Fiduciaries, Federalization, and Finance Capitalism: Berle's Ambiguous Legacy and the Collapse of Countervailing Power

John W. Cioffi†

I. INTRODUCTION: BERLE AS ADOPTED FOREFATHER OF SHAREHOLDER PRIMACY AND QUASI-CORPORATIST

Pathbreaking and influential intellectual works are often reinterpreted and appropriated in support of propositions and policy positions inconsistent or directly at odds with their authors' views. Adolf Berle's seminal critiques of managerial power and analysis of the separation of ownership and control provide an especially important and illuminating case in point.[1] Berle's work, both his celebrated collaboration with Gardiner Means and his individual writings, helped lay the modern intellectual foundations for shareholder capitalism and shareholder-centric theories of corporate governance, the normative ideal of shareholder primacy, and the ideology of shareholder value espoused by later law and economics scholars, lawyers and jurists, policymakers, and managers themselves.[2] Scholars in law, economics, business, and political science have

---

† Associate Professor of Political Science, University of California, Riverside. Ph.D., University of California, Berkeley (2001); J.D., Rutgers School of Law, Newark (1990). Prepared for the Second Annual Symposium, Adolf A. Berle, Jr. Center on Corporations, Law & Society, Seattle University Law School, January 21–22, 2011. I would like to thank the participants in the Berle Center's Second Annual Symposium for comments on an earlier draft of this Article. I am especially indebted to Charles O'Kelley for organizing the Symposium and to Bill Bratton and Fenner Stewart, whose comments, conversation, and earlier papers on the evolution and historical context of Adolf Berle's thinking were particularly helpful in the development of my own thinking. Responsibility for any errors, omissions, or lapses in judgment remain my own.

1. *See* ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932); ADOLF A. BERLE, JR., POWER WITHOUT PROPERTY: A NEW DEVELOPMENT IN THE AMERICAN POLITICAL ECONOMY (1959) [hereinafter BERLE, POWER WITHOUT PROPERTY]; ADOLF A. BERLE, JR., STUDIES IN THE LAW OF CORPORATE FINANCE (1928); ADOLF A. BERLE, JR., THE 20TH CENTURY CAPITALIST REVOLUTION (1954); A.A. Berle, Jr., *Corporate Powers As Powers In Trust*, 44 HARV. L. REV. 1049 (1931); A.A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932); Adolf A. Berle, *Modern Functions of the Corporate System*, 62 COLUM. L. REV. 433 (1962).

2. This reinterpretation of the central problem posed by Berle and Means as a principal–agent problem of managerial incentives and the costs to economic efficiency, rather than a political and

all adopted and refined the operationalization of Berle's stylized conception of dispersed shareholding as a proxy metric, and even a policy goal or teleological ideal, for the relative maturation and economic efficiency of national financial systems, corporate organizations, and legal systems.

The neoliberal appropriation of Berle's incisive critiques of corporate and managerial power and their reinterpretation through the lens of neoclassical economics have inverted his original intentions, and the political and economic concerns underlying these original intentions are now more pertinent than at any time since they were originally written.[3] A great critic of the prevailing form of finance capitalism of his day has been appropriated to justify the ascendance of the new form of finance capitalism of our own. The influential architect of the New Deal and the American administrative and regulatory state has been domesticated within the confines of contemporary neoliberalism and neoclassical economics to serve as a posthumous champion of limiting state power over the governance of the corporation. The deep structural flaws that Berle found in the American public corporation have given way to a preoccupation with promoting the diffusion of shareholding as a policy goal and indicator of efficient, well-developed capital markets.

---

social problem of power and control created by the large public corporation, began shortly after the book was published in 1932, though it initially tended to take the form of a defense of managerialism. *See* NORMAN S. BUCHANAN, THE ECONOMICS OF CORPORATE ENTERPRISE 446–48 (1940); Robert A. Gordon, *Financial Control of Large-Scale Enterprise*, 29 AM. ECON. REV. 85 supp. (1939); Robert A. Gordon, *Ownership and Compensation as Incentives to Corporation Executives*, 54 Q. J. ECON. 455 (1940). Appropriation of Berle and Means as support for the agency theories of the emerging neoclassical law and economics began in earnest by the 1960s. *See*, *e.g.*, Eugene Rostow, *To Whom and for What Ends is Corporate Management Responsible*, *in* THE CORPORATION IN MODERN SOCIETY 46, 67 (Edward S. Mason ed., 1959); Henry G. Manne, *The "Higher Criticism" of the Modern Corporation*, 62 COLUM. L. REV. 399 (1962); *see also* ALLEN KAUFMAN, LAWRENCE ZACHARIAS & MARVIN KARSON, MANAGERS VS. OWNERS: THE STRUGGLE FOR CORPORATE CONTROL IN AMERICAN DEMOCRACY (1995) (tracing the development of the agency and shareholder primacy position). By the 1980s, Berle and Means's analysis of the separation of ownership from control was foundational in theoretical justifications of shareholder primacy. *See*, *e.g.*, Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288, 289 (1980); Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301, 308 (1983); Michael Jensen & William Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 309 (1976); *cf.* George J. Stigler & Claire Friedland, *The Literature of Economics: The Case of Berle and Means*, 26 J.L. & ECON. 237, 240 (1983) (criticizing Berle and Means for failing to focus systematically on managerial incentives and agency costs within the firm).

3. Likewise, an earlier generation of scholars invoked Berle and Means's analysis of managerial power as supporting their contentions that the postwar American political economy had resolved the problem of concentrated power in industrial capitalism *by means* of the separation of ownership and control—precisely reversing the argument of the book. *See* Mark S. Mizruchi & Daniel Hirschman, The Modern Corporation *as Social Construction*, 33 SEATTLE U. L. REV. 1065, 1074–79 (2010).

To be fair, Berle's attachment to the trust theory of the corporate firm and emphasis on fiduciary duties as his favored legal mechanism for shareholder protection provided intellectual ammunition for later advocates of shareholder primacy as a legal norm and policy goal. Likewise, the separation of ownership and control was, and is, well-suited to serve as the template for the analysis of principal–agent problems and agency costs, which are the central problems of corporate governance and securities regulation. Berle's empirical and theoretical work did champion the shareholder cause, but it did so for ends far broader and deeper than mere enhancements of shareholder returns or even economic efficiency.

Like many of his contemporaries, Berle's fundamental preoccupations were not economic efficiency, corporate profitability, or even corporate governance, but rather the allocation and accountability of private power and its legitimation by forms of economic governance that constrained and enabled private interests to serve the public interest.[4] The shareholder and the corporate entity were embedded in a set of broader societal, legal, and political relationships and arrangements threatened by the immense power unleashed by industrialization. Ultimately, in Berle's own thinking and in post-New Deal practice, the emergence and development of the administrative state loomed larger and played a more important role than the legal principles and structures of corporate governance. Future generations are free to refashion and use theories and analytical frameworks in new ways to address new problems, at least when their content and implications are not misstated. But the double irony in Berle's case is that the problems of governance, power, and accountability that so engaged him never disappeared. In fact, the rise of contemporary finance capitalism, legitimated in part by theories of shareholder primacy he helped to inspire, has revived these problems to an astonishing degree.

Berle's prominent intellectual and political role as an important inspiration and architect of the New Deal policy agenda and its legal infrastructure, and later as a prominent defender of the post-New Deal political economic order, further contribute to the ambiguity of his legacy. Berle and Means's foundational text on the modern large corporation, *The Modern Corporation and Private Property* (*The Modern Corporation*), was hailed as the "Economic Bible" of the New Deal,[5] and that transformative period of American history has generated fierce controversy over its essential character as an approach to economic governance

4. *Cf. id.* (arguing that the concentration of power fostered by the separation of ownership and control was a central concern of Berle and Means).

5. PIERRE-YVES GOMEZ & HARRY KORINE, ENTREPRENEURS AND DEMOCRACY: A POLITICAL THEORY OF CORPORATE GOVERNANCE 237 (2008) (quoting *Time* magazine, April 24, 1933).

and the merits of its contributions to the establishment of the modern American state. Berle was a member of the Roosevelt "brain trust" and one of the most influential architects and defenders of the New Deal from its earliest—and most explicitly corporatist—incarnation.[6] He was a forceful proponent of the early New Deal's ultimately ill-fated experiment in corporatism, the National Industrial Recovery Administration (NIRA), leading many commentators to identify Berle's thinking as fundamentally and enduringly corporatist. Consequently, Berle has been characterized as advocating, or at least accepting, the displacement of the individualistic and competitive market by large, hierarchical, and technocratically managed organizations.[7] Yet Berle did not play a significant role in the NIRA's design, played no role in its administration, and was critical of its operation in practice.[8] His thinking following the failure of the NIRA and National Recovery Administration (NRA) tended to endorse, though with considerable ambivalence, the emergence of a robust regulatory state, which would prove to be the most durable legacy of the New Deal and would largely define the paradigm of post-New Deal economic and corporate governance.[9]

This Article engages these problematic interpretations, as well as their implications for understanding Berle's legacy and its relevance to some of the most critically important contemporary dilemmas of American law, policy, and politics. Yet his great contributions to the theory and empirical analysis of corporate governance, corporate finance, and the dangers of unaccountable managerial power just as surely—and far more enduringly—informed the development of securities regulation during the New Deal and postwar eras, as well as its emphasis on strengthening shareholder rights, protecting investor interests, and promoting the development of financial markets. Berle's work and legacy are as riddled

6. *See* DONALD R. BRAND, CORPORATISM AND THE RULE OF LAW: A STUDY OF THE NATIONAL RECOVERY ADMINISTRATION 74–79 (1988); JORDAN A. SCHWARZ, LIBERAL: ADOLF A. BERLE AND THE VISION OF AN AMERICAN ERA 75–79, 83–85 (1987).

7. *See* William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and* The Modern Corporation, 34 J. CORP. L. 99, 115 (2008); Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 936 (1984); *see also* SCHWARZ, *supra* note 6, at 83–85 (identifying Berle as one of the leading proponents of economic "planning," "collectivism," and an American version of state capitalism, but not describing his vision of the New Deal as corporatist). Bratton and Wachter are careful to qualify their identification of Berle as a corporatist, and readily concede that the New Deal and the postwar political economy erected on its legal and institutional foundations was ultimately not a form of corporatism. But the concession highlights the problematic nature of the characterization and terminological usage.

8. *See* Bratton & Wachter, *supra* note 7; William W. Bratton & Michael L. Wachter, *Tracking Berle's Footsteps: The Trail of* The Modern Corporation*'s Last Chapter*, 33 SEATTLE U. L. REV. 849, 855–56; SCHWARZ, *supra* note 6, at 88.

9. *Cf.* Bratton & Wachter, *supra* note 7, at 136 ("[T]he NIRA had failed, but a regulatory state had evolved to replace it.").

with internal tensions and contradictions as the American legal and political economic regimes that he so deeply influenced.

Characterizing the New Deal, let alone the political economic and regulatory regime that emerged as its lasting legacy, as corporatist is imprecise, prone to misunderstanding, and largely erroneous. The misuse of corporatism as a term not only misconceives neocorporatism as a theory of governance and political economic ordering, but also obscures its core institutional and juridical attributes along with the variety of its historical and existing forms across much of the industrialized world. Still worse, the increasingly common description of contemporary economic and regulatory policy as corporatist is polemical, rather than analytical.[10] The imprecise use of the term corporatist does not merely distort our understanding of Berle and his times, it also, and more importantly, distracts our attention from the salient, enduring features of the American political economy and a regulatory and administrative state that appears increasingly inadequate for addressing the causes and consequences of our recent catastrophic financial crisis. The use of the term corporatist to characterize the destructive deregulatory policies and regulatory failures that contributed to the financialization of the economy, the excessive power of the financial sector, and ultimately, the global financial crisis and Great Recession is perverse.[11] These policies and the catastrophic crises they unleashed reflected the growing hegemony of neoliberal ideology empowered by financial and other business elites pursuing "free market" policy agendas. Likewise, characterizing as corporatist the federal government's controversial and, in many respects, deeply flawed and unpo-

10. *Cf.* Robert Teitelbaum, *An Excursion with Adolf Berle*, DEAL (Jan. 3, 2011), http://www.thedeal.com/thedealeconomy/an-excursion-with-adolph-berle.php (Corporatism has a "close 'association' with the fascist politics of the '20s and '30s in Europe, much as collectivism is redolent of the Soviet Union. . . . Like 'bureaucracy,' 'corporatism' has a clearly negative edge.").

