was required to act in their best interests.[293] In evaluating a takeover bid, then, the board was under great pressure to sell the company to a bidder if the sale would ultimately benefit shareholders, even if the bidder promised to take actions that would hurt other groups dependent on the corporation, such as its employees or the communities where its plants were located.[294] Corporate constituency statutes explicitly broadened the kinds of constituencies directors could consider when evaluating a takeover bid; thus, Pennsylvania's 1983 statute, the first passed, allowed a board "in considering the best interests of the corporation, [to] consider the effects of any action upon employees, suppliers, and customers of the corporation, communities in which offices or other establishments of the corporation are located . . . ."[295] Within a decade twenty-nine states had passed similar measures.[296] Even in states where such laws were not passed, notably the corporate-charter capital Delaware,[297] court decisions gave directors greater leeway to weigh a bid's "impact on 'constituencies' other than shareholders."[298]

291. *See generally* Marleen A. O'Conner, *Corporate Malaise-Stakeholder Statutes: Cause or Cure?*, 21 STETSON L. REV. 3 (1991) (discussing statutes aimed at preventing corporate takeovers); Roberta Romano, *The Political Economy of Takeover Statutes*, 73 VA. L. REV. 111 (1987) (discussing statutes aimed at preventing corporate takeovers and defense mechanisms created by corporation themselves).

292. The laws had a variety of names. Here I adopt the neutral term suggested by Eric Orts. Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14, 16–17 (1992) [hereinafter Orts, *Beyond Shareholders*].

293. *See, e.g.*, Revised Model Business Corporation Act § 8.31 (2002) ("[a] director shall not be liable to the corporation or its shareholders").

294. *See, e.g.*, Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 176 (Del. 1986) (allowing a corporate board to take into account nonshareholder interests while considering a takeover only when a "rationally related benefit" would accrue to shareholders). In fact, this duty might be evaded by a board or managers who wished to hide their actions behind the business judgment rule, but litigation often followed in the wake of takeover bids and the new statutes provided (at the very least) additional comfort for board members concerned about such suits. *See* BURROUGH & HELYAR, *supra* note 290, at 474–75 (1990) (retelling the RJR Nabisco board's concern about lawsuits in the midst of takeover negotiations).

295. Orts, *Beyond Shareholders*, *supra* note 292, at 27 (quoting Act of Dec. 23, 1983, No. 1983–92 § 1(b), 1983 Pa. Laws 395).

296. Orts, *Beyond Shareholders*, *supra* note 292, at 28.

297. *Id.* at 28–29.

298. *Revlon*, 506 A.2d at 176; *see also* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985) (allowing directors to establish a defense mechanism that includes consideration of the impact on "'constituencies' other than shareholders"); Paramount Communications, Inc. v. Time, Inc., 571 A.2d 1140, 1153 (Del. 1989) (stating that directors may consider the impact of a takeover

In substance, corporate-constituency statutes were of a piece with other anti-takeover measures developed in the mid-1980s:[299] they were often backed by firms and labor unions worried about impending hostile takeover bids, were first passed in Midwestern states fearing plant closings, and in some instances, were prepared by law firms representing potential takeover targets.[300] But they were more than shields for corporate managers. Since the 1930s, advocates of corporate social responsibility had pushed for legal changes that would empower corporate managers to act in the best interests of all a firm's "constituents," not just its shareholders.[301] In these anti-takeover statutes, their hopes were realized. As written, the statutes offered a more capacious view of directors' fiduciary duties, and promised that the needs of a range of "constituencies" could (or must) be taken into account in corporate decision-making.[302] Almost inadvertently, the legal mechanism for corporate social responsibility seemed at last to have been put in place.

Out of the takeover movement, resulting downsizing, and the consequent passage of corporate-constituency statutes came a new round of scholarly work on corporate social responsibility,[303] or as its proponents would rename it, "progressive corporate law."[304] Two other developments also shaped the debate. One was again exogenous to legal academia: new concern over the United States' economic competitiveness.[305]

---

on "'constituencies' other than shareholders").

299. *See* COX ET AL., *supra* note 60, § 23.4 at 615–18 (discussing the various other types of anti-takeover measures).

300. Orts, *Beyond Shareholders*, *supra* note 292, at 24–25.

301. *See, e.g.*, Dodd, *For Whom*, *supra* note 4 (discussing the motivation for corporate managers to act in the best interests of all their firms' "constituents").

