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Abstract: Adolph A. Berle and Gardiner C. Means' *The Modern Corporation and Private Property* is one of law's undisputed canonical texts. Its 75th anniversary is an occasion both to reassess its legacy and perhaps to rework its insights. Although Berle and Means' work was intended to redirect the governance of corporate affairs away from furthering private cupidity and towards advancing public policy, their enslaving insights have done more harm than good; they have tended to reinforce the primacy of private cupidity or, perhaps more accurately, allowed subsequent theorists to prefer the pursuit of private cupidity by equating it with the development of public policy. This is not only unfortunate, but also unnecessary. Although Berle and Means' *The Modern Corporation* forms the bedrock of the prevailing paradigm in corporate law and governance, it also contains some very suggestive materials from which to construct an alternative and more democratic way of proceeding which actually subverts and transforms the established model. In this essay, therefore, I want both to celebrate *The Modern Corporation*, but also to lament the enduring influence of its received understanding on corporate law scholarship and practice.

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**PUBLIC POLICY AND PRIVATE CUPIDITY:
BERLE AND MEANS RE-VISIONED**

Allan C. Hutchinson*

*"The Berle-Means corporation...is an adaptation, not a
necessity."*

Mark Roe¹

The seventy-fifth anniversary of the publication of Adolph A. Berle and Gardiner C. Means' The Modern Corporation and Private Property in 1932 will soon be upon us. This classic work is universally acknowledged as one of law's canonical texts. While it has aptly been described as "arguably the most influential book in U.S. business history,"² its importance is not merely as an historical curiosity: it has remained a mainstay of corporate law

* Distinguished Research Professor and Associate Dean (Research), Osgoode Hall Law School, York University, Toronto. I am grateful to Michael Abdelkerim, Stephanie Ben-Ishai, Daved Muttart, Lisa Philipps, Poonam Puri, Paul Saguil, Tony Vanduzer, John Cioffi, and Peer Zumbansen for their critical comments and helpful suggestions. I am also grateful to participants in seminars and workshops at the universities of Western Ontario, Queens, Ottawa, Windsor, Victoria, Boston, British Columbia, Toronto and Harvard.

¹ MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE 286-87 (1994).

² Peter Drucker, Reckoning with the Pension Revolution, HARV. BUS. REV. 106 at 114 (March/April 1991). In a similar vein, it has been said that "no field of American law has ever been so totally dominated by one work as the corporation law area by the Berle and Means classic." Henry G. Manne, Intellectual Styles and the Evolution of American Corporate Law in ECONOMIC IMPERIALISM: THE ECONOMIC APPROACH APPLIED OUTSIDE THE FIELD OF ECONOMICS 219 at 223 (Gerard Radnitzky and Peter Bernholz eds. 1987).

and scholarship up to the present day. While its detailed analysis of corporate governance and the particulars of its reform proposals have become less important over time, it still exerts extensive conceptual influence. The fact that it is no longer referenced as frequently is less an indication of its dated quality and more a testament to its foundational status. Indeed, it would be no exaggeration to report that, as befits a book of its stature, The Modern Corporation continues to provide the general intellectual framework within which much traditional thinking about corporate governance in both law and business takes place: this is as true for the status quo's defenders as well as its detractors. It is clear, therefore, that any serious effort to appreciate, let alone transform, the theory and practice of contemporary corporate governance must pay close and critical attention to The Modern Corporation.

Recent events in the corporate world have underlined the urgency of attending to the conceptual foundations of present and future practice. This is not only because of the scandals and calamities which have occurred, but also because of the enacted reforms' relative failure to address the deeper sources of the crisis which face corporate governance: the causes and the reputed cure are part of the same informing paradigm.³ Although theoretical posturing is considered indulgent by the tough-minded sensibilities of corporate actors, the current practice of corporate governance is in thrall to a very partial cluster of theoretical premises: "practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist."⁴ Although Berle and Means' work was intended to

³ Some commentators, of course, maintain that those reforms went too far. See, for example, Roberta Romano, The Sarbanes-Oxley Act and the Making of Quack Corporate Governance, 114 YALE L.J. 1522 at 1529 (2006).

⁴ JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY ch.24 (1936). He went on to conclude that "madmen in authority, who hear voices in the air, are distilling their frenzy from some

redirect the governance of corporate affairs away from furthering private cupidity and towards advancing public policy, their enslaving insights have done more harm than good; they have tended to reinforce the primacy of private cupidity or, perhaps more accurately, allowed subsequent theorists to prefer the pursuit of private cupidity by equating it with the development of public policy. This is not only unfortunate, but also unnecessary. Although Berle and Means' The Modern Corporation forms the bedrock of the prevailing paradigm in corporate law and governance, it also contains some very suggestive materials from which to construct an alternative and more democratic way of proceeding which actually subverts and transforms the established model. In this essay, therefore, I want to celebrate The Modern Corporation, but also to lament the enduring influence of its received understanding on corporate law scholarship and practice. If Berle and Means are to avoid becoming 'defunct' and remain relevant to contemporary ideas and practice, it must be more as a conceptual corrective and less as a traditional prop.

I. 1932 AND ALL THAT

Although Berle and Means' work had a prescient quality to it, The Modern Corporation was very much a product of the 1920s. The first quarter of the Twentieth Century had witnessed a massive and rapid surge in America's capital economy. Along with this rise in economic development and prosperity, there was a shift in production from small businesses to huge conglomerates; the accumulation of vast fortunes and the concentration of corporate power in elite hands were hallmarks of the period. However, culminating in the stock market crash of 1929 and the Great Depression, this era of unfettered capitalism was beginning to

academic scribbler of a few years back. I am sure that the power of vested interests is vastly exaggerated compared with the gradual encroachment of ideas. Sooner or later, it is ideas, not vested interests, which are dangerous for good or evil."

collapse under its own burgeoning weight. By the late 1920s, the juggernaut of corporate organisation was being more closely scrutinised and its pervasive influence challenged. In what began as a research project for the Social Science Research Council of America, Columbia law professor Adolph A. Berle, Jr. sought out an economist with a statistical bent to work with so as to produce a more empirical and technical understanding of corporate development: he was paired up with Gardiner C. Means. Their unusual collaboration sought to appreciate the corporation as a social institution as well as an economic organisation. This huge undertaking was projected to be “the work of a lifetime” and The Modern Corporation was to be the opening volume “intended primarily to break ground on the relation which corporations bear to property.”⁵ As such, it was meant to be the first and not the last word on the corporation as a human institution.

Mean’s extensive mapping of the contemporary corporate terrain was novel and revealing. In an examination of the 200 largest non-financial corporations in 1929, he found that in only 11% of the firms did the largest owner hold a majority of the firm’s shares. Further, establishing ownership of 20% of the stock as a threshold minimum for control, it was discovered that 44% of those firms had no individual who owned that much of the stock. These 88 firms which were classified as management-controlled also managed to account for 58% of the total assets held among the top 200 corporations. As analysed by both Berle and Means, the upshot of these statistical insights was that there were two significant and

⁵ Preface (1932) in ADOLPH A. BERLE, JR. AND GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY liii (Rev. ed. 1968) (hereinafter all page references are in parenthesis in the text). For two very different approaches to the history of the modern corporation, see JOHN MICKLETHWAIT AND ADRIAN WOOLDRIDGE, THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA (2003) and JOEL BAKAN, THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER (2004).

pressing features to be addressed—the growing concentration of power within a relatively small number of large corporations and the increasing dispersal of stock ownership resulting in a widening gulf between share ownership and executive control within those corporations. While each trend was important in itself, their combination persuaded Berle and Means that a corporate revolution had occurred and that a new frame of reference was required in order to appreciate it fully and deal with its legal and social ramifications. However, although the fact of growing corporate power provided the informing backdrop, the major thrust of their report was the struggle to come to terms with the separation of ownership and control. Indeed, this characterization of the challenge became “the master problem for research” in corporate law.⁶ The growing concentration of corporate power was more a contextual concern than a central problematic, presumably to be explored more fully and directly in a later, but never realised volume.

In examining the organisational implications of the historical shift from family-owned firms to large widely-held corporations in which there was separation of ownership and control, Berle and Means continued, as they refined, a traditional view on corporate governance. They insisted quite straightforwardly that corporations ought to be run by the management whose powers were to be held in trust for stockholders as the sole beneficiaries of the corporate enterprise. As the separation between share ownership and managerial control was becoming increasingly wide, they worried about “the concentration of economic power” creating “empires” which permit “a new form of absolutism” to be exercised by “the new princes” and “economic autocrats” of controlling management (116). In an arresting phrase, they noted that “a Machiavelli writing today would have very little interest

⁶ Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923 at 923 (1984).

in princes, and every interest in the Standard Oil Company of Indiana.”⁷ Indeed, they were so concerned about the power of management that they compare the board of directors to “a communist committee of commissars” and cast the director as someone who “more nearly resembles the communist on mode of thought than he does the protagonist of private property” (245). In combating such disturbing consequences of the shift in corporate holdings, Berle and Means maintained that the primary role of corporate law was to ensure that “all powers granted to a corporation or the management of a corporation, or to any group within the corporation, ... are necessarily and at all times exercisable only for the ratable benefit of all the shareholders” (220). Because it is the liquidity of their property which most concerns shareholders, not their involvement in the corporation’s management, corporate law could rightly arrogate to itself the task of acting as general overseers of management and subscribe to the commitment that “a corporation should be run for the benefit of its owners, the stockholders” (293).

For Berle and Means, therefore, the task for corporate law was to work out how best to shape corporate law so that it could respond effectively and efficiently to the intricate and operational consequences of the divide between diffuse owners and self-serving managers. Put more bluntly, their main focus was upon ensuring that managers do not ignore the absentee owners and line their own pockets at the expense of the shareholders. Although retaining a continuing, if partial, faith in the market as a means to discipline management and to protect shareholders’ expectations, they pinned their reform hopes on judicial intervention to discipline managers in the name of shareholder confidence. With varying degrees of success, this was to be achieved by mandating

⁷ A.A. Berle, Jr. and Gardiner C. Means, Corporations and the Public Investor, 20 AM. ECON. REV. 54 at 71 (1930). For an excellent biographical account, see JORDAN A. SCHWARZ, LIBERAL: ADOLF A. BERLE AND THE VISION OF AN AMERICAN ERA (1987).

the primacy of shareholder voting in all important corporate decisions and the imposition of fiduciary duties on management (i.e., demanding that managers place the corporation's interests ahead of their own). In effect, they gambled on the willingness and suitability of courts to fashion and police a series of strict and equitable obligations such that "corporation law becomes in substance a branch of the law of trusts" (242).