11. Nouriel Roubini, the eminent and influential economist, has described pro-finance policies and legal changes as both corporatist *and* as the product of extremist neoliberal ideology, revealing the depths of the conceptual and terminological confusion in contemporary policy debates and discourse. *See* Nouriel Roubini, *The Transformation of the USA into the USSRA (United Socialist State Republic of America) Continues at Full Speed with the Nationalization of AIG,* RGE ECONOMONITOR (Sept. 17, 2008), http://www.roubini.com/roubini-monitor/253625/. *But cf.* Martin Lipton, *Corporate Governance in the Age of Finance Corporatism*, 136 U. PA. L. REV. 1, 3 n.1 (1987) ("[T]he term 'corporatism' refers to the interaction between a corporation and its various constituencies."). But Lipton's conception of "finance corporatism" does relate to neocorporatism as a political–economic regime in two important ways. First, he elaborates on his definition of corporatism to refer "not only to the development of capital-gathering arrangements, but also to the broader evolution of a corporation's relationships with its constituencies, such as shareholders, employees, and creditors, which are the proper subjects of any corporate governance debate." Second, he is concerned with the legal rules, and thus the deployment of political power, to define the power relations within corporate governance. The political and juridical ordering of these stakeholder relations is a core function of neocorporatist institutional arrangements, whether at the level of firm or macroeconomic governance. *See id.*

pular responses to the recent crisis, including bailouts of various financial institutions and the Dodd-Frank Act's reform of banking and financial regulation, is an especially problematic and emblematic instance of this obfuscating polemical turn.[12] These policies and legal reforms bear no discernible relation to neocorporatism as an ideal type of regime or to the formal or substantive role of law within neocorporatist institutional arrangements and governance processes. The use of corporatist as a term for plutocratic politics, state and regulatory capture, and wholesale corruption of policymaking serves to foreclose paths of reform toward alternative forms of regulation and governance that are potentially capable of redressing the increasingly serious problems of instability, inequality, and illegitimacy generated by contemporary neoliberal finance capitalism.[13]

Berle's thinking was not informed by corporatist theories, nor was it an adaptation of corporatist-type principles of institutional design and governance to the level of the corporation.[14] Further, his advocacy of national economic planning through quasi-corporatist arrangements during the early New Deal reflected a contradictory and often vague conception of how such arrangements should be structured and function with respect to the role of the state, business interests, and formal rules. The ambiguities of Berle's intellectual legacy can be clarified by viewing it in the context of the rise and fall of "countervailing power" in the American political economy. John Kenneth Galbraith identified countervailing

---

12. *See*, *e.g.*, DAVID SKEEL, THE NEW FINANCIAL DEAL: UNDERSTANDING THE DODD-FRANK ACT AND ITS (UNINTENDED) CONSEQUENCES 11–12, 77–85, 156–58 (2011) (calling the Dodd-Frank Act a corporatist collaboration between government and large businesses that advantages and entrenches these favored corporate interests while allowing the state to channel policy through large financial institutions); Glenn Greenwald, *The Underlying Divisions in the Healthcare Debate*, SALON (Dec. 18, 2009), http://www.salon.com/news/opinion/glenn_greenwald/2009/12/18/corporatism/index.html (stating that the Democratic Party and the Clinton and Obama Administrations have a "corporatism" that, "[a]t its core, . . . seeks to use government power not to regulate, but to benefit and even merge with, large corporate interests, both for political power . . . and for policy ends . . . devoted to empowering large corporations"); Evan McMorris-Santoro, *Ron Paul: President Obama is Not a Socialist*, TALKING POINTS MEMO (Apr. 10, 2010), http://tpmdc.talkingpointsmemo.com/2010/04/ron-paul-president-obama-is-not-a-socialst.php (discussing Ron Paul's denunciation of President Obama, much of the Republican Party, and broad areas of federal policy as corporatist); Roubini, *supra* note 11 (financial sector bailouts are "akin to the creation of a corporatist state (like the Italian fascism or the German[] Third Reich) where private sector interest[s] are protected (gains privatized and losses socialized) where the government is taken over by corrupt and reckless private interests").

13. In this sense, the tendentious ideological and discursive distortion of the terms "corporatism" and "corporatist" recapitulates the earlier misuse and debasement of the terms "liberal" and "socialist" in post-New Deal and post-Cold War American political discourse.

14. *But cf.* JOHN W. CIOFFI, PUBLIC LAW AND PRIVATE POWER: CORPORATE GOVERNANCE REFORM IN THE AGE OF FINANCE CAPITALISM 68, 73–75, 81 (2010) (discussing the replication of neocorporatist legal mechanisms at the firm level to create a form of "microcorporatist" corporate governance in Germany).

power in 1952 as a pervasive structural feature of the postwar economic order that served as a crucial means of stabilization and legitimation. This concept referred to the largely spontaneous and market-driven emergence of increasingly organized opposing interests within the economy that were capable of bargaining with each other on roughly equal terms. The consequent balance of economic power effected by these countervailing organizational interests ameliorated threats to both the economic and political order posed by the massive concentration of unconstrained managerial power made possible by industrialization and the rise of the large publicly held corporation. Within the postwar economic regime of countervailing power, corporate management was situated within a comprehensive set of market relationships that limited managerial discretion and promoted the development of a form of corporate and sectoral organization, as well as an accompanying management style, that tamed the self-serving excesses of managerial and financial elites.

In Part II, this Article provides a general overview of the distinctive institutional, functional, and juridical characteristics of neocorporatist forms of governance. Part III briefly examines some of the ambiguities and tensions within Berle's thinking about the governance of the publicly traded corporation and the role of the state, law, and regulation in the broader political economy before and during the New Deal era. Part IV reviews Galbraith's theory of countervailing power to highlight the distinctive and, in many ways, exceptional characteristics of the liberal postwar political economic order in the United States that differentiate it from the neocorporatist forms of organization and governance prevalent in much of the world during the postwar era. Part V then discusses the economic crisis of the 1970s and the takeover wave of the 1980s as pivotal in the collapse of countervailing power and the emergence of a new form of neoliberal finance capital. The Article concludes by showing how this political economic order has developed and imploded in ways that recapitulate many of Berle's political and economic critiques of corporate power, unregulated markets, and the role of the state and law in ameliorating the excesses and crises of capitalism.

II. LEVELS OF NEOCORPORATIST GOVERNANCE AND THEIR LEGAL FOUNDATIONS

The imprecise use of the term corporatism tends to equate it, quite incorrectly, with the deeply flawed economic policies implicated in the hypertrophic growth, collapse, and public bailouts of the financial sector in the United States and other neoliberal (i.e., non-corporatist) national economies. Likewise, this idiosyncratic turn in American political discourse and, to some extent, scholarly commentary collapses the "state corporatism" of the pre-World War II period (with its dark associations with fascism and authoritarianism) with the democratic neocorporatism of postwar European social democracy and Christian democracy.[15] This tends to preclude serious consideration of policy ideas and institutional designs derived from neocorporatist theory and practices that might prove instructive and useful in grappling with the deep-seated structural deficiencies and policy problems afflicting the American political, legal, and economic systems.

Whereas "pluralism suggests spontaneous formation, numerical proliferation, horizontal extension, and competitive interaction," neocorporatism entails "controlled emergence, quantitative limitation, vertical stratification, and complementary interdependence."[16] Philippe Schmitter offered a classic, succinct, and structurally oriented definition of corporatism:

> [Corporatism is] a system of interest representation in which the constituent units are organized into a limited number of singular, compulsory, non-competitive, hierarchically ordered, and functionally differentiated categories, recognized or licensed (if not created) by the state and granted a deliberate representational monopoly within their respective categories in exchange for observing certain controls on their selection of leaders and articulation of demands and supports.[17]

In contradistinction, pluralism can be defined as the inverse of corporatism. Conceptualized in formal, legal terms:

> [Pluralism is] a system of interest representation in which the constituent units are organized into an unspecified number of multiple, voluntary, competitive, nonhierarchically ordered, and self determined (as to type or scope of interest) categories which are not specially licensed, recognized, subsidized, created or otherwise controlled in leadership selection or interest articulation by the state and which do not exercise a monopoly of representational activity within their respective categories.[18]

15. Much of the scholarly literature refers to the non-authoritarian corporatism of the postwar era as neocorporatism. I follow that convention here.

16. GUY MUNDLAK, FADING CORPORATISM: ISRAEL'S LABOR LAW AND INDUSTRIAL RELATIONS IN TRANSITION 17 (ILR Press, Cornell Univ. Press 2007) (citing Philippe Schmitter, *Corporatism is Dead! Long Live Corporatism!*, 24 GOV'T & OPPOSITION 54, 62 (1989); Philippe Schmitter, *Still the Century of Corporatism?*, 36 REV. POL. 85 (1974)[hereinafter Schmitter, *Still the Century of Corporatism?*]).

17. Schmitter, *Still the Century of Corporatism?*, *supra* note 16, at 93–94.

18. *Id.*

Within a neocorporatist system of governance, actors and organizations are classified within functional or interest categories and then institutionalized as some form of associational organization in order to carry out functions pertaining to representation and negotiation. The classic form and function of this type of democratic corporatist governance, commonly identified with Scandinavian political–economic models, is national trilateral concertation of collective bargaining over wages and other labor relations issues among authoritative centralized unions, employers associations, and state representatives at the national or sectoral (or "meso-corporatist") level. Corporatist institutions also generally play an authoritative policymaking (or implementation) function through legal delegations of rulemaking and governance responsibilities to private associational organizations that act as "private interest governments" that enable "the public use of private organized interests."[19]

With the widespread erosion or disintegration of national and sectoral corporatist "concertation," the quasi-regulatory and governance functions of corporatist institutional arrangements have taken on greater prominence and importance in enabling and enhancing economic and policy coordination among and within sectors, interest groups, and firms. Indeed, during the past half-century, juridical and institutional legacies of corporatism have informed the development of legal architectures and institutional forms of "microcorporatism" at the level of the corporate firm in Western Europe (and arguably Japan).[20] The incorporation of labor interests and institutionalized channels of employee consultation, voice, and negotiation within processes of firm decision-making translate the representational logic and legal mechanisms of corporatism into the juridical forms and practices of corporate governance. Institutional organization and representation of employees within the firm, whether

19. Wolfgang Streeck & Philippe C. Schmitter, *Community, Market, State—and Associations? The Prospective Contribution of Interest Governance to the Social Order*, *in* PRIVATE INTEREST GOVERNMENT: BEYOND MARKET AND STATE 1 (Philippe C. Schmitter & Wolfgang Streeck eds., 1985). For a useful summary of the ideal typic formal features of corporatism, see MUNDLAK, *supra* note 16, at 15–23.

20. But the presence of firm-level microcorporatist mechanisms and practices has been found to be correlated with preexisting macro-level (i.e., national and sectoral) neocorporatist arrangements. *See* Alexander Hicks & Lane Kenworthy, *Cooperation and Political Economic Performance in Affluent Democratic Capitalism*, 103 AM. J. SOC. 631 (1998). For theoretical and empirical treatments of microcorporatism, see Heinz-Dieter Assmann, *Microcorporatist Structures in German Law on Groups of Companies*, *in* REGULATING CORPORATE GROUPS IN EUROPE 317 (David Sugarman & Gunther Teubner eds., 1990) [hereinafter REGULATING CORPORATE GROUPS]; Wolfgang Streeck, *Status and Contract as Basic Categories of a Sociological Theory of Industrial Relations*, *in* REGULATING CORPORATE GROUPS, *supra*, at 105; Gunther Teubner, *Unitas Multiplex: Corporate Governance in Group Enterprises*, *in* REGULATING CORPORATE GROUPS, *supra*, at 67, 78–82; Gunther Teubner, *Enterprise Corporatism: New Industrial Policy and the 'Essence' of the Legal Person*, 36 AM. J. COMP. L. 130 (1988).

through employee committees, works councils, or board representation, are prevalent in European countries and increasingly adopted into the law of the European Union.