302. While most statutes only permitted boards to take into account the needs of other constituencies, Connecticut's law made it mandatory. Orts, *Beyond Shareholders*, *supra* note 292, at 29.

303. *See id.* at 21 n.31 ("[C]onstituency statutes have reawakened [the] theoretical debate concerning the nature and purpose of the corporation from its long slumber").

304. The loose-knit group of legal scholars who advocate corporate social responsibility can be labeled "communitarian" or "progressive"—I use the term used in the area's best-known collection. PROGRESSIVE CORPORATE LAW (Lawrence E. Mitchell ed., 1995) [hereinafter PROGRESSIVE CORPORATE LAW]; *see also* David Millon, *Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373, 1377–90 (1993) [hereinafter Millon, *Communitarians*] (discussing differences between communitarian thinkers and contractarians).

305. The literature is voluminous, but for representative works expressing concerns over American competitiveness and suggesting new modes of industrial organization and planning, see LESTER C. THUROW, THE ZERO-SUM SOCIETY (1980) (discussing several economic dilemmas present in America in the 1970s and '80s and suggesting some possible solutions); ROBERT B. REICH, THE NEXT AMERICAN FRONTIER: A PROVOCATIVE PROGRAM FOR ECONOMIC RENEWAL (1983) (arguing that the American economy was in a steady decline since the 1960s and suggesting several sources of this decline); MICHAEL J. PIORE & CHARLES F. SABEL, THE SECOND INDUSTRIAL DIVIDE: POSSIBILITIES FOR PROSPERITY (1984) (arguing that the economic model operating in modern capitalist nations in the 1970s and '80s was failing to produce needed technological advances); AMERICA VERSUS JAPAN (Thomas K. McCraw ed., 1986) (comparing certain American and Japanese eco-

In the 1980s fears arose over American business's ability to compete with foreign firms, especially Japanese corporations.[306] Overseas competitors appeared to exceed the productivity of the United States' firms, while also maintaining workplace harmony alien to the American experience. In response, American journalists, management specialists, and legal scholars took a new look at how foreign corporations were run, which produced (in law reviews and books) a wave of work on comparative corporate governance that drew lessons from governance rules in Europe and East Asia.[307] The apparent failure of the giant American corporation opened up new possibilities for legal reform of corporate governance.

A final development that shaped the new debate over corporate social responsibility was the appearance and wide adoption in the 1980s of the contractarian theory of the firm.[308] This approach conceptualized a corporation as a "nexus of contracts" between the corporation's various constituencies. Employees, shareholders, creditors, and managers all contributed their products to the firm in what would—but for transaction costs—be a series of individual contracts, bargaining for their respective payments and rights.[309] Corporate law, in this telling, was just a set of default rules.[310]

In its extreme version, the "nexus-of-contracts" approach threatened to eliminate the underpinnings of the corporate social responsibility

---

nomic policies of the 1980s).

306. Evidence of this can be found in the pages of almost any popular business magazine from the period, from *Business Week* to *The Atlantic*. For examples of the journalistic works embodying this idea, see JAMES FALLOWS, LOOKING AT THE SUN: THE RISE OF THE NEW EAST ASIAN ECONOMIC AND POLITICAL SYSTEM (1994) (discussing economic growth in several Asian countries during the 1980s); DAVID HALBERSTAM, THE RECKONING (1986) (discussing the history as well as the reasons for economic growth in Japan during the 1980s).

307. *See, e.g.*, Symposium, *Economic Competitiveness and the Law*, 102 YALE L.J. 1803 (1993) (discussing possible benefits of a European system of labor organization); Roberta Romano, *A Cautionary Note on Drawing Lessons from Comparative Corporate Law*, 102 YALE L.J. 2021 (1993) (discussing possible risks of adopting a German or Japanese corporate governance system). The group of scholars most willing to draw inferences from abroad were the "progressive corporate law" scholars, *see infra* text accompanying notes 316–19. *See, e.g.*, Alfred F. Conard, *Corporate Constituencies in Western Europe*, 21 STETSON L. REV. 73 (1991) (linking stakeholder legal reforms to European models and then vigorously attacking them); Marleen A. O'Connor, *A Socio-Economic Approach to the Japanese Corporate Governance Structure*, 50 WASH. & LEE L. REV. 1529 (1993) (suggesting lessons to be learned from Japanese corporate governance).

