

Neo-Brandeisianism and the New Deal: Adolf A. Berle, Jr., William O. Douglas, and the Problem of Corporate Finance in the 1930s

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This essay revisits Adolf A. Berle, Jr. and *The Modern Corporation and Private Property* by focusing on the triangle of Berle, Louis D. Brandeis, and William O. Douglas in order to examine some of the underlying assumptions about law, economics, and the nature of modern society behind securities regulation and corporate finance in the 1930s. I explore Douglas and Berle's academic and political relationship, the conceptual underpinnings of Brandeis, Berle, and Douglas's critiques of modern finance, and the ways in which the two younger men—Berle and Douglas—ultimately departed from their role model, Brandeis. Douglas and Berle both styled themselves as intellectual and political heirs of Brandeis, “the people's lawyer.” From the late 1920s and into the New Deal years, they traveled in the same academic and political circles as legal scholars who sought to graft social scientific inquiry to the analysis of corporate finance. In *The Modern Corporation and Private Property*, Berle provided the defining statement for a younger generation's interpretation of Brandeis's critique of how financial elites took advantage of “other people's money.”¹ Backed by Gardiner Means's rigorous empirical research, Berle provided a hard-hitting analysis of the ever-widening separation between ownership and control and its disturbing implications for the nature of property and ownership in modern society. Douglas, a less original thinker, drew heavily upon both Brandeis and Berle in his efforts to expose the ugly realities of corporation reorganization as a regulator at the Securities and Exchange Commission in the 1930s.

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1. Louis D. Brandeis took the phrase “other people's money” from Adam Smith's *The Wealth of Nations* (1776) and used it as the central theme for his own classic work, *Other People's Money and How the Bankers Use It* (1914).

Historian Ellis W. Hawley long ago identified a neo-Brandeisian strain within the New Deal and examined the ways in which Brandeis's outlook on industrial society and the threat of concentrated economic power permeated the consciousness of central figures in the history of 1930s securities regulation.² Berle, Douglas, and other New Deal followers of Brandeis, however, differed sharply from their role model when it came to the moral and spiritual dimensions of modern economic relationships. Where Brandeis had underscored the need to uphold Americans' capacity for self-rule and active participation in economic decision making, Berle and Douglas focused on economic efficiency and protection of ordinary investors, whom they assumed would remain essentially passive actors in market relations. Brandeis wanted to lift "the curse of bigness" and restore power and control to local communities by breaking apart large, far-flung economic combinations. By contrast, although Berle and Douglas distrusted large organizations and their power, in the end they sought not to destroy bigness, but to tame it through government regulation and oversight.

The early twentieth century efforts of Brandeis, Berle, and Douglas to grapple with corporate finance still have much to tell us today about the instability of the market, the dizzying complexity of modern financial instruments, the sheer imbalance of power between ordinary investors and financial elites, and the struggle for regulation. But history seeks to illuminate not only the familiar, but also the strangeness of the past. The final section of this essay addresses the latter by exploring Berle's invocation of revolution and radical skepticism about prevailing conceptions of private property. That Berle could mount so daring an intellectual challenge to the foundational principles of industrial capitalism yet remain politically mainstream reminds us of the gulf that separates his past from our present, even as the separation of ownership from control remains as vexing as ever.

I. DOUGLAS AND BERLE: AN ACADEMIC AND POLITICAL FRIENDSHIP

In the early 1930s, Douglas and Berle developed a cordial academic relationship out of their mutual interest in bankruptcy and corporate

2. See ELLIS W. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE* §§ 15–16 (1966). Hawley left Adolf A. Berle off of a long list that included James M. Landis, Benjamin Cohen, and Thomas G. "Tommy the Cork" Corcoran—the authors of the New Deal's key financial regulatory measures, the Securities Act of 1933, and the Securities and Exchange Act of 1934—as well as Felix Frankfurter and William O. Douglas. The omission reflected Hawley's emphasis on a divide between Frankfurter's group of "Happy Hot Dogs" (Landis, Cohen, and Corcoran) and the Brain Trust of Berle, Rexford Guy Tugwell, and Raymond Moley. His study generally overstated the commitment to anti-trust of Brandeis's self-proclaimed disciples, however.

finance. Douglas and Berle first crossed paths at the Columbia University School of Law, a hotbed of the legal realist movement until infighting led to an exodus of realists in 1928. Berle, who launched a private practice in New York City in 1924, angled for a position at Columbia for several years before joining the faculty on a temporary basis in 1927. The appointment became permanent the following year. Douglas, a graduate of Columbia's law school, began lecturing there part time in 1925. For two years, he alternated between teaching and unhappy stints as a corporate lawyer on Wall Street before becoming a regular faculty member at Columbia in 1927.

Berle and Douglas's scholarly interests made them a natural fit. Berle played a major role in founding corporation finance as a scholarly field in the mid 1920s. Although he did not openly identify himself as a legal realist, his dedication to empirical research and his institutionalism—rooted in the theoretical work of the iconoclastic economist and intellectual Thorstein Veblen—accorded well with the content and intellectual style of legal realism. Indeed, *The Modern Corporation and Private Property*, with its emphasis on the disjuncture between traditional legal theories of property and socioeconomic realities, could be considered a classic legal realist text.³

Douglas, following the path of his mentor Underhill Moore, sought to apply social scientific methods to the study of business phenomena as part of the empiricist wing of legal realism. After he left for Yale Law School in 1928, Douglas carved out his early reputation by undertaking social scientific studies that employed court records, questionnaires, and interviews in order to uncover the social realities of bankruptcy and their divergence from legal theory. Although federal bankruptcy law was well-established by the end of the 1920s, few reliable statistics or other concrete data about the actual workings of bankruptcy and corporate reorganization existed. A small group of pioneering researchers, including Douglas, Leon Henderson of the Russell Sage Foundation (another future New Dealer), and a group at the Department of Commerce, worked to fill the gap.

As scholars, Douglas and Berle combined legal knowledge and economic expertise with a depth and sophistication rarely seen before their generation. During the late 1920s and early 1930s, they enjoyed a collegial relationship defined by the usual rhythms of academic life. They requested materials from each other, exchanged ideas, planned conference sessions together, expressed their admiration for each other, and

3. Some reviewers at the time underscored the legal realist dimensions of *The Modern Corporation and Private Property*. See Richard S. Kirkendall, *A. A. Berle, Jr. Student of the Corporation 1917–1932*, at 35 *BUS. HIST. REV.* 43, 46 (1961).

traded recriminations over their too busy, overcommitted academic lives. Although the ever-insecure and competitive Douglas resented Berle's greater professional and political success and occasionally badmouthed him behind his back,⁴ the two remained on good terms. After Franklin D. Roosevelt entered the White House, their correspondence turned to public policy, particularly the administration's plans to regulate the securities market, one of the cornerstones of the New Deal. In letters to Berle and other colleagues, Douglas excoriated the Securities Act of 1933—a sunshine law mandating registration and truthful disclosure statements for newly-issued securities with the Federal Trade Commission—as a weak-kneed and inadequate response to the enormous problems that plagued securities and corporate finance. To Berle, Douglas labeled the Act “a rather laborious and untimely effort to turn back the clock and quite antithetical to many of the other significant current developments.”⁵ Berle, by then a Washington D.C. insider as part of the New York-centered “Brain Trust” that advised Roosevelt throughout his first presidential campaign and in the early years of the New Deal, responded apologetically, “I get generally blamed for the Securities Act, the fact being that I thought that, as no [here Berle originally wrote ‘though’ and crossed it out] emergency required its immediate passage, it would not be a bad idea to do a good deal of long range thinking on the subject.” Berle scornfully described Felix Frankfurter, who had contributed to the drafting of the act (although its primary authors were his protégé, James M. Landis, as well as Thomas G. “Tommy the Cork” Corcoran and Benjamin V. Cohen), as knowing “next to nothing about the subject except on paper.” Frankfurter, Berle claimed, thought “he had reached the final and everlasting answer” to the problems of the securities market, whereas Berle saw the act as a beginning. “The result of the Securities Act,” Berle observed, “will be that the United States government will go into the investing banking business before very long.” He added drily, “There might be worse results.”⁶