Law plays a critical role in constituting and buttressing the institutional forms and functions of neocorporatism. Even where the state does not play a dominant, or any, active role in coordination or "concertation," it does play an essential function in creating the legal foundations for the formation, activities, and perpetuation of neocorporatist associations. The state, through law and regulation, fashions the basic juridical and institutional structures that supplant contractual and market relations as mechanisms designed to contain and intermediate relations and conflicts among interest groups. Frameworks of legal rules either mandate or incentivize the participation in neocorporatist or microcorporatist arrangements by firms, associational organizations, interest groups, and individuals. The constitutive function of law enables the necessary attributes of organizational exclusivity, centralization, and concentration of representational and bargaining authority in neocorporatist associations and microcorporatist firms.[21] Simultaneously, the legal foundations of neocorporatist arrangements and bargaining practices perform an essential legitimation function that renders them more acceptable within a democratic polity under the rule of law. As Guy Mundlak notes, "The unique feature of associations in corporatism is their exclusive, quasi-legal position. Exclusivity is a result of the singular, noncompetitive, hierarchically ordered nature of these associations. The quasi-legal position granted to these associations is what makes exclusivity possible within the domains of the rule of law."[22]

This, of course, does not assure the popular legitimacy or passive acceptance of neocorporatist arrangements. The state and the law obviously cannot fulfill legitimation functions where political, and therefore legal, legitimacy is lacking. Politics and law cannot confer legitimacy they do not possess themselves. Causation can flow in the opposite direction, as well. The broader legitimacy of the state and public law may be compromised where, due to conflicts with widely held social values or serious institutional dysfunction, the legitimacy of corporatist arrangements is largely absent (e.g., the quasi-corporatist elements of the early New Deal) or has decayed (e.g., neocorporatist countries suffering pro-

21. For example, legislation that extends the terms of collective bargaining agreements or product standards on all firms within a given sector profoundly alters incentives to participate in corporatist associations and negotiations by foreclosing the easy-exit options available in a more voluntarist pluralist system. *See* MUNDLAK, *supra* note 16, at 15–27 (providing an analytical account of the quasi-legal character of neocorporatist institutions and contrasting their characteristic exclusivity, centralization, and concentration of authority with pluralist politics and governance).

22. *Id.* at 17–18 (internal quotation marks omitted).

longed slow growth, rising structural unemployment, and increasing inequality).

The foregoing discussion indicates how the form and functions of law in neocorporatist systems are distinct from the role of law in more market-driven pluralist systems, where law plays a prominent and essential role in constituting institutional arrangements and allocating power within them. The institutionalization and practices of neocorporatism at the levels of the national economy, economic sector, and firm thus rely on law's constitutive role as a source of institutional architecture and delegated authority. This contrasts sharply with the primacy of market-enabling and contractual functions of law in liberal market economies, as fostered by pluralist political systems and promoted by neoliberal conceptions of law and economics.[23] Neocorporatist law does not merely bridge the public–private divide, it also deliberately blurs, and in some respects effectively obviates, the dichotomous distinction between the public and private spheres that is central to the liberal tradition of law and political pluralism. And it does so as part of an established and entrenched political tradition that uses law and institutional arrangements to constitute, articulate, and balance power relations among social and economic interests.

This corporatist political tradition and legal function is almost entirely foreign, literally and figuratively, to the United States. The United States, by virtually any definition or measure of governance institutions, legal mechanisms, or practices, has never been a corporatist political economy.[24] As discussed below, the country's brief experimentation with

23. *See* CIOFFI, *supra* note 14, at 43–47 (distinguishing between the market-enabling function of law in liberal market economies and the institutionalizing function that typifies neocorporatist political economies).

24. Robert H. Salisbury, *Why No Corporatism in America?*, *in* TRENDS TOWARD CORPORATIST INTERMEDIATION 213–30 (Gerhard Lehmbruch & Philippe C. Schmitter eds., 1979); Mancur Olson, *A Theory of the Incentives Facing Political Organizations: Neocorporatism and the Hegemonic State*, 7 INT'L POL. SCI. REV. 165, 178 (1986); *cf.* Martin Höpner, *Coordination and Organization: The Two Dimensions of Nonliberal Capitalism* 12–17 (Max Planck Instit. for the Study of Societies, MPIfG Discussion Paper 07/12, 2007); Peter A. Hall & Daniel W. Gingerich, *Varieties of Capitalism and Institutional Complementarities in the Macroeconomy: An Empirical Analysis* (Max Planck Instit. for the Study of Societies, MPIfG Discussion Paper 04/05, 2004) (multiple measures of corporatism and economic coordination show, *inter alia*, that the United States consistently scores the lowest on each scale of all industrialized democracies). For an argument that a nascent form of microcorporatism emerged in the United States following the economic stagnation and deindustrialization of the 1970s and 1980s, see Seth Borgos, *Industrial Policy in a Federalist Polity: Microcorporatism in the United States*, *in* MANAGING MODERN CAPITALISM: INDUSTRIAL RENEWAL AND WORKPLACE DEMOCRACY IN THE UNITED STATES AND WESTERN EUROPE ch. 4, 65–94 (M. Donald Hancock, John Logue & Bernt Schiller eds., 1991). As Borgos notes, however, what he describes as microcorporatism in the American context bears no relationship to the patterns of institutional development and governance practices in neocorporatist national economies. Instead, he uses the term to refer to weak and poorly institutionalized collaborations among state (not federal)

corporatist economic reforms barely lasted two years before it was struck down as unconstitutional by the Supreme Court, never to be revived in whole or in part.[25] Even prior to this judicial *coup de grâce*, the practical ineffectiveness and collapse of political support for the NIRA and NRA heralded the end of corporatism as a viable and enduring approach to economic organization and governance in the United States. No recent developments in American politics, law, or economic organization have borne any meaningful relation to corporatism in any of its cognizable forms.

Post-New Deal American politics, policy, and law are simply unintelligible as a manifestation of neocorporatist law and politics. Many of the most important and transformative conflicts over the evolving character of the American political economy during the past three decades, beginning with the hostile takeover wave of the 1980s, have pitted the rising power and influence of financial interests against the well-entrenched form of managerialist corporate governance that emerged during the post-New Deal and post-World War II eras. An analysis of the complex causes of this shift in power relations among sectors and elite interest groups is beyond the scope of this Article. It should be noted, however, that in contrast to the relative resiliency of the political and economic status of labor in neocorporatist political economies, the rise of finance in the United States accompanied and helped accelerate the long-term collapse of organized labor in the private sector. Since the 1980s, the increasing dominance of finance and the consequent financialization of the American economy has produced recurring and intensifying financial crises and corporate scandals that have spurred repeated legal and regulatory reforms. Yet even in the wake of the catastrophic global financial crisis of 2007–2009, interest-group politics in the United States has in no appreciable way displaced or even deviated from its established pluralist form. Likewise, changes in law and policy driven by political

---

government, corporate management, and labor that serve to accelerate market-driven innovation and adjustment. *Id.* at 79–81. These arrangements and polices failed to endure because they accepted the increasing predominance of financial interests inimical to any form of neocorporatist interest intermediation and coordination, and represented a continuation of the postwar market-centered growth model that was already undermined politically by prolonged economic stagnation and industrial deterioration.

25. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). I do not address the extraordinary expansion and pervasiveness of economic control and planning exercised by the federal government during the Second World War. Though worthy of additional consideration, the radical disjuncture represented by wartime economic governance was far more statist than corporatist and, like the forms of interventionist federal policies during the First World War, was rapidly eliminated with the cessation of hostilities (in contrast to Western Europe and Japan, where corporatist forms of governance were retained, modified, and newly fashioned to establish political legitimacy and advance reconstruction in the postwar era).

and economic struggles between financial and managerial interests have not significantly departed from the liberal legal tradition, as modified by the enduring regulatory legacy of the New Deal. If anything, political pluralism and the non-corporatist legalism of post-New Deal regulation made the American regulatory state *more* vulnerable to erosion and to influence and capture by powerful interest groups, thus making the regulatory state *more liberal*.

These political processes and their economic consequences would have been familiar to Berle and other New Deal-era reformers who criticized the politics, legal foundations, and concentrated financial and economic powers of the first Gilded Age. Accordingly, Berle's incisive and influential analyses of the political economy of finance and corporate capitalism of the early twentieth century are well worth revisiting as we consider the self-destructive form taken by neoliberal finance capitalism at the century's end. And the ambiguities and ambivalence of Berle's critiques and policy positions are as instructive in understanding the dilemmas of our own age as they are for the problems of eighty years ago.

III. The Ambiguities of the Separation of Ownership and Control and American Managerialism

The appropriation of the separation of ownership and control for the neoliberal ends of elevating the interests of financial capital in public policy and enshrining the norm of shareholder primacy rests on a fundamental misunderstanding, or disregard, of historical context and, more specifically, the constraints Berle confronted as a lawyer, legal scholar, and politically active reformer during the pre-New Deal era. First, legal analysis, even when deployed in deliberately pathbreaking ways, tends to be highly constrained by the contours and contents of received legal materials that define the established and authoritative categories, norms, procedural and institutional mechanisms, and range of cognizable legal argument. Plausible modifications and extensions of existing legal rules, principles, and mechanisms—such as fiduciary duties, legal hermeneutics of corporate charters, or boards of directors—are often (and still may be) inadequate for creating fundamental reform and innovation in policy and governance. Second, prior to the New Deal (and even afterward), the entrenched status quo of American politics (and constitutional law) imposed narrow constraints on the possibilities for economic and regulatory reform. Berle's early analyses of and proposed remedies for structural flaws in corporate governance, such as the positions espoused in *The Modern Corporation*, reflected an intersection of what was legally plausible and politically possible at the time.

Notably, Berle himself did not think of *The Modern Corporation* as particularly novel. The articulation of the trust model of the corporation, and thus the elevation of shareholder rights and regulatory protection, tracks the functional and substantive core of corporate law. That core was well-entrenched by the 1920s and persisted through the New Deal and the zenith of the technocratic managerial postwar political economic order. Berle appeared to endorse an embryonic form of shareholder primacy over a stakeholder or public interest theory of managerial responsibilities in his earlier legendary debate with Merrick Dodd about the identity and scope of the interests that should inform managerial decision-making. Fiduciary duties, for which the trust theory of the corporation supplied a supportive foundation, developed within the body of American corporation law as a means of protecting shareholders by imposing flexible and adaptable constraints on managers. Expansion of these duties to protect a wider array of stakeholders or to encompass more general, and woefully indeterminate, public interests or social values risked diluting their function as managerial constraints and turning fiduciary law into a means of rationalizing nearly limitless managerial discretion. In this sense, Berle displayed an acute and early awareness of the "too many masters" problem in fiduciary law, even if the commitment to shareholder primacy this implied was more apparent than real. This position, largely recapitulated in *The Modern Corporation*, used extant legal materials of corporation law, and most importantly the established principles of fiduciary obligations, while implicitly recognizing the limited functions for which they were suitable.[26]

Berle thus saw the limitations of traditional legal categories and principles as mechanisms to use in achieving the broader political economic reforms necessary to render managerial power democratically accountable and to promote the public good. Accordingly, at the time of the Berle–Dodd debate, and even more so during the writing and publication of *The Modern Corporation*, Berle's professional role and disciplinary identity as a lawyer collided with his political and policy agendas. The institutional and disciplinary confines of law and the harsh practical realities of politics and economics simultaneously constrained and drove his analyses of corporate power and his prescriptions to alleviate its pathologies. Berle himself noted that the political and economic crises triggered by the Great Depression created the exceptional conditions that made the New Deal's legal reforms and transformation of public–private

26. One should also keep in mind that, given the inability or unwillingness of the courts to develop and strengthen fiduciary duties to effectively constrain the managers of large corporations, Berle's call to adapt fiduciary law to address the new problems of managerial power and control in the age of the large industrial corporation was not a trivial or minimalist position.

relations possible.[27] The extraordinary exigencies and rapidly unfolding possibilities of reform enabled the creation of the modern administrative and regulatory state. That state was able to wield powers and develop legal and institutional forms of economic governance that had been politically—and certainly judicially—implausible in American politics prior to the New Deal.

The Modern Corporation owed an intellectual and methodological debt to legal realism in the empirical analysis underlying its theoretical and policy-based arguments. While the nod to realism in much of its argumentation represented a clear departure from the prevailing orthodoxy of legal formalism, its legal prescriptions were fairly conventional adaptations of established legal concepts, forms, and norms. Yet within Berle's theory, the centrality of the trust theory of corporations and the law of fiduciary obligations bridged an implicitly narrow conception of the functional possibilities of corporate governance and the larger agenda of protecting democracy and improving public welfare. The resulting theory and legal framework for corporate governance appealed to, or at least did not offend, the prevailing jurisprudential orthodoxy by articulating legal arguments that were ostensibly conventional while also conducive to Berle's broader reformist purposes.

