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Tracking Berle's Footsteps: The Trail of the Modern Corporation's Law Chapter

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Tracking Berle's Footsteps: The Trail of *The Modern Corporation*'s Last Chapter

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INTRODUCTION

Readers game enough to work through all three hundred pages of *The Modern Corporation and Private Property*[1] looking for insights on corporate law today encounter two, apparently contradictory, lines of thought.[2] One line, set out in Books II and III, resonates comfortably with today's shareholder-centered corporate legal theory. Here the book teaches that even as ownership and control have separated,[3] managers should function as trustees for the shareholders and so should exercise their wide-ranging powers for the shareholders' benefit.[4] The other line of thought emerges in Books I and IV, where *The Modern Corporation* encases this shareholder trust model in discussions of corporate power and social welfare. These discussions resonate today with those who advocate corporate social responsibility. Here, the separation of ownership and control implies public responsibilities: "It is entirely possible . . . that the corporate profit stream in reality no longer is private property, and that claims on it must be adjusted by some test other than that of property right."[5]

The two lines of thought come together in the book's most famous sequence, its last chapter, entitled "The New Concept of the Corpora-

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1. ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (Harcourt, Brace & World, rev. ed. 1968) (1932).

2. *See* William W. Bratton, *Berle and Means Reconsidered at the Century's Turn*, 26 J. CORP. L. 737 (2001).

3. BERLE & MEANS, *supra* note 1, at 250–52.

4. *Id*. at 275–77.

5. *Id.* at 219.

tion."[6] After the book's publication, Berle himself suggested that the last chapter was what the book was all about—a few pages for the general reader "too lazy, busy or uninterested to read three hundred pages of academic argument."[7]

Unfortunately, Berle's commendation is misleading. Those who pick up the book looking for the origins of shareholder primacy reach the last chapter only to find the shareholders trumped by the public interest. The chapter takes the trust model, painstakingly developed for the shareholders' benefit earlier in the book, and redeploys it for the public's benefit: since the shareholders had given up responsibility for corporate property, other constituents should join them as corporate beneficiaries; the "[r]igid enforcement of property rights" of passive shareholders would give way in the face of a "convincing system of community obligations."[8] Management, moreover, must develop into a "purely neutral technocracy."[9] In meeting these technocratic obligations, corporate leaders would be expected to "set forth a program comprising fair wages, security to employees, reasonable service to their public, and stabilization of business . . . ."[10] But, the reader is left to wonder how management can be expected to serve as trustee to the shareholders and the public simultaneously?

In our previous work,[11] we show that this contradiction can be explained by reference to the context in which the book was written. The book had a long gestation, spanning the late 1920s, the Crash, and the early years of the Great Depression. Many reordered their political economic views during those years, Berle among them. *The Modern Corporation*'s various parts capture Berle at different points in the timeline, beginning in the boom years as a friend of the shareholders and ending in the depths of the Depression as an advocate of corporate advancement of national social welfare policies. Consequently, the last chapter, written to address Depression conditions, stands apart from the sections of the book conceived during the brighter years of the 1920s.

The last chapter speaks to debates over appropriate policy responses to economic crisis, debates still underway upon the book's publication in 1932. Many looked to Franklin Delano Roosevelt not only to win the election, but to follow the lead of many European leaders of the

6. *Id.* at 352–57 (bk. IV, ch. IV).

7. *See* JORDAN A. SCHWARZ, LIBERAL: ADOLF A. BERLE AND THE VISION OF AN AMERICAN ERA 63 (1987).

8. BERLE & MEANS, *supra* note 1, at 312.

9. *Id.*

10. *Id.*

11. *See* William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and* The Modern Corporation, 34 J. CORP. L. 99 (2008).

time and adopt corporatism as the political economy of the United States. Berle, who joined FDR's inner circle during the 1932 campaign, was a leading advocate of a corporatist approach. Our earlier work shows that *The Modern Corporation*'s last chapter extensively overlaps the "New Individualism" speech that Berle (and his wife Beatrice) wrote for FDR.[12] The speech, the most radical of the 1932 campaign,[13] presaged the economic program of the New Deal, in particular the corporatist National Industrial Recovery Act (NIRA) enacted in June 1933.[14]

But the NIRA proved unsuccessful, and formal corporatism disappeared from the American political economy along with it. Even so, *The Modern Corporation*'s last chapter has maintained a grip on generations of readers. In this essay, we reconsider it and track its later footsteps.

Our inquiry has three phases. Part I begins with the last chapter itself, explicating its text. We show that it speaks at two levels: the particular and the general. At the particular level, the chapter references community obligations and neutral technocrats in the political context of 1932. It also speaks generally, offering a concept of ongoing corporate-government cooperation without ties to transitory political events. It tells us that corporations, and by implication corporate law, go to the wider political economy for instructions respecting the public interest. These instructions necessarily vary across different contexts and times. Public duties can follow, but the initial onus lies squarely on the public and the state to articulate the duties clearly. The chapter states that there is no hard-wired, intrinsic connection between corporate power and any particular program of public responsibility.

Part II turns to Berle's later writings on political economy to see the last chapter's footsteps change direction, but only slightly. Postwar Berle modified his corporatist vision to suit America's postwar political economy. Corporatism had failed and the regulatory state was the replacement. Where the last chapter looks to immediate redeployment of corporate power and resources toward social welfare enhancement, postwar Berle situates corporate power in a regulatory state that contains it successfully. The regulatory framework makes it advantageous for managers to attend to public demands. Thus, despite the change of time and context, managers retain their status as quasi-public servants required to attend to public goals.

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12. Davis W. Houck, *FDR's Commonwealth Club Address: Redefining Individualism, Adjudicating Greatness*, 7 RHETORIC & PUB. AFF. 259, 259–60 (2004).

13. SCHWARZ, *supra* note 7, at 79. The text can be found at the American Rhetoric Online Speech Bank, http://www.americanrhetoric.com/speeches/fdrcommonwealth.htm.

14. Bratton &Wachter, *supra* note 11, at 109–18.

Part III looks at the world post-Berle. Here the regulatory state retreats and market-based controls advance, superannuating Berle's political economy. We inspect this deregulatory landscape for traces of the last chapter, and find them in two distinct locations. The first is in the employment relationship. There the corporation, as the nation's primary employer, becomes the primary supplier of employee welfare provisions preferred by the state. The two leading examples are corporate offerings of health care insurance and retirement security through private pension plans. Both practices became institutionalized during Berle's lifetime and both persist, encouraged by federal tax breaks, but are not otherwise mandated. At the second location, we find new patterns of government-mandated cooperation with societal goals. These new demands devolve on legal compliance. In some cases, as with the Foreign Corrupt Practices Act and the Sarbanes-Oxley Act, the goal is elimination of corporate corruption. In others, as with the anti-money laundering provisions in the Bank Secrecy Act, the corporation serves as the first layer of enforcement against corrupt practices by others. Berle could not have envisioned this development—the footsteps have veered off onto a new trail. The track is continuous, however, and today's corporate compliance regime embodies the last chapter's precepts.