However, it is Berle and Means' framing of the ownership/control problem as the central dynamic of corporate law and organisation that is the main legacy of The Modern Corporation. Notwithstanding the almost universal acceptance in the ensuing 75 years of the accuracy of their diagnosis of the ills that afflict corporate governance, agreement with their descriptive observations has not been matched by implementation of their prescriptive recommendations. While their mode of proceeding has had some measure of influence, it has not carried the day; they are something of "a policy relic."⁸ Its incorporation into corporate law has been half-hearted at best and its capacity to restrain corporate malfeasance has clearly been lacking in practical effect.

⁸ William W. Bratton, Berle and Means Reconsidered At the Century's Turn, 26 J. CORP. L. 737 at 739 (2001). Berle and Means' concerns about the owners/managers divide was echoed by critics of the democratic process's operation more generally. See JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY (1942) and SEYMOUR MARTIN LIPSET, Introduction in ROBERT MICHELS, POLITICAL PARTIES 15-39 (1962). However, not all commentators saw the disjuncture as problematic, but viewed the greater dispersal of capital as a harbinger of 'people's capitalism' and greater democracy. See Carl Kaysen, The Social Significance of the Modern Corporation, 47 AM. ECON. REV. 311 (1957). See generally Mark Mizruchi, Berle and Means Revisited: the Governance and Power of Large U.S. Corporations, 33 THEORY AND SOCIETY 579 (2004). For a very different account of corporate history and politics, see Dalia Tsuk, Corporations Without Labor: The Politics of Progressive Corporate Law, 151 U. Pa. L. Rev. 1861 (2003). She notes that "by focusing on entrepreneurs and investors, they helped legitimize a conception of value or wealth that was detached from work and labor." Id. at 1868.

More recently, commentators have turned to the market by way of possible take-overs and performance-based compensation as further modes of discipline such that inefficient managers would be replaced by profit-seeking shareholders.

In large part, the relative failure of Berle and Means' reform proposals is because they could not or would not move beyond the 'private property' logic of the traditional paradigm; profit maximization and the protection of shareholders' ownership entitlements were still the order of the day. Their support for governmental and judicial intervention was premised on the limiting premise that these official agencies would act as public surrogates for private shareholders' control. In anointing managers as the "princes of industry" (4) and recommending that they must serve the community as a whole by ordering their affairs "on the basis of public policy rather than private cupidity" (313), there was the distinct whiff of *noblesse oblige* around even relatively liberal boardrooms in matters of corporate governance. Indeed, with their the commitment to the idea that shareholders are 'the owners of the corporation', Berle and Means offer a lament for the lost 'active' shareholder who is left with "a mere symbol of ownership" (65). After all, the full title of their book is The Modern Corporation and Private Property. For them, a private property regime provides the best incentive to ensure that property is used efficiently in the sense that "the quest for profits will spur the owner of industrial property to its effective use" (9). Accordingly, the central thrust of Berle and Means' reform proposals was to close the gap between owners and management as much as the legal imposition of equitable duties can do so as to emulate or approximate the ideal situation of owner-managers. Their's was a less of a break with the tradition of 'shareholder primacy' and more of a continuance of it. There may well have been a 'corporate revolution' by 1932, but Berle and Means were far from revolutionary in their response.

II. CHRONICLE OF AN END FORETOLD

Much has changed since 1932 in the world of capitalist economies and corporate organisation. If the forces of 'concentration' and 'separation' were in play in Berle and Mean's day, they have been supplemented by others and become even more powerful and relentless today—institutional investors, take-overs and mergers, financial entrepreneurship, and the like. Yet, if Henry Hansmann and Reinier Kraakman are to be believed, the last few years have witnessed 'the end of corporate history'. Echoing the apocalyptic pronouncements of Francis Fukuyama from a decade earlier, they declaimed in 2001 that "the basic law of corporate governance—indeed, most of corporate law—has achieved a high degree of ... continuing convergence toward a single, standard model ... [and] there is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value."⁹ This seemed wishful thinking on the part of Hansmann and Kraakman; their reasoned analysis was leavened by ideological advocacy. At best, it can be reported that the mainstream of corporate lawyers and commentators have settled

⁹ Henry Hansmann and Reinier Kraakman, The End of History for Corporate Law, 89 GEO. L.J. 439 (2001). No mention is made of Francis Fukuyama who (in)famously argued that the world had beaten a path to American liberal democracy on the unfolding carpet of a Universal History whose woof and warp comprise the motifs of political individualism and economic privatism. While it is incompletely implemented and capable of further refinement, the ideal of liberal democracy marks the final end of History: "the modern liberal democratic world ... is free of contradictions" and "at the end of history, there are no serious ideological competitors left to liberal democracy." F. FUKUYAMA, THE END OF HISTORY AND THE LAST MAN 48 (1992). For a powerful critique of this viewpoint, see J. DERRIDA, SPECTERS OF MARX: THE STATE OF THE DEBT, THE WORK OF MOURNING, AND THE NEW INTERNATIONAL 56, 69 and 78 (P. Kamuf trans. 1994). Even Fukuyama himself has had serious second thoughts about his original 'end of history' thesis. See AMERICA AT THE CROSSROADS: DEMOCRACY, POWER, AND THE NEO-CONSERVATIVE LEGACY (2006).

upon 'shareholder primacy' as the preferred normative goal. This is less because it has achieved an objective and universal status, but more because few are prepared or have sufficient incentive to resist the economic and political clout of those championing its contemporary hegemony. It may well be a descriptive fact that "governance practice is largely a matter of private ordering",¹⁰ but that does not mean that it should be accepted as a prescriptive recommendation. Yet, even in the few years since 2001, events in the corporate world have not only confounded Hansmann and Kraakman's optimism, but have highlighted how fragile and defective the reliance on 'shareholder primacy' has become.

Despite these end-of-history prognostications, the fact remains that Berle and Means' account of the problem to be solved still informs most corporate law thinking. Almost all scholars and commentators are still in the grip of a traditional mind-set in which the interests of shareholders are paramount: 'shareholder primacy' remains the guiding light of corporate law and scholarship. However, what has changed over the past 75 years is that there have been varied and umpteen efforts to explain and rationalize this informing mandate so that it can have the largest possible claim to normative legitimacy. Along with a continuing reliance on the 'private property' rationale, there are three other

¹⁰ *Id.* at 455. For a more interesting spin on the 'historical progress' of corporate law scholarship, see Brain Cheffins, [The Trajectory of \(Corporate Law\) Scholarship](#), 63 *CAMB. L.J.* 456 (2004). While there are strong pressures towards convergence, the history and political economy of comparative corporate governance strongly suggests that there is no particular magic to any particular mode of corporate organisation and structure. Advanced economies have managed to develop and grow by reliance on a variety of systems of corporate governance; there is no one size that fits all or, as importantly, no one size that necessarily fits best. See Ronald Dore, William Lazonick, Mary O'Sullivan, [Varieties of Capitalism in The Twentieth Century](#), 15 *OXFORD REV. ECON. POLICY* 102 (1999).

dominant arguments relied on by contemporary theorists to explain and support the continued reliance on 'shareholder primacy' as the preferred rationale for corporate law and governance; they are 'market discipline', 'social wealth', and 'shareholder democracy'. Each of them is deeply flawed and unconvincing; there has been much heat, but little light.

A. PROPERTY OWNERSHIP

The defence of 'shareholder primacy' which runs most directly from Berle and Means' ideas is the claim that those who own the corporation are entitled to have the corporation operate in their interests and receive any resulting profits. While this still has its supporters, it has lost much of its argumentative appeal.¹¹ The 'private property' rationale misconstrues both the particular import of owning shares in a corporation and the general consequences of property ownership. While there can be little doubt that shareholders have property rights over shares which can traditionally be treated as ownership, it does mean not that they, therefore, have similar ownership rights over the corporation. For instance, the fact that I buy a lottery ticket does not mean that I own part of the lottery corporation. While I do own the lottery ticket and have certain traditional property rights which accompany that (e.g., to destroy it or give it to someone else), it does not mean that my relation to the lottery corporation

¹¹ See Symposium, Corporations and Private Property, 26 J. L. & ECON. 235 (1983). For a sampling of the theorists who champion 'shareholder primacy', see Jonathon Macey, An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties, (1991) 21 STETSON L. REV. 23 ; Stephen M. Bainbridge, In Defense of the Shareholder Wealth Maximization Norm: A Reply to Green, 50 WASH. & LEE L. REV. 1423 (1993); Mark Roe, The Shareholder Wealth Maximization Norm and Industrial Organization, (2001) U. PA. L. REV. 2063; W. Allen, J. Jacobs and L. Strine, The Great Takeover Debate : A Mediation on Bridging the Conceptual Divide, (2002) 69 U. CHI. L. REV. 1067 at 1075; and Lucian Bebchuk, The Case for Increasing Shareholder Power, 118 HARV. L. REV. 833 (2005).

is one of owner. While shareholders have various rights of 'ownership' (i.e., to sell stock, vote proxies, sue directors, receive certain information, get residual pay-outs from corporation's liquidation, etc.), it is not convincing to assert that shareholders own the corporation in the same way that people own their cars or houses. Moreover, even if it is conceded that shareholders are to be treated as 'the owners of the corporation', it by no means follows that they are entitled by virtue of that status to have the corporation run entirely in their sole interests. Whatever property ownership was originally considered to entail, the claims of property owners are no longer thought to be or enforced as if they were unreserved and trumped all other competing claims and interests: the rights of property owners are fundamental, but not absolute.¹²

