Then and Now: Professor Berle and the Unpredictable Shareholder

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INTRODUCTION

If it is true that all roads once led to Rome, it is equally true that in corporate law, all paths radiate from Adolf A. Berle, Jr. Professor Berle’s scholarship was also riveting in his own era. His seminal work with economist Gardiner Means, The Modern Corporation and Private Property,1 was truly radical at the time of publication in 1932. Its interdisciplinary nature was ahead of the times,2 with one contemporaneous reviewer describing the book as “époque shattering.”3

It is difficult to overstate the influence of Professor Berle’s work. In 1984, more than fifty years after The Modern Corporation and Private Property’s publication, Roberta Romano claimed that it was the last major work of original scholarship in corporate law in terms of its power “to rechannel public discourse.”4 She also noted that the book invariably provided the starting point for all corporate law debate.5

Other scholarship by Professor Berle proved to be similarly influential. His famous debate with E. Merrick Dodd on the nature of directors’

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5. Id. It seems that little has changed in this regard since 1984. For example, see Herbert Hovenkamp, Neoclassicism and the Separation of Ownership and Control, 4 VA. L. & BUS. REV. 373 (2009).
duties provided the groundwork for most major theories of the corporation since the 1930s. For example, Richard Buxbaum, writing at the same time as Romano, proposed a modern version of Berle’s formulation of “enterprise law” to capture the complex relationship between the corporation, its stakeholders, and society.

Shareholders, and the relationship between shareholders and management, lay at the heart of Professor Berle’s scholarship. The goal of this Article is to compare the image of shareholders emerging from The Modern Corporation and Private Property and the Berle/Dodd debate with a range of contemporary visions of the shareholder that underpin some international regulatory responses to recent financial debacles, from Enron to the current global financial crisis. As the Article discusses, these recent developments in the era of financial crises have prompted a reevaluation of the traditional image of the shareholder—and the role of the shareholder in the modern corporation—that emerged in Professor Berle’s work.

I. IMAGE OF THE SHAREHOLDER IN PROFESSOR BERLE’S SCHOLARSHIP

A. The Modern Corporation and Private Property

According to the ancient Greek poet Archilochus, “The fox knows many things, but the hedgehog knows one big thing.” On its face, Berle and Means’s work, The Modern Corporation and Private Property, is a quintessential example of the latter category of legal thought. In highlighting the division between ownership and control, Berle and Means’ text presented one very large idea, which constituted a new prism through which future discourse would be refracted. Yet, over-familiarity with this famous message can obscure the more ambiguous, nuanced, and radical nature of the text as a whole. In The Modern Corporation and Private Property, and in Professor Berle’s later 1967 Preface to the

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6. The concept of “enterprise law” derives from Professor Berle’s 1947 article dealing with the problem of affiliated enterprises under corporate law. See Adolf A. Berle, Jr., The Theory of Enterprise Entity, 47 COLUM. L. REV. 343 (1947).


8. Id.

9. See, e.g., Dalia Tsuk, From Pluralism to Individualism: Berle and Means and 20th-Century American Legal Thought, 30 LAW & SOC. INQUIRY 179, 180 (2005) (noting that this message has obscured the fact that the issue of corporate power was a major theme in The Modern Corporation and Private Property).
text, the reader finds surprising riffs, comparing the board’s concentration of power with that of communist regimes and medieval churches; descriptions of corporate leaders as “dictators of capital”; philosophical discussions about social ethics; and astute predictions about the future of corporate law. Many of these comments provide a basis for contemporary corporate law theories and developments. For example, the statement that shareholders “have surrendered the right to have the corporation operated in their sole interest,” is arguably consonant with modern team production theory. Berle and Means also made the prophetic observation that “the American state is an investor in almost every substantial enterprise,” an increasingly important aspect of the current debate concerning government regulation of the financial industry sector. Finally, the issue of wealth distribution, which was of great concern to Professor Berle, is as relevant today as it was in the gilded era that launched the modern industrial economy.


11. See BERLE & MEANS, supra note 1, at 245.

12. Id. at 309.

13. See, e.g., id. at 306—07.

14. Id. at xxxv.

15. For example, Martin Lipton credits Professor Berle with predicting “the third stage of capitalism,” in which practical control of major corporations would be held by professional investors. See Martin Lipton, Takeover Bids in the Target’s Boardroom, 35 BUS. LAW. 101, 114 n.45 (1979).

