

**University of Pennsylvania
Law Review**

FOUNDED 1852

**Formerly
American Law Register**

VOL. 151

JUNE 2003

NO. 6

ARTICLES

CORPORATIONS WITHOUT LABOR: THE POLITICS OF
PROGRESSIVE CORPORATE LAW

DALIA TSUK[†]

“We, the rank and file, got burned I thought that people had to treat us honestly and deal fairly with us. In my neck of the woods, what happened is not right.”¹

[†] Associate Professor of Law, James E. Rogers College of Law, University of Arizona; Ph.D. Candidate, Yale University; S.J.D., Harvard Law School; M.Phil., Yale University; LL.B., Tel Aviv University. I am grateful to Sally Gordon and the Program Committee for inviting me to participate in the conference on Law and the Disappearance of Class in the Twentieth-Century United States and to the participants for their helpful suggestions. For comments on earlier drafts, for engaging conversations about corporate legal history and pluralism, and for their ongoing encouragement, I also wish to thank David Adelman, Barbara Atwood, Bill Bratton, Jean Braucher, Dan Ernst, Robert Glennon, Bob Gordon, Morty Horwitz, Toni Massaro, Larry Mitchell, Ted Schneyer, Joe Singer, and Elliott Weiss. The University of Arizona James E. Rogers College of Law provided financial support. All errors are mine.

* * *

American corporate law ignores workers. They don't figure into the structure of the corporation or its legal duties. But there is no one group of people more identified with a corporation and more responsible for its day-to-day conduct than corporate workers.²

* * *

"People can complain about the corporate culture at Enron, but that doesn't represent the employee culture, the thousands of wonderful people who worked there."³

INTRODUCTION

One of the most enduring characteristics of modern American corporate law is its shareholder-centered vision of managerial duties, pointedly expressed by Milton Friedman, according to which corporate managers are agents of shareholders and must manage the corporation in ways that maximize the profits of their principals.⁴ Ardent supporters of this vision argue that corporate law requires managers to exercise their power to maximize shareholder value, not the interests of other corporate constituencies, specifically workers.⁵ Last year,

¹ Kurt Eichenwald, *Audacious Climb to Success Ended in a Dizzying Plunge*, N.Y. TIMES, Jan. 13, 2002, at A1 (quoting Mr. Charles Prestwood, an Enron retiree from Conroe, Texas, who reportedly lost nearly \$1.3 million in savings).

² LAWRENCE E. MITCHELL, CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT 208 (2001).

³ Eichenwald, *supra* note 1 (quoting Ms. Lara Leibman, an employee from Houston who lost her job in governmental affairs at Enron after four-and-a-half years).

⁴ Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, § 6 (Magazine), at 32; *see also* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133-36 (reissued ed. 1982) (1962) (criticizing the idea that corporate officials "have a 'social responsibility' that goes beyond serving the interest of their stockholders").

⁵ This shareholder-centered vision of corporate law has been challenged throughout the past century and particularly in recent decades. *See, e.g.*, MITCHELL, *supra* note 2, at 209-50 (arguing that corporate managers should also take into account the interests of workers); PROGRESSIVE CORPORATE LAW (Lawrence E. Mitchell ed., 1995) (containing a collection of essays that seek to reconceptualize corporations as entities with public obligations); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 250-51 (1999) (arguing that "corporate assets belong not to shareholders but to the corporation," that shareholders, executives, rank-and-file employees, creditors, and the local community all "have an interest in [the] enterprise's success," and that, accordingly, the job of the corporation's "internal hierarchy" is to "coordinate the activities of the team members, allocate the resulting production, and mediate disputes among team members over that allocation"); G. Mitu Gulati et al., *Connected Contracts*, 47 UCLA L. REV. 887, 895 (2000) (calling attention to "the co-

the collapse of Enron and the losses suffered by its rank-and-file workers brought aspects of this shareholder-centered vision of corporate law (particularly the short-term shareholder-wealth-maximization norm) to the front pages of newspapers around the country.⁶

Many contemporary progressive corporate law scholars⁷ like to fault Milton Friedman and his students for the exclusion of workers' interests from corporate law and shareholder centrism more broadly.⁸ But the responsibility lies elsewhere. As this Article demonstrates, a

operation, conflict, competition, and compromise among equity investors, lenders, managers, workers, suppliers, customers, and all others who contribute to an economic endeavor"). For a strong endorsement of the shareholder-centered vision of the corporation, as well as a critique of progressive corporate law scholarship, see Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856 (1997) (book review).

⁶ As this description should demonstrate, the "shareholder-centered vision of corporate law," also known as shareholder centrism or the shareholder-primacy norm, is the idea that the main duty of corporate management is to maximize shareholder value. David Millon, *Why Is Corporate Management Obsessed with Quarterly Earnings and What Should Be Done About It?*, 70 GEO. WASH. L. REV. 890, 901 (2002). As Millon argues, "[g]enerally speaking, this translates into an injunction to maximize corporate profits. The law leaves unstated the time frame for achievement of that objective, but presumably some intermediate period between the immediate and the distant future is contemplated." *Id.* In turn, the "short-term shareholder-wealth-maximization norm" enjoins corporate actors to focus on short-term performance. (Or as Millon puts it, it describes "corporate management's current obsession with meeting quarter-to-quarter earnings targets." *Id.* at 892.) It is important to note that both the shareholder-centered vision of corporate law and the short-term shareholder-wealth-maximization norm reduce shareholders' ownership interests to the maximization of profit. *Cf.* David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 224 [hereinafter Millon, *Theories*] (maintaining that "[t]he shareholder primacy conception reduced the corporation to the purely private financial interests of its owners, the shareholders"). As I hope this Article will demonstrate, while a shareholder-centered vision initially allowed for a broader interpretation of shareholders' interests, it was rapidly translated into a managerial duty to maximize shareholder value and then into the short-term shareholder-wealth-maximization norm. *Cf.* Lawrence E. Mitchell, *Talking with My Friends: A Response to a Dialogue on Corporate Irresponsibility*, 70 GEO. WASH. L. REV. 988, 988 (2002) (arguing that the short-term stock price maximization "would never have arisen but for the underlying, and ultimately far more entrenched, norm of stockholder-centrism").

⁷ The term "progressive corporate law" was the title of a collection of essays edited by Lawrence Mitchell in 1995. PROGRESSIVE CORPORATE LAW, *supra* note 5. In this Article, I use the term to refer to twentieth-century corporate law scholarship that criticizes the shareholder-centered vision of corporate law and views corporations as institutions with public obligations. See Lawrence E. Mitchell, *Preface to id.*, at xiii, xiii ("It is time that the corporation be recognized as what it is: a public institution with public obligations.").

⁸ See, e.g., Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283, 289-90 (1998) (noting that Friedman "popularized the claim that the 'one and only . . . social responsibility of business' was to increase its profits").

shareholder-centered vision of corporate law (on its different aspects) reflects the cumulative effect of a broader phenomenon—namely, the reluctance of American legal scholars (progressives, moderates, and conservatives) to accept the existence of a permanent, working, wage-labor class, and hence their failure to direct law’s attention to it and to class analysis more generally.⁹

Focusing on major issues in corporate law—the nature of corporate entities and corporate power—this Article explores how, in the course of the twentieth century, legal scholars and political theorists helped remove the interests of workers (as differentiated from shareholders, officers, and directors) from the core concerns of corporate law and theory. It demonstrates how scholars’ conversations about corporate entities and corporate power were influenced by a shared cultural and intellectual objection to Marxist class analysis with its focus on the proletariat. It further explicates how the purging of the working class from scholarly imagination paved a way, first, for the rise of the new classes of managers and owners and the shareholder-centered vision of corporate law and, then, for the emergence of a narrow, shareholder-wealth-maximization norm, which is being questioned today.¹⁰

⁹ Cf. William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1111 (1989) (examining the impact of American myths with respect to class on the development of the labor movement and labor law).

¹⁰ As this description should make clear, the term “class,” as used in this Article, attaches to different classes—workers compose the working class while directors and top managers are the elite, managerial class. Contemporary social scientists recognize different class strata. Yet it is important to remember that the focus of class analysis and the meaning of the concept of class have changed dramatically over the past century. As social scientists have demonstrated, the early-twentieth-century concept of class focused on the working class, which was composed of factory workers and other blue-collar wage earners engaged in manual work. By the mid-twentieth century, however, it was necessary to distinguish the narrowing working class from the “new and expanding middle class,” which was composed of “[m]anagers, school teachers, and even clerks and secretaries”—“‘non-manual’ employees who worked for salaries rather than wages and in offices and stores rather than on the shop floor.” John Myles & Adnan Turegun, *Comparative Studies in Class Structure*, 20 ANN. REV. SOC. 103, 112 (1994). Then, “[w]ith the passage of time,” the lower and upper strata of the middle class formed new classes—office workers were delegated, “[b]y virtue of their typical earnings, job requirements, and position in the ‘relations of ruling’ of the contemporary enterprise” to “the lower echelons of a new postindustrial proletariat,” while “corporate executives who exercise[d] traditional entrepreneurial functions of investment and allocation,” were “typically counted among those who exercise[d] ‘real economic ownership,’ that is, as a fraction of the ruling class or bourgeoisie.” *Id.* While I draw on the conclusions of such sociopolitical studies, the focus of this Article is different. It examines how in the course of the twentieth century, corporate law and theory, which strongly resisted class analysis (in all its forms), helped empower certain classes, spe-

Part I of the Article focuses on scholars' attempts to come to terms with the rapid growth of corporate power and changes in business structure during the early decades of the twentieth century. Specifically, it explores how collective entities such as corporations and labor unions were reconfigured as real or natural entities. I argue that this reconfiguration was inspired by a particular, pluralist image of the state, an image that early-twentieth-century scholars adopted as an alternative both to the traditional, liberal vision of the state and to radical (Marxist) class analysis.¹¹ A pluralist image of the state was an innovative approach within the boundaries of American liberalism. It acknowledged that collective entities were a fact in American political and social life that had to be dealt with if the American democratic experience was to continue to succeed. Drawing on this pluralist image of the state, legal scholars imbued corporations and unions with life and will to act, hoping that this understanding would guarantee labor unions constitutional rights such as freedom of speech while simultaneously subjecting corporations to criminal and tort liability.¹² Yet, as I also argue, by adopting a pluralist image of the state and corporations, legal scholars opened a door for the removal of workers' interests from corporate law and theory.

Traditional class analysis envisioned society as composed of collectives of agents "sharing a common position within the specific relations of production."¹³ Its account of history and the state was based on "prevailing modes of production and their potential for epochal

cifically the ruling, executive class, at the expense of the working (and ultimately middle) classes. It is important to emphasize that the Article does not examine the relationship between legal theory and the processes of class formation, *see, e.g.*, Antoine Joseph, *Modes of Class Formation*, 43 BRIT. J. SOC. 345 (1992) (examining modes of class formation by deducing from studies of the historical development of labor movements), nor does it examine the differences between political and socioeconomic classes, *see, e.g.*, Ferenc Feher & Agnes Heller, *Class, Democracy, Modernity*, 12 THEORY & SOC'Y 211, 215 (1983) (describing the characteristics that distinguish a political class from a socioeconomic class). I hope to explore these topics and expand on the themes of this Article in the future.

¹¹ Cf. John F. Manley, *Neo-Pluralism: A Class Analysis of Pluralism I and Pluralism II*, 77 AM. POL. SCI. REV. 368 (1983) (exploring different theories of pluralism and their limited usefulness in explaining the political economy of the United States, especially when compared with class analysis).

¹² Cf. Mark M. Hager, *Bodies Politic: The Progressive History of Organizational "Real Entity" Theory*, 50 U. PITT. L. REV. 575, 625 (1989) ("[E]arly twentieth-century analysts and advocates thought the real entity paradigm would help restrain corporate capital while promoting the growth of more responsible and democratic institutions and arrangements.").

¹³ GREGOR MCLENNAN, *MARXISM, PLURALISM AND BEYOND: CLASSIC DEBATES AND NEW DEPARTURES* 86 (1989).

change.”¹⁴ In turn, a pluralist image of the state envisioned society as composed of multiple groups and associations, of multiple loci of representation, the corporation being an example.¹⁵ Amid heightening social conflict produced by immigration, urbanization, industrialization, and the decline of religious assurance,¹⁶ American intellectuals (and their European colleagues) found solace in a pluralist image of the state, which emphasized the diffusion of social and political power, thus offering a midway between conservative individualism and radical collectivism.¹⁷ Beginning with Arthur Bentley’s *The Process of Government*,¹⁸ which unveiled the impact of interest groups in society, American writers on politics viewed groups not only as the basic political form,¹⁹ but also as constitutive elements of American democracy.

Ironically, early-twentieth-century pluralists were particularly interested in legitimizing labor unions. Yet, rather than endorsing class analysis which put the proletariat at the center of history,²⁰ pluralists’ analyses focused on the (neutral, voluntary, and changing) group as the forum in which individuals found meanings for their ideas and actions. Pluralists recognized that groups differed in their goals, and most important, their powers. Yet, while class analysis viewed class an-

¹⁴ *Id.*

¹⁵ As this Article will demonstrate, this early-twentieth-century pluralist vision and post-1945 pluralism were similar in their assumptions about the dispersal of power among diverse groups. Yet, while post-War pluralist theories rested on the assumption that power could be mediated through neutral political and economic markets, early-twentieth-century pluralists (specifically legal scholars) sought to accommodate and to regulate organizational power for the benefit of the community. On the similarities and differences between early-twentieth-century pluralism and post-War pluralism, see AVIGAIL I. EISENBERG, *RECONSTRUCTING POLITICAL PLURALISM* (1995).

¹⁶ See BRUCE KUKLICK, *THE RISE OF AMERICAN PHILOSOPHY: CAMBRIDGE, MASSACHUSETTS, 1860-1930* xix-xx, 5-126 (1977) (discussing the challenge that Darwinism posed to the nineteenth-century Unitarian philosophy, which was grounded in arguments from natural and revealed theology). See generally DANIEL J. WILSON, *SCIENCE, COMMUNITY, AND THE TRANSFORMATION OF AMERICAN PHILOSOPHY, 1860-1930* (1990) (examining the early-twentieth-century transformation of American philosophy from a religiously oriented discipline into a scientific one).

¹⁷ Cf. Daniel R. Ernst, *Common Laborers? Industrial Pluralists, Legal Realists, and the Law of Industrial Disputes, 1915-1943*, 11 *LAW & HIST. REV.* 59, 60 (1993) (“Seeking a middle way between conservative individualism and radical class analysis, the liberal pluralists settled on the group as the forum in which individuals received the shared understandings that gave meaning to their ideas and actions.”).

¹⁸ ARTHUR F. BENTLEY, *THE PROCESS OF GOVERNMENT* (Peter H. Odegard ed., Belknap Press 1967) (1908).

¹⁹ EARL LATHAM, *THE GROUP BASIS OF POLITICS: A STUDY IN BASING-POINT LEGISLATION* 10 (1952).

²⁰ MCLENNAN, *supra* note 13, at 87.

tagonism as intrinsic to capitalism and class struggle as crucial for any process of change,²¹ pluralists assumed that power inequalities, specifically between workers and their employers, were historically contingent and could be overcome once all individuals were allowed to associate to promote their collective interests. Pluralists believed that by embracing groups as bases for the modern state, they would transform social warfare into civic deliberation among groups, including labor unions and corporations. By the 1930s, this vision, which was labeled industrial pluralism by some and corporate liberalism by others, resulted in a description of management and labor as “political parties in a representative democracy.”²² Workers had a right to organize and to strike, employers were required to bargain with their workers’ collective representative, but the workplace was viewed as “an autonomous realm, resistant to the intrusion of externally-defined rights and obligations.”²³

Labor law scholars have demonstrated how the industrial pluralists’ failure to address inequalities of bargaining power between workers and employers was detrimental to workers’ interests.²⁴ This Article adds to their endeavors by looking at another, untold part of the story. It examines how a pluralist image of the state was gradually transformed into a vision of the corporation that focused on the interests of shareholders vis-à-vis managers ultimately to the exclusion of all other corporate constituencies. If the world of industrial disputes was composed of workers and employers, the world of corporate law was

²¹ *Id.*

²² Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 622 (1992).