308. The approach began with R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937), but was fully developed and publicized in a series of articles published in the 1980s by Judge Frank Easterbrook and Dean Daniel Fischel, collected in THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991). Easterbrook and Fischel were not the only scholars working in this vein. *See, e.g.*, THE NATURE OF THE FIRM (Oliver Williamson & Sidney Winter eds., 1991) (compiling articles that celebrated the ideas expressed in R.H. Coase's 1937 article).

309. Bainbridge, *supra* note 9, at 859.

310. EASTERBROOK & FISCHEL, *supra* note 308, at 15.

movement.[311] Since before Berle progressive scholars had depicted the corporation as a political as well as economic entity, run by managers and directors, with shareholders as citizens, and employees as serfs. Due to this power, its "legitimacy" was a perennial concern in the literature of corporate social responsibility. If, however, the corporation were only a web of contracts, which would have been freely entered into but for transaction costs, then the corporation as a distinct entity apart from these constituencies was attenuated if not erased.[312] As two pioneers of the nexus-of-contracts approach put it, under this model the firm is simply a legal fiction with "no power of fiat, no authority, no disciplinary action."[313] According to Easterbrook and Fischel, there is no easy distinction between a corporation and any firm: "[a] corporation is a financing device and is not otherwise distinctive."[314] Progressive corporate-law scholars never accepted this vision of the corporation, but the dominance of the nexus-of-contracts approach in the 1990s would force them to spend considerable time grappling with it.[315]

Progressive corporate law, the latest incarnation of the corporate social responsibility movement, cohered into a clear movement with common approaches to corporate law in the early 1990s.[316] It differed from

311. Advocates of progressive corporate law recognized the threat posed by the nexus-of-contracts approach, and expended a great deal of energy trying to limit or rechannel it. *See, e.g.*, Douglas M. Branson, *The Death of Contractarianism and the Vindication of Structure and Authority in Corporate Governance and Corporate Law*, *in* PROGRESSIVE CORPORATE LAW, *supra* note 304, at 93 [hereinafter Branson, *Death of Contractarianism*] (arguing that contractarian thought threatens to destroy basic notions of corporate responsibility); William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1478–80 (1989) [hereinafter Bratton, *New Economic Theory*] (illustrating the conflict in policy between the two schools of thought); David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 203–04 (same).

312. *See* Bratton, *New Economic Theory*, *supra* note 311, at 1478 (discussing the decreased role of management and corporate structure under a nexus-of-contract approach).

313. *Id.* (quoting Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 777 (1972)).

314. EASTERBROOK & FISCHEL, *supra* note 308, at 10.

315. This is not to say that progressive scholars rejected the contractarian approach; rather, they rejected its extreme versions and sought to incorporate other elements drawn from it into a progressive critique of corporate law. *See* David Millon, *Communitarianism in Corporate Law: Foundations and Law Reform Strategies*, *in* PROGRESSIVE CORPORATE LAW, *supra* note 304, at 1, 16–30 [hereinafter Millon, *Communitarianism*] (citing authors who combined progressive sentiments favoring the nonshareholder with certain contract theories such as implied contracts to provide the desired corporate structure).

316. In 1993, David Millon assembled a short bibliography of "communitarian corporate law scholarship" in which most of the articles that he judged to be communitarian were written after 1988. Millon, *Communitarians*, *supra* note 304, at 391–93. The movement really gained shape in two collections, one the book PROGRESSIVE CORPORATE LAW, *supra* note 304, the other a symposium held in 1992 at the Washington & Lee University Law School. Symposium: *New Directions in Corporate Law*, 50 WASH. & LEE L. REV. 1373 (1993).

its predecessors in important respects. In the 1950s the inchoate debate over corporate social responsibility was carried on by legal mandarins like Berle and Abram Chayes, while in the 1970s advocates of corporate social responsibility were self-styled radicals who pushed for legal reform through public campaigns. The 1990s' progressive scholars were a smaller group of legal thinkers, based at a few law schools, notably George Washington University and Washington and Lee, and self-consciously isolated from the mainstream of corporate law scholarship. Yet they shared enough with these earlier proponents of corporate social responsibility to be fairly classed together;[317] most important, all agreed that the shareholder primacy model of corporate law was inadequate, that large corporations should be governed not only for the benefit of shareholders but to benefit a range of corporate constituents.[318]

