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“Corporation Law is Dead”: The Mystery of Corporation Law at the Height of the American Century

Harwell Wells*

ABSTRACT: In 1962, the corporation law scholar Bayless Manning famously wrote that “[C]orporation law, as a field of intellectual effort, is dead in the United States.” Looking back, most scholars have agreed with Manning, concluding that corporation law from the 1940s to the 1970s was stagnant, only rescued from its doldrums by the triumph of the theory of the firm and modern finance in the 1980s. This paper takes a new look at American corporate law during this time, asking why scholars believed corporation law was “dead” at the same time that the American corporation had seized the commanding heights of the world economy, and the imagination of social and political theorists. It aims to answer two questions: Why was corporation law perceived as moribund in a period when the American corporation’s image and power was at its zenith? And, What does this tell us about the historical relationship between corporation law and the operation of America’s corporate economy? In answering these questions, the paper may even point us towards a still larger question: what is the relationship between a legal-academic discipline, and the thing it studies?

Introduction

In 1962, Yale law professor Bayless Manning famously wrote that that “corporation law, as a field of intellectual effort, is dead in the United States. When American law ceased to take the ‘corporation’ seriously, the entire body of law that had been built upon that construct slowly perforated and rotted away. We have nothing left but our great corporation statutes—towering skyscrapers of rusted girders, internally welded together but containing nothing but wind.”¹ In some ways, he was right; with the subsiding of debates over corporate personhood in the 1920s,² the high-universal adoption of enabling corporation statutes that gave corporate framers broad powers to vary the corporate form,³ and the abandonment of most of the pretenses of shareholder

* Associate Professor of Law, Temple University James E. Beasley School of Law. A version of this paper was previously presented at the Conference on Firm Governance: Law in History at Tel Aviv University. My thanks to [] for helpful comments and suggestions, and to Temple University Beasley School of Law for research support.

¹ Bayless Manning, *The Shareholder’s Appraisal Remedy: An Essay for Frank Coker*, 72 *Yale L.J.* 223, 245 n.37 (1962). The best reflections on Manning’s comment that I have found is in J. Willard Hurst, *The Legitimacy of the Business Corporation in Modern America 1780-1970*, 10, 154-58 (1970).

² See Gregory Mark, *The Personification of the Business Corporation in American Law*, 54 *U. Chi. L. Rev.* 1441, 1478-82 (1987)

³ See, e.g., Wilber G. Katz, *The Philosophy of Midcentury Corporation Statutes*, 23 *Law & Contemp. Probs.* 177, 187-88 (1958)

democracy,⁴ it appeared that corporation law’s great issues had been settled by mid-century and that, as Delaware Chancellor William Allen concluded years later, “nothing remained to engage the wit and energy of those with a taste for discovery and construction.”⁵ Later corporate law scholars have tended to agree. Writing in 1984, Roberta Romano noted that corporation law was long “an uninspiring field for research even to some of its most astute students,”⁶ while others have said that as of the early 1970s “corporation law was more or less dead,”⁷ and that for decades before the 1980s it was “the sleepest of fields.”⁸ Only the appearance of law-and-economics approaches to the corporation in the 1970s would revivify the field.⁹

So goes the conventional wisdom, but is it right? To some extent, the judgment is subjective and so can’t be questioned; if the field was intellectually dead to Manning in 1962, or uninspiring to Romano in the 1970s, then that’s what it was. But the conclusion is still puzzling, for in the 1950s the American corporation seemed to bestride the world. Corporations (or at least large, public ones), many believed, controlled the American economy, dictated its politics, imposed a conformist straitjacket on American society, and manipulated individual tastes and mores. Many of the nation’s best-known economists, political scientists, and social theorists, from Peter Drucker and John Kenneth Galbraith to David Riesman and C. Wright Mills, took “corporate power” as a central concern. Why then was corporate law, a field devoted to studying power relationships within the corporation, perceived as moribund from World War II to the

⁴ See *infra* Part III [other cites]

⁵ William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 *Cardozo L. Rev.* 261, 263 (1992).

⁶ Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 *Stan. L. Rev.* 923, 923 (1984).

⁷ Richard Booth, *Five Decades of Corporation Law*, 53 *Vill. L. Rev.* 459, 460 (2008).