I. THE LAST CHAPTER IN 1932

Let us pick up the last chapter and read it in the context in which it was written. It begins with a general excursus on private economic power. Those who have it desire it. But they inevitably come into conflict with those they affect who wish to redirect the power's exercise, so as to share in its attendant benefits.[15] Thus, private economic power triggers demands for social response. Although the conflicts are inevitable, Berle and Means write that particular outcomes depend on particular political economic contexts: "How will this demand be made effective? To answer this question would be to foresee the history of the next century. We can here only consider and appraise certain of the more important lines of possible development."[16]

The chapter then turns to themes developed earlier in the book. While the separation of ownership and control disempowers shareholders, shareholder empowerment does not figure among the political responses the book envisions. Berle and Means dismiss shareholders as "inactive and irresponsible," and go on to pose three alternative responses to corporate power. First, society could leave managers uncon-

15. BERLE & MEANS, *supra* note 1, at 310.
16. *Id*. at 310.

strained, but only if we were ready to face the "danger of a corporate oligarchy with the probability of an era of corporate plundering."[17] Second, society could cut off management self-dealing by strictly insisting on adherence to the shareholder trust. Third, society could step away from the tradition of private property rights and insist on corporations following government mandates.[18]

The chapter opts for the third alternative, positing a "wholly new concept of corporate activity,"[19] but following up with little in the way of specifics. Indeed, Berle and Means did not see specification as their job. It was up to the community to put forward its demands "with clarity and force"[20] in the new corporatist state they projected. *The Modern Corporation* had the limited, but necessary job of clearing away the conceptual underbrush of property rights. With the field open, the public could act and impose a new regime of government/corporate partnership.

Such specification that we get does follow the corporatist template. Corporatism privileges cooperation over competition and emphasizes group over individual interests.[21] It assumes that government, through consultation with the major groups in society, can articulate an objectively cognizable "public interest." Once the public interest is expressed, government calls on the various groups, including big business, to adapt their positions in support of it. It follows that corporations are entities that operate, in part, as organs of the state. Corporatism is not socialism—capitalism and private property rights are assumed, along with the legal model under which directors must maximize the value of the corporation. Under corporatism, companies come to a state-directed negotiating table where they sit down with the state and other interest groups, such as labor unions, to determine the public interest. Given a determination, the calculus of corporate rights and duties must adjust and recognize a constraint on managerial action in the form of the public interest.[22]

Thus, the last chapter tells us that once "a convincing system of community obligations is worked out and is generally accepted," private property rights will necessarily have to yield.[23] Corporate leaders will use their power for social betterment:

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17. *Id*. at 311.
18. *Id*. at 310–11.
19. *Id*. at 311–12.
20. *Id*. at 312.
21. One of us recently has described the corporatist context of the New Deal. *See* Michael L. Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 U. PA. L. REV. 581 (2007).
22. *See* Bratton & Wachter, *supra* note 11, at 113–14.
23. BERLE & MEANS, *supra* note 1, at 312.

> Should the corporate leaders . . . set forth a program comprising fair wages, security to employees, reasonable service to their public, and stabilization of business, all of which would divert a portion of the profits from the owners of passive property, and should the community generally accept such a scheme as a logical and human solution of industrial difficulties, the interests of passive property owners would have to give way.[24]

Managers are envisioned as "purely neutral" technocrats making allocative decisions across groups in society "on the basis of public policy rather than private cupidity."[25]

The chapter is as notable for caution as it is for grand political economic vision. It poses corporate social responsibility as an inevitable demand, but it does not purport to lock us into a given means of meeting that demand. It tells us only two things. First, demands for corporate social responsibility will emerge so as to suit particular political and social contexts. Second, the social demands will have to be clearly and forcefully stated, and only then can we expect private property rights to yield.

The last chapter thus poses corporatism only as a possible alternative. This is not surprising; the book was written in advance of the national political decision. Indeed, it was written before Berle and like-minded members of the "Brain Trust" captured FDR's complete attention.[26] Corporatism was not the only available mode of addressing the crisis and, even assuming a corporatist initiative, different proponents advocated different variations on the theme.[27] Berle, desirous of political influence himself, was keenly aware that FDR would make the final de-

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24. *Id.*

25. *Id*. at 313. Berle and Means speculate that the power of corporate actors, once redirected in this cooperative direction, could even eclipse that of state actors. *Id*. They do not expand on the point. We do not believe that they were projecting that corporate actors would displace state actors at the top of the corporatist pyramid as those responsible for formulating the directives. More likely, they saw corporate actors on the ground effecting allocative decisions in accord with state policy, and making judgment calls as they acquitted themselves of their cooperative duties.

26. Berle had allies in Ray Moley and Rexford Tugwell. *See* DONALD R. BRAND, CORPORATISM AND THE RULE OF LAW: A STUDY OF THE NATIONAL RECOVERY ADMINISTRATION 74–79 (1988). But Roosevelt liked to surround himself with advisors espousing competing positions. One such advisor was Felix Frankfurter, an old nemesis of Berle's, *see* SCHWARZ, *supra* note 7, at 14–15, who, along with a cadre of acolytes, still hewed to the economic liberalism of decades before. *See id*. at 76.

27. *See* Bratton & Wachter, *supra* note 11, at 110 (describing Berle's "New Freedom" opponents and their emphasis on trust busting as the means of corporate disempowerment), and at 122–28 (describing a "New Capitalist" version of corporatism circulating in 1932, with its emphasis on management empowerment, and contrasting Berle's corporatism, which contemplated labor and management both would have a place at the government's corporatist table).

cision and was not about to foreclose any options before the fact in a book chapter.

That said, the chapter goes for broke with its vision of a brave new world of empowered management technocrats. The vision needs to be contextualized carefully. Berle and Means's managers become empowered only if they successfully redirect their resources to maximize social welfare. And their power is only that of technocrats—experts who effectuate instructions delivered by a government policymaker vested with the legitimacy of public office. There is nothing here for a modern proponent of corporate social responsibility in a deregulatory state.

Nor is there much in *The Modern Corporation* for modern proponents of shareholder primacy. Berle retains a reputation as shareholder primacy's grandfather figure because of *The Modern Corporation*'s shareholder trust model. Even before the book's publication in 1932, he had forcefully advanced the shareholder trust model as an alternative to management empowerment in a famous back and forth with E. Merrick Dodd on the pages of the *Harvard Law Review*.[28] But, as the last chapter shows, Berle saw the shareholder trust model as the alternative to the pre-New Deal status quo and its regime of unconstrained management self-dealing. Given the status quo, and absent a big stick state, Berle went with the shareholder trust as the least dangerous alternative.[29] Given the state-controlled economy to which the last chapter looked forward, Berle saw things very differently, with the public displacing the shareholders as trust beneficiaries and the directors owing their primary allegiance to the national interest. Once a well-articulated public policy was established, the directors of the corporation should help society achieve the articulated goals. At that point, shareholders would have to take a back seat. Instead of unrestrained maximization, directors were to maximize the corporation's value in a way that satisfied societal goals.

II. BERLE'S POSTWAR POLITICAL ECONOMY

The last chapter's grand vision soon achieved real world manifestation in the National Industrial Recovery Act (NIRA). But the NIRA

28. Berle first set out the book's shareholder trust model in a law review article. *See* Adolf A. Berle, *Corporate Powers As Powers In Trust*, 44 HARV. L. REV. 1049 (1931). Dodd responded with an attack. *See* E. Merrick Dodd, *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932). Berle then responded to Dodd, defending the shareholder trust model. *See* Adolf A. Berle, *For Whom Corporate Managers Are Trustees: A Note In Harvard Law Review*, 45 HARV. L. REV. 1365 (1932). Berle's response lingers in corporate law's collective memory as shareholder primacy's ancestral text. We show that this is a misreading in Bratton & Wachter, *supra* note 11, at 122–30. For a contrasting reading, *see* Amir N. Licht, *The Maximands of Corporate Governance: A Theory of Values and Cognitive Style*, 29 DEL. J. CORP. L. 649, 690–98 (2004).

29. For our development of this argument see Bratton & Wachter, *supra* note 11, at 122–35.

quickly fell apart. It looked to cooperative alliances that never coalesced and, absent cooperation, its economic plan foundered due to internal contradictions. Berle's grand vision disappeared along with it.