²³ *Id.* at 620. On industrial pluralism, see Ernst, *supra* note 17, at 62-68; Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 BERKELEY J. EMP. & LAB. L. 1, 5-9 (1999). On the different meanings of industrial democracy, see INDUSTRIAL DEMOCRACY IN AMERICA: THE AMBIGUOUS PROMISE (Nelson Lichtenstein & Howell John Harris eds., 1993); Holly J. McCammon, Book Review, 23 CONTEMP. SOC. 197 (1994).

²⁴ See, e.g., Stone, *supra* note 22, at 623 (explaining that “[t]he normative message [of industrial pluralism] is that all is well[;] . . . that outsiders, such as legislatures, should not intervene;” and that “private arbitration, rather than the outside judiciary, should be the exclusive tribunal for resolving disputes”). Scholars have also demonstrated how the industrial pluralists’ view was detrimental to the interests of historically disprivileged groups within unions. See Ernst, *supra* note 17, at 82-83, 99-100 (emphasizing that the industrial pluralists’ deference to “collectively arrived-at bargains of pre-existing groups of skilled workers and their employers” was often at the expense of subgroups such as African American workers).

limited to conflicts between shareholders and managers. In the pluralistic world of the 1930s, they became the classes of corporate law.

Specifically, Part II of the Article examines how the pluralist re-configuration of corporations and unions as real entities triggered concerns about corporate power and ways to tame it. Drawing on the works of prominent legal scholars, I explore how, beginning in the 1930s, corporate legal theory struggled to limit potential abuses and excesses of corporate power by describing particular social and economic groups or interests as capable of directing corporate power toward social goals. Interestingly, while such discussions might have brought traditional class analysis into corporate law, this promise was not fulfilled. Reluctant to admit the pervasiveness of class conflict, and viewing workers' interests as protected by their unions, scholars relied upon other, less immutable social interests or classes, namely shareholders and managers, to tame corporate power. For example, Adolf A. Berle, Jr., who was among the first to describe corporations as composed of a variety of individuals and factions with conflicting visions, nonetheless rejected the possibility that class warfare permeated corporate structure. Instead, Berle sought to limit corporate power by requiring managers to exercise it to promote the interests of corporate members—the shareholder class. His contemporary E. Merrick Dodd, Jr., on the other hand, adopted an elitist vision, trusting an elite class of corporate managers to exercise its power responsibly.²⁵

Dodd and Berle believed that the constraints they imposed on corporate power would protect the interests of workers (as well as the community at large). Yet, by focusing on entrepreneurs and investors, they helped legitimize a conception of value or wealth that was detached from work and labor. In the post-War years, debates about organizational power shifted to a more technocratic notion of expertise and institutional competence. Then, in the 1980s, with the ascent of an economic theory of the firm that emphasized market efficiency, a limited, shareholder-wealth-maximization norm became the means of constraining corporate power. This norm's potential harm to workers, corporations, and society was uncovered in the aftermath of Enron's collapse.²⁶

²⁵ The debate between Berle and Dodd is discussed *infra* Part II.B.

²⁶ Cf. William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275, 1283 (2002) (arguing that Enron's principals "pursued heroic short-term growth numbers that their business plan could not deliver," causing "them to become risk-prone, engaging in levered speculation, earnings manipulation, and concealment of critical information").

The recent corporate scandals are reminders of how the rapid economic, social, and technological changes of the twentieth century have led to the emergence of powerful organizations. As national governments amass political power, multinational corporations are dominating the “world economy, over which . . . centralized national governments have less and less control.”²⁷ Indeed, while the turn of the twentieth century witnessed the nationalization of the business corporation,²⁸ with the creation of multinational corporations, the twenty-first century is experiencing the internationalization of the business corporation. Faced with a rapidly growing national economy, early-twentieth-century legal scholars endorsed a pluralist image of the state and corporations to embrace the multiplicity of centers of power in society. Such an image, in turn, helped legitimize a shift of attention from the working class to shareholders and managers and ultimately a particular conception of social value. By using class as a category of analysis to reinterpret major moments in the history of corporate law and theory, I do not purport to suggest how a class-centered vision of corporate law would have altered the path of business history in the twentieth century. Such an assessment is, of course, a futile task. Yet, by demonstrating how ideology both freed and constrained scholarly imagination, and hence the development of legal doctrine,²⁹ I hope this Article encourages critical thinking about our own ideological and doctrinal commitments in a rapidly growing global community.³⁰

²⁷ Eugene D. Genovese, *Secularism in the General Crisis of Capitalism*, 42 AM. J. JURIS. 195, 202 (1997).

²⁸ See Keith E. Whittington, *Dismantling the Modern State? The Changing Structural Foundations of Federalism*, 25 HASTINGS CONST. L.Q. 483, 494-95 (1998) (discussing how multistate corporations advanced the nationalization of the American economy).

²⁹ For an illuminating discussion of the role of ideas in shaping and legitimizing legal doctrine, see Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984).

³⁰ In using class analysis to interpret major themes in corporate law, I also do not purport to offer a deterministic explanation of the field’s legal history. Rather, as I hope to demonstrate, class analysis can provide a fluid historical interpretation, recognizing contingency and unforeseeability. Cf. Ira Katznelson, *Considerations on Social Democracy in the United States*, 11 COMP. POL. 77, 84-86 (1978) (explaining that class—a multileveled concept that describes the division of labor into productive and unproductive workers, social relations in the labor market and the political realm of citizenship, and the processes of class formation—intersects history, structure, daily life, and political conflict); Maurice Zeitlin, *Corporate Ownership and Control: The Large Corporation and the Capitalist Class*, 79 AM. J. SOC. 1073, 1108-10 (1974) (arguing that using class as a category of analysis allows for the examination of the dynamics of social and political conflicts and their structural roots).

I. ENTITIES AND GROUPS BUT NOT CLASSES: THE (POLITICAL)
PLURALIST ORIGINS OF THE MODERN CORPORATION

A. *From Fictions to Real Entities: The Rise of the Modern Corporation*

Corporations have historically represented an anomaly to liberal legal thinkers who envisioned the world as sharply divided between state power and individual right holders, the ruler and the ruled. A corporation was both—an association of individual right holders, on the one hand, but an entity with state-like powers, on the other. For eighteenth-century thinkers, the continued existence of corporations demonstrated the failure of liberal efforts to destroy the intermediate forms associated with medieval life. Early-nineteenth-century legal doctrine eased the tension by dividing corporations into two different entities—public corporations that assimilated the role of the state, such as municipal associations, and private corporations that assimilated the role of the individual in society, such as business organizations.³¹

The categorization of corporations as private or public organizations determined the boundaries of their autonomy. By comparing municipal associations to governments, courts were able to impose checks on their powers, checks that were similar to the limits imposed on sovereign powers. In turn, business corporations, which were analogized to private individuals, were gradually freed from checks or government regulation.³² Yet, at the turn of the twentieth century—amidst the rise to prominence of big corporations, labor’s spreading agitation, and increasing disparities of wealth and income—the regulation of private business entities became the focus of attention.³³

Before the 1880s, states regulated the activities of large corporations, such as banks, “through the limited and specified powers

³¹ Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1099 (1980).

³² See *id.* at 1100 (arguing that “[t]he very purpose of the [public/private] distinction was to ensure that some corporations, called ‘private,’ would be protected against domination by the state and that others, called ‘public,’ would be subject to such domination”); Warren J. Samuels, *The Idea of the Corporation as a Person: On the Normative Significance of Judicial Language*, in CORPORATIONS AND SOCIETY: POWER AND RESPONSIBILITY 113, 119 (Warren J. Samuels & Arthur S. Miller eds., 1987) (explaining that “the marketing of the private character of the corporation is functional to the . . . countering of government regulation”).

³³ See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 65-107 (1992) (tracing the development of corporate legal theory at the turn of the twentieth century).

granted in their charters of incorporation.”³⁴ Private corporations were thus viewed as artificial entities (unlike real persons), created by a charter or a grant of the state, the charter being a contract “between the state and the incorporators in their collective capacity.”³⁵ By the late nineteenth century, however, the fiction paradigm lost much of its credibility as states encouraged incorporation in their territories by reducing the requirement for a state charter into a mere formality. To accommodate the change, legal thinkers adopted either a contractual or a natural entity vision of the corporation. The contractual paradigm described corporations as associations of individuals, similar to partnerships. In turn, the natural (or real) entity paradigm portrayed corporations as distinct from their individual members, though, like them, they had real existence.³⁶

The competition between the contractual and the natural entity theories was laid to rest during the early decades of the twentieth century. As early as 1886, in *Santa Clara County v. Southern Pacific Railroad Co.*—a case involving state tax on corporate property—the Supreme Court declared that corporations were protected by the safeguards of the Fourteenth Amendment’s Equal Protection and Due Process clauses.³⁷ The original rationale for the protection of corporate rights, as it was articulated in the *Santa Clara* case, was contractual—that is, the need to protect the property rights of individual members of corporations (the owners).³⁸ Yet, gradually, this rationale was abandoned. Supreme Court decisions consistently reinforced the natural entity paradigm by upholding “the personhood of corporations with respect to property rights,” especially in cases relating to the Equal Protection

³⁴ Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1444 (1987); see also Millon, *Theories*, *supra* note 6, at 210 (noting that “states used corporate law to address the interests of particular constituencies vulnerable to corporate activity”).

³⁵ Mark, *supra* note 34, at 1449. As Mark argued, “[a]t the heart of the assertion that corporations were artificial were the twin beliefs that private property was an individual right and that an individual would not manage the property of others with the same interest with which he cared for his own.” *Id.* at 1448; cf. William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1484 (1989) (“Corporations were ‘artificial’ and ‘fictive’ in part because observers looked to the conduct of individuals for the economic substance of businesses. Thus, American legal theory fastened the classical conception of the economy as a system of transactions among individuals onto a legal foundation of individual property rights.” (footnote omitted)).

³⁶ Hager, *supra* note 12, at 579-80.

³⁷ 118 U.S. 394, 397 (1886).

³⁸ HORWITZ, *supra* note 33, at 69-70; Bratton, *supra* note 35, at 1489-90.

and Due Process Clauses.³⁹ Attempts by the states to regulate corporations were accordingly viewed as unconstitutional.⁴⁰

In part, the success of the natural entity theory of the corporation was due to the inability of the contractual paradigm to accommodate the dramatic changes in business structure at the turn of the twentieth century. While antebellum businesses were single-unit enterprises owned by small groups of investors, in the early twentieth century, big businesses were becoming multiunit enterprises.⁴¹ As getting outputs from the new economies of scale required large capital investments, which most individuals lacked, firms began to draw capital from many dispersed individuals. Gradually, “salaried managers with specialized, often technological, skills took over day-to-day control of the operations.”⁴² “Dispersed shareholders and concentrated management became the quintessential characteristics of the large American firm.”⁴³ The contractual paradigm, which represented the corporation as “nothing more than the aggregate property of the shareholders,”⁴⁴ seemed to ignore the recognized truth that ownership in large public corporations was rapidly separated from control; in other words, “individual corporators were responsible neither for much of the growth

³⁹ Michael D. Rivard, Comment, *Toward a General Theory of Constitutional Personhood: A Theory of Constitutional Personhood for Transgenic Humanoid Species*, 39 UCLA L. REV. 1425, 1452-53 (1992); see also *Conn. Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 90 (1938) (Black, J., dissenting) (noting the prevalence of cases seeking to apply the Fourteenth Amendment to corporations—more than fifty percent of the cases invoking the Fourteenth Amendment during the first fifty years after its adoption).

⁴⁰ See Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 589 (1990) (“From the 1905 *Lochner* decision until the middle of the 1930s, the Court invalidated approximately two hundred economic regulations . . . ; many of the challenges were brought by corporate plaintiffs. Most decisions centered on labor legislation, the regulation of prices, and restrictions on entry into businesses.”).

⁴¹ AMERICAN LEGAL REALISM 130-32 (William W. Fisher III et al. eds., 1993); see also MICHAEL J. PIORE & CHARLES F. SABEL, *THE SECOND INDUSTRIAL DIVIDE* 49-72 (1984) (discussing how the early-nineteenth-century development of mass production as the dominant form of industrial organization resulted in the construction of giant corporations, capable of balancing supply and demand in their respective industries).

⁴² MARK J. ROE, *STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE* 4 (1994).

⁴³ *Id.* at 4; see also ALFRED CHANDLER, JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* 484-500 (1977) (examining the modern shift toward managers running large corporations and its effect on the concentration in American industries).

⁴⁴ Mark, *supra* note 34, at 1464.

within a given corporation nor for the adverse consequences of corporate actions.”⁴⁵

Indeed, with the growing separation of ownership from control in large business corporations, even those who did not envision the corporation as a natural entity described its existence as real.⁴⁶ As legal historians explained, while adherents to the *natural* entity theory “attempted simply to capitalize on the language of natural rights individualism by portraying the corporation as just another right-bearing person,”⁴⁷ others endorsed a *real* entity vision of the corporation, which gave normative recognition to an already existing economic structure. They used the real entity paradigm pragmatically—it was becoming an accurate description of corporate reality, with its multiplicity of ownership, complex financial structure, managerial control, and immortality.⁴⁸

Yet, as John Dewey explained in a 1926 article aptly titled *The Historic Background of Corporate Legal Personality*, scholars’ fascination with the natural/real entity paradigms was primarily due to their endorsement of a particular political ideology.⁴⁹ Early-twentieth-century legal scholars accepted the natural/real entity theories because they fit their political pluralist image of the modern state—their description of collective entities such as corporations and labor unions as important centers of representation and participation. As Dewey concluded, some scholars viewed corporations as natural or real because they wanted “to moralize the idea of the state, to attack the idea of irresponsible sovereignty, and, under the influence of the pluralistic philosophy . . . to utilize the importance of the group” to promote the interests of labor and trade unions.⁵⁰ Others desired “to preserve the autonomy of ecclesiastic organizations.”⁵¹ Still others sought to defend corporate personality in order “to afford a basis for popular government.”⁵²

⁴⁵ *Id.* at 1465.

⁴⁶ *See id.* (“A successful theory [of corporate entities] had to recognize the functional economic autonomy of the corporation, derived initially from the incorporators and thereafter from the effective operation of the entity by its management.”).

⁴⁷ HORWITZ, *supra* note 33, at 104.

⁴⁸ Hager, *supra* note 12, at 580-82; Mark, *supra* note 34, at 1475.

⁴⁹ John Dewey, *The Historic Background of Corporate Legal Personality*, 35 *YALE L.J.* 655, 671 (1926).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

For the most part, legal historians have accepted Dewey's explanation. The corporation, Morton Horwitz wrote, "was the most powerful and prominent example of the emergence of non-individualistic or . . . collectivist legal institutions."⁵³ The debate over the personality of associations thus reflected "a crisis of legitimacy in liberal individualism arising from the . . . emergence of powerful collective institutions."⁵⁴

Legal historians contended, however, that the depiction of corporations as real or natural supported the ascent of big businesses.⁵⁵ For example, Horwitz, having established that early-twentieth-century scholars "were at one in seeking to demonstrate the real and natural character of corporations,"⁵⁶ charged that "the rise of a natural entity theory of the corporation was a major factor in legitimating big businesses and that none of the other theoretical alternatives could provide as much sustenance to newly organized, concentrated enterprise."⁵⁷ As corporations were equated with individuals, they enjoyed the protections of the Bill of Rights.⁵⁸ In a similar manner, Mark Hager, who argued that by making the group the basic unit for political and social analysis, early-twentieth-century scholars hoped to empower some associations (labor unions) while imposing tort and criminal liability on others (corporations), asserted that "their optimism on this point seems quaint in retrospect."⁵⁹

Let me suggest that the natural/real entity paradigms supported the rise of big business not only because they brought corporations under the protection of the Bill of Rights, but also, and perhaps more important, because they helped obliterate power disparities in society, or if I may, the class basis of corporations and society. Specifically, as Parts I.B and I.C demonstrate, early-twentieth-century social scientists

⁵³ HORWITZ, *supra* note 33, at 72.