⁸ Jason Scott Johnston, *The Influence of The Nature of the Firm on Corporate Law*, 18 *J. Corp. L.* 213, 219 (1993) (quoted in Brian Cheffins, *The Trajectory of (Corporate Law) Scholarship*, 63 *Camb. L. J.* 456 (2004)). See also, e.g., [cite]

⁹ Some groundbreaking work in corporate law and economics, notably Henry Manne’s, was done in the 1960s, but the field as a whole only caught fire a decade later. See William Bratton, *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 *Stan. L. Rev.* 1471, 1476 (1989); Cheffins, *Trajectory of (Corporate Law) Scholarship*, 63 *Camb. L. Rev.* ____.

1970s? And what might this tell us about corporation law as “a field of intellectual effort” during this era, and perhaps our own as well?

This paper tries to answer that question by examining the underlying assumptions and main concerns of corporation law scholarship during the “long 1950s” (basically, from the end of World War II to the mid-1960s). It shows, first, that corporation law was not, at least to its practitioners, intellectually dead during this period; it was a rich area of inquiry which engaged some of the era’s leading scholars. Given that, the paper then why the main concerns and approaches of the era’s corporation law scholars have seemed so uninteresting and even trivial to their successors. For that I turn to the economic and social assumptions that structured corporation law discourse, and much else, during this period.

Corporation law scholarship during the 1950s rested on an interconnected series of underlying assumptions: that modern American corporations had, through economies of scale and scope, come to win permanent oligopolistic positions in many industries, thus sharply curbing traditional competition; that large corporations were qualitatively different from both their predecessors and smaller business units, and wielded not only economic but social and political power in ways that other business units did not; that they were not merely economic entities but “social institutions” sharing much in common with other dominant institutions, notably labor unions; and that the consequence of these developments was that corporate management’s role had (or was in the process of) evolved so that it should serve not only shareholder interests but the competing interests of different corporate constituencies.¹⁰ It was within this matrix of ideas, sometimes called “Managerialism,” that the era’s corporation law

¹⁰ See, e.g., Edward S. Mason, *The Apologetics of “Managerialism,”* 31 *J. Bus.* 1, 2 (1959). Other legal scholars have noted this line of ideas; see, e.g., Jeffrey N. Gordon, *Corporations, Markets, and Courts*, 91 *Colum. L. Rev.* 1931, 1982 (1991); Melvin Aron Eisenberg, *The Structure of the Corporation: A Legal Analysis* 24-28 (1976). A thorough account of the thought of three major managerial thinkers can be found in Scott Bowman, *The Modern Corporation and American Political Thought* 185-236 (1995) (Berle, Galbraith, Drucker).

developed, and even opponents of these views found their arguments framed by them.¹¹ When economic, social, and political upheavals of the late 1960s and 1970s undercut these assumptions, much of the corporation law produced during this period lost its rationale, and now appears as peripheral or pointless.

Corporate Economy, Corporate Society

Looking back, the period from the end of World War II to the late 1960s appear a golden age for the American economy. The basic facts are well-known. While the 1930s marked the economy’s low point, World War II revived it. Wartime government spending boosted production, while industry’s vital role in the war effort revived the confidence of many corporate leaders and rehabilitated the image of corporations tarred with the economic failures of the previous decades.¹² At war’s end a feared recession did not materialize, and instead pent-up consumer demand ignited economic growth. Between 1945 and 1973, real per capita income doubled,¹³ and to a great extent this new wealth was spread widely, as wage inequality fell sharply in the 1940s and did not begin to increase significantly again until the 1970s.¹⁴

At the center of this economic success story was the American corporation, more specifically the few hundred giant corporations perceived as dominating most major industries.¹⁵

¹¹ There is no perfect term. As an intellectual matter, it would be equally valid to call this net of ideas “corporatism,” see, e.g., [Bratton & Wachter 2010,] and calling it “managerialism” evokes some confusion, as the same term has been used for other, related sets of ideas, including an entire line of management-focused study of the corporation following Berle & Means [Bratton 1989, Mizruchi]. That said, “managerialism” was used during the 1950s, has been used by scholars since, and seems at least as appropriate as any other term. It probably dates to Burnham’s *Managerial Revolution*; the earliest usage recorded in the Oxford English Dictionary is from a 1942 review of Burnham’s book in the *American Economic Review*. [OED online]

¹² See Louis Galambos & Joseph Pratt, *The Rise of the Corporate Commonwealth* 127-29 (1988); Roland Marchand, *Creating the Corporate Soul* 312-56 (2001).