Berle accepted the result.[30] He viewed the NIRA as an experiment, years later observing that intervention on such a scale occurred in this country only in the event of an emergency.[31] Even so, he never abandoned corporatism's underlying economic and political assumptions. Nor would he stray from the last chapter's four general points: (1) demands for corporate social responsibility are inevitable; (2) the demands must be stated clearly and forcefully by the public to the state; (3) the state must then articulate the regulatory response; and (4) the specific content of the demands will vary to suit particular political and social contexts.

Berle went on to show how the four points manifested themselves in America's postwar political context. He described a strong regulatory state that could articulate the social welfare function, guiding and pushing the markets to the socially preferred result. This presupposed the cooperative engagement of interested parties. Berle described a benign equipoise amongst strong organizations; one equipoise constrained by a wider public consensus that empowered the government.

Corporate managers emerged in this framework as quasi-public servants, roughly approximating the last chapter's neutral technocrats. Whether they liked it or not, corporate managers were accountable to the regulatory state, on the one hand, and to the public consensus on the other. Failure to satisfy the public meant new regulation; avoidance of new regulation meant satisfying the public. It followed that public duties were unavoidable as a practical matter. Shareholders, in contrast, remained what they were in the last chapter—passive investors with no productive role to play in the political economy. As we will see, these characterizations were context specific.

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

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30. He outlined a number of dysfunctional aspects of the regime's operation in a report he prepared in July 1934. ADOLF A. BERLE, JR., NAVIGATING THE RAPIDS, 1918–1971; FROM THE PAPERS OF ADOLF A. BERLE 99–101 (Beatrice Bishop Berle & Travis Beal Jacobs, eds. 1973) [hereinafter BERLE, RAPIDS].

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

A. The American Economic Republic

For postwar Berle, the events of 1933 had constitutional significance. Before 1933, the economy and the polity were separated, with the economy left to go its automatic way; but, to Berle, the "open market" could not prevent destructive business cycles—"[i]t was not designed to . . . ."[32] Catastrophe had resulted, leading to a fundamental shift during the Hundred Days:

> The 1929 crash, the slow recovery of 1930, and the ensuing spiral descent into an abyss of unemployment, bank failures, and commercial paralysis was not corrected by market processes. The contemporary business captains, working desperately (as they did) to meet the situation, failed completely. Following established precepts of the American political process, the public . . . increasingly asked that the political state propose a program and act. Necessarily, this meant considerable reorganization of private business. . . . Out of the crisis was born the American economic republic as we know it today.[33]

Although the NIRA had failed, the state and the economy nonetheless emerged in the "American economic republic" as interdependent, with the state taking ultimate responsibility for economic results and exercising the higher level of power.[34] The old economic order, with its private property regime, persisted[35] and, incentivized by the profit motive, took care of the production.[36] The state had intervened only to stabilize the capitalist system.[37] More extensive intervention in the form of full blown corporatism complete with state economic institutions had been avoided, but only because sophisticated private actors had learned to play by the new rules. They had seen that the state's regulatory power took precedence over their own economic power. The private actors accordingly restrained exercise of their own power for the sake of its preservation.[38] This restraint permitted the state to reserve exercise of its full regulatory power as a deterrent, rarely resorting to direct insistence on positive action.

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

33. *Id*. at 91.

34. *Id*. at 95.

35. *Id*. at 99.

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

37. BERLE, REPUBLIC, *supra* note 32, at 99. Keynes, said Berle, had shown that the state could "stabilize, stimulate and direct" the economy without assuming dictatorial powers and without abolishing private property. *Id*. at 5.

38. *Id*. at 169.

B. Economic Planning

For Berle, the economic conditions that brought about the Depression were intrinsic to capitalism. The industrial production machine, he asserted, could bring forth limitless goods, a capacity that had been achieved for the first time in human history in the mid-1920s.[39] But, there was a persistent problem—overcapacity gave management the discretion to set the level of production wherever it wanted; at the same time, labor tended toward oversupply. This problem led to an unpalatable either/or: either too many goods were produced or unemployment was too high.[40] The solution to this problem lay in a planned equation of supply to demand that would hopefully generate greater economic stability.[41]

Satisfying the preference for economic stability called for economic regulation. Although the NIRA was gone, industry-specific regulatory mechanisms, for the most part dating from the New Deal, remained in place over banking, ground and air transport, public utilities, broadcasting, petroleum, and shipping.[42] These mechanisms controlled entry, exit, and prices, operating as miniature, industry-specific NIRAs with the twin aims of preventing excessive competition and promoting constituent cooperation.[43]

In other industries, Berle looked in part to oligopoly to perform the planning function. Rather than being a cause of instability, the concentration of economic power, could be harnessed to dampen it, and increasing concentration (and oligopoly conditions) remained the way of the future.[44] The balancing of supply and demand at fair prices by actors in concentrated industries required government oversight.[45] Whenever

39. ADOLF A. BERLE, POWER 176 (1969). Berle expressed no concerns about incentives to innovate within big firms—there was no way to tell whether development worked better inside or outside; the important thing was that the capital was there inside. *Id*. at 209–14.

40. BERLE, REPUBLIC, *supra* note 32, at 78–79. Berle observed that, absent regulation, conditions in 1962 resembled those of 1930, heralding another depression. *Id*. at 217.

41. BERLE, 20TH CENTURY, *supra* note 31, at 11–12.

42. *Id.* at 49.

43. Wachter, *supra* note 21, at 607–10.

44. He regularly brought to date *The Modern Corporation*'s figures on industrial concentration. Unfortunately for Berle's track record as a prognosticator, things had not worked out quite as predicted. The book had projected that the largest 200 firms would account for 70% of production. By 1962, however, they supplied only 40%. BERLE, REPUBLIC, *supra* note 32, at 149. For earlier updates, see BERLE, 20TH CENTURY, *supra* note 31, at 27; BERLE, POWER WITHOUT PROPERTY, *supra* note 36, at 18. Berle sidestepped accordingly, lowering the bar and stressing that in 1962 the largest 400 to 500 firms did account for 60% to 70% of production. BERLE, REPUBLIC, *supra* note 32, at 149.

45. BERLE, 20TH CENTURY, *supra* note 31, at 47–48. *See also* BERLE, REPUBLIC, *supra* note 32, at 102–03. New industries would come into the system when they grew large enough to have an

pricing power was abused or the public came to deem its exercise unacceptable in a given segment—or, alternatively, competition broke out with destructive effects[46]—regulation or informal intervention could be expected, with informal means being preferred.[47]

Berle addressed his critique of the capitalist system to the perfectly competitive state envisioned by classical economics. He never integrated into his thinking the neoclassical theory that emerged after World War II, which in its first iteration envisioned a stable environment with oligopolistic markets, and later envisioned a stable environment with contestable markets. Berle thus failed to appreciate the private system's inherent equilibrating capability. Having lived through the Great Depression, which only ended with the military buildup prior to the United States' entry into World War II, his pessimism is understandable.

C. Political Processes and Controls

Berle built his political economy around two points. We have just seen the first: state economic management could not be avoided. We turn now to the second: the state manager would approximate the ideal of a benign maximizer.

There was, said Berle, no problem of a Leviathan state, at least in the American context. Government actors assumed new economic planning functions only reluctantly, because of the political costs of failed policy and the lack of upside benefits.[48] Intervention thus presupposed private sector failure or abuse, and informal intervention was preferred to formal regulation.[49] If anything in American politics worried him, it was persistent, anti-statist objections to government intervention, which in his view failed to recognize the danger posed when private actors wielded concerted economic power.[50]

For Berle, then, the American political state had learned to take a pragmatic and flexible approach to economic management, hewing to the premise of a free society and eschewing grand theories.[51] Berle little

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impact on public welfare. At that point, stabilization plans would have to be worked out, with the unions cooperating. *Id.* at 159–60.