4. See JORDAN A. SCHWARZ, *THE NEW DEALERS: POWER POLITICS IN THE AGE OF ROOSEVELT* 159 (1993).

5. Letter from William O. Douglas to Adolf A. Berle, Jr. (Dec. 29, 1933), (on file with Library of Congress, Manuscript Division, Papers of William O. Douglas [hereinafter Douglas papers], Box 2, Folder 5) See also Letter from William O. Douglas to George E. Bates, (Nov. 1, 1933), in Douglas papers at Box 2, Folder 1. To Bates, his collaborator on a joint course between the Yale Law School and the Harvard Business School, Douglas described himself as “fed up with the Securities Act.” *Id.*

6. Letter from Adolf A. Berle, Jr. to William O. Douglas (Dec. 30, 1933), Douglas papers, *supra* note 5, at Box 2, Folder 5. Berle's long-held contempt for Felix Frankfurter dated back to his student days at Harvard Law School. See JORDAN A. SCHWARZ, *LIBERAL: ADOLF A. BERLE AND THE VISION OF AN AMERICAN ERA* 14–15 (1987); WILLIAM O. DOUGLAS, *GO EAST, YOUNG MAN: THE EARLY YEARS: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS* 369 (1974).

Douglas responded to Berle's opening with enthusiasm and reminded his friend of his willingness to serve if called. He hoped that the New Deal would now "get at the really fundamental problem of the increment of power and profit inherent in our present forms of organization." By that, Douglas meant rearranging the securities market along the lines of the National Recovery Administration (NRA), with its efforts to boost prices and stymie deflation by enlisting industries into a complex system of codes and price-fixing, with concessions to labor in the form of a guaranteed right to collective bargaining. He told Berle, "Perhaps it will not be long before we can see security regulation occupying as prominent a place in the present codes as prices and costs, competition and monopoly, consumption and production, etc." Douglas concluded with an invocation of the choice between drift and mastery that progressive journalist and writer Walter Lippmann had once identified as the cardinal choice of the modern industrial age—a reference still familiar to anyone in progressive political circles in the 1930s.⁷ Douglas wrote, "The gradual drift, or better yet, the conscious direction of the United States into the investment banking business is one of the most significant contributions to the mastery of high finance which this generation has seen. Any securities act could point with pride to such an accomplishment."⁸

While Berle and other contemporaries descended upon Washington, Douglas waited for the call. In the spring of 1933, he considered undertaking research for Ferdinand Pecora, the special counsel to the Senate Committee on Banking and Currency, who was leading the Senate's charge against malfeasance on Wall Street. Instead, Douglas continued to churn out academic articles, hone his critique of the Securities Act of 1933 and his case for stronger protections for investors, and bide his time. His break came with the passage of the Securities and Exchange Act of 1934, which created the Securities and Exchange Commission

7. See William E. Leuchtenburg, *Introduction* to WALTER LIPPMANN, *DRIFT AND MASTERY: AN ATTEMPT TO DIAGNOSE THE CURRENT UNREST* (University of Wisconsin Press ed., 1985).

8. Letter from William O. Douglas to Adolf A. Berle, Jr. (Jan. 3, 1934), Douglas papers, *supra* note 5, at Box 2, Folder 5. Douglas also floated the idea to Herman Oliphant, another former Columbia colleague in the legal realist camp. By 1934, Oliphant had moved to Washington to become general counsel at the Treasury Department. Douglas wrote, "In any program for genuine protection of investors I believe that truth about securities is the secondary rather than the primary line of defense. . . . I think the statute we need lies somewhere between the [English] Companies Act and the present Securities Act. I would superimpose on such type of control a further control of an administrative kind. If the various codes are to be a permanent part of our organization, I think before long we will have to incorporate in them control over security issues." Letter from William O. Douglas to Herman Oliphant (March 2, 1934), Douglas papers, *supra* note 5, at Box 11, Folder 15; *see also* Letter from William O. Douglas to Herman Oliphant (March 9, 1934), Douglas papers, *supra* note 5, at Box 11, Folder 15.

(SEC) and the promise of new mechanisms to regulate the securities market. Douglas, never one to conceal his ambitions, angled for a seat on the commission. He did not come away with the prize that he sought. But James M. Landis, impressed by an article Douglas had written on railroad reorganizations, tapped him to head the SEC's study of protective and reorganization committees. The Securities and Exchange Act of 1934 mandated the study, and the SEC's architects anticipated that it would produce another major round of regulatory legislation. Thus the Protective Committee Study carried far greater weight than its unprepossessing title suggested. Douglas himself viewed the position as a stepping stone to the SEC chairmanship and eagerly took the job in the summer of 1934.⁹ After Joseph Kennedy stepped down and Landis moved to the chairmanship, Douglas attained a seat on the commission in 1935, and he ascended to the much-coveted chairmanship in 1937.

Douglas's move to the SEC, combined with the failure of the National Recovery Administration, muted his criticisms about New Deal securities regulation. The Securities and Exchange Act of 1934, which established the SEC as an agency with considerable discretionary power to develop economic knowledge and implement new regulations to deal with the problems of the securities market, possessed the regulatory prowess to satisfy Douglas in ways that the earlier act had not. Meanwhile, as the bureaucratic unwieldiness and economic shortcomings of the NRA experiment became increasingly apparent, Douglas quietly abandoned his earlier calls for close management, control, and planning in the securities market. Instead, he embraced Landis's governing ideology for the agency, which endorsed regulated capitalism over economic planning. Throughout his six-year career at the SEC, Douglas argued for the need to establish an appropriate balance between, on the one hand, preserving and encouraging the dynamism of the free market as a realm of individual free choice, and on the other, aggressively targeting the underhanded and illicit practices that left individual investors vulnerable to the manipulation and coercion that produced the grotesque inefficiencies and spectacular failures of the unregulated marketplace.

As Douglas made his career in public service, his friendship with Berle moved to the political realm. Berle had decided that work as a publicist and booster on behalf of the New Deal, rather than a specific position in the Roosevelt administration, better suited his ambitions. He also enjoyed working behind the scenes, within Democratic Party circles in New York state and at the national level. Historian Jordan A. Schwarz

9. See Letter from William O. Douglas to George E. Bates (April 7, 1933), Douglas papers, *supra* note 5, at Box 2, Folder 1; BRUCE ALLEN MURPHY, *WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS* 106–08 (2003).

once aptly described Berle as a “free-lancer for Roosevelt and La Guardia” and a “braintruster without portfolio.”¹⁰ For Douglas, Berle’s self-appointed role meant occasional tips and leads in connection with the Protective Committee Study’s investigations of bondholders’ committees, and Douglas warmly welcomed Berle’s advice.¹¹ When it became clear that SEC chairman Landis would leave the commission and return to Harvard, Berle pushed Roosevelt to appoint Douglas to the vacancy. By this point, Douglas—an inveterate social climber—had already established himself as a prominent fixture in Washington’s high society, and his carefully cultivated talents as a raconteur had earned him a seat at Roosevelt’s regular poker table at the White House. Douglas hardly needed help gaining high-level political access anymore, and with much of the shine off the Brain Trust, Berle’s intervention probably meant little.¹² Whatever the nature of Berle’s role, Douglas attained his long-desired position. Meanwhile, Berle remained active within the corridors of power in both New York state and Washington D.C. In 1938, he finally took an official government position and moved to Washington as Assistant Secretary of State. Berle had attended the Paris Peace Conference as part of the American delegation back in 1919, and in his State Department career, he pushed American-sponsored economic development programs as an alternative to violent forms of imperialism. He did not forsake his New Deal roots. As Jordan Schwarz has pointed out, Berle’s foreign policy vision amounted to New Deal-style state capitalism on a global scale.¹³

By the late 1930s, Douglas had surpassed Berle in public prominence, and his appointment to the Supreme Court in 1939 cemented his status within the American political elite. As an intellectual, however, he was no match for the man behind *The Modern Corporation and Private Property*, one of the most important works in American economic thought of the twentieth century. Douglas owed Berle considerable intellectual debts, and both men derived their critiques of the modern economy from a giant of the previous generation, Louis D. Brandeis. For his work with the SEC in the 1930s, Douglas needed both Brandeis and Berle.