¹³ Wyatt Wells, *American Capitalism, 1945-2000* at 27-28 (2003).

¹⁴ See Claudia Goldin & Robert Margo, *The Great Compression: The Wage Structure in the United States at Mid-Century*, 107 *Q. J. Ec.* 1, 3 (1992).

¹⁵ I write “perceived” deliberately; as Alfred Chandler pointed out long ago, concentration came in some industries but not in others, a fact, he also pointed out, overlooked by many critics of the American economy. See Alfred D. Chandler, Jr., *The Structure of American Industry in the Twentieth Century: A Historical Overview*, 43 *Bus. His. Rev.* 255, 255 (1969). As used here, “corporation” generally applies to the large, public corporations perceived as economically and politically dominant.

Analyses of the American economy often began with the vision of a corporation-dominated economy offered in Adolf A. Berle, Jr. and Gardiner Means’s *The Modern Corporation and Private Property* (1932). Based on data assembled by Means, *The Modern Corporation* had made two great claims about the modern American economy, that control of corporations was shifting from stockholders to managers, and that more and more of the nation’s wealth was gravitating to approximately 200 of the nation’s largest corporations; in 1932, they had estimated, those corporations controlled half the nation’s nonfinancial corporate wealth.¹⁶ In the postwar era, both assertions were still the conventional wisdom¹⁷ (though they had retreated a bit from their claim that corporations were accruing larger percentages of national wealth).¹⁸ As these large corporations grew, it was held, competition weakened (in some tellings, disappeared altogether). The era of *laissez-faire* appeared to recede, as a time where industries contained many small manufacturers battling for market share was succeeded by one where more and more industries were controlled by a small number of dominant corporations locked in oligopolistic competition. This in turn gave those firms greater ability to set prices higher than they would have in perfect competition, leading some to speak of the postwar shift “from competitive to administered prices.”¹⁹ And even as oligopolistic position weakened competitive pressures, the

¹⁶ Adolf A. Berle & Gardiner C. Means, *The Modern Corporation and Private Property* 32 (1932)

¹⁷ See, e.g., Clair Wilcox, On the Alleged Ubiquity of Oligopoly, 40 *A. Ec. Rev.* 67, 67 (1950); Robert J. Lerner, Ownership and Control of the 200 Largest Nonfinancial Corporations, 1929 and 1963, 66 *Am. Ec. Rev.* 777, 777 (1963); This is not to say there were no dissenters, just that their basic conclusions were generally accepted.

¹⁸ Adolf A. Berle, *The Twentieth Century Capitalist Revolution* ___ (1954); John Lintner, The Financing of Corporations, in *The Corporation in Modern Society* 170-71 (ed. Edward S. Mason 1959).

¹⁹ W. T. Easterbrook, Book Review, 67 *J. Pol. Ec.* 242 (1959) (reviewing Thomas Cochran, *The American Business System* (1958)). On “administered prices,” see also Gardiner Means, *Pricing Power and Public Interest: A Study Based on Steel* (1962); John Kenneth Galbraith, *American Capitalism: The Concept of Countervailing Power* 196-200 (1952). The late 1950s did see Congressional hearings on administered prices. See Meg Jacobs, *Pocketbook Politics*, in *The Democratic Experiment* 267 (Jacobs, Novak, & Zelizer, eds. 2003).

ability to rely on internally generated funding eroded any discipline promised by the capital markets.²⁰

Though upended by events in the 1970s, this vision of the American economy as centralized, oligopolistic, and even managed, was not foolish at the time. According to the economic historian Louis Galambos, “[in] most sectors of the American economy . . . oligopoly prevailed and, with it, competitive practices that downplayed short-term price competition and emphasized competition through product and process innovation and through new forms of marketing.”²¹ As Alfred Chandler showed, many of the corporations that grew to industrial dominance by the 1910s held their commanding positions into the 1970s, which suggested that competition was not alive and well in the upper reaches of the economy.²² Federal government involvement in many economic sectors lent credence to the view that *laissez-faire* was on the wane. Defense spending effectively sponsored many industries, which operated less in an environment of fierce competition than as part of an “administered economy,” with steady profits guaranteed by cost-plus contracts.²³ Other industries, including railroads, airlines, finance, and energy production, were so heavily regulated that competition there, too, was muted at best.²⁴