As noted above, many progressive scholars eagerly seized on corporate-constituency statutes passed in the 1980s. In part, they hoped that the new statutes signaled the end of shareholder primacy. Some scholars simply took the statute as a sign that shareholder primacy was gone. Thus, Lyman Johnson and David Millon argued that, far from being a management protective device, the statutes were intended "to protect non shareholders from the disruptive impacts of . . . corporate restructurings," such as "lost jobs, destruction of established supplier and customer relationships, and [lost] tax revenues and charitable contributions."[319]

The statutes encouraged a few scholars to envision further legal steps to insert nonshareholder concerns into board decisions. Lawrence Mitchell, in a *Texas Law Review* article, argued that the new statutes would be best implemented if members of constituent groups were allowed a cause of action by nonshareholder constituents against directors if the board failed to consider fully the consequences of corporate actions for those constituents.[320] Ultimately, the enthusiasm for such corporate-

317. Some progressive scholars would disagree with this, arguing that "corporate social responsibility" is an overbroad term, implying that a corporation should have responsibilities to promote generally beneficial causes, such as environmental welfare. Millon, *New Game Plan*, *supra* note 17, at 1002 n.5. *See also* Lawrence E. Mitchell, *Preface*, *in* PROGRESSIVE CORPORATE LAW, *supra* note 304, at xiv (discussing the prevailing ideas consistent among progressive authors). While I agree there are differences between several approaches, I still think all these movements have enough in common that they can fairly be linked together.

318. *See, e.g.*, Lawrence E. Mitchell, *Preface*, *in* PROGRESSIVE CORPORATE LAW, *supra* note 304, at xiii–xiv (arguing that the broad effects of corporations require that they be held answerable to a broad range of societal interests); Millon, *Communitarians*, *supra* note 304, at 1374 (same).

319. Lyman Johnson & David Millon, *Missing the Point About State Takeover Statutes*, 87 MICH. L. REV. 846, 848 (1989). In fairness, they were partly right about the statutes, but they also underplayed the degree to which the statutes were produced by managers fearful of change.

320. Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituent Statutes*, 70 TEX. L. REV. 579, 585–86, 634–36 (1992). Mitchell would require a two-

constituency statutes faded, as their effects did not meet the expectations of either their supporters or their enemies.

In the meantime, a coherent group of scholars had formed, linked by the belief that corporations owed some duties to their nonshareholder constituents and by dissent with the prevailing view of the corporation-as-contract. In 1995, several set forth a program for their work in the collection *Progressive Corporate Law*.[321] The scholars represented in this volume advanced a new agenda for corporate law, based on their argument that the corporation itself should be viewed as a community (hence the other label, "communitarian") comprised of shareholders, creditors, directors, managers, employees, and maybe even customers. The "social responsibility" they sought to impose on the corporation was, then, responsibility not to society in general, but to those groups that made up the corporation-as-society.[322]

On the surface, the essays proposed several distinct programs for reforming the corporation. In his somewhat-utopian *On the Frontiers of Capitalism*, Lewis D. Solomon argued that business leaders should be charged with responsibility not only to corporate constituencies but to the natural environment, and examined Ben & Jerry's Ice Cream and The Body Shop as two exemplars of this approach.[323] Marleen O'Connor took a more economistic approach in her *Promoting Economic Justice in Plant Closings*, contending that corporate directors have fiduciary duties to displaced corporate workers because of quasi-contractual implicit employment agreements that have grown up between workers and employers.[324] In *Trust. Contract. Process.* Lawrence Mitchell argued for a "trust model" of corporate law that would lead courts to punish breaches of trust between corporate parties, as well as breaches of fiduciary duty,

---

step process. First, plaintiffs would have to prove that a corporation's actions injured them; then the burden would shift to defendants, who would have to show the acts were in pursuit of a "legitimate corporate purpose." *Id.* at 636.

321. PROGRESSIVE CORPORATE LAW, *supra* note 304.

322. This is, I think, the sense in which Millon argues that 1990s progressive corporate law scholars should be distinguished from earlier exponents of "corporate social responsibility." *See* Millon, *Communitarians*, *supra* note 304. As we have seen, however, earlier attempts to impose corporate social responsibility also focused on specific constituencies.

323. Lewis D. Solomon, *On the Frontier of Capitalism: Implementation of Humanomic by Modern Publicly Held Corporations—A Critical Assessment*, *in* PROGRESSIVE CORPORATE LAW, *supra* note 304, at 281, 285–86 [hereinafter Solomon, *Frontier*]. Solomon's article predates the sale of Ben & Jerry's to Unilever for $321 million.