10. SCHWARZ, *supra* note 6, at 102–03.

11. See Letter from Adolf A. Berle, Jr. to William O. Douglas (Feb. 22, 1935); Letter from William O. Douglas to Adolf A. Berle, Jr. (Feb. 28, 1935); Letter from Adolf A. Berle, Jr. to William O. Douglas (June 18, 1935); Letter from William O. Douglas to Adolf A. Berle, Jr. (July 1, 1935); Douglas papers, *supra* note 5, at Box 2, Folder 5.

12. See Letters from Adolf A. Berle, Jr. to William O. Douglas (Jan. 26 1937 & Feb. 1 1937), Douglas papers, *supra* note 5, at Box 2, Folder 5; SCHWARZ, *supra* note 6, at 108; MURPHY, *supra* note 9, at 118–20; and DOUGLAS, *supra* note 6, at 317.

13. SCHWARZ, *supra* note 6, at 113.

II. OTHER PEOPLE'S MONEY IN THE AGE OF THE MODERN CORPORATION: FROM BRANDEIS TO BERLE

Two key works—Louis D. Brandeis's *Other People's Money* (1914) and Berle and Gardiner Means's *The Modern Corporation and Private Property* (1932)—undergirded Douglas's and other New Dealers' understanding of the problems of the modern political economy and the need for government regulation. As lawyers who sought to integrate social scientific analysis into law and public policy, both Douglas and Berle followed in Brandeis's footsteps. In 1908, Brandeis's introduction of the "Brandeis brief" in *Muller v. Oregon*, which mobilized all manner of social scientific and medical data to defend a protective labor law for women, transformed legal practice. Although most of the data Brandeis cited reflected opinion laden with gender biases of the time period, and not what one today would recognize as rigorous scientific investigation, the brief nonetheless established the legitimacy of a new form of legal argumentation that rested on fact-based social analysis and not simply appeals to legal theory or precedent. Brandeis did not singlehandedly turn the social scientific gaze onto American legal practice—credit also belongs to Oliver Wendell Holmes, Jr., as well as the sociological jurisprudence of Roscoe Pound. The "Brandeis brief," however, combined with Brandeis's crusading zeal as the nation's most visible progressive lawyer, symbolized more than any other development the new power of social inquiry grafted to reformist politics. As Berle described him in 1936, Brandeis represented "the strictly modern methods of fact-finding, education, and political action."¹⁴

Six years later, with the publication of *Other People's Money*, Brandeis provided a critique of large organizations and their command of modern financial life that inspired at least two generations of progressives. *Other People's Money* detailed the workings of a modern financial system in which bankers occupied new positions of privilege and power.¹⁵ They served on boards of directors and protective committees and played managerial roles in corporate reorganizations. By exploiting the organizational instruments of modern corporate finance—voting trusts, interlocking directorates, joint ownership—bankers acquired control of large business enterprises and established themselves as a new "financial oligarchy."¹⁶ From Brandeis's standpoint, the bankers' concentration of economic power in and of itself constituted a dangerous

14. A. A. Berle, Jr., *The Way of an American*, 25 SURV. GRAPHIC 597 (1936).

15. On the impact of *Other People's Money* and its status as an exemplar of empiricist, social scientific inquiry, see STEVE FRASER, EVERY MAN A SPECULATOR: A HISTORY OF WALL STREET IN AMERICAN LIFE 295–302 (2005).

16. BRANDEIS, *supra* note 1, at 4.

locus of power that threatened democratic values, but he also took pains to document how investment bankers failed to use their authority wisely or equitably. By exercising their control over the supply of capital, bankers manipulated stock and bond prices and stifled economic competition. In addition, they profited by charging exorbitant sums for underwriting and other services. Far from supplying capital as the engine of innovation, they frequently impeded the development of new technologies.¹⁷ To add insult to injury, the bankers did not even have to use their own money to amass enormous profits at the expense of investors. Instead, they enjoyed “the privilege of taking the golden eggs laid by somebody else’s goose.”¹⁸ Although investors enjoyed ownership rights in theory, their isolation, atomization, and lack of access to information rendered them helpless to exert any meaningful control over their economic fates. Into this power vacuum stepped the bankers. Brandeis indignantly observed, “They control the people through the people’s own money.”¹⁹

Brandeis argued his case against modern corporate finance with a distinctive moral fervor that energized progressives and their New Deal descendants. Brandeis cared less about the negative economic effects of investment banking than what he saw as its corrosion of American individualism and self-rule.²⁰ Although he once believed that some large corporate enterprises managed to conduct themselves virtuously, by the early twentieth century he opposed with ever-growing vigor what he called “the curse of bigness.”²¹ Unlike Theodore Roosevelt and the other exponents of the New Nationalism, who believed in the inevitability of big business and the possibility of its efficiency, Brandeis, by 1912, could declare forthrightly, “There are no good trusts.”²² Combinations, Brandeis believed, tended by their nature to stifle economic competition and, even worse, they endangered democratic self-rule. As he declared in *Other People’s Money*, “far more serious even than the suppression of competition is the suppression of industrial liberty, indeed of manhood itself, which this overweening financial power entails.”²³ With respect to the nation’s railroads, Brandeis wrote, “[I]n nearly every case the absorption into a great system of a theretofore independent railroad has involved the loss of financial independence to some community, property,

17. *See id.* chs. 1, 7.

18. *Id.* at 17–18.

19. *Id.* at 18.

20. *See* MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE (2009).

21. *Id.* at 94–97, 161.

22. *Id.* at 308.

23. BRANDEIS, *supra* note 1, at 48.

or men, who thereby become subjects or satellites of the Money Trust.”²⁴ On the whole, the financial system shunted power away from the vast sea of ordinary Americans and instead enriched a tiny minority. Brandeis observed, “The depositors are largely wage earners, salaried people, or members of small tradesmen’s families. Statically the money is used for them. Dynamically it is used for the capitalist. For rare, indeed, are the instances when savings banks moneys are loaned to advance productively one of the depositor class.”²⁵ Over and over again, Brandeis described a system that deprived individuals and communities of power and control and that therefore failed to take advantage of Americans’ true potential. Brandeis concluded, “If industrial democracy—true cooperation—should be substituted for industrial absolutism, there would be no lack of industrial leaders.”²⁶ Modern high finance did not simply exact economic costs—it damaged citizens’ capacity for self-rule and left the collective energies of society untapped and dissipated. Where large enterprises were unavoidable, Brandeis could imagine maintaining competition through aggressive regulatory action, although he feared big government almost as much as big business. He preferred breaking up large combinations and, to the extent possible, restoring an old economic order of small competing units and a culture of ownership that he believed best fostered liberty and democracy.²⁷

In an age in which doubts about the basic nature of industrial society dominated public discourse, critiques such as Brandeis’s held widespread appeal. From roughly 1870 to 1940, the question of whether industrial capitalism could generate and distribute wealth without unac-

24. *Id.* at 174.

25. *Id.* at 218.

26. *Id.* at 208.