Given the decline of competition, and the apparent entrenchment of the largest firms, it was not clear what could significantly curb corporations’ economic power. Regulated industries

²⁰ Berle, *Twentieth Century Capitalist Revolution* 25-40. This view appears to have been widespread, but was not universal. See, e.g., John Lintner, *The Financing of Corporations*, in *The Corporation in Modern Society* 166 (Mason ed. 1959).

²¹ Louis Galambos, *The U.S. Corporate Economy in the Twentieth Century*, in 3 *Cambridge Economic History of the United States* 927, 942 (1996). In other industrial sectors characterized by batch production and customized products, such oligopolies did not arise. See *id.* at 938.

²² [Cite]. This was also the view at the time; one 1958 study of the 100 largest firms indicated that the movement of firms out of the “top 100,” and particularly out of the top of the “top 100,” was decreasing over time, and that there was “considerable reason to believe that firms now at the top of the industrial pyramid are more likely to remain there . . . [and] large-scale corporations enjoy an increasing amount of entrenchment of position by virtue of their size.” Norman R. Collins & Lee E. Preston, *The Size Structure of the Largest Industrial Firms, 1909-1958*, 51 *A. Ec. Rev.* 986, 1001 (1961).

²³ Louis Galambos & Joseph Pratt, *The Rise of the Corporate Commonwealth* 137 (1988)

²⁴ See *id.* at 153-54.

were, it is true, regulated, but the pro-business Eisenhower administration did not appear eager to impose further limits on giant corporations. This was, after all, the administration whose nominee for Secretary of Defense, General Motors President Charles Wilson, told Congress in his confirmation hearings that “for years I thought what was good for our country was good for General Motors, and vice versa.”²⁵ The antitrust laws may have done a bit to limit horizontal and vertical mergers in some industries, though they did not challenge industry concentrations as a whole.²⁶

One ingenious and influential theory was put forward by John Kenneth Galbraith in his 1952 work *American Capitalism*, where he argued that the economic power of large corporations was offset in the United States not by competition but by the “countervailing power” of other large institutions, ranging from other large corporations (for instance, retail chains countering producers) or unions.²⁷ Berle himself believed that public opinion would limit corporate managers’ acting in ways inimical to the public interest, and others argued that an evolving ethos of professionalism would constrain managerial opportunism.²⁸ But none of these claims settled the issue of whether significant limits existed on the economic power of the large corporation.

Limits on corporate power were particularly important because of a second development, the oft-expressed view that the corporation was no longer merely an economic entity but a “social institution.” What exactly this meant can be hard to pin down. Berle and Means wrote of the corporation as a “major social institution” in *The Modern Corporation and Private Property*, claiming that the corporation had accrued so much economic power, at the same time ownership

²⁵ Morrell Heald, *The Social Responsibility of Business: Company and Community, 1920-1960*, 237 n.8 (quoting N.Y. Times 8 (24 Jan. 1953)).

²⁶ Tony Freyer, *Regulating Big Business: Antitrust in Great Britain and America 1880-1990*, 300-04 (1992); Galambos & Pratt, *Rise of the Corporate Commonwealth* 153.

²⁷ John Kenneth Galbraith, *American Capitalism* ____; see also generally Richard Parker, *John Kenneth Galbraith* (2008).

²⁸ Berle, *Twentieth-Century Corporate Revolution* ____; see *infra* text accompanying notes ____ - ____.

of the corporation had become so attenuated, that the “larger interests of society” now had a claim on corporate wealth at least equal to that of shareholders.²⁹ They also speculated that the corporation’s power meant it could eclipse even the state as the dominant institution of modern society.³⁰