16. BERLE & MEANS, supra note 1, at 312.

17. Professors Blair and Stout advocate a team production model of the modern corporation. They argue that teamwork problems associated with the various corporate stakeholders can be solved by rational individuals seeking to profit from team production adopting a “mediating hierarchy” governance mechanism. The “mediating hierarchy” approach involves team members renouncing certain property rights over the team’s joint output in favor of the corporation itself. The board of directors constitutes the apex of the internal corporate hierarchy and has the task of coordinating team members and allocating team assets. A team production model of the corporation views shareholders as having voluntarily ceded control of the corporation to the board of directors to attract the firm-specific investment of other stakeholder groups, such as executives, employees and creditors. See Margaret M. Blair & Lynn A. Stout, A Team Production Theory of Corporate Law, 85 VA. L. REV. 247, 250–51 (1999); Lynn Stout, The Shareholder as Ulysses: Some Empirical Evidence on Why Investors in Public Corporations Tolerate Board Governance, 152 U. PA. L. REV. 667 (2003).

18. BERLE & MEANS, supra note 1, at xxviii.

19. See, e.g., Lucian A. Bebchuk & Holger Spamann, Regulating Bankers’ Pay, 98 GEO. L.J. 247 (2010). In the U.K. context, the Walker Review also raises this issue, noting that the taxpayer has provided U.K. banks with nearly £1.3 trillion in funding. See SIR DAVID WALKER, WALKER REVIEW: A REVIEW OF CORPORATE GOVERNANCE IN UK BANKS AND OTHER FINANCIAL INDUSTRY ENTITIES ¶ 7.1 (2009).

20. See BERLE & MEANS, supra note 1, at xxxv-xxxvi.

The Modern Corporation and Private Property presented a new image of shareholders. This image was closely tied to a fundamental transformation in the nature of property itself: it was the corporate entity, not the shareholders, that became the “legal owner” of the collectivized capital and had complete decision-making power over it. Under this transformation, shareholders became essentially dispossessed owners or passive wealth-holders, increasingly dissociated from active management. This model of private property reflected a commercial world in which “[o]wners don’t manage, and managers don’t own.”

The Modern Corporation and Private Property contains many descriptions about what shareholders cannot do; specifically, shareholders cannot make demands of management with any expectation that those demands will be met. According to Berle and Means, “the individual interest of the shareholder is definitely made subservient to the will of a controlling group of managers.” Quoting Walther Rathenau, the industrialist who was instrumental in implementing co-determination in Germany, Berle and Means state that “[o]wnership has been depersonalized.”

For Berle and Means, shareholder participation in corporate governance was impossible in this transformed system. They viewed the right to vote as a matter of diminishing importance, and Professor Berle would later dismiss the shareholders’ meeting as a “kind of ancient, meaningless ritual like some of the ceremonies that go with the mace in the House of Lords.” In The Modern Corporation and Private Property, Berle and Means thus sought alternative legal techniques to protect shareholder interests and to control managerial power.

increased dramatically in the United States in recent decades and by 2007, rivalled that existing in 1928 at the pre-Depression stock market peak).

22. See, e.g., BERLE & MEANS, supra note 1, at xxxiv.
23. Id. at xxii.
24. Id. at 244.
25. Id.
26. Id. at 309.
28. BERLE & MEANS, supra note 1, at xxxii.
30. See, e.g., BERLE & MEANS, supra note 1, at 247.
The issue of managerial power and the protection of shareholder interests\(^{31}\) was also a central issue in Professor Berle’s debate with Professor Dodd.\(^{32}\) The trust concept was the main regulatory technique advocated in this debate.\(^{33}\) Professors Berle and Dodd reached quite different conclusions to the famous question of “for whom are corporate managers trustees?”\(^{34}\) They also disagreed on the issue of whether management was the problem in corporate law or the solution.\(^{35}\) While Professor Dodd’s approach granted directors broad discretion to consider other constituencies such as employees, creditors, and consumers, Professor Berle adopted a far narrower “minimalist version”\(^{36}\) of directors’ duties, under which shareholder interests were paramount. Professor Berle’s model was clearly designed as a constraint on managerial power.

