The Birth of Corporate Governance

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INTRODUCTION

When did our modern debates over corporate governance begin? The traditional view dates them to 1932 with the publication of Adolf A. Berle and Gardiner Means's *The Modern Corporation and Private Property*, a work that delineated the separation of ownership and control in the modern corporation and the problems that separation caused.[1] *The Modern Corporation* is said to be the "ur-text of modern corporate governance,"[2] to have "began the modern debate on corporate governance,"[3] to have first identified the "fundamental problem in U.S. corporate governance,"[4] to be the first work to have "described corporate governance as a problematic separation of ownership and control,"[5] and even, in one contrarian take, to be the work that "got the corporate governance literature off on the wrong foot."[6] Careful students will occasionally acknowledge that there were predecessors to Berle and Means and that the idea of the separation of ownership and control was in the air

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1. ADOLF A. BERLE, JR. & GARDINER MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (Harcourt, Brace & World, Inc. 1968) (1932) [hereinafter MODERN CORPORATION].

2. Lawrence Mitchell, *The Trouble with Boards* 14 (George Washington University Law Sch. Pub. Law & Legal Theory Working Paper, Paper No. 159, 2005), *available at* http://ssrn.com/abstract=801308.

3. Liam Seamus O'Melinn, *Neither Contract Nor Concession*, 74 GEO. WASH. L. REV. 201, 201 (2006).

4. Jesse Fried, *Options Backdating and Its Implications*, 65 WASH. & LEE L. REV. 853, 884 (2008).

5. William Bratton, *Hedge Funds and Governance Targets*, 95 GEO. L.J. 1375, 1381 (2007).

6. Oliver E. Williamson, *Corporate Boards of Directors: In Principle and Practice*, 24 J.L. ECON. & ORG, 247, 268 (2009) ("[T]he Berle and Means query . . . got the corporate governance literature off on the wrong foot."). Williamson is not the only scholar who thinks Berle and Means got it wrong. So did most of the contributors to the symposium held on their work's fiftieth anniversary. *See* Symposium, *Corporations and Private Property: A Conference Sponsored by the Hoover Institution*, 26 J.L. & ECON. 235 (1983).

before *The Modern Corporation and Private Property*.[7] But the broader message is clear: whatever came before, corporate governance *really* began with Berle and Means.[8]

This Article will show that this story is wrong. It is wrong not because Berle and Means were not path-breaking and innovative (they were), nor because they did not develop an enduring framework for corporate legal scholarship (they did). The story is wrong because of what it leaves out. *The Modern Corporation and Private Property* was not a radical break from earlier thought but the end product of several decades in which economists, lawyers, and journalists tried to understand both the governance problems of the new modern corporations and what impact those corporate governance problems had on the nation's public. The separation of ownership and control, together with dispersed shareholding, two closely related but not identical concepts, had been identified as a new development for the American corporation shortly after the turn of the twentieth century—well before Berle and Means—but those developments' import was not at all clear. Thus, economists and legal scholars of that earlier era argued over what exactly was meant by the separation of ownership and control, what groups it would most sharply impact, and even whether it was a problem at all.

By the 1920s these ideas took on a more familiar cast, as several writers identified the separation of ownership and control and widely dispersed share ownership as developments that raised grave problems

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7. *See*, *e.g.*, Lipartito & Morii, 33 SEATTLE U. L. REV. 1025 (2010) (discussing Ripley as a predecessor to Berle and Means); HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW 1836–1937 357–59 (1991) (discussing Marshall, Veblen, and Ripley) [hereinafter ENTERPRISE]; Herbert Hovenkamp, *Neoclassicism and the Separation of Ownership and Control*, 4 VA. L. & BUS. REV. 373, 374–75 (2009) [hereinafter *Neoclassicism*]; Dalia Tsuk Mitchell, *Shareholders as Proxies: The Contours of Shareholder Democracy*, 63 WASH. & LEE L. REV. 1503, 1527–33, 1539 (2006) (Ripley) [hereinafter *Shareholders as Proxies*]. Tsuk Mitchell is the only legal scholar to devote much attention to Ripley within the last two decades, though a few have focused on specific aspects of his work. *Id. See also* Rebecca Roiphe, *The Most Dangerous Profession*, 39 CONN. L. REV. 603, 646–48 (2006) (Ripley's calls for independent auditing); Eric A. Chiappinelli, *The Moral Basis of State Corporate Law Disclosure*, 49 CATH. U. L. REV. 697, 705–09 (2000) (addressing Ripley's discussion of state disclosure requirements); Fred S. McChesney, *Intellectual Attitudes and Regulatory Change: An Empirical Investigation of Legal Scholarship in the Depression*, 38 J. LEGAL EDUC. 211, 235–40 (1988) (comparing and measuring reception of Ripley's and Berle and Means's works); Joel Seligman, *Equal Protection in Shareholder Rights: The One Share, One Vote Controversy*, 54 GEO. WASH. L. REV. 687, 693–99 (1986) (discussing Ripley and the campaign against nonvoting stock in the 1920s).

8. *See, e.g.*, Robert B. Thompson & Randall S. Thomas, *The Public and Private Faces of Derivative Lawsuits*, 57 VAND. L. REV. 1747, 1756 (2004) ("For most of the twentieth century, the dominant paradigm of corporate governance within legal academia was that provided by Berle and Means in their classic 1932 book."); Douglas M. Branson, *Corporate Governance 'Reform' and the New Corporate Social Responsibility*, 62 U. PITT. L. REV. 605, 605 (2001) (dating "the history of corporate governance 'reform'" to Berle and Means).

for the management of corporations. These writers also identified shareholder protection as the central goal for corporation law. It was during this decade that corporate governance became a major topic for public debate, as newspaper articles, magazine accounts, and popular books appeared. These publications attacked corporate management, asserted that management was benefitting itself at shareholders' expense, and pointed to the separation of ownership and control as the ultimate culprit. By seeing Berle and Means's work as a product and a beneficiary of these debates, we can better understand the genuine innovations it made and why it was so quickly accepted as a classic.

This Article proceeds as follows: Part I briefly examines the concept of "corporate governance" and argues for dating the concept's origins to the debates of the 1920s. Part II then moves on to examine early scholarly and popular discussions of the separation of ownership and control. After surveying the historical developments that produced the recognizably modern corporate economy around the turn of the century, it examines early scholarly and popular discussions of the separation of ownership and control, focusing on three major thinkers, Louis D. Brandeis, Walter Lippmann, and Thorstein Veblen. It argues that, while each of these authors examined the separation of ownership and control, they did not agree on its contours or impact. They did not necessarily see the separation of ownership and control as a problem for shareholders, and some did not see it as a problem at all. To portray these authors simply as anticipators of Berle and Means is to misunderstand the arguments they actually made and to miss the ways in which ideas about the separation of ownership and control were slowly developed.

Part III, the heart of this Article, focuses on Berle and Means's most significant predecessor in the debates over corporate governance, William Z. Ripley, and his 1920s crusade for better corporate governance, culminating in his book *Main Street and Wall Street*.[9] It discusses how Ripley, already one of the best-known economists of his day, launched a campaign in 1925 against financial and legal innovations that were, he claimed, allowing corporate managers to wrest control of corporations away from their owners—shareholders scattered across the country. In speeches and a series of articles in the *Atlantic* magazine, Ripley hammered corporate leaders and pushed for a range of reforms in corporate law and governance intended to provide new protections for shareholders. His campaign drew wide attention and gained notice from Wall Street and the President of the United States. Ripley was not alone during the 1920s; his work is only the best-remembered of a series of scho-

9. WILLIAM Z. RIPLEY, MAIN STREET AND WALL STREET (1927) [hereinafter MAIN STREET].

larly and popular works that turned a spotlight on the separation of ownership and control and the spread of shareholding. Thus, it was during the 1920s that recognizably modern views of the separation of ownership and control, and its consequences, took form.

Finally, in Part IV, the Article turns to Berle and Means. It discusses both their connections to earlier theorists and crusaders, and the ways in which they transcended their predecessors. *The Modern Corporation and Private Property* broke with its predecessors by providing a technically sophisticated and empirically based legal and economic analysis of the separation of ownership and control, and by setting that analysis within a narrative describing how the modern corporation had come to dominate American economy and society.

In discussing the history of corporate governance before Berle and Means, I intend to do three things. First, I seek to develop a new account of the origins of modern debates over corporate governance. As told now, the story usually begins with *The Modern Corporation and Private Property*, with the economic development of large corporations provided as background, and perhaps a footnote acknowledging some intellectual precursors. As an historical account, this story misses or downplays writers who grappled with the separation of ownership and control before Berle and Means and who saw that separation in very different lights than did Berle and Means. It was not inevitable that the problem of ownership and control would take the form it eventually did, with shareholder protection and managerial power as its main foci; however, we cannot recognize its contingent nature until we reach back to see alternative paths not taken.

Second, I wish to emphasize an element sometimes overlooked, then and now, in debates over corporate governance: their popular aspect.[10] In the 1920s, corporate governance became a matter of concern to the general public, one that drew in not only economists or law professors but also ordinary Americans who were introduced to and then angered by the separation of ownership and control.

Third, I hope to shed new light on why *The Modern Corporation and Private Property* won such immediate acclaim. Why were Berle and Means so quickly hailed as prophets? Much of the answer lies in the fact they built on ideas already in circulation and spoke to a public already

10. Not to say that other scholars have completely missed the public face of corporate governance; some critics of the Sarbanes-Oxley Act, for instance, have attributed its flaws to the fact that it was a product not of careful deliberation but of a hurried response to public outrage. *See, e.g.*, Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1528 and *passim* (2005) (connecting the passage of the Act to the economic downturn and public outcry inspired by a "media frenzy involving several high-profile corporate fraud and insolvency cases").

primed to hear their views. This is not to disparage Berle and Means's very real accomplishments, which were many; they both synthesized and transformed what had gone before. But we can best understand their genuine innovations by also understanding the achievements of their predecessors.

The historical aim of this Article, then, is not merely to find out who said "separation of ownership and control" first,[11] for tracing out an intellectual antecedent wouldn't tell us why the idea succeeded. This Article instead aims to explain why and when the idea took shape, flourished, and spread.

I. CORPORATE GOVERNANCE: WHERE TO BEGIN?

Asserting that corporate governance's origins lie early in the twentieth century, before Berle and Means, raises the question: what do we mean by corporate governance? In one form or another, "corporate governance" has always been with us, at least as long as the corporate form has allowed for conflicts between investors and managers. Early in the seventeenth century, for example, conflicts between directors and shareholders marked the Dutch East India Company.[12] In *The Wealth of Nations*, Adam Smith identified divergent interest between managers and owners as an, in his eyes, insuperable dilemma for the efficient operation of the corporation. Directors, he wrote, "being the managers of other people's money rather than their own," would never watch over this money with the "same anxious vigilance with which the partners in a private copartnery frequently watch over their own." Thus, Smith argued, "[n]egligence and profusion . . . must always prevail . . . in the management of such a company."[13] In the mid-nineteenth century, corporate governance in the U.S. shifted with changes in shareholder voting rights as democratic, weighted-voting systems, which gave small shareholders significant power, were replaced by a "plutocratic" system of one-share, one vote, favoring those with the most shares.[14] Each of these examples was surely an episode in the history of corporate governance.[15]

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11. Herbert Hovenkamp has traced the concept at least to the economist Alfred Marshall and the legal scholar William W. Cook in the 1890s. HOVENKAMP, ENTERPRISE, *supra* note 7, at 357–58.

12. Matthijs de Jongh, *Shareholder Activism at the Dutch East India Company, 1622–1625*, (Research Department of the Supreme Court of The Netherlands, Working Paper No., 2010), *available at* http://ssrn.com/abstract=1496871.

13. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 606–07 (Penn State Press ed. 2005) (1776).

14. Colleen Dunlavy, *From Citizens to Plutocrats: Nineteenth-Century Shareholder Voting Rights and Theories of the Corporation*, *in* CONSTRUCTING CORPORATE AMERICA: HISTORY, POLITICS, CULTURE 66, 66–68 (Kenneth Lipartito & David Sicilia eds., 2004).

15. *See id.* (identifying the essay as a contribution to the history of corporate governance).

As it is used by corporate law scholars today, however, "corporate governance" has a more specialized connotation.[16] At its broadest, the term can cover all the rules of and constraints on corporate decision-making.[17] More often, however, its use is tied to the need to constrain managers to act in shareholders' best interests, at least in the public corporation. In other words, corporate governance is a response to the agency problems created by the separation of ownership and control, namely the powerless shareholders and the autonomous management. This is nicely captured in a definition of the term offered by Hillary Sale:

> The term "corporate governance" is widely used to refer to the balance of power between officers, directors, and shareholders. Academics often discuss it in the context of regulating communications and combating agency costs where corporate officers and directors have the power to control the company, but the owners are diverse and largely inactive shareholders. Good corporate governance, then, allows for a balance between what officers and directors do and what shareholders desire. The term implies that managers have the proper incentives to work on behalf of shareholders and that shareholders are properly informed about the activities of managers.[18]

While other scholars have offered variants of this definition, essential to almost all definitions is the need for mechanisms to minimize problems created by the separation of ownership and control. That is, in a world of dispersed and "largely inactive" shareholders, corporate governance asks what legal, economic, and social mechanisms can best compel their agents, the corporation's managers, not only to run the corporation well but also to run it for the benefit of shareholders and not themselves.[19] As one commentator put it, the separation of ownership

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16. The term itself appears to have become popular only in the 1980s and was used to describe the movement to reform corporate rules and norms to provide greater legal protections to shareholders. *See* E. Norman Veasey & Christine di Guglielmo, *What Happened in Delaware Corporate Law and Governance from 1992–2004? A Retrospective on Some Key Developments*, 153 U. PA. L. REV. 1399, 1410–11 (2005); Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1259–60 (1982).