324. Marleen A. O'Connor, *Promoting Economic Justice in Plant Closings: Exploring the Fiduciary/Contract Law Distinction to Enforce Implicit Employment Agreements*, *in* PROGRESSIVE CORPORATE LAW, *supra* note 304, at 219–21, 228–30. O'Connor notes that she employs fiduciary duty as the legal issue here partly because courts have refused to find implicit employment agreements in the context of plant closings. *Id.* at 220.

and more generally claimed that the overemphasis on contract in corporate law eroded societal trust.[325] Other authors in the collection move further afield to reexamine the history of the corporation,[326] or to argue that the corporation really is a locus of power, contra what is argued in much of the nexus-of-contracts literature.[327]

Despite their differences, the articles all fit squarely in the line of work on corporate social responsibility stretching back to Berle and Dodd. In a few instances, the proposals are remarkably similar to those made a generation or more before, as with Marleen O'Connor's argument that the board of directors should be seen as a mediating institution, duty-bound to balance the needs of shareholders and employees,[328] or Lewis Solomon's argument that corporate boards should take environmental concerns into account.[329]

More generally, the articles share the features that characterized the long debate over corporate social responsibility. First, though written in a decade when corporations appeared more vulnerable to competition than they had in fifty years, the articles shared the assumption that there was something distinctive about large corporations that set them qualitatively apart from small firms and made it appropriate to assign them greater responsibilities.[330] Second, the authors all aimed to reform corporate law; none were radical in the sense of believing in either nationalizing or eliminating large corporations. Third, most authors shared the

325. Lawrence Mitchell, *Trust. Contract. Process.*, *in* PROGRESSIVE CORPORATE LAW, *supra* note 304, at 185, 204–07.

326. *See* Gregory Mark, *Some Observations on Writing the Legal History of the Corporation in the Age of Theory*, *in* PROGRESSIVE CORPORATE LAW, *supra* note 304, at 67 (discussing new developments in the study of the history of corporations).

327. *See generally* Branson, *Death of Contractarianism*, *supra* note 311, at 93 (arguing corporate law must contain structure and authority at its fundamental level); Lynne L. Dallas, *Working Toward a New Paradigm*, *in* PROGRESSIVE CORPORATE LAW, *supra* note 304, at 37 (challenging the traditional nexus theory).

328. To see how the idea of a revamped board, with responsibilities to several constituencies, recurs, compare O'Connor, *supra* note 324, at 234 (proposing the directors have obligations to both shareholders and employees), with NADER, TAMING, *supra* note 237, at 123–26 (proposing a board charged with duties to shareholders and to other constituencies), with DRUCKER, NEW SOCIETY, *supra* note 148, at 207–08 (proposing a revamped board of directors for large corporations that would contain representatives of workers as well as shareholders and managers).

329. *Compare* Solomon, *Frontier*, *supra* note 323, at 281 ("the political economy must be enabling for humans *and* conserving of resources and the environment") *with supra* text accompanying notes 181–83 (promoting conservation of resources).

330. Most authors simply assume they are dealing with large, public corporations when they write of the duties corporations owe their various stakeholders. *See, e.g.*, Dallas, *supra* note 327, at 37–38 (speaking of the ownership of the corporation by "hundreds of thousands of shareholders"); Eric W. Orts, *The Legitimacy of Multinational Corporations*, *in* PROGRESSIVE CORPORATE LAW, *supra* note 304, at 247–49 (focusing on large multinational corporations); Solomon, *Restructuring*, *supra* note 284, at 583 (examining publicly held corporations).

belief that the best way to reform corporate law (and thus corporations) was to make corporate directors and managers legally responsible to a wider range of constituents, including employees, communities, and even the environment, thus abandoning the shareholder primacy norm.[331] Finally, while the problems addressed were those of the 1990s—corporate downsizing and lagging productivity—the solutions were those already tried out in the long span of corporate social responsibility debates. This is not to argue that there was nothing new in progressive corporate law; just to point out that it was only the most up-to-date version of the long debate over the role of the corporation in American society.