27. See generally THOMAS K. MCCRAW, PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, ALFRED E. KAHN ch. 3 (Belknap Press 1984); UROFSKY, *supra* note 20. Gerald Berk has challenged the conventional image of Brandeis and the “curse of bigness” with an analysis of Brandeis’s conception of scientific management and railroad cost accounting in the 1912 *Eastern Rate* case, in which he argues that Brandeis was far more willing to countenance government intervention to regulate large business enterprises than McCraw and other scholars acknowledge. See Gerald Berk, *Whose Hubris? Brandeis, Scientific Management, and the Railroads*, CONSTRUCTING CORPORATE AMERICA: HISTORY, POLITICS, CULTURE 120–48 (Kenneth Lipartito and David B. Sicilia ed., Oxford University Press 2004). It is telling, however, that Berk’s two examples—gas and railroads—were business endeavors widely considered in the early twentieth century to be “natural monopolies,” which may explain why Brandeis did not envision breaking up combinations in these cases. Berk’s interpretation refines the prevailing understanding of Brandeis’s conception of political economy, but does not, I think, completely overturn it. Berk’s analysis is nonetheless important as a reminder of the modernist dimensions of Brandeis’s economic thinking, which have made his intolerance of bigness so confounding to latter-day readers. No less a personage than Adolf A. Berle, Jr. could identify Brandeis with modern methods, but also accuse him of wanting “to turn the clock backward.” ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY viii (1932).

ceptably high social costs constituted the central issue of the day. Progressives looked to reinforce the social and collective bonds of society in order to contain what they perceived as the damaging consequences of rampant individualism. Settlement houses and social surveys provided new ways of seeing society and exposing the light of public opinion on its harsh realities, while protective labor legislation, workers' compensation, attacks on corporate abuses of power, and other political measures offered means of ameliorating the frequently appalling socioeconomic conditions of the late nineteenth and early twentieth century. Whether they concentrated on the plight of the urban poor or the broader outlines of law and political economy, progressives targeted industrial capitalism as a system in dire need of reform.

The New Dealers inherited the progressives' political and intellectual legacies, and Berle embraced much of Brandeis's critique of modern finance. Berle imbibed Brandeisian progressivism practically from birth. Berle's father encouraged his two sons to take Brandeis's combination of intellect and activism as their model, and Berle's parents expected all four of their children to excel. An impressive list of guests dined at the Berle household during young Adolf's childhood, including Brandeis and other Boston luminaries. In 1916, after graduating from Harvard Law School at the age of twenty-one, Berle took a job at Brandeis's law firm. Although he enjoyed little if any direct contact with the grand master, he nonetheless dreamed of becoming a reform-oriented, crusading lawyer like Brandeis.²⁸ The dream shifted somewhat, as aspirations for wealth and public status turned Berle toward a career in corporate law. As a young lawyer making his way in the world in the 1920s, however, he continued to travel in progressive circles. Like future New Dealers Harry Hopkins and Frances Perkins, Berle lived for a time at the Henry Street Settlement on New York's Lower East side, an unusual choice of residence for someone striving to build a practice in corporate law. But through his association with the settlement house and with progressive reformer Paul Kellogg and the social survey movement, he kept his feet on the ground within the gritty urban orientation of progressive reform while directing his intellectual energies toward the larger structural problems of the corporation, finance, and modern economic life.²⁹

The Brandeisian strain ran strong in Berle's most famous work, *The Modern Corporation and Private Property*. Berle and Means offered a stark and startling analysis of corporations, the organization of modern economic relationships, and the diminishing power of ownership. But

28. See SCHWARZ, *supra* note 6, at 5–8, 16, 19.

29. See *id.* at 38–45.

while Brandeis frequently let moral suasion outpace fact-based analysis, Berle and Means developed the expansive empirical base to match their sweeping indictment of modern financial life and the corrosive effects of its ever more pervasive separation between ownership and control. In a dry, rigorous, and sustained analysis far removed from Brandeis's crusading style, Berle and Means explained the complex structure of modern financial relationships and how the separation of ownership from control allowed managers to keep the benefits of ownership from shareholders and instead "divert profits into their own pockets."³⁰ In addition to the basic fact of mass ownership of stock, which by itself diluted the power of ownership, a proliferation of legal and financial mechanisms exacerbated shareholders' weakness. Holding companies, non-voting stock, and voting trusts concentrated control in an ever-smaller elite.³¹ Clauses in modern corporate charters easily bypassed shareholders' traditional common law rights.³² New types of securities, such as stock purchase warrants, blank stock, and securities convertible at the corporation's option, eroded stockholders' already limited expectations of control.³³ The creation of different classes of stock diluted the theory that shareholders even represented a single, common interest, while directors' power to distribute dividends further pitted shareholders against each other.³⁴ Control over accounting practices placed "another powerful weapon" in the hands of directors.³⁵ Meanwhile, court precedents wavered over whether directors even had a fiduciary responsibility toward shareholders, or whether their loyalties properly lay solely with the corporation itself.³⁶ If the latter, then shareholders could not even hold onto the theoretical expectation that directors represented their interests. Berle called for the establishment of the principle that corporate management's powers constituted powers held in trust for the benefit of all shareholders. But he also admitted that "[i]t would require an expert and courageous court to apply this theory to most of the corporate problems reaching litigation. For this reason, it cannot be reckoned on as a solution of the major difficulties in the problem."³⁷

30. BERLE & MEANS, *supra* note 27, at 333.

31. *See id.* at 73–77.

32. *See id.* at 159.

33. *See id.* at 180–87.

34. *See id.* at 160, 193. Changes in participation rights established by management also pitted stockholders against stockholders. *See id.* at 215.

35. *Id.* at 202.

36. *Id.* at 328–29.

37. *Id.* at 276. Here I should note that while Berle granted Means co-authorship and a third of the royalties, scholars have generally credited Means with developing the economic data that dominated Book I of *The Modern Corporation and Private Property*, while attributing the book's legal arguments and larger analytical structure to Berle. *See* SCHWARZ, *supra* note 6, at 58–59; Robert

In short, at virtually every turn circumstances tilted control away from shareholders and towards management, and the conditions of modern corporate finance rendered traditional protections and concepts obsolete. The separation of ownership from control had completely undermined traditional assumptions about property and ownership. Contract theory offered investors little more than “a fiction of law” in the face of shareholders’ inability to formulate or even understand their contractual relationship with the corporation.³⁸ Litigation hardly offered sufficient remedies, since investors were so atomized that they could rarely mount a case. “Scattered shareholders,” Berle noted, “do not easily organize for mutual protection.”³⁹ Nor did the ideal of individualism offer more than empty rhetoric in the context of modern “economic empires” that constituted “a new form of absolutism, relegating ‘owners’ to the position of those who supply the means whereby the new princes may exercise their power.” Honest acknowledgement of this existing state of affairs, Berle argued, “must bring with it a realization of the hollowness of the familiar statement that economic enterprise in America is a matter of individual initiative.”⁴⁰

The central problem lay in a profound disjuncture between legal and economic logic created by the rise of modern corporate finance. In the final part of *The Modern Corporation and Private Property*, Berle underscored how the newly bifurcated quality of modern wealth—the passive wealth of shareholders as opposed to the active wealth that arose from management’s powers of control—had not only separated ownership and management, but also economic and legal logic.⁴¹ The “traditional logic of property” implied that managers’ powers were powers in trust held for the benefit of stockholders. Management was entitled to fair compensation for its labor, but no more. Rather than rest his case on traditional legal theory, however, Berle raised the contrarian question—why should profits not go to management? “Are no profits,” he asked, “to go to those who exercise control and in whose hands the efficient

Hessen, *The Modern Corporation and Private Property: A Reappraisal*, 26 J.L. & ECON. 273, 274–75 (1983). I will, for the most part, drop the collective attribution at this point and refocus the narrative on Berle alone. It should be noted, however, that Berle, in his preface to the book, explicitly shared the credit with Means for the conclusions in Book IV.

38. BERLE & MEANS, *supra* note 27 at 188. Berle continued:

[S]hareholders do not bargain with their corporation and strike an agreement on the terms of corporation law and the charter before the stock is sold. They almost certainly did not read the corporate charter, and probably would not have understood it if they had; and would be entirely helpless in the face of the provisions of a complicated corporation act.

Id.

39. *Id.* at 218.

40. *Id.* at 125.