17. *See*, *e.g.*, Tom Baker & Sean J. Griffith, *Predicting Corporate Governance Risk: Evidence from the Directors' and Officers' Liability Insurance Market*, 74 U. CHI. L. REV. 487, 516 (2007) ("'Corporate governance' is a broad concept that the legal literature has given a narrow definition. Scholars discuss it most often in the context of specific regulatory reforms or in terms of charter provisions and other easily observable structural characteristics on which regressions can be run. But corporate governance may refer more broadly to any aspect of the system of incentives and constraints operating within a firm.").

18. Hillary Sale, *Delaware's Good Faith*, 89 CORNELL L. REV. 456, 460 (2004).

19. *See, e.g.*, JONATHAN MACEY, CORPORATE GOVERNANCE: PROMISES KEPT, PROMISES BROKEN vii (2008) (discussing corporate governance as "farrago of legal and economic devices that induce the people in charge of companies with publicly owned and traded stock to keep the promises

and control is "the central problem of corporate governance."[20] It is to the separation of ownership and control—how it arose, how it was first understood, and how it came to be seen as a problem—that we now turn.

II. SEPARATIONS

In the early decades of the twentieth century, observers were united in recognizing that there were major transformations underway in the corporate economy, that these changes would also have far-reaching social and political effects, and that the changes included a separation of ownership from control. They did not, however, agree on what these changes were or what they meant.

A. Historical Antecedents

The business and economic developments that would give rise to the modern corporation and to modern corporate governance are well understood and deserve only a brief recap. The nineteenth century saw the growth of giant, complex industrial enterprises in several industries, starting with the railroads.[21] At the turn of the twentieth century, large-scale business organization came to the manufacturing sector as industry-wide mergers attempted to unite many comparatively small firms into "single giant enterprise[s]" that dominated their respective industries.[22] Although not all industrial combinations succeeded, those that did succeeded spectacularly. By the mid-1910s, a few giant "center firms" dominated many sectors of the American economy and maintained their preeminence for decades.[23] These firms' growth generated a popular

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they make to investors"); Merritt B. Fox & Michael A. Heller, *Corporate Governance Lessons from Russian Enterprise Fiascoes*, 75 N.Y.U. L. REV. 1720, 1722 (2000) ("Firms exhibit good corporate governance when they both maximize the firm's residuals—the wealth generated by real operations of the firm—and, in the case of investor-owned firms, distribute the wealth so generated to shareholders in a pro rata fashion."). Some scholars, it should be noted, argue against a narrow focus solely on shareholder benefit. *See* PROGRESSIVE CORPORATE LAW (Lawrence Mitchell ed., 1995).

20. STEPHEN BAINBRIDGE, THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE 5 (2008).

21. The standard account of the growth of large-scale enterprise in the United States remains ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS (1977), which of course gives a far more complex account than the brief summary presented above. It should now be read in conjunction with later critiques. *See, e.g.*, Naomi R. Lamoreaux, Daniel M.G. Raff & Peter Temin, *Beyond Markets and Hierarchies: Toward a New Synthesis of American Business History*, 108 AM. HIST. REV. 404, 428–35 (2003).

22. NAOMI LAMOREAUX, THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895–1904 1 (1985). Not all the merged firms succeeded, but many did and they dominated their respective industries for much of the twentieth century. *See* CHANDLER, *supra* note 21, at 340–44.

23. Center firms succeeded in industries where a capital-intensive, technologically advanced firm would enjoy significant economies of scale, scope, or both. THOMAS MCCRAW, PROPHETS OF REGULATION 68–79 (1984) [hereinafter PROPHETS]. Informal or formal attempts at combination

backlash; critics ranged from farmers baffled and angered by high railroad rates to small retailers pressed by giant competitors. Distinctions between various kinds of combinations and their various ill effects were often lost in public discourse, as a generalized hostility to large business enterprises arose under the misleading heading of the "trust problem."[24]

Another development ran alongside the growth of large corporations and the hostility to them: the broadening market for their securities and a growing number of shareholders.[25] When the turn-of-the-century mergers produced new giant corporations, they also produced many individuals, specifically the former owners of the small firms that combined in the merger, who needed to be paid for their ownership interests.[26] These individuals received securities, preferred and common stock, which they often sold, giving rise to a market for industrial securities. For the first time, a significant number of comparatively "small" investors were drawn into securities ownership.[27] Although exact ownership is extremely difficult to estimate before the 1920s, one study showed that the three largest American corporations at least tripled their number of book stockholders between 1900 and 1917.[28] Further, the popular press increased its attention given to the phenomenon of stock ownership by

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failed in industries that did not have such features and where entry by new competitors was easy. *See id.*

24. *See* MAURY KLEIN, THE GENESIS OF INDUSTRIAL AMERICA 1870–1920 127 (Donald Critchlow ed., 2007) ("By 1890 alarmed critics were plastering the 'trust' label on every giant enterprise and flinging it about as a loose synonym for monopoly and big business in general."); MCCRAW, PROPHETS, *supra* note 23, at 57–79.

25. *See generally* Julia Cathleen Ott, *When Wall Street Met Main Street: The Quest for an Investors' Democracy and the Emergence of the Retail Investor in the United States, 1890–1930*, 9 ENTER. & SOC'Y 619 (2008) [hereinafter *When Wall Street*]; LAWRENCE E. MITCHELL, THE SPECULATION ECONOMY: HOW FINANCE TRIUMPHED OVER INDUSTRY 103–05, 200–04 (2007) [hereinafter SPECULATION ECONOMY].

26. *See* Thomas R. Navin & Marian V. Sears, *The Rise in a Market for Industrial Securities 1887–1902*, 29 BUS. HIST. REV. 105, 137 (1955). Although Navin and Sears's account focuses on industrial securities, other evidence suggests that railroad securities were also not widely held before 1900. Of the largest U.S. railroads in 1900, only two had more than 10,000 book stockholders, the Union Pacific (14,256) and the giant Pennsylvania (51,543); the only other large corporations with more than 10,000 book shareholders were American Sugar (10,816) and U.S. Steel (54,016). Gardiner C. Means, *The Diffusion of Stock Ownership in the United States*, 44 Q. J. ECON. 561, 594 (1930) [hereinafter *Diffusion*].

27. Ott, *When Wall Street*, *supra* note 25, at 620 (A century ago, "no more than three percent of households held stocks or bonds."). This is not to assert that then, or now, most Americans directly owned securities, just that the numbers that did own stocks or bonds rose sharply by the 1920s.

28. Means, *Diffusion*, *supra* note 26. Means's study is illuminating, but any attempt at obtaining exact estimates is stymied by lack of transparency. His figures show, for example, that the total number of book shareholders in the nation's thirty-one largest firms almost tripled from 1900 to 1917, but he cannot tell how much of this ownership is duplicative (e.g., one individual owning shares in two companies being counted twice) or through intermediaries, nor exactly who these individuals are.

comparatively small investors.[29] The real explosion in stock ownership, though, would occur in the 1920s when millions of Americans became first-time investors.[30]

It is around 1900 that we first find stirring the popular idea that ownership and control were separating in the modern corporation. Well before then, of course, there had been corporations with minority shareholders who were not active in management,[31] and those minority shareholders had at times suffered oppression at the hands of the controlling shareholders who ran their firms.[32] However, there was not a sense that these minority shareholders were so numerous or widely dispersed that they were a class deserving of extra protection, or that their plight should be a major public issue. Nor was there the sense that some corporations were coming under the control, not of a dominant shareholder, but of autonomous managers. What was new after the turn of the century was the concern about the growing number of small shareholders, who appeared powerless to influence corporate management—even if they wished to do so—and a realization that followed from this: if ownership was so diffused that shareholders no longer controlled the corporation and if management had taken on that task, then the interests of shareholders and managers might no longer be the same. It was these two developments, the growth of small shareholders and the rise of managers with little ownership in the corporation, that came to be lumped together as the separation of ownership and control.

The implications of this development were addressed in the early decades of the twentieth century by three writers who left extraordinary intellectual legacies: the activist lawyer and later Supreme Court Justice, Louis D. Brandeis; journalist, Walter Lippmann; and dissident economist, Thorstein Veblen.[33] Each has been identified as a discoverer of the

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29. *See* MITCHELL, SPECULATION ECONOMY, *supra* note 25, at 95–103.

30. Ott, *When Wall Street*, *supra* note 25, at 620.

31. One recent study has found that as early as the 1820s, corporations in New York often had many more shareholders than could have been actively involved in management. The average corporation had seventy-four shareholders, and a few had several hundred. *See* Eric Hilt, *When Did Ownership Separate from Control? Corporate Governance in the Early Nineteenth Century*, 68 J. ECON. HIST. 645, 663–64 (2008). These corporations were probably not marked by "managerial control," but "minority control," with "managers holding stakes that were large enough to make them unaccountable to the other shareholders[,] was [likely] quite common." *Id.* at 679.

32. On minority shareholders in corporation law during the late nineteenth century, *see* Naomi Lamoreaux & Jean-Laurent Rosenthal, *Corporate Governance and the Plight of the Minority Shareholders in the United States Before the Great Depression*, *in* CORRUPTION AND REFORM: LESSONS FROM AMERICA'S ECONOMIC HISTORY 126–29 (Edward Glaeser & Claudia Goldin eds., 2006).

33. Others could be added to the list; in addition to Alfred Marshall and William Cook, see HOVENKAMP, ENTERPRISE, *supra* note 7, at 357–59, one could cite the German politician Walter Rathenau, see BERLE & MEANS, MODERN CORPORATION, *supra* note 1, at 2 n.3, 352, or Woodrow Wilson, who described the corporation in a 1910 speech as "an arrangement by which hundreds of

separation of ownership and control,[34] but to write of them solely in this vein misses the mark. To see them as merely precursors to Berle and Means overlooks the significant ways in which each differed from Berle and Means in their understanding of the separation of ownership and control and its consequences. From today's vantage point, the separation of ownership and control appears as a problem in corporate governance to be solved by mechanisms that would protect shareholders. Brandeis, Lippmann, and Veblen saw it differently.

B. Brandeis, Lippmann, Veblen

In his 1914 collection *Other People's Money and How the Bankers Use It*, Brandeis honed in on the problem of the separation of ownership and control.[35] Brandeis, a crusading public interest lawyer at this stage of his life, may have been alerted to the topic by the report of the Pujo Committee. This 1913 congressional investigation into the "money trust" concluded that in almost "all great corporations with numerous and widely scattered stockholders[,] . . . management is virtually self-perpetuating and is able through the power of patronage, the indifference of stockholders[,] and other influences to control a majority of stock."[36] It was shortly after receiving the Pujo Committee report that Brandeis wrote the essays that became *Other People's Money*.[37]

In *Other People's Money*, Brandeis noted that the dispersion of share ownership left the "bonds and stocks of the more important corporations . . . owned, in large part, by small investors, who do not participate in the management of the company."[38] Such small investors were unable to judge the worth of securities without the help of intermediaries, and their dependence "upon the banker [had] grown in recent years, since women and others who [did] not participate in the management, [had]

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thousands of men who would in days gone by have set up in business for themselves put their money into a single huge accumulation and place the entire direction of its employment in the hands of men they have never seen, with whom they never confer." RIPLEY, MAIN STREET, *supra* note 9, at 5 (reproducing Woodrow Wilson's 1910 annual address to the American Bar Association). Herbert Hovenkamp has also noted that similar ideas were present in neoclassical finance theory since the 1920s. *See* Hovenkamp, *Neoclassicism*, *supra* note 7, *passim*.

34. *See, e.g.*, Allen D. Boyer, *Activist Shareholders, Corporate Directors, and Institutional Investment: Some Lessons from the Robber Barons*, 50 WASH. & LEE L. REV. 977, 999 (1993) (Berle and Veblen); Thomas McCraw, *In Retrospect: Berle and Means*, 18 REV. AM. HIST. 578, 579 (1990) (Berle and Lippmann) [hereinafter *Berle & Means*].

35. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT (1914).

36. H.R. Rep. No. 1593 (1913), *quoted in* EDWARD S. HERMAN, CORPORATE CONTROL, CORPORATE POWER: A TWENTIETH CENTURY FUND STUDY 7 (1981). *See also* MELVIN UROFSKY, LOUIS D. BRANDEIS: A LIFE 321 (2009) (noting that Brandeis followed the Pujo hearings closely and read the committee's report in early 1913, as soon as it was issued).

37. UROFSKY, *surpa* note 36, at 321–22.

38. BRANDEIS, *supra* note 35, at 7–8.

become the owners of so large a part of the stocks and bonds of our great corporations."[39] Brandeis had identified the essence of the separation of ownership and control, namely the dispersed, powerless shareholders, but he concluded that this would leave power not with a corporation's managers, but with its bankers. This conclusion is not surprising in an era when J. P. Morgan dominated U.S. investment banking and organized giant industrial combinations, and when such bankers' control had just been scrutinized by the Pujo Committee.[40] These developments certainly disadvantaged shareholders, but shareholders were not Brandeis's real concern.[41]

Instead, the "separation" in the modern corporation that most worried Brandeis and that he believed was the fundamental problem of the modern corporation was a growing separation between the corporation's managers and their firm. As the historian Melvin Urofsky noted, Brandeis believed that "[c]onsolidations created companies too big for their managers to manage responsibly, because they could not know what was happening in all of the divisions."[42] This separation, the necessary consequence of corporate consolidations, left the corporation unwieldy and inefficient, able to survive by using its power to squash smaller competitors.[43] While such separation may have harmed the corporation's small shareholders, it harmed others more, particularly the public. Brandeis criticized the "Money Trust" legislation, legislation designed to break banks' power by prohibiting interlocking directorates. He argued that "the provision would not safeguard the public[,] and [that] the primary purpose of the Money Trust legislation is *not to prevent directors from injuring stockholders, but to prevent them from injuring the public*."[44] Thus, the result of the separation of corporate management and ownership that most concerned Brandeis was the risk of giant corporations harming the public and the small proprietors that they competed against, not the shareholders.[45]

While Brandeis looked back to a time of small-scale proprietary capitalism, Walter Lippmann looked forward to the era of giant corpora-

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39. *Id.* at 8. He also noted that over half the stockholders of the American Sugar Refining Company and nearly half of the stockholders of the Pennsylvania Railroad and New York, New Haven & Hartford were women, which to him signaled that they needed to be protected. *See id.*

40. *See id.* On "Morganization" and J.P. Morgan's bank's control and consolidation of firms, see, for example, J. Bradford De Long, *Did J. P. Morgan's Men Add Value? An Economist's Perspective on Financial Capitalism*, *in* INSIDE THE BUSINESS ENTERPRISE: HISTORICAL PERSPECTIVES ON THE USE OF INFORMATION 205, 211–14 (Peter Temin ed., 1991).