Although it is tempting, particularly for a corporate law professor, to attribute this view to Berle & Means (or just Berle, who was still active in the 1950s),³¹ that act of compression would misrepresent the complex roots and widespread acceptance of managerial ideas. In 1940 James Burnham had published his enormously influential *The Managerial Revolution*, where he drew on Berle & Means among many others to argue that a “social revolution” was underway that would see “an unusually rapid rate of change [in] the most important economic, social, political, and cultural institutions of society,” and that would conclude with a new, managerial class seizing control of the major institutions of society.³² In 1946 Peter Drucker, whose position as a major social theorist was later eclipsed by his role as pop-management guru, described his study of General Motors, *The Concept of the Corporation*, as taking a “social and political approach to the problems of industrial society—as distinct from economics.”³³ In the postwar United States, he wrote, “[o]nly now have we realized that the large mass-production plant is our social reality, our representative institution, which has to carry the burden of our dreams.”³⁴

²⁹ Berle & Means, *The Modern Corporation and Private Property* 351, 356.

³⁰ See *id.*

³¹ For an thought-provoking reconsideration of Berle’s later works, see Marc T. Moore and Antoine Reberieux, *Corporate Power in the Public Eye: Re-Assessing the Implications of Berle’s Public Consensus Theory*, 33 *Seattle U. L. Rev.* ____ (forthcoming 2010).

³² See James Burnham, *The Managerial Revolution* 71-77 and *passim* (1940). Burnham had been influenced by Berle & Means; see Daniel Kelly, *James Burnham and the Struggle for the World* 93 (2002). In important respects, it should be noted, Burnham’s vision was *sui generis*; he also believed that one consequence of the managerial revolution would be state ownership of the means of production.

³³ Peter Drucker, *Concept of the Corporation* xxvi (1946). Drucker certainly did not agree with Burnham or the other “managerial” authors on everything; for instance, he believed the corporation had to be guided by the profit motive.

³⁴ *Id.* at 142.

By the 1950s so widespread was the assumption that the corporation was a social institution that Harvard economist Carl Kaysen would publish an essay in the *American Economics Review* entitled “The Social Significance of the Modern Corporation,” which began by claiming that in “the evolving giant corporation, managers possess great scope for decision making unconstrained by market forces.”³⁵ Such power was a particular danger because of the corporation’s new reach; beyond economic power, he continued, “the modern corporation operates to spread business valuations and business ideas widely through the whole of society . . . most obviously through the mass media, the tone of which is set by the themes of sales promotions. But the more subtle effect of membership in the corporate institution is probably more important.”³⁶ Modern corporations had almost guaranteed their workers and executives permanent employment, but this meant that “membership in the modern corporation becomes the single strongest social force shaping its career members in the whole hierarchy above the production line.”³⁷ Harvard law professor Abram Chayes wrote shortly thereafter that the corporation was “the dominant nongovernmental institution of American life. The university, the labor union, the church, the charitable foundation, the professional association—other potential institutional centers—are all, in comparison, both peripheral and derivative.”³⁸ Making the point about the corporation as a “social institution” more explicit, a 1959 collection of essays on the corporation (including Chayes’s), most by law professors and economists, was not entitled, say, the *Corporation and the Economy* but *The Corporation in Modern Society*.³⁹

³⁵ Carl Kaysen, *The Social Significance of the Modern Corporation*, 47 *Am. Ec. Rev.* 311, 316 (1957)

³⁶ *Id.* at 318.

³⁷ *Id.*

³⁸ Abram Chayes, *The Rule of Law*, in *The Corporation in Modern Society* 27 (ed. Edward Mason 1959).

³⁹ *The Corporation in Modern Society* (ed. Edward Mason 1959). Out of 14 contributors, 3 were law professors, 6 economists or business-school professors, 2 political scientists, and 1 sociologist.