41. *See id.* at 344, 348.

operation of enterprise ultimately rests?” Economic logic, Berle went on to explain, did not justify profit as solely an expectation of ownership. As he put it in a rhetorical question, “Where is the social advantage in setting aside for the security holder, profits in an amount greater than is sufficient to insure the continued supply of capital and taking of risk?”⁴² To use the language of economics, Berle essentially posed the question of why investors should expect profits that went beyond their own marginal utility. In the context of twentieth century economic relationships, the rationale for adhering to traditional concepts of ownership was not self-evident. Just what should replace those concepts, however, remained unclear.

Some reviewers of *The Modern Corporation and Private Property* chided Berle and Means for their ambivalence about solutions and their failure to suggest reforms.⁴³ Although the book’s conclusion opened the door to government intervention and the establishment of a “neutral technocracy” that could balance competing community interests, the trust theory that Berle laid out earlier in the book implied far more limited remedies. As discussed above, Berle conceded that it would take a brave court to establish his trust theory as legal doctrine. The theory did at least suggest, however, “that the common law has at its command tools adequate to meet the situation in sufficiently competent hands.”⁴⁴ In theory, then, the existing legal process could handle the modern corporation.

Douglas expressed considerable skepticism about Berle’s trust theory and griped to a former law school classmate about Berle’s 1931 essay, *Corporate Powers as Powers in Trust*, an earlier version of the chapter with the same title in *The Modern Corporation and Private Property*. “Some of the stuff this boy Berle has been getting off,” Douglas complained, “is not only bum law but also very poor theory.”⁴⁵ More than personal envy was at work here. A solution that relied upon courts rather than administrative power could hardly satisfy fervent advocates of federal regulation, who believed, as Berle himself admitted, that litigation offered too little too late in terms of the problems of the securities market. In the closing pages of *The Modern Corporation and Private Property*, Berle reached for an alternative to a binary choice between traditional conceptions of property versus a wholesale embrace of

42. *Id.* at 342–43.

43. See Kirkendall, *supra* note 3, at 54.

44. BERLE & MEANS, *supra* note 27, at 276.

45. Letter from William O. Douglas to Alfred McCormack (Oct. 1, 1931) in THE DOUGLAS LETTERS: SELECTIONS FROM THE PRIVATE PAPERS OF JUSTICE WILLIAM O. DOUGLAS 16 (Melvin I. Urofsky ed., Adler & Adler, Publishers 1987). For Berle’s original article, see Adolf A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931).

economic logic and corporate power. He recognized that to the extent corporations had become state-like institutions, they became matters of public interest and could no longer be relegated to the realm of purely private transactions.⁴⁶ On the campaign trail in 1932–1933, as part of Franklin Delano Roosevelt’s “Brain Trust,” Berle supported Roosevelt’s early proposals for securities regulation and banking reform. He drafted Roosevelt’s September 1932 San Francisco “Commonwealth Club” speech, which pointed to the existence of an “economic oligarchy” and called for government to develop new ways of protecting the public interest that was now part and parcel of economic relationships once considered private.⁴⁷ To that extent, Berle became a firm advocate of government regulation as the answer to the problem of the modern corporation. Yet, as Arthur M. Schlesinger, Jr. observed in his classic study of the New Deal, although Berle embraced the need for regulation, he continued to hope for “repentance and responsibility among business leaders.”⁴⁸ For all the boldness of the critique in *The Modern Corporation and Private Property*, Berle never entirely broke from convention when it came to solutions.

One cannot imagine Brandeis hoping for redemption among the business elite. More significantly, Berle departed from Brandeis on the question of bigness. In broad outline, *The Modern Corporation and Private Property* was a Brandeisian text whose analysis rested upon Brandeis’s attack on concentrated financial power and lent robust statistical representation to Brandeis’s fact-based but impressionistic depiction of money and power in modern America. Berle, however, viewed large organizations and concentrations of power as an inevitable characteristic of the modern political economy, and beyond a vague and passing nod to the potential collective power of consumers and labor, *The Modern Corporation and Private Property* remained silent about the questions of citizens’ meaningful participation in self-governance that had animated Brandeis’s critique.⁴⁹ In Berle’s work, Brandeisian inspiration served the

46. See BERLE & MEANS, *supra* note 27, at 354–57.

47. ARTHUR M. SCHLESINGER, JR., *THE CRISIS OF THE OLD ORDER, 1919–1933*, at 425 (Houghton Mifflin 1957). See also *id.* at 423, 425–26.

48. *Id.* at 415. See also *id.* at 193; ARTHUR M. SCHLESINGER, JR., *THE COMING OF THE NEW DEAL, 1933–1935*, at 183–84 (Houghton Mifflin 1958). In emphasizing Berle’s continued attachment to the possibility of redemption among the business elite, I depart somewhat from Jordan A. Schwarz, who contends that Means’s data turned Berle into an aggressive advocate of government regulation, and led him to reject his early belief that improved self-regulation by the stock exchanges might suffice to ensure stockholder rights and address other problems of unregulated high finance. SCHWARZ, *supra* note 6, at 52–56.

49. Berle pointed to the “tens and hundreds of thousands of owners, of workers and of consumers combined in single enterprises” that illustrated how “corporate enterprise” was remaking society as a whole and not simply the institution of the corporation. Even here, however, he reached

worthy but more limited end of promising protections for investors and greater economic security for society at large, but sidestepped the problem of democratic rule in a modern, corporate age. Where Brandeis sought to end “the curse of bigness,” Berle and other New Dealers tried to find ways to live with it.

Like Berle, Douglas also drew heavily upon Brandeis for his own critique of how bankers and managers enriched themselves at the expense of security holders. Like other analysts of modern finance in the 1930s, he also looked to Berle and Means on the gulf between ownership and management and the wide-ranging powers of control held by management. At the SEC, Douglas’s Protective Committee Study echoed *The Modern Corporation and Private Property* with an empirical analysis that upheld Brandeis’s image of modern finance as a realm of manipulation and malfeasance, and a set of solutions that offered investors protection, but not participation.

III. THE PROTECTIVE COMMITTEE STUDY AS NEO-BRANDEISIAN TEXT

The massive, eight-volume Protective Committee Study explored the intricate workings of the protective and reorganization committees that were supposed to represent shareholders’ interests following declarations of corporate bankruptcy. In lavish detail, the study exposed the inequities of receivership and the ways in which bankers and corporate management exploited the reorganization process for their own ends. The analysis reflected both Brandeis’s and Berle’s depictions of modern finance, with an emphasis on the helplessness of ordinary investors that could have come straight out of *Other People’s Money*, and a stark portrayal of the gap between ownership and control that owed much to *The Modern Corporation and Private Property*. Ultimately, the study produced two important pieces of legislation—the Chandler Act in 1938 and the Trust Indenture Act in 1939. The Chandler Act, which established Chapter X bankruptcy, governed large corporate reorganizations for the next forty years.⁵⁰

Douglas grew up in rural south central Washington State with none of the Berle family’s social advantages, and he could not boast of childhood connections to “the people’s lawyer.” Nonetheless, he too cast himself in a Brandeisian mold. In his autobiography, Douglas claimed

disturbing conclusions from the perspective of democratic political theory, for he went on to indicate that “individual initiative” was becoming obsolete in a new era of large organizations. BERLE & MEANS, *supra* note 27, at 349.