41. *See* BRANDEIS, *supra* note 35, at 80, 131, 191, 199.

42. UROFSKY, *supra* note 36, at 322.

43. *See* UROFSKY, *supra* note 36, at 322 and *passim*.

44. BRANDEIS, *supra* note 35, at 80 (emphasis added).

45. *See* UROFSKY, *supra* note 36, at 397; BRANDEIS, *supra* note 35, at 205.

sions, [and] by developing labor unions. The stockholders deprived of their property rights are being transformed into money-lenders."[52]

For Lippmann, the separation of ownership and control was a welcome moment in social evolution. Power was shifting to management, to the "salaried men" who were hired by the firm's owners,[53] and management was itself changing, transcending the profit-seeking behavior of owner-operators and taking on a new social role.[54] He wrote further:

> [Managers] on salary, divorced from ownership and from bargaining[] . . . represent the revolution in business incentives at its very heart. For they conduct giant enterprises and they stand outside the higgling of the market, outside the shrewdness and strategy of competition. The motive of profit is not their personal motive. . . . The administration of the great industries is passing into the hands of men who cannot halt before each transaction and ask themselves: what is my duty as the Economic Man looking for immediate gain?[55]

He believed that managers, freed from shareholders, would also be freed from the demands of the "profit system," and they would use their expertise to become "industrial statesmen," running the corporations in the interest of society.[56]

The period's most idiosyncratic take on the separation of ownership and control may have been that of the radical economist Thorstein Veblen.[57] Veblen discussed the separation of ownership and control quite

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52. *Id.* at 49. This last passage is worth noting, for others during these decades also noted shareholders' roles had so changed in the early twentieth century that they should be viewed as, essentially, loaning money to the corporation rather than becoming its owners—a view later reached by some in the law-and-economics movement. *See, e.g.*, BERLE & MEANS, MODERN CORPORATION, *supra* note 1, at 279; E. Merrick Dodd, *The Modern Corporation, Private Property, and Recent Federal Legislation*, 54 HARV. L. REV. 917, 921 (1941) (mentioning "an unorthodox theory that corporate managements hire capital, . . . [and] our traditional assumption[s] that shareholders . . . hire management").

53. Though Lippmann also believed that, at the time he was writing, "control ha[d] passed for the time being into the hands of . . . the banking interests." LIPPMANN, *supra* note 47, at 51.

54. Such optimism concerning the businessman-as-statesman was a common feature of the era. *See, e.g.*, E. Merrick Dodd, *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1154–55 (1932).

55. LIPPMANN, *supra* note 47, at 43.

56. *See* William Leuchtenberg, *Walter Lippmann's 'Drift and Mastery'*, *in* LIPPMANN, *supra* note 47, at 8–9.

57. There is a vast literature on Veblen. *See* William T. Ganley, *The Theory of Business Enterprise and Veblen's Neglected Theory of Corporation Finance*, 38 J. ECON. ISSUES 397 (2004); Forest G. Hill, *Veblen, Berle, and the Modern Corporation*, 26 AM. J. ECON. & SOC. 279 (1967); Rosalind Schulman, *Absentee Ownership Reread*, 21 AM. J. ECON. & SOC. 319 (1962). This discussion of Veblen focuses on his views of separation of ownership and control, which is only one element of his works.

early in his 1904 *Theory of Business Enterprise*[58] and returned to it two decades later in *Absentee Ownership*.[59]

There are passages in *The Theory of Business Enterprise* where Veblen sounds like a herald of Berle and Means, writing that "[i]n so far as invested property is managed by the methods of modern corporate finance, . . . the management is separated from the ownership of the property, more and more widely as the scope of corporation finance widens."[60] He also notes that the effect of modern finance is to "dissociate ownership from management."[61]

On closer examination, though, one discovers that these statements must be interpreted through Veblen's highly idiosyncratic views of corporate finance. The separation Veblen sees in the modern corporation—at least as presented in *Theory of Business Enterprise*—is not, in any straightforward way, a separation of shareholders and management. It is instead a separation of two kinds of shareholders: passive owners of common stock and managers who own preferred stock. According to Veblen, modern corporations were increasingly capitalized based on the value of both tangible assets (for example, machinery) and intangible assets (for example, goodwill). Modern corporations also issued both preferred and common shares, with only common shares voting. The preferred shares had a claim on, in Veblen's view, the more stable part of the corporation's worth, its tangible assets.[62] Managers desirous of keeping control sold preferred shares to outside investors and kept the common shares for themselves. The result of this was to give the preferred shareholders a prior claim on, and in effect to make them owners of, the corporation's tangible assets. This "method of capitalization," Veblen wrote, "effects a somewhat thoroughgoing separation between the management and the ownership of the industrial equipment. . . . [U]nder corporate organization the owners of the industrial material have no voice in its management[.]"[63] Veblen, who looked skeptically at all forms of corporate finance, appeared to believe that the "real" corporation was the firm's tangible assets. Therefore, the preferred shareholders, who had a prior claim on these assets, were the corporation's real owners. Ultimately, he used this theory of corporate finance not to de-

58. THORSTEIN VEBLEN, THEORY OF THE BUSINESS ENTERPRISE (1904) [hereinafter THEORY].

59. THORSTEIN VEBLEN, ABSENTEE OWNERSHIP AND BUSINESS ENTERPRISE IN RECENT TIMES: THE CASE OF AMERICA (Viking Press 1964) (1923) [hereinafter ABSENTEE OWNERSHIP].

60. VEBLEN, THEORY, *supra* note 58, at 174–75.

61. *Id.* at 148 n.1.

62. *Id.* at 145–46.

63. *Id.* at 146. Veblen also believed that, given this structure, the managers, the preferred holders, had incentives to manipulate the securities in a way that was harmful to the corporation. *See id.* at 155–57.

fend these preferred shareholders, but to attack corporate managers and their evanescent claims on the corporation. Veblen did not care about powerless shareholders.

Absentee Ownership offers a somewhat different theory than the earlier work but invites similar misreadings. To a reader familiar with Berle and Means, the very title suggests an attack on the separation of management and shareholding. Yet Veblen is again uninterested in that separation. The absentee owners he discusses, far from being small vulnerable shareholders, are the idle rich, the parasites who have bought shares and so own "essentially claims to unearned income[.]"[64] While absent, these investors still control the corporation—a "system of absentee ownership and control[.]"[65]

In *Absentee Ownership*, the separation that draws Veblen is between absentee owners and those who operate the corporation's machinery and the industrial system as a whole. Absentee owners, he writes, "are removed out of all touch with the working personnel or with the industrial work in hand, . . . and very much the same is true for the business agents of the absentee owners, the investment-bankers and the staff of responsible corporation officials."[66] Not only are absentee owners removed from the firms that they own, but also their interests are actively hostile to such firms. This is because, Veblen argues, they need to restrict output in order to make money, an act that Veblen describes as "sabotage" of the industrial system.[67] "The material interest of the underlying population is best served by a maximum output at a low cost, while the business interests of the industry's owners may best be served by a moderate output at an enhanced price."[68] Nowhere do dispersed shareholders appear in Veblen's account, and his concerns are far from those of modern advocates of corporate governance. It should not be surprising that Veblen, scornful of absentee owners and businessmen, would soon be an advocate of Technocracy, the political ideology that favored replacing capitalism with a system run by engineers and whose rallying cry was "production for use."[69]

Thus, even before World War I, the idea of managerial dominance of the corporation and lack of shareholder power was present in public discourse, but in a variety of often conflicting forms. Yet those ideas would not be given their enduring modern shape until *The Modern Cor-*

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64. VEBLEN, ABSENTEE OWNERSHIP, *supra* note 59, at 20 n.4.

65. *Id.* at 5.

66. *Id.* at 215–16.

67. *Id.* at 78 and *passim*.

68. *Id.* at 10.

69. *See* THORSTEIN VEBLEN, THE ENGINEERS AND THE PRICE SYSTEM (Viking Press 1965) (1921).

poration and Private Property appeared more than a decade later. To understand why, we must look towards those ideas' careers in the 1920s, especially to the man who did most to popularize them, William Z. Ripley.

III. "PROFESSOR QUIXOTE"

In 1927, the radical journalist Stewart Chase reviewed William Z. Ripley's book *Main Street and Wall Street* for *The Nation* magazine.[70] The book was a sharp attack on modern corporate management, one that brought the idea of the separation of ownership and control and the problems it created to a mass audience. In his review, Chase dubbed Ripley "Professor Quixote" and wrote that "[a]ll the world knows how a couple of [Ripley's] articles in the *Atlantic Monthly* swept the financial centers of the country, put their author and his opinions into the headlines and the editorials of every newspaper," and forced changes at the New York Stock Exchange.[71] Underlying the review, however, is a sense of surprise; how did a "bespectacled professor" from Harvard's economics department come to terrorize Wall Street?

A. Race and Railroads

Born in 1867 outside of Boston, William Zebina Ripley was a graduate of MIT and received his doctorate in political economy from Columbia in 1893.[72] In a time when the borders between the social sciences were still fluid,[73] his interests ranged widely. His dissertation was a financial history of colonial Virginia.[74] From 1893 to 1901 he taught political science, sociology, and economics at MIT along with sociology and anthropology at Columbia. In 1901, he moved to Harvard as professor of economics, where he would spend the rest of his career.[75]

His first brush with fame came not as an economist but as an anthropologist, writing in the then-popular (now long discredited) field of "scientific" racism. In 1899, Ripley published *The Races of Europe*, an exhaustive work now considered to be "the most influential work on race during the early years of this century."[76] Ripley spent over six hundred

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70. *See* Stuart Chase, *Professor Quixote*, THE NATION, Mar. 9, 1927, at 263.

71. *See id.* at 263.

72. John F. Stover, *William Zebina Ripley*, AM. NAT. BIO. (Mark Carnes & John Garraty eds., 1999); *Prof. Wm. Ripley of Harvard Dies*, N.Y. Times, Aug. 17, 1941, at 39.

73. *See, e.g.*, DOROTHY ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE 94–95 (1991).

74. WILLIAM Z. RIPLEY, THE FINANCIAL HISTORY OF VIRGINIA, 1609–1776 (1893).

75. Stover, *supra* note 72.

76. ERIC L. GOLDSTEIN, THE PRICE OF WHITENESS: JEWS, RACE, AND AMERICAN IDENTITY 44 (2006). For a discussion of Ripley's "scientific" racism and its influence, see JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860–1925 154–56 (Rutgers Univer-

pages arguing that previous scholars had erred in concluding there was only one white, or Aryan, race in Europe.[77] Instead, he argued that careful study, particularly the use of the "cephalic index" revealed by head measurements, showed that there were three races native to Europe: Teutonic, Alpine, and Mediterranean.[78] While the work focused on these three groups, Ripley also examined the Jewish population of Europe, writing darkly of the Jewish population in Eastern Europe and the danger that this "swamp of miserable human beings . . . threatens to drain itself off into our country."[79] It is little surprise that his work would find favor with advocates of immigration restriction.[80]

What does this have to do with corporate governance? Directly, very little. Ripley would later write critically of corporate managers and Wall Street, but there is no trace in later writings of the kinds of anti-semitism or conspiratorial thinking that characterized some populist opponents of Wall Street and corporate finance.[81] Surprisingly, despite his racial theorizing, Ripley's own politics put him into the progressive tradition. In a 1909 essay, he wrote favorably of immigration and even intermarriage among ethnic groups, and called for an "active programme of social betterment," including "more and better schools[,]" "[h]umane regulation of [factory] hours[,]" and revived trade unions.[82] In 1916, he was one of the few Harvard professors to support Louis Brandeis's nomination to the Supreme Court.[83]

What his early career as a racial theorist does illustrate is that Ripley consistently reached out for a wide audience. *The Races of Europe* began as a series of public lectures presented at Boston's Lowell Institute, and earlier versions of some chapters were published in *Popular Science* magazine.[84] When Ripley sought an even broader audience for

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sity Press 1988) (1955); JONATHAN PETER SPIRO, DEFENDING THE MASTER RACE: CONSERVATION, EUGENICS, AND THE LEGACY OF MADISON GRANT 92–97 (2009); and NELL IRVIN PAINTER, THE HISTORY OF WHITE PEOPLE 215–27 (2010).

77. WILLIAM Z. RIPLEY, THE RACES OF EUROPE (1899). The work was well-received at the time, see, for example, William Z. Ripley, *The Races of Europe*, N.Y. TIMES, Aug. 27, 1899, at IM10, though subject to withering attack from Franz Boas, who would later demolish the pretences of scientific racism, see Franz Boas, *The Races of Europe*, Science, Sept. 1, 1899, at 292 (book review).

78. *See* RIPLEY, THE RACES OF EUROPE, *supra* note 77, at 103–04.

79. *Id.* at 372.

80. *See* SPIRO, *supra* note 76.

81. *See* RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. 78–81 (Alfred A. Knopf, Inc. 1966) (1955).

82. *See* William Z. Ripley, *Race Progress and Immigration*, 34 ANNALS AM. ACAD. POL. & SOC. SCI. 130, 136 (1909). Here Ripley even makes a few kind remarks about Jewish immigration. *See id.* at 130.

83. *See* UROFSKY, *supra* note 36, at 446.

84. Boas, *supra* note 77, at 292; RIPLEY, THE RACES OF EUROPE, *supra* note 77, at v.

his ideas after the turn of the century, he was able to publish articles on racial issues, and later railroad organization and finance, in *Atlantic Monthly*.[85] Long before writing *Main Street and Wall Street*, Ripley was adept at cultivating a public audience for his ideas.