IV. CONTEMPORARY APPLICATIONS AND HISTORICAL PERSPECTIVE

What can contemporary critics take from the history of corporate social responsibility? By giving a long perspective on the development of legal proposals for making corporations more responsible, this history should better enable us to distinguish genuinely innovative proposals from conceptual dead ends, and spot weaknesses and unanswered questions in new proposals. As examples, we can examine two recent scholarly proposals touching on corporate social responsibility: Cynthia Williams' proposals for greater corporate transparency through securities disclosures,[332] and Margaret Blair and Lynn Stout's proposal that corporate law be understood through the lens of team production.[333]

A. Social Transparency

Cynthia Williams seeks social responsibility through greater corporate disclosure. In *The Securities and Exchange Commission and Corporate Social Transparency*, she argues that the SEC should change its disclosure rules to require publicly held corporations to make "social disclosures," which she defines as information about "management's policies and practices with respect to social and environmental issues."[334] Most of her article is exegesis of the history of the Securities Act and the Exchange Act, demonstrating that the acts (especially Section 14(a) of the Exchange Act) can be fairly read to allow the SEC to require disclo-

331. *See, e.g.*, Millon, *Communitarianism*, *supra* note 315, at 9–11 (outlining communitarian law reform).

332. *See* Williams, *supra* note 5, at 1205–06 (arguing for corporate social transparency in addition to financial transparency).

333. *See* Blair & Stout, *supra* note 5, at 249 (introducing the team production approach).

334. Williams, *supra* note 5, at 1199.

sure of socially relevant, but non-material, information.[335] Onto this she then appends a shorter discussion of why such disclosure might be desirable, pointing to the use that independent investors, concerned with social issues, might make of such information, and the light such disclosure might also shed on corporate management's competency.[336] While Williams focuses on the use shareholders and potential investors would make of this information, it is clear she hopes the information will change the companies' policies as well.

Williams' article fits within the broad ambit of corporate social responsibility, as defined in this paper. Her proposal focuses on large corporations, is reformist rather than radical, and aims to make corporate managers responsible to nonshareholder constituencies. True, she does not call for imposing new fiduciary duties on managers or directors. But her proposal would still indirectly accomplish this. She does call for imposing new responsibilities for disclosures on managers through the securities laws.[337] This information, once disclosed, will, she assumes, be used not only by shareholders to improve the bottom line, but also by nonshareholder groups to pressure managers to treat overseas workers better and to act in an environmentally sensitive manner.[338] In effect, her proposal aims to force directors and managers to act responsibly towards nonshareholder constituents by imposing new disclosure requirements on them.

Williams' proposal is the kind that would have particularly benefited from the historical perspective set out here. She does have excellent discussions of the development of the securities laws in the 1930s, and of proposals to reform reporting in the mid-1970s.[339] But her paper also suffers from unanswered questions, questions that would have been apparent against a backdrop of earlier proposals.[340] Two examples will suffice. First, following Berle, Williams assumes that corporations have concentrated power and that taming that power is the proper task of corporate law.[341] In making this assumption, she ignores criticisms of this

335. *See id.* at 1223–46.

336. *See id.* at 1282–87.

337. *See generally id.* (describing how new disclosures would fit within securities law).

338. *See id.* at 1293–96 (discussing "social accounting" and its positive effects on nonshareholder groups).

339. *See id.* at 1209–35, 1246–73 (discussing the underlying purposes of disclosure and prior reform efforts).

340. Williams's article, it must be noted, presents an array of unanswered questions, most clearly the question of why social accounting should be required if shareholders do not seem at present to be demanding it. The discussion above merely focuses on a couple of issues that could have been resolved had she paid heed to earlier forays at corporate social responsibility.

341. Williams, *supra* note 5, at 1294.

view offered by, among others, Milton Friedman and the nexus-of-contracts theorists of the corporation, who have contended that the corporation when properly viewed has little power other than what its constituents have ceded to it.[342] She presupposes corporations have disproportionate power and need to be tamed, but does not support this with the careful analysis that marked Berle or even Nader's work. Second, Williams' apparently neutral proposals smuggle in a specific social agenda. Social reporting, she hopes, will lead companies to do "more expensive things for their communities, their employees, and the long-term welfare of the company," including offer flextime and childcare.[343] But as David Engel pointed out twenty years before,[344] such proposals ask corporations to implement programs that government has not yet seen fit to provide, in effect asking corporate managers to use corporate funds to implement their own view of societal needs.[345]

Knowledge of the long debate over corporate social responsibility would have allowed Williams to frame answers for these objections to her proposals, and so strengthened her overall scheme for SEC-imposed corporate social transparency. As it is, not taking into account the past, she leaves unanswered the same questions that faced her predecessors.