⁵⁴ *Id.*; see also Hager, *supra* note 12, at 582-85 (exploring "the intellectual universe in which it was possible for many observers to see the real entity theory as a basically pro-democratic paradigm;" specifically the appeal to early-twentieth-century legal thinkers of Otto Gierke's charge that political individualism's elimination of communal political units empowered the state and capital at the expense of individual citizens).

⁵⁵ *But see* Bratton, *supra* note 35, at 1511-13 (arguing that legal doctrine and practice played a more important role in legitimizing corporate power); Millon, *Theories*, *supra* note 6, at 240-51 (suggesting that legal theories and social practice evolved contemporaneously and were mutually influential).

⁵⁶ HORWITZ, *supra* note 33, at 104.

⁵⁷ *Id.* at 68.

⁵⁸ *Id.* at 79.

⁵⁹ Hager, *supra* note 12, at 585.

endorsed a pluralist image of the state because it helped alleviate their concerns about inequalities of power and shielded them from realizing the pervasiveness of traditional class conflict.⁶⁰ In turn, legal scholars' reliance on theories of pluralism in their reconfiguration of corporate entities brought this blindness toward class differences into corporate law. As Part II will demonstrate, once removed from the scholarly imagination, the working class disappeared from discussions about potential constraints on corporate power.

B. *Corporations and Pluralism: Neither Individualism nor Collectivism*

A pluralist image of the state is traceable to theories of political pluralism that developed in Great Britain and the United States in the early decades of the twentieth century. As farmers, workers, professionals, consumers, women, and ethno-cultural groups formed a variety of associations to protect and advance their interests,⁶¹ political theorists made groups such as labor unions and corporations the bases for the modern state. They added groups, organizations, and associations to the traditional array of national, state, and local governments.⁶²

Certain political theorists, such as Arthur Bentley, emphasized that a pluralist image of the state was an accurate description of American society amidst the organizational revolution of the early twentieth century.⁶³ These political theorists argued that because in-

⁶⁰ Cf. R. JEFFREY LUSTIG, *CORPORATE LIBERALISM: THE ORIGINS OF MODERN AMERICAN POLITICAL THEORY, 1890-1920*, at 143 (1982) (noting that group theorists failed to analyze how "the competitive process was rigged to the advantage of some groups, and whether the ability to organize was restricted to some areas of the society").

⁶¹ John Buenker, *The New Politics, in 1915, THE CULTURAL MOMENT: THE NEW POLITICS, THE NEW WOMAN, THE NEW PSYCHOLOGY, THE NEW ART, AND THE NEW THEATER IN AMERICA* 15, 15 (Adele Heller & Lois Rudnick eds., 1991); see also ELISABETH S. CLEMENS, *THE PEOPLE'S LOBBY: ORGANIZATIONAL INNOVATION AND THE RISE OF INTEREST GROUP POLITICS IN THE UNITED STATES, 1890-1925*, at 100-234 (1997) (analyzing the organizational politics of workers, farmers, and women).

⁶² On group theories in early-twentieth-century American thought, see generally LUSTIG, *supra* note 60, at 109-49; Ellis W. Hawley, *The Discovery and Study of a "Corporate Liberalism,"* 52 *BUS. HIST. REV.* 309 (1978); Ellis W. Hawley, *Herbert Hoover, the Commerce Secretariat, and the Vision of an "Associative State," 1921-1928,* 61 *J. AM. HIST.* 116, 117-22 (1974).

⁶³ See BENTLEY, *supra* note 18, at 465-80 (discussing the development of "group interpretation" as a means of political analysis). The term "organizational revolution" is used to imply that the rise of large business corporations at the turn of the twentieth century encouraged other groups to pursue their interests through collective action, bureaucratic structures, and administrative expertise. See, e.g., ELLIS W. HAWLEY, *THE*

dividuals organized themselves into groups to pursue their interests, groups and organizations were loci of participation and representation. They believed that by exploring the role of groups in society, they could offer a more realistic description of liberal democratic politics and of the (limited) role of the liberal state.⁶⁴

Other political theorists, such as John Dewey, Mary Parker Follett, and Harold Laski, offered an explicit, normative argument in support of a pluralist state. They not only recognized the existence of a multiplicity of centers of self-government in society, but also endorsed this multiplicity as a constitutive element of American democracy. These theorists argued that the state was too broad and abstract a body to command loyalty and allegiance from individuals, who associated more easily with diverse groups and organizations than with a unified state entity.⁶⁵ As Harold Laski explained, by focusing on the unity of the state, traditional, absolutist (or monist) visions of sovereignty obliterated differences of class, politics and religion: there were “no rich or poor, Protestants or Catholics, Republicans or Democrats,” only “members of the State”; all groups—“[t]rade-unionists and capitalists alike”—surrendered their interests to the state.⁶⁶ By envisioning sovereignty as distributive or multiple, pluralists sought to guarantee

GREAT WAR AND THE SEARCH FOR MODERN ORDER: A HISTORY OF THE AMERICAN PEOPLE AND THEIR INSTITUTIONS, 1917-1933, at 9 (1979) (“[T]he land that had idealized yeoman farmers and rugged individualists was becoming a land of corporate organization, bureaucratic systematizers, and associational activities.”). While the term organizational revolution refers to American society in the early twentieth century, groups and associations had always played an important role in American life. The classic account of the role of associations in the antebellum era remains ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Henry Reeve trans., D. Appleton and Co. 1904) (1835-1840). For recent accounts of associational activities in American history, see WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996); Liam Seamus O’Melinn, *The Sanctity of Association: The Corporation and Individualism in American Law*, 37 *SAN DIEGO L. REV.* 101 (2000).

⁶⁴ See LATHAM, *supra* note 19, at 12-13 (describing the pluralists’ view that “[t]he state and other group forms represent power in different packages . . . [and that] group forms other than the state are the reason for believing that the subject matter of politics is power, contrary to the view that its subject matter is the state”).

⁶⁵ As examples of these normative pluralists’ works, see JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* (1927); M.P. FOLLETT, *THE NEW STATE: GROUP ORGANIZATION THE SOLUTION OF POPULAR GOVERNMENT* (Peter Smith Publ’g 1965) (1918); HAROLD J. LASKI, *STUDIES IN THE PROBLEM OF SOVEREIGNTY* (Howard Fertig, Inc. 1968) (1917). For a historical and political analysis of American theories of political pluralism, see EISENBERG, *supra* note 15. For an examination of British theories of political pluralism, see *THE PLURALIST THEORY OF THE STATE: SELECTED WRITINGS OF G.D.H. COLE, J.N. FIGGIS, AND H.J. LASKI* (Paul Q. Hirst ed., 1989).

⁶⁶ HAROLD J. LASKI, *The Sovereignty of the State*, in LASKI, *supra* note 65, at 1, 5.

the flourishing of diverse and valuable forms of identities, ways of life, experiences, and viewpoints.

Despite political pluralists' desire to promote labor unions' interests, a pluralist vision of the state evaded an explicit discussion of class conflict. Instead, Laski, Dewey, Follett, and their colleagues turned to groups. They celebrated the diversity of interests in society, but resisted analyses that prioritized one social structure over others. Rather than dividing society into classes, they described a multiplicity of groups as the foundation of the modern state.⁶⁷ Some, like G.D.H. Cole, who advocated guild socialism, aimed to democratize the workplace to allow for workers' participation in the management of production.⁶⁸ Others, like John Neville Figgis, called for the legal accommodation of "the inherent rights of permanent associations, such as churches and trade unions."⁶⁹ Still others, like Harold Laski, "merged these economic and political streams, attacking the all-absorptive state and promoting the inherent worthiness of group associations."⁷⁰

In other words, pluralists did not single out the working class (or the proletariat). Rather, they viewed all associations as important to individual development, and sought to encourage their growth. While traditional class analysis viewed class conflict as an inevitable characteristic of social and political life, pluralists described groups as forums where individuals received meanings for their ideas and actions.⁷¹ "[B]y the 1920s," as Avigail Eisenberg recently wrote, pluralism "was displacing the conventional conception of the state."⁷² It offered an image of society that focused on the equality of groups and their members and on civic participation rather than on intra- and intergroup warfare.

As Part I.C explicates, early-twentieth-century social scientists were aware of power inequalities, but they believed that they could eliminate or at least mitigate them by endorsing pluralism. In corporate law, a (political) pluralist image of the state supported the early-twentieth-century reconfiguration of corporations as natural or real

⁶⁷ Cf. MCLENNAN, *supra* note 13, at 20 ("U.S. pluralists . . . tended to posit a multiplicity of groups rather than a concentration of society into *classes*.").

⁶⁸ David Schneiderman, *Harold Laski, Viscount Haldane, and the Law of the Canadian Constitution in the Early Twentieth Century*, 48 U. TORONTO L.J. 521, 529 (1998).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Ernst, *supra* note 17, at 60.

⁷² EISENBERG, *supra* note 15, at 63.

entities. As I explain in Part II, when legal scholars realized the need for laws and policies that would tame potential excesses and abuses of power, specifically corporate power, they, too, refused to admit that class structure was an important part of corporate law. Instead of looking to workers to constrain corporations, corporate law scholars, beginning in the 1930s, sought to limit corporate power by focusing, first, on other social structures—on the classes of managers and shareholders—and then, on the norms of expertise, efficiency, and wealth maximization.

C. *Pluralism and Power*

Political pluralists were concerned about the power that corporations could amass vis-à-vis the state, other groups, and individuals. Yet, viewing corporate efficiency and productivity as constitutive of the modern, industrial democracy,⁷³ they hesitated to subject corporations to the absolute power of the emerging regulatory state. They were also reluctant to accept that class struggle permeated social institutions such as corporations. As I have suggested, the pluralists' focus on groups was an attempt to offer an alternative to conservative individualism while simultaneously evading radical class analysis.⁷⁴

Some political pluralists assumed that corporations would remain relatively small, never amassing the power of the nation-state. For example, in his early works, Laski uncritically adopted Louis Brandeis's argument that large business units would be "physically incapable of successful administration,"⁷⁵ and that business corporations were therefore "naturally limited in scope."⁷⁶ Given such assumptions, Laski's early pluralist ideal justified liberating corporate management

⁷³ See, e.g., HERBERT CROLY, *THE PROMISE OF AMERICAN LIFE* 357-68 (1909) (describing how corporations have contributed to economic efficiency); see also SCOTT R. BOWMAN, *THE MODERN CORPORATION AND AMERICAN POLITICAL THOUGHT: LAW, POWER, AND IDEOLOGY* 80-91 (1996) (examining Croly's discussion of the ways in which industrialization transformed social and political relationships); LUSTIG, *supra* note 60, at 127-28, 136 (discussing Croly's view of the corporation as a way to bring people together and to eliminate scarcity through productivity, as well as Dewey's perception of the corporation as "the product of a natural social evolution").

⁷⁴ See MCLENNAN, *supra* note 13, at 21 ("[G]enerally speaking, the conventional pluralist literature reveals a fear that society will simply be torn apart, and democracy rendered impossible, by the concentrated workings of a small number of social divisions.").

⁷⁵ HAROLD J. LASKI, *Sovereignty and Centralisation*, in LASKI, *supra* note 65, at 277, 284.

⁷⁶ Joel Edan Friedlander, *Corporation and Kulturkampf: Time Culture as Illegal Fiction*, 29 CONN. L. REV. 31, 91 (1996); see *id.* (discussing Laski's views).

“from all restrictions imposed by a higher authority, whether that higher authority be the State, the shareholders or management’s own recognition of sacred order.”⁷⁷ Laski genuinely believed that the “corporation, being a real entity, with a personality that is self-created [rather than state created], must bear the responsibility for its actions.”⁷⁸ Yet, he neglected to assess to whom corporate responsibilities extended, or who would keep corporations in check.⁷⁹ “Having pointed to ‘interests,’” R. Jeffrey Lustig has charged, pluralists “failed to analyze empirically how those interests were structured in particular configurations.”⁸⁰

Follett offered a different solution, one that focused on the relationship between management and workers in corporations. In the early 1920s, she turned her energies to the study of industrial democracy, particularly the resolution of industrial conflicts. Follett advocated the organization of work to assure that the experience of workers would be integrated with the experience of the expert controlling the plant.⁸¹ Industrial democracy, she wrote, would emerge out of the integrative experience of labor and management.⁸² Follett urged

⁷⁷ *Id.* at 94.

⁷⁸ Harold J. Laski, *The Personality of Associations*, 29 HARV. L. REV. 404, 413 (1916), reprinted in HAROLD J. LASKI, *THE FOUNDATIONS OF SOVEREIGNTY AND OTHER ESSAYS* 139, 152 (1921); see also Friedlander, *supra* note 76, at 89 (discussing Laski’s views).

⁷⁹ See Friedlander, *supra* note 76, at 89 (explaining that “Laski did not answer [these] questions” because he was more interested in challenging the efforts of church and state to confine corporate and other collective activity “beyond its natural limits”).

⁸⁰ LUSTIG, *supra* note 60, at 143. Influenced by his interactions with American scholars, including Mary Parker Follett and Morris Raphael Cohen, who warned against the pluralists’ deference to corporate authorities, Laski ultimately altered his position. See, e.g., HAROLD J. LASKI, *A GRAMMAR OF POLITICS* 66-74 (1929) (providing a positive role for the state as coordinating the political and economic lives of a multiplicity of groups and associations). On Laski’s transformation, see Schneiderman, *supra* note 68, at 529-38.

⁸¹ E.g., M.P. FOLLETT, *CREATIVE EXPERIENCE* 20 (1924) (“[O]ur aim in the so-called democratic organization of industry should be, not to give the workmen a vote on things they know nothing about, but so to organize the plant that the workmen’s experience can be added to that of the expert . . .”).

⁸² See, e.g., *id.* at 211-12 (advocating “experience meetings,” in which experts would provide information for individuals to examine in light of their personal experiences, as a form of “collective action that is . . . satisfying by the criteria of enlightened living . . . [and that maintains] vigor and creativeness in the thinking of everybody, not merely of chosen spirits”). According to Follett, “[t]he problem of democracy [was] how to make . . . daily life creative.” *Id.* at 230. “Every man,” she wrote, “has *his* interests; at those points his attention can be enlisted. At those points he can be got to take an experimental attitude toward experience The lamp of experience is both to illumine our way and to guide us further into new paths.” *Id.*

management to exercise power with workers, not over them;⁸³ she envisioned management and labor working together to solve conflicts in an “integrative” way—by accommodating the demands of all parties involved, through cooperation rather than competition.⁸⁴

In short, early-twentieth-century pluralists trusted corporate size, workers’ self-government, or managerial statesmanship⁸⁵ to constrain corporate power. It remained, indeed, the task of legal scholars who were influenced by theories of political pluralism to articulate laws and policies that would embrace corporate power while simultaneously taming its potential excesses and abuses. Focusing on their endeavors since the 1930s, Part II of this Article demonstrates how a pluralist image of the state continued to constrain scholars’ imagination. Between the 1930s and the 1970s, pluralist-oriented corporate law scholars articulated a wide range of approaches to limit the power of corporate entities, none of which focused on the power of workers as a fixed or separate class. Ultimately, legal scholars’ cumulative efforts helped legitimize a narrow shareholder-wealth-maximization vision of corporate law, which came to dominate the field in the 1980s and 1990s.

Part II.A draws upon the path-breaking book *The Modern Corporation and Private Property*⁸⁶ to explicate how corporate legal scholars such as Adolf A. Berle, Jr. and Gardiner C. Means helped transform the pluralist vision of the state into a particular, legal pluralist image. Like

⁸³ MARY PARKER FOLLETT, *Power*, in DYNAMIC ADMINISTRATION: THE COLLECTED PAPERS OF MARY PARKER FOLLETT 95, 101-07 (Henry C. Metcalf & L. Urwick eds., 1940) [hereinafter DYNAMIC ADMINISTRATION].