His writing on race tapered off after the turn of the century as Ripley began building a reputation as perhaps the nation's leading expert on its indispensable and deeply troubled railroads.[86] Railroads dominated transportation, but this did not guarantee them economic success.[87] Long loathed by farmers, small merchants, and reformers, railroads had been plagued for decades by overbuilding, destructive competition, and bankruptcies. By the early twentieth century, these perennial difficulties were joined by growing government rate regulation.[88] High and variable railroad rates had long been targets for reformers, but only after the turn of the century did the federal government's Interstate Commerce Commission (ICC) gain clear legislative power to regulate them.[89] Railroads' troubles culminated with World War I when the federal government seized the railroads and ran them directly.[90]

Ripley was both an expert on railroads and an active participant in making railroad policy. Beginning with a stint at the U.S. Industrial Commission in 1901, he held several significant positions, culminating in 1920 when the ICC asked him to prepare a national plan for railroad consolidation.[91] Though his plan was voted down, he continued as a consultant to the ICC through the 1920s.

Ripley's work on railroads demonstrates his decidedly non-radical, progressive orientation. He began his career as a critic of the railroads, but after the ICC won the power to set rates he became more sympathetic to the rail lines and their need for adequate income, warning that punitive

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85. *See* William Z. Ripley, *Federal Railroad Regulation*, ATLANTIC, Mar. 1910, at 414; William Z. Ripley, *Races in the United States*, ATLANTIC, Dec. 1908, at 745; William Z. Ripley, *President Roosevelt's Railway Policy*, ATLANTIC, Oct. 1905, at 377; William Z. Ripley, *Race Factors in Labor Unions*, ATLANTIC, Mar. 1904, at 299.

86. William Stover described Ripley's works as "among the most significant works on American railroads written in the generation before World War I." Stover, *supra* note 72, at . *See also* WILLIAM Z. RIPLEY, RAILROADS: RATES AND REGULATION (1912); WILLIAM Z. RIPLEY, RAILROADS: FINANCE AND ORGANIZATION (1915) [hereinafter RAILROADS: FINANCE].

87. JOHN F. STOVER, AMERICAN RAILROADS 96–97 (2d. ed. 1997).

88. *See id.* at 96–109.

89. The 1906 Hepburn Act gave the ICC power to establish "just and reasonable" maximum rates for railroads, and the 1910 Mann-Elkins Act put the burden on railroads to show a proposed rate increase was justified. *Id.* at 128–31.

90. *See id.* at 173.

91. Stover, *supra* note 72.

rate setting could severely damage the rails.[92] Ripley's work on railroad regulation may have been a proving-ground for his later writings on Wall Street, for by the 1910s he was perhaps the leading expert on railroad finance.

B. The Present Economic Revolution

When Ripley turned to studying corporate finance in the 1920s, he found a field undergoing rapid changes. While the authors discussed in the previous Part all recognized the spread of shareholding after 1900, it was only after World War I that new retail shareholders flooded into the market.[93] The trend toward widened securities ownership had started accelerating during World War I, as Americans purchased the popular Liberty Bonds in record numbers to fund the war effort.[94] At war's end, Americans, made comfortable with securities purchases, were further encouraged to purchase bonds and, increasingly, stocks, by the spread of national retail brokerages and, at many corporations, customer and employee stock ownership plans.[95] Although exact numbers are hard to come by, one recent study estimates that stock ownership increased from "a few hundred thousand before World War I (about three percent of U.S. households) to an estimated [eight] million by 1929 (roughly a quarter of households)."[96]

An almost necessary consequence of the increase in investors was the further dispersion of stock ownership, creating for the first time a mass shareholding class. While some prewar writers had seen problems lurking with the dispersal of stock ownership, the earliest postwar observers welcomed the trend.[97] These writers heralded ever-widening stock ownership as a salve for social problems because it promised to give ordinary Americans a stake in the nation's growing corporate econ-

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92. *See* RIPLEY, RAILROADS: FINANCE, *supra* note 86, at v–vi (1916); *see also* RIPLEY, PREFACE TO TRUSTS, POOLS, AND CORPORATIONS v (calling for "a reasonable policy of public control over monopolistic and corporate enterprises").

93. As Lawrence Mitchell points out, the number of relatively small shareholders increased before World War I, MITCHELL, SPECULATION, *supra* note 25, at 201–03, but share ownership really spiked after World War I, as did public perception that the average American was investing in stocks, which was an exaggeration. STEVE FRASER, EVERY MAN A SPECULATOR: A HISTORY OF WALL STREET IN AMERICAN LIFE 391 (2005).

94. DAVID M. KENNEDY, OVER HERE: THE FIRST WORLD WAR AND AMERICAN SOCIETY 105–06 (1980).

95. Ott, *When Wall Street*, *supra* note 25, at 622–24.

96. Julia C. Ott, *"The Free and Open People's Market": Political Ideology and Retail Brokerage at the New York Stock Exchange, 1913–1933*, 96 J. AM. HIST. 44, 45 (2009) [hereinafter *The Free*]. Ott does not deal with Ripley at length, but she does identify Ripley as the individual who drew increasing attention to the separation of ownership and control in the 1920s. *Id.* at 62.

97. Perhaps excepting Veblen, whose *Absentee Ownership* appeared in 1922. *See supra* discussion in Part II. *See* VEBLEN, ABSENTEE OWNERSHIP, *supra* note 59.

omy.[98] In 1925, Ripley's Harvard economics colleague Thomas Nixon Carver gave voice to this view in his work *The Present Economic Revolution in the United States*. Carver announced that widespread ownership would solve the "labor problem" by making small investors "small capitalists."[99] A similar tack was taken by the philanthropist Robert Brookings in *Industrial Ownership*, published the same year. In this book, Brookings noted two crucial developments in twentieth-century capitalism: the separation of ownership and management and the widening dispersal of share ownership, which he foresaw continuing until ownership was "diffused among the largest share of the population."[100] Like Carver, Brookings saw no problems arising from these developments. While Berle and Means would see in the separation of ownership and control an opportunity for managers to appropriate shareholder wealth, Brookings concluded that the dispersal of ownership would have the opposite effect, giving management an *increasing* sense of responsibility toward shareholders. "The widespread diffusion of ownership and the increasing sense of responsibility to management to all the interested parties," he wrote, "point to a satisfactory solution of 'the industrial problem.'"[101]

Although not always noted by its proponents, these works' sunny vision of the ordinary American as shareholder also hints at a more fundamental shift in the orientation of corporate governance.[102] If Carver and Nixon were right that ordinary Americans' wealth and security was now tied directly to their status as shareholders, then the well-being of shareholders *qua* shareholders suddenly jumped in importance.[103] No longer was the fundamental problem in corporation law to be that corporations damaged competitors or the public; now the chief concern in corporation law was for the shareholders. As the historian Julia Ott puts it, under this vision of universal shareholder democracy, "the maximization

98. The New York Stock Exchange (NYSE) campaigned against regulation during this period by promoting a vision of "shareholder democracy" as "a modern form of proprietary democracy distinguished by universal ownership of shares." Ott, *The Free*, *supra* note 96, at 64. Of course, shareholder democracy was the very opposite of "proprietary democracy," but the NYSE claimed otherwise. *Id.* at 61–65.

99. THOMAS NIXON CARVER, THE PRESENT ECONOMIC REVOLUTION IN THE UNITED STATES 112 (1925).

100. ROBERT BROOKINGS, INDUSTRIAL OWNERSHIP: ECONOMIC AND SOCIAL SIGNIFICANCE 9 (1925). Brookings was not himself a scholar but did fund what became the Brookings Institution.

101. *Id.* at 14.

102. *See infra* text accompanying notes 220–27.

103. Which is not to say that previous corporation law did not seek to protect shareholders, just that shareholder protection was not always the overarching goal.

of shareholders' returns was the most important consideration in corporate governance and economic policy."[104]

C. From Main Street to Wall Street

During the mid-1920s, William Ripley would bring the separation of ownership and control before the public and spark a national debate over corporate governance. His initial public foray was at a seemingly modest venue, the annual meeting of New York's Academy of Political Science, where in November 1925 he gave a talk on "Two Changes in the Nature and Conduct of Corporations," which he asserted went to the "very tap-root of our capitalistic system."[105] The first was "the divorce of ownership of property, represented by securities emitted by corporations or trustees, from any direct accountability, whatsoever, for its prudent and effective management." The second was the diffusion of that ownership, "the wide distribution of stock to employees and to consumers of the corporation's product[.]"[106] The result, Ripley announced, was "the assumption of an absolute control by intermediaries—most commonly bankers[—] . . . in place of the former responsibility for direction which, theoretically at least, rested upon the shoulders of the actual owners."[107]

Some of Ripley's conclusions had already been reached by others. His critique of bankers' control, in particular, sounded little different from critiques made of Morgan decades before. He innovated, though, when he identified two separate elements in what we have since lumped together as the separation of ownership and control. To him, separation of ownership and management was one problem, exacerbated by dispersed shareholding. This latter development turned the separation of ownership and control into a problem for the general public.

His attack took on urgency because, he claimed, the separation of ownership and control had reached a tipping point. Neither the separation nor shareholder passivity was new, he admitted; shareholders had "always been inert, delegating most of their power," but there had still

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104. Ott, *The Free*, *supra* note 96, at 64. In a similar vein, Daila Tsuk Mitchell has pointed out that in Berle and Means's telling, there are two classes in modern corporate society, managers and shareholders, with labor nowhere to be found. *See* Dalia Tsuk, *Corporations Without Labor: The Politics of Progressive Corporate Law*, 151 U. PA. L. REV. 1861, 1884 (2003).

105. *See* William Z. Ripley, *Two Changes in the Nature and Conduct of Corporations*, 11 PROC. ACAD. POL. SCI. N.Y. 143, 143 (1926) [hereinafter *Two Changes*]. The speech was also excerpted in W. Z. Ripley, *More Power to the Bankers*, NATION, Dec. 2, 1925, at 618, and later republished in the Congressional Record, 67 CONG. REC. 7719–20 (cited in Seligman, *supra* note 7, at 695 n.50).

106. Ripley, *Two Changes*, *supra* note 105, at 145.

107. *Id.* at 143.

remained the possibility that they might "be stimulated to assert themselves."[108] New innovations in corporate finance promised to put an end to that. He illustrated his point by citing the recent public offering of Dodge Brothers, Inc. Purchased by the banking house of Dillon, Reed in 1924 for $146,000,000, the investment house took the automaker public again a year later, selling $160,000,000 of bonds and preferred and common stock. But, Ripley pointed out, the new Dodge Bros. had a new kind of capital structure with two kinds of common stock, "Class A" and "Class B." Only the Class B stock had voting power.[109] Dillon Reed, unsurprisingly, sold the Class A and kept the Class B, stripping all power from most of the company's putative owners. How, Ripley asked his audience, "can there be other than a whirlwind of abuse of power under such conditions?"[110] For all Ripley's criticism of corporate controllers, however, he offered only anodyne solutions to the problem in his speech, calling for better publicity for corporate accounts and standardized accounting under the aegis of a revamped Federal Trade Commission (FTC).[111]

What separated Ripley from the cheerleaders for shareholder democracy was that he emphasized the dangers inherent in widening ownership—a point made by an editorial the *New York Times* published after his talk. It said that Ripley's talk had cast "the corrosive of a doubt" on previous "rejoicing over the wide diffusion of ownership in the nation's industries[.]"[112] In linking widening ownership and the separation of ownership and control, Ripley also looked forward to modern debates on corporate governance by moving the shareholder to the center of concern. "Precisely as the 'trust' of old menaced the consumer," concluded the *Times*, "closed management of corporations menaces the diffused owner."[113]

Ripley's speech garnered wide attention. *The New York Times* devoted two columns to it the next day and reported that it had "stirred the assembly."[114] It made the *Wall Street Journal* soon thereafter. The

108. *Id.* at 144.

109. *See id.* at 145.

110. *Id.* at 144. Nor was Dodge Bros. the only firm to issue nonvoting common stock; the first firm to issue nonvoting 'Class A' stock was in 1916, and in 1924 to 1925, over a dozen firms issued nonvoting common stock of the kind Ripley decried. *See The Development of Class A and Class B Stocks*, 6 HARV. BUS. REV. 332 (1926). Frank Partnoy has recently attributed the popularity of Class B non-voting stock to the Swedish entrepreneur and fraud, Ivar Kreuger. FRANK PARTNOY, THE MATCH KING: IVAR KREUGER, THE FINANCIAL GENIUS BEHIND A CENTURY OF WALL STREET SCANDALS 75–77 (2009).

111. Ripley, *Two Changes*, *supra* note 105, at 144.

112. *The New Capitalist*, N.Y. TIMES, Nov. 1, 1925, at E8.

113. *Id.*

114. *Bankers' Control of Trade Deplored*, N.Y. TIMES, Oct. 29, 1925, at 27.

Journal reported that Ripley's speech had met "with considerable interest" from bankers, enough so that the Bank of America felt compelled to issue a statement stoutly denying Ripley's charges and stating there was no need for further government regulation of business.[115] In mid-November, a speaker at the New York Banker's Institute more forcefully rebutted Ripley's claims, and echoed Thomas Carver's earlier conclusions, insisting that diffuse ownership in fact benefitted shareholders while giving "the responsible executives of the utilities more of a sense of fiduciary accountability to these investor-owners and less of a sense of control by a few men, inside or outside of banking circles."[116]

Over the next year, Ripley would conduct a campaign that would inject the separation of ownership and control and the diffusion of stock ownership into the center of public debate, lead to significant changes by the New York Stock Exchange, and even involve the President of the United States. It began with his New York speech and gained steam in January 1926, when Ripley expanded upon his charges in an article entitled, *From Main Street to Wall Street*, in the *Atlantic Monthly*, then one of the nation's most-read magazines.[117] With a title playing off Sinclair Lewis's recent novel *Main Street*—indeed, Ripley appears to have invented the "Main Street and Wall Street" cliché[118]—the article caused a national sensation. If remembered at all, the article is now remembered for launching a campaign against nonvoting common stock,[119] but its ambit was larger. It was an attack on modern corporate governance.