The 'private property' argument tends to beg the very question which it is intended to answer. In a democracy, private property has its important place, but it is not the foundational source of all other rights and no longer, if it ever was, the right against which all other claims are to be measured. Even when it comes to owning real property (e.g., a house or land) or personal property (e.g., cars or books), there is no entitlement that the owners' interests and desires will always be given precedence over others' interests; there are a whole host of codes, regulations, rules and conventions which curtail the freedom and entitlements of owners. Indeed, corporate law itself is chock full of examples which contradict the stark idea that shareholders 'own' the corporation—shareholders can be restricted as to whom they sell

¹² S. BOWLES AND H. GINTIS, *DEMOCRACY AND CAPITALISM: PROPERTY, COMMUNITY, AND THE CONTRADICTIONS OF MODERN SOCIAL THOUGHT* xi (1987). (It is entirely puzzling why "the rights of ownership prevail over the rights of democratic citizenry in determining who is to manage the affairs of a business enterprise whose policies might directly affect as many as half a million employees, and whose choice of product, location, and technology touches entire communities and beyond.")

their shares, how they vote for management, when they must offer to buy others' shares, etc. Furthermore, in an economy of relatively diffuse shareholding, many shareholders are decidedly passive by preference and have no interest in being involved in the management of the corporations in which they invest; the self-image of the average investor is not one of corporate owner. Accordingly, as in almost all other areas of law, therefore, corporate shareholding does not comprise a black-and-white set of fixed entitlements, but is a very colourful, highly-shaded and dynamic process. It is now accepted that property ownership is a matter of social calculation in which individual interests are measured with and against other people's interests.¹³ As the state creates and gives legal identity to corporations, it is for the state or the public to determine who gets ownership over it and what that ownership entails. As such, the ownership of a share will not convey any necessary rights on its owner nor will it necessarily amount to ownership of the corporation from which the shares arise. As with all property ownership, shareholding will consist of a bundle of rights whose content and extent will not be a natural given, but will vary over time and across contexts.

B. MARKET DISCIPLINE

The most sweeping defence of 'shareholder primacy' comes from economics-inspired scholars. The world of corporate governance is considered to be an informal institutional venue for self-interested and motivated entrepreneurs to enter a series of consensual deals to advance their own private economic interests. Although the market is far from being ideal or even optimal in its operations, it is touted as the preferred or least-worst alternative through which to co-ordinate productive endeavours and meet the mixed needs of its participants. From such a standpoint, the public regulation of

¹³ J. Waldron, Property Law in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 7 (D. Patterson ed. 1999) and THE RIGHT TO PROPERTY (1986).

corporate governance is considered to be merely facilitative rather than directive. Corporate actors are to be left to exercise their private discretion in determining what is best for particular corporations and, by virtue of that, the public interest: the market will fill the gaps and exact a penalty on the deviant few who engage in dubious activities and unreasonable practices.¹⁴ This competitive market behaviour is supposed to solve the separation of ownership and control by a variety of disciplinary devices—minimizing agency costs (i.e., keeping managers in line with shareholder interests), containing the ever-present threat of takeovers, responding to competition among firms for successful managers, monitoring share prices in the stock market, etc. Corporate law clearly favours the interests of shareholders over others because shareholders are more vulnerable as they are less able to find alternative outlets in the market for their services; they risk all their equity in the corporation's ventures and therefore are entitled to greater protection by being beneficiaries of the directors' fiduciary duty over the fate of the corporation.

However, the confidence placed in the capacity of market forces to fulfill these onerous responsibilities seems extravagant and entirely suspect. The 'great tragedy' of economics, like so many other academic disciplines, is that it is one more beautiful theory brought to its knees by ugly facts—it is reductionist in its insistence in viewing all social conduct in terms of market behaviour; it manages, by giving everything a monetary value, to overvalue and undervalue much of human interaction; its leading concepts (voluntariness, transaction costs, etc.) are theoretically vague and practically indeterminate; it is ethically bankrupt in that it takes all personal preferences at face value and refuses to distinguish among them; it is self-serving in that it treats all

¹⁴ F. EASTERBROOK AND D. FISCHER, *THE ECONOMIC OF CORPORATE LAW* 34 (1991). The 'nexus of contracts' idea is attributable to M. Jensen and W. Meckling, *Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

personal preferences as independent of the social or market system in which they are generated and satisfied; it ignores the distinction between willingness to pay and ability to pay; and it celebrates individual autonomy over communal attachment.¹⁵

Any plausibility that the market can operate as a disciplinary technique through which to advance the larger public good is confounded by the sheer size and influence of today's corporations. These massive institutions begin to serve their own interests at the expense of everyone else's and distort rather than personify the entrepreneurial spirit of a market economy. Even Berle and Means accepted this, although they were not prepared to act fully upon it.¹⁶ Accordingly, although many scholars preach the gospel of free markets, the cruel irony is that corporations are one of the greatest threat to the operation of free markets; competition is attenuated and limited to a few large players. As such, corporations have become super-citizens with enormous powers and influence that rival those of the state and the latter-day church, but with much less popular legitimacy and social accountability. Rather than be the justificatory underwriter of corporate institutions and enterprise, the validating operation of today's market is effectively hobbled by the continuing involvement of today's mega-corporations.

SOCIAL BENEFIT

A third justification for 'shareholder primacy' is that it is the best way to ensure that corporate operations and profits work to the benefit of everyone in society: it is a 'on a rising tide, all boats will rise' defence. Although it might appear paradoxical, it is argued that, even though " interests of shareholders deserve no greater

¹⁵ Robert Ashford, The Socio-Economic Foundation of Corporate Law and Corporate Social Responsibility, 76 TUL. L. REV. 1187 at 1198 (2002).

¹⁶ See infra at pp. ** .

weight in this social calculus than do the interests of any other members of society, there is “as a consequence of both logic and experience, ... convergence on a consensus that the best means to this end ... is to make corporate managers strongly accountable to shareholder interests and, at least in direct terms, only to those interests.”¹⁷ In short, it is contended that such that the more wealth generated in a society, the better off or more satisfied the whole of society will be. By holding corporate powers in trust for shareholders, it will be the same as holding corporate powers in trust for the entire community: any efforts (and this is proportionately true for the efforts of corporations) which contribute to the increased wealth of a society are to be applauded. In short, maximizing profits and increasing share prices will not only benefit everyone, but corporate profit-making and social service, far from being at odds with each other, can be understood as mutually-reinforcing aspects of the same enterprise.

Despite its ingenious nature, this ‘rising tide’ defence of the desirability of prioritizing the pursuit of corporate profits in the social scheme of things is as unconvincing on second look as it is on first glance: it is unsupported by ‘logic’ and no evidence of ‘experience’ is offered. There is surely no reason to accept at face value that, if a corporation declares profits of \$1 million, social wealth is increased whether that profit is all distributed to one person, shared among the shareholders at large, spread among the various stakeholders, or distributed evenly among society. Economic growth will not in itself ensure that a society’s economic health, let alone its broader democratic or social health, is rude or improving. Indeed, many small boats are sinking or capsizing in this economic flow; their ability to stay afloat, let alone make progress, might well be in real danger. Accordingly, while a society’s overall economic growth is important and telling,

¹⁷ Henry Hansmann and Reinier Kraakman, The End of History for Corporate Law, 89 GEO. L.J. 439 at 440 (2001).

it is not the sole or most important indicator of a society's general condition and improvement. That being the case, there is no self-evident reason to accept that an increase in its Gross Domestic Product is, without more, a consistent or convincing indication that a society is better off.¹⁸ Indeed, an increasing GDP may actually exacerbate social divisions. While an increase might usually be better than a decrease, the circumstances of the increase or decrease and the distribution of those gains or losses will need to be measured against a broader and less exclusively economic standard. If some smaller or less sturdy boats sink before the increasing tide, then that is the price of progress. But this response seems crass, at best, because it is difficult to take satisfaction in society's overall increased wealth if there are still people who live in relative poverty and destitution.

D. SHAREHOLDER DEMOCRACY

The final rationale for 'shareholder primacy' is that it actually facilitates the achievement of democratic control over corporate activities and governance. The basic assertion is that, whatever the historical record suggests, the present distribution of shareholding is so diffuse and extensive that large corporations are actually controlled by society at large: more Americans own stock today than ever before. After all, the United States has one of the most widely-held corporate economies in the world with only about 20% of corporations being owned or controlled by a single shareholder.¹⁹ This developing trend is considered to have been

¹⁸ BRANKO MILANOVIC, *WORLDS APART: MEASURING INTERNATIONAL AND GLOBAL INEQUALITY* (2005). For instance, the financial wealth of the top one percent of US households exceeds the combined wealth of the bottom 95 percent. See J. GATES, *DEMOCRACY AT RISK: RESCUING MAIN STREET FROM WALL STREET – A POPULIST VISION FOR THE 21ST CENTURY* (2000).

¹⁹ See Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, *Corporate Ownership Around the World*, 54 J. FIN. 471 (1999).

reinforced by the increasing role of institutional shareholders, like mutual funds and pension funds, which enable ordinary investors to participate in corporate affairs and exert their aggregated influence in a more effective manner. Indeed, some have commentators have gone so far as to suggest that plutocratic rule is at an end and that the age of “pension fund socialism’ is now upon us.²⁰

However, while these claims have some statistical credibility, their deeper significance is exaggerated. First, although more Americans hold more stocks than ever before, their distribution is heavily skewed—the bottom three-quarters of households own less than 15% of all stock, barely one-third hold more than \$ 5,000 in stock, and almost a half own no stock at all.²¹ This is very soft ground on which to support the claim that ‘shareholder

²⁰ PETER F. DRUCKER, *THE UNSEEN REVOLUTION: HOW PENSION FUND SOCIALISM CAME TO AMERICA* (1976). Of course, this turn of events is not greeted with glee by all. The major rationale for an increased and active voice by institutional investors is that it will “increase corporate efficiency and value.” Bernard Black, *Agents Watching Agents: The Promise of Institutional Investor Voice*, 39 *UCLA L. REV.* 811 at 887 (1992).