Professor Berle’s “minimalist version”\(^{37}\) of directors’ duties was interesting both in its choice of the trust as the appropriate legal concept to capture the relationship between shareholders and directors, and also in its selection of the shareholder as \textit{cestui que trust}, or beneficiary.\(^{38}\) An alternative possible legal relationship might have been agency. Although some scholars have argued that agency and trust operate as functional

\(\text{\textsuperscript{31}}\) Id. at 310.


\(\text{\textsuperscript{33}}\) The trust concept also appears in similar terms in Chapter VII of Book II of \textit{The Modern Corporation and Private Property}.

\(\text{\textsuperscript{34}}\) Whereas Professor Berle identified the shareholder as \textit{cestui que trust}, Professor Dodd adopted a broader view of fiduciary powers that granted the directors discretion to consider the interests of a range of other constituencies associated with the corporation, such as employees, creditors, and consumers. The differences between Professors Berle and Dodd on the issue of to whom directors owe duties reflected a more fundamental disagreement between them on the nature of the corporation itself. See generally Jennifer Hill, \textit{At the Frontiers of Labour Law and Corporate Law: Enterprise Bargaining, Corporations and Employees}, 23 FED. L. REV. 204, 210–11 (1995). However, the divide between Berle and Dodd was less than clear-cut, compounded by the fact that both men later appeared to swap positions. See Joseph L. Weiner, \textit{The Berle–Dodd Dialogue on the Concept of the Corporation}, 64 COLUM. L. REV. 1458, 1463 (1964); Bratton & Wachter, supra note 32, at 103–04, 132–34.

\(\text{\textsuperscript{35}}\) Bratton & Wachter, supra note 32, at 127.

\(\text{\textsuperscript{36}}\) See Gunther Teubner, \textit{Corporate Fiduciary Duties and Their Beneficiaries: A Functional Approach to the Legal Institutionalization of Corporate Responsibility}, in \textsc{Corporate Governance and Directors’ Liabilities: Legal, Economic and Sociological Analyses on Corporate Social Responsibility} 149 (Klaus J. Hopt & Gunther Teubner eds., 1984).

\(\text{\textsuperscript{37}}\) Id.

equivalents in attempting to legitimate bureaucratic control,\textsuperscript{39} these legal relationships differ fundamentally in terms of the balance of power between the trustee and the \textit{cestui que trust} and between the principal and the agent. One of the features of true agency is that the agent is under the continuous control of the principal.\textsuperscript{40} Professor Berle’s selection of the trust relationship was therefore a revealing one. It again signalled that shareholders had become dispossessed, passive, and vulnerable under the new economic order, and it sought to control managerial powers via judicial enforcement of more stringent duties applicable to trustees.\textsuperscript{41}

\section*{II. REEVALUATING THE ROLE OF SHAREHOLDERS IN THE ERA OF FINANCIAL CRISSES}

A range of different conceptions of the shareholder’s role in the corporation have prevailed at different times in corporate law. In addition to Professor Berle’s image of shareholders as beneficiaries under a trust, other conceptions of the shareholder have included that of owner/principal; bystander;\textsuperscript{42} participant in a political entity;\textsuperscript{43} investor;\textsuperscript{44} and gatekeeper.\textsuperscript{45} The status of shareholder interests and the level of shareholder participatory rights vary significantly across these different paradigms. Whereas Professor Berle’s image of shareholders as beneficiaries under a trust elevated shareholder interests, it deflated shareholder participation. Recent corporate governance and financial developments have again prompted a reevaluation of the role of shareholders in the corporation, in terms of the status of their interests and level of participatory rights.


\textsuperscript{45} For a detailed discussion of all these visions of the shareholder, see generally Jennifer Hill, \textit{Visions and Revisions of the Shareholder}, 48 AM. J. COMP. L. 39 (2000).
In the 1990s, recognition of the implications of the rise of institutional investors opened the door to a range of new possible roles for shareholders. Growing institutional investor influence raised the possibility of greater shareholder participation in corporate governance and investor activism. Some commentators welcomed the ascent of institutional investors as heralding a new age in which such shareholders might become full-scale partners with management in corporate decision-making, thereby bridging the historical divide between ownership and control. Others, however, were skeptical about this prospect. These critics were concerned either that a shared power model contained embedded conflicts of interest or that such a model could be used to entrench management. It has recently been suggested that the modern role of the institutional investor is more akin to that of financial trader than to either owner or joint manager.