B. Team Production

Awareness of the history of corporate social responsibility will also allow us to recognize genuinely innovative proposals in corporate law, as we can see when we look at Margaret Blair and Lynn Stout's *A Team Production Theory of Corporate Law*.[346]

In their article, Blair and Stout lay out a theory of corporate law based on the "team production" approach in economics.[347] To simplify slightly, team production occurs when production of a good requires the coordinated effort of several groups, and when the good produced cannot be easily apportioned among the contributing groups.[348] Blair and Stout argue that the corporation should be envisioned as such a team production, with its constituencies—managers, stockholders, employees—as the

---

342. *See supra* text accompanying notes 269–73, 257–62.
343. Williams, *supra* note 5, at 1295.
344. *See generally* Engel, *supra* note 254 (suggesting topics relevant to a cost-benefit analysis of corporate social responsibility).
345. *See supra* notes 279–81 and accompanying text.
346. Blair & Stout, *supra* note 5.
347. *See id.* at 249 (introducing the team-production approach).
348. *See id*. at 249 (discussing nonseparable apportionment among contributing groups).

contributing groups.[349] The way all these groups manage their interactions without shirking duties or employing other strategic behavior to seize a disproportionate share of the team's surplus, is by ceding control to a "mediating hierarch."[350] In the corporation, this hierarch is (or should be) the board of directors, which is then responsible for balancing the competing groups so that all stay happy and contribute their just share to the corporation.[351]

Blair and Stout are not just advancing an economic theory of the corporation, but a new theory of corporate law. In their telling, their proposal is not radical, for they claim that corporate law already recognizes this view of the corporation.[352] In the law, and contrary to popular belief, the board of directors is already charged not with maximizing shareholder value, but with balancing the competing demands of "team members" for the good of the corporation, and most of the time that is what boards actually do.[353] Shareholder primacy is an error of legal analysis.

The parallels with earlier work in corporate social responsibility are obvious. Blair and Stout differentiate the large, publicly held corporation from other business organizations, focusing on their structure and actions in a way reminiscent of Berle and Means's focus on America's largest corporations.[354] Their approach is quasi-reformist; they do not want to change the large corporation, but they do want to change the way scholars and (one suspects) directors understand it. The goal of their reform is for the board to acknowledge it has responsibilities to constituents other than shareholders, and that it manages the firm to balance the competing demands of all participants.[355] True, they attempt to accomplish this by proving that neither in law nor in fact do directors owe a special loyalty to shareholders, but the ultimate result of such a proof is to enable the board to better answer the demands of all the corporation's diverse constituents.[356] In this legal formulation, Blair and Stout bring E. Merrick

---

349. *Id.* at 253.

350. *See id.* at 320 (explaining that groups yield control to the mediating hierarch).

351. *See id.* at 281 ("[M]ediating hierarchs . . . balance team members' competing interests in a fashion that keeps everyone happy enough that the productive coalition stays together.").

352. *See id.* at 280–81 ("directors are trustees *for the corporation itself*").

353. *Id*.

354. Of course, Berle and Means really were concerned with the 200 largest firms, whereas Blair and Stout examined all publicly held corporations.

355. *See* Blair & Stout, *supra* note 5, at 289 (concluding directors ought to have obligations to all participants).

356. *See id.* (same).

Dodd's 1932 proposal, that directors be freed from fiduciary duties to shareholders, into the twenty-first century.[357]

Blair and Stout's article is not immune to criticism,[358] but seen in perspective it makes important advances on earlier debates on corporate social responsibility in at least two ways. First is Blair and Stout's conceptualization of the corporate board. In corporate social responsibility, a major thread from the 1930s to the 1990s has been that corporate directors be assigned duties to nonshareholder constituents of the corporation. So persistent has been the emphasis on board responsibility that ideas have been recycled to the point of staleness. Thus Berle in the 1950s adopted Dodd's position from the 1930s, and progressive scholars in the 1990s proposed to give boards new duties in a way reminiscent of Ralph Nader's 1970s plans. Blair and Stout reinvigorate this approach by drawing on economists' team production models to argue that not only should the board take into account demands of diverse constituencies (the perennial normative claim) but that it is already the board's legal and economic role to do so (the new descriptive claim).[359]

Second, and less appreciated by their critics, is that Blair and Stout open new avenues for research on corporate social responsibility by emphasizing the political nature of power within the corporation.[360] Corporate political power has been another perennial issue in discussions of corporate social responsibility, with scholars usually examining either the power a company had over workers and communities, or the power the company had in the political arena.[361] By depicting the board as a "mediating hierarch" over disputing constituencies within the corporation, Blair and Stout provide another way to understand politics and the

357. The authors discuss Dodd's work in a footnote, *see id*. at 303 n.138 (quoting Dodd, *For Whom*, *supra* note 4), though they never address the problem that came to disturb him: how a board, freed from responsibility to a single identifiable constituency, will be prevented from taking wealth for itself.