Berle's emphasis of fiduciary duties in corporate governance resonated in some deeper ways with the coming transformation of the regulatory state and the state's role in economic governance. Fiduciary duties represent a peculiar form of law that blends regulatory and contractual characteristics; their animating *ex ante* normative principles are as general and abstract as their *ex post* adjudicative applications are specific and concrete. The generality of fiduciary principles and norms allows sufficient flexibility to apply to the infinite variety and frequent complexity of intracorporate disputes, while also allowing courts broad equity powers in defining and enforcing these obligations. The abstract form of fiduciary norms and doctrine was consistent with Berle's preference for principle-based, as opposed to rule-bound, approaches to regulating corporate and economic behavior—a long-standing theoretical and policy debate over the optimal forms of regulation that has only grown in importance.

The state's plenary capacity to impose legal norms on the conduct of corporate affairs, reflected in the normative generality of fiduciary principles, also provided a conceptual template for a more encompassing legal and institutional framework for securing equity, functionality, and legitimacy in corporate capitalism. This vision of law reflected not only

27. *See* ADOLF A. BERLE, JR., THE 20TH CENTURY CAPITALIST REVOLUTION 59 (1954); Bratton & Wachter, *supra* note 8, at 856.

Berle's critical stance toward unconstrained managerial power, but also his deeper normative and practical concerns: (1) the threat posed by corporate power (i.e., managerial power) to democratic governance, and (2) the search for effective means to render concentrated private power accountable to governmental authority consistent with the requirements of social welfare and the public good. But strengthened fiduciary duties that protect shareholder interests would only have advanced this agenda at one level of the political economy, and only partially at that. The expansion of governmental authority and discretionary power in order to redirect narrow managerial self-interest toward more socially beneficial ends required an expansion of state power through the broad delegation of regulatory authority to technocratic regulators, which in turn would have refashioned corporate management into a new technocratic, quasi-public function.

Berle and Means's famous work was thus not the apotheosis of Berle's thinking about the corporation and its role in the political economy. It instead represented a historical moment of extraordinary intellectual and political tension between a laissez-faire form of classical liberalism and the political, regulatory, institutional, and constitutional upheavals of the New Deal era that made wholesale reform possible. In this light, it is not surprising that Berle, along with most other New Dealers, largely abandoned concerns with corporate governance, narrowly conceived as the power relations and decision-making processes within corporations, to focus on the more thoroughgoing reconstruction and expansion of federal regulatory power and authority over economic management.

This path was further consolidated with the abandonment of the corporatist approaches to governance and regulation in 1935–1936, the victim of the NIRA's incoherence, chaotic administration, and failure to improve economic conditions. The New Deal's initial foray into corporatism not only suffered from the immense difficulty of creating corporatist institutions from scratch, but also from intractable problems of conflict and complexity that frustrated attempts to use such institutions as a mechanism for national economic planning and a means to foster cooperation among economic interest groups. The corporatist approach also placed the emerging administrative state on a collision course with classical liberalism's core tenets of individualism and competition, and with American constitutional and legal principles. Even the New Dealers within the Roosevelt Administration and Congress were divided over the propriety, effectiveness, and proper implementation of an American variant of corporatism. Judicial hostility to the legal form and scope of the delegated powers underlying the NIRA's corporatism temporarily united the Court's conservative, moderate, and progressive members in striking it down as unconstitutional.[28] Even the more progressive Justices Louis Brandeis and Benjamin Cardozo were wary of, and ultimately opposed to, the Roosevelt Administration's assertion of virtually limitless power and ability to delegate that power to large government bureaucracies that could potentially collude with large corporations.

Thereafter, even prior to the epochal defeat of Roosevelt's Court-packing plan, the New Deal's favored mechanisms of economic governance were regulatory, not corporatist. This distinctive feature of the modern American administrative state had substantial implications for legal and political economic development during the New Deal and post-New Deal eras. Direct federal intervention in the private sphere and the implementation of federal economic policy and macroeconomic management largely eschewed state-imposed mechanisms of governance at the levels of the firm, sector, and national economy. Instead, American law took a distinctive regulatory turn, emphasizing the promulgation and enforcement of detailed rules by agencies and other governmental bodies granted broad powers by general enabling legislation.

Although this shift is often described as the fall of the "first" quasi-corporatist New Deal and the rise of the largely regulatory "Second New Deal,"[29] the historical record of the legal reforms of the 1930s undermines this characterization. The regulatory elements of the New Deal emerged alongside and in parallel with the more corporatist approaches to economic governance, such as the NIRA, undertaken from 1933 to 1935. The Securities Act of 1933 and the Securities and Exchange Act of 1934 were vitally important regulatory initiatives of the early New Deal period, and their primary reliance on disclosure and transparency endured as the dominant approach to financial market regulation. Though its demarcation and enforced separation of financial markets and business lines diverged from the dominant forms of financial-sector regulation, the Banking Act of 1933 (the Glass-Steagall Act) was an exercise in prudential regulation of systemic risk. It was not a form of corporatist organization designed to police sectoral boundaries and restrict member-

---

28. *Schechter Poultry,* 295 U.S. at 541–42 (invalidating the National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933) (previously codified at 15 U.S.C. § 703)). But the Court's decision in *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936), invalidating the quasi-corporatist but sector-specific Bituminous Coal Conservation Act of 1935, ch. 824, 49 Stat. 991 (previously codified at 15 U.S.C. §§ 801–27), reactivated splits between the conservative and progressive justices, foreshadowing the great jurisprudential shift toward a broad reading of the federal Commerce Clause power and judicial deference in matters of economic regulation. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 46–47 (1937) (upholding the National Labor Relations Act against constitutional challenge).

29. For a classic statement of this characterization, see 3 ARTHUR M. SCHLESINGER, THE POLITICS OF UPHEAVAL: THE AGE OF ROOSEVELT, chs. 16, 21–22 (1960).

ship in order to foster stable governance and self-regulation by market incumbents. The National Labor Relations Act of 1935 (the Wagner Act), a more regulatory approach to labor relations than the NRA's efforts to encourage labor organization and sectoral employment standards, was introduced in Congress in early 1934, prior to the *Schechter Poultry* decision, and was therefore a ready replacement after the Supreme Court's invalidation of the NIRA.[30] The parallel tracks represented by the corporatist and regulatory elements of the New Deal reflected the protean and experimental character of Roosevelt's political and policy offensives. Yet by 1935, it was clear that political support for national economic planning and the corporatist thrust of policy embodied in the NIRA had largely dissipated as its coherence and effectiveness came into question. The political balance of policy and legal reform shifted decisively toward more legalistic regulatory approaches to economic governance.

There is an intriguing parallel between the emerging legal structure of the regulatory state during the New Deal and the transformation of corporate law and governance that quickly followed the emergence of the large industrial corporation decades earlier. With the waning of the concession theory of incorporation and the erosion of the doctrine of ultra vires, state incorporation acts were revised to function as general enabling statutes for corporate charters, which were likewise increasingly drafted as broad conveyances of authority to directors and officers with few, if any, limitations on the firm's bona fide business activities.[31] Similarly, although the Supreme Court had declared wholesale delegations of rulemaking power to be unconstitutional,[32] unconstrained by any meaningful jurisdictional or substantive limits, the permissible breadth of legislative delegations to regulatory agencies had grown dramatically by the end of the 1930s. The expansion of regulatory authority and power, however, also provoked a political backlash and ignited interbranch (and intrabranch) rivalries that would spark and inform the development of

30. *Cf. id.* at 292 (contending that the Emergency Relief Appropriations Act, Wagner Act, and Social Security Act continued to follow the path of the "first" New Deal and "none bore the distinctive mark of the Second New Deal"); *see also* 2 ARTHUR M. SCHLESINGER, THE COMING OF THE NEW DEAL: THE AGE OF ROOSEVELT, 297–315, 400–06 (describing the passage of the Social Security and Wagner Acts).

31. *See* JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780–1970, at 56–57, 69–71 (1970) (discussing the erosion of mandatory terms and statutory limitations on corporate organization and activities in state corporation law during the late nineteenth and early twentieth centuries, as well as their displacement in the 1930s by general enabling statutes providing default rules).

32. *Schechter Poultry*, 295 U.S. at 537.

modern administrative law.[33] A plausible explanation for these parallel developments is that the increasing complexity of organizations in both the private and public spheres outstripped the capacity of legislation to govern them though detailed enactments. The increasing generality of enabling laws was one result of this burgeoning complexity in organizational structures, operations, and tasks. The increasing complexity of corporate affairs, on the one hand, and regulatory policies and rules, on the other, were often mutually reinforcing and complementary, each emphasizing technocratic specialization within their respective organizations.

In the policy domain of corporate governance, the most important of the New Deal regulatory initiatives was, of course, the development of federal securities regulation under the administration of the SEC following the passage of the Securities Act of 1933, the Securities and Exchange Act of 1934, and the Investment Company Act of 1940.[34] Ironically, Berle played at most a marginal role in the design of the first two of these laws, the drafting of which was entrusted to John Landis and other protégés of Felix Frankfurter. Frankfurter was Berle's bitter rival, a disciple of Brandeisian liberalism's legalistic vision of regulation and antagonism toward the concentration of political and economic power by large organizations in both the public and private spheres.[35] Berle's reservations about and criticisms of the emerging regime of securities law and regulation may thus have been influenced by personal pique over defeats in administrative infighting, but they were also consistent with his long-standing intellectual convictions favoring principle-based regulation and the exercise of broad, flexible governmental powers over business. He found himself allied with Wall Street bankers in his critical attitude toward the complex and prescriptive rule-based approach to regulation and economic governance represented by the new securities laws and SEC rulemaking.

The Glass-Steagall Act's separation of commercial banking and the securities business defined the scope and permissible participants in dif-

---

33. *See generally* Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 260, 268–72 (1978) (analyzing the tensions between the New Deal's expansion of regulatory authority and established notions of the rule of law, and reviewing the resulting political conflicts and compromises that led to the Administrative Procedure Act). Of course, for political and constitutional reasons, regulatory-enabling statutes never achieved the level of permissiveness reached by corporation law, with its generally contentless chartering provisions allowing firms to pursue virtually any business activity and default rules supplied against the backdrop of legally sanctioned opt-out powers granted to the board.

34. Securities Act of 1933, 15 U.S.C. §§ 77a–77aa (2006); Securities and Exchange Act of 1934, 15 U.S.C. §§ 78a–78mm (2006); Investment Company Act of 1940, 15 U.S.C. §§ 80a-1–80a-64 (2006).

35. *See* SCHWARZ, *supra* note 6, at 107–08.

ferent financial markets, but did so as a means of controlling systemic risk and moral hazard in the financial sector. This control became even more essential following the creation of the FDIC and bank deposit insurance to prevent bank runs like those that devastated the banking system during the early 1930s. Neither Glass-Steagall nor the new disclosure regime under federal securities regulation created or imposed anything resembling an encompassing corporatist form of associational interest representation or sectoral governance. The overriding goal of this legislation and regulation was to enable markets, as opposed to displacing markets and contractual governance through state-sanctioned hierarchical institutions.[36]

Other sector-specific governmental bodies set up to regulate prices (including interest rates in some segments of the banking sector and commissions in securities trading) and market entry were not corporatist in structure or operation. The New Deal's legacies of sectoral regulation became infamous for creating regulatory cartels of, and susceptibility to capture by, incumbent firms.[37] But corporatism is not synonymous with capture, and regulatory capture does not transform a regulatory body into a corporatist one. This unparalleled period of institution building and regulatory expansion marked the true origins of the modern American state, which was legally and institutionally distinctive and also comparatively belated. The resulting regulatory regime would transform the American political economy, and thus the governance of the large publicly traded corporation, but it was never corporatist in its intellectual and

36. *Cf.* CIOFFI, *supra* note 14, at 43–47 (distinguishing the market-enabling form of regulation characteristic of the United States from neocorporatist forms of regulation and governance that displace contractual and market relations).

37. Indeed, this form of regulation would later spark a political backlash that began the process of deregulation during the 1970s, and it was directed at precisely those sectors where regulatory cartels and capture had turned the regulatory apparatus into a means of rent-seeking contrary to the public good. *See*, *e.g*., THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES (2d ed. 1979) (critiquing post-New Deal "interest group liberalism" as leading to regulatory and state capture by well-organized, resource-rich groups and as corrosive of American liberalism as a governing philosophy and programmatic agenda); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971) (critiquing regulation as a form of "state failure" and private rent-seeking, focusing on protected markets and regulatory cartels created and entrenched by regulation that favors large firms and government officials due to their coherent interests, organizational advantages, and control over economic resources and coercive state power); *cf.* STEPHEN G. BREYER, REGULATION AND ITS REFORM (1982) (discussing theoretical regulation dismissing the "excess competition" theory of regulation influential during the New Deal and postwar eras, and criticizing price and market entry and allocation regulation as often "mismatched" to sector-specific policy problems); MARTHA DERTHICK & PAUL J. QUIRK, THE POLITICS OF DEREGULATION (1985) (empirical study of deregulation of the trucking, airline, and rail sectors arguing that bureaucrats' policy preferences and beliefs often facilitated deregulation in ways that deviated from the narrow economic interests underlying economic models and public-choice theories of regulation).

programmatic origins or in its later development. The distinctiveness of the American political–economic model and its failure to develop along a neocorporatist path is elucidated by the concept and development of countervailing power in the American economy during the postwar era.