²¹ David Callahan, *The Myth of the Populist Stock Market* (January 8, 2004) *CHRISTIAN SCI. MONITOR*. Most Americans have more debt on their credit cards than money in their mutual funds. Between 1989 and 1997, 86% of stock market gains went to just the top 10% of households. these figures reflect the deeper inequality which pervades American society. In 2002, it was estimated that the United States’ Gini coefficient (a measure of relative income inequality) to be 0.394. Thus, income inequality in the United States is higher than in France (0.326), Belgium (0.246), Italy (0.306), Portugal (0.348), Greece (0.320), the Netherlands (0.311), Norway (0.247), Canada (0.310), Switzerland (0.324), the UK (0.354) and Australia (0.354), to name a few. Branko Milanovick and Shlomo Yitzhaki, *Decomposing World Income Distribution: Does the World Have a Middle Class?*, 48 *REVIEW OF INCOME AND WEALTH* 155 (2002). Also, between 1979 and 1989, the top 1% doubled its wealth from 22% to 39 % of the overall wealth and had captured 70% of all earnings growth since the mid-1970s. See KEVIN PHILLIPS, *WEALTH AND DEMOCRACY: A POLITICAL HISTORY OF THE AMERICAN RICH* (2002).

democracy' is alive and well. Not only does the unequal distribution of share-ownership fatally impair such claims, but the fact that most of these investors remain passive does little to bolster the claim. Indeed, the incidence of institutional investment has actually exacerbated the divide between ownership and control. Even greater power is concentrated in a small cadre of investing professionals who have enormous control over the market and seem intent on exercising it in order to aligning themselves closer to management so as to obtain further business and advance their own interests. For instance, a recent study reveals that mutual funds have a definite tendency to back executive-pay proposals and to oppose shareholder attempts to rein in such excesses: mutual funds support executive plans over shareholder opposition in almost 3 out of 4 instances.²² Accordingly, while ensuring a more robust check on corporate management's self-serving tendencies is not unimportant, it does not address the broader concerns of corporate governance in a democratic society. Not surprisingly, the advancement of private interests has been the primary goal of institutional investors; the public interest has taken a distinct second place or has been reduced to much the same as the aggregate maximization of private interest. There is, at best, a faux-democracy at work in contemporary corporate governance.

²² American Federation of State, County and Municipal Employees, AFL-CIO and The Corporate Library, Enablers of Excess: Mutual Funds and The Overpaid American CEO (March 2006).

III. TOWARDS A NEW AGE

If there is to be an end to corporate history, it is not the one that Hansmann and Kraakman reported or predicted. To paraphrase Winston Churchill, the first decade of the Twenty-First Century is not the end of corporate history, but it might well be the beginning of the end of one phase of corporate history and the beginning of another.²³ Although we have entered the third millennium, society's most important and influential institution remains decidedly Victorian, if not occasionally feudal, in its orientation and organisation. A small and unrepresentative elite of controlling shareholders, directors and management effect a command-and-control regimen over the lives and fates of countless people. Yet, there are now some encouraging indications that there is a nascent shift in public opinion and forbearance. Not only are people beginning to lose patience with corporations, but there are also some emerging efforts to rein in their power. It is important to seize this moment of institutional disaffection and turn it to greater democratic and transformative effect. If there is a crisis, it is as much one of political will as it is of normative decrepitude. As the Italian philosopher Antonio Gramsci put it, "the crisis consists precisely in the fact that the old is dying and the new cannot be born; in this interregnum a great variety of

²³ Winston Churchill, Speech at the Lord Mayor's Luncheon, Mansion House, London, November 10, 1942 ("This is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning."). For a sampling of the theorists who reject 'shareholder primacy', see Ronald M. Green, Shareholders as Stakeholders: Changing Metaphors of Corporate Governance, 50 WASH. & LEE L. REV. 1409 (1993); PROGRESSIVE CORPORATE LAW (Lawrence E. Mitchell ed. 1995); David Millon, Theories of the Corporation, [1990] DUKE L.J. 201; Lyman Johnson, The Delaware Judiciary and the Meaning of Corporate Life and Corporate Law, (1990) 68 TEXAS L. REVIEW 865; W. Leung, The Inadequacy of Shareholder Primacy : A Proposed Corporate Regime that Recognizes Non-Shareholder Interests, (1997) 30 COL. J. OF LAW AND SOC. PROBS. 589; and G. Crespi, Rethinking Corporate Fiduciary Duties: The Inefficiency of the Shareholder Primacy Norm, (2002) 55 S.M.U. L. REV. 141.

morbid symptoms appears."²⁴ Indeed, the past few years have witnessed 'a great variety of morbid symptoms' in regard to corporate governance.

The Enron saga and particularly the institutional response to it are probably most illustrative of this pathological condition. Indeed, the beleaguered company's accounting scandals and the legislative response by way of the Sarbanes-Oxley Act of 2002 (SOX) are both decidedly derivative of and trapped within the paradigm of shareholder primacy; they present an indictment of the whole conceptual basis for corporate governance. As a reasonably stern response to shaken investor confidence in financial performance, SOX contains a series of measures intended to enhance corporate responsibility, improve financial disclosure and combat corporate and accounting fraud. To ensure more reliable processes of control, disclosure and auditing of financial results, rules are directed to improving the efficiency of audit committees, the independence of outside auditors, the implementation of internal procedures, and the like. In particular, senior executives of large publicly-traded corporations are required to validate the legitimacy of their performance reports by signing-off on them. Most of these measures are mandatory in nature and impose monetary and criminal penalties for violations, although the provisions about adopting a code of ethics for the CEO and senior financial officers only require that corporations disclose whether or not they have such codes and, if not, why not. From within the shareholder-centred traditional paradigm, SOX is a relatively robust initiative and, as long as its rigorously enforced, will have some important and beneficial effects.

Yet, while the legislative reforms might or might not improve auditing and budgetary controls, there was a singular failure on the part of regulators to appreciate that it was the single-minded focus

²⁴ A. GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS 210 (Q. Hoare and G. Nowell-Smith eds. 1971).

on maximizing shareholder-value that was at the heart of the problem. The Act is premised on the idea that the whole Enron debacle was attributable to management's conflicts of interest which resulted from a lack of supervision by the board of directors.²⁵ Consequently, the remedy was to be found in ensuring that executive behaviour was brought back into line with and disciplined by greater solicitude for the interests of shareholders through a more independent board of directors and external auditors. However, there is ample evidence that it was the single-minded and irresponsible efforts by the management and board to inflate and maintain share prices and stock values that fueled the corporation's demise. A continuing attachment to shareholder primacy was as much the problem as the solution.²⁶ Until that underlying commitment is confronted and met, there will be little progress in moving forward and avoiding further Enron-like debacles. While it might be going too far to suggest that traditional models of corporate governance are priming large corporations to become accidents waiting to happen, it is entirely appropriate to recommend that there will be little progress in combating Enron-like failures until there is a shift away from the shareholder-primacy ideology which continues to dominate the theory and practice of corporate governance.

²⁵ Berle and Means' The Modern Corporation made no real distinction between board and management (196) and, therefore, paid little attention to the power struggle within management to control the firm. Nor did they pay much attention to the existence and impact of inter-locking directorships and integrated corporate networks. As the scandals at Enron and other companies show, the board's ability and appetite to monitor management is suspect at best. For a recent comparative analysis of corporate networks, see PAUL WINDOLF, CORPORATE NETWORKS IN EUROPE AND THE UNITED STATES (2002).

²⁶ See Simon Deakin and Suzanne Konzelmann, Learning From Enron, 12 CORP. GOV. 134 (2004). For a very different take on SOX, see Roberto Romano, supra, note 3.

Accordingly, after a run of almost 150 years, the basic model for corporate regulation is in need of serious revision. The maladies that afflict corporate governance are no longer capable of being fixed by strong doses of reformist medicine. The time has come to effect a complete re-thinking of our fundamental theories about and expectations of corporations in modern Canadian society. As in mid-Nineteenth Century England, it is now imperative to bring about a massive transformation in the structure, organisation and outlook of large corporations. Up to the 1860s, there was the First Age of corporations in which they began life as state-sponsored enterprises to support the schemes and ambitions of fledgling nation-states in commerce and colonization. Between the 1860s and today, there has been the Second Age of corporations as private-controlled agencies for wealth accumulation and technological innovation. Giving birth to robber-barons, corporate raiders and dot.com billionaires, private corporations have become more global and only a little less exploitative in their operations as the state-directed agencies of old. There is now the need and, as importantly, the possibility for the emergence of a new paradigm for the corporation. The move away from a private conception of corporate life to a more public vision of corporations need most decidedly not be a misconceived return to the pre-1860 understanding of corporations as delegated centres of state power. The new age of corporations must be one in which these vital organisations are treated as vibrant and democracy-enhancing vehicles for public and private benefit. Within such a newly-emerging sensibility and milieu, the power and prestige of corporations can be harnessed to the realisation of a more democratic society generally. Indeed, precisely because corporations are so pervasive and so potent in their impact on most people's daily lives, they offer a vital site at which to begin this paradigmatic overhaul. And the neglected sub-theme of Berle and Means' Modern Corporation is an excellent place to begin that important endeavour.

IV. BACK TO THE FUTURE

It seems to be the fate of almost all canonical texts that they not only become more cited than read, but that they are affixed with one received and uncontroversial meaning. Berle and Means' classic monograph is wonderful proof of that tendency. If the great bulk of secondary literature is to be believed, The Modern Corporation comprises a series of secondary motifs around a primary theme—the need to bridge the gap between owners and management as much as the legal imposition of equitable duties can do so as to approximate the ideal situation of owner-managers. Yet, because a particular text has been accepted into the legal canon does not mean that the light it casts is clear or certain. Indeed, as with texts that have received canonical status in literature or precedents as part of the doctrinal canon, the meaning and instruction of legal texts often remain much richer and more contested than appreciated or conceded; they do not speak for themselves, but their re-reading is an occasion for valorized efforts at hermeneutical retrieval. For some, in law and literature, this richness and opacity are some of the qualities that recommend a text as great. In this sense, Shakespeare's Hamlet and the Supreme Court's Roe are great not only because of their profundity, but also because of their profligacy.²⁷ They have stood the test of time because of their richness and contestability, not in spite of them. Sadly, Berle and Means' Modern Corporation has suffered a more orthodox fate.