⁸⁴ See Pauline Graham, *Mary Parker Follett (1868-1933): A Pioneering Life*, in MARY PARKER FOLLETT: PROPHET OF MANAGEMENT 11, 21 (Pauline Graham ed., 1995) (describing Follett’s “integrative solution” as a way to enable “those involved to grow in mutual self-respect and to learn to work together”). Immersed in Boston’s social welfare projects, in particular Boston’s public schools, Follett lectured on different occasions, publicizing her particular interpretation of industrial democracy. She worked with the Placement Bureau and the Vocational Guidance Bureau in Boston, and was a member of the Massachusetts Minimum Wage Board. Follett was also a conference leader of the Bureau of Personnel Administration in New York. Henry C. Metcalf & L. Urwick, *Introduction to DYNAMIC ADMINISTRATION*, *supra* note 83, at 9, 9-29.

⁸⁵ Cf. Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1422-23 (1993) (“The analogy between political and managerial power had lodged firmly in the progressive mind. . . . Many corporate leaders . . . had come to justify their exercise of political influence by the sovereign-like authority they already wielded as ‘industrial statesmen’ controlling the ‘vital institutions’ of social life.”).

⁸⁶ ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

political pluralists, legal pluralists acknowledged the actual role of associations in American politics. Yet they also emphasized that organizations exercised coercive powers over their members, nonmembers, and other associations. They exposed organizations, associations, and corporations as loci both of individual self-government and of coercive power cloaked by liberal legal thought as free contractual arrangements between individuals.⁸⁷ Like political pluralists, legal pluralists also recognized the importance of associations and collective entities for individual development. Yet, fearing the power that certain groups, particularly corporations, could amass, legal pluralists argued that in principle, collective entities such as corporations should be allowed to freely exercise their powers, but that courts should tame potential abuses of power by imposing on organizations limitations associated with constraints on sovereign power—that is, the requirement that their power be exercised to benefit the community at large. As I argue, this was the normative message of *The Modern Corporation and Private Property*.⁸⁸

Legal pluralists' conversations about power and the interests of the community were nonetheless limited in scope. Inspired by political pluralism, legal pluralists sought to replace structural (and class) analysis of power with a description of power as multiple, fluid, and indeterminate. The limited nature of the legal pluralists' analysis of power was revealed in the famous debate between Berle and E. Merrick, Jr. on the question of corporate managers' fiduciary duties. As Part II.B explicates, Berle, refusing to focus on the proletariat, equated community interests with the interests of a new class—the shareholder class. Dodd, in turn, sought to channel corporate power toward socially beneficial goals by reintroducing elitism. Part II.C demonstrates how in the 1950s, scholars rejected not only traditional class analysis, but also Berle's and Dodd's positions, and instead

⁸⁷ The classic critique of the distinction between public and private power remains Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

⁸⁸ In retrospect, legal pluralism may seem an inconsistent or incomplete position. For one thing, if the state, through its courts, were to guard against potential abuses of corporate power, it is not obvious how legal pluralism would have differed from absolutist (or monist) views of sovereignty. Because legal pluralists believed that courts should guarantee that the sovereign state exercised its powers to benefit society, they viewed their analogy between states and organizations as offering a pluralistic rather than monistic vision. On early-twentieth-century visions of the state, see JAMES T. KLOPPENBERG, *UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPE AND AMERICAN THOUGHT, 1870-1920* (1986); Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1427 (1982).

sought to constrain corporate power and promote community interests by focusing on the expertise of the professional, managerial class. Finally, Part II.D explores how the ascent of a new economic theory of the firm in the 1980s helped obliterate concerns about corporate power and the need to limit its excesses.

II. TAMING CORPORATE POWER WITHOUT CLASS: THE LEGAL PLURALIST STATE

A. *Power as a Category of Analysis*

The Modern Corporation and Private Property was one of the earliest attempts to probe the role of corporations in a rapidly growing industrialized society. Having shown that in large public corporations capitalism was transformed from a system of dominance by suppliers of capital to a system of dominance by managers, Berle and Means concluded that “[t]hese great associations are so different from the small, privately owned enterprises of the past as to make the concept of private enterprise an ineffective instrument of analysis.”⁸⁹ Instead, they offered “the concept of corporate enterprise[,] . . . which is the organized activity of vast bodies of individuals, workers, consumers and suppliers of capital, under the leadership of the dictators of industry, ‘control.’”⁹⁰

Since the publication of *The Modern Corporation and Private Property*, corporate law scholarship has been obsessed with its exegesis of the potential economic risks associated with the separation between ownership and control in large business corporations.⁹¹ Yet, the true in-

⁸⁹ BERLE & MEANS, *supra* note 86, at 349.

⁹⁰ *Id.*

⁹¹ In a recent article, William Bratton argued that the history of the book’s influence may be divided into two stages. In the first fifty years after its publication, the book was “the basis of a paradigm that dominated the field”—it focused on managerial fiduciary duties as a solution to the problem of the separation of ownership from control. William W. Bratton, *Berle and Means Reconsidered at the Century’s Turn*, 26 J. CORP. L. 737, 737 (2001) [hereinafter Bratton, *Berle and Means*]. Beginning in the early 1980s, however, “the book lost its paradigmatic position along with the general collapse of confidence in regulatory solutions to economic problems.” *Id.* Instead of focusing on managerial duties, contractarianism—the new paradigm—rested on the assumption that corporations were nexuses of contractual arrangements between rational actors and on opposition to regulation. *Id.* at 740. On contractarianism, see FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1991); Symposium, *Contractual Freedom in Corporate Law*, 89 COLUM. L. REV. 1396 (1989); Henry N. Butler, *The Contractual Theory of the Corporation*, GEO. MASON L. REV., Summer 1989, at 99. For critical assessments of the contractual para-

novation of the book was not its rigorous analysis of the separation of ownership from control.⁹² Rather, as reviewers commented at the

digm, see William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407 (1989) [hereinafter Bratton, *Nexus of Contracts*]; Victor Brudney, *Contract and Fiduciary Duty in Corporate Law*, 38 B.C. L. REV. 595 (1997); Elliott J. Weiss, *Economic Analysis, Corporate Law, and the ALI Corporate Governance Project*, 70 CORNELL L. REV. 1, 17-26 (1984). Nonetheless, as Bratton concluded, contractarianism did not lessen the significance of *The Modern Corporation and Private Property*. Despite harsh critiques of the book's data and of its inaccurate prediction of "ever-increasing concentration and dispersion of ownership," the book's exploration of the difficulties associated with the separation of ownership from control has remained the focus of corporate scholarship into the twenty-first century. Bratton, *Berle and Means*, *supra*, at 754. Even contractarians have argued that the separation of ownership from control causes agency costs to be suboptimally high, and hence jeopardizes contractual self-regulation. *Id.* at 755-56; see also John C. Coffee, Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618, 1667-70 (1989) (arguing that judicial intervention is necessary, even under the contractual paradigm); Jeffrey N. Gordon, *The Mandatory Structure of Corporate Law*, 89 COLUM. L. REV. 1549 (1989) (arguing that a mixed system of optional and mandatory rules is optimal, even from a contractarian perspective). But see Henry N. Butler & Larry E. Ribstein, *Opting out of Fiduciary Duties: A Response to the Anti-Contractarians*, 65 WASH. L. REV. 1 (1990) (concluding that to promote efficiency, corporate rules should result out of private ordering and not be the product of government regulation).

⁹² Certainly, this theme was not original. Throughout the early decades of the twentieth century, scholars expressed concerns about management's growing power and shareholders' inability to control it. In a 1910 address, Woodrow Wilson noted the relatively weak position of stockholders, especially in comparison to the power of those in control. Woodrow Wilson, *The Lawyer and the Community*, 35 A.B.A. REP. 419, 434 (1910). According to Wilson, shareholders did not enjoy any of the rights associated with property in connection with their corporate stock; they merely contributed money to a business which other men managed and controlled. *Id.*; see also Jerome Frank, Book Review, 42 YALE L.J. 989, 990 n.3 (1933) (discussing Wilson's address). In 1923, Thorstein Veblen explored the development of the modern corporate structure, arguing that "absentee ownership has come to be the main and immediate controlling interest in the life of civilised men." THORSTEIN VEBLEN, ABSENTEE OWNERSHIP AND BUSINESS ENTERPRISE IN RECENT TIMES 3 (1923). In 1925, Thomas Carver pointed to the increasing dispersal of corporate securities. THOMAS NIXON CARVER, THE PRESENT ECONOMIC REVOLUTION IN THE UNITED STATES 107-10 (1925); see also Nathan Isaacs, Book Review, 42 YALE L.J. 463, 463 (1933) (noting that Carver "called attention to the increasing distribution of corporate securities"). In 1927, William Ripley argued that shareholders in publicly held corporations had become powerless. WILLIAM Z. RIPLEY, MAIN STREET AND WALL STREET 78-99 (1927); Robert Hessen, *The Modern Corporation and Private Property: A Reappraisal*, 26 J.L. & ECON. 273, 279 (1983); George J. Stigler & Claire Friedland, *The Literature of Economics: The Case of Berle and Means*, 26 J.L. & ECON. 237, 241 (1983). And in 1931, I. Maurice Wormser described the corporation as "Frankenstein's creature [which had] developed into a deadly menace to his creator." I. MAURICE WORMSER, FRANKENSTEIN, INCORPORATED, at v (1931); see also Isaacs, *supra*, at 463-64 ("Wormser saw in the corporation a creature of man which seemed destined to become the master of its own creator.").

time, the book's novelty was its normative message.⁹³ While Berle and Means did not indicate their debt to the pluralist tradition, their rhetoric unequivocally placed them within it. Specifically, the book was an attempt to formulate a regulatory scheme befitting a pluralist image of the state and corporations. It made corporate power the guiding principle for determining the duties and obligations of corporations.⁹⁴ As I will also demonstrate, while Berle and Means's concept of power could have brought traditional class analysis to bear upon corporate law, it rapidly became a proxy for turning attention away from workers and toward shareholders and managers as the classes of the modern society.

On its face, *The Modern Corporation and Private Property* was "intended primarily to break ground on the relation which corporations bear to property."⁹⁵ The statistical studies, which were carried out by Means, were intended to document the growing dispersion of stock ownership in large corporations, and hence, the rapid separation of ownership from control.⁹⁶ These studies provided a background for the book's argument that the separation of ownership from control helped undermine traditional assumptions about the efficiency of competition over resources between self-interested individuals. Ac-

⁹³ Jerome Frank, for example, described the book as "the first detailed description . . . of a new economic epoch," in which corporate rulers had become "princes who . . . are sovereigns subject to no effective legal checks." Frank, *supra* note 92, at 989, 991. Following Berle and Means, Frank concluded that such a transformation raised important questions as to the appropriate restraints on corporate power. *Id.* at 995-96. In a similar manner, Isaacs emphasized Berle and Means's attention to the social consequences of the separation of ownership from control. Isaacs, *supra* note 92, at 464.

⁹⁴ See JORDAN A. SCHWARZ, *LIBERAL: ADOLF A. BERLE AND THE VISION OF AN AMERICAN ERA* 60 (1987) (arguing that "[p]ower is what the book is about"); see also GREGORY S. ALEXANDER, *COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776-1970*, at 345-46 (1997) (noting that "time could not have been more ripe for a study of the modern corporation that focused on its enormous power" and emphasizing in this respect the importance of Berle and Means's "argument that large corporations were not really private institutions but were actually 'quasi-public'"). Interestingly, later in his career Berle would be more explicit about the relationship between his approach and theories of pluralism. See ADOLF A. BERLE, *POWER 100* (1969) (claiming that America has a pluralist system that includes political institutions and private ones—"great and small corporations, banks, universities, ecclesiastical organizations, engines of mass communication and entertainment"—all of which are "mechanism[s] for conferring power on individuals and assuring . . . that their use of power shall be effective").

⁹⁵ BERLE & MEANS, *supra* note 86, at viii.

⁹⁶ Hessen, *supra* note 92, at 274-75. Means's contribution was primarily in the first chapters of the book, which contained about forty pages of charts and tables. *Id.*

ording to Berle and Means, the divergence between managers' and shareholders' interests indicated that managerial use of shareholders' property might be both self-interested and inefficient.⁹⁷

Yet, as Berle's biographer indicated, "[b]y the spring of 1929, Berle discerned [another] significant trend in Means' research": "American capitalism headed toward an oligarchical concentration of economic power."⁹⁸ Means's statistical studies illustrated that some two hundred corporations, controlled by less than eighteen hundred men, administered over one-third of the national wealth.⁹⁹ Thereafter, Berle and Means described the separation of ownership from control as a pressing matter not only because it could trigger market abuses of shareholders' interests, but also because multiple ownership created "tremendous aggregations of property," which made possible such buildups of power (in the hands of the control group).¹⁰⁰ The possibility of mass concentration of power augmented the risk of inefficient uses of power and the potential adverse effect of corporations on the economy at large.¹⁰¹ The power that corporations could amass and ways to tame it became the book's underlying theme.

⁹⁷ Specifically, Berle and Means argued that the divergence between the interests of owners and those of the control group severed the tie between self-interest and efficiency. In the classical model of market relations, individuals owned and controlled the means of production, and competition between individual entrepreneurs was presumed to result in an efficient distribution of market sources. Self-interest, "held in check only by competition and the conditions of supply and demand," was seen as "the best guarantee of economic efficiency." BERLE & MEANS, *supra* note 86, at 8; *see also* Bratton, *supra* note 35, at 1483 ("Classical economic thinking . . . assumed that market competition would keep the incompetence and greed of owners of the means of production under control . . . [and] that profit-oriented investors closely scrutinized the managers of firms."). The separation of ownership from control in large corporations undermined this assumption. Corporate managers, who "own[ed] so insignificant a fraction of the company's stock," had no incentive to increase the corporation's value. BERLE & MEANS, *supra* note 86, at 8-9. In turn, stockholders, "to whom the profits of the corporation go, [could not] be motivated by those profits to a more efficient use of the property, since they have surrendered all disposition of it to those in control of the enterprise." *Id.* As a consequence, Berle and Means concluded, large business corporations could not be engines of efficiency. *See* Hessen, *supra* note 92, at 276 (examining Berle and Means's analysis of the transformation of "the traditional logic of property" in large publicly held corporations).

⁹⁸ SCHWARZ, *supra* note 94, at 55-56.

⁹⁹ *Id.* at 56.

¹⁰⁰ BERLE & MEANS, *supra* note 86, at 5.

¹⁰¹ *Id.* Because Berle and Means's argument focused on publicly held corporations (which Berle labeled quasi-public), they viewed the consolidation of power and the separation of ownership from control as interrelated phenomena. *See id.* ("The Fords and the Mellons, whose personal wealth is sufficient to finance great enterprises,

Power was “an elusive concept, for power [could] rarely be sharply segregated or clearly defined.”¹⁰² As Scott Bowman explained, Berle described two dimensions of power: an internal dimension and an external one.¹⁰³ The internal dimension focused on the power of corporations over individuals within them, specifically power over employment decisions: “the relation of the corporation to its workers, its plant organization and its technical problem of production.”¹⁰⁴ The external dimension emphasized corporations’ impact on society at large, specifically corporations’ power to control markets by administering prices, their capacity to accumulate capital and affect the economy, and their ability to shape the forces of production through the development of new technologies.¹⁰⁵

Both dimensions of power underlay Berle and Means’s proclamation that the economic power of the modern corporation resembled the power of the sovereign state both in form and in substance.¹⁰⁶ “The rise of the modern corporation,” Berle and Means wrote in the last paragraph of *The Modern Corporation and Private Property*, “has brought a concentration of economic power which can compete on equal terms with the modern state.”¹⁰⁷ Echoing two decades of pluralist conversations, Berle and Means suggested that, in the future, the corporation could even supersede the state “as the dominant form of social organization.”¹⁰⁸ “The law of corporations,” Berle and Means concluded, “might well be considered as a potential constitutional law for the new economic state, while business practice is increasingly assuming the aspect of economic statesmanship.”¹⁰⁹

Having called attention to corporate power, as augmented by the separation of ownership from control, Berle and Means turned to the task of formulating a unified theme for the law of corporations. Specifically, they evaluated three ways to guarantee the responsible exercise of power. The first way—the application of strict property rules to passive ownership—would have required the control group to exercise

are so few, that they only emphasize the dependence of the large enterprise on the wealth of more than the individual or group of individuals who may be in control.”).