46. *Id.* at 160.

47. *Id*. at 41, 103. *See also* BERLE, POWER, *supra* note 39, at 201 (noting price policing by Presidents Kennedy and Johnson). Here Berle was open to a more explicit corporatist reform, advocating a postwar proposal made by Means for a government board that would monitor the "economic performance" (as opposed to the profitability) of all large firms and intervene as needed. BERLE, REPUBLIC, *supra* note 32, at 161.

48. BERLE, REPUBLIC, *supra* note 32, at 67.

49. *Id.* at 41.

50. *See* BERLE, POWER WITHOUT PROPERTY, *supra* note 36, at 124–25.

51. BERLE, REPUBLIC, *supra* note 32, at 15.

concerned himself with political process.[52] European theories of corporatist organization do not register in his postwar writing—there are no elaborate structures of groups and lines of political input. Nor does postwar American pluralism fully register. Interest group pluralism made Berle suspicious because it assumed good results from competition in pursuit of self-interested goals and failure to cooperate.[53]

Berle did, however, acknowledge that interest group competition could have the beneficial effect of preventing acquisition of excessive power in any one interest.[54] It is at this level that Berle identified a pluralism he could embrace, a pluralism consistent with his preference for cooperation: the multiplicity of empowered institutions—states, firms, and labor unions—had emerged in interdependent "equipoise," an equilibrium relationship in which no single institution had been permitted to assume more than a handful of functions.[55] Berle thought the balance worked well.

It followed that political process did matter in Berle's theorizing, but only at a very general level. The "clear social demands"[56] hypothesized in the last chapter now manifested themselves in the apparatus of public consensus. The public consensus in turn legitimized the exercise of power.[57] Empowered actors, whether private or public, were expected to voluntarily observe the standards stated in the consensus.[58] The consensus in turn reflected prevailing customs respecting fair and equitable outcomes.[59]

While Berle can be called a political economist, he was not a political theorist. His postwar writings take the political economic landscape of the Eisenhower and Kennedy eras and describe it at a high level of generality. While he projected this picture forward in time, time would prove the projection inaccurate. Nor would political theory remain sup-

52. Berle did have a theory of "political forces." ADOLF A. BERLE, JR., NATURAL SELECTION OF POLITICAL FORCES 17 (rev. ed. 1968) (1950). This abstracted from Western history to offer a vision of natural selection of different political regimes. *Id*. at 17–18. "Good" regimes built on coherent ideologies and directed to taking people to "safety and survival" had superior evolutionary fitness. *Id*. at 86. What a political theorist today might call "process," Berle called "apparatus," attaching an open-ended definition: "the entire range of method, from persuasion and emotion to force, . . . by which groups are held together." *Id*. at 24. The better the political force, the more would its apparatus sustain it effectively over time. *Id*. at 24–25.

53. Berle denounced planning directed towards the defense of special interests as irresponsible. BERLE, REPUBLIC, *supra* note 32, at 127.

54. BERLE, POWER WITHOUT PROPERTY, *supra* note 36, at 92.

55. *Id.* at 88.

56. *Id*. at 127.

57. In Berle's view, the American public's value system—"vast, silent, nonestablished but still regnant"—was the polity's essential organizing force. BERLE, POWER, *supra* note 39, at 294.

58. BERLE, REPUBLIC, *supra* note 32, at 41.

59. *Id*. at 42–43.

portive. Later political theories describe frictions that prevent the formulation of the stable political consensus on which he grounded his political economy. Absent a stable consensus, there is no source of instructions for managers to follow in their quasi public capacity or, in the last chapter's terms, no "clear articulation."

D. Corporate Power

Recall that the last chapter envisions managers as "purely neutral" technocrats who make allocative decisions "on the basis of public policy rather than private cupidity"[60] and dismisses the shareholders from its political economic picture owing to their inactivity and irresponsibility. Postwar-Berle backed away from the neutral technocracy, but as the discussion that follows will show, public duties retained a central place in his description of corporate managers. Meanwhile, his description of shareholders underwent expansion but did not change in substance.

1. The Political Position of Management

The Modern Corporation was written before 1933 and, in that context, Berle had seen collectivized corporate power as a problem. The shift from an atomized economy in which no individual could direct the actions of another meant something entirely different in the American economic republic. Managers, of course, remained where they had been in *The Modern Corporation*—atop self-perpetuating corporate oligarchies with close to absolute power,[61] at least as compared to other interest holders in the firm. Now, however, the power stemming from the concentration of productive functions in the hands of a few provided the means to realize a planned economy.[62]

Ironically, reliance on a planned economy improved management's position. At the time of *The Modern Corporation*, Berle thought that corporate power implied legitimacy problems for managers. Now, in contrast, managers legitimized themselves in the de facto corporatist framework Berle called the equipoise of strong organizations. Within the equipoise, corporate power was constrained by the need to profit,[63] by the residuum of competition within oligopolies, by the labor unions and, given misuse of power or a crisis, by the state.[64] Public opinion—the consensus—influenced all of these, operating slowly but, in the long

60. BERLE & MEANS, *supra* note 1, at 312–13.
61. BERLE, 20TH CENTURY, *supra* note 31, at 180.
62. *Id*. at 32, 34–35.
63. BERLE, POWER WITHOUT PROPERTY, *supra* note 36, at 90.
64. *Id*. at 89–92; BERLE, 20TH CENTURY, *supra* note 31, at 53–59.

run, determinatively.[65] It also bore on managers directly; for managers, as for politicians, violation of community values implied a loss of prestige. The corporation thus did have a conscience, one imposed by the community outside.[66]

The corporate manager emerged as a "non-Statist civil servant,"[67] a non-state actor nonetheless subject to the consent of the governed.[68] Problems could result—a manager could be caught by surprise between the emergent public consensus and the responsive state, grappling in the unfamiliar territory of political accountability.[69] If corporations had the power to address a matter and the public demand registered, failure to take responsibility meant a forfeiture of power to the state.[70] The best defense was a satisfied American public and, happily, the U.S. public imposed no unreasonable demands (unlike that in other countries).

2. The Role of Shareholders

Berle never abandoned his trust model of corporate law. Even so, corporate law, which lay at the center of *The Modern Corporation*, dropped to secondary status in Berle's postwar political economy. It was simply not a very important mode of regulation in the big stick regulatory state. Management, already constrained by federal regulations, only needed to be constrained on the margin by the state corporate law apparatus.[71] Indeed, Berle approved of postwar extensions of the protection of the business judgment rule.[72]

Berle left the shareholders in the marginal position to which the last chapter had consigned them, expanding on the point by reference to developments in the capital markets. For Adam Smith, the capital markets had the means to penalize inefficient managers and retain the final say respecting new deployments of capital. Now, the capital function had passed to the investing firm itself. Berle pointed out in 1954 that during the preceding six years, 64% of invested capital had been financed by

65. *Id*. at 53–57.

66. BERLE, POWER WITHOUT PROPERTY, *supra* note 36, at 90–91.

67. *Id*. at 8.

68. BERLE, 20TH CENTURY, *supra* note 31, at 59–60.

69. BERLE, POWER WITHOUT PROPERTY, *supra* note 36, at 8.

70. BERLE, 20TH CENTURY, *supra* note 31, at 172–73.

71. So far as labor was concerned, Berle strongly supported the institution of collective bargaining, but viewed unions that took advantage of a strategic position to extort special benefits by wielding the strike weapon as little better than gangsters. Here too, state intervention was necessary, but only as the occasion arose. BERLE, REPUBLIC, *supra* note 32, at 167–78.