50. On the impact and significance of Chapter X bankruptcy, see DAVID A. SKEEL, JR., DEBT’S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 123–25 (2001). See also William W. Bratton, *Berle and Means Reconsidered at the Century’s Turn*, 26 J. CORP. L. 737, 744–50 (2001).

that as a young man he dreamed of becoming a lawyer in Brandeis's vein, and he named the senior justice as one of "six seminal forces in the law who shaped my life."⁵¹ When he went to work at the SEC in 1934, he cultivated a personal relationship with the elderly Supreme Court Justice, and as the first volumes of the Protective Committee Study began to roll off the presses, he took a moment to thank his hero. Douglas wrote unctuously to Brandeis, "It is needless for me to add that your own monumental work on 'Other Peoples [sic] Money' has been a guiding star and inspiration to all of us who have collaborated on this present project."⁵² A year later, when Douglas moved to the SEC chairmanship, he hung a portrait of Brandeis behind his desk, a gesture that sent a clear political message about where he stood on abuses of corporate power.⁵³

The Protective Committee Study itself took a distinctly Brandeisian tone as it described the plight of the ordinary investor, a forlorn figure whose isolation and powerlessness made him, or frequently her, helpless before the thieving machinations of financiers and corporations. "The single and isolated security holder," the Protective Committee Study observed, "usually is helpless in protecting his own interests or pleading his own cause."⁵⁴ Lay investors were "scattered and uninformed" and therefore had little hope of combining their forces to challenge what the study called "the banker-management."⁵⁵ At every turn, trustees' passivity and small investors' lack of easy access to information left them vulnerable. "There have been instances," the Protective Committee Study noted, "of failure to erect buildings in which purchasers of bonds supposed they had invested, of diversion of proceeds to service other issues sponsored by the same underwriter; and of other similar abuses."⁵⁶ A close examination of one case, the Celotex Company reorganization, exposed how the company's president formed a reorganization committee that manipulated stock prices in order to acquire the shares necessary to control the

51. DOUGLAS, *supra* note 6, at 182; *See also id.* at 455. One always needs to take Douglas's memoir with many grains of salt, since he frequently embellished his past. His claim that Brandeis recommended him for the Supreme Court, for example, is not to be trusted. *See UROFSKY, supra* note 45, at 43. Specific details may be suspect; however, his general reverence for Brandeis is clear.

52. UROFSKY, *supra* note 45, at 35.

53. *See DOUGLAS, supra* note 6, at 442; MURPHY, *supra* note 9, at 136.

54. SEC, REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL, AND FUNCTIONS OF THE PROTECTIVE AND REORGANIZATION COMMITTEES, PART II—COMMITTEES AND CONFLICTS OF INTEREST I (1937).

55. SEC, REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL, AND FUNCTIONS OF THE PROTECTIVE AND REORGANIZATION COMMITTEES, PART III—COMMITTEES FOR THE HOLDERS OF REAL ESTATE BONDS 96 (1936).

56. SEC, REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL, AND FUNCTIONS OF THE PROTECTIVE AND REORGANIZATION COMMITTEES, PART VI—TRUSTEES UNDER INDENTURES 30 (1936).

reorganization, employed strong-arm tactics to encourage security holders to sell their shares to committee members, and engaged in aggressive profiteering from the reorganization itself, especially from the fees that the reorganizers' front corporation, the Central Securities Corporation, took for underwriting the new common stock. As the Protective Committee Study observed in its report, at no time did investors' interests occupy the reorganization committee's concerns. The controlling group had no qualms about taking advantage of "unorganized, weak security holders"—to the contrary, it pursued "its selfish and undisclosed schemes with startling ruthlessness."⁵⁷ Brandeis had emphasized the weak, dependent status of small investors, for whom investment constituted "little better than a gamble" in the face of bankers' inordinate power.⁵⁸ In *Celotex* and countless other cases, Douglas and the staff of the Protective Committee Study also portrayed ordinary stockholders and bondholders as the helpless victims of large, well-organized forces that used others' money to enhance their own wealth and power.

In other key respects, however, the study sounded more like Berle than Brandeis. In *The Modern Corporation and Private Property*, "control" more than "power" became the central concept for describing and understanding modern management's usurpation of the traditional expectations and functions of ownership.⁵⁹ The Protective Committee Study similarly placed control at the center of the reorganization process. Reorganization constituted a "fight for control" in which "the emoluments of control" constituted "the stakes of reorganization."⁶⁰ Control of a reorganization meant control of a company, and struggles for control occurred in every area of the reorganization process—in underwriting, in committees' efforts to acquire securities, in committees' distribution of patronage.⁶¹ For both Berle and Douglas, control was not merely a convenient metaphor—it was a technical term that captured the underlying sociological function behind a diverse and complex set of actions.

The Protective Committee Study's recommendations, which emphasized improved representation for investors and measures to outlaw the conflicts of interest and other underhanded practices that pervaded corporate reorganizations, combined with government oversight, also shared more in common with Berle than Brandeis. One might have im-

57. SEC, REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL, AND FUNCTIONS OF THE PROTECTIVE AND REORGANIZATION COMMITTEES, PART I—STRATEGIES AND TECHNIQUES OF PROTECTIVE AND REORGANIZATION COMMITTEES 136 (1937) [hereinafter SEC STRATEGIES & TECHNIQUES REPORT]. See also *id.* at 99–136.

58. See BRANDEIS, *supra* note 1, at 8.

59. See BERLE & MEANS, *supra* note 27, at *Book I*, chs. 5–6 & *Book II*, chs. 1–8.

60. SEC STRATEGIES & TECHNIQUES REPORT, *supra* note 57, at 4.

61. See *id.* at 137–55.

aged an alternative approach to reorganization that sought greater education and direct involvement by security holders. Douglas, however, had little sympathy for such approaches. In the 1934 article on railroad reorganizations that had brought him to the SEC, he criticized as impractical proposals for giving the mass of security holders direct control in reorganizations and instead advocated “strengthening the position of committees, in assuring them full and complete powers, and in supplying control over them at the time of their constitution.”⁶² Douglas also made his position clear in a letter to his friend and fellow legal realist Jerome Frank, written before submitting the article for publication. The reorganization process, he wrote, required “truly representative groups,” whereas proposals for “salvation” that relied on small investors were simply “naïve.”⁶³

Not surprisingly, a similar logic permeated the Protective Committee Study, which argued that circumstances required new, active regulatory legislation to prevent abuses and ensure vigorous representation of security holders. To those critics who believed that knowledgeable investors already possessed the means to look after their own interests, and that the state should not feel obligated to create mechanisms that compensated for investors’ ignorance, the study offered a sharp response:

A point of view that regards an average investor as negligent because he is not acquainted with the rights conferred by appraisal statutes not only evidences a callous disregard of the interests of investors but also discounts realities. The fact is that the average investor is not likely to be aware of these rights, or of the conditions with which he must comply to perfect them. Nor can the responsibility of advising investors of these rights justifiably be placed upon brokers or dealers. It is essential to the efficacy of the appraisal statutes that minority stockholders be fully informed of their rights. This can be assured only by placing the responsibility upon the management. Unless the management is required fully to advise the stockholders of their rights under these statutes, the protection they afford minorities will continue to be inadequate.⁶⁴

62. William O. Douglas, *Protective Committees in Railroad Reorganizations*, 47 HARV. L. REV. 565, 566–67 (1934).

63. Letter from William O. Douglas to Jerome Frank (January 3, 1934) (on file with Sterling Memorial Library, Jerome N. Frank papers, Manuscript Division, Yale University, at Box 11, Folder 72). As author of *Law and the Modern Mind*, Frank was one of the leading lights of the legal realist movement. After stints elsewhere in the New Deal, he joined Douglas at the SEC as a commissioner in 1937 and ascended to the chairmanship when Douglas joined the Supreme Court.

64. SEC, REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL, AND FUNCTIONS OF THE PROTECTIVE AND REORGANIZATION COMMITTEES, PART VII—MANAGEMENT PLANS WITHOUT AID OF COMMITTEES 352 (1938).

Even if ordinary investors could manage to overcome their own ignorance, sheer inequalities of power prevented them from commanding their own fates. As the Protective Committee Study noted with respect to defaulted municipal bonds, “The owners of the security themselves have no voice in the negotiations. They do not undertake direct negotiations with the city, either because of the expense involved, or lack of sufficient knowledge, or realization that the city will not seriously discuss the situation with a small holder.”⁶⁵ Elsewhere, in its volume on trustees under indenture, the Protective Committee Study noted that “the individual security holder is impotent when acting alone and can get together with his fellow security holders only at great labor and expense.” As a result, lay investors had to rely on the trustee as “his *alter ego* in safeguarding his rights.”⁶⁶ Reform efforts accordingly needed to concentrate on ensuring proper, disinterested representation on the part of trustees.