A. A RE-VISION

Nevertheless, The Modern Corporation is not so easily pigeonholed and lends itself to convincing and suggestive alternative

²⁷ See ALLAN C. HUTCHINSON, IT'S ALL IN THE GAME: A NON-FOUNDATIONALIST ACCOUNT OF LAW AND ADJUDICATION 86-115 (2000).

readings. Although it has been appropriated by mainstream corporate law academics to invoke the 'separation of ownership and control' thesis to advocate stronger shareholder rights, the text's "analysis was a gun on a rotating platform that could be pointed in more than one direction."²⁸ Indeed, The Modern Corporation and Private Property is a profoundly challenging, yet schizophrenic book. It is, in large and traditionally-understood part, a nostalgic lament for a lost and traditional age of simple economic arrangements; this rendering has become the mainstream legacy of Berle and Means. But, in smaller and neglected part, it is also a romantic yearning for a new and revolutionary vision of social organisation. Once it is appreciated that "[s]ize alone tends to give these giant corporations a social significance not attached to the smaller units of private enterprise," it is not so large a step to conclude that "new responsibilities towards the owners, the workers, the consumers, and the State thus rest upon the shoulders of those in control" (7).

This alternative and more capacious reading comes alive when Berle and Means' concern with the rise of the corporation as organisations which have "passed far beyond the realm of private enterprise ... [and] have become more nearly social institutions" (46) is placed front and centre ahead of the ownership-and-control thesis. Indeed, in 1932, they felt able to conclude The Modern Corporation with a chilling appraisal of American corporate power. They opined that not only did corporations represent "a concentration of economic power which can compete on equal terms with the modern state," but also that "the modern corporation may be regarded not simply as one form of social organisation, but potentially (if not yet actually) as the dominant institution of the modern world, ... possibly even superseding [the state]" (313). If that day of 'actually' has not yet arrived today, it is

²⁸ J.A.C. Hetherington, Redefining the Task of Corporation Law, 19 U. SAN. FRAN. L. REV. 229 at 235 (1985).

perilously closer; the march of corporate power has continued apace. In order to appreciate fully the extent to which corporations have consolidated and increased their economic sway, it is necessary to place their operations and performance in a wider global context. When this is done, the almost unrivalled dominance of these “non-statist collectivism²⁹” in social and political as well as economic spheres can be grasped.

If corporate sales and national GDPs are treated as interchangeable, corporations comprise about 50% of the world’s 100 largest economies in the world. Of course, American corporations dominate the global group, with 82 representatives or 41% in the top 200 corporations: Japanese firms are second, with only 41 representatives in the top 200. General Motors is now bigger than Denmark; Daimler-Chrysler is bigger than Poland; Royal Dutch/Shell is bigger than Venezuela; IBM is bigger than Singapore; and Sony is bigger than Pakistan. Indeed, the top 200 corporations’ combined sales are bigger than the combined economies of all countries, except for the biggest 10. Also, the top 200 corporations’ sales are growing at a faster rate than overall global economic activity. However, while the sales of the top 200 corporations are the equivalent of 27.5% of world economic activity, they employ only 0.78% of the world’s workforce. Furthermore, although the those corporations’ profits grew 362.4% in the past 20 years or so, the number of people that they employ increases by only 14.4%. The economic clout of the top 200 corporations is particularly staggering compared to that of the poorest segment of the world’s humanity: their combined sales are 18 times the combined annual income of the 1.2 billion people or

²⁹ Berle, Foreword to THE CORPORATION IN MODERN SOCIETY xvi (E. Mason ed. 1959).

24% of the world's total population living in 'severe' poverty (those surviving on less than \$1 per day).³⁰

Once what Louis Brandeis termed the "curse of bigness" is placed in contemporary context,³¹ the concerns of Berle and Means become even more compelling. They appreciated that, because "the economic power in the hands of the few persons who control a giant corporation is a tremendous force which can harm or benefit a multitude of individuals, affect whole districts, shift the currents of trade, bring ruin to one community and prosperity to another," (46) the people who exercised power over these burgeoning corporate empires would become the new "princes of industry" (4) and a new despotism would take hold. As such, it was essential that this enormous power "shall be subjected to the same tests of public benefit which have been applied in their turn to power otherwise located" (310) in modern society. In short, therefore, if 'accountability' is seen as the primary theme of the book, its concerns and proposals for change take on a very different emphasis and orientation. The private property owners became as much a part of the problem as the solution; their powers and entitlements must be harnessed to and disciplined in accordance with the public interest. When read in this way (and almost despite the efforts of the authors themselves), The Modern Corporation remains a robust and still relevant critique of corporate governance at the beginning of the Twenty-First Century. More importantly, it still resonates strongly as a rallying

³⁰ Sarah Anderson and John Cavanagh, Top 200: The Rise of Corporate Global Power (Institute for Policy Studies, December 2000).

³¹ L. BRANDEIS, THE CURSE OF BIGNESS (O. K. Fraenkel, ed. 1935). For more modern analyses along these lines, see GAR ALPEROVITZ, AMERICA BEYOND CAPITALISM: RECLAIMING OUR WEALTH, OUR LIBERTY, AND OUR DEMOCRACY (2005); W.K. CARROLL, CORPORATE POWER IN A GLOBALIZING WORLD: A STUDY IN ELITE SOCIAL ORGANIZATION (2004); and CARL BOGGS, THE END OF POLITICS: CORPORATE POWER AND THE DECLINE OF THE PUBLIC SPHERE (2000).

call to populist arms for all those who are committed to making the large modern corporation a worthy and welcome participant in the all-important project for democratic empowerment.

B. SECOND THOUGHTS?

In many ways, it was Berle and Means' own ambivalence about pursuing the more radical implications of their critique which hindered efforts to move away from a 'private property' regime to a more fully public re-envisioning of the corporate role and responsibility. At the end of their celebrated monograph, they begin to build on the established fact that the modern-day shareholder has clearly "surrendered a set of definite rights for a set of indefinite expectations" (244). Indeed, they go so far as to concede that, with the entrenched separation of ownership and control, the shareholders' "relation to [their] wealth" has changed and that the corporation should be seen as a public entity and "the logic applicable to that change should itself change" (298). Yet Berle and Means refused to take the next 'logical' step which was not only to accept the passivity of shareholders, but also to recognise that the very idea of the shareholder as property owner was no longer valid or applicable and that reliance on a 'private property' rationale for corporate governance was no longer compelling or desirable.

Even on its publication in 1932, The Modern Corporation's focus on the importance of the disjuncture between ownership and control did not persuade everyone. Dissenting voices could be heard, although their force and caution have long since been ignored. In particular, E. Merrick Dodd Jr. argued that corporate directors and officers should not be viewed solely as agents of shareholders, but should also be required to act as stewards for the interests of others, even if that meant curtailing the proprietary rights of those shareholders. Indeed, Edwin Dodd went so far as to suggest that managers might go further and actually consider

themselves to be “guardians of all the interests which the corporation affects and not merely servants of its absentee owners.”³² Berle took up the challenge and responded to Dodd by arguing that a broad corporate duty to serve society not only would violate shareholders’ private property rights, but would also be so vague as to put no meaningful constraint on managers’ use of corporate assets: “unchecked by present legal balances, a social-economic absolutism of corporate administrators, even if benevolent, might be unsafe.”³³ However, by the late 1950s, a chastened Berle seemed to have at least conceded considerable ground in his debate with Dodd. While he recognised that managerial discretion might be viewed as a positive attribute which could allow managers to act in the interests of society as a whole,³⁴ Professor Berle insisted that he did not accept that Dodd was right in any absolute or prescriptive sense: “it is one thing to agree that this is how social fact and judicial decisions turned out [but,] ... it is another to admit this was the ‘right’ disposition; I am not convinced it was.”³⁵

By 1968, in their new and separate prefaces for The Modern Corporation, Berle and Means had begun to accept many of the limitations in the thinking that underlay the original edition. Nevertheless, they were still not fully prepared to abandon their established ways of thinking. After describing the even greater level of concentration and lack of genuine competition among

³² Dodd, For Whom Are Corporate Managers Trustees?, 45 HARV. L. REV. 1145 at 1157 (1932).

³³ Berle, For Whom Corporate Managers Are Trustees: A Note, 45 HARV. L. REV. 1365 at 1372 (1932).

³⁴ See ADOLPH A. BERLE, JR., POWER WITHOUT PROPERTY: A NEW DEVELOPMENT IN AMERICAN POLITICAL ECONOMY 107-10 (1959).

³⁵ Berle, supra, note 29 at xii.

American corporations, the economist Means contented himself with simply asking “is the concentration of power in the management of the large corporations consistent with the maintenance of a democratic society?” (1). On the other hand, the law professor Berle stated that, while the nature of the property rights of shareholders has changed, there is still very much a property right at work. Although “a new classification has been superimposed on the old theory” (xxiii) and “the ‘private’ and, still more, individualized, aspects [of property] will become increasingly attenuated” (xxvi), there has now been a break-up of “the package of rights and privileges comprising the old conception of property” (xxxi). Nevertheless, Berle came back to the conclusion that, even though there has been a move away from treating stock as primarily a vehicle for raising capital and more “a channel for distributing income whose accumulation for capital purposes is not required” (xxix), the modern corporation and “property used in production [i.e., shares] must conform to conceptions of civilisation worked out through democratic process of American constitutional government” (xxxviii). He was convinced that the era of private corporations (or, at least, the understanding of corporations as extensions of private shareholding) was no longer coherent in practice or theory.