Another contemporary development that tested traditional thinking about shareholders involves the recent corporate and financial scandals. At the beginning of this decade, international corporate scandals, including the Enron and WorldCom scandals in the United States, raised two interesting shareholder-related questions. The first question concerned the role of shareholders in these scandals. Historically, theories of the corporation that la-


52. See, e.g., John Hendry et al., Owners or Traders? Conceptions of Institutional Investors and Their Relationship with Corporate Managers, 59 Hum. Rel. 1101 (2010).
mented the “bystander” status increasingly accorded to investors tended to view shareholders as not only passive and vulnerable, but also “innocent.” One notable exception to this trend was Justice Louis D. Brandeis, who once stated that “[t]here is no such thing . . . as an innocent stockholder.”

In the aftermath of Enron, WorldCom, and the global financial crisis, Justice Brandeis’s view has gained considerable traction. Although some reform initiatives proceeded on the basis that shareholders were victims of these corporate catastrophes, a growing number of scholars dispute this assessment. These scholars focus on the perceived short-term interests of many shareholders, viewing them not as victims, but as threats to the corporate enterprise. Such an image is also evident in


55. Justice Brandeis continued, saying that the shareholder “may be innocent in fact, but socially he cannot be held innocent. He accepts the benefits of a 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.” See THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS 75 (Osmond K. Fraenkel ed., 1934).

56. See, e.g., Lawrence Mitchell, Protect Industry from Predatory Speculators, FIN. TIMES, July 9, 2009, at 9.

57. Taxpayers who have funded recent government bailouts have also been perceived as victims of the global financial crisis. See, e.g., William W. Bratton & Michael L. Wachter, The Case Against Shareholder Empowerment, 158 U. PA. L. REV. 653 (2010); Sir David Walker, supra note 19, at 90.

58. See, e.g., Roberta S. Karmel, Should a Duty to the Corporation be Imposed on Institutional Shareholders?, 60 BUS. LAW. 1, 4–9 (2004) (arguing that institutional investors must take a share of the blame for defective financial analysis and aggressive pursuit of a shareholder primacy norm, which encouraged earnings manipulation and excessive executive pay); Vice Chancellor Leo E. Strine, Jr., Toward a True Corporate Republic: A Traditionalist Response to Bebchuk’s Solution for Improving Corporate America, 119 HARV. L. REV. 1759, 1764, 1772–73, 1776 (2006) (suggesting, from the perspective of the corporate law traditionalist, that quarter-to-quarter earnings of mutual and pension funds helped to fuel the pre-Enron environment and noting the failure of institutional investors to detect the “obvious rot” at firms like Enron). See also William W. Bratton, Enron and the Dark Side of Shareholder Value, 76 TUL. L. REV. 1275, 1284 (2002) (condemning the short-termism associated with a commercial norm of shareholder value maximization); Antoine Rebérioux, Shareholder Primacy and Managerial Accountability 2–3, 18–24 (Comparative Research in Law and Political Economy Working Paper No. 1/2007, 2007), available at http://ssrn.com/abstract=961290 (suggesting that a shareholder primacy norm, rather than gatekeeper failure, was the main driving force in the corporate scandals); Patrick Bolton, José A. Scheinkman & Wei Xiong, Executive Compensation and Short-Termist Behavior in Speculative Markets, 73 REV. ECON. STUD. 577 (2006) (positing a reinterpretation of compensation practices in a bubble market). Cf. George W. Dent, Jr., The Essential Unity of Shareholders and the Myth of Investor Short-Termism, 35 DEL. J. CORP. L. 97, 100 (2010) (arguing that the charge that most investors are short-term oriented is a myth).

59. See generally Vice Chancellor Strine, supra note 58, at 1764.
the cross-border context, where protectionism is on the rise. These developments constitute an interesting twist on the traditional focus of corporate law. Although, since the time of Professor Berle, a key goal of corporate law has been the protection of shareholders, a pivotal theme in much contemporary U.S. corporate law scholarship is the need to protect the corporation from its shareholders and also protect shareholders from fellow shareholders with divergent interests. Paralleling Professor Berle’s proposal to rein in managerial power by subjecting directors to trustee duties, recently some scholars have suggested that corporate law