In essence, the study assumed that traditional nostrums about individualism no longer applied. Douglas and the Protective Committee Study instead viewed investors as a class or group that required better representation in order to level the economic playing field and to defend ordinary investors’ interests, as well as the insertion of the SEC’s expertise into the reorganization process, as ultimately outlined under the Chandler Act and Chapter X bankruptcy. This emphasis on the collective identity of the investing public in reorganization situations meant that although Douglas, like Berle, embraced much of Brandeis’s economic critique, he did not imagine a return to the values embodied in a world of small producers and self-reliant individuals. Rather, as the Protective Committee Study’s approach to regulating corporate reorganizations and other readjustments of debt indicates, he envisioned a future in which large organizations would continue to dominate American economic life and in which the power of concentrated capital could be countered only by the state and by organized economic groups.

As far as self-rule was concerned, the Protective Committee Study advocated “democratization of the processes of reorganization . . . without running the risk of disorganization which would be entailed if these complicated and intricate financial and business problems were left to ‘town meeting’ methods.”⁶⁷ That was a far cry from Brandeis’s impassioned call for industrial democracy. By the 1930s, Berle, Douglas, and

65. SEC, REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL, AND FUNCTIONS OF THE PROTECTIVE AND REORGANIZATION COMMITTEES, PART IV—COMMITTEES FOR HOLDERS OF MUNICIPAL AND QUASI-MUNICIPAL OBLIGATIONS 61 (1936).

66. SEC, REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL, AND FUNCTIONS OF THE PROTECTIVE AND REORGANIZATION COMMITTEES, PART VI—TRUSTEES UNDER INDENTURES 5 (1936).

67. SEC STRATEGIES & TECHNIQUES REPORT, *supra* note 57, at 900 (1937).

other disciples of Brandeis had transformed their hero's moral critique into a problem of technical policy management.⁶⁸

Such a transformation is not necessarily a bad thing, and it may be virtually inevitable any time a body of ideals has to be translated into a set of concrete policies. Today, nearly a hundred years removed from *Other People's Money*, it is difficult to know what Brandeis's industrial democracy would look like, how it would generate wealth, and whether most Americans would actually find it desirable. Meanwhile, the New Deal politics of Berle and Douglas remains directly relevant, even if its political viability is questionable in a considerably more conservative age. The financial crisis of fall 2008 demonstrated anew the market's capacity to generate economic chaos through lax regulation and the proliferation of new and virtually incomprehensible financial instruments. Whether the Obama administration will manage to pass comprehensive financial reforms and what final form its policy response will take, remains to be seen. But seventy-five years later, Berle and Douglas's critiques of corporate finance still seem all too revealing, and today's policymakers might do well to reconsider the historical experience of securities regulation in the 1930s as they address the pitfalls of the modern corporation and private property in the twenty-first century.

IV. CODA: OWNERSHIP, REVOLUTION, AND THE PASTNESS OF THE PAST—THE RADICALISM OF ADOLF A. BERLE, JR.

Yet, how usable a past does *The Modern Corporation and Private Property* really offer? Elsewhere in this volume, Mark Mizruchi discusses readers' tendency to pick and choose what they want from a text, and how this process has shaped the place of *The Modern Corporation and Private Property* in historical memory. From the perspectives of historians, economists, and legal scholars, the book endures for its revelations about the separation of ownership from control (or what scholars today prefer to call agency problems) and its contributions to the theory of the firm. The seemingly intractable problem of corporate governance

68. Phil Nicholas, Jr. has offered a rather more sanguine account of the SEC's dedication to shareholder democracy and argued that in the early 1940s the shareholder proposal rule, which opened proxy votes to greater shareholder intervention, allowed the SEC "to curb the ability of corporate management to thwart shareholder participation and also reduce the separation of ownership from control." The rule, Nicholas contends, symbolized a significant ideological commitment to democratization of the securities market in the late New Deal. See Phil Nicholas, Jr., *The Agency that Kept Going: The Late New Deal SEC and Shareholder Democracy*, 16 J. POL'Y HIST. 212, 229 (2004). See also *id.* at 212–38. In the absence of evidence to the contrary, one doubts whether shareholders were able to exploit the rule except on the rarest of occasions and, therefore, whether it had any significant effect in terms of promoting shareholder democracy. Based on the secondary literature, however, Nicholas suggests that the increased threat of shareholder action had some visible impact on corporate behavior.

continues to provide a steady readership more than three-quarters of a century later. A presentist mindset, however, obscures the most provocative element of Berle's analysis, namely, its challenge to the very notion of private property. Writing from a historical standpoint that viewed the past as punctuated by revolution, Berle boldly suggested that the separation between ownership and control transformed the nature of property so radically that private property, as conventionally understood, could no longer form the basis of the legal and economic systems.

Berle, like most intellectuals of the early decades of the twentieth century, believed he lived in a time of fundamental change, defined by sharp disjunctures between past, present, and future. As historian Dorothy Ross has observed, "There was no more characteristic refrain of the Progressive Era than that economic changes had created a world unknown to the founders and that new industrial conditions required new practices."⁶⁹ Ross's description applies just as well to the New Deal generation, which inherited much of the progressives' worldview. A belief that the present was not like the past, and that the future would not resemble the present, defined the sensibility of Americans who were acutely self-conscious about living in a modern age. From the late nineteenth century onwards, the rise of new technologies, new institutional forms such as the corporation and the modern factory, unprecedented possibilities offered by mass production, and the proliferation of new economic and social relationships engendered by these developments both promised and threatened to overturn completely past assumptions about the economic foundations of American society. For Berle and his contemporaries, history, with its dramatic record of revolutionary political, scientific, and technological change, further underscored the sense of modernity as a condition of constant shifts in the social order.

During the interwar years, no single event symbolized the disruptive, revolutionary tendencies of the modern age more powerfully than the Russian revolution. Back in 1919, Berle ended up in military intelligence and a member of the American delegation at Versailles as an expert on Russia, despite the fact that he had neither been to Russia nor ever studied the Russian language. From this vantage point, he observed the aftermath of the Russian revolution from Paris and aligned with those on the losing side of the U.S. diplomatic corps who believed that the Wilsonian principle of national self-determination required recognizing the Bolshevik government.⁷⁰ It does not seem too far-fetched to tie Berle's invocation of revolution in *The Modern Corporation and Private*

69. DOROTHY ROSS, *THE ORIGINS OF AMERICAN SOCIAL SCIENCE* 151 (1991).

70. See SCHWARZ, *supra* note 6, at 23–30.

Property to this life experience and its place within his broader historical understanding of the economic transformation symbolized by the modern corporation.

As Berle declared in the preface to *The Modern Corporation and Private Property*, as of 1928, “the financial machinery was developing so rapidly as to indicate that we were in the throes of a revolution in our institution of private property.”⁷¹ In case any readers doubted the seriousness implied by his use of the term “revolution,” Berle soon added that the corporate revolution matched the industrial revolution in significance, and he described the transformation wrought by the separation of ownership from control as the outright annihilation of an old economic order centered on private property. “This dissolution of the atom of property,” Berle observed, “destroys the very foundation on which the economic order of the past three centuries has rested.” Just as the rise of private property marked the end of feudalism, so did the separation of ownership from control imply the end of private property as understood for three centuries.⁷²

References to revolution and its consequences recurred throughout the rest of the book. In a discussion of data suggesting a growing trend towards stock ownership among persons of modest means, Berle tellingly asked, “Does it represent a permanent change in the ownership of industrial wealth comparable to the shift in land ownership which was an outgrowth of the French Revolution?” In a very different passage about the prospects for shareholders to assert control over an entrenched management, Berle commented strikingly that in the rare instances where shareholders managed such a feat, the results were tantamount to a revolution and not an assertion of democratic control. As he put it, “Occasionally [the stockholder] may have the opportunity to support an effort to sieze [sic] control, a position not unlike that of a populace supporting a revolution.” Much later in the book, Berle famously suggested that the corporate system operated through “communist modalities.” He observed, “It is an odd paradox that a corporate board of directors and a communist committee of commissars should so nearly meet in a common contention. . . . [I]t still remains true that the corporation director who would subordinate the interests of the individual stockholder to those of the group more nearly resembles the communist in mode of thought than he does the protagonist in private property.” Perhaps Berle was indulging in a bit of Veblenesque provocation, but nonetheless the tart com-