However, the time has come to take the obvious steps that Berle and Means illuminated, but felt unable or unwilling to pursue themselves. In a compelling conclusion to The Modern Corporation, they floated the idea of rejecting both a strengthening of the rights of passive investors and a *realpolitik* acceptance of managerial control. Instead, they offered the possibility that, because existing corporate arrangements had “cleared the way for the claims of a group far wider than either the owners or the control [group],” the community could “demand that the modern corporation serve not [only] the owners or the control [group] but all society and that the governing principle of corporate governance should be “the paramount interests of the community” (312). Indeed, Berle and Means end with a hope that the separation between ownership and control will result not in a triumph by one faction over the other, but with the rise of a new

paradigm of corporate governance; “the law of corporations might well be considered as a potential constitutional law for the new economic state.” (313). While they were wrong in believing that the control of corporations and the balancing of interests might be effected by “a purely neutral technocracy”, they were on the right track when they expressed the hope that this might be done “on the basis of public policy rather than private cupidity” (312-13). The challenge, therefore, is to move from ‘private cupidity’ to ‘public policy’ while both retaining the best of private initiative and resisting the worst of a domineering state. This can be achieved by ushering in a new era of corporate history in which democracy is the standard and the goal of corporate governance. In such a vision, corporations might begin to function as a democratic nexus at which public and private, political and economic, individual and state, and personal freedom and civic responsibility meet. Corporations will be less an anomaly in contemporary democratic terms and more a primary site for the advancement of democratic politics.

Before proceeding to sketch this democratic alternative, two preliminary caveats are worth mentioning. As critical as I am of the narrow scope and shallow substance of the existing model of corporate governance, none of my critique should be interpreted as trashing or rejecting those legal rules and doctrines which seek to control management in the name of some larger set of interests: no other group gains when managers self-deal. However, in supporting such disciplinary laws, it does not follow that the effort to discipline management should be done only on behalf of shareholders. From a more democratic perspective, profit maximization will not be eschewed entirely, but will simply no longer be the exclusive or pre-dominant goal among many other social ambitions—shareholders will be one kind of constituency member. Moreover, in recommending a shift away from the present paradigm, I am not suggesting that the whole idea of ‘private property’ should be abandoned or, as some might propose, that the ‘means of production’ be put in public hands. I am as much against an overbearing state as a rampant private sphere. It is more that democracy should be used as a theory and a practice

to address the economic and social conditions of people's lives as much as their civil and political entitlements; the market must be made to serve, not control people's interests. In that, Milton Friedman is right in one important regard—the effort to extend the range of institutions and interests to which corporations owe obligations is a “fundamentally subversive doctrine.”³⁶ However, while this effort might signal the end of the prevailing governance arrangements, it might also be the harbinger of a more democratic society.

³⁶ M. FRIEDMAN, CAPITALISM AND FREEDOM 135 (1962).

V. FROM CORPOCRACY TO DEMOCRACY

In seeking to nurture and develop suitable forums and settings that are more local and less hierarchical and are more participatory and less private, large corporations recommend themselves as almost ideal locations for enabling people to become full citizens in their society. They stand squarely between the market and the government and they exert the kind of power which needs to be opened up if there is to be any real progress in closing the democratic gap between the governors and governed. Of course, such a political enterprise will demand that several crucial relations and contexts be transformed and reworked—those between corporations and the state; those inside corporations (i.e., shareholders, management and workers); and those between corporations and general public. Nevertheless, it is only if such a bold strategy to advance the democratic project is commenced that any real or meaningful change in the democratic condition generally and in corporate governance particularly can be expected. There are risks attached to such a commitment, but there are greater dangers to maintaining the status quo.

A. A DEMOCRATIC GAMBIT

In the quarter century since Lindblom's conclusion that "the large corporation [does not fit] into democratic theory and vision",³⁷ the situation has hardly improved. Although the power and influence of corporate activities has continued to expand and deepen, a democratically-inspired agenda for corporate governance has lost much of the plot. Reform efforts remain too reactive, too piecemeal, too modest, and too trapped within the prevailing paradigm. In contrast, I want to offer, in the spirit of a reworked Berle and Means' approach, an unabashedly and robust democratic

³⁷ C. LINDBLOM, *POLITICS AND MARKETS: THE WORLD'S POLITICAL-ECONOMIC SYSTEMS* 356 (1977).

proposal for corporate law and governance. By understanding corporations as neither wholly public nor wholly private institutions, the hope is to move beyond the cramped language of the public/private and harness the traditional strengths of the corporate form to the more civic agenda of democracy. By envisaging and concretizing a democratic form of corporate organization, it might become possible to cultivate the kind of hybrid institution for civic interaction, both economic and political, which will be true to the democratic ambitions of all its participants.

Despite all the recent and high-profile shenanigans of bad corporate behaviour, it would be mistaken to place all the critical focus on them. If any actual progress is to be made in confronting and improving corporate wrongdoing, it demands more than an ethical and criminal condemnation of such individual conduct. As important as that is, identifying and punishing corrupt or greedy executives whose conduct is castigated by almost everyone both outside and inside the corporate world is almost the easy part. What is much more difficult and necessary is to address the larger organisational structures and culture within which such roguery arises and persists. What presently passes as 'good corporate governance' is as much of a problem as the instances of bad corporate behaviour. It might be that, when corporate managers are doing their job best or, at least, well, they are doing most harm to society. This perverse state of affairs demands urgent appraisal. It is only when large corporations are understood and analysed in the larger setting of democracy that it will be possible to move forward. Indeed, it is only when corporations are obliged to become part of, rather than remain apart from, democratic society more broadly that progress will be made. If we want 'good corporate citizens', then we must seek a sea-change in how we think about corporations, how we constitute them, how we regulate them, and what we expect of them. To ignore or marginalize such issues is to renege on the most basic of democratic ambitions.

The fact that large corporations are major players in the political, economic and social system seems to be indisputable; they

exercise enormous power over the lives of ordinary people. While any accumulation of power must be treated with suspicion and mistrust in a democracy, there is no necessity to consider it illegitimate by its aggregation fact alone. Power is not the problem in and of itself, but the basis for its exercise and legitimacy. When it comes to the pedigree and consequences of corporate power, there is a considerable burden on its operatives and apologists to offer a suitable series of justifications; corporate power seems presumptively undemocratic, if not actually anti-democratic. Because the goal of shareholder primacy has become “second nature to politicians,”³⁸ it will be necessary to offer a pragmatic alternative to the neo-liberal philosophy which has proven so effective in insulating large corporations from regulation and regeneration in the public interest. As the line between government and business has become increasingly blurred, politicians are persuaded that government’s only legitimate role is to facilitate business. As one critic pointedly notes, “while the business of government seems more than ever to be business, the business of business ... [is] increasingly becoming that of government.”³⁹

Despite its many different and innovative efforts, traditional theorizing has failed to make a persuasive case for how the modern corporation can be reconciled with the rhetoric and reality of democratic governance in contemporary society. In particular, a major source of bewitchment in this process is the conceptual tendency to insist that there is an almost cast-iron distinction between public undertakings and private interests. Whereas the former are considered to be the legitimate domain for democratic participation, the latter are treated as something aside from that. In this formalised approach, emphasis is placed on the source and

³⁸ Hansmann and Kraakman, *supra*, note 9 at 468.

³⁹ NOREENA HERTZ, *THE SILENT TAKEOVER: GLOBAL CAPITALISM AND THE DEATH OF DEMOCRACY* 190 (2001).

pedigree of power rather than its effects and consequences. In a world of such enormous corporate power and influence, such a disciplinary device is almost guaranteed to ignore and even condone extensive abuses of power. It guts the whole emancipatory dynamic of accountability and makes democracy safe for the private exercise of corporate power. In short, large corporations are the favoured offspring of neo-liberalism's attachment to the public-private distinction.⁴⁰

B. BEYOND PUBLIC AND PRIVATE

Yet, when viewed from a thoroughly democratic perspective, the operations and decision-making of the modern corporation cannot be immune from public oversight in the public interest. It is the 'abuse of power' in substantive and real terms which is the focus of attention. The formal source of power is secondary to its effects and deprivations. Reliance on a strict public-private distinction exacerbates the pernicious effects of privatised corporate power on people's lives. Of course, it does not follow that, when understood as "the dominant institution of the modern world" (313), corporations are to be treated in the same way as other large-scale public institutions by having the full panoply of duties and responsibilities under the administrative or even constitutional law regime imposed on them by the courts. This is to misunderstand both the nuanced and pluralistic insights of democratic governance and the structural and democratic limitations of judicial review. Although it is important to appreciate large corporations as remote and bureaucratic institutions and to emulate the participatory ambitions of modern administrative law, it is both unwise and impractical to aggregate even further power in the courts; their own democratic legitimacy is sufficiently fragile and contested to caution against an extension

⁴⁰ See Morton Horowitz, The History of the Public/Private Distinction, 130 U. PA. L. REV. 1423 (1982).

of judicial review's existing reach.⁴¹ Instead, a different and more substantive set of measures must be introduced which can grapple more directly and effectively with the substantive and formal dimensions of what counts as 'good corporate governance'. If corporations can be made to function as a democratic nexus at which public and private, political and economic, individual and state, and personal freedom and civic responsibility meet, they will become less an anomaly in contemporary democratic terms and more a primary site for the advancement of democratic politics.

At the heart of a democratic compact will be a re-invigoration of the neglected fact that the corporate form is a distinctly public-created institution which is brought into existence by the state and has certain conditional powers delegated to it by the state. As constructions and emanations of the state, modern corporations have a distinctly public origin and a decidedly public purpose.⁴² The debate about corporate governance is, therefore, about the nature and parameters of those public purposes. Once corporations are understood in this way, it no longer continues to be a question of whether it is appropriate or reasonable to ask corporate owners and administrators to pursue the public interest at all. Instead, the more telling issue is what public interests should the corporation pursue and how it should go about formulating and operationalising them. The advancement of private interests will remain important, but will not exhaust the 'public interest'. By availing themselves of the advantages of incorporation, investors and entrepreneurs are entering into a bargain with the state and the community—in return for the benefits of pursuing their private ambitions through the corporate form, people must accept

⁴¹ See, for example, CHRISTOPHER EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* (1990).

⁴² John Dewey, *The Historic Background of Corporate Legal Personality*, 35 *YALE L.J.* 655 (1926).

the public responsibilities and costs that come with it. Shareholders and stakeholders would become simply different kinds of members who would include owners, directors, managers, workers, customers, suppliers, lenders, neighbours, community, etc.