72. *See* BERLE, 20TH CENTURY, *supra* note 31, at 179–80.

retained earnings and only 6% from new equity.[73] It followed that the stock exchanges no longer served primarily as places of investment and capital allocation, traditional functions only implicated in the rare instance of a new issue of common stock.[74]

The shareholders, earlier thrown up against Dodd as a countervailing interest, dropped out of the governance picture. Federal bureaucrats now did the law enforcement. The annual election of directors played a minimal legitimating role in the wider political framework—a ritualized community process pursuant to a hoary legal template.[75] Proxy fights, a recent development in the 1950s, did not imply renewed empowerment for equity capital. Although always a possibility, interventions by proxy contestants would be rare and would tend to involve smaller firms.[76] With bigger firms, the vote was getting ever more dispersed, further diminishing its importance and embedding passivity.[77]

All of this caused Berle to pose fundamental questions:

> Why have stockholders? What contribution do they make, entitling them to heirship of half the profits of the industrial system . . . ? Stockholders toil not, neither do they spin, to earn that reward. They are beneficiaries by position only. Justification for their inheritance must be sought outside classic economic reasoning.[78]

Passive property holders who wielded no power still might be socially justified for their distributive role in the polity. The shareholders used their wealth to provide for their families, pay their taxes, and support charitable institutions.[79] But there was a catch: *full* justification for the shareholder interest would follow only when shareholder wealth became so widely distributed as to benefit every American family.[80]

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73. *Id.* at 37–39 (acknowledging exceptions for utilities and new industries). *See also* BERLE, POWER WITHOUT PROPERTY, *supra* note 36, at 45 (noting that 10% or 15% of new capital came from pension funds and insurance companies and 20% from bank borrowing).

74. Adolf Berle, *Property, Production and Revolution: A Preface to the Revised Edition* of ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY, at xxvi-ii (Harcourt, Brace & World, rev. ed. 1968) (1932) [hereinafter Berle, *1968 Introduction*]. It followed that "productive property" needed to be subdivided into two classes. First came the layer controlled by the managers. Although managers served as the passive owners' "representatives," *id.* at xi, it was subjection to outside political processes that made their decisions legitimate. Liquid capital made up the other layer, a layer passive so far as concerned ownership of the production function but actively managed to earn returns through interest, dividends, or other return of profits. *Id.* Here too regulation had followed—the federal securities laws protected liquidity and the integrity of the market price. *Id.* at xxi.

75. BERLE, POWER WITHOUT PROPERTY, *supra* note 36, at 104–05.

76. *Id.* at 63. *See also* BERLE, POWER, *supra* note 39, at 260.

77. Berle, *1968 Introduction*, *supra* note 74, at xix.

78. *Id.* at xxiii.

79. *Id.*

80. *Id.*

Berle entered a caveat to this description. He noticed that more and more stock had been accumulating in pension funds, insurance company vaults, and mutual funds. These institutions constituted a new nucleus of power, a small oligarchy that potentially could exercise power over management as it accumulated and deployed risk capital.[81] All the shareholding institutions needed to do was combine and use the proxy process, ignoring management's slates and substituting their own.[82] But they were not yet exercising this power, instead following the Wall Street rule and opting for exit over voice. For the moment, then, public opinion remained the more effective check on managers than shareholder opinion.[83] The picture could change if the institutions woke up and exerted power over management tenure, ending management's self-perpetuating oligarchy.

If Berle did not predict the emergence of activist institutional shareholding, he at least identified it as a possibility and so was a step ahead of his time. But when such institutions finally did appear, they had the effect of, in part, unwinding Berle's separation of ownership and control and the problems it creates.

That said, it is likely that Berle would modify his framework only slightly to accommodate today's institutional investors. He would simply say that one set of oligarchs—the managers—was being replaced by another institutional oligarchy—money managers—and that the problem of public accountability remained unaddressed. Here again we see that shareholder primacy was not Berle's loadstone. His goal remained the insertion of the public interest into the corporate calculus.

E. Summary

Late Berle expanded the themes of the last chapter into a general political economy, picking up where *The Modern Corporation* had left off. Although sensitive to context and new developments, Berle filtered them through a static framework set by the politics and economics of the New Deal. He interrogated, but dismissed, new thinking in market economics, never contemplating that private markets can make institutional adjustments to resolve their own problems. To Berle, the political equilibrium that favored state planning would endure because markets always failed, and that was that.

Corporate legal theory today is about "governance," a phenomenon in which postwar Berle displayed little interest. For him, the central

81. BERLE, POWER WITHOUT PROPERTY, *supra* note 36, at 49–51, 53.
82. *Id*. at 53, 55–56.
83. *Id*. at 53, 55.

problem was not insuring that managers acted on behalf of shareholders; instead, the central problem was to get managers to act in the shareholders' interest with the binding constraint that managerial decision making had to take into account the dictates of public policy. If that were accomplished, shareholders would have no public policy role to play. Their interest will become a part of the policy discussion only to the extent that shareholdings become sufficiently dispersed as to merge the shareholder and public interest into one. This has never happened.

III. THE LAST CHAPTER AFTER BERLE

The last chapter tells us that demands for corporate social responsiveness are inevitable and that political and social particulars will vary with the context; and so they have in the years since Berle's death in 1971. The regulatory state on which Berle based his postwar theory of corporate power began its retreat soon thereafter, disrupting the benign equipoise he pictured. For example, Berle, writing in 1963, had approvingly cited President Kennedy's recent intervention between the steel companies and the United Steel Workers[84] as an example of the enduring corporatist state. No one knew it at the time, but that would be the last industrial labor dispute settled by the big stick state making threats to corporate actors who failed to comply.[85] The last adoption of an economy-wide corporatist policy came with the wage and price controls that the Nixon Administration imposed between 1971 and 1974.[86] Thereafter, the industry-specific regulatory framework of the New Deal was rolled back, piece by piece.[87]

The United States jettisoned the big stick state for a political economy that relied on competitive forces to produce the greatest wealth, not only for shareholders, but also for society in general. Were we to close our account at this point, the last chapter of *The Modern Corporation* would be in partial, if not full, eclipse. As the new political economy emerged, Berle's vision of corporate participation in the achievement of national social objectives within a corporatist framework disintegrated. To Berle, the state, rather than the markets, would be the agent of change. He did not project a picture of management duties in a deregulated state.

The framework for identifying and addressing corporate problems changed as the regulatory state retreated. The problem of management power continued to hold the center stage, but was reframed as a matter of

84. BERLE, REPUBLIC, *supra* note 32, at 168–69.
85. *See* Wachter, *supra* note 21, at 614–15.
86. *Id*. at 616.
87. *Id*. at 618–20.

incentive alignment. In addition, shareholder value maximization came to be seen as a proxy for optimal economic results, situating the shareholder interest at the economic margin.[88] Under this emerging view, management in the shareholder interest maximizes value, partly as a matter of correct incentive alignment,[89] and partly because the financial markets where shareholders set the price came to be viewed as better deployers of corporate assets than actors in management suites.[90]

The model, now seen in agency terms, included structural barriers that prevented the shareholder principals from controlling the manager agents. It followed that the structure of the board of directors needed revision to make the board an effective monitor of management performance.[91] There followed movement toward a more vital, independent board—a shift that occurred largely as a matter of private initiative.[92] The process apparatus, now termed "corporate governance," followed, channeling the operation of the independent board through an ever-expanding list of best practices. Together, these constrain management power ever more. Thus the task of management power containment, which Berle assigned to the big stick state, has been privatized.

Comes the question: What role does the corporation play in society in a political economy built around competitive outcomes and private value maximization? One possible answer is that the corporation does not play a social role, its sole function being maximization of the value of the shareholder interest. But that answer only gives rise to another question: How does a society that grounds its political economy in competitive markets go about achieving social goals?