60. For example, in January 2008, Takao Kitabata, Vice-Minister of Japan’s Ministry of Economy, Trade, and Industry described shareholders as “fickle and irresponsible,” adding that “[t]hey only take on a limited responsibility, but they greedily demand high dividend payments.” The comments were made in the context of pressure exerted by an activist U.S. investment fund, Steel Partners, against management of the Japanese beer company, Sapporo. See Samurai v. Shareholders—Activist Investors in Japan, THE ECONOMIST, Feb. 16, 2008, at 386. In Germany, too, hedge funds and foreign investors were described as “swarms of locusts” following the 2005 ouster of Werner G. Seifert from his position as chief executive of the German Stock Exchange. See Peter Gumbel, The Day of the Locusts, TIME, May 15, 2005; Mark Lander & Heather Timmons, Poison Ink Aimed at ‘Locusts’, N.Y. TIMES, Mar. 31, 2006, at C8.

61. Such a paradigm, for example, underlies and explains the famous anti-managerialist lament by Professor Cary that amendments to Delaware law had “watered the rights of shareholders vis-à-vis management down to a thin gruel.” See William L. Cary, Federalism and Corporate Law: Reflections Upon Delaware, 83 YALE L. J. 663, 666 (1974). The subsequent critique of the anti-managerialist position by contractarian scholars did not deny the importance of shareholder protection in corporate law, but instead challenged the view that corporate law provided inadequate protection. See, e.g., Gregory A. Mark, Some Observations on Writing the Legal History of the Corporation in the Age of Theory, in PROGRESSIVE CORPORATE LAW 67, 71 (Lawrence E. Mitchell ed., 1996) (stating that, according to contractarians, “[t]he putative abuse of shareholders . . . is largely mythical”). For further discussion of this critique, see generally Jennifer G. Hill, Visions and Revisions of the Shareholder, 48 AM. J. COMP. L. 39, 57–59 (2000).


should impose fiduciary duties on activist shareholders in order to promote greater responsibility and accountability.

Another question to emerge from recent financial scandals and crises is whether there was a causal connection between the lack of shareholder power and these events. Some U.S. scholars have vehemently rejected the existence of any such link. Professor Stout states simply that the “[l]ack of shareholder power did not contribute to Enron’s fall.” Professor Bainbridge has also denied that the division between ownership and control caused the global financial crisis. These and other scholars assert that reform efforts to empower shareholders will not prevent future crises and may even provoke them.

III. SHAREHOLDER PROTECTION AND SHAREHOLDER PARTICIPATION UNDER RECENT REGULATORY RESPONSES TO FINANCIAL CRISSES: SOME COMPARATIVE PERSPECTIVES

Enron, WorldCom, and other contemporaneous international corporate scandals elicited a range of reforms in common law jurisdictions including the United States, the United Kingdom, and Australia. Although these reforms tackled similar problems of corporate legitimacy, they varied in terms of focus and structure, often tracking the contours of national issues and political pressures. Despite the view expressed by U.S. scholars that a lack of shareholder power was not a factor in the scandals, many reforms and reform proposals appear to assume the contrary. The reform responses across several common law jurisdictions suggest interesting variations in attitudes to shareholders and in regulatory approach.


While similar motivations underpinned these various reforms, their long-term effects are unlikely to coincide because of inevitable differences in compliance and enforcement intensity. Regulation is a dynamic process that includes the strategic responses of regulated parties themselves and political reaction. Thus, regulatory stringency of the kind exhibited by the Sarbanes-Oxley Act of 2002 can itself engender reaction from the business community. The 2006 Committee on Capital Markets Regulation (“Paulson Committee”), which stressed the need to protect shareholders from excessive regulation, exemplifies this kind of regulatory backlash. It has, nonetheless, now met with counter-backlash. Against the backdrop of the global credit crisis and scandals like the Madoff affair, a deregulatory reform agenda no longer appears politically feasible. The era of calls for a “kinder, gentler” SEC is


73. For discussion of the influence of politics on rule-making and allocation of power in corporate law, see, for example, David Charny, The Politics of Corporate Convergence, in CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE 296 (Jeffrey N. Gordon & Mark J. Roe eds., 2004); Tracy A. Thompson & Gerald F. Davis, The Politics of Corporate Control and the Future of Shareholder Activism in the United States, 5 CORP. GOV. 152 (1997).


over, for some time at least. 79 As Professor Coffee stated, if the credit crisis demonstrates anything, it is “that there are also costs to under-regulation.” 80 Shareholder protection was a common goal in the various post-Enron regulatory reforms in common law jurisdictions. Nonetheless, the reforms differed in the way in which they sought to achieve this end, with a dichotomy emerging between strengthening shareholder participatory rights and merely protecting shareholder interests.