¹⁰² *Id.* at 69.

¹⁰³ BOWMAN, *supra* note 73, at 207.

¹⁰⁴ BERLE & MEANS, *supra* note 86, at 7.

¹⁰⁵ *Id.*; BOWMAN, *supra* note 73, at 207-08.

¹⁰⁶ On Berle’s distinction between economic and political power, see BOWMAN, *supra* note 73, at 214-17.

¹⁰⁷ BERLE & MEANS, *supra* note 86, at 357.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

corporate power “for the *sole* benefit of the security owners.”¹¹⁰ Berle and Means feared that such an approach would have “the bulk of American industry . . . operated by trustees for the sole benefit of inactive and irresponsible security owners.”¹¹¹ The second way—application of strict contractual rules—would have invested in the control group uncurbed powers and seen security holders as having “agreed in advance to any losses which they may suffer by reason of such use.”¹¹² Berle and Means believed that such a scheme would create “a corporate oligarchy coupled with the probability of an era of corporate plundering.”¹¹³ Rather than choosing traditional rules of property or contracts as the underlying theme of the modern law of corporations, Berle and Means settled on a third alternative, an alternative that offered “a wholly new concept of corporate activity.”¹¹⁴ Shareholders, they argued, “by surrendering control and responsibility over the active property, have surrendered the right that the corporation should be operated in their sole interest[]—they have released the community from the obligation to protect them to the full extent implied in the doctrine of strict property rights.”¹¹⁵

According to Berle and Means, this tampering with the interests of the owners did not make the controlling group the beneficiary of corporate power. Rather, Berle and Means concluded that it had “cleared the way for the claims of a group far wider than either the owners or the control [group]”; it had “placed the community in a position to demand that the modern corporation serve not [only] the owners or the control [group] but all society.”¹¹⁶

Should the corporate leaders, for example, 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.*¹¹⁷

¹¹⁰ *Id.* at 354.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 355.

¹¹⁴ *Id.* at 356.

¹¹⁵ *Id.* at 355. Berle and Means further suggested that “[a]t the same time, the controlling groups, by means of the extension of corporate powers, have in their own interest broken the bars of tradition which require that the corporation be operated solely for the benefit of the owners of passive property.” *Id.*

¹¹⁶ *Id.* at 355-56.

¹¹⁷ *Id.* (emphasis added).

Simply put, *The Modern Corporation and Private Property* announced that all publicly held business corporations were public trustees. Their power was to be exercised to satisfy the demands of the community.

In their portrayal of corporations as public trustees, Berle and Means drew upon the early-twentieth-century pluralist image of the state.¹¹⁸ Like their political pluralist predecessors, Berle and Means embraced corporations as centers of participation in, and constitutive elements of, the modern industrial society.¹¹⁹ Yet, rather than engaging earlier debates about the nature of collective entities, Berle and Means focused on corporate power. Given corporations' economic power, they argued that it was meaningless to assume that corporations were private associations, or that the state was the only center of coercive (public) power. Instead, Berle and Means described corporations as lawmaking and law-applying entities—as loci of coercive economic power “comparable to the concentration of religious power in the mediaeval church or of political power in the national state.”¹²⁰ “A Machiavelli writing today would have very little interest in princes,

¹¹⁸ As legal historians have shown, Berle and Means's conception of public (corporate) property also drew on the early-twentieth-century reconceptualization of property rights as a delegation of coercive, sovereign powers to individuals. See ALEXANDER, *supra* note 94, at 342-46 (discussing how Berle and Means “echoed” early-twentieth-century scholars who argued “that the market was a realm of power and that economic institutions were not wholly private in character”); HORWITZ, *supra* note 33, at 166 (suggesting that *The Modern Corporation and Private Property* was “[p]erhaps the most influential . . . work to highlight the connection between property and power for an entire generation”); Bratton, *Berle and Means*, *supra* note 91, at 760-61 (discussing Berle and Means's conception of corporate property as public property and the ultimate suppression of this idea due to the “collectivized” assumptions upon which it rested). Accordingly, Berle and Means took the early-twentieth-century critique of private property to its highest level; they argued that because property—especially corporate property—was a means by which the state legitimized the exercise of nongovernmental coercive power, the state could require those in control of corporate property to use it to promote public interests. For examples of the early-twentieth-century critique of property, see Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927); Hale, *supra* note 87. For analyses of the early-twentieth-century critique, see ALEXANDER, *supra* note 94, at 243-302; AMERICAN LEGAL REALISM, *supra* note 41, at 98-129; HORWITZ, *supra* note 33, at 193-212; Robert W. Gordon, *The Elusive Transformation*, 6 YALE J.L. & HUMAN. 137 (1994) (book review); Robert W. Gordon, *Legal Realism*, in A COMPANION TO AMERICAN THOUGHT 392, 392-93 (Richard Wightman Fox & James T. Kloppenberg eds., 1995); Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 467, 487-94 (1988) (book review); Dalia Tsuk, *Legal Realism*, in 2 LEGAL SYSTEMS OF THE WORLD: A POLITICAL, SOCIAL, AND CULTURAL ENCYCLOPEDIA 892 (Herbert M. Kritzer ed., 2002).

¹¹⁹ Cf. Thomas K. McCraw, *Berle and Means*, 18 REV. AM. HIST. 578, 582 (noting that Berle and Means “saw America's economic future as wedded to great corporations, ‘the flower of our industrial organization’”).

¹²⁰ BERLE & MEANS, *supra* note 86, at 352.

and every interest in the Standard Oil Company of Indiana,” they proclaimed shortly before the publication of *The Modern Corporation and Private Property*.¹²¹

Because they celebrated the contributions of corporations to the modern industrial society, Berle and Means feared that an overuse of government regulation could eliminate potential benefits of corporate power. Like other pluralists, they realized the need to encourage the development of diverse associations to promote various experiences and actions. Because they feared potential abuses of corporate power, they also rejected freeing corporations to act as if they were mere aggregates of individuals or real entities (as the contractual and real entity theories of the corporation, respectively, implied). They rejected both the early pluralists’ scheme of self-governing associations,¹²² and the alternative of allowing the state to regulate all corporate activities.¹²³

Instead, Berle and Means argued that corporations should exercise their powers to benefit the community. Large corporations, Berle

¹²¹ A.A. Berle, Jr. & Gardiner C. Means, *Corporations and the Public Investor*, 20 AM. ECON. REV. 54, 71 (1930).

¹²² Compare, for example, Berle’s early works to *The Modern Corporation and Private Property*. In his first book, *Studies in the Law of Corporation Finance*, Berle expressed views that resembled the views of the political pluralists, suggesting that corporate power could be mediated through voluntary arrangements. ADOLF A. BERLE, JR., *STUDIES IN THE LAW OF CORPORATION FINANCE* (1928). Berle’s analysis focused on three safeguards for investors: “an association of interested investment bankers, stock exchange regulation of markets, and the organized market power of institutional stockholders whose interests coincided with individual stockholders.” SCHWARZ, *supra* note 94, at 53; see also BERLE, *supra*, at 26-40 (discussing the position of, and limitations on, corporate management). Faced with Means’s statistical exploration of the rapid concentration of economic power, Berle’s focus shifted from groups to group power as the basis for legal and political analysis. See *infra* Part II.B (analyzing Berle’s mid-1930s views with respect to managerial duties).

¹²³ Daniel Ernst has argued that early-twentieth-century pluralists faced a dilemma: on the one hand, to allow the state to exercise power over diverse groups risked imposing one set of concededly partial interests and beliefs in the name of a general, public good; on the other hand, the alternative of deferring to groups risked moral relativism, maybe even nihilism. Ernst, *supra* note 17, at 60. Ernst further concluded that scholars chose either prong of the dilemma as a solution—some scholars privileged group autonomy, others public regulation. *Id.* at 82-83. While this Article focuses on the disappearance of class from corporate law and theory, my analysis of Berle and Means’s works suggests that they offered a midway between scholars who turned to the government to keep in check organizational power and scholars who trusted associations to self-regulate. Specifically, Berle and Means maintained that corporations should be left to exercise their powers freely, but they also argued that the courts should tame potential abuses of power by imposing on corporations limitations associated with constraints on sovereign power—particularly the requirement that their power be exercised to benefit the community.

and Means wrote, brought together “workers, consumers and suppliers of capital,” under the guidance of the control group.¹²⁴ It was thus “conceivable,” if not “essential” that “the ‘control’ of the great corporations should develop into a purely neutral technocracy, balancing a variety of claims by various groups in the community and assigning to each a portion of the income stream on the basis of public policy rather than private cupidity.”¹²⁵

Yet, despite their recognition of the power inequalities associated with the modern corporation, Berle and Means were reluctant to admit that workers were a distinct class whose interests might differ from the interests of the community. They also seemed to believe that unions could sufficiently protect workers’ interests. Accordingly, the corporation was to exercise its power to benefit the community at large, not workers as a class.

More important, a close reading of *The Modern Corporation and Private Property* reveals normative inconsistencies. Berle and Means were of two minds on the question of managerial duties. While in the paragraphs cited above, they sought to extend management’s duties to the community, in other segments they emphasized that management’s duties were to shareholders.¹²⁶ This was also the position that Berle took in his public debate with E. Merrick Dodd, Jr. of Harvard Law School, a debate that offered future generations a framework for discussing fiduciary duties.

As I argue in Part II.B, the Berle-Dodd debate was predicated on the need to articulate ways to constrain corporate power without resorting to traditional class analysis. Berle and Dodd believed that corporate power should be exercised to promote community interests (including workers’ welfare). Yet, rather than focusing on the power of workers, Berle and Dodd entrusted other classes (namely, the shareholder class and the elite, managerial class) with the task of taming corporations. As Sections II.C and II.D will show, in the post-War years, Berle and Dodd’s framework gradually helped legitimize a narrow, shareholder-wealth-maximization vision of corporate law.

¹²⁴ BERLE & MEANS, *supra* note 86, at 349.

¹²⁵ *Id.* at 356.

¹²⁶ Apparently, Means was more sympathetic to workers’ interests and the interests of the community at large than Berle. The seeming inconsistencies in the book might thus reflect the different assumptions of its two authors. For Means’s perspective, see Gardiner C. Means, *The Distribution of Control and Responsibility in a Modern Economy*, 50 POL. SCI. Q. 59, 66 (1935).

B. *Taming Power I: Elite Managers and Shareholders*

The debate between Berle and Dodd took place “[d]uring the penultimate stage of *The Modern Corporation’s* creation.”¹²⁷ Berle instigated the controversy in an article titled *Corporate Powers as Powers in Trust*, where he declared that corporate powers were held in trust for the benefit of shareholders.¹²⁸ Dodd, who wrote the only public response to Berle’s article,¹²⁹ rebutted, announcing that while he was “thoroughly in sympathy with Mr. Berle’s efforts to establish a legal control which [would] more effectually prevent corporate managers from diverting profits into their own pockets from those of stockholders,” the corporation was, nonetheless, “an economic institution which ha[d] a social service as well as a profit-making function.”¹³⁰

Dodd was keen on validating corporate policies that sought to benefit constituencies such as employees (but also consumers, creditors, and the community) in situations in which the result would be a diminution of profits for the shareholders.¹³¹ His justification drew upon public opinion, specifically the views of corporate managers such as Owen D. Young, an officer of General Electric, who maintained that the corporation should recognize its “public obligations and perform its public duties—in a word, vast as it is, that it should be a good citizen.”¹³²

According to Dodd, his argument was rooted in the (pluralistic) conceptualization of corporations as real entities.¹³³ In giving charters to corporations, Dodd wrote, the state had created “e pluribus unum.”¹³⁴ But, Dodd concluded, if, as generations of pluralists argued, the unity of the corporate body was real, then “there [was] reality and not simply legal fiction in the proposition that the managers of

¹²⁷ SCHWARZ, *supra* note 94, at 64.

¹²⁸ A.A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931).

¹²⁹ Joseph L. Weiner, *The Berle-Dodd Dialogue on the Concept of the Corporation*, 64 COLUM. L. REV. 1458, 1459 (1964).

¹³⁰ E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1147-48 (1932).

¹³¹ *Id.*; see also Millon, *Theories, supra* note 6, at 216-18 (discussing Dodd’s views about corporate social responsibilities).

¹³² Dodd, *supra* note 130, at 1154 (quoting Owen D. Young, Address at the Park Avenue Baptist Church (Jan. 1929), *quoted in* JOHN H. SEARS, *THE NEW PLACE OF THE STOCKHOLDER* 209 (1929)).

¹³³ See Millon, *Theories, supra* note 6, at 217 (“Dodd’s article presented a solution that depended on an entity theory of the corporation.”).

¹³⁴ Dodd, *supra* note 130, at 1160.

the unit are fiduciaries for it and not merely for its individual members, that they are . . . trustees for an institution rather than attorneys for the stockholders.”¹³⁵

Berle anticipated neither Dodd’s rebuttal nor his attack on lawyers, which he took rather personally. His response was prompt and forcefully unfavorable.¹³⁶ Lawyers, Berle wrote, “know what the social theorist does not”:¹³⁷

When the fiduciary obligation of the corporate management and “control” to stockholders is weakened or eliminated, the management and “control” become for all practical purposes absolute [Y]ou can not abandon emphasis on “the view that business corporations exist for the sole purpose of making profits for their stockholders” until such time as you are prepared to offer a clear and reasonably enforceable scheme of responsibilities to someone else.¹³⁸

Less than five years earlier, Berle advocated industry self-regulation, assigning managers—subject to industry oversight—the role of public trustees.¹³⁹ But in 1932, having witnessed the collapse of the stock market, Berle came to believe that self-regulation was not a sufficient means of constraining corporate power. Managers could be trusted to run the corporation, but clear guidelines had to be set as to how they would perform their duties. As he explained to Dodd, “[t]he industrial ‘control’ does *not* now think of himself as a prince; he does *not* now assume responsibilities to the community; his bankers do *not* now undertake to recognize social claims; his lawyers do *not* advise him in terms of social responsibility.”¹⁴⁰

Having challenged managers’ willingness to assume social responsibilities, Berle put his faith in a new propertied class, a class that was yet to be formed—the shareholders. Drawing on the conclusion of *The Modern Corporation and Private Property*—that the separation of ownership from control made possible tremendous buildups of corporate power—Berle determined that only strict property rules could tame corporations. In other words, only the owners (the shareholders) could channel corporate power toward socially beneficial goals.

¹³⁵ *Id.*

¹³⁶ SCHWARZ, *supra* note 94, at 64-65; Weiner, *supra* note 129, at 1461.

¹³⁷ A.A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1367 (1932).

¹³⁸ *Id.* (footnote omitted).

¹³⁹ *See supra* note 122 (discussing Berle’s early works).

¹⁴⁰ Berle, *supra* note 137, at 1367.

In a society rapidly turning into a consumer society, Berle sought to make shareholders the foundation of the modern economic order.

Thirty years after the debate, Joseph Weiner noted that Berle's response could not have been predicted from his earlier writings.¹⁴¹ More recently, William Bratton has contended that Berle's indecision on the matter of managerial duties "reflects the ambivalence displayed in corporate law commentary ever since."¹⁴² Let me suggest that Berle's position is traceable to his pluralism.

Berle was a legal pluralist. He embraced groups, associations, and organizations as constitutive elements of American democracy and in his scholarship, he addressed questions of group power and the need to tame excesses of power. Yet, the prospects of a legal pluralist state depended upon a particular vision of social conflict as occurring outside groups, not within them. To admit the existence of intragroup conflict meant to accept that some structures, specifically class structure, crossed group and state boundaries. And to admit the latter went against the grain of pluralism.