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88. Michael Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976), began a new line of microeconomic theory that succeeded where classical microeconomics stopped short, modeling the governance of large firms with separate ownership and control as incidents of contracting among rational economic actors.

89. *See, e.g.*, HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE 12–16 (1996) (describing the corporation as a "capital" or "shareholders cooperative"); OLIVER E. WILLIAMSON, ECONOMIC INSTITUTIONS OF CAPITALISM (1985) (emphasizing transaction costs); OLIVER E. WILLIAMSON, THE MECHANISMS OF GOVERNANCE 184 (1996) (arguing that shareholders have residual claimant status with respect to both earnings and asset liquidation); Oliver E. Williamson, *Corporate Governance*, 93 YALE L.J. 1197, 1210 (1984) (emphasizing shareholder vulnerability).

90. Bengt Holmstrom & Steven N. Kaplan, *Corporate Governance and Merger Activity in the United States: Making Sense of the 1980s and 1990s*, 15 J. ECON. PERSP. 121, 122 (Spring 2001).

91. *See* MELVIN ARON EISENBERG, THE STRUCTURE OF THE CORPORATION: A LEGAL ANALYSIS 162–85 (1976). Eisenberg synthesized and materially advanced a generation of thinking about deficiencies of the received legal model of the corporation. *Id*. Eisenberg's monitoring model of the board of directors has ever since been the main focus of legal corporate governance.

92. *See* William W. Bratton & Michael L. Wachter, *The Case Against Shareholder Empowerment*, 158 U. PA. L. REV. 653, 677–81 (2010) (describing private sector containment of management power).

The surprising answer is that the corporation plays a highly salient role in achieving social goals, even in the new political economy. The reason is that the large corporation, a newly emerging phenomenon when Berle and Means wrote *The Modern Corporation*, grew into a ubiquitous social institution. It did so because it proved a highly productive mechanism; indeed, it creates most of society's increasing wealth.

The large corporation's ubiquity and productivity together made it the logical institution to provide many of the economic items in the social welfare function and even to join with government as a regulatory enforcer. Indeed, given a political economy that relies on the market mechanism, there was no other option.

We fill in this picture of a corporate service provision below. Section A looks at the corporation's provision of health care and pensions, two examples of corporate provision of socially valued goods in the deregulatory era. Section B shows that corporations have been deputized as law enforcers. While Berle neither recommended nor predicted this development, it neatly fits the picture articulated in *The Modern Corporation*'s last chapter.

A. The Corporation as Social Insurer: Health Care and Pensions

Nineteenth century corporations were uninvolved in providing health care and pensions for individual employees.[93] This changed in the 1910s when a few corporations undertook "welfare work," which included providing limited health care and pensions for their employees.[94] The benefits, however, were less extensive than those commonly provided today, with unsecured insurance coverage and "informal" pension benefits.[95] Some corporations made these efforts on the theory that benefits increased employee loyalty to the company, but the practice was not widespread.[96]

Employer health and pension provision increased dramatically beginning in the late 1920s and early 1930s, with the growth trajectory continuing to the 1950s. In a 1935 study, the National Industrial Conference Board found that health insurance provisions increased from 16% to 34%

93. *See* Frank R. Dobbin, *The Origins of Private Social Insurance: Public Policy and Fringe Benefits in America, 1920–1950*, 97 AM. J. SOC. 1416, 1417 (1992).

94. *See id.* (discussing "welfare work" programs in firms such as General Electric, U.S. Steel, Pullman, and International Harvester).

95. *See id.* (citing STUART D. BRANDES, AMERICAN WELFARE CAPITALISM, 1880–1940 (1976) (discussing "informal" pension programs where employers paid into mutual benefit associations, which "maintained contributory employee-financed funds that paid benefits to injured and ill employees and sometimes to their survivors").

96. *Id.* (citing JILL QUADAGNO, THE TRANSFORMATION OF OLD AGE SECURITY: CLASS IN POLITICS IN THE AMERICAN WELFARE STATE ch. 4 (1988)).

of large employers between 1928 and 1935 and that employer-provided pensions increased from 2% to 13% among large employers over the same time period.[97] Institutional stability came with the growth—companies maintained the vast majority of these programs even through the Depression[98]—with mechanisms more akin to today's benefit programs. Health coverage included guaranteed payment for illness-related work absences and was sometimes supplemented by more extensive medical coverage.[99] Pension programs were mainly comprised of contributions to private insurance programs, with benefits calculated based on years of service.[100]

Corporate welfare provision became more thorough-going and, indeed, assumed its contemporary institutional shape during the late New Deal and World War II. Different accounts of this development focus on different factors. Some cite labor shortages in key industries[101]—particularly those involving firm-specific skills where reducing turnover most dramatically reduced costs.[102] Others emphasize industrial factors during the wartime years, particularly the growth in firm size.[103] Still, others focus on company relationships with unions, associating the passage of the Wagner Act with union gains and a consequent increase in provision.[104] A contrasting line of explanation looks to public policy during the 1930s and 1940s. Proponents of this view argue that the increase in benefit programs during this time was a result of the excess-profits tax (making it less costly for firms to provide such benefits), the wartime wage freeze (leading firms to use non-wage benefits as a means

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97. *Id.* at 1426–27 (citing NATIONAL INDUSTRIAL CONFERENCE BOARD, WHAT EMPLOYERS ARE DOING FOR EMPLOYEES 11 (1936)).

98. *Id.* at 1417; *see also id.* at 1426–27 (stating that the NICB's 1935 study "found that only 7% of all pension and health insurance programs had been canceled since the onset of the Depression") (citing NATIONAL INDUSTRIAL CONFERENCE BOARD, *supra* note 97, at 11).

99. *Id.* at 1417 (citing MARQUIS JAMES, THE METROPOLITAN LIFE: A STUDY IN BUSINESS GROWTH 263 (1947); NATIONAL INDUSTRIAL CONFERENCE BOARD, RECENT DEVELOPMENTS IN INDUSTRIAL GROUP INSURANCE 13 (1934)).

100. *See id.*

101. *Id.* at 1418 (citing SUMNER SLICHTER, POTENTIALS OF THE AMERICAN ECONOMY: SELECTED ESSAYS OF SUMNER H. SLICHTER (1961)).

102. *Id.* (citing PETER B. DOERINGER & MICHAEL J. PIORE, INTERNAL LABOR MARKETS AND MANPOWER ANALYSIS (1971); RICHARD EDWARDS, CONTESTED TERRAIN 142 (1979); DAVID M. GORDON, ET AL., SEGMENTED WORK, DIVIDED WORKERS 195–212 (1982); Randy Hodson, *Labor in the Monopoly, Competitive, and State Sectors of Production*, 8 POL. & SOC'Y 429 (1978)).

103. *Id.* (citing PETER M. BLAU & RICHARD A. SCHOENHERR, THE STRUCTURE OF ORGANIZATIONS (1971); D.S. Pugh, et al., *Dimensions of Organizational Structure*, 14 ADMIN. SCI. Q. 91 (1969)).

104. *Id.* (citing IRVING BERNSTEIN, THE TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER, 1933–1941 (1972); BRANDES, *supra* note 95; DAVID BRODY, WORKERS IN INDUSTRIAL AMERICA (1980); SANFORD JACOBY, EMPLOYING BUREAUCRACY: MANAGERS, UNIONS, AND THE TRANSFORMATION OF WORK IN AMERICAN INDUSTRY, 1900–1945 (1985)).

of reducing turnover), and the tax exemptions for pensions and health care under the Revenue Act of 1942 and IRS provisions issued in 1943.[105]

Whatever causal factor one chooses to emphasize, it is clear that the corporation assumed a focal-point role in welfare provision in the corporatist political economy ushered in by the New Deal. Given that, the absence of direct federal mandate is unsurprising. The Wagner Act empowered the unions, and the managers went to the new bargaining table with an eye to the government's interest in peaceful workplaces and the constant possibility of new regulatory intervention. Welfare provision followed naturally in this structure of enforced cooperation, a structure presaged in *The Modern Corporation*'s last chapter.