358. *See generally*, John C. Coats IV, *Measuring the Domain of Mediating Hierarchy: How Contestable Are U.S. Public Corporations?*, 24 J. CORP. L. 837, 838 (1999) ("Crucial questions remain, however, about the relevance to corporate law of firm-specific capital specifically and the 'mediating hierarchy' version of the TPM generally."); Millon, *New Game Plan*, *supra* note 17, at 1003 ("Although Blair and Stout offer some useful insight . . . I will suggest that they ultimately fail to refute [one] widely-held view . . . .").

359. Dodd, in the 1930s, and Berle, in the 1950s, made similar claims about the board's duties, but they were both advancing arguments about what the board's responsibilities should be in the future. Blair and Stout, in contrast, are arguing that it has *always* been the economic and legal role of boards of publicly held companies to balance the demands of different team members.

360. *See id*. at 325 (emphasizing political forces). *See* Blair & Stout, *supra* note 5, at 303 ("*case law interpreting the business judgment rule often explicitly authorizes directors to sacrifice shareholders' interests to protect other constituencies*").

361. Although as they note, a few other scholars have made similar points, notably Jack Coffee. *See id*. at 323 n.196 (describing corporations as unstable political coalitions).

corporation. As they point out, this allows conflicts between different constituencies in the corporation to be modeled as political, and also allows one a new understanding of how political change outside the corporation might change the internal dynamics of corporate governance.[362]

None of this is to say that Blair and Stout are correct in their team production approach to the corporation; here I am more concerned with what is new in their approach, than in what is right in it. My purpose is instead to suggest that new proposals for corporate social responsibility must be measured in light of earlier attempts at reforming the corporation. Especially given the cyclical nature of debates over corporate social responsibility, judging new proposals for corporate social reform requires that one know the history of earlier proposals. Those who do not know the history of corporate social responsibility will be doomed to repeat it.

V. CONCLUSION

In this article I have argued that the cycles of legal debates over corporate social responsibility have, since the 1930s, shared deep similarities despite superficial differences. All the separate debates have (1) presupposed that the problems created by business are really problems created by this nation's large publicly held corporations, (2) aimed to reform those corporations, rather than to eliminate them, and (3) seen the imposition of new duties towards nonshareholder constituents on directors and officers as the best way to make corporations answerable not just to shareholders, but to the wider society. To be sure, each debate has also differed from its predecessors and successors, but chiefly in the problems they profess to tackle. As this article stated earlier, the problems change; the solutions remain the same. The result has been an often-stale scholarly critique of corporations as each new cycle of debate recapitulates debates in the past, and as ideas are unwittingly recycled with little awareness of their predecessors, much less why they were rejected thirty (or even seventy years) before.

This is a shame, for the history of corporate social responsibility is of more than historical interest. Corporations remain today, as they were in the 1920s, the most powerful nongovernmental institutions in America. In innumerable ways they shape the nation's politics and culture, and the lives of their employees and consumers. They create great wealth and

362. *See id.* at 323–27 (explaining how changing political forces affected shareholders' bargaining power).

opportunities, but often deliver them unevenly; they frequently use their power in ways that benefit shareholders and managers, but harm the rest of us. From time to time we are reminded of this, when investors discover their money has disappeared in the collapse of a stock-market bubble, employees wake to find their 401(k) plans are worth nothing, or shareholders discover their firms have been looted by self-serving executives.[363] The task of ameliorating the influence of corporations, and of channeling and limiting their power, should be of concern to all of us. This article has tried to show why past attempts to impose social duties on corporations have failed, but one of its goals has been to revitalize the debate as well. Corporate social responsibility is a vital issue for today, and it should not remain trapped in the past.

363. The literature on all these developments is still being written, but for more on them see JOHN CASSIDY, DOT.CON: THE GREATEST STORY EVER SOLD (2001) (discussing the history of the internet bubble); PETER C. FUSARO & ROSS M. MILLER, WHAT WENT WRONG AT ENRON (2002) (discussing Enron's collapse); or the business pages of the *Wall Street Journal*, *Financial Times*, or *New York Times*.