IV. COUNTERVAILING POWER, AMERICAN LIBERALISM, AND THE RISE AND FALL OF THE POST-NEW DEAL ORDER

The hegemonic dominance of shareholder primacy in legal and policy discourse followed the decay and disintegration of the New Deal coalition during the latter 1960s, the collapse of the postwar "labor-capital accord" and Keynesian macroeconomic policy in the 1970s, and the ascendance of neoliberalism and the financial sector in politics and business during the 1980s. John Kenneth Galbraith's theory and presciently incisive analysis of countervailing power's strengths and weaknesses reveals how distinct the American political economy was, structurally and functionally, from a neocorporatist regime and why that political economic order turned out to be so fragile.[38] Relations of countervailing power among increasingly organized opposing interests were a defining feature of the American political economy and the governance of large public firms during the New Deal and post-New Deal eras. The most important of these opposing forces—managers, shareholders and other financial interests, strong unions and organized labor relations, and regulators and other officials of the administrative state—were the most influential groups within the polity. Their power was instantiated and exercised largely within the private sphere, autonomously from the state.

Galbraith set out an economic logic by which countervailing power proliferated throughout the political economy, with the organized power of an existing group driving the formation of an opposing group as weaker constituencies sought to organize to more effectively bargain with their more powerful and organized counterparts. The import of countervailing power to corporate governance, as well as Berle's contributions to its theory and practice, is threefold. First, countervailing power as manifest in the postwar era was largely, if not entirely, the product of voluntarist market-driven organization within the private sphere. Second, countervailing power was categorically distinct from corporatist and neocorporatist forms of political economic organization and consistent with Berle's own thinking about economic power and governance,

38. JOHN KENNETH GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER (Sentry ed., 1962) (1952) [hereinafter GALBRAITH, COUNTERVAILING POWER]. Though his later books, THE AFFLUENT SOCIETY (1958) and THE NEW INDUSTRIAL STATE (1967), became far more famous, *Countervailing Power* introduced many, and arguably most, of the ideas and themes that he would popularize in his later work.

including the governance of the firm. Third, Galbraith also noted that the flaws of countervailing power as a form of economic ordering made it both prone and vulnerable to the inflationary spirals that would ultimately prove to be its undoing.

Galbraith sought to explain the apparent "paradox of the unexercised power of the large corporation." He argued that even as competition withered as a constraint on large, oligopolistic firms and economic power became increasingly concentrated among their managers, the exercise of that concentrated power had not become oppressive or dysfunctional in practice as many (including Berle) had feared.[39] The restraints on private economic power took the form of countervailing power, "nurtured by the same process of concentration which impaired or destroyed competition," which held in check the power of large corporations and those who ran them.[40] Galbraith further argued that under relations of industrial capitalism:

> [P]rivate economic power is held in check by . . . those who are subject to it. The first begets the second. . . . The two develop together, not in precise step but in such manner that there can be no doubt that the one is in response to the other.[41]

An important implication follows from the logic of mutual concentration and dyadic opposition set out by Galbraith. Just as competition in neoclassical markets is self-generating and self-regulating:

> Countervailing power is also a self-generating force . . . the tendency of power to be organized in response to a given position of power is the vital characteristic of the phenomenon . . . . [P]ower on one side of a market creates both the need for, and the prospect of reward to, the exercise of countervailing power from the other side. This means that, as a common rule, we can rely on countervailing power to appear as a curb on economic power.[42]

This theory of self-generating countervailing power thus describes an economic system that is largely *self-regulating*, and therefore does not require pervasive and intensive state intervention and control of private economic matters. By happy operation of this functionalist logic, Galbraith argued that the largely self-regulating character of the market and private sector remained intact, though in a new form that made a virtue

---

39. GALBRAITH, COUNTERVAILING POWER, *supra* note 38, at 108–09. Although he pronounces optimism that this salutary state of affairs could be maintained if the lessons of countervailing power were learned and properly applied, he also raises serious concerns about political capacities to do just that.

40. *Id.* at 111.

41. *Id.*

42. *Id.* at 113.

of large-scale organizations and concentrated power. This theory of largely spontaneous, organizationally based ordering is quite close to Berle's own conception of groups, functionally specialized organizations, and social forces as beneficially balanced in "equipoise."[43] Liberal economics was reconciled with economic modernity, preserving the core attributes of a market-driven economy and rendering moot much of the debate over the appropriate extent of state intervention in the economy. The postwar political economy was not hurtling inexorably down the road to socialism and serfdom, but was instead on the stable path toward the technocratic management of countervailing power relations.

This conception of how power and conflict are structured in an industrial society (at least during the postwar decades) follows neither the Madisonian vision of ever-splintering factions with divergent interests cycling through ever-changing pluralist coalitions,[44] nor the more deliberately structured and state-sanctioned designation, empowerment, or concertation of groups characterizing neocorporatist political economies. What differentiated the logic of countervailing power from pluralism was (1) the relentless movement toward organization and centralization of power and (2) the developmental process of dyadic opposition to the power of other organized interests. Like Berle's vision of the corporation embedded within the constraints and demands of the regulatory state, Galbraith's conception of countervailing power accepts large-scale organizations as historical facts. Both were simultaneously modern and quintessential reflections of the postwar consensus among much of the American elite.

Galbraith did recognize that the countervailing group could be too small or weak to organize effectively. In such cases, the theory of countervailing power provided a justification for state action through regulation.[45] Federal labor relations laws promoting union organization and

---

43. BERLE, POWER WITHOUT PROPERTY, *supra* note 1, at 88, 92. But when comparing it to Galbraith's dynamic understanding of countervailing power, Berle's conception of equipoise appears essentially static, with its balance undisturbed and founded on public consensus on social values and collective goals.

44. In another example of isomorphic developments across the public–private divide, the private sphere structured by relations of countervailing power loses its fragmented pluralist character, and it begins to resemble the structural bargaining relationships within the political institutions and the constitutional structure of the public sphere.

45. But the move from "self-generating" countervailing power to state intervention that creates or imitates its hypothetical effects opens an array of ambiguities and practical problems in application. First, the theory contains no clear criteria for determining when one group has acquired *sufficient power*, or when another group has demonstrated a *sufficient incapacity* to organize, that would warrant legislative or regulatory action. This difficulty is compounded by the fact that the theory does not require that the countervailing power be in opposing groups, leaving the standards for determining acceptable and unacceptable power differentials unclear as a matter of theory and policy. Second, the appropriate *form* of governmental action remained unclear, as well. There are govern-

collective bargaining were the most critical, controversial, and divisive manifestation of governmental intervention to promote countervailing power. Indeed, just as organized labor relations are central to neocorporatist institutional theory and practices, they were foundational to the countervailing power relations of the postwar American political economy. And the American labor relations regime proved to be the weak point in the architecture of countervailing power because of structural flaws in the legal framework, firm-level practices, and macroeconomic consequences of organized labor relations that were barely perceptible in the 1950s, but which grew more glaring by the 1970s.

Galbraith recognized that while countervailing power in labor relations functions well under conditions of weak demand by preventing employers from driving worker incomes down, under inflationary conditions it creates a de facto coalition between management and labor to continuously raise wage levels and pass the added expenses along as price increases that consumers are willing to bear given the prevailing conditions of high demand.[46] This transforms a virtuous cycle of stabilizing employment and equitable division of economic surplus into a vicious cycle tending toward a destructive inflationary spiral. Keynesian fiscal policy—a lynchpin of the postwar economy and macroeconomic management—magnifies this problem of inflation.[47] Government spending increases aggregate demand, but in the real world of politics, expansionary fiscal policy is unlikely to be, and in fact was not, conducted countercyclically as called for by Keynesian theory. Political incentives favor countercyclical spending during downturns, but they militate against countercyclical spending cuts or tax increases during economic booms.[48] The result is a tendency to ratchet up fiscal policy and thus inflation.

Strong unions and oligopolistic employers within a fragmented (i.e., noncorporatist or otherwise uncoordinated and unrestrained) collective bargaining framework further accelerate inflation by ratcheting wage levels upward. The costs of inflation are partially externalized onto the

---

mental interventions that serve to promote organization, such as labor laws, policies fostering sectoral consolidation (or collusion?), or laws facilitating the formation of advocacy associations. But there are also legal rules, such as minimum wage or prevailing wage and hours laws, that appear to deliver the very benefits that would have been enjoyed by the weaker group had it been able to organize sufficiently to achieve a desirable degree of countervailing power. The theory of countervailing power may have restated the self-regulating dynamics of the private sphere in a new form, but it also restated the policy dilemmas of when and how much regulatory intervention should be deployed in a new form without supplying clear solutions to those dilemmas.

46. GALBRAITH, COUNTERVAILING POWER, *supra* note 38, at 128–34.

47. *See id.* at 187–201.

48. *Id.* at 194–95. Likewise, political incentives favor inflationary deficit spending because politicians are far more inclined to spend than raise taxes to finance that spending. *Id.*

rest of society while the negotiating partners retain all gains accruing from agreement. These mutually reinforcing inflationary tendencies ultimately contributed to the destabilization and erosion of the postwar political economic order in the United States during the 1970s. The inflationary tendencies built into the postwar American political economy presented an increasingly serious political and policy problem of inadequate restraints.[49] Countries with neocorporatist labor relations and collective bargaining at the national or sectoral levels had more effective institutional restraints to curtail inflationary spirals because the more encompassing scope of wage bargains between industrial unions and employer associations limits the parties' ability to externalize the costs of inflation outside their membership. In contrast, the problem of inflation could not be solved satisfactorily within American institutional arrangements.

The exceptional fragmentation of the American labor movement and the narrow coverage of collective bargaining agreements was, in part, the consequence of the voluntaristic form of unionization and decentralized bargaining under federal labor laws. The harsh restrictions on labor-organizing tactics imposed by the Taft-Hartley Act of 1947, the product of a bitter political fight over the proper balance of countervailing power, further impeded union organization. By impeding union organization, these restrictions also removed any possibility of more encompassing collective bargaining arrangements that have the paradoxical effect of enabling and encouraging wage moderation.[50] From its peacetime peak of approximately 35% in the mid-1950s, union density in the United States declined continuously, plummeting during the 1980s until sliding to barely 7% of the private nonagricultural workforce in 2009.[51] Low and declining union density reinforced the highly decentralized bargaining structure and the perverse inefficiencies of American "job control" unionism that rigidly fixed job titles, responsibilities, and work

49. *See id.* at 194–201.

50. Where wage bargaining covers a larger percentage of the workforce, industrial unions and employer associations have an incentive to practice wage restraint because they internalize more of the inflationary costs of their bargains. Conversely, highly fragmented bargaining produces a classic negative externality problem in which union and management negotiators do not internalize the potential inflationary consequences of collective agreements. Each individual contract generates a small, often imperceptible, share of inflation, and these costs are largely borne by the population as a whole. The resultant incentive structure encourages a proliferation of inflationary wage bargains (at least where a significant proportion of the workforce is covered by collective agreements) that tends to increase the overall inflation rate and its aggregate costs, and yet intensifies labor demands for further wage increases.

51. *See* Barry T. Hirsch & David A. Macpherson, *Union Membership and Coverage Database from the Current Population Survey*, 56 INDUS. & LAB. REL. REV. 349 (2003), *available at* http://unionstats.gsu.edu/ (describing the data about union membership, coverage, density, and employment among private sector nonagricultural workers from 1973–2009).

rules through the negotiation of detailed labor contracts.[52] The irony was that the weakness of unions not only fueled inflation, but also often impaired productivity and efficiency, and both dynamics contributed to the downward spiral of organized labor during the 1970s and 1980s.[53] On the other hand, in countries with neocorporatist forms of labor organization and industrial relations, union density and collective bargaining coverage remained far more resilient (though both measures indicate that organized labor relations have come under pressure in those countries, as well, though not to the same disastrous degree as in the United States). This collapse of union strength altered the political terrain of the American political economy. As one of the pillars of the New Deal and postwar order crumbled, the power of financial interests ascended to challenge managerialism. The conflicts over corporate takeovers during the 1980s and early 1990s illustrate this transformation vividly.