If there is a puzzle here, it goes to the persistence of the corporation's focal-point role in welfare provision. In the 1950s, corporations altered their political position to favor expansion of Social Security provision and to de-emphasize private provision.[106] But employer provision of health and pension coverage did not decline in response. Levels of employer coverage underwent only modest shifts in subsequent years.[107]

No doubt some of the factors cited in accounts of the rise of corporate welfare provision also figure into the practice's persistence, even as union power has, for the most part, declined in importance with the de-

105. *Id.* at 1418–19 (citing LOUISE ILSE, GROUP INSURANCE AND EMPLOYEE RETIREMENT PLANS (1953); QUADAGNO, *supra* note 96; HUGH MACAULAY, FRINGE BENEFITS AND THEIR FEDERAL TAX TREATMENT (1959); RAYMOND MUNTS, BARGAINING FOR HEALTH: LABOR UNIONS, HEALTH INSURANCE, AND MEDICAL CARE (1967); Beth Stevens, *Blurring the Boundaries: How the Federal Government Has Influenced Welfare Benefits in the Private Sector*, *in* THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES 123–48 (Margaret Weir, Ann Shola Orloff & Theda Skocpol eds., 1988)). Professor Dobbin, however, rejects this explanation, *id*. at 1419, finding that the majority of the increases in benefit programs occurred before the legislative measures were taken. *Id*. at 1437 (citing ILSE, *supra* note 105, at 189, 315). He suggests, in the alternative, that the rise in employer-provided benefits comprised of institutional reactions to government and market developments across the entire period. *Id.* at 1420–21.

106. This was a strategic response in a long-running battle with the unions, who wanted fringe benefits like health care and pensions brought to the mandated bargaining table. When public policy shifted in the unions' favor in that debate, management shifted to favor government provision. *Id.* at 1420–21.

107. Sanford Jacoby, *Are Career Jobs Headed for Extinction?*, 42 CAL. MGMT. REV. 123, 133 (1999) (citing Henry S. Farber & Helen Levy, *Recent Trends in Employer-Sponsored Health Insurance Coverage: Are Bad Jobs Getting Worse?* (Nat'l Bureau of Econ. Research, Working Paper No. 6709, 1998); U.S. BUREAU OF LABOR STATISTICS, REPORT NO. 99-02, EMPLOYEE BENEFITS IN MEDIUM AND LARGE PRIVATE ESTABLISHMENTS tbls. 5 & 6 (1999)).

Pension coverage declined in the 1980s among some groups; but the proportion of employers providing pensions later returned to the late 1970s level. The proportion of employees with pension coverage rose slightly through the 1990s, *id.* at 132, and has not changed significantly since that time. *Id.* at 133. Nor has there been much change in the proportion of employees who receive employer-provided health coverage, *id.* at 133, even as the trend has been for employers to restrict health benefits available to part-time employees. *Id.* at 132.

cline of the union share of private employment. Notably, the Internal Revenue Code makes health insurance premiums deductible as corporate business expenses[108] and tax exempt for employees.[109] Assuming that Internal Revenue Service rules are constructed to serve social goals, we see how the ubiquitous presence of corporations as employers can serve as the vehicle to realize social goals.

The Modern Corporation's last chapter projects that "the great economic organisms [will] be made to accept responsibility for the well-being of those who are subject to the organization, whether workers, investors, or consumers."[110] We see that, so far as concerns the employment relationship, this projection has been borne out. The ubiquitous corporation has become the vehicle of choice to realize social priorities for the working population. Berle wanted the government to state the priorities and management to assimilate those priorities into their business plans as corporate objectives. This want, in effect, has occurred, but without the big stick state that Berle thought was necessary.

B. The Corporation as Law Enforcer: Mandated Compliance

Read minimally, the last chapter tells us that, given corporate power, the public will address demands for corporate responsiveness to the state and that private property rights will not afford a defense to demands thus addressed. The last chapter grappled with the demands being made in the wake of the Great Depression. After Berle, lesser economic reverses triggered new demands on several occasions: in the mid-1970s, after Enron, and again in 2008. In the first two cases, scandals crystallized the demands, and Congress responded by passing the Foreign Corrupt Practices Act of 1977 (FCPA)[111] and the Sarbanes Oxley Act of 2002 (SOX).[112] As befits new regulation in a deregulatory era, neither act went into great detail about the economic substance of corporate management, even though both constrained management power.

The FCPA stemmed from the Watergate investigations of 1973–74. The special prosecutor discovered corporate political slush funds that evaded normal accounting controls.[113] Payments included illegal domes-

108. I.R.C. § 162 (2006).

109. *Id*. § 106(a). *See* BARRY R. FURROW, ET AL., HEALTH LAW: CASES, MATERIALS, AND PROBLEMS 639 (6th ed. 2008).

110. BERLE & MEANS, *supra* note 1, at 310.

111. Pub. L. No. 95-213, sec. 102–04, 91 Stat. 1494 (amending the Securities Exchange Act of 1934 at §§ 13(b)(2), 30A, 32) (codified at 15 U.S.C. §§ 78ff, 78dd-2, 78m(b)(2)).

112. Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, & 29 U.S.C.).

113. *See* GEORGE C. GREANIAS & DUANE WINDSOR, THE FOREIGN CORRUPT PRACTICES ACT 17–19 (1982).

tic political contributions and bribes to officials abroad—termed "questionable foreign payments"—made in connection with the sale of American goods and services.[114] A voluntary disclosure program instituted by the SEC[115] resulted in admissions by over 400 companies implicating $300 million in questionable payments.[116] Agitated by the media, the public was disgusted with corruption in government.[117] In response, Congress demanded a clean-up of corruption in corporate America.[118]

The FCPA prohibited bribery of foreign officials, making the "questionable" payments illegal. More importantly for present purposes, it mandated internal compliance systems, amending the Securities Exchange Act of 1934 to go deeply into corporate internal affairs, imposing record-keeping and internal control requirements on reporting firms.[119] It was said to amount to the most extensive application of federal law to the regulation of corporations since 1934.[120]

The scenario acted out in the mid-1970s was repeated in 2002 in the wake of reporting failures at Enron, WorldCom, and other firms. Two ingredients once again registered: headline-grabbing stories of corporate corruption and popular anger towards corporate management. Congress again passed legislation intended to "rein in" corporations—the Sarbanes-Oxley Act of 2002.[121]

Some of the SOX mandates pick up where the FCPA left off, addressing the integrity of the disclosure system. For example, SOX requires that the CEO and CFO certify public reports, making them responsible for the maintenance of the firm's internal controls system[122] and subject to accompanying criminal penalties.[123] Other provisions of SOX draw on processes specified in the corporate governance book of best practices, locking them in as mandates.[124]

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114. *See* Roberta S. Karmel, *Realizing the Dream of William O. Douglas—The Securities and Exchange Commission Takes Charge of Corporate Governance,* 30 DEL. J. CORP. L. 79 (2005).

115. Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct,* 78 GEO. L.J. 1559, 1582 (1990).

116. The lead item was the revelation of $22 million of bribes abroad by Lockheed Aircraft. *Id.* at n.144; *see also* DONALD R. CRUVER, COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT 4 (1st ed. 1994).