In the United States, protection of shareholder interests was a clear priority and part of the legislative intent of the post-Enron reforms; enhancement of shareholder participation and power was not. 81 The preamble to the Sarbanes–Oxley Act of 2002 confirms this focus. 82 Nonetheless, at the time of the reforms, the Sarbanes–Oxley Act did not grant shareholders greater participatory rights in relation to matters such as the director election process, which some commentators saw as a striking omission. 83 Post-Enron legislation in the United States also paid relatively little attention to the issue of executive compensation. 84

79. The International Corporate Governance Network (ICGN), for example, has blamed the current global financial crisis on the failure of regulators and said that stricter regulation is inevitable. See Kate Burgess, Global Crisis? Blame the Regulators, Says Investors Group, FIN. TIMES, Nov. 10, 2008, at 18.

80. In discussing the costs of under-regulation, Professor Coffee continues: “Those costs can come all of a sudden and without warning. We need to find the proper balance between over-regulation and under-regulation (both of which are dangerous), and to identify the particular problems that most require a focussed assessment.” John C. Coffee, Jr., Financial Crises 101: What Can We Learn from Scandals and Meltdowns—from Enron to Subprime?, in THE CREDIT CRUNCH AND THE LAW 37 (R.P. Austin ed., 2008).


82. The preamble to the Sarbanes–Oxley Act of 2002 states that it is an Act “[t]o protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes.” The Act does not, however, provide any greater opportunities for shareholder involvement in corporate governance. See generally Roberta S. Karmel, Should a Duty to the Corporation Be Imposed on Institutional Shareholders?, 60 BUS. LAW. 1, 2 (2004) (arguing that the Sarbanes–Oxley Act reinforces shareholder primacy norms in corporate law). Cf. Donald C. Langevoort, The Social Construction of Sarbanes–Oxley, 105 MICH. L. REV. 1817, 1828ff (2007) (arguing that although the Sarbanes–Oxley Act is, by its terms, about shareholder protection, the long-term effect of the Act may be less about protection of investor interests than about public accountability).


It is worth noting that, in spite of the focus on shareholder interests under the dominant U.S. corporate law paradigm, historically, U.K. and Australian shareholders were accorded far stronger powers than U.S. shareholders in a range of corporate governance matters, such as amending the corporate constitution, convening meetings, and the appointment and removal of directors. Indeed, it has been said that U.S. corporate and securities law is “highly unusual in the extent to which it disenfranchises shareholders from both explicit and implicit influence.” In the area of takeovers, too, scholars have sought to explain significant differences in the allocation of power between shareholders and directors under U.K. and U.S. takeover regimes.

In the light of these historical legal differences regarding shareholder rights, the post-Enron reforms in other common law jurisdictions presented an interesting contrast to the U.S. approach under Sarbanes–Oxley. Further strengthening of shareholder power was an explicit theme in the U.K. and Australian reforms, suggesting that legislators viewed increased shareholder participation in corporate governance as a valuable check on the abuse of managerial power and a potential antidote to future corporate collapses.

Additionally, non-common law jurisdictions have also enacted reforms that tend to increase shareholder participation rather than merely provide increased shareholder protection. For example, the EU Directive on Shareholder Rights (“EU Directive”) sought to ensure more eff-

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fective institutional investor participation and voting in European listed companies, many of which operate with blockholder ownership structures and have a civil law regulatory tradition.90

The Australian post-Enron reforms appeared to rest upon the implicit assumptions that shareholders were victims of the corporate scandals, rather than collaborators, and that increased shareholder power would enhance managerial accountability. Australian policy documents relating to the reforms91 contained numerous references to the desirability of improving shareholder participation,92 increasing shareholder activism,93 and enabling shareholders to “influence the direction of the companies in which they invest.”94

Strong rhetoric on the need to encourage greater shareholder democracy and participation in response to recent financial scandals was also apparent in the United Kingdom.95 Shareholder engagement was an


92. See, e.g., Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003, Explanatory Memorandum, ¶¶ 4.271–4.280, Shareholder Participation and Information. According to the Explanatory Memorandum:

Shareholders can and should play a key role in promoting good corporate governance practices by influencing the management of corporations through participating at general meetings. . . . It is sought to increase the practical opportunities for shareholders to assess and influence the performance of the board by effectively participating in general meetings of corporations.