From Main Street to Wall Street opened with a somewhat strained parable about a young man from Maine who was given shares in the local power company by his father. The father gave his son a short lecture on the duties of ownership along with the shares: "You must never forget that you are partly responsible for this undertaking. . . . That responsibility is an inseparable part of your ownership."[120] Quoting Justice Brandeis, the father continued:

> 'There is no such thing to my mind . . . as an *innocent* shareholder. He may be innocent in fact, but he cannot be held innocent. He accepts the benefits of the system. It is his business and his obligation to see that those who represent him carry out a policy which is consistent with the public welfare.' . . . This accountability for wealth

115. Will Nassau, *In and Out of the Banks*, WALL ST. J., Oct. 15, 1925, at 9.

116. *Professor Ripley and the Facts*, N.Y. TIMES, Nov. 14, 1925, at 14 (quoting H. M. Brundage).

117. *See* William Z. Ripley, *From Main Street to Wall Street*, ATLANTIC MONTHLY, Jan. 1926, at 94 [hereinafter *From Main Street*].

118. *See* RIPLEY, MAIN STREET, *supra* note 9, at vii.

119. *See* Seligman, *supra* note 7, at 693–99.

120. Ripley, *From Main Street*, *supra* note 117, at 94.

> underlies and justifies the whole institution of private property upon which the government of our great country is founded.[121]

Yet economic developments in Ripley's story soon thwarted the son's attempt to exercise the responsibilities of ownership. A utility holding company bought the small Maine power company, and the son found his ownership transmuted into ownership of shares in a national firm, based in Chicago with tens of thousands of shareholders and owning power companies in states from Maine to Oklahoma to Nebraska.[122] "It began to look indeed as if the days of the simple life and of direct responsibility of ownership were by way of passing in the field of public utilities in New England."[123]

Ripley's critique was not limited to utilities holding companies, a major issue in the 1920s. When his Maine shareholder looked for a corporation to invest in where he could exercise the responsibilities of ownership, the son found that firms used voting trusts and pyramiding ownership to avoid shareholder involvement. "Hopeless indeed did it appear that any uninitiated public investor could understand, much less participate intelligently in, any of these affairs."[124]

According to Ripley, these developments not only cut shareholders off from a voice in their corporations but also undermined the traditional justifications offered for private property. "What an amazing tangle this all makes of the theory that ownership of property and responsibility for its efficient, public-spirited, and far-sighted management shall be linked one to the other."[125] The developments enabled managerial exploitation of shareholders, for under such arrangements it was likely that management's interests would diverge from shareholders' interests. Ripley explained,

> All managers—that is to say, the operating men—are working on salary, their returns, except on the side, being largely independent of the net result of company operation year by year. The motive of self-interest may even have been thrown into the reverse, occasionally, so far as long-time upbuilding in contradistinction to quick turnover in corporate affairs is concerned.[126]

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121. *Id.* (quoting LOUIS D. BRANDEIS, THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS 74–75 (Osmand K. Fraenkel ed., 1935)).

122. *See id.* at 94–95.

123. *Id.* at 95.

124. *Id.* at 96.

125. *Id.*

126. *Id.*

The new system not only threatened shareholders but also the entire economic order: "Veritably, the institution of private property, underlying our whole civilization, is threatened at the root unless we take heed."[127]

Having set out the overarching problem, Ripley then concentrated his fire on nonvoting common stock, which he believed threatened to put "at rest the last vestige of power of participation of the owners of property in prudent and efficient management."[128] Nonvoting common stock threatened shareholders in two ways. First, it left them open to managerial exploitation, and second, it destroyed any responsibility they felt for their property, resulting in a "bald and outrageous theft of the last title of responsibility for management of the actual owners by those who are setting up these latest financial erections."[129]

Nonvoting stock was a major problem, but not the only one Ripley tackled in the article. Another was the diffusion of stock ownership, encouraged in the 1920s by the growth of employee and consumer stock purchase plans, a development that would only concentrate more power in managers.[130] The "wide distribution of stock to employees and the consumers of the corporation's product, . . ." he wrote, would have an effect that was "bound to be cumulative with that of the insinuation of professional management power between ownership and operation."[131] "[T]he larger the number of shareholders," Ripley wrote, "the more easily may a small concentrated block of minority shares exercise control over all the rest. . . . With 300,000 scattered holdings, a possible [fifteen] or [twenty] percent of the votes can never be overmatched at an election."[132]

But what to do about these developments? Ripley, unlike Louis Brandeis, did not call for the restoration of a perhaps mythical era of small corporations and proprietor-managers. Nor did he assert that shareholder disengagement from active management was new. "It will be objected," he wrote, "that no real change is involved in these recent tendencies[,] that stockholders never did, and never will, exercise their voting rights."[133] Yet, he continued, the mere potential for shareholder action mattered: "[E]very once in a blue moon some resolute individual or stockholder could rise . . . and organize a protective committee or dis-

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127. *Id.*

128. *Id.* at 97.

129. *Id.* at 97–98.

130. The spread of ownership through ESOPs in the 1920s has gained scholarly attention. *See* STUART BRANDES, AMERICAN WELFARE CAPITALISM (1976). But much less attention has been paid to dispersal of ownership through consumer-purchase plans.

131. Ripley, *From Main Street*, *supra* note 117, at 99.

132. *Id.*

133. *Id.* at 100.

senting group."[134] This would be foreclosed if "the people who own that property have allowed themselves to be utterly divorced from the exercise of their natural right to elect the directors and to influence . . . the corporate policy."[135]

In his article, Ripley put forward a flurry of proposals for solving the problems he identified. Perhaps bondholders should be enfranchised as well as shareholders, cumulative voting more widely adopted, or the federal government could regulate holding companies.[136] But Ripley's main solution was publicity. During the 1920s, required disclosure was minimal to nonexistent.[137] State-mandated disclosure, he believed, would reveal "the amount of gross business, the cost of conducting it, and especially the policy respecting upkeep and depreciation" at a corporation. Disclosure would also aid the shareholder who, even if not equipped to personally evaluate the data, would be able to benefit from the "intelligent judgment of competent experts" who could provide such analysis.[138]

Ripley closed his first article by demanding that his readers recognize "there is something the matter."[139] It had not yet reached a crisis point, but it was becoming more pressing with the "great incursion into the field of investment by the common people—corporate possession being shared by those of moderate and small means with the wealthy class."[140] What, he asked, "would be the effect were these newcomers . . . to discover some day that ownership and control had parted company, each going its way as ships that pass in the night?"[141] The vision of ownership remaining with the people, while control rested in the "great financial centers," led Ripley to foresee greater problems and damaging social divisions. He wrote, "We have had the experience, to our sorrow, with the old sectional divisions between the East and the West. Is there no smoldering spark in this matter of corporate control, which may some day flare up as a political issue of the first order?"[142]

The "spark in this matter" turned out to be Ripley's own article, though he may have been surprised that public anger focused on only one

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134. *Id.*

135. *Id.*

136. *See id.* at 102, 103, 106.

137. While large corporations made some disclosures due to such influences as the listing requirements of the NYSE or state blue sky laws, many also evaded them and released little if any useful information. *See* Harwell Wells, *No Man Can be Worth $1,000,000 a Year: The Fight over Executive Compensation in 1930s America*, 44 U. RICH. L. REV. 689, 707–08 (2010).

138. Ripley, *From Main Street*, *supra* note 117, at 104.

139. *Id.* at 107.

140. *Id.*

141. *Id.*

142. *Id.* at 108.

of his targets: nonvoting common stock.[143] Within weeks of *From Main Street to Wall Street*'s publication, an outcry arose sufficient to force the New York Stock Exchange to disapprove an issue of nonvoting common for the first time, and thereafter, it refused to list such stock.[144] Later that year, the ICC disapproved a reorganization that included a voting trust, stating that "the public interest requires that the entire body of the stockholders of a railroad . . . and not a powerful few, shall be responsible for management." The New Jersey Public Utility Commission blocked a stock issue loaded with nonvoting shares on similar grounds soon after.[145] That spring, several corporations that reorganized their capital structure specifically rejected the use of nonvoting common stock, and in announcements of their actions, they "called attention along with other 'selling points' to the fact that all stock carried full voting rights."[146] So loud was the public outcry that in February 1926 President Calvin Coolidge met with Ripley at the White House to discuss the problem of nonvoting common stock.[147]

Ripley's campaign against managerial power stirred not only policy-makers but also the general public. In perhaps the most telling example of the attention garnered by his crusade, the *New York World* published a poem in the spring of 1926 entitled, "On Waiting in Vain for the *New Masses* to Denounce Nonvoting Stock," which may also have made a wry commentary on the plight of the retail shareholder compared to that of the real working class:

> Then you who drive the fractious nail
> And you who lay the heavy rail,
> And all who bear the dinner pail
> And daily punch the clock—
> Shall it be said your hearts are stone?
> They are your brethren and they groan!
> Oh, drop a tear for those who own
> Nonvoting corporate stock.[148]

While nonvoting stock tended to dominate press coverage in the spring of 1926, Ripley's broader concerns also gained currency, in part because nonvoting stock served as a synecdoche for shareholders' more

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143. The episode is recounted in Seligman, *supra* note 7, at 693–99.

144. *See id.* at 697. The NYSE disapproved a nonvoting issue for Fox Theaters on January 18, 1926. *Id.*

145. *Id.* at 696.

146. Preston Lockwood, *The Voting Rights of Stockholders: A Resume of a Current Controversy*, 113 BANKERS' MAGAZINE 19, 20 (1926).

147. *See* Seligman, *supra* note 7, at 695–96; *President Studies Non-Voting Stocks*, N.Y. TIMES, Feb. 17, 1926, at 1.

148. RIPLEY, MAIN STREET, *supra* note 9, at 121.

pervasive loss of control. Thus, a 1926 article in the *New York Times* entitled, "Voteless Stock Stirs Wall Street," presented the case against nonvoting stock while also summarizing Ripley's larger concerns.[149] In its account, nonvoting common stock was only a symptom of more basic changes in corporate governance. For instance, the article described the Dodge Brothers reorganization as "typical of a movement, gaining momentum rapidly during the past few years, that tends to shift the entire centre of industrial control from the 'owner,' in the traditional sense of the word, to the investment banker." Alongside nonvoting common stock, it highlighted the dispersal of stock ownership and the growth of complex holding companies as causes of that shift.[150] "In this divorce of ownership from responsibility, of financial risk from actual control," it continued, "the critics see the likelihood of a dangerous abuse of power."[151]

Ripley's crusade had quickly defeated nonvoting stock, but its larger goals were not so easily reached.[152] In August 1926, he followed with a second article in the *Atlantic* entitled, *Stop, Look, Listen! The Shareholder's Right to Adequate Information*,[153] where he expanded on his attack on corporate reporting, again framing this specific problem as an outgrowth of more basic economic changes.

The article opened with a labored metaphor. Two roads intersected, initially unregulated and little-traveled. As the volume of traffic increases, Ripley wrote, as inattentive, "careless or drunken drivers" appear, "then as the appalling records of death and casualties betokens, the time has come for public supervision of the crossways."[154] To fix the problem, "the simple remedy of visibility suggests itself."[155] The comparison is clear:

> Main Street and Wall Street have come to cross one another at right angles—Main Street, our synonym for this phenomenon of widespread ownership, and Wall Street, as applied to the well-known aggregation of financial and of directorial power in our great capital centres. This intersection of interest[s], so often at cross-purposes,

149. *See* Evans Clark, *Voteless Stock Stirs Wall Street*, N.Y. TIMES, Feb. 7, 1926 at XX1.

150. *Id.*

151. *Id.*

152. Something noted by at least one editor of the New Republic, who wrote in February 1926 that the NYSE's banning of nonvoting common would be only a "half-hearted remedy for one minor aspect of a major evil," the evil being that "we have lost the principle of responsible ownership, which is the chief justification of the capitalist order." *The Week*, THE NEW REPUBLIC, Feb. 10, 1926, at 308.

153. William Z. Ripley, *Stop, Look, Listen! The Shareholder's Right to Adequate Information*, ATLANTIC MONTHLY, Sept. 1926, at 380–399 [hereinafter *Stop, Look, Listen!*].

154. *Id.* at 380.

155. *Id.*

> is marked by an imminent danger of collision at the junction point of ownership and management.[156]

His solution to the intersection between Main Street and Wall Street was better visibility; in the corporate context, more publicity.

At the time, corporations were required to produce little or no information for shareholders, and this lack of financial data was Ripley's target.[157] While some firms regularly issued audited balance sheets and income statements, many did not, and Ripley did not hesitate to attack those firms whose disclosures he judged insufficient. Indeed, part of his popularity was his willingness to name names. Firms such as Singer Manufacturing and Royal Baking Powder, he reported, gave shareholders essentially no financial information, while many others provided at best a short balance sheet.[158] Even corporations providing more copious information often failed to explain how figures were reached, a major problem in an era before standardized accounting rules.[159]

Ripley's discussion of corporate information highlights a disjunction in his views of the shareholder, one marking a transition from older views of activist shareholders to a new recognition of the shareholder as, chiefly, a passive investor.[160] He believed that additional information would help the shareholder, but this raised the question of how exactly the shareholder would benefit from it. At times, Ripley had held out some hope for at least an attenuated version of shareholder activism, suggesting that better information would create a more engaged shareholder. In *From Main Street to Wall Street*, he highlighted a few instances where individual shareholders were able to "overcome a corporate Goliath," including the long shareholder campaign waged by Charles and Philip Cabot, which in the 1910s eventually persuaded U.S. Steel to abandon the twelve-hour workday.[161] In his 1927 book *Main Street and Wall Street*, however, Ripley conceded that most shareholders had no desire or ability to become involved in corporate management:

> [A]ny plan for the greater democratization of corporate management which is based upon the expectation of a general active partic-

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156. *Id.* at 380–81.

157. *See* Wells, *supra* note 137, at 737–38.

158. *See* Ripley, *Stop, Look, Listen!*, *supra* note 153, at 382.

159. *See id.* at 388–93.