71. BERLE & MEANS, *supra* note 27, at v.

72. *See id.* at vii, 8.

ment conveyed a sense of the corporation and communism as parallel modern projects of social transformation.⁷³

If Marx and Engels offered a theory about the alienation of workers from the means of production, Berle and Means highlighted the central irony of capitalists' own alienation from ownership and property, as control over the means of production passed to a new set of managers. Indeed, Berle identified a specific shift in values that accompanied the transition from active to passive ownership. Whereas the owner had once felt that physical property "represented an extension of his own personality," Berle observed, "with the corporate revolution, this quality has been lost to the property owner much as it has been lost to the worker through the industrial revolution."⁷⁴ Berle's perception of modernity as a sharp break from previous experience allowed him to imagine a future far removed from past conventions. Indeed, he believed the economic realities of the early 1930s already demonstrated the emptiness of comforting nostrums about individualism and "the hollowness of the familiar statement that economic enterprise in America is a matter of individual initiative."⁷⁵ In a context of radically changing times, one could even envision a future in which American jurisprudence might rest on principles other than private property.⁷⁶ Such heretical thoughts made *The Modern Corporation and Private Property* far more than an exercise in dry and dutiful scholarship. These were radical ideas that suggested the obsolescence of existing norms and the possibility that society in the future would rest upon fundamentally different assumptions from those of the present.⁷⁷

Admittedly, Berle himself was no political radical.⁷⁸ As discussed earlier, when it came to remedies, *The Modern Corporation and Private Property* waffled over potential solutions, and the trust theory of Book II tempered the more expansive possibilities for governmental action hinted

73. *See id.* at 62, 89, 278. At the October 2009 symposium in honor of the opening of Seattle University's Adolf A. Berle, Jr. Center on Corporations, Law & Society, Beatrice Berle commented on her father's sense of humor, a personal characteristic of Berle that scholars have generally failed to acknowledge.

74. *Id.* at 67. The parallels with Marxist theory were hardly accidental. Jordan Schwarz found that in a September 1934 diary entry, Berle's wife Beatrice recorded her husband's declaration "that his real ambition in life is to be the American Karl Marx—a social prophet." SCHWARZ, *supra* note 6, at 62.

75. BERLE AND MEANS, *supra* note 27, at 125.

76. *See id.* at 247.

77. By "radical," I mean in the general sense of departing dramatically from the norm and envisioning the possibility of fundamental change, and not the narrower political definition with specific connotations of leftist politics.

78. As Jordan Schwarz observed, "Rhetoric is important, and Berle loved his radical. Yet he did not hide the caution of his ideas." *See* SCHWARZ, *supra* note 6, at 66.

at in Book IV. Nor did Berle have much use for the Soviet experiment, as his dig at corporations as the realm of commissars implies. Although he forcefully advocated government regulation of the securities market under the New Deal, throughout the Depression years, he also never entirely abandoned the faith in the potential of self-regulation that had animated his thinking in the 1920s. His acceptance of a seat on the New York Stock Exchange's advisory board in 1934 provides one indication of Berle's continued belief that institutions might learn to reform themselves, albeit with the added incentives provided by government regulation.⁷⁹ Radical theorizing about the end of private property appealed to the intellect, but Berle also lived in the real world of American politics, where he preferred pragmatism over revolution.

A recognition of Berle's more moderate persona, however, does not negate the radical dimensions of *The Modern Corporation and Private Property*. That Berle could imagine a historical process driven by sudden shifts and periods of abrupt change reminds us that as much as his work still speaks to us today, his present was not our present, and the way in which observers in the 1930s conceived of possibilities differs sharply from our time. For the most part, Americans no longer imagine that the present is profoundly different from their lived past, or that the future is likely to offer significant departures within their lifetimes. The idea of revolution no longer possesses the same connotations that it held for Berle, for the revolutions of recent decades have not envisioned creating new and experimental societies, but reproducing older social orders. In the United States, after World War II, cold war intellectuals erected a bulwark against radical critique by pronouncing "the end of ideology" and insisting that interest group liberalism could take care of any remaining problems in the American socioeconomic system. The "rights revolution" of the 1960s suggested more expansive possibilities, but it concentrated on extending an existing conception of rights to all individuals, regardless of race, ethnicity, or gender, and not the creation of a dramatically new conception of rights. Elsewhere in the world, Iran's Islamic Revolution of 1979 sought to re-create an imagined past of tradition and piety, while the velvet revolutions of Eastern Europe in 1989 rested on overturning communist society by claiming liberal democracy and its economic partner, capitalism. Of course, these revolutions wrought extensive changes within their own societies, but at an ideological level they were a far cry from the third world revolutions of the early post-

79. See *id.* at 108. Mark T. Moore and Antoine Reberioux point out elsewhere in this volume that *The Modern Corporation and Private Property* should be read not as an end point, but as the beginning of a decades-long effort by Berle to wrestle with the problem of the modern corporation. I must emphasize that my own analysis of Berle applies only to the 1930s.

World War II decades, most of which started with high hopes for the creation of new, radically different, and more just social orders, but ended in autocracy and repression. By the end of the 1990s, intellectual historian and cultural critic Russell Jacoby lamented a profound change in the American consciousness, in which “a belief that the future could fundamentally surpass the present” was now “stone dead.” He continued, “A new consensus has emerged: There are no alternatives. This is the wisdom of our times, an age of political exhaustion and retreat.”⁸⁰

In this context, few readers over the past half century have acknowledged, much less seriously engaged, Berle’s challenge to private property.⁸¹ His provocative analysis may have constituted the most profound and daring part of the book, yet it has the least resonance today because Berle’s aching consciousness about revolutions as a living reality no longer possesses much cultural valence. Berle and other scholars of his generation believed in questioning all conventional wisdoms because they lived in an era when one could easily imagine that the foundational principles of the present might soon rest in the dustbin of history, which meant both dire instability and open possibility. By contrast, in the present, the rhetoric of private property and its sanctity, the free market as basis of freedom, and the desirability of an “ownership society” persists with nary a change in over a century, practically as if the likes of Brandeis, Berle, Douglas, and other twentieth century critics of American capitalism never existed. Berle wrote for people who believed in changing times and not for us. The gap between past and present yawns as widely as the separation of ownership from control.

80. RUSSELL JACOBY, *THE END OF UTOPIA: POLITICS AND CULTURE IN AN AGE OF APATHY* at xi–xii (1999).

81. Among the countless works that identify Berle with the separation of ownership and control or the theory of the firm, two essays stand out for their acknowledgment of Berle’s incendiary comments on private property. From the decidedly unfriendly environs of the 1982 Hoover Institution conference on *The Modern Corporation and Private Property*, fifty years after the book’s publication, Robert Hessen took Berle to task for too simplistic and ahistorical a conception of private property. Hessen argued that Berle ignored precapitalist forms of property that had long separated ownership from control. Gardiner Means delivered a spirited response, in which he contended that Hessen missed the book’s central target, namely, the inadequacy of classical theory. See Hessen, *supra* note 37, at 273–89; Gardiner Means, *Hessen’s ‘Reappraisal,’* 26 J.L. & ECON. 297. The other comment on Berle’s attack on the idea of private property came from the opposite end of the political spectrum in a 1992 article by Philip A. Klein. Klein noted that Berle’s reworking of existing conceptions of the relationship between ownership and the means of production failed to earn Marxists’ attention, “although it did impress New Deal interventionists.” Philip A. Klein, *Institutionalists, Radical Economists, and Class*, 26 J. ECON. ISSUES 537 (1992).