117. CRUVER, *supra* note 116, at 4.

118. *Id.*

119. *See* Walter Perkel, *Foreign Corrupt Practices Act*, 40 AM. CRIM. L. REV. 683 (2003).

120. *See* GREANIAS & WINDSOR, *supra* note 113, at 1.

121. Pub. L. No. 107-204, 116 Stat. 852 (codified at 15 U.S.C. §§ 7201 et seq.).

122. *Id.* § 302.

123. *Id.* § 906(a) (enumerating penalties for knowing violation of similar certification requirement). *See* Lisa M. Fairfax, *Form Over Substance?: Officer Certification and the Promise of Enhanced Personal Accountability Under the Sarbanes-Oxley Act*, 55 RUTGERS L. REV. 1 (2002).

124. SOX requires audit committees composed entirely of independent directors, defines independent director, lays down audit committee duties and powers, and requires disclosure respecting

Both statutes strengthen the federal truth-telling regime, responding to compliance failures by pushing federal regulation beyond the financial reports themselves, to the process of data collection. Both concern compliance with law (or in the case of "questionable payments," quasi law). In effect, the federal government, having instituted the mandatory disclosure system, reacted to successive compliance failures by reaching further and further back inside of corporations to cover the processes that generate the mandated reports. Both statutes responded to political demands and appeared when high profile noncompliance combined with economic reverses. In both cases, the political demands stemmed from the general public rather than from organized interest groups. Both statutes draw on a non-ideological source, the corporate governance agenda. Indeed, both "surmounted partisan politics in the course of their enactment."[125]

In sum, both statutes exemplify the last chapter's point about corporate power and public demands. They both flow from an ongoing mediation between corporate power—now manifested in the insiders' informational superiority—and the outside economy—now protected by disclosure rules. And, just as the last chapter predicts, the state traverses the public/private divide as the mediation proceeds.

The FCPA and SOX extend the penetration of public enforcement considerably into the private sphere, forcing corporations to participate directly in the enforcement enterprise. The mandatory aspect of this deputization looms large in the imagination. Most people, when they look at compliance systems, see a new layer of mandated costs—the big stick state in raw form, the public pounding the private. But something else also is at work here: a corporate compliance officer is a cop, a private sector cop pursuing a public goal. The state mandates the officer's presence (indeed, it mandates a whole corporate department) to make sure the empowered actors inside the corporation cooperate with the public's clearly stated legal compliance demands. The compliance officer accordingly exercises delegated public authority, harnessing corporate resources toward public ends. To the extent the system works as contem-

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the expert status of committee members. Sarbanes Oxley Act of 2002, §§ 301, 407, 15 U.S.C. §§ 78j-1, 7265. It can be noted that these mandates implied little in the way of real world institutional adjustment. Most large firms were organized with audit committees and compliance systems already, reflecting the influence of decades of self regulatory conversations about best governance practices. National level audit committee mandates date from the Watergate era, albeit through the medium of exchange listing requirements. Indeed, amendments to NYSE listing requirements, mooted in 2002 and approved in 2004, track the SOX audit committee provisions and extend them to the compensation and nominating committees before going on to the final redoubt of the boardroom to mandate a majority independent board. *See* NYSE LISTED COMPANY MANUAL ¶ 303A.

125. William W. Bratton & Joseph A. McCahery, *The Equilibrium Content of Corporate Federalism*, 41 WAKE FOREST L. REV. 619, 668 (2006).

plated, it is because the corporation internalizes the public goal, working in co-operation with the government.

Corporate deputization extends well beyond the mandatory disclosure system and internal self-policing to external police work. We have already seen this with the FCPA. The "questionable payments" that motivated it had two parties, an American corporate payor and a foreign payee. In forbidding the payments, the FCPA sought not only to assure domestic corporate cleanliness, but also to eliminate corruption in business contexts abroad. Subsequent legislation goes further. For example, money laundering is a problem, and the criminals doing the laundering use bank accounts. The Bank Secrecy Act (BSA) accordingly requires banks to file "Suspicious Activity Reports" (SARs) with the Financial Crimes Enforcement Network of the Treasury Department whenever a transaction of $5,000 or more gives the bank reason to suspect that the transaction stems from, or disguises, illegal activities.[126] Onerous obligations result. The facts of a well-known Delaware case, *Stone v. Ritter*,[127] illustrate this. Two miscreants working a Ponzi scheme used trust accounts opened at one of AmSouth Bank's 600 branches to direct proceeds to forty scheme participants.[128] No SARs were filed. Exposure of the scheme meant a criminal investigation of the bank, along with $40 million in fines and $10 million of civil penalties.[129] But it was not as if AmSouth lacked a compliance system. Its board of directors promulgated and regularly amended a set of BSA policies. It had a BSA Officer who made regular reports to the board and headed an office staffed with nineteen professionals. AmSouth also had a Corporate Security Department run by a former Secret Service officer and a Suspicious Activity Oversight Committee.[130] We see that the BSA demands not merely cooperation, but also effectiveness. Failure to deliver means being held accountable, much as would be case with an officer in a law enforcement organization.

Corporate deputization also occurs under other legal regimes, albeit in a less demanding form. With environmental, tort, employment discrimination, and health care law, the federal government avoids the flat out mandates of the FCPA, SOX, and the BSA in favor of a carrot-and-stick approach. Under this approach, the enterprise liability held out by the given legal regime is reduced or eliminated for those organizations that can demonstrate the existence of effective internal compliance struc-

126. *See* 31 U.S.C. § 5318(g) (2006).
127. Stone *ex rel.* AmSouth Bancorp. v. Ritter, 911 A.2d 362 (Del. 2006).
128. *Id*. at 365–66.
129. *Id*. at 365.
130. *Id*. at 371–72.

tures.[131] The government in effect extends an invitation to cooperate, rewarding the companies that accept it.

Corporate deputization, in short, has become a ubiquitous regulatory tool. More than a trace of *The Modern Corporation*'s last chapter survives as these arrangements proliferate. We continue to harness corporations to serve public purposes, but as the last chapter predicted, we do so in a different political economic context. The various mandates and carrots and sticks recall corporatist ideology: those who wield power in society will be brought to the public table with the expectation that cooperation will follow; punishment is held out for those who fail to cooperate with public directives.

CONCLUSION

We have seen that *The Modern Corporation*'s last chapter made four points. First, to the extent that corporations wield significant economic power, they inevitably will be the object of social demands made by the public. Second, the demands will not register unless stated clearly and forcefully by the public to the state. Third, the state must then formulate regulatory instructions directed to corporations. Fourth, the demands' content will vary with the particular political and social context.

In this Article, we have expanded on the meaning of these points by reference to three successive political and social contexts, each viewed through the lens of Berle's political economic vision of government/corporate cooperation. We looked first at the context in which the chapter was written. At that time, Berle contemplated a new regime of intense government/corporate cooperation addressed to Depression conditions, a regime thereafter realized when the NIRA set up a structure in which the government directly shaped corporate policy. We then showed that Berle's cooperative vision, reformulated as a political economy of the big stick regulatory era, survived and prospered despite the NIRA's fast collapse. We turned finally to the more recent period, in which Berle's political economy dissipated as the economy became more competitive. Here we show that Berle's vision of government/corporate cooperation has survived his own political economy.

The corporation's success as an economic producer has turned it into a ubiquitous institution to which the government turns for assistance in achieving its social welfare goals. The government still harnesses the corporation as an agent for social change, employing a mixed strategy of mandate and cooperation as it does so. The last chapter's broad outline

131. For an overview, see Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH U. L.Q. 487, 495–510 (2003).

thus retains its descriptive force. The change goes not to the process of public demand, government response, or corporate cooperation, but to the set of issues to which the public addresses its demands.