Id. at ¶¶ 4.271–4.272.

93. See, e.g., id. at ¶ 1.4 (stating that “[t]he underlying objective of the reforms is to improve the operation of the market by promoting transparency, accountability and shareholder activism”). See also id. at ¶ 4.71.

94. Id. at ¶ 4.174. The assumption that shareholder engagement enhances corporate performance and accountability also underlies more recent Australian reform proposals, such as a 2008 report by the Parliamentary Joint Committee on Corporations and Financial Services (“Parliamentary Joint Committee”). See PARLIAMENTARY JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES, BETTER SHAREHOLDERS—BETTER COMPANY: SHAREHOLDER ENGAGEMENT AND PARTICIPATION IN AUSTRALIA (2008).

important subtext in the 2003 Higgs Committee Report on which the U.K. Combined Code on Corporate Governance was based. The recommendations of the Higgs Committee were designed to strengthen the position of independent directors and foster a strong relationship and active dialogue between those directors and major shareholders. The theme of shareholder engagement has gained momentum in the United Kingdom during the global financial crisis. In 2009, the Walker Review, a prominent U.K. report on the role of banks and financial institutions in the current crisis, advocated greater institutional investor activism as a protection against financial market failure. The review recommended adoption of a Stewardship Code to increase institutional investor engagement in corporate governance, with the goal of improving long-term corporate profitability and reducing the risk of catastrophic failure due to bad strategic decision-making. It also urged institutional investors to adopt guidelines outlining when and how they will escalate activist conduct.

It was in the area of remuneration that the most contentious U.K. and Australian post-Enron reforms for increased shareholder participation were introduced. Both jurisdictions passed reforms, in 2002 and 2004 respectively, requiring an annual nonbinding shareholder resolution approving the directors’ remuneration report. Unlike the United

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100. Id. at 153.
101. See Principle 4, Stewardship Code (U.K.). Id. at 156.
States, which has a history of precatory shareholder voting, there was no precedent for a nonbinding shareholder vote in these other common law jurisdictions. In Europe too, the 2004 Recommendation on directors’ pay has provided for a shareholder vote on remuneration policy.

The value and efficiency of the non-binding shareholder vote has been questioned, partly on the basis that it does not appear to have resulted in reduced director pay levels in the United Kingdom. Nonetheless, there is some evidence that the vote has had a significant impact in the United Kingdom and in Australia. Early empirical research suggests that it has been effective as an outrage constraint on pay packages with structures that deviate from best practice principles. A study by Ferri and Maber indicated an increased degree of sensitivity of executive compensation (particularly cash compensation) to negative operating performance during the period since the non-binding shareholder vote was introduced in the U.K., which the authors view as consistent with the U.K. government’s policy against “rewards for failure.”

Although significant shareholder protest votes in relation to the remuneration report were initially quite frequent in Australia, they were far rarer in the United Kingdom. However, in 2009, there were large protest votes against the remuneration reports at a number of major U.K.


companies, including Bellway,112 BP,113 and Pearson,114 the parent company of the Financial Times. At the 2009 annual shareholders meeting of the Royal Bank of Scotland, an unprecedented 90.42% of votes were cast against the directors’ remuneration report.115

Shareholder protest votes are also increasing in Australia.116 According to a 2009 report on executive remuneration by the Australian Government Productivity Commission (“Productivity Commission”), approximately 5% of the top 200 companies listed on the Australian Securities Exchange received consecutive protest votes of 25% or higher in 2008 and 2009.117 The Productivity Commission has recommended further strengthening shareholder power in circumstances where the board is non-responsive to a significant negative shareholder vote. The Productivity Commission report recommends that this be achieved by linking the advisory vote on executive pay to the unconditional right of shareholders to remove public company directors from office under Australian law.118 The Productivity Commission report proposes that, where a company’s remuneration report receives a “no” vote of 25% or higher at consecutive annual shareholder meetings, a resolution should be put to shareholders stating that the directors who signed the remuneration report should be required to stand for re-election.119 In addition, the Productivity Commission report advocates legislative changes to prohibit directors and executives identified as key management personnel from participating in the nonbinding vote.120