In short, the possibility that organizations' internal structures would replicate group warfare in society undermined the pluralist image of the state. Many pluralists thus treated groups and organizations as homogenous, and equated the interests of individual members with the concerns of the collective entity.¹⁴³ As Berle was quick to realize, unless he could describe corporations as associations of similarly situated individuals, he would not be able to sustain his legal pluralism.

On its face, then, Berle's response to Dodd was as follows: Berle agreed with Dodd that the economic power that was "mobilized and

¹⁴¹ Weiner, *supra* note 129, at 1461.

¹⁴² Bratton, *Berle and Means*, *supra* note 91, at 761-62.

¹⁴³ By describing groups and organizations as homogenous, pluralists were also able to evade the pluralist dilemma (described *supra* note 123). As long as groups could be viewed as composed of equally situated individuals, the interests of these individuals could be equated with the interests of the association, and concerns about potential internal hierarchies could be eliminated. As Daniel Ernst noted:

[A] crucial, unarticulated assumption of the pluralist tradition . . . [was] that the groups themselves [could] safely be treated as organic, homogenous, and voluntarily formed. If one sees particularity in social groups as well as in society and thinks of groups as contingent, constructed projects rather than naturally occurring phenomena, claims of group solidarity become controversial. Accepting them uncritically might well ratify and reinforce imbalances of power and other inequities within the group.

Ernst, *supra* note 17, at 60 (footnote omitted).

massed under the corporate form”¹⁴⁴ was beneficial to society, as long as its excesses could be prevented. Yet, Berle criticized Dodd’s position on the ways to constrain corporate power as theoretically sound but practically dangerous. Specifically, according to Berle, rather than taming corporate power, Dodd’s position would bring group warfare into corporations and allow “the massing of group after group to assert their private claims by force or threat.”¹⁴⁵ Furthermore, Berle seems to have equated Dodd’s endorsement of diverse social interests with socialism: “Either you have a system based on individual ownership of property,” he wrote, “or you do not.”¹⁴⁶

Berle rejected traditional class analysis, but not the need to find social and economic interests that would check corporate power. Indeed, Berle wanted to substitute a different class for Marx’s proletariat. As his biographer explained, Berle wanted to be remembered as “Marx of the shareholder class.”¹⁴⁷ He believed that “the middle and working classes should entrust their savings, through organizations such as savings banks or pension funds, to the security—rather than the risk—of the stock exchanges.”¹⁴⁸ Like many of his generation, Berle wanted to substitute a conception of a constantly changing, market-oriented, middle class for the concept of a permanent wage-labor, working class.¹⁴⁹ In his analysis, the chairman of the board, the directors, and the oilers, feeders, and loomfixers were lumped together as employees (“the staff of the plant”),¹⁵⁰ while the shareholder class became a proxy for the interests of the community in general (including workers).

As to Dodd, neither his statement “that capitalism . . . [could] not permanently survive under modern conditions unless it [treated] the economic security of the worker as one of its obligations and [was] intelligently directed so as to attain that object,”¹⁵¹ nor his extension of fiduciary duties to the community, was an endorsement of socialism or class analysis. Dodd’s position was elitist. As Lawrence Mitchell recently noted, Dodd’s ideas reflected notions traceable to “such ‘best

¹⁴⁴ Berle, *supra* note 137, at 1368.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ SCHWARZ, *supra* note 94, at 62.

¹⁴⁸ *Id.* at 65.

¹⁴⁹ *Cf.* Forbath, *supra* note 9 (describing cultural and intellectual attitudes toward the wage-labor class).

¹⁵⁰ A.A. Berle, Jr., *How Labor Could Control*, NEW REPUBLIC, Sept. 7, 1921, at 37, 38.

¹⁵¹ Dodd, *supra* note 130, at 1152.

men' as Henry Adams, John Hay, and Henry Cabot Lodge, that relied upon the breeding and values and education of a superior class to fulfill its civic responsibility."¹⁵² Like these "best men," Dodd believed that business respect for traditional moral values would produce material rewards and help rejuvenate the nation.¹⁵³ Accordingly, business was "a profession of public service, not primarily because the law had made it such but because a public opinion shared by business men themselves had brought about a professional attitude."¹⁵⁴ Like Berle, Dodd hoped to find a social structure that would prevent abuses of corporate power. His solution focused on the role of the elite, that is, the managerial elite.

Both Berle and Dodd offered alternative structures as means of constraining corporate power. Both rejected traditional class analysis, but endorsed theories that took into account workers' interests. Berle suggested that workers should become shareholders, while Dodd required management to attend to workers as a matter of managerial civic responsibility.

Dodd's hopes were never fulfilled. For the most part, the managerial elite became hostile toward labor unions and their supporters.¹⁵⁵ As to Berle—as David Millon concluded, his "vision of the corporation

¹⁵² MITCHELL, *supra* note 2, at 187 (footnote omitted).

¹⁵³ On Dodd's predecessors, see JOHN G. SPROAT, *THE BEST MEN: LIBERAL REFORMERS IN THE GILDED AGE* (1968).

¹⁵⁴ Dodd, *supra* note 130, at 1153; see also E. Merrick Dodd, Jr., *Is Effective Enforcement of the Fiduciary Duties of Corporate Managers Practicable?*, 2 U. CHI. L. REV. 194, 205-06 (1934) (noting that "[t]he proposition that the sole function of business organizations is to produce the maximum profit for absentee owners . . . no longer appeals . . . to the community as a social policy," and that "modern corporate executives . . . think of themselves as trustees of an institution rather than attorneys for the stockholders"). For a more cynical view of corporate philanthropy and welfare capitalism, see ROLAND MARCHAND, *CREATING THE CORPORATE SOUL: THE RISE OF PUBLIC RELATIONS AND CORPORATE IMAGERY IN AMERICAN BIG BUSINESS* 15-17 (1998).

¹⁵⁵ Nelson Lichtenstein traced post-War business hostility toward trade unionism to three different historic sources: first, "a profound ideological commitment by businessmen to their historic, inherent managerial prerogatives," which were initially defined at the turn of the twentieth century; second, "the relatively decentralized, hyper-competitive structure of many key industries," which "put a premium upon keeping labor costs flexible, production techniques plastic, and unions weak"; and third, "the economic and ideological transformations generated by . . . depression and war," which led Americans to associate unionism with New Deal intellectuals, "whose interests lay with urban ethnic minorities, organized labor, and northern blacks." Nelson Lichtenstein, *Taft-Hartley: A Slave-Labor Law?*, 47 CATH. U. L. REV. 763, 770-72 (1998). According to Lichtenstein, union power was seen "as a fundamentally illegitimate transgression upon the decentralized producer republic which still retained a powerful and imaginative grasp upon the minds of so many entrepreneurs and professionals whose social roots lay with the Protestant bourgeoisie." *Id.* at 772.

as shareholder-owners and management-fiduciary has provided the basic model for thinking about corporations and therefore has effectively defined the boundaries within which serious debate . . . [has taken] place.”¹⁵⁶ Yet, as Part II.C explicates, while endorsing a shareholder-centered vision of corporations, corporate legal scholars have rejected Berle’s ideal of a shareholder class. In its stead, corporate law scholars articulated a conception of a functional (but not elitist) managerial class; they trusted expert management to use corporate power to promote the general welfare. As Part II.D will elaborate, in the 1980s a new economic theory of the firm sought to eliminate from corporate law not only workers’ interests, but also power, hierarchy, and mandatory accountability.

C. *Taming Power II: The New Managerial Class*

With the coming to power of the New Deal administration, intellectuals turned to the regulatory state to limit corporate power.¹⁵⁷ Concerns about corporate size, which Berle and Means expressed in *The Modern Corporation and Private Property*, became part of the rationale for the passage of the Securities Act of 1933,¹⁵⁸ the Securities Exchange Act of 1934,¹⁵⁹ and the creation of the Securities and Exchange Commission.¹⁶⁰ The securities acts rested on the assumptions that government planning required cooperation with big business, and

¹⁵⁶ Millon, *Theories*, *supra* note 6, at 228-29.

¹⁵⁷ For example, in 1935 Means wrote:

Either we must make the market place a satisfactory coordinator or supplement the market place by other coordinating devices.

To make the market effective as a coordinator, it would presumably be necessary to reverse the trend of a century and break the large units into a multitude of smaller enterprises. This would involve the loss of much of the advantage of modern technology and there would seem to be little popular support for such a thorough-going atomization of industry as would be necessary to make the market effective. The thrust of the present Administration is clearly in the direction of increasing the element of administrative coordination of economic activity rather than its elimination.

Means, *supra* note 126, at 63.

¹⁵⁸ Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a-77aa (2000)).

¹⁵⁹ Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a-78mm (2000)).

¹⁶⁰ *Id.* § 4, 48 Stat. at 885 (codified as amended at 15 U.S.C. § 78d (2000)). On the history of the Securities and Exchange Commission, see JOEL SELIGMAN, *THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE* (1982).

that mandatory transparency and disclosure—qualifications associated with sovereign authority—had to underlie such cooperation.¹⁶¹

In a similar manner, New Dealers assumed that specific regulations would help make corporations more socially responsible by requiring them to pay minimum wages, to maintain quality standards, to adjust production to general social needs, and to safeguard the interests of workers and consumers. As Herbert Hovenkamp concluded, by the end of the New Deal

little was left of the classical corporation. Its internal dealings with shareholders and its debtor-creditor relations were substantially regulated by the federal securities acts. Its labor relations were regulated by the new federal labor laws. Its relations in the general market with consumers and suppliers became increasingly regulated by the antitrust laws and the Federal Trade Commission, which tried to impose on it a duty to engage in only “fair” competition For the emerging category of utilities and “public service” companies, regulation was even more complete, including restrictions on entry and price controls.¹⁶²

Courts helped sustain the New Deal corporate structure by adopting an industrial pluralist approach to industrial disputes. They viewed collective bargaining as industrial self-government. Accordingly, “management and labor together determine[d] wages and working conditions through a legislative-type process.”¹⁶³ “These rules [were] embodied in the collective bargaining agreement,” which was viewed as “a statute or a constitution.”¹⁶⁴ Managers were required to attend to workers’ interests only when such concerns were included in the agreement and only as long as they did not interfere with the duty to maximize value for shareholders. A shareholder-centered vision of managerial duties dominated the field of corporate law. To quote Jus-

¹⁶¹ In *The Nature of Difficulty*, which was written for members of Franklin Roosevelt’s “brain trust,” Berle reiterated the conclusions that he made in *The Modern Corporation and Private Property*, and urged the government to establish “a Capital Issues Board which could perform the functions of a federal Blue Sky Commission, exacting full information about securities sold.” ADOLF A. BERLE, *The Nature of Difficulty*, in NAVIGATING THE RAPIDS, 1918-1971: FROM THE PAPERS OF ADOLF A. BERLE 32, 47 (Beatrice Bishop Berle & Travis Beal Jacobs eds., 1973). Berle hoped that such a commission would develop “to the point where it would exercise a real control over undue expansion of groups of credit instruments, where issue of these reached a point threatening the safety of the financial structure.” *Id.*

¹⁶² Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1688 (1988) (citation omitted).

¹⁶³ Stone, *supra* note 22, at 622.

¹⁶⁴ *Id.*

tice Scalia (pointedly noting several decades later), “That [was] the deal.”¹⁶⁵

With this as a background, attempts by corporate law scholars to articulate the limits of corporate power seemed to remain fixated on the positions adopted by Berle and Dodd. In the late 1950s, in a collection of essays titled *The Corporation in Modern Society*,¹⁶⁶ to which Berle wrote a foreword, two articles focused explicitly on the question of managerial duties. Abram Chayes concluded, as Dodd before him, that a shareholder-centered vision of corporations was an incomplete paradigm for corporate law because it excluded other constituencies who were subject to corporate power.¹⁶⁷ But Eugene Rostow seemed to follow Berle’s analysis and argued that corporate law should direct corporations into essentially economic purposes and that a shareholder-centered vision of managerial duties would fulfill this aim.¹⁶⁸

Yet, Chayes and Rostow did not view either Berle’s ideal of a shareholder class or Dodd’s elitism as a means of constraining corporate power. Rostow described shareholders not as a class with shared social and political goals, but as individuals sharing an economic interest.¹⁶⁹ In turn, Chayes, who concluded that workers should be given representation in corporate governance, advocated the empowerment of workers and other corporate constituencies rather than the imposition of civic responsibilities on corporate managers.¹⁷⁰

¹⁶⁵ *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 686 (1990) (Scalia, J., dissenting).

¹⁶⁶ THE CORPORATION IN MODERN SOCIETY (Edward S. Mason ed., 1959).

¹⁶⁷ See Abram Chayes, *The Modern Corporation and the Rule of Law*, in THE CORPORATION IN MODERN SOCIETY, *supra* note 166, at 25, 40-41 (arguing that the relation of shareholders to the corporation is “quite limited in scope, and readily reducible to monetary terms,” and that a shareholder-centered vision of the corporation “perpetuates—and presses to a logical extreme—the superficial analogy of the seventeenth century between contributors to a joint stock and members of a guild or citizens of a borough”).

¹⁶⁸ See Eugene V. Rostow, *To Whom and for What Ends Is Corporate Management Responsible?*, in THE CORPORATION IN MODERN SOCIETY, *supra* note 166, at 46, 71 (suggesting that the vote of active shareholders limits the discretion of managers and thus legitimizes their power).

¹⁶⁹ See *id.* at 53-54 (“The current prototype, increasingly, is that of a corporation with stock widely scattered among individuals, investment trusts, or institutional investors Most stockholders of this class are interested in their stock only as investments.”).

¹⁷⁰ See Chayes, *supra* note 167, at 41-45 (arguing that while “[t]he work force . . . is self-evidently a constituency of the corporation, . . . [w]e should be sensitive to the emergence of other groups equally entitled to a voice”).

Indeed, by the early 1950s, Berle and Dodd, too, moved away from their original positions. In 1942, Dodd, conceding that the New Deal legislation had improved the status of labor, concluded that his elitist ideal of managers as trustees for workers, consumers, and the community was not part of corporate law. Rather, according to Dodd, corporate law focused on the relationship between managers and shareholders.¹⁷¹ And while in 1954 Berle surprisingly suggested that Dodd had won the debate,¹⁷² he took pains to emphasize that the issue was not one of class power or elitism,¹⁷³ but simply of powers and responsibilities.¹⁷⁴

What social and economic interests, then, did corporate law scholars in the 1950s and 1960s see as capable of limiting corporate power? Beginning in the 1930s and culminating in the post-War years, progressive corporate law scholars put corporate expert management, which became “more than ever before a professional group,”¹⁷⁵ “at the large corporation’s strategic center.”¹⁷⁶ As rapid economic growth during the post-War years seemed to eliminate the need to tame corporate power, concerns about class conflict dissi-

¹⁷¹ Dodd noted that in the decade that had passed since his debate with Berle, the nation turned not to “industrial government, as represented by corporate managers, but to political government” to resolve economic tensions. Business obligations toward labor were accordingly “accomplished by means other than treating business managers as in some measure fiduciaries for their employees.” Such alternative means included statutory rights, unionization, and collective bargaining. In a similar manner, Dodd described the idea that managers were trustees for consumers or the community as “a misnomer.” E. Merrick Dodd, Book Review, 9 U. CHI. L. REV. 538, 546-47 (1942).

¹⁷² See ADOLF A. BERLE, JR., *THE 20TH CENTURY CAPITALIST REVOLUTION* 169 (1954) (conceding that the debate between him and Dodd had “been settled (at least for the time being)” in favor of Dodd’s argument that “corporate powers . . . were held in trust for the entire community”).

¹⁷³ Cf. BERLE, *supra* note 94, at 73-74 (“On close examination, the theory of ‘class power’ appears absurd. There never was any evidence of it. Factually, classes more often than not are never organized at all, do not exercise any power, never delegate any power, cannot act even when their disparate members may desire to do so.”).