160. The view of the shareholder as chiefly an investor was already dominant by the 1910s. Dalia Tsuk Mitchell, *Shareholders as Proxies: The Contours of Shareholder Democracy*, 63 WASH. & LEE L. REV. 1503, 1517 (2006).

161. Ripley, *From Main Street*, *supra* note 117, at 100. The actual story of how the Cabots pressured U.S. Steel into dropping the 12-hour day is considerably more complex than in Ripley's telling. *See* Charles Hill, *Fighting the Twelve-Hour Day in the American Steel Industry*, 15 LAB. HIS. 19, 21–23 and *passim* (1974).

> ipation by the whole body of shareholders is bound to go wrong from the crossing of the wire. . . . The average stockholder is entirely unqualified to engage actively in management. For a surprisingly large number of great corporations more than half of the shareholders are women. . . . Such a multitude are ill-fitted by training—begging the moot point of sex—to govern directly, less so than in politics. . . . Even the men by themselves, for the most part, have neither time, impulse, nor capacity for such concerns. The very practice of scattering investments, spreading the risk, would in a considerable estate constitute an aggregate burden of bother which would be backbreaking.[162]

Information would typically not, Ripley concluded, help shareholders be better governors of the corporation. Instead, it would help them in their role as investors. Once corporate information was provided, he wrote, "specialists, analysts, bankers, and others will promptly disseminate the information."[163] This was an interesting concession. Even as Ripley searched for ways to maintain the shareholder franchise, he admitted that, in this context, it would not be effective. Shareholders would benefit from better information not because it would empower them to better participate in management but because it would indirectly protect their economic interests: "This, then, is the ultimate defense of publicity. It is not as an adjunct to democratization through exercise of voting power, but as a contribution to the making of a true market price."[164]

As to how information should be forced from corporations, Ripley quickly discarded proposals for self-regulation and public pressure. While he praised the NYSE's disclosure mandates, he concluded they were easily avoided by any firm that did not wish to trade on that exchange.[165] Nor was state-level regulation a solution, as the weakness of state "blue-sky" securities laws showed they could easily be avoided.[166] His solution was federal action, specifically for the FTC to require detailed disclosure by corporations. Ripley closed his article with an argument that the FTC already had the statutory authority to require disclosure, if only it wished.[167]

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162. RIPLEY, MAIN STREET AND WALL STREET, *supra* note 9, at 129–30.

163. Ripley, *Stop, Look, Listen!*, *supra* note 153, at 385.

164. *Id.*

165. *See id.* at 394–95. Even the listing requirements were only of limited use; while they required the production of copious data, the figures were available for public inspection only at the NYSE. *See id.* at 395.

166. *See id.* at 397–98.

167. *See id.* at 398–99. Ripley's argument turned on an interpretation of Section 6 of the Federal Trade Commission Act. *Id.*

Ripley's second article again shook Wall Street—this time more literally. Advance copies of *Stop, Look, Listen!* reached New York early on August 24, 1926. By the middle of the day, many brokerages were referring to the article in market comments they circulated to customers and brokers, apparently highlighting the damage Ripley's criticisms could do to public confidence in corporations and the possibility that they would lead to new reporting requirements.[168] The result, according to market observers, was a sharp-sell off that sent the market lower at the end of the day.[169] While some on Wall Street actually favored better disclosure—it had been a cause of the NYSE's for the past year—many others feared disclosure or at least feared Ripley's criticisms.

The article also caused ripples in the nation's capital. Days after it appeared, several FTC Commissioners insisted that the FTC Act did not give them the authority Ripley claimed.[170] The President was soon drawn into the debate as well. Coolidge was reported to have spent some of the summer studying corporate issues, "inspired by Professor Ripley's previous utterances on nonvoting stock."[171] Yet, while Coolidge claimed to be "in full sympathy" with better corporate reporting, he rejected federal intervention, reasoning that corporations "get their life from [s]tate laws" and thus reporting requirements were a state concern.[172]

Stop, Look, Listen! also kept Ripley in the spotlight. The month it appeared, the *New York Times* ran a profile entitled *When Ripley Speaks, Wall Street Heeds*, which opened with the surprised observation that "the Stock Exchange, the bankers, the big investment corporations, and the corporate lawyers have taken quite seriously a criticism of their system and practices which comes from the occupant of an academic chair at Harvard University."[173] As his star rose, however, Ripley became the target of more pointed criticism. Shortly after the appearance of *Stop, Look, Listen!*, his claims came under fire from conservative Wall Street lawyer Gilbert Montague, who expanded his criticisms in an article entitled *More Government in Business—Does Wall Street Need It, or Main Street Want It?*[174] Montague's answer was, of course, "No," and he took

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168. *New Ripley Attack Stirs Wall Street*, N.Y. TIMES, Aug. 25, 1926, at 1.

169. *See id.*; *see also Publicity and Stock Prices*, WALL ST. J., Aug. 26, 1926, at 1.

170. *See Against Ripley's Plan: Majority of Trade Commission Doubts Its Legality*, N.Y. TIMES, Aug. 26, 1926, at 21. Ripley may have been too optimistic about the FTC's power to compel reports from corporations, at least in a time before a broad reading of the Commerce Clause. *See* Milton Handler, *The Constitutionality of Investigations by the Federal Trade Commission: II*, 28 COLUM. L. REV. 905, 930–37 (1928).

171. *Coolidge Believes State Should Guard Holders of Stock*, N.Y. TIMES, Aug. 28, 1926, at 1.

172. *Id.*

173. *When Ripley Speaks, Wall Street Heeds*, N.Y. TIMES, Sept. 26, 1926, at SM7.

174. *Says Ripley Plan Runs Afoul of the Court*, N.Y. TIMES, Aug. 30, 1926, at Fin. 22 (providing comments of Gilbert Montague); Gilbert H. Montague, *More Government in Business—Does*

pains to insist, against a wide array of evidence, that corporations' officers and directors were providing shareholders more than sufficient information and always stood ready to answer any additional requests for information that might come from shareholders.[175]

A more substantial and subtle response addressed not only Ripley's worries about corporate disclosure but also his underlying analysis of dispersed ownership and the separation of ownership and control. In an interview that appeared a month after *Stop, Look, Listen!*, General Motors (GM) president Alfred P. Sloan answered Ripley's criticisms.[176] After defending GM's reports to shareholders (which were remarkably transparent for the day) and insisting less plausibly that he did not know of a corporate executive who felt "resentful of public curiosity about his company's affairs," Sloan then turned to a second question: "Can a corporation have too many stockholders?"[177] At some point, Sloan conceded, a corporation's ownership could be *too* widespread: "[T]here is a point beyond which diffusion of stock ownership must enfeeble the corporation by depriving it of virile interest in management upon the part of some one man or group of men to whom its success is a matter of personal and vital interest."[178] GM, however, had found a happy medium. While it had 70,000 small shareholders, they owned only forty percent of its stock; the remaining sixty percent was held by a "small group of men," mainly the DuPont family, though Sloan did not name them.[179] In Ripley's terms, GM had a "control group." To Ripley, a control group, which he depicted most often as investment bankers rather than large shareholders, posed a threat to shareholders that increased with shareholding dispersal among small investors. In Sloan's telling, however, the existence of a control group was not a problem but "the strongest possible safeguard of the public interest."[180] Such a control group would "lose no opportunity to see that the management is sound, industrious, and progressive," a development that would benefit all shareholders, majority

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Wall Street Need It, or Main Street Want It?, 119 ANNALS AM. ACAD. POL. & SOC. SCI. 138 (1927). While Montague's article was published in 1927, it was a response to *Stop, Look, Listen!* and included the arguments made in 1926. On Montague, *see generally* Wyatt C. Wells, *Counterpoint to Reform: Gilbert Montague and the Business of Regulation*, 78 BUS. HIST. REV. 433 (2004).

175. Montague, *supra* note 174, at 140.

176. *See* Alfred P. Sloan, Jr., *Modern Ideals of Big Business*, WORLD'S WORK 695, 697 (1926). Sloan's article is clearly a response to Ripley's magazine articles, and was even billed as such in one advertisement for that issue, though Ripley's name is never mentioned in Sloan's article. *See Advertisement, Shall Corporation Secrets be Disclosed to Stockholders?*, N.Y. TIMES, Sept. 28, 1926, at 12.

177. Sloan, *supra* note 176, at 695, 697.

178. *Id.* at 697.

179. *Id.* at 698.

180. *Id.*

and minority alike.[181] Sloan had taken two of the main targets of Ripley's criticism—the existence of minority controlling groups and dispersed, powerless shareholders—and argued that they were both strengths of the system.

In the fall of 1926, Ripley's campaign moved into higher gear. Two months after the *Atlantic* published the article on corporate publicity, it published a third. *More Light!—and Power Too* was both an attack on the pyramided utilities holding companies assembled during the 1920s and another opportunity to reiterate the themes of Ripley's previous two articles.[182] Since the end of World War I, Ripley argued, utilities holding companies had sprung up and then consolidated across the nation, often with multiple levels of holding companies standing between a local utility and a national parent.[183] Their complex capital structures and layered ownership often allowed control to be wielded by those controlling the topmost firm, even if they held only a small ownership stake in the whole complex.[184] The holding companies' baffling capital structures also made fraud easier—or, as Ripley wrote in his distinctive style, increased the "temptation afforded to prestidigitation, double-shuffling, hornswoggling, and skullduggery."[185] As utilities in the 1920s moved aggressively to sell shares to their customers—Ripley estimating that 1,307,000 customers of utilities were now also shareholders—their financial shenanigans not only threatened the public generally but also endangered shareholders with particular force.[186] Yet for all his concerns, Ripley's proposed solution was, as had been the case in the previous articles, mild. While he implied that national regulation of utilities would be appropriate, all he called for in his article was a comprehensive study of the utilities by the National Power Commission.[187]

Though each of Ripley's articles garnered public attention, his crusade for better corporate governance appeared to be building towards the publication of a book collecting and expanding upon his articles. *Main Street and Wall Street* was published in February 1927. It is a book that raises "what-ifs," for while the book proved a best-seller, Ripley was not

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181. *Id.*

182. *See* William Z. Ripley, *More Light!—and Power Too*, ATLANTIC MONTHLY, Nov. 1928, at 667 [hereinafter *More Light!*].

183. *Id.* As Ripley noted, one reason for holding companies was state laws requiring utilities to be held by companies incorporated in-state; if, say, a Wisconsin firm wished to own a Minnesota utility, it would have to do so through a Minnesota corporation. *Id.* at 669. This did not, however, explain the multiple levels of companies held.

184. *See generally* JAMES C. BONBRIGHT & GARDINER C. MEANS, THE HOLDING COMPANY: ITS PUBLIC SIGNIFICANCE AND ITS REGULATION (1932).

185. Ripley, *More Light!*, *supra* note 182, at 671.

186. *Id.* at 685.

187. *See id.* at 687.

able to use it as a springboard to further attacks on corporate ills. A month before its publication in January 1927, Ripley was riding in a taxicab to give a speech to the annual meeting of the American Bar Association in New York City when his cab was struck by a drunk driver.[188] He suffered a severe head injury in the crash and, shortly thereafter, a nervous breakdown.[189] At precisely the moment when American capitalism entered its frenzied phase and his book was gaining high praise, Ripley was removed from the scene. He was out of the public spotlight for more than two years. While accounts of Ripley dot newspapers throughout 1926, further reports of his activities do not appear again until the end of 1929 when he was finally well enough to resume teaching at Harvard.[190]

Main Street and Wall Street appeared to great acclaim.[191] The "underlying thought" in the work, Ripley acknowledged, was hardly new; his intellectual forebears included Brandeis, Lippmann, and Woodrow Wilson, each of whom had identified the separation of ownership and control of corporate property.[192] But, Ripley continued, the problem had been fundamentally changed, and made newly important, by "the great increase in popular investment in business and other corporations."[193] It was the "transformation of hitherto purely personal businesses, closely owned, into very widely held and loosely governed public enterprises . . . which brings the problem of corporate organization and government into such peculiar prominence at this time."[194]

For the most part the work gathered up and expanded on Ripley's three articles from the *Atlantic*, with a few additions. The first chapter was not by Ripley at all, but an address given by Woodrow Wilson in 1910 which drove home both Ripley's general themes about managerial power and, in particular, his contention that the corporation had changed the nature of a shareholder's property. As Wilson noted, the minority shareholder of a corporation "does not seem to enjoy any of the substan-

188. *See Prof. Ripley Injured in an Auto Crash*, N.Y. TIMES, Jan. 20, 1927, at 1.

189. *See Prof. Ripley Improving*, N.Y. TIMES, Sept. 27, 1927, at E3. Ripley may have suffered from mental illness before or suffered permanent effects from his head injury; his death in 1941 was reputed to have been a suicide. JONATHAN P. SPIRO, DEFENDING THE MASTER RACE 96 (2009).

190. *See* S.T. Williams, *William Z. Ripley—and Some Others*, N.Y. TIMES, Dec. 29, 1929, at XX2.

191. *See* McChesney, *supra* note 7, at 237–38 (finding only one review of Ripley's work unfavorable).

192. *See* RIPLEY, MAIN STREET, *supra* note 9, at vi. Ripley does not squarely say that the separation of ownership and control is the "underlying thought" shared with these earlier thinkers, but it seems obvious. *See id.*

193. *Id.* at vi–vii.