112. Bellway shareholders voted against the directors’ Remuneration Report after it was announced that the board of directors had agreed to award bonuses of more than £630,000 to senior executives, in spite of a 28% drop in share value and a 50% fall in sales. The bonuses constituted 55% of the executives’ salaries. See Sharelene Goff, Bellway Pay-Outs Prompt Concern, FIN. TIMES, Jan. 5, 2009, at 19; Robert Cookson & John O’Doherty, Bellway Investors’ Vote Goes Against Bonuses, FIN. TIMES, Jan. 17, 2009, at 13.
113. See William MacNamara & Kate Mackenzie, Protest Vote Over BP Pay Packages, FIN. TIMES, Apr. 17, 2009, at 20.
117. Id. at 296.
118. See Corporations Act 2001 (Cth), § 203D.
119. If the resolution was carried by more than 50% of eligible votes cast, the board would then be required to give notice of an extraordinary general meeting to be held within ninety days for the purposes of re-electing the directors. See Australian Government Productivity Commission, Productivity Commission Inquiry Report No. 49, Executive Remuneration in Australia, Dec. 19, 2009, Recommendation 15, XL.
120. Id. at Recommendation 4, XXXVII.
It is noteworthy that, although shareholder participation has recently been enhanced under U.K. and Australian corporate law, the preeminence of shareholder interests has been subject to challenge. Section 172 of the U.K. Companies Act of 2006 introduced a new, codified duty requiring U.K. directors to “promote the success of the company” and to take into account the interests of a range of stakeholders in making that determination. Section 172 is based upon a policy of “enlightened self-interest.” In Australia, two recent government reports have considered the issues of corporate social responsibility and stakeholder interests. A major focus of these reports was the scope of directors’ duties, and the extent to which current Australian law permits directors to consider the interests of stakeholders or the broader community. Finally, a number of U.K. and Australian reports concerning aspects of the global financial crisis have focused on the need to re-evaluate the concept of interest alignment in relation to executive pay to include the interests of a range of stakeholders broader than only shareholders.

In the United States, the global financial crisis seems to have pushed U.S. lawmakers and regulators away from a strategy aimed at protection of shareholder interests and toward one concerned with shareholder empowerment as a way to restore market trust. In spite of concerns voiced by many U.S. commentators, a broad law reform agenda is now underway in relation to shareholder power. Two of the most


122. Id.


126. Bratton & Wachter, supra note 57.


128. See generally Jennifer G. Hill, The Rising Tension Between Shareholder and Director Power in the Common Law World, CORP. GOV. (forthcoming 2010); Bratton & Wachter, supra note 57.
obvious examples of the attitudinal shift in terms of shareholder participation rights are the proposed SEC Rule 14a-11,129 which would grant shareholders access to companies’ proxy materials to nominate directors, and the non-binding shareholder vote on executive pay, which is included in several recent U.S. reforms and reform proposals.130

These U.S. reform proposals have become the subject of fierce debate. The shareholder election issue has been described as a “knock-down, drag out political brawl.”131 This comment evokes the view of Berle and Dodd that a state of constant warfare exists between the holders of power and their subjects, including in the modern corporation.132

IV. CONCLUSION

In the early part of the twentieth century, Professor Berle mapped out many major issues in contemporary corporate law, including the role of the shareholder, the balance of power between shareholders and directors, and regulatory techniques to constrain managerial power. As this Article shows, the role of shareholders in recent corporate law has become more fluid, more unpredictable, and more controversial than in Professor Berle’s day. Nonetheless, the tracks leading from Professor Berle to contemporary developments in corporate law are still clearly visible, and the issues that first captured his interest and imagination continue to have great resonance today.


130. “Say on pay” has, indeed, become emblematic of public backlash against excessive pay during the global financial crisis. Originally restricted to financial institutions receiving federal bailout funding, under, for example, the American Recovery and Reinvestment Act of 2009, there have been a number of subsequent proposals for broader application of “say on pay” principles. A “say on pay” provision appeared, for example in the Shareholder Bill of Rights and in the proposed Corporate and Financial Institution Compensation Fairness Act of 2009. Much of the content of the Shareholder Bill of Rights has now been incorporated into a larger draft bill on financial services regulation, the Restoring American Financial Stability Act of 2009.