¹⁷⁴ For example, in 1951, at a conference on corporation law and finance, Berle proposed “that in essential fields, where the community has come to rely on a concentrate[,] . . . certain minimum and more or less uniform requirements” should be imposed on the concentrate, including an obligation “at least to maintain moderately steady employment,” and “a requirement that the plant or operation shall not be hastily or violently moved from one place to the next without regard to the damage that it may do to the community.” Adolf A. Berle, *Implications of the Conditions of Ownership and the Control of the Modern Corporation*, in CONFERENCE ON CORPORATION LAW AND FINANCE 3, 5 (Univ. of Chi. Law Sch. 1951).

¹⁷⁵ Morrell Heald, *Business Thought in the Twenties: Social Responsibility*, 13 AM. Q. 126, 131 (1961).

¹⁷⁶ Bratton, *supra* note 35, at 1476.

pated.¹⁷⁷ Furthermore, despite studies challenging Berle and Means's conclusions about the control of large publicly held corporations,¹⁷⁸ many 1950s scholars endorsed the view that the separation of ownership from control had destroyed the analytical value of class analysis premised on "the relationship between owners of capital and formally free wage workers."¹⁷⁹ Instead, scholars' attention became fixated on the managerial class. As historian Richard Hofstadter wrote in the mid-1960s, "business structure has brought into being a managerial class of immense social and political as well as market power."¹⁸⁰ Corporations were seen as autonomous entities governed by a professional, managerial class and subject to the "laws of industrial society."¹⁸¹ Management organized the processes of production and distribution, dominated the corporate bureaucracy, and exercised control over individual lives in the firm and market transactions outside it.¹⁸²

¹⁷⁷ According to one account:

Given the country's rising standard of living and comparative social stability, it was reasonable to believe that the fundamental problems of American capitalism (particularly those of poverty and unemployment) had been permanently solved. The smooth functioning of Keynesian economy, fueled by massive federal expenditures on national defense and atomic research, seemed to eliminate the inevitability of class conflict and the necessity of a socialist revolution. Prosperity had become the supreme and incontestable fact of contemporary experience.

RICHARD H. PELLIS, *THE LIBERAL MIND IN A CONSERVATIVE AGE: AMERICAN INTELLECTUALS IN THE 1940S AND 1950S*, at 119-20 (2d ed. 1989).

¹⁷⁸ See Richard L. Sklar, *Postimperialism: A Class Analysis of Multinational Corporate Expansion*, 9 *COMP. POL.* 75, 76 (1976) (noting that, by 1940, "authoritative studies had shown, contrary to Berle and Means, that large nonfinancial corporations in the United States were likely to be controlled by their leading owners"); Zeitlin, *supra* note 30, at 1080-85 (calling attention to studies, undertaken between the 1930s and 1950s, which had suggested that "without an investigation of the specific situation in a given corporation, and of the interconnections between the principal shareholders, officers, and directors, and other corporations, the actual control group is unlikely to be identified").

¹⁷⁹ Zeitlin, *supra* note 30, at 1075. Zeitlin urged sociologists to "reclaim the concept of class" by examining "the institutional and class structure in which the individual large corporations [were] situated," specifically the relationship between investors and managers, which, in Zeitlin's view, comprised a new capitalist class. *Id.* at 1107-12.

¹⁸⁰ RICHARD HOFSTADTER, *What Happened to the Antitrust Movement?, in THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 188, 236 (1965).

¹⁸¹ BOWMAN, *supra* note 73, at 198.

¹⁸² Bratton, *supra* note 35, at 1476.

Unlike Berle's shareholders, whose status depended on stock (or value) ownership, or Dodd's civic-minded elite management, the new managerial class was a functional class. It was

a ruling group which derive[d] its authority and its responsibilities squarely from function, that is, from its status relationship to the organization, and not from anything it possess[e] such as property, birth, inherited magical power, or military force. Nor [did] it derive its position from the authority of superior knowledge or through socially accepted objective tests of achievements or accomplishment; in other words, it [was] not based on the standing of a profession. Its position, its power,¹⁸³ and its responsibilities rest[ed] solely on indispensable function.

The new managerial class, in other words, resembled neither the old propertied class, which American mythology had long rejected, nor Berle's new propertied class, which could have radically altered American social structure. Rather, it was a functional class—an incarnation of the age-old American dream about success and possibilities. The term "free enterprise"—in use since the 1930s—came to symbolize the free reign of managers, who in cultural imagination replaced the small producers and entrepreneurs of the nineteenth century.¹⁸⁴ In post-War America, as "Marxist-inspired theoretical conceptualizations [were rendered] ideologically suspect,"¹⁸⁵ not ownership of property or social status, but an ability to run an enterprise legitimized managers' powers.¹⁸⁶ The new managerial class was a loose class of leaders, presumably free from the constraints of the old world.¹⁸⁷

¹⁸³ Peter F. Drucker, *The Employee Society*, 58 AM. J. SOC. 358, 359 (1953); cf. Sklar, *supra* note 178, at 76-77 (suggesting that the American corporation has produced a new middle class, whose "mode of social thought is cosmopolitan (within national limits) rather than narrowly sectional . . . [and whose] political style is passive and nonpartisan rather than earnestly participative and staunchly partisan, as the old middle class had been").

¹⁸⁴ Cf. Lichtenstein, *supra* note 155, at 771 (adding that "[s]uch nomenclature reflected an effort, however crudely worded, to distinguish U.S. conditions from those of Europe, where the state, the gentry, and the unions constrained entrepreneurial activity and regulated the labor market").

¹⁸⁵ Rick Fantasia, *From Class Consciousness to Culture, Action, and Social Organization*, 21 ANN. REV. SOC. 269, 269 (1995).

¹⁸⁶ As Daniel Bell noted:

The older property capitalists had a theory of "natural rights" as a philosophical sanction. The newer managers could not claim this foundation. But power requires legitimation, and rules and authority have to be invested with a sense of "justice." The fact that the new managers have lacked a class position buttressed by tradition has given rise to a need on their part to justify their enormous power. In no other capitalist order, as in the American, therefore, has this drive for an ideology been pressed so compulsively. As we have had in the corporation the classic shift on the economic level from ownership to

The new managerial class was a class to which legal scholars and political scientists could easily relate. Indeed, post-War legal scholarship sought to accommodate this new (modern and American) ruling class.¹⁸⁸ While shareholder centrism remained the norm of corporate law, scholars' analyses of corporate power turned to the question of the legitimate rule by a functional, managerial class.¹⁸⁹ Some (the "anti-managerialists") demanded that management be made more accountable, but other scholars (the "managerialists") defended management's broad discretion.¹⁹⁰

As legal and business scholars, whose social roots lay with the managerial class, helped shift the focus of cultural and scholarly attention from property to management and from power to expertise, they helped facilitate another scholarly turn—from corporate structure to markets as a means of taming corporate power. Post-War managerialists "abandoned the reformist zeal" that characterized the works of their legal pluralist predecessors.¹⁹¹ Viewing corporations, for the most part, as private rather than public institutions,¹⁹² post-War man-

managerial control, so, on the symbolic level, we have the shift from "private property" to "enterprise," as the justification of power.

Daniel Bell, *The Power Elite—Reconsidered*, 64 AM. J. SOC. 238, 247 (1958).

¹⁸⁷ Davita Silfen Glasberg and Michael Schwartz have similarly noted that the managerial theory of the 1940s "denied the Marxian vision of an organized business class acting together to impose its will upon the government and the society as a whole," and instead "produced portraits of a new class of corporate leaders who had been freed from the outside pressures (i.e., from stockholders and leaders) that had driven their predecessors." According to this managerial theory, such freedom gave corporate leaders "enormous unconstrained power, but it also removed the main incentive (the profit nexus) to misuse this power," thus creating "a loosely connected, nonhierarchical, and relatively disorganized business structure." Davita Silfen Glasberg & Michael Schwartz, *Ownership and Control of Corporations*, 9 ANN. REV. SOC. 311, 313 (1983).

¹⁸⁸ Pluralists often trusted experts—dedicated to democracy and the decentralization of bureaucratic power—to lead the transformation toward a pluralist society. Everett Helmut Akam, *Pluralism and the Search for Community: The Social Thought of American Cultural Pluralists* (1989) (unpublished Ph.D. dissertation, University of Rochester) (on file with University Microfilm International).

¹⁸⁹ Bratton, *supra* note 35, at 1476; Millon, *Theories*, *supra* note 6, at 224.

¹⁹⁰ Millon, *Theories*, *supra* note 6, at 225; *see also* Bratton, *Nexus of Contracts*, *supra* note 91, at 414 (noting that while corporate law remained pro-managerialist into the 1980s, law reviews in the post-War years were filled with anti-managerialist rhetoric); Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 444 (2001) (contrasting the managerialist model of the 1950s and 1960s with the anti-managerialist model of the 1970s and 1980s).

¹⁹¹ BOWMAN, *supra* note 73, at 187.

¹⁹² *Cf.* Bratton, *Nexus of Contracts*, *supra* note 91, at 414 (noting that while "[t]he anti-managerialists analogized the management corporation to government to demon-

agerialists substituted concerns about profits for legal pluralists' attempts to find social and economic interests or groups that would constrain corporate power. Initially, executives were expected "to seek sufficient profit to forstall [sic] the mobilization of quiescent, dispersed stockholders, but not to press for maximum profits, which might stir labor unrest or involve risk of financial disaster."¹⁹³ Yet, as I conclude in Part II.D, with the emergence of a new theory of corporate law—an economic theory of the firm—managerialism was replaced by investor capitalism,¹⁹⁴ and the profit rhetoric was used to support a limited shareholder-wealth-maximization norm. This new economic theory of the firm appeared in the late 1930s, reached its apogee in the 1980s, and is the dominant theme in corporate law today. Its potential harm was realized in the recent corporate scandals.

D. *The New Economic Theory of the Firm*.¹⁹⁵
Corporations Without Power

By the mid-1970s, a new elite ruling class had emerged. It was composed not only of corporate top managers and directors, but also of large investors (specifically institutional investors). Socialized through personal and professional networks, this new class—often labeled the capitalist class—immediately exercised tremendous influence on U.S. economic policy.¹⁹⁶ Organizations such as the National

strate its public nature," "[t]he contrary assertion of the corporation's private nature affirmed the legitimacy of the substantial discretion legally vested in management").

¹⁹³ Glasberg & Schwartz, *supra* note 187, at 312.

¹⁹⁴ Cf. Hansmann & Kraakman, *supra* note 190, at 452 (noting that the "rapid expansion of the ownership of equity securities within broad segments of society, [has] creat[ed] a coherent interest group that presents an increasingly strong countervailing force to the organized interests of managers, employees, and the state").

¹⁹⁵ The term "New Economic Theory of the Firm" is attributed to William Bratton. Bratton, *supra* note 35, at 1471.

¹⁹⁶ See Michael Useem, *Corporations and the Corporate Elite*, 6 ANN. REV. SOC. 41, 41-42 (1980) (adding that "membership in the corporate elite [could] also be achieved by (a) those who possess[ed] ties of kinship or friendship" with large investors, top executives, and directors; or (b) "those attorneys and other professionals who control[led] external resources valued by large corporations, such as technical expertise and legal experience"). As Davita Glasberg and Michael Schwartz pointedly noted:

The children of the business class attend elite prep schools and prestigious private colleges, where they form friendships and develop similar world views; they are trained in a handful of law and business schools, which complete their socialization into the value system of the corporate world; they are recruited into the exclusive social clubs of the rich, where they meet and interact with current business leadership These processes produce a package

Federation of Independent Business, the U.S. Chamber of Commerce, and the Business Roundtable were able to join with ad hoc organizations “to coordinate strategy on specific issues such as tax policy, regulatory policy, consumer affairs, and labor legislation.”¹⁹⁷ Despite “record inflation,” “the worst recession since the 1930s,” and the flourishing of proposals for different economic planning at the state and federal levels, by the early 1980s, U.S. economic policy heavily relied on market allocation of resources.¹⁹⁸ The concerted efforts of the new, sufficiently unified class of business leaders and large investors helped reduce constraints on capital, either by organized labor or the state, to a minimum.¹⁹⁹

The new economic theory of the firm, which became dominant during the 1970s and 1980s, offered an image of the corporation that fit the market-centered economic policies of those years. Rather than putting management hierarchies and the need for constraints on corporate power at the center of the corporate paradigm, scholars found a way around hierarchy and regulation by drawing on microeconomics to describe corporate entities as nexuses of private, contractual relationships and to paint a new picture of the firm and economic markets in which “hierarchy [was] irrelevant.”²⁰⁰

Indeed, by bringing microeconomics inside the firm, this new economic theory helped eradicate not only the class structure of cor-

of common values, an elaborated personal network, and a set of institutional arenas in which common goals can be established.

Glasberg & Schwartz, *supra* note 187, at 315-16; *see also* John Scott, *Networks of Corporate Power: A Comparative Assessment*, 17 ANN. REV. SOC. 181, 200 (1991) (emphasizing the “need to explore the class position of those who are recruited to the corporate elite and who are drawn from families with diversified, system-wide portfolios of wealth in numerous units of capital” and, more broadly, the reproduction of the capitalist class).

¹⁹⁷ Patrick J. Akard, *Corporate Mobilization and Political Power: The Transformation of U.S. Economic Policy in the 1970s*, 57 AM. SOC. REV. 597, 603 (1992).

¹⁹⁸ *Id.* at 597.

¹⁹⁹ On the emergence of an elite business, or capitalist, class “aided by social, economic, and organizational ties among firms, industries, and sectors,” *see id.* at 600-08. *See also* Useem, *supra* note 196, at 68 (noting that “[a]lthough divided by sectoral, size, and other schisms, the corporate elite [was] united by its primary commitment to capital accumulation, [and] possess[ed] a degree of internal integration, particularly within the dominant stratum, unmatched by any other social class”); Zeitlin, *supra* note 30, at 1108-12 (calling for an analytical examination of the relationship between “the peculiar cohesiveness of dominant economic classes” and “the linkage of the family and the property system”). On the divergence and convergence of ideologies within the elite business class, *see* Maynard S. Seider, *American Big Business Ideology: A Content Analysis of Executive Speeches*, 39 AM. SOC. REV. 802 (1974).

²⁰⁰ Bratton, *Nexus of Contracts*, *supra* note 91, at 417.

porations, but also the corporation itself.²⁰¹ As William Bratton concluded:

[The corporation] dissolves into disaggregated but interrelated transactions among the participating human actors. Some transactions involve the fictive firm entity as a party, but only as a matter of convenience. The “firm” has no precise boundaries The “firm”²⁰² represents a mere series of contracts joining inputs to produce output.

The new theory of the firm supported a shift in the focus of scholarly debates—from questions of power, influence, sanctions, and legitimacy to issues of cost reduction and profit maximization.²⁰³ Investors, managers, workers, and all other corporate constituencies were presumed to be self-interested wealth maximizers operating in formally free markets. Concerns about managerial expertise were translated into questions about economic efficiency, and corporate managers described corporations’ activities in the social realm as related to “the pursuit of profit.”²⁰⁴ Public problems such as discrimination and growing disparities of wealth were depicted as providing industries that participated in their solution with opportunities for growth and profit making.²⁰⁵ By the mid-1980s, amidst a wave of corporate takeovers, the short-term maximization of wealth for investors was rapidly becoming the focus of corporate decisions. Class analysis was nowhere to be found. The corporate world of wealth and value was able to dissociate itself from the world of work and labor.

Interestingly, the neoclassical picture of the corporation resembled a new pluralist image of the state which scholars like Robert Dahl articulated during the 1950s and 1960s. Also rooted in models of equilibrium drawn from economics, the new pluralist image of the state described society as composed of multiple interest groups interacting, competing, and trading ends in neutral economic and political markets. For Dahl, as it was for early-twentieth-century pluralists, the goal was the ongoing realignment of power in society. Dahl and his contemporaries viewed permanent and fixed social structures, such as class, as leading to totalitarianism, and they described fluid structures,

²⁰¹ *Id.* at 416-17.

²⁰² *Id.* at 420.

²⁰³ Bratton, *supra* note 35, at 1498.