The concept of the corporation as a major social institution, with social power, had at least two further effects. First, it created some affinities between “managerial” writers such as Berle, Drucker, and Kaysen, and more popular critics of the corporation such as the journalist Vance Packard, author of an attack on advertisers, *The Hidden Persuaders*, or William Whyte, who wrote the classic critique of corporate conformism, *The Organization Man*. In the above essay, Harvard economist Kaysen does not sound so far from Packard. Second, it allowed some observers to blur the distinctive nature of the corporation. Specifically, once the (dominant, large, public) corporation was perceived as a significant social institution, it could be categorized and analyzed along with other giant social institutions such as unions or the emerging giant foundations, losing some of its economic distinctiveness in the process. American society, in this view, became a network of large institutions, with corporation perhaps the most prominent, tied together atop a society and economy they managed. Thus Galbraith portrayed unions as one of the “countervailing powers” at work in *American Capitalism*. Speaking further from the left, the radical sociologist C. Wright Mills in his classic *The Power Elite* (1956) depicted the corporation, which he saw as controlling the “economic domain” of modern society, as only one of society’s “big three” hierarchies, alongside the state and the military, and further argued that all were deeply entwined, writing that “there is no longer, on the one hand, an economy, and, on the other hand, a political order containing a military establishment unimportant in politics and money-making. There is a political economy linked in a thousand ways, with military institutions and decisions.”⁴⁰ Even Bayless Manning, when criticizing studies of “corporate power” published in the 1950s, argued that the problem under consideration was not the power of the “generic” corporation – which was merely a legal form – but rather the power wielded in modern America by any “vast centralized economic and social organization.” Looking back, the historian Richard

⁴⁰ C. Wright Mills, *The Power Elite* 6 (1956).

Pells would write of the view of the “harmonious marriage of government, business, the military, and the unions that became an accustomed feature of American life after 1945.”⁴¹

Berle and Means, Drucker, Kaysen, and Manning did not speak for everyone, nor did they agree on many points, but their comments do mark out a distinctive approach in economic and social thought that influenced how the corporation was understood during the long 1950s. Moving towards the main subject of this paper, we can ask how this broad view shaped understandings of corporate management, and how this in turn shaped legal scholarship on the corporation.

“Heroic Managerialism”⁴²

At the core of “managerialism” was not only the belief that large corporations were rapidly growing to become, or already were, dominant economic and social institutions, but that they were being run by a new kind of controller. Both those optimistic and pessimistic about managerialism pointed to corporate managers as a central element of the new system. Burnham and C. Wright Mills, for instance, saw corporate managers as a new class in society, supplanting the capitalists of a previous era.

More sympathetic students of the corporation did not see senior managers as a self-perpetuating elite, but they did conclude that managers were no longer simply agents of the shareholders of giant corporations. Berle and Means said as much in 1932, but the idea became widespread in the postwar era, as corporate leaders were increasingly depicted as balancing the demands of various corporate constituencies, not only shareholders but employees, communities, consumers, and society generally.⁴³ In 1950 Drucker wrote of the need for a business enterprise

⁴¹ Richard Pells, *The Liberal Mind in a Conservative Age* 55 (1985).

⁴² I take the term “heroic managerialism” from Gregory Mark, *The Corporate Economy: Ideologies of Regulation and Antitrust, 1920-2000*, in 3 *The Cambridge History of Law in America* 613, 643 (Michael Grossberg and Christopher Tomlins, eds., 2008).

⁴³ See Wells, *The Cycles of Corporate Social Responsibility*, 51 *Kan. L. Rev.* at 100-110 (2002), for a survey of this development.

to have “management whose responsibility is to the enterprise rather than to any one group: owners, workers, or consumers,”⁴⁴ and a decade later Berle, who remained a formidable intellectual presence through the 1950s, spoke of modern directors who were no longer “limited to running business enterprises for maximum profit, but are in fact . . . administrators of a community system.”⁴⁵ Economists voiced similar beliefs; in his 1957 essay Kaysen wrote that management, no longer constrained by fierce competition or the need for outside capital, “sees itself as responsible to stockholders, employees, customers, the general public, and, perhaps most important, the firm itself as an institution,”⁴⁶ while his Harvard colleague Edward S Mason wrote shortly thereafter of “management voices . . . raised to deny th[e] exclusive preoccupation with profits and to assert that corporate management are really concerned with equitable sharing of corporate gains among owners, workers, suppliers, and customers.”⁴⁷

The last comment is slightly jarring, for it hints that managerialism was the ideology not only of the managerial theorists, but of corporate managers themselves. The evidence suggests that this is the case—or at least that in their public pronouncements corporate leaders voiced managerial views.⁴⁸ Clearly, many business leaders accepted some or all of the economic underpinnings of managerialism; by the 1950s, for instance, many senior managers had accepted that pure competition was in the past, and that the kind of competition facing large corporations was imperfect or oligopolistic competition, not the competition of “a peddler with a pack of pots and pans on his back and a different price for every customer [but] . . . the competition of pricing policies, of quality, of consumer surveys, of mass advertising and of mass distribution devices, of

⁴⁴ Drucker, *The New Society* 40.