VI. A DEMOCRATIC AGENDA

There will be nothing easy about determining for the purposes of corporate governance which groups are to classify as members, by what means their interests are to be ascertained, how to ensure that those interests are adequately represented, and on what basis those often competing interests are to be weighed and balanced. However, a commitment to democracy demands that such efforts be made.⁴³ While a variety of strategies lend themselves to this emancipatory project, I will concentrate on four particular initiatives—limits on limited liability; a broadening of directors' fiduciary duties; the increased representativeness of the board; and the enactment of substantive regulatory standards. While each of these innovations are not novel in themselves, they will, when taken together as a package, help to bring about a genuine and thoroughgoing change in the democratic thrust of corporate governance.

A. LIMITED LIABILITY

Although the limited liability of corporations is considered to be one of the main attractions of incorporation as it encourages investment at less risk and with greater diversification, it has some severe shortcomings—it tends to re-allocate risk rather than reduce it; it places this re-allocated risk on those stakeholders (e.g., employees, neighbours, etc.) often less able to shoulder it; and it can encourage riskier behaviour as corporations are excused from internalizing the full costs of their risky behaviour.⁴⁴ However, in

⁴³ I have begun the effort to flesh out practical strategies to meet these challenges in a Canadian context. See ALLAN C. HUTCHINSON, *THE COMPANIES WE KEEP: CORPORATE GOVERNANCE FOR A DEMOCRATIC SOCIETY* (2006).

⁴⁴ Compare F. EASTERBROOK AND D. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1991) with Ronald M. Green,

order to make democratic sense of this debate, it is necessary keep a broader and more encompassing view of corporate activity. After all, as I have been at pains to emphasise, the whole notion of 'governance' implies much more than simply doing profitable business; it suggests a public and accountable aspect to the dealings of the corporation which encompasses, but is not only reducible to private gain and economic profitability. When understood from a democratic perspective, it is the limits of limited liability rather than limited liability itself which must be re-configured.

Under such a democratic conception of corporate governance, it seems entirely unconvincing to establish an institutional framework for legal liability which shifts almost all the costs onto some persons and all the benefits onto different persons. At the moment, on the one hand, there is management/shareholder control without responsibility and, on the other hand, there is stakeholder responsibility without control. This is anathema to the democrat who is committed to closing, not maintaining the gap between the powerful and the less powerful. If people claim the rights of ownership and the authority to govern the corporation in their own best interests, it seems almost axiomatic that they should at least bear some responsibility for its actions and behaviour. That being said, if the shareholder's lack of responsibility is to continue to any extent, then there seems no compelling reason to object to the reduced control of shareholders or their displaced focus as the corporation's main concern. From a democratic perspective, the price of limited liability is the cost of reduced influence. While there are also other legal mechanisms by which to reduce negative externalities created by corporate conduct (i.e., general welfare laws designed to deter corporate conduct through criminal and civil sanctions), the imposition of

some liability in some circumstances on shareholders seems democratically optimal.⁴⁵

Rather than take an all-or-nothing stance, it is better to provide a series of initiatives that can be combined to effect the limited and selective availability of limited liability. Possible legal strategies for limiting limited liability include narrowing its scope to contractual risk as opposed to tort liability, introducing *pro rata* liability for shareholders,⁴⁶ lifting the corporate veil more, imposing selective liability on controlling shareholders, abolishing limited liability for shareholding corporations, and greater vicarious liability of directors in certain circumstances.⁴⁷ Each has the distinct potential to effect a more acceptable balance of control and risk; traces of each approach can already be detected in corporate law. But, when understood as part of an integrated and democratic approach to corporate governance, they can work together to provide a more subtle, balanced and measured solution.

⁴⁵ The available historical and empirical evidence strongly suggests that there would be little effect on the operation and innovativeness of capital markets if there was a reduction in limited liability. See P. Blumberg, Economic Dimensions: The Role of Limited Liability in THE MULTINATIONAL CHALLENGE TO CORPORATION LAW (1993) and H. Grossman, The Market for Shares of Companies with Unlimited Liability: The Case of American Express, 24 J. LEGAL STUD. 63 (1995).

⁴⁶ See Theresa Gabaldon, The Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders, 45 VAND. L. REV. 1387 (1992) and Henry Hansmann and Reiner Kraakman, Toward Unlimited Shareholder Liability for Corporate Torts, 100 YALE L.J. 1879 (1991).

⁴⁷ See Timothy Glynn, Beyond 'Unlimiting' Shareholder Liability: Vicarious Tort Liability for Corporate Officers, 57 VAND. L. REV. 329 (2004).

B. EXTENDED DUTIES

The next step in transforming the modern corporation into a more democratic and more public-oriented institution is to take seriously the assertion that the board of directors must exercise their powers and fulfil their fiduciary duties ‘in the best interests of the corporation’. In defining which interests best comprise the corporation, it will be necessary to take a more expansive view than the limited focus on the interests of one set of stakeholders, namely the shareholders. Such interests are entirely deserving of consideration, but they will be only one set of interests to be taken into the balance and not the exclusive or primary ones. The ghost of Dodge must be exorcized once and for all.⁴⁸ The corporation is an organic entity with multiple and shifting constituents whose interest will vary over time and in different contexts; no one set of interests will have their thumb on the governance scales. In advancing the welfare of the corporation, it will be important to assess the directors’ performance over an extended time-frame rather than on a single decision basis; the best interests of the corporation will not be reducible to a simple formula or set of fixed interest. This will be a challenging undertaking for directors and one that will demand a variety of skills and sensitivities. Traditional critics will be right to point out that such general obligations will not easily be rendered operational, instilled with specific substance or given effective teeth; this broad responsibility can become a shield to justify any action by the board. As Berle himself observed, “unchecked by present legal balances, a social-economic absolutism of corporate administrators, even if benevolent, might be unsafe.”⁴⁹ These are

⁴⁸ Dodge v. Ford, 204 Mich. 459, 170 NW 668 (1919).

⁴⁹ Berle, supra, note 33. See also FRIEDRICH HAYEK, LAW, LIBERTY AND LEGISLATION: THE POLITICAL ORDER OF A FREE PEOPLE vol. 3, 82 (1979).

reasonable objections, but insufficiently compelling to derail the whole project.

As things presently stand, the directors must often balance the competing interests of different shareholders in a constantly shifting market—Are long-, medium- or short-term interests of the shareholders to be served? Are directors to concentrate on increasing production and dividends or managing the share price? How is equity to be ensured among majority and minority interests? These are far from easy questions and require considerable sophisticated judgment on the part of the directors. Of course, extending the directors' fiduciary duty to stakeholders will not lessen that challenge. But it will not move it into a qualitatively different realm of operational difficulty. There are already several fiduciary relationships imposed by law (e.g., executors) which encompass duties to a class of persons or groups whose interests might well be far from unitary or readily compatible. Consequently, while demanding and difficult, the application of a broader fiduciary duty is certainly not outside the competence of sophisticated businesspersons. Rather than be an exceptional duty, the fiduciary responsibility of directors would be brought in line with the thematic principle that fiduciaries are to be held "to something stricter than the morals of the marketplace; ... only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd."⁵⁰ In the campaign to democratise the corporation, this seems an essential and welcome reform.

C. REPRESENTATIVE BOARDS

Corporate duties to stakeholders are an improvement, but they are not a lasting or substantial solution and their effects will be muted. Unless there is a change in the composition of those

⁵⁰ Reinhard v. Salmon, 249 NY 458 (1928) at 464 per Cardozo J.

entrusted with the power and responsibility to run the corporation, it will always be what managers or shareholder-appointed directors think is in the best interests of the broader stakeholder community rather than stakeholders being able to determine that for themselves. After all, democracy is not only supposed to be *for* the people, but *of* the people. No matter how benign or progressive the decisions made by elite groups may be, they remain decisions which lack the important imprimatur of democratic participation: accountability is only a poor second to participation as a mode of democratic governance. As with other institutions and agencies charged with advancing the public interest, there is a compelling need for public participation. Accordingly, as well as reforming the rules for proxy voting, strenuous efforts must be made to introduce reforms which will facilitate involvement by those stakeholder groups whose interests are directly and substantially at stake in corporate behaviour.

However, because the potential effects of large-scale corporate activities are truly wide-ranging and often global, this challenge is beset by practical difficulties. The two main initiatives to date for dealing with this conundrum are 'diversified shareholding' and 'independent directors'. While they both make important in-roads into present arrangements, they fall short of any truly democratic goal. Whereas 'independent directors' are themselves appointed by and are often beholden to the existing shareholder-appointed board, 'diversified shareholding' tends to reinforce the existing scheme of corporate governance by perpetuating the idea that financial contribution is the best measure of democratic participation.⁵¹ When employees become shareholders, the real threat is that they become persuaded to adopt the same purely

⁵¹ Also, apart from the dangers of co-optation, employees might actually become more vulnerable because, if the corporation gets into serious problems, they will stand to lose not only their jobs, but also their savings. See K. MOODY, *WORKERS IN A LEAN WORLD: UNIONS IN THE INTERNATIONAL ECONOMY* 93-108 (1997).

economic mentality to corporate planning and success as today's shareholders; they will be more interested in short-term gains in the secondary stock market than in long-term contributions to the primary goods-and-services and jobs market.

A more convincing avenue of democratic reform would be to introduce independence and diversification in a more direct manner. For instance, it might be possible to divided affected persons and stakeholders into three main constituencies. Each constituency would represent and give increased involvement to different members of the corporate community. The three constituencies would be the shareholders, the employees, and the other stakeholders or the public. As regards the shareholder constituency, all shareholders might have the same entitlements and responsibilities with no one shareholder being able to exercise more than 25% of the overall total of votes available to shareholders. When it came to the employees, all existing and permanent employees, part-time and full-time as well as management and rank-and-file, would be eligible to vote for a fraction of the board: those who stood for election as employee-representatives would themselves have to be employees. Finally, as regards the public constituency (which would include all other stakeholders, such as creditors, suppliers, customers, local community, etc.), there might be an attempt to designate a fraction of the board as 'general public directors' whose mandate would be to represent the public interest as it applies to the operations of a particular corporation. These directors could be selected by a fractional vote of the rest of the already-elected board of shareholder- and employee-representatives from a list of approved candidates maintained by a public agency which would have ultimate authority to approve or disapprove such elected persons as being suitably diverse and pertinent to the specific corporation's operations.⁵² In order to be admitted to this list,

⁵² See *infra*, pp.36-37. This proposal for 'public interest directors' draws on a neglected and before-its-time idea by Christopher Stone. See CHRISTOPHER

candidates would have to satisfy the regulatory body that they not only had general directorial competence, but that they also appreciated the public role and democratic responsibilities of corporations.