194. *Id.* at vii.

tial rights of property in connection" with his stocks.[195] Also, two later chapters dealing with railroad reorganization were completely new.[196]

Main Street and Wall Street's main points would have been familiar to readers of the *Atlantic* pieces: corporations were fast-growing and supplanting other business forms; managers were whittling away at the remnants of shareholder power; power over corporate property had been separated from its ownership; and wider dispersion of ownership and the new retail shareholder only accelerated the shift in power. Once more, Ripley linked all these developments to two fundamental changes, "the progressive diffusion of ownership on the one hand and of the ever-increasing concentration of managerial power on the other."[197]

One shift in emphasis between the *Atlantic* articles and the book might have been noticed by astute readers: the book paid new attention to recent changes in corporation law that had allowed "the steady encroachment of management on shareholder rights."[198] Those already familiar with Ripley's attack on nonvoting stock were introduced to additional legal changes, which, Ripley asserted, undermined shareholder power. They learned how state competition for corporate charters encouraged managerial power and impeded state-level regulation,[199] of the growing use of no-par stock, which Ripley believed would destroy a shareholder's ability to evaluate the finances of his firm,[200] and of grants of indemnity in corporate charters intended to shield managers from any liability for errors or conflicts of interest.[201]

In providing a brief summary of legal developments, this section of *Main Street and Wall Street* presages the much more thorough account given several years later in Berle and Means's *The Modern Corporation and Private Property*. This is unsurprising, as by 1927 Ripley had become a friend and patron of Adolf A. Berle, Jr. Berle had actually been a student of Ripley's at Harvard College—as had many others, including Franklin Roosevelt—but they renewed their acquaintance in 1925 when Berle, then a successful corporation lawyer, began teaching a class on

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195. WOODROW WILSON, ANNUAL ADDRESS TO THE AMERICAN BAR ASSOCIATION (1910), *reprinted in* RIPLEY, MAIN STREET, *supra* note 9, at 13. Despite Ripley's use of Wilson's talk, much of Wilson's ire appeared directed at older debates concerning corporate personhood, which died out by the mid-1920s. *See* RIPLEY, MAIN STREET, *supra* note 9, at 3–15.

196. *See* RIPLEY, MAIN STREET, *supra* note 9, at 229–75.

197. *Id.* at 131.

198. *Id.* at 37. Some of these changes were mentioned in the *Atlantic* articles, but overshadowed by Ripley's attack on nonvoting stock.

199. *See id.* at 25–37. Ripley's articles did deal with chartermongering as a regulatory problem.

200. *See id.* at 46–51.

201. *See id.* at 55–61.

corporation finance at the Harvard Business School.[202] Berle's writings in the 1920s examined the various ways that corporation law was changing to disempower shareholders. While his name does not appear in the *Atlantic* articles, Berle's name and ideas show up half-a-dozen times in *Main Street and Wall Street*, usually in connection with the legal changes Ripley is attacking.[203] By 1927, they were such good friends that when Ripley was injured on his way to give his speech to the ABA, Berle read the paper in his stead.[204] As discussed below, it was through Berle's friendship with Ripley that he secured a grant to begin his study of the modern corporation.[205]

The interplay between Berle and Ripley also appears in a comparison of their work during the late 1920s.[206] In *Main Street and Wall Street*, Ripley repeated his criticisms of corporate governance and suggested solutions, but he also put forward a new proposal to mitigate the problems of corporate governance. In the face of shareholder apathy and powerlessness, Ripley suggested that permanent committees be formed to represent shareholders' interests and to serve as "independent checks or balances" on traditional corporate management.[207] A year later, when Berle published his *Studies in Corporation Finance*, one of his main proposals for protecting shareholders was for trust companies to hold stock on behalf of small shareholders and so garner a block of stock large enough to "represent the depositors of the stock . . . and, as representing their clients, [they] could take the action necessary to prevent or rectify violations of property rights."[208] Both men were searching for an institutional intermediary that could defend small shareholders' rights.

When *Main Street and Wall Street* appeared, its reception ranged from positive to gushing and testified to how widely Ripley's ideas had spread. The distinguished corporate law scholar Henry Ballantine, writing in the *California Law Review*, was driven to poetry. Discussing Ripley's impact on Wall Street, he wrote:

A look of sadness, a blush of shame,

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202. *See* JORDAN SCHWARZ, LIBERAL: ADOLF A. BERLE AND THE VISION OF AN AMERICAN ERA 51–52 (1987).

203. *See* RIPLEY, MAIN STREET, *supra* note 9, at 47, 53, 60, 92, 122, 131, 133.

204. *See* SCHWARZ, *supra* note 202, at 52.

205. *See id.* at 51.

206. For an extended comparison of their proposals, see Tsuk Mitchell, *supra* note 160, at 1529–33.

207. *See* RIPLEY, MAIN STREET, *supra* note 9, at 131–55.

208. ADOLF A. BERLE, JR., STUDIES IN THE LAW OF CORPORATE FINANCE 39 (1928) (*quoted in* William W. Bratton, *Berle and Means Reconsidered at the Century's Turn*, 26 J. CORP. L. 737, 752 (2001)). As Bratton notes, Berle would move away from proposals to empower shareholders in the 1930s. *See* Bratton, *Berle and Means Reconsidered*, *supra* at 752.

Over the faces of Wall Street came,
A spirit of manhood within them stirred,
To life at Ripley's horrible words.[209]

Other reviews also alluded to both the impact and the popularity of Ripley's work, one writing that "no recent book dealing with economic subjects has received so much attention," [210] another making much the same point, that "seldom, if ever, has the appearance of a book within the general field of applied economics, created such a stir in the American world of affairs. . . ."[211] Yet this popularity did not detract from the weight reviewers gave the book; another called it the "most important book on the economic aspects of our day since . . . [Keynes's] *Economic Consequences of the Peace*."[212]

In its review, *The New York Times* also sought to answer a puzzling question: Why did a campaign waged by this "bespectacled" Harvard economist gain so much attention? Ripley did have access to the pages of the *Atlantic*, but that alone could not explain the controversy his articles generated. The *Times* credited Ripley's success to his writing style and moral stance. Although a distinguished scholar, Ripley's criticisms were couched in the vernacular, and his "flippancies and colloquialisms" entertained readers. At the same time—and in the same voice—Ripley managed to speak as a prophet: "he is first and last a moral crusader, hammering at the iniquities of his generation."[213] Not the least, he "mentions names and dates—a round score of corporations come in for scathing denunciation."[214] The review nicely captures the attractions of Ripley's vivid writing style and of the outrage that permeates his work. It also suggests one reason why Ripley's critique was later forgotten: pitched at a broad audience, it lacks the heft of a scholarly work that would have dissected corporation law and finance.[215]

For many readers, *Main Street and Wall Street* must have recalled the previous decades' muckraking classics, but a few recognized that the work also marked a turning-point in popular understandings of corporation law and governance. As noted above, while shareholder protection

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209. Henry W. Ballantine, *Ripley's Indictment of Corporate Skulduggery*, 17 CAL. L. REV. 35, 35 (1928).

210. E. A. Kincaid, *Book Review*, 14 VA. L. REV. 240, 241 (1927) (reviewing *Main Street and Wall Street*).

211. Avard L. Bishop, *Main Street and Wall Street*, 37 YALE L.J. 280, 280 (1927).

212. Harold Lasswell, *Book Review*, 33 AM. J. SOC. 658, 659 (1928) (reviewing *Main Street and Wall Street*).

213. Evans Clark, *Cleaning House in Wall Street*, N.Y. TIMES, Feb. 13, 1927, at BR1.

214. *Id.*

215. The one chapter in the book that seems most "scholarly" was drawn from Ripley's work as a railroad expert; it was a dry disquisition on railroad line consolidation between New York and Chicago. *See* RIPLEY, MAIN STREET, *supra* note 9, at 255–75.

has always been one element of corporation law, before the 1920s public discourse over corporations had focused on the corporation's relationship to groups outside the corporation—customers, competitors, the general public—summed up in the term "the trust problem." In the 1920s, the spotlight had begun to shift to the corporation's relationship to its shareholders.[216] Writing in the *Nation*, Stuart Chase took from *Main Street and Wall Street* that "the fat boys, no longer content with their ancient perquisite of milking the public, are now engaged in the dizzy and lofty job of squeezing their own shareholders dry!"[217] In the *American Journal of Sociology* the political scientist Harold Lasswell also highlighted the shift:

> [*Main Street and Wall Street*] is a study in the corporation problem, which must be distinguished from the trust problem, about which so much was formerly written and about which so little is heard today. The welkin used to ring with complaints that big business gouged the consumer, and that monopolistic prices were squeezing the life out of the innocent public. In this post-war world big business has somehow or other become a matter of course, and the controversies over it are conducted from the standpoint of the participant, not the outsider. It is the little investor and not the little buyer who squeals for help.[218]

Main Street and Wall Street was a popular and critical success. It drove home the modern problems of corporate governance—the separation of ownership and control, dispersed share ownership, and the dangers this posed for small shareholders—not only for a scholarly audience but also for a broad swath of American readers.

D. Followers

Ripley's accident and nervous breakdown took him off the public stage for several years, yet the ideas he had propounded continued to be heard. By the late 1920s it was almost a commonplace that ownership and control of corporations had separated, and that problems created by the separation were exacerbated by the dispersion of share ownership.[219]

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216. *See* MORTON KELLER, REGULATING A NEW ECONOMY 89 (1990) (explaining that in the 1920s the "relationship of a company's stockholder owners to its management now became a matter of substantial concern in a number of western nations"). Lawrence Mitchell has found a shift to investor protection in securities acts proposed at the dawn of the 1920s. *See* MITCHELL, SPECULATION ECONOMY, *supra* note 25, at 263–64.

217. Chase, *supra* note 70, at 264.

218. Lasswell, *supra* note 212, at 658.

219. *See, e.g.*, JOHN H. SEARS, THE NEW PLACE OF THE STOCKHOLDER 35–43 (1929) (reproducing comments by many observers in a chapter entitled "The Era of the Small Stockholder"). By 1928, recognition of the separation of ownership and control even appeared in a Supreme Court

In the years after *Main Street and Wall Street*, other authors would write popular works on the American corporation and the small shareholder, attempting to replicate Ripley's popular success. None enjoyed his readership, but their work demonstrates that Ripley's ideas continued in the main current of American economics and culture.[220]

In 1929, John H. Sears's *The New Place of the Stockholder* was described as another addition to the "long list of recent business books brought out in response to a popular demand, which seemed to grow along with public participation in the recent boom market."[221] Sears was an attorney with the Corporation Trust Company, but his book was aimed at a popular audience. It opened with a folksy "Prologue" in which two stereotyped Irishmen discussed the modern corporation.[222] In this exchange, readers are told that, while problems in corporations exist, they are rapidly learning to heed the voice of their shareholders, with one speaker telling his friend that, "Me son tells me that invistors is getting' informed of their rights" [*sic*].[223] Sears was not a complete apologist for the *status quo*; he acknowledged some problems caused by dispersed shareholding and advocated increased voluntary disclosure by public corporations, including an annual "lawyers' audit" of its activities. But the chief problem he identified was just that corporate management had not done enough to make small shareholders feel welcomed by the corporation. His overall approach can be summed up by his statement that, "I don't think Main Street has any right to criticize Wall Street in matters of corporate finance."[224]

Frankenstein, Incorporated took the opposite tack. It was written by a respected New York corporation lawyer and professor at Fordham Law School, Maurice Wormser.[225] As the title suggests, Wormser was a sharper critic of the corporation than Ripley, but his book echoes *Main Street and Wall Street*. The book locates many "glaring abuses" in the "transformation of small, closely held, personal business corpora-

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decision. *See* Louis K. Liggett Co. v. Baldridge, 278 U.S. 105, 114 (1928) (Holmes, J., dissenting) ("A standing criticism of the use of corporations in business is that it causes such business to be owned by people who do not know anything about it. Argument has not been supposed to be necessary in order to show that the divorce between the power of control and knowledge is an evil.").

220. As noted above, it also had its predecessors in Carver's *Economic Revolution* and Brooking's work. *See supra* text accompanying notes 99–100.

221. Robert L. Masson, *Book Review*, 5 THE ACCOUNTING REVIEW 324 (1930) (reviewing *The New Place of the Stockholder*).

222. *See* Sears, *supra* note 219, at xiii. This was Sears's attempt to emulate the ethnic humor of Peter Finley Dunne's popular "Mr. Dooley."

223. *Id.*

224. *Id.* at 6.

225. *See* I. MAURICE WORMSER, FRANKENSTEIN, INCORPORATED (F.B. Rothman 1981) (1931).

tions . . . into nationwide companies whose stock is widely held in many dispersed hands and which too often are characterized by loose, careless management and control."[226] Many of his targets were also the same; "chartermongering" states, nonvoting stock, and holding companies all came in for criticism. However, the solutions he proposes are more ambitious than Ripley's. In particular, Wormser advocated a uniform national corporation law. Fundamentally, though, Wormser followed Ripley in attacking the "tendency to corporate control by a small group[,] . . . [which] has given rise to a reign of corporate oligarchy. . . . The shareholders have become an empty cipher."[227]

Both *The New Place of the Stockholder* and *Frankenstein, Incorporated* recalled Ripley's work. Both focused on the separation of ownership and control and dispersed shareholding, and both spent time on the legal mechanisms by which management could overpower shareholders. But they, and indeed *Main Street and Wall Street*, would ultimately be eclipsed by another successor, Berle and Means's *The Modern Corporation and Private Property*.

IV. FROM *MAIN STREET* TO *THE MODERN CORPORATION*

After its publication in 1932, *The Modern Corporation and Private Property* would set the agenda for corporation law for the rest of the century, establishing the separation of ownership and control as the central issue of modern corporate governance. Its introduction, however, closed with an acknowledgment that it was not the first work to tackle these issues: "all students of these and allied problems, and we among them, owe a debt to Professor William Z. Ripley . . . who must be recognized as having pioneered this area."[228] *The Modern Corporation* was no knockoff of *Main Street and Wall Street*—indeed, as discussed below, its departures from the 1920s critiques were as significant as its resemblance to them—but the later book clearly followed in Ripley's wake.