⁴⁵ Adolf A. Berle, Jr., *Foreward to The Corporation and Modern Society* xii (Edward S. Mason ed. 1959).

⁴⁶ Kaysen, *The Social Significance of the Modern Corporation*, 47 *Am. Ec. Rev.* at 313.

⁴⁷ Edward S. Mason, *Introduction to The Corporation and Modern Society* 11. See also Mason, *The Apologetics of ‘Managerialism,’* 31 *J. Bus.* at 3.

⁴⁸ The sources discussed in this paragraph and the next examine the public statements of businessmen; their private beliefs are more difficult to plumb.

research, and of production practices and conditions of employment.”⁴⁹ Nor did many object to the notion that prices were “administered,” only to the “implication that administered prices were arbitrary, sinister, evil, and anti-social.”⁵⁰

Business leaders not only accepted some of the economic assumptions of managerialism, many also agreed that they no longer managed solely on behalf of shareholders. In 1951 *Fortune* magazine announced in a special survey of the American economy that the United States had produced a new “kind of capitalism that neither Karl Marx nor Adam Smith ever dreamed of.”⁵¹ Quoting Standard Oil of New Jersey president Frank Abrams, it reported that managers were increasingly conducting the “affairs of the enterprise in such a way as to maintain an *equitable and working balance* among the claims of the various directly interested groups—stockholders, employees, customers, and the public at large.”⁵² Expanding on this, the magazine’s editors insisted that “[m]anagement is no longer occupied exclusively with the interests of the stockholder, who often has become a kind of contingent bondholder rather than a part owner, and who rarely exerts any direct influence on the affairs of the company.”⁵³

This view was echoed several years later in a large-scale sociological study of the public ideology of American business, the *American Business Creed*.⁵⁴ Drawing on the public statements of business leaders, spokesmen, and organizations, its authors identified a “managerial” view as one of the two major strands of business ideology (the other being a

⁴⁹ Herman E. Krooss, *Executive Opinion: What Business Leaders Said and Thought on Economic Issues, 1920-1960*, 311 (quoting U.S. Steel Chairman Roger Blough).

⁵⁰ *Id.* at 327.

⁵¹ The Editors of *Fortune Magazine*, U.S.A. *The Permanent Revolution* 68 (1951). The chapters in this book originally appeared in a special issue of *Fortune*.

⁵² *Id.* at 80.

⁵³ *Id.* It did continue, however, that management could also not “flagrantly disregard stockholders’ interests.”

⁵⁴ The authors were clear to note that theirs was a study of ideology, the “system of beliefs publicly expressed with the manifest purpose of influencing the sentiments and actions of others.” Sutton et al., *American Business Creed* 2.

“classical” strand).⁵⁵ The managerial view emphasized “the role of professional managers in the large business firm who consciously direct[ed] economic forces for the common good.”⁵⁶ This was, its adherents believed, a new form of American capitalism, one born as “the whole system is moving toward a new kind of homogeneity – the large, professionally managed, socially oriented corporations.”⁵⁷ As described by the study’s authors, this view held by businessmen could easily have been shared by Berle or Drucker:

[T]he enterprise is not conceived in the narrow terms of its legal model. Instead emphasis is placed on the enterprise as a social system. Employees, customers, and suppliers are not regarded as outsiders but as integral parts of the organization; their relations to management are not purely, or even mainly, contractual and economic. . . . [I]n the managerial view [stockholders] are on a par with other groups that have stakes in, and just claims on, the organization. Managers are assigned a more important and more autonomous role than that of agents for the owners. Theirs is the statesman’s function of mediating among the groups dependent on the enterprise, satisfying just claims and preserving the continuity of the organization.⁵⁸

In the authors’ analysis, deeply suffused with the sociological approach of the time, the managerial ideology was a response to managers’ discomfort with the implied selfishness of businessmen, as it denied “that private profit is or ought to be the principal orientation of the business enterprise.”⁵⁹ A nice summary of this public creed was provided by General Foods

⁵⁵ Sutton et al., *The American Business Creed* 34. The “classical” strand centered around the “model of a decentralized, private, competitive capitalism, in which the forces of supply and demand, operating