By establishing such a balanced scheme of membership, certain important advantages will accrue. Apart from the general conformity of the proposal to a democratic vision of corporate governance, the most obvious benefits are twofold. First, even if individual directors take a very self-regarding stance by pushing only for the interests of those groups who elected them, they will still have to persuade others of the more general wisdom of that stance. It will likely require a more long-term approach to directorial debate so that priorities and plans will be able to proceed on a more consensual basis. Also, being exposed to different perspectives might well loosen the more parochial concerns of particular directors. Moreover, the active presence of the 'public directors' will oblige other directors to develop and frame their views in ways which are more conducive to the promotion of the general public interest. Secondly, because the board of directors would be under a broad fiduciary duty to advance the interests of the whole corporation, the considerable challenge of balancing competing interests and objectives might be more easily accomplished. By having a more diverse and representative board, an appreciation of what is in the best interests of the corporation *as a whole* will be more informed and immediate: the various stakeholder communities will have a direct voice in discussions. This will also help to de-stabilize the ruling elite which presently has a virtual lock on corporate decision-making and culture. Accordingly, the odds on making the

democratic wager are significantly shortened by the appointment of a more diverse and representative board of directors.⁵³

D. SUBSTANTIVE MEASURES

Nevertheless, while such reforms in representation will be extremely important, they again will not be sufficient in themselves to implement a democratic system of corporate governance. The introduction of more stakeholder-representative boards, greater responsibility for corporate actors and beneficiaries, and better protections for minority shareholders will be vitally important. But they will not be enough. If the goal is to ensure that large corporations act in a more democratically and responsive manner, it will also be essential to lay down certain minimum substantive standards against which corporate performance and behaviour can be judged. Accordingly, there will need to be a mix-and-match balance between structural reform and substantive regulation. As traditional scholars insist, it is naive to believe that asking present corporate officers to act responsibly for the benefit of stakeholder communities will be sufficient or that making structural changes without some accompanying ethical shift will achieve a marked degree of

⁵³ The proposal that various stakeholders might have a voice or part in the governance of a firm is far from novel or radical. In Germany (and Japan), for example, it is mandated by the *Mitbestimmung* (workers co-determination) law that there is to be worker representation on the supervisory boards of large public corporations. While the impact of this innovation should not be exaggerated, it has not brought German capitalism to its knees. Indeed, some might argue that it has been a contributing factor in the relative success of German industry. See Peter Cornelius and Bruce Kogut, Creating the Responsible Firm: In Search for A New Corporate Governance Paradigm, 4 GERMAN L. J. 45 (2003). Moreover, the fact that such arrangements are now being dismantled does not speak to their democratic desirability or efficacy: it does speak to the globalizing pressure of a shareholder-centric approach.

democratic modification.⁵⁴ In order for there to be genuine change and transformation in corporate behaviour, it will be necessary for society as a whole to participate in the continuing responsibility of determining what is 'in the public interest'. As public institutions and government-created ones at that, corporations must at a minimum be obliged to ensure that they do not act in a way that is inimical to the public interest. As things presently stand, the 'public interest' is too often a by-product of what happens to advance corporate and private interests at any given time and place. In a democracy, it is for the public through democratic institutions and processes to determine what that public interest is; it is not for corporations either by design or default to appropriate that task entirely for themselves alone.

As well as improved transparency in corporate transactions and dealings, it would also be necessary to introduce mandatory disclosure and reporting on a whole range of economic and social issues that might include, for example, information on the products a company produces and the countries in which it does business; on the corporation's law compliance structure; on its domestic labour practices; on its global labour practices and supplier/vendor standards; on its domestic and global environmental effects; on corporate charitable contributions, political contributions, or the effects of using a corporation's products on consumer health and safety.⁵⁵ However, if corporate governance is to be taken seriously on its own terms, the enactment and enforcement of such regulations must not be left only to securities regulators. While the protection of shareholder

⁵⁴ Whether the goal is profit-maximization or something broader, substantial change will require even optimal laws to be supplemented by social and moral sanctions. See Einer Elhauge, Sacrificing Corporate Profits in the Public Interest, 80 N.Y.U. L. REV. 733 (2005).

⁵⁵ See Cynthia Williams, The Securities and Exchange Commission and Corporate Social Transparency, 112 HARV. L. REV. 1197 (1999).

interests is a necessary feature of any advanced economy, it is not and should not be the only game in town. Of course, it is not surprising that the authorities persist in treating corporate governance as largely about the protection of shareholders interests alone when the informing vision of corporate governance is so shareholder-centred in orientation, content and enforcement. Accordingly, under a democratic model of corporate governance, it will be essential to create and empower a public regulatory body whose exclusive responsibility is to deal squarely with corporate governance in its own right and not only as a function of the protection of shareholder interests. Because the size and power of large modern corporations has assumed such significance, it is clear that they warrant their own regulatory body.

E. DEMOCRACY AND CAPITALISM

Finally, in offering this robust critique of contemporary approaches to corporate law and governance, it bears emphasizing that my intention has not been to defend the claim that productivity or profit-making is a bad thing. Nor am I recommending that all jobs will be forever safe or that the workers' and other stakeholders' interests will always outweigh those of shareholders. This would be plain silly. There is nothing wrong with productivity, efficiency, profitability, etc. Indeed, they are essential values for any modern society to embrace and foster. But it is the elevation of such values to a cluster of meta-values against which all social processes and other values must be judged that is the problem. As both a matter of historical record and as an issue of public policy, it is mistaken to suggest shareholder-value maximisation is or ought to be the sole or primary goal of the business corporation. This would be, as an incredulous critic notes, "to define the business corporation ... as a kind of shark that lives off the community rather than as an important agency in the construction, maintenance, and transformation of our shared

lives.”⁵⁶ In particular, there is no sense in thinking about large corporations as a democratic venue for democratic engagement between political equals. While a cost-benefit analysis is necessary and desirable, it ought to be the first step in making any corporate decision, not the first, last and only consideration. The process of formulating benefits and entitlements is important in itself under a democratic theory; an appreciation of the social context within which individuals exist and thrive is essential.

There is simply no reason to be persuaded that capitalism and democracy are somehow synonymous.⁵⁷ Indeed, the link between capitalism and democracy is weak at best and counter-productive at worst. If capitalism is to remain, then it must serve rather than master the interests of democracy. Citizens are entitled to basic economic protections by virtue of their membership in society and not only through their efforts at contractual negotiations. Democrats appreciate that, while everything has a cost, that is not the sole measure of value: citizens are not only consumers. And Democracy is not only or best sold in the marketplace. Indeed, as Amy Chua has noted, “markets concentrate wealth, often spectacular wealth, in the hands of the market-dominant minority, while democracy increases the political power of the

⁵⁶ White, How Should We Talk About Corporations? The Languages of Economics and of Citizenship, 94 YALE L.J. 1416 at 1419 (1985). See also See LAWRENCE MITCHELL, CORPORATE IRRESPONSIBILITY: AMERICA’S NEWEST EXPORT (2001).

⁵⁷ For a sophisticated attempt to portray ‘market economics’ as an (American) article of faith, see ROBERT NELSON, ECONOMICS AS RELIGION: FROM SAMUELSON TO CHICAGO AND BEYOND (2001). See also G. SOROS, OPEN SOCIETY: REFORMING GLOBAL CAPITALISM (2000) and JOHN KAY, THE TRUTH ABOUT MARKETS: THEIR GENIUS, THEIR LIMITS, THEIR FOIBLES (2003).

impoverished majority."⁵⁸ The obvious challenge is to ensure that politics is played out throughout social life and not merely confined to areas outside the economic sphere; people are entitled to participation and accountability in their dealings with and inside businesses as much as with politicians and governments. Accordingly, a shift to more democratically-structured corporations will likely galvanize the democratic instinct generally. As President Woodrow Wilson famously opined, "the cure for the ills of democracy is more democracy, not less."

⁵⁸ A. CHUA, *WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY* ** (2003).

VII. CONCLUSION

Recent events in corporate governance have at least opened up a space to think seriously about how it might be possible to turn the present system's failings to transformative effect. Indeed, with effort and imagination, it might presently be possible to bring to an end the age of the corporation as a private-controlled agency for wealth accumulation. Uncoupled from 'market capitalism' and hitched to a more democratic vision, the institution of the corporation can become a social, political and economic organisation in which public, political and distributive ends are in play as well as private, economic and productive ones. Berle and Means' The Modern Corporation has a definite contribution to make to that project provided that its traditional reading is abandoned and its more enlightened alternative theme is emphasised; there must be a shift from 'private property' to 'democratic accountability' such that public policy is not only consistent with private cupidity. When large corporations are understood and analysed in the larger setting of democracy, it will be possible to move forward. By carrying out such a democratic stock-taking, it might then be possible to provide a more telling critique of corporate governance and to offer more constructive proposals for change. Indeed, it is only when corporations are obliged to become part of, rather than remain apart from, democratic society more broadly that progress will be made.

But the present conditions of decay and deterioration will only last for short time. Given opportunities and intellectual backing, the old habits and entrenched arrangements might re-assert themselves. In the meantime, it is essential that those who take the democratic imperative seriously act quickly and decisively; the opportunity might not come again or soon. The seventy-fifth anniversary of Adolph A. Berle and Gardiner C. Means' The Modern Corporation and Private Property could be celebrated in no more fitting or timely way than with such a initiative. Indeed, it might well be that, as goes corporate governance, so goes democracy.