The Modern Corporation owed its origins to Ripley. In 1927, with Ripley's support, Berle received a grant from the Laura Spellman Rockefeller Foundation to begin a study of the modern corporation that would eventually become *The Modern Corporation and Private Property*.[229] When the foundation insisted that Berle collaborate with an economist in the study, he chose an old friend, Gardiner Means. Means was by then a graduate student in economics at Columbia, but he began his graduate career at Harvard, where he had taken Ripley's course on the corporation

226. *Id.* at 87.
227. *Id.* at 159.
228. BERLE & MEANS, MODERN CORPORATION, *supra* note 1, at ix.
229. SCHWARZ, *supra* note 202, at 51–52.

and industry.[230] Ripley's support of Berle and of his project continued over the next few years. When Berle's casebook on Corporation Finance appeared in 1931, Ripley reviewed it for the *Columbia Law Review*, describing it not only as a landmark contribution to jurisprudence and business practice but also as a companion to *Main Street and Wall Street*.[231] In fact, another reviewer of the casebook described it as just "an able and brilliant footnote" to *Main Street and Wall Street*.[232]

The Modern Corporation and Private Property appeared in late 1932. The story of its publication and success is fairly well-known. The book was initially scheduled to be published by the Corporation Clearing House, a law publisher and subsidiary of the Corporation Trust Company, but shortly after publication, a client of the Trust Company read a review and demanded that the publisher pull the book.[233] The book was picked up by Macmillan, whose clout brought *The Modern Corporation* "much wider distribution and review."[234] Glowing reviews helped it along. In the *New York Herald Tribune*, the historian Charles Beard called the work perhaps the most "significant work of American statecraft" since the *Federalist Papers*,[235] while in the *New Republic* Stuart Chase called it "epoch-shattering."[236] It sold well and was hailed as a classic.[237]

In its outlines, the story of the work's success is no doubt correct. But that success is still puzzling. *The Modern Corporation and Private Property* is not an easy book. As more than one critic has noted, it is a work of parts that do not always hang together, with daunting statistical sections and long disquisitions on arcane areas of corporation law sharing space with portentous speculations about the evolution of American society and economics. "Except for corporate lawyers who happened to have a way with statistics, few readers could have understood all of the

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230. Frederic Lee, *The Modern Corporation and Gardiner Means's Critique of Neoclassical Economics*, 24 J. EC. ISSUES 673, 675 (1990).

231. William Z. Ripley, *Book Review*, 31 COLUM. L. REV. 1220, 1222 (1931) (reviewing BERLE, CASES AND MATERIALS IN THE LAW OF CORPORATE FINANCE (1930)).

232. Joseph V. Kline, *Book Review*, 42 HARV. L. REV. 714 (1929).

233. *See* BERLE, NAVIGATING THE RAPIDS, 1918–1971: FROM THE PAPERS OF ADOLF A. BERLE, 21–22 (Beatrice Bishop Berle & Travis Beal Jacobs eds. 1973) [hereinafter NAVIGATING THE RAPIDS].

234. McCraw, *Berle and Means*, *supra* note 34, at 581.

235. SCHWARZ, *supra* note 202, at 60 (*quoting* Charles A. Beard, *Who Owns–and Who Runs–the Corporations,* NEW YORK HERALD TRIBUNE, Feb. 19, 1933, at § 10 (Books), 1).

236. Stuart Chase, *Ticker Tapeworms*, THE NEW REPUBLIC, Jan. 23, 1933, at 299. Berle mentioned the Beard and Chase reviews as especially significant in his memoirs. BERLE, NAVIGATING THE RAPIDS, *supra* note 233, at 22.

237. Sales were good though perhaps not spectacular; over twenty years it sold 35,000 copies. SCHWARZ, *supra* note 202, at 61. But by early 1934 it was in its seventh printing. *See* BERLE & MEANS, MODERN CORPORATION, *supra* note 1, at Frontpiece.

book."[238] Macmillan's promotional reach alone cannot explain the book's success nor can its timing. *The Modern Corporation* was certainly not the only book published during the 1930s seeking to explain economic changes, and unlike some of its competitors, *The Modern Corporation* barely addressed the Great Depression.[239]

Why then was it so quickly and rapturously welcomed? Some credit must go to the work of Ripley and to other corporate critics of the 1920s. *The Modern Corporation and Private Property* had the welcome quality of being, at least at first glance, a new variation on themes popularized by the earlier authors. Reviewer after reviewer noted that *The Modern Corporation* fit into a familiar genre. A reviewer in the *Cornell Law Quarterly* called *The Modern Corporation* a "further, more detailed, and up-to-date study" of the problem examined by Ripley in *Main Street and Wall Street*, while also mentioning earlier works by Veblen and John Sears.[240] The *Yale Law Journal* described *The Modern Corporation* as the latest in a "series of books [that] in recent years has discerned the widening gap between the legal theory of the corporation and its use or abuse in business practice," a series that included Carver's *Present Economic Revolution* and Wormser's *Frankenstein Incorporated*, as well as *Main Street and Wall Street*.[241] Other reviewers also noted the similarity between Berle and Means's and Ripley's work, not the least being Ripley himself, who wrote a generous review of *The Modern Corporation* in the *New York Times* shortly before its publication. He stated that, while he had "brushed over . . . lightly" the issues raised by their work in *Main Street and Wall Street*, *The Modern Corporation* provided "a more substantial appraisal of . . . the whole business."[242]

What was old and what was new in *The Modern Corporation*? Many of its ideas and themes had been circulating for a decade, not only in academic circles but also, thanks chiefly to Ripley's work, in broader public discourse. Readers had learned in magazines and books that ownership had separated from control in giant corporations, that this was ac-

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238. McCraw, *Berle and Means*, *supra* note 34, at 581 (1990).

239. Bookstores in the early 1930s were crowded with books promising to diagnose and cure the nation's economic ills, with titles like *The Crisis of Capitalism in America*, *From Chaos to Control*, *The Road to Recovery*, and *America Faces the Future*. *See* Howard Odom, *A New Deal Popular Bookshelf*, 12 SOCIAL FORCES 601, 603 (1934).

240. Robert S. Stevens, *Book Review*, 18 CORNELL L.Q. 634, 634 (1933) (reviewing *The Modern Corporation and Private Property*). *See also* Paul L. Sayre, *Book Review*, 18 IOWA L. REV. 581, 584 (1932) (review of *The Modern Corporation and Private Property*) (stating that Berle and Means "carr[y] on the work of Professor Ripley").

241. Nathan Isaacs, *Book Review*, 42 YALE L.J. 463, 463 (1933) (reviewing *The Modern Corporation and Private Property*).

242. William Z. Ripley, *Our 'Corporate Revolution' and Its Perils*, N.Y. TIMES, July 24, 1932, at XX1.

celerated by the growth of small stockholders, and that these developments posed deep problems for the legitimacy and governance of the modern corporation. They were familiar as well with a corporate critique that focused not on the corporation's threat to consumers, workers, competitors, or the general public, but on the threat that untrammeled management posed shareholders.[243] They had even been introduced to the notion that shares were a new kind of property.[244] Were this the sum of *The Modern Corporation and Private Property*, Berle and Means would not have been saying much new; but, of course, it was not.

The Modern Corporation and Private Property was not only a product of the 1920s critiques; it was also a transcendence of them. Berle and Means began with the materials developed in the 1920s but expanded upon them and fit them within an overarching framework absent from the earlier works. *Main Street and Wall Street* had been a work of journalism and advocacy, more jeremiad than treatise. *The Modern Corporation* had its advocacy, but it was, in addition, a commanding work of scholarship, partnering daunting empirical and statistical data with a dense discussion of recent developments in corporation law. In both appearance and fact, *The Modern Corporation* had a weight that *Main Street and Wall Street* lacked. Where Ripley and his epigones had sketched out the growth of shareholding, Gardiner Means surveyed major firms to provide fine-grained and systematic information about small shareholdings at the nation's largest corporations.[245] Where Ripley pointed to nonvoting stock as a culprit for management's disconnect from shareholders and in his book drew on Berle's articles to sketch out other pernicious legal developments, Berle spent almost one hundred pages of *The Modern Corporation* providing a detailed synopsis of legal changes that had over decades disempowered shareholders.[246]

Berle and Means also developed concepts absent from the 1920s debates, perhaps a sign of the distance between 1927 and 1932. One of these was the idea of "control" as a separate category from ownership and management, an idea one careful critic has labeled a "profound and original insight, perhaps the salient long-term contribution" of *The Modern Corporation*.[247] For Berle and Means, control of a giant corporation was the ability to name its directors—and, therefore, to set its course—and it could be wielded by a majority shareholder, by minority share-

243. *See* BERLE & MEANS, MODERN CORPORATION, *supra* note 1, at 7–8.

244. By Ripley; *see supra* Part III.C.

245. BERLE & MEANS, MODERN CORPORATION, *supra* note 1, at 47–68.

246. *See id.* 127–220.

247. McCraw, *Berle and Means*, *supra* note 34, at 585; *see also* BERLE & MEANS, MODERN CORPORATION, *supra* note 1, at 69–72 and *passim*. This idea was new, though it does resonate with criticisms of "banker's control" of corporations in the 1910s and 1920s.

holders if ownership were sufficiently dispersed, or by management if there were no powerful minority shareholders.[248] Another innovation was a product of Berle's legal writings. Whereas during the 1920s Ripley, and indeed Berle, had looked to shareholders to develop their own mechanisms to tame corporate managers, perhaps with a nudge from the FTC, by the early 1930s, Berle had begun to demand judicial protection for shareholders. Hence, Berle insisted in *The Modern Corporation* that corporate managers' powers are "powers in trust," subject to judicial oversight in the same manner as are trustees' powers.[249] No longer was a shareholder's protection to be found only within the corporation; it was also to be found in the courtroom.

Berle and Means's most striking innovation, however, was to embed their story of the separation of ownership and control and dispersed ownership within a larger historical narrative. *The Modern Corporation and Private Property* came with its own teleology. Relying on Means's study of growing corporate concentration, they claimed to have discerned a process whereby the nation's largest corporations absorbed more and more of America's assets. This was not merely an observation that corporations were getting larger. Within the corporate system, Berle and Means asserted, there was a "centripetal attraction, which draws wealth together into aggregations of constantly increasing size."[250] Already, as the authors showed, the two hundred largest U.S. nonbank corporations controlled half the nation's corporate wealth, and if their growth continued, as the authors expected it would, those two hundred corporations would conduct seventy percent of all corporate activity by mid-century.[251]

The continued growth of the modern corporation and its accrual of economic and political power was for Berle and Means the central fact of modern life, rendering the corporation an organization with an impact comparable to the medieval church or the modern state.[252] They agreed with earlier writers who noted that the corporation had changed the nature of property, but they extrapolated from this the need not to reestab-

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248. Though, in most cases, management held control. *See* BERLE & MEANS, MODERN CORPORATION, *supra* note 1, at 128.

249. I take this point from William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins*, 34 J. Corp. L. 99, 107 (2008). Of course, this insistence made in the middle of *The Modern Corporation* sits uneasily with the conclusions reached by the book's final chapter.

250. BERLE & MEANS, MODERN CORPORATION, *supra* note 1, at 18. Others have disagreed with this assessment. *See, e.g.*, *Symposium, Corporations and Private Property*, 26 J.L. & ECON. 235.

251. BERLE & MEANS, MODERN CORPORATION, *supra* note 1, 32, 40.

252. *Id.* at 352. Berle and Means were careful, though, not simply to equate the three; they wrote of the corporation's "concentration of power in the economic field comparable to the concentration of religious power in the medieval church or of political power in the national state." *Id.*

lish shareholder power over the corporation but to rethink "the ends for which the modern corporation can or will be run."[253] The corporate critiques of the 1920s tended to close with a call to tame corporate management. *The Modern Corporation* closed with a more prophetic vision—one of the end of private enterprise, the abandonment of the profit motive, and the transformation of corporate control from a selfish clique 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."[254]

In sum, two elements decisively set *The Modern Corporation and Private Property* apart from its predecessors. First was the weight and thoroughness of its scholarly apparatus. Whereas earlier authors identified the separation of ownership and control and dispersed shareholding as creating deep problems of corporate governance, Berle and Means documented both phenomena in a way never attempted previously. Second, they bound up their conclusions in a grand narrative, one which portrayed the split of ownership and control and the spread of shareholding not as ordinary problems to be solved but as elements of a fundamental transformation of American society and of capitalism itself.[255]

CONCLUSION

Scholars and historians date the origins of modern corporate governance to the 1932 publication of Adolf A. Berle & Gardiner Means's *The Modern Corporation and Private Property*. This Article argues that conclusion is wrong. Well before the publication of *The Modern Corporation* the separation of ownership and control, dispersed shareholding and the problems attendant on them were topics of intellectual analysis and, more surprising, public debate. The intellectual roots of these ideas stretch back at least to the 1890s, and authors including Louis Brandeis, Walter Lippmann, and Thorsten Veblen grappled with them before World War I. In the 1920s, the separation of ownership and control and consequent questions of corporate governance became matters for public debate, thanks largely to the work of Harvard economist William Z. Ripley, who popularized them in a public crusade against corporate man-

253. *Id.* at 7–8.

254. *Id.* at 356. This echoes Lippmann's vision in *Drift and Mastery*, see *supra* note 47 and accompanying text.

255. Dalia Tsuk has reached a similar conclusion, writing that *The Modern Corporation and Private Property*'s novelty was not its "rigorous analysis of the separation of ownership from control . . . [but] its normative message." Dalia Tsuk, *From Pluralism to Individualism: Berle and Means and 20th Century American Legal Thought*, 30 LAW & SOC. INQUIRY 175, 186–87 (2005). Her work also emphasizes the influence American legal realists had on Berle and Means, a topic beyond the scope of this paper.

agement that culminated in his 1927 work *Main Street and Wall Street*. Due to Ripley and others, by the 1920s the orientation of corporation law was already shifting from concern over corporations' power over outsiders such as consumers and competitors, to worries about the distribution of power within the corporation, as shareholder protection became a central concern for corporate law and theory.

This conclusion does not denigrate from *The Modern Corporation and Private Property*'s real achievements; instead, it helps better explain them. *The Modern Corporation and Private Property* was quickly hailed as a classic due to the fact that it was both startling and familiar. Its grand prophecies about the transformation of capitalism were startling, yet those prophecies rested on conclusions about corporate evolution and governance that had been spread widely in the decades before its publication. It was because *The Modern Corporation* was a continuation of trends in American thought, the latest in a series of works on the separation of ownership and control, dispersed shareholding, and corporate governance, that its more radical conclusions won a hearing. Only with the passage of time and with the fading of memories of William Z. Ripley and other writers, did Berle and Means come to be seen as the discoverers of the separation of ownership and control and *The Modern Corporation* as the originating document of modern corporate governance.