²⁰⁴ PHILLIP I. BLUMBERG, CORPORATE RESPONSIBILITY IN A CHANGING SOCIETY: ESSAYS ON CORPORATE SOCIAL RESPONSIBILITY 5 (1972); *see also* Zeitlin, *supra* note 30, at 1094-97 (reporting studies demonstrating that both “management-controlled and owner-controlled corporations are similarly profit oriented”).

²⁰⁵ BLUMBERG, *supra* note 204, at 5.

such as diverse interest groups, as promoting America's democratic ideals.²⁰⁶ While the new economic theory of the firm reduced the corporation into a nexus of contractual arrangements between self-interested individuals, Dahl and his colleagues turned the American state into a political compromise among diverse pressure groups.²⁰⁷

Interest group pluralists and advocates of the new economic theory of the firm differed in their expectations from the state: while pluralists wanted to construct a welfare state, neoclassical economists assigned to the state an almost negligible role.²⁰⁸ However, both groups of scholars shared important beliefs about the role of markets: neoclassical economists argued that free economic markets would optimize the allocation of social goods, while neo-pluralists trusted free political markets to produce shared public goods. Furthermore, while neo-pluralists did not envision free market capitalism as an end (as neoclassical economists did), they viewed capitalism as the economic base of a welfare society. By combining capitalist economy and interest group politics, they hoped to create "a social order that was neither intrusive nor anarchistic, [one] that provided opportunities for cooperative action and crevices for personal freedom."²⁰⁹

²⁰⁶ See ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 150 (1956) (describing the American political system as a decentralized one in which "[d]ecisions are made by endless bargaining"); ROBERT A. DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT 456 (1967) (asserting that groups must negotiate, compromise, and bargain, and therefore concluding that "no single group can win national elections—only heterogeneous combinations of groups can"). In a series of earlier essays on British socialism and Marxism, Dahl explicitly substituted a participatory model of democracy (and majority rule) for class analysis. As Dahl explained, "Marx and Engels [did] not provide any comprehensive theory of political means, or any unequivocal grounds on which one [could] be constructed," and hence "there [was] no *inherent* contradiction between Marxism and totalitarianism from the point of view of their respective assumptions about the means by which political power [was] to be wielded." Robert A. Dahl, *Marxism and Free Parties*, 10 J. POL. 787, 804 (1948).

²⁰⁷ On different strands of post-War interest group pluralism, see Schiller, *supra* note 23, at 5-18.

²⁰⁸ For the neoclassical economists' critique of pluralism, see Michael A. Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, 88 MICH. L. REV. 917, 930 n.32 (1990). Cf. Nicholas S. Zeppos, *Reforming a Private Legislature: The Maturation of the American Law Institute as a Legislative Body*, 23 LAW & SOC. INQUIRY 657, 660 (1998) (noting that "[l]aw and economics scholars fundamentally challenged . . . the idealized model of interest group pluralism").

²⁰⁹ PELLIS, *supra* note 177, at 143-44; see also Mark Seidenfeld, *Administrative Law Discussion Forum: The Challenge of Teaching Administrative Law*, 38 BRANDEIS L.J. 293, 296 (2000) (noting that the "pluralistic/interest group theory" included "both the optimistic models of David Truman and Robert Dahl and the pessimistic models of George Stigler, Richard Posner, James Buchanan and Gordon Tullock").

In short, according to neoclassical economists and neo-pluralists, individuals promoted their interests and arrived at their destinies by freely associating with others. Thus described, however, individuals could not belong to a class. Indeed, post-War intellectuals viewed individuals as belonging to a multiplicity of functional groups. John Kenneth Galbraith described the countervailing demands of different economic interests (producers, labor unions, and consumers) as the fuel that made American capitalism work.²¹⁰ And Daniel Bell noted that “[t]he growing complexity of society necessarily multiplies . . . interests, regional or functional, and in an open society the political arena . . . is a place where different interests fight it out for advantage.”²¹¹ In other words, post-War intellectuals viewed interest groups, organized along economic or political axes, as ensuring social, political, and economic stability. Class domination of the political arena by one group (i.e., the corporate elite) was accordingly impossible, because other interest groups could refuse to elect or reelect its members.²¹²

Both the neoclassical picture of the corporation and the neo-pluralist image of the state purported to be merely descriptive and devoid of any ethical conviction, but their operative assumptions had strong normative features. Pluralists assumed that the delicate balance among diverse interest groups would be preserved by existing political institutions and a cultural consensus—a consensus “rooted in the common life, habits, institutions, and experience of generations.”²¹³ The status quo became a normative theory.²¹⁴ Instead of

²¹⁰ JOHN KENNETH GALBRAITH, *AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER* 115-39 (1956).

²¹¹ DANIEL BELL, *THE END OF IDEOLOGY* 66 (1962). While Bell explained that such an analysis was not meant to “deny the existence of classes or the nature of a class system,” he nonetheless emphasized that “one cannot, unless the society is highly stratified, use the class analysis for direct political analysis.” *Id.* Usually, Bell noted, “the prism of ‘class’ is too crude to follow the swift play of diverse political groups.” *Id.*

²¹² See Glasberg & Schwartz, *supra* note 187, at 325 (explaining the pluralists’ argument that “[s]ince voters could refuse to reelect unsatisfactory officials, these officials would be forced to honor the will of the electorate, despite their elitist inclinations”).

²¹³ EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* 255 (1973) (quoting BENJAMIN FLETCHER WRIGHT, *CONSENSUS AND CONTINUITY, 1776-1787*, at 57 (1958)).

²¹⁴ *Id.* at 253-66. As Purcell explains, “the moral emphasis on tolerance in the relativist theory easily translated into the acceptance of the status quo.” *Id.* at 254. Specifically, Purcell suggests that in their focus on civil liberties and the possibility of compromise within the existing social structure, pluralist theorists made “broad demands for political and economic change” seem “irresponsible.” *Id.* at 255.

seeking policies that would promote diverse interests, pluralists directed their efforts toward finding “‘a morality of process’ independent of results.”²¹⁵ In turn, proponents of the new economic theory of the firm assumed a shared consensus about efficiency, wealth, and value, and directed their efforts toward reducing transaction costs and maximizing profits.

In the 1960s and 1970s, as rational choice theorists discredited the ability of groups to mobilize without institutional leadership,²¹⁶ and political theorists turned their attention to individual rights, interest group pluralism came under direct attack.²¹⁷ Yet, the normative world that the 1960s pluralist image of the state helped create, and that the

²¹⁵ HORWITZ, *supra* note 33, at 253.

²¹⁶ Cf. Glasberg & Schwartz, *supra* note 187, at 325-26 (noting the difference between “[p]luralists [who] argued that since the general population retained the capacity to remove leadership, it could therefore impose its will in the use of this decision-making power,” and elite theorists, who “argued that political leadership could prevent its own removal and therefore exercise unhindered discretion”).

²¹⁷ Powerful critiques pointed to the inequalities of social, economic, and political power that permeated American corporations and society. C. Wright Mills, for example, argued that in the post-War years, “a conjunction of historical circumstances has led to the rise of an elite of power,” whose “decisions carry more consequences for more people than has ever been the case in the world history of mankind.” C. WRIGHT MILLS, *THE POWER ELITE* 28 (1956). According to Mills, the post-War years saw “[t]he top of the American system of power . . . [becoming] much more unified and much more powerful, the bottom . . . much more fragmented, and in truth, impotent.” *Id.* at 29. Mills’s contemporary, Henry Kariel, explicitly placed the responsibility for this outcome with intellectuals’ fascination with pluralism. He charged that American social scientists had allowed organizations to trump individual rights. Kariel advocated placing constraints on organizational practices to promote the protection of individual liberties. HENRY S. KARIEL, *THE DECLINE OF AMERICAN PLURALISM* 254-72 (1961). As Kariel indicated, he would have the United States move “from the much-celebrated ideal of Tocqueville toward the still unfashionable one of Rousseau, from a hierarchical public order toward an equalitarian one.” *Id.* at 4. Sharing similar views, Gabriel Kolko, Mills and Kariel’s contemporary, reinterpreted the regulatory laws of the Progressive era as reflecting the efforts of conservative corporate leaders to maintain the social and political status quo amidst changing economic conditions. GABRIEL KOLKO, *THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY 1900-1916*, at 8 (1963). Kolko pointedly proclaimed that the modern American state was the result of business efforts to explain capitalism in a way that allowed the corporate elite to maximize their profits. *Id.* at 3. Kolko further emphasized that “many well-intentioned writers and academicians” ended up supporting business goals—not only because they naively believed that “[g]overnment economic regulation, per se, was desirable,” or “assumed that the power of government was neutral and socially beneficent,” but also because many of them were, in fact, conservative in their intentions, viewing the stability promoted by businesses as the only way to maintain “the basic virtues of capitalism.” *Id.* at 286. See generally Schiller, *supra* note 23, at 48-52 (explaining the role of these intellectuals in discrediting “the group pluralist vision of policy-making”).

1980s economic theory of the firm captured, remains with us. At the very least, neoclassical economics and the new pluralism helped transform the American ideal of democracy into a blend of interest groups, efficient compromises, and wealth maximization.²¹⁸ The series of corporate disasters that plagued our economy last year illustrated the risks associated with putting a limited interest-based (i.e., maximization-of-value) norm at the center of corporate law (or our image of the state). As Enron's retiree Charles Prestwood well knows,²¹⁹ rank and file workers bore the main brunt of our collective realization.

CONCLUSION

"My ambition," said Mr. Ford, "is to employ still more men, to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes. To do this we are putting the greatest share of our profits back in the business."²²⁰

* * *

It is often said that modern society has chosen efficiency in production rather than richness in the working life; that it has chosen the possibility of fuller and more varied living outside working hours rather than the possibility of a creative life on the job itself.²²¹

In 1919, in the famous *Dodge v. Ford* case, the Michigan Supreme Court held that "[a] business corporation is organized and carried on primarily for the profit of the stockholders."²²² In essence, this has remained the norm underlying the doctrine of fiduciary duties; it rests on the assumption that market competition, "as manifested in the

²¹⁸ As Patrick Akard similarly noted:

[B]y the end of 1981, the *class*-based political conflicts that emerged in the mid-1970s were resolved in favor of capital through significant reductions in the power of labor and the fiscal and administrative capacities of the state. Once these classwide interests were acted on . . . the *intra*class conflicts over the distribution of the benefits and costs of restructuring *between segments of capital* re-emerged. By the early 1980s, labor and progressive interests were nonparticipants in the policy process. The only question was which conservative faction would rule.

Akard, *supra* note 197, at 611.

²¹⁹ See *supra* note 1 and accompanying text (quoting Mr. Prestwood).

²²⁰ *Dodge v. Ford Motor Co.*, 170 N.W. 668, 683 (Mich. 1919).

²²¹ CARTER GOODRICH, *THE MINER'S FREEDOM: A STUDY OF THE WORKING LIFE IN A CHANGING INDUSTRY* 5 (1925).

²²² *Ford Motor Co.*, 170 N.W. at 684.

profit motive,” is a sufficient constraint on corporate power.²²³ Yet, legal doctrine does not exist in a vacuum. Over the past century legal scholars and political scientists helped legitimize the shareholder-centered vision of the corporation by suggesting how different interests would help direct corporate power toward socially beneficial aims. Ultimately, corporate law scholars endorsed the ideals of expertise, economic progress, and efficiency as sufficient means of constraining corporate power.

This Article followed these scholarly endeavors. Specifically, it examined how a strong ideological opposition to class analysis helped remove workers’ interests from corporate theory and law. It explained how early-twentieth-century scholars, keen on protecting workers’ interests, nonetheless rejected class analysis and in its stead adopted a pluralist image of the state and corporations. It then demonstrated how by taking class and inequalities of power out of the corporate structure (and the legal imagination more broadly), early-twentieth-century scholars helped legitimize a shareholder-centered vision of the corporation, and paved a path for the rise of an even more limited vision of the corporation as an institution with a narrow and very specific function, namely the short-term maximization of its owners’ wealth.

It is impossible to evaluate how attention to the working class, and class analysis more broadly, might have changed the contours of corporate history. However, faced with recent corporate scandals—perhaps the form of class warfare for the twenty-first century—we may want to reassess how this lack of attention to class conflict has affected our corporations and our society, more broadly.

A recent article in *The New York Times Magazine* described the disparities of income in America over the past century. As reported, before the 1930s, a time in which corporations began to amass power, America “was a society in which a small number of very rich people controlled a large share of the nation’s wealth.”²²⁴ During the New Deal, as corporate power was subject to a wide range of regulatory and normative constraints, income became more “fairly equally distrib-

²²³ Jan G. Deutsch, *Corporate Law as the Ideology of Capitalism*, 93 YALE L.J. 395, 397 (1983) (book review). According to Deutsch, “a society characterized by this faith in the competitive ideal” must “justify a system that may injure those who fall short in the contest.” *Id.* at 398. Deutsch notes that in the United States, the “answer has pointed to success, to a standard of living that far exceeds that of other societies.” *Id.*

²²⁴ Paul Krugman, *For Richer: How the Permissive Capitalism of the Boom Destroyed American Equality*, N.Y. TIMES, Oct. 20, 2002, § 6 (Magazine), at 62.

uted.”²²⁵ Yet, since the 1970s—when the new economic theory began its ascent—“income gaps have been rapidly widening.”²²⁶ As the article concluded:

[B]y most measures we are, in fact, back to the days of “The Great Gatsby.” After 30 years in which the income shares of the top 10 percent of taxpayers, the top 1 percent and so on were far below their levels in the 1920s, all are very nearly back where they were.²²⁷

Corporate legal theory did not cause the widening of the income gap in America. But corporate law and theory played a role in reinforcing a legal structure that allowed for disparities of power and wealth to grow. For a large part of the twentieth century, corporate law scholars rejected the notion of a permanent, wage-labor class. Their assumptions about power, their rhetoric of efficiency and progress, and their political rejection of class differences—all seem to reflect their class background. As C. Wright Mills would have it, intellectuals, too, belong to the power elite;²²⁸ they control legal imagination, delineating the boundaries of freedom and constraint in law and theory. At least in part, the present American political and economic order is the result of an ongoing scholarly blindness to class conflict.

Class analysis can help us deconstruct age-old assumptions. For one thing, it can show how norms such as efficiency, professionalism, and wealth maximization define a class, just as property ownership has traditionally defined class. It can further illustrate what Carter Goodrich stressed as early as 1925—that a wealth-aggregation norm could not capture the complexity of human interactions or the nature of life on the job.²²⁹ Finally, it can suggest how our endorsement of such

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ Mills described the power elite as the “men whose positions enable them to transcend the ordinary environments of ordinary men and women;” as men who “are in a position to make decisions having major consequences.” MILLS, *supra* note 217, at 3-4. According to Mills, intellectuals supported the rise of the power elite by masking its power and by endorsing the elite’s conservative mood. By failing to check the power of the elite, intellectuals, Mills charged, paved a path for the rise of a power elite that had neither ideology nor morality and felt the need of neither. *Id.* at 342. For a critique of Mills’s analysis, see Bell, *supra* note 186.

²²⁹ An early-twentieth-century advocate of workers’ control of the means of production, Goodrich called attention to the dangers of the modern emphasis on efficiency, stressing the complex nature of modern industrial life and urging managers to allow workers to bring into corporate decisions the quality of the individual worker’s life on the job. GOODRICH, *supra* note 221; see also CARTER L. GOODRICH, *THE FRONTIER OF CONTROL: A STUDY IN BRITISH WORKSHOP POLITICS 19-50* (1920) (out-

norms as representing the American ideal of democracy helps deepen conditions of inequality and reinforce relationships of dominance and subordination in corporations and in society more broadly.²³⁰

lining workers' basic interests in industry as gaining control in four areas—benefits and wage, what work they are doing, freedom and autonomy, and workmanship).

²³⁰ *Cf.* BOWMAN, *supra* note 73, at 267 (explaining that class analysis is helpful because it “focuses attention on the fact that relationships of control exist because of some basic social differentiation or condition of inequality that gives rise to a relationship of dominance and subordination”).