V. TAKEOVERS, FINANCE CAPITALISM, AND PSEUDO-STAKEHOLDER POLITICS

During the New Deal and postwar period that ended in the 1980s, shareholders were but one poorly organized group more than counterbalanced by an array of others contending for political, legal, and economic advantage. Shareholder primacy, lying inchoate within fiduciary duties, was but one normative element in a complex set of political, legal, and economic arrangements, and could not become effective and enforceable without destabilizing (or absent the prior destabilization) the broader political economic structure. The ideological triumph of shareholder primacy and the increasing influence and priority accorded to the pursuit of shareholder value in legal norms, policy discourse, and managerial strategy was contingent on the collapse of countervailing power. In its place emerged a crisis-prone form of finance capitalism marked by an increasingly skewed redistribution of income, wealth, and power toward those privileged by their control over corporations and financial capital. The

52. For the classic analysis of the emergence and legal-institutional logic of "business" or "job control" unionism in the United States, see Derek C. Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394 (1971). For an exhaustive theoretical and empirical update and elaboration on Bok's account, see Joel Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws,"* 1990 WIS. L. REV. 1. In contrast to the American case, labor relations in more corporatist countries, where labor bargains from a relatively stronger position and agreements are often sectoral or national, tend to rely on broader job classifications and enable more flexible reallocation of labor inside of firms. *See*, *e.g.*, Richard M. Locke, *The Transformation of Industrial Relations? A Cross-National Review*, *in* THE COMPARATIVE POLITICAL ECONOMY OF INDUSTRIAL RELATIONS 9 (Lowell Turner & Kirsten S. Wever eds., 1995).

53. A more comprehensive discussion of the manifold and complex causes of organized labor's decline in the United States is beyond the scope of this Article. For an excellent overview of the issue, see generally Rogers, *supra* note 52.

1980s are generally, and accurately, regarded as the tipping point when the deterioration of the New Deal and postwar order finally gave way to the succeeding era of neoliberalism. During the 1980s and early 1990s, corporate takeovers triggered intense political and legal conflicts over the legal treatment of shareholder rights, managerial power, and stakeholder interests.[54] These struggles are particularly revealing of the final breakdown of the postwar era's configuration of countervailing power and the role of law in constituting the power relations of the new neoliberal order.

Though hostile takeovers only accounted for approximately 14% of all corporate control transactions in the United States between 1980 and 1989, nearly *half* of all major American firms received a takeover bid during the decade.[55] The disproportionate impact of hostile takeovers on large, highly visible public corporations magnified the political and economic stakes involved in these battles for control.[56] Hostile takeovers, along with other mergers and acquisitions, also involved vastly greater amounts of money than earlier merger waves, and even exceeded (in inflation-adjusted dollars) the enormous sums exchanged during the extraordinary merger boom of the 1990s.[57] A fierce struggle over a new balance of countervailing power was framed as a shift from the separa-

---

54. Although the 1980s were exceptional in terms of M&A activity, this was only one of five periods in which mergers and acquisitions soared. There had been three great merger "waves" in American economic history prior to the 1980s, and at least one thereafter:

> The first great merger wave in the United States followed the depression of the late 19th century and was fueled by growth and infrastructure. The second merger wave sprouted during the economic boom that followed the First World War and was driven by an abundant supply of investment capital. The third merger wave, set in the late 1960s, was primarily motivated by the desire for diversification. This was the wave of conglomeration, with very large firms possessing market share in extremely diverse industries. The diversification of large conglomerates became so questionable that the fourth merger wave, that of the 1980s, served to restructure many conglomerates created during the third wave. The 1990s have emerged to produce a fifth wave of corporate acquisitions. This wave has seen consolidation of market share and acquisition of technology.

Glenn Yago et al., *A Tale of Two Decades: Corporate Control Changes in the '80s and '90s*, 21 MILKEN INST. POLICY BRIEF 1, 1–2 (Nov. 23, 2000), http://www.milkeninstitute.org/pdf/twodecad.pdf; *see also id.* at 4–8, chart 1. One might add the private equity acquisition boom of 2002–2007 to this list. Like the M&A boom of the 1990s, however, it did not represent a major structural change in the economy and was eclipsed in significance by the huge housing and debt bubbles of that decade.

55. Gregor Andrade, Mark Mitchell & Erik Stafford, *New Evidence and Perspectives on Mergers*, 15 J. ECON. PERSP. 103, 104–05 (2001); *see also* Monika Schnitzer, *Hostile versus Friendly Takeovers*, 63 ECONOMICA 37, 54 n.1 (1996) (18% of all attempted mergers and acquisitions by volume were hostile from 1985–1989).

56. Andrade, Mitchell & Stafford, *supra* note 55, identify the large-firm bias of hostile takeover attempts during the 1980s, noting that their analysis "suggests that hostile activity was practically non-existent among the smaller, lesser-known companies." *Id.* at 106.

57. *See* Yago et al., *supra* note 54, at 10, 16, chart 10.

tion of ownership and control to a market for control. Berle's engine of managerial power had become contested terrain, and fiduciary duties of directors, in which he had placed such hope, became a recurrent legal object of the battles to control it.

Counsel for would-be acquirers urged courts to articulate and enforce norms of shareholder primacy within the law of fiduciary duties to invalidate antitakeover defenses and compel boards to accept takeover bids, while targets invoked the implicit stakeholder norms of the postwar era to legitimate their defensive tactics. Not surprisingly, interest groups, legislatures, and courts reacted to hostile takeovers by enabling incumbent boards and managers to employ antitakeover defenses and undermined the institutional conditions of corporate governance on which hostile acquisition strategies relied.[58] Perhaps the most striking and revealing political response to the takeover wave was the enactment of state "corporate constituency" (or stakeholder) statutes that authorized directors and managers to take the interests of employees, suppliers, communities, and other stakeholders in the firm into account when responding to takeover attempts. But these laws gave no enforceable rights or governance voice to these nonshareholder groups, and the omission illuminates the true allocation of power in the American political economy. In Delaware, by far the most important jurisdiction for corporation law, the balance of power between managerial interests and the newly assertive financial sector prevented the adoption of an antitakeover statute and left the courts to develop a complex and shifting body of case law that repeatedly readjusted the balance of managerial and shareholder interests in adjudicating the legality of antitakeover defenses.[59]

A. Corporation Law Federalism and the Fiduciary Conundrum

The United States is unique among the advanced industrialized countries in that its corporation law is primarily made and enforced at the state level. In contrast to other advanced industrial countries, the United States has no national corporation law. American federalism relegates the chartering of corporations and the ordering of their internal governance to the sphere of state legislation, while the federal government has taken the lead role in securities regulation and labor law. This long-established division of legal and political competencies has produced a unique institutional dynamic in the development of the corporate governance system as a whole. With the increasing incidence of hostile takeovers during the 1980s, this fragmentation of governmental authority produced conflicts

58. *See* Mark J. Roe, *Takeover Politics*, *in* THE DEAL DECADE: WHAT TAKEOVERS AND LEVERAGED BUYOUTS MEAN FOR CORPORATE GOVERNANCE 321 (Margaret M. Blair ed., 1993).

59. *Id.*

over the proper scope of state corporation law and its tensions with federal constitutional and statutory commitments to unified national markets—whether for finance, securities, or firms.

In many states, antitakeover statutes were the principal political response to the upheavals wrought by the hostile takeover era and the traumatic transition from the relative stability of the postwar economic order to the far more volatile era of neoliberal finance capitalism.[60] Even in the absence of a strong antitakeover statute in Delaware, that state courts' highly complex—and frequently unstable—case law developed in the shadow of the same political pressures. Thus, it sought to balance the same conflicting normative and practical imperatives that informed antitakeover statutes: the powers of directors and managers to exercise their business judgment in the conduct of firm affairs (including the sale of the firm and amending corporate charters and bylaws) versus the fundamental financial and governance interests of shareholders. In state legislatures, the longstanding American tradition of anti-financier populism[61] enabled managerial elites to mobilize labor and the public at large against shareholder interests as represented by financiers and financial institutions involved in hostile takeovers. Consequently, legislation designed to curb takeovers consistently embodied a balance of interest-group power in state politics that tilted toward incumbent management.

The political and legal reaction to the threat of hostile takeovers generated three major waves of antitakeover statutes. The merger boom of the 1960s and subsequent fears of hostile takeovers and proxy battles resulted in the passage of the federal Williams Act in 1968,[62] which required public disclosure of the acquisition of large stakes in publicly traded corporations, and the adoption of antitakeover statutes by thirty-seven states prior to 1982.[63] The hostile takeover boom of the mid- to late 1980s triggered the last two of these waves, which overlapped and extended into the early 1990s. Along with potent judicially sanctioned antitakeover devices, these statutes effectively moderated (though they did not eliminate) the threat posed by the increasing power of finance to the managerialism of the status quo ante.

---

60. In this sense, Martin Lipton's description of an emergent form of "finance corporatism" misses the fundamental character of the financially driven transformation of American corporate capitalism as founded on neoliberal market ideology and elevating the market over the hierarchical corporate firm as the dominant institution in economic life. *See* Martin Lipton, *Corporate Governance in the Age of Finance Corporatism*, 136 U. PA. L. REV. 1, 5–6 (1987).

61. *See generally* MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE (1994); Mark J. Roe, *A Political Theory of American Corporate Finance*, 91 COLUM. L. REV. 10 (1991).

62. 15 U.S.C. §§ 78m(d)–(e), 78n(d)–(f) (2010).

63. Roberta Romano, *The Political Economy of Takeover Statutes*, 73 VA. L. REV. 111, 113 (1987).

In 1982, the Supreme Court's plurality decision in *Edgar v. MITE Corp.* invalidated an Illinois antitakeover statute (and by implication other similar early state antitakeover statutes) as preempted by the Williams Act and unconstitutional under the "silent Commerce Clause" doctrine because its protectionist bias against out-of-state bidders unreasonably burdened interstate commerce.[64] Within months of the *MITE* ruling, the states began passing a "second generation" of antitakeover statutes.[65] The momentum of the antitakeover legislation strengthened after 1987 when the Supreme Court gave its imprimatur in *CTS Corp. v. Dynamics Corp. of America* to at least some forms of antitakeover legislation, reversing the course it had set in *MITE*.[66] The states took advantage of this new latitude by enacting a veritable flood of antitakeover legislation purportedly designed to protect corporations chartered under their corporate law, but primarily benefitting incumbent mangers.[67]

The third generation of antitakeover statutes, the "corporate constituency" statutes, (also called "directors' duties" or "stakeholder" statutes) became the most widely adopted form of all.[68] A corporate constituency statute allows managers and directors to invoke nonshareholder interests in rejecting or defending against a hostile tender offer. They recognized and legitimated the interests of multiple corporate constituencies, ranging from shareholders to employees, from creditors to suppliers to customers, from local communities to the American economy as a whole. Like other types of antitakeover statutes, they provide an effective

64. *See* Edgar v. MITE Corp., 457 U.S. 624, 640 (1982).

65. Roberta Romano notes that the number of forms taken reflected the "uncertainty regarding the scope of constitutional constraint imposed by *MITE* rather than by disagreement concerning the most effective regulation." Romano, *supra* note 63, at 115.

66. CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 85–86 (1987).

67. In 1988, John C. Coffee, Jr. wrote:

> [T]here has been an epidemic-like character to the spread of state antitakeover legislation; a majority of the states have now enacted a 'second generation' statute in the wake of *Edgar v. MITE Corp.* and . . . many of these states (or others) may soon move to a 'third generation' statute after *CTS* . . . . This activism at the state level contrasts sharply with the relative caution being shown by the Congress. . . . [T]he states—particularly those in the 'Rustbelt' . . . have become protective havens for target corporations, while the Congress has tended more toward neutrality. For many—including most academics—the prospect of state regulation of tender offers threatens a Balkanized world in which a national securities market is gradually fragmented, special interest legislation is adopted under the transparent guise of 'protecting' shareholders and the disciplinary capacity of the hostile takeover is gradually dulled.

John C. Coffee, Jr., *The Uncertain Case for Takeover Reform: An Essay on Stockholders, Stakeholders and Bust-Ups*, 1988 WIS. L. REV. 435, 436.

68. States adopted the first constituency statutes contemporaneously with a variety of second-generation antitakeover statutes. Yet constituency statutes continued to multiply in number and constituted a third generation unto themselves after the second-generation statutes and other antitakeover defenses had already diminished the threat of takeovers.

means of defense against hostile takeovers. But corporate constituency statutes represented a departure from traditional corporate law principles. The constituency statute originated in Pennsylvania in 1983,[69] where managerial and labor interests feared that takeovers would threaten local corporations and herald an acceleration of deindustrialization as financially weakened firms fell to raiders.[70] By the early 1990s, twenty-nine states had enacted constituency statutes,[71] and by 2000, that number had grown to thirty-two.[72] The extraordinary political success of corporate constituency statutes therefore cannot be attributed to special-interest pleading by individual firms or to rust belt anxieties. Moreover, corporate constituency statutes proliferated even as the threat from hostile takeovers was *declining* to the point they had largely ceased, suggesting that recognizing the interests of multiple corporate constituencies has an enduring political appeal. These laws targeted the substantive content of

69. Act of Dec. 23, 1983, No. 1983-92, § 1(B), 1983 Pa. Laws 395 (codified at 15 PA. CONS. STAT. § 515 (1995), *amended by* 15 PA. CONS. STAT. §§ 1715, 1716 (1990)).

70. *See* Ronald J. Gilson, *Comment on* Roe, *in* THE DEAL DECADE, *supra* note 58, at 358; Roe, *supra* note 58, at 339–40; Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14, 26 n.47, 28 & nn.61–63 (1992).

71. John H. Matheson & Brent A. Olson, *Shareholder Rights and Legislative Wrongs: Toward Balanced Takeover Legislation*, 59 GEO. WASH. L. REV. 1425, 1540–45 (1991).

72. Edward S. Adams & John H. Matheson, *Statutory Model for Corporate Constituency Concerns*, 49 EMORY L.J. 1085, 1086 n.9, app. (2000). Matheson and Olson list twenty-nine states as having enacted constituency statutes as of 1991: Arizona, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Virginia, Wisconsin, and Wyoming. Matheson & Olson, *supra* note 71, at 1425. Adams and Matheson note that four more states had adopted constituency statutes between 1991 and 2000: Maryland, Nevada, North Dakota, and Vermont. Adams & Matheson, *supra*. The Arizona and Virginia statutes do not specify the nonshareholder constituencies whose interests may be taken into account by directors, but instead refer to the long-term and short-term interests of the firm (Arizona) and interests in the "continued independence" of the corporation (both Arizona and Virginia). Because the practical effect of the statutes is the same as a constituency statute, they are included here. *See* ARIZ. REV. STAT. ANN. § 10-2702 (2011); CONN. GEN. STAT. § 33-756 (2011), *amended by* 2010 Conn. Pub. Acts 10-35 § 10; FLA. STAT. § 607.0830 (2010); GA. CODE ANN. § 14-2-202 (1994); HAW. REV. STAT. § 415-35 (1993); IDAHO CODE ANN. § 30-1-1602 (1999); 805 ILL. COMP. STAT. 5/8.85 (1983); IND. CODE § 23-1-35-1 (2009); IOWA CODE § 491.101B (2011); KY. REV. STAT. ANN. § 271B.12-210 (LexisNexis 1989); LA. REV. STAT. ANN. § 12:92 (1994); ME. REV. STAT. tit. 13-A, § 716 (repealed 2010); MD. CODE ANN., CORPS. & ASS'NS § 2-104(b)(9) (West 2011); MASS. GEN. LAWS ch. 156B, § 65 (1996); MINN. STAT. § 302A.251 (1985); MISS. CODE ANN. § 79-4-8.30 (1999); MO. REV. STAT. § 351.347 (1986); NEB. REV. STAT. § 21-2432 (1997); NEV. REV. STAT. § 78.138 (1999); N.J. STAT. ANN. § 14A:6-1 (West 1969); N.M. STAT. ANN. § 53-11-35 (1983); N.Y. BUS. CORP. LAW § 717 (McKinney 1954); N.D. CENT. CODE § 10-19.1-50 (1995); OHIO REV. CODE ANN. § 1701.59 (West 1999); OR. REV. STAT. § 60.357 (1988); 15 PA. CONS. STAT. § 1715 (1995); R.I. GEN. LAWS § 7-5.2-8 (1999); S.D. CODIFIED LAWS § 47-33-4 (2000); TENN. CODE ANN. § 48-103-204 (1995); VT. STAT. ANN. tit. 11A, § 8.30 (1997); VA. CODE ANN. § 13.1-727.1 (1999); WIS. STAT. § 180.0827 (1992); WYO. STAT. ANN. § 17-16-830 (1999).

fiduciary duties and the norm of shareholder primacy to an unprecedented degree.

Paradoxically, the legal recognition of nonshareholder interests served only to entrench and empower management. The vast majority of constituency statutes frame directors' duties to consider nonshareholder interests in *permissive* terms.[73] While recognizing the legitimacy of nonshareholder interests in corporate governance, the statutes did not grant these constituencies any legally enforceable rights, let alone representation or voice in firm governance, but they did give managers and directors a wealth of legal justifications for decisions arguably adverse to shareholder interests.[74] To put the matter in principal–agent terms, where more than one principal is recognized, the agent can justify a variety of possible decisions that cannot be predictably enforced by reference to legal norms. Constituency statutes exploited for managerial ends present the "too many masters" problem of reconciling or ranking the competing and often incommensurate interests of multiple constituencies.[75] The debate over constituency statutes thus recapitulated Berle's concerns in the Berle–Dodd debate, but this time the debate was played out in legislative politics and litigation rather than the *Harvard Law Review*.

Managerial interests and organized labor spearheaded the political support for constituency statutes. They were better organized than the smaller, more diffuse, and disorganized groups representing other stakeholder constituencies (e.g., local communities, suppliers, customers) and generally had stronger ties to state and local politicians than to financial interests. Labor, however, occupied a subordinate position in the antitakeover alliance. By the 1980s, unions had lost far too much political and economic strength to push for enforceable governance rights or formal representation in the institutions of firm governance. Labor occupied the position of "rule taker," and served as a legitimating fig leaf for managerial power.[76]

---

73. In fact, the Georgia, Indiana, New York, and Pennsylvania statutes expressly deny that they create any enforceable rights or causes of action on behalf of nonshareholder constituencies. The Arizona, Connecticut, and Idaho constituency statutes contain language *mandating* consideration of nonshareholder interests or the long-term interests of the corporation (as opposed to short-term interests of current shareholders). Yet these statutes did not create any mechanisms for enforcement of this consideration by the constituencies, and it is difficult, if not impossible, to see how they could.

74. For a comparison with the European conception of "corporate constituencies," see Alfred F. Conard, *Corporate Constituencies in Western Europe*, 21 STETSON L. REV. 73 (1991).

75. *See*, *e.g.*, Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23, 31–32 (1991).

76. *See* Orts, *supra* note 70, at 25 n.47 (quoting Democratic state senators in Pennsylvania during the debate over the state's constituency statute observing that although this was a law advocated by and benefiting "big business," it also provided protection to labor and local economic interests). Both the state chamber of commerce and the AFL-CIO pushed for the 1990 amendments that

Constituency statutes embodied the balance of interest groups' political power at the *state* level and their resonance with prevailing popular values favoring economic stability and security over higher aggregate levels of macroeconomic growth or corporate efficiency.[77] Politics at the state level empowered corporations chartered in a given state, as well as local unions, local politicians and community representatives, and particularistic local grass roots organizations. These local interests prevailed over distant financial institutions and a nationally diffuse class of shareholders in the torrent of legislative politics unleashed in opposition to hostile takeovers and the growing economic power of financial capital. Notwithstanding specific instances of managerial rent-seeking through state legislation, the wave of antitakeover statutes passed by the states suggested that a far more powerful and pervasive alignment of interests and beliefs drove the political response to takeovers. Further, this new configuration of political forces seeking to constrain the power of financial interests and market pressures proved to be enduring. Rather than dying down at the end of the 1980s along with the takeover wave, the politics of company law and corporate governance at the state level not only defended antitakeover statutes against repeal, but also continued to generate new statutes through the mid-1990s. American federalism, as construed by the Supreme Court in *CTS*, supplied managers and labor with the avenue of state politics to achieve their objectives, and they used it to alter the terrain of American corporate law.

The overwhelming state responses to takeovers contrasted with the absence of any significant congressional action. In contrast to the political alignments favoring antitakeover laws at the state level, no political consensus or sufficiently dominant interest-group coalition emerged at the *national* level to support federal takeover legislation. Hence, Wall Street interests were unable to press Congress to preempt state antitakeover law, while managers and labor were incapable of pushing through a federal antitakeover law. This also accounts for the striking difference between the widespread antitakeover legislation passed by states, where localized interests are more powerful, and the almost complete absence of such legislation in federal statutory and regulatory law.[78] The entrenched structural legacy of federalism also constrained federal policy. Federal legislation in the takeover area would directly intrude on the traditional prerogatives and function of the states as the source of corporate

strengthened the protective features of the Pennsylvania statute. *Id.*; *see also* 15 PA. CONS. STAT. ANN. §§ 1715, 1716 (West 2001); Nell Minow, *Shareholders, Stakeholders, and Boards of Directors*, 21 STETSON L. REV. 197, 220 (1991).

77. *Cf.* Roe, *supra* note 58.

78. *See id.* at 337; Coffee, *supra* note 67, at 435–36.

law in the federal system. No legislation could emerge from a fragmented congressional legislative process that tends to protect localized interests and discourage substantial reform. The internal fragmentation of the congressional committee system and the veto points created by Senate rules consistently hampered federal lawmakers. This structural characteristic of American politics impeded coherent policymaking on a subject implicating intensely local interests.

Constituency statutes reflected the balance of political and economic power in the United States during the 1980s and 1990s, and this balance continued to favor managerial interests. Ironically, constituency statutes protected managers by dissolving fiduciary duties just as many scholars, professionals, and policymakers were proclaiming the advent of shareholder capitalism and a growing corporate governance movement began to identify and champion conceptions of shareholder value and shareholder primacy as central features of the American economy. While economists, law and economics scholars, and professionals were raising shareholder value and shareholder primacy to the level of first principles, the state legislatures were hollowing out fiduciary duties to shareholders and undermining the image of American corporate governance as the embodiment of shareholder primacy. Despite the prevailing rhetoric and theories of the past twenty years, legislative outcomes indicate that the *politics* of corporate governance in the United States has actually favored *management* to a striking degree. Paradoxically, the decade commonly regarded as the origin of a new form of shareholder capitalism, from the early 1980s to the early 1990s, was accompanied by a transformation of the statutory landscape that diluted fiduciary duties and the norm of shareholder primacy to an extent never before seen in American legal history.

Constituency statutes, along with other varieties of antitakeover statutes, grant greater discretionary power to corporate boards as guardians of the interests of the firm as an ongoing entity. With the recognition of multiple constituencies, these interests diverged from those of shareholders. Constituency statutes thus granted directors and corporate officers broader discretion—and imposed fewer fiduciary constraints—in framing and making decisions on behalf of the firm. The recognition of nonshareholder interests in fiduciary law enfeebled an already weak constraint on managerial and directorial conduct. The spread of these statutes (and the more limited recognition of nonshareholder interests in Delaware case law on takeovers) left a crucial gap in the law's protection of shareholders, but did little to advance the broader social interests that legitimated them and provided their political appeal.

Nonshareholder constituencies got little from this weakening of fiduciary protections for shareholders—not even a seat at the corporation's governance table. Jonathan Springer concluded a comprehensive review of the impact of constituency statutes with an incisive political economic commentary that parallels Berle's abandonment of corporation law and governance as a means of reform in favor of expanded regulatory power:

> Proponents of constituency statutes would better serve the interests they seek to advance by focusing on other measures. Constituency statutes arguably detract attention from more promising measures of change such as measures with potential to change not only whose interests may be legally considered, but who also makes corporate decisions. . . . Although it is true that preventing takeovers may ultimately benefit constituency groups by forestalling plant closures, the fact that these statutes are invoked by directors casually, perhaps sometimes even cynically, does little to advance the case for consideration of constituent interests in corporate law. . . . "However radical shareholder laws appear to shareholder rights advocates, and however hopefully they are viewed by worker rights advocates," writes Joseph Singer, "stakeholder laws are not radical enough in altering corporate governance to protect the legitimate interests that workers have in democratic economic institutions."[79]

As a consequence of the political battles over takeovers, the board of directors had become a far more important institution in American capitalism by the 1990s,[80] even as the clarity and coherence of the fiduciary duties that bound them became ever more diffuse and indeterminate. Most states effected this disintegration of fiduciary duties through statutory means. In Delaware, the development of takeover and corporate governance law proceeded in the state courts, where judges grappled with the conceptual core and practical implications of fiduciary duties and corporate governance. The travails of the Delaware courts reveal the difficulties of addressing governance problems through a rights-based adjudicatory system.

B. The Conundrum Continued: Interests, Time Horizons, and the Problem of the Paramount*s*

The pair of cases that most clearly reveal the conceptual contradictions within Delaware takeover law and the depths of the tensions be-

---

79. Jonathan D. Springer, *Corporate Constituency Statutes: Hollow Hopes and False Fears*, 1999 ANN. SURV. OF AM. L. 85, 123–24 (quoting Joseph William Singer, *Jobs and Justice: Rethinking the Stakeholder Debate*, 43 U. TORONTO L.J. 475, 505 (1993)).

80. *See generally* STEPHEN M. BAINBRIDGE, THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE (2008) (elaborating a theory of "director supremacy" in corporate governance law).

tween shareholder primacy and the practical and political forces of managerialism were not decided until the early 1990s—*after* the hostile takeover wave had ended. The Delaware Supreme Court issued a pair of decisions that encapsulated, and in some ways recapitulated, the problem first confronted in the tension between judicial deference to managerialism and stakeholder interests, on the one hand, and enhanced judicial scrutiny and resurgent shareholder primacy, on the other. Ironically, both cases involved Paramount Communications, and in both cases, the company lost.

In *Paramount Communications, Inc. v. Time, Inc*. (*Paramount v. Time*), the Delaware Supreme Court held that management and the board may lawfully reject a takeover bid when the board believes in good faith that its commitment to an established long-term business strategy is in the long-term interests of the corporation and its shareholders.[81] In *Paramount v. Time*, Time's management had been working out a comprehensive business strategy since the early 1980s, and had been involved in protracted negotiations with Warner Communications over a merger of equals.[82] Two weeks prior to the scheduled shareholder vote on the Time–Warner merger, Paramount launched a hostile takeover bid for Time. Time rejected the offer and restructured the terms of its merger agreement with Warner to prevent Paramount from breaking up the planned merger.[83] In litigation, Paramount claimed that Time's directors had breached their fiduciary duties to the company's shareholders by rejecting its more generous offer. Calling the shareholder primacy theory into question, the court ruled that the Time board had not decided to sell the company by agreeing to a merger of equals and, therefore, the board could consider broader nonshareholder interests in rejecting a takeover offer.[84] Time had chosen Warner for reasons of institutional cultural compatibility and quite deliberately and consciously structured the deal with Warner to preserve the editorial autonomy, "identity[,] and culture" that its board and managers regarded as essential to its journalistic success.

The court's decision and reasoning relied on the recognition of two factors that bedevil the legal analysis of takeovers and corporate governance generally: (1) the legitimacy of nonshareholder interests and (2) the desirability of pursuing long-term over short-term growth and profitability. The court noted that "Delaware law imposes on a board of

81. Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140, 1152 (Del. 1990).

82. A lengthy recitation of the facts of the case is contained in the Delaware Supreme Court's opinion. *Id.* at 1143–49.

83. *Id.* at 1148–49.

84. *See id.* at 1151, 1153–54.

directors the duty to manage the business and affairs of the corporation"[85] and "[t]his *broad mandate* includes a conferred *authority to set a corporate course of action, including time frame* . . . ."[86] Accordingly, under the Delaware Supreme Court's formulation, the courts do not defer simply to the board's long-term strategic plans, *but to the selection of the strategic time frame and the plans developed within it*. In *Paramount v. Time*, the board rendered a reasonable business judgment in rejecting a tender offer that conflicted with an established long-term business strategy.

The court directly confronted and rejected the shareholder primacy view. It held that a board is reasonable in refusing the shareholders even the opportunity to consider such an offer. In doing so, it ruled that the fundamental "power of corporate governance" lies with the board of directors:

> Delaware law confers the management of the corporate enterprise to the stockholders' duly elected board representatives. The fiduciary duty to manage a corporate enterprise includes the selection of a time frame for achievement of corporate goals. That duty may not be delegated to the stockholders. Directors are not obliged to abandon a deliberately conceived corporate plan for a short-term shareholder profit unless there is clearly no basis to sustain the corporate strategy.[87]

Under *Paramount v. Time*, shareholders as an interest group are neither primary nor sovereign in corporate governance. While rejecting quasi-political conceptions of shareholder sovereignty, the court emphasized board autonomy in corporate governance. It invoked the interests of nonshareholder corporate constituencies as relevant concerns in corporate governance,[88] and it noted that courts cannot apply a mathematical

85. *Id.* at 1150 (citing DEL. CODE ANN. tit. 8, § 141(a) (1983)).

86. *Id.* (emphasis added).

87. *Id.* at 1154 (citing DEL. CODE ANN. tit. 8, § 141(a) (1983); Smith v. Van Gorkom, 488 A.2d 858, 873 (Del. 1985); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 173 (Del. 1986)). *Compare*, *e.g.*, Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 659–60 n.2 (Del. Ch. 1988), *with* Aprahamian v. HBO & Co., 531 A.2d 1204, 1206–07 (Del. Ch. 1987) (emphasizing the importance of maintaining and strengthening "corporate democracy" in construing fiduciary duties in corporate governance). The court also noted that:

> [T]he question of "long-term" versus "short-term" values is largely irrelevant because directors, generally, are obliged to charter a course for a corporation which is in its best interest without regard to a fixed investment horizon. Second, absent a limited set of circumstances as defined under *Revlon*, a board of directors, while always required to act in an informed manner, is not under any *per se* duty to maximize shareholder value in the short term, even in the context of a takeover.

Paramount Commc'ns, 571 A.2d at 1150.

88. *Paramount Commc'ns*, 571 A.2d at 1153 (quoting Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985)).

formula to resolve disputes over stock valuations and the adequacy of returns.[89] For this reason, *Paramount v. Time* has been called a "constituency precedent."[90] Judicial diffidence in the face of complex financial and corporate strategy issues led to the renewed empowering of the board as the site of dispute resolution through internal governance. The reasoning of the decision allowed the court to recast conflicts over substantive economic interests as a conflict between long-term strategic planning and short-term decisions. Reconceiving the litigation as a contest between alternative investment and planning time horizons, the court held that corporate boards should be granted wide latitude under the business judgment rule in making these sorts of decisions. This deference to the board allowed the courts to withdraw from the difficult and perhaps irresolvable issues of whose interests should be recognized (or recognized as preeminent) in these private polities.[91] Yet those who thought that *Paramount v. Time* heralded a legal vindication of long-term corporate planning and the interests of nonshareholder constituencies were disappointed.[92] The courts were drawn back into the morass of conflicts among constituencies and the problem of shareholder primacy.

A mere four years after *Paramount v. Time* recognized the legitimacy of both nonshareholder interests and long-term corporate strategies, the Delaware Supreme Court embraced shareholder primacy in *Paramount Communications, Inc. v. QVC Network, Inc.* (*Paramount v. QVC*).[93] In *Paramount v. QVC*, the court again ruled against Paramount Communications and held that shareholder interests in short-term maximization of equity value are primary in board decisions regarding a takeover bid. In contrast to the deference shown the directors in *Paramount v. Time*, *Paramount v. QVC* ruled that once they had "decided to sell control, they had an obligation to continue their search for the best value reasonably available to the stockholders."[94] The court's opinion made no mention of any long-term strategic considerations or nonshareholder interests. Although the court distinguished *Paramount v. Time* on factual grounds,[95] the critical difference between *Paramount v. QVC* and

89. *Id.* ("The open-ended analysis mandated by *Unocal* is not intended to lead to a simple mathematical exercise . . . . [P]recepts underlying the business judgment rule militate against a court's engaging in the process of attempting to appraise and evaluate the relative merits of a long-term versus a short-term investment goal for shareholders.").

90. *See* Orts, *supra* note 70, at 105 n.629.

91. *See id.* at 113–15 & nn.660–680.

92. *Cf.* Jeffrey N. Gordon, *Corporations, Markets, and Courts*, 91 COLUM. L. REV. 1931, 1971–88 (1991).

93. Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34 (Del. 1994).

94. *Id.* at 48–49.

95. *Id.* at 52.

Paramount v. Time is normative, not factual.[96] The Delaware Supreme Court once again vacillated on the norm of shareholder primacy and its incorporation into fiduciary law, this time favoring proponents of shareholder primacy.[97] Given that assertions of corporate culture and long-term strategies would dissolve the conceptual foundations, logical coherence, and practical utility of takeover and fiduciary duty law, the court may have concluded that it needed to retreat from *Paramount v. Time*. The "problem of the Paramounts" thus may be interpreted as a real-world experiment using Berle and Dodd's competing positions in their debate sixty years earlier, and Berle did come out as the winner. The rights-based structure of fiduciary law and judicial enforcement impels courts to maintain and reinforce normative hierarchies.

VI. CONCLUSION

The problem of shareholder primacy loomed large at the beginning of the current era of neoliberal finance capitalism, and proved resistant to solution largely because the mechanism of fiduciary duties frames normative conflicts in a way that doesn't allow for resolution. This conundrum, as I have detailed it, supports Berle's later implicit skepticism toward corporate governance and fiduciary law as vehicles for reform. State legislatures and the Delaware courts were incapable of fashioning a practicable alternative to the structure of fiduciary duties and shareholder rights based on shareholder primacy, but the implications of strict enforcement of a shareholder primacy norm are as socially and politically unacceptable as enforceable stakeholder norms are impossible under prevailing political, institutional, and legal conditions in the United States. With the intermediate neocorporatist approach to governance through institutional design and representation unavailable, American corporate and economic governance remains divided between the market and the regulatory state in the balancing of interests among multiple constituencies in a complex economy and polity.

The choice is analytically the same one that confronted Berle and the New Dealers after the brief NIRA corporatist interlude, but the choice in recent decades has far more often favored the market. Following the acute financial crisis of 2007–2009, the deficiencies and systemic failures of both the market and functionally specialized regulatory agencies are excruciatingly clear. The problem for any aspiring successor to Adolf Berle or John Kenneth Galbraith is that the politics of countervailing power that ordered *both* sides of the public–private divide during the

96. *Cf.* Gary von Strange, *Corporate Social Responsibility Through Constituency Statutes: Legend or Lie?*, 11 HOFSTRA LAB. L.J. 461, 479 (1994).

97. *Cf. id.* at 496 & n.193.

postwar era are gone, while no plausible functional or institutional equivalent has emerged.

This historically contextualized reading of Berle and Galbraith helps to resolve a nagging paradox in the legal development of corporate governance: even as normative underpinnings of fiduciary law provided conceptual and doctrinal foundations for legal theories of shareholder primacy, fiduciary duties were largely discredited as peripheral and ineffective in influencing corporate governance practices. In a political economy characterized by relations of countervailing power, Berle's emphasis on the protection of shareholder interests within the narrow confines of corporate governance was counterbalanced by the range of other organized private interests within the private sphere, and thus formed one nonprivileged part of an economic order that, in its totality, ameliorated the problem of managerial and financial power. The collapse of countervailing power was triggered first by the inflationary conditions and implosion of the New Deal political coalition during the late 1960s and 1970s, followed by the collapse of organized labor and ascendance of neoliberal politics during the 1970s and 1980s, and finally by the emergence and entrenchment of neoliberal finance capitalism since the 1980s. The structural conditions that reconciled the two sides of the Berlean governance paradox disintegrated and left the narrow conception of corporate governance and its inchoate valorization of shareholder interests unmoored and dominant.

But the resolution of this paradox confronts us with another. In the wake of the most catastrophic financial collapse since the Great Depression, the most significant reforms of financial regulation since the New Deal have reemphasized, to a striking degree, the importance of the legal rights of shareholders within corporate governance as a means of protecting and empowering shareholder interests. This revival of shareholder governance rights, of which fiduciary duties are but one component, is part of a deeper reform of the structural attributes of American corporate governance that relies on greater representational power for shareholders within firm governance, but remains firmly within the political economic paradigm of contemporary finance capitalism. This potentially historic development represents a contemporary struggle over countervailing power, but one fought out in an era in which the contending interests have been winnowed to those of management and finance. This political, economic, and legal order is a long way from the one that Berle and later Galbraith played such an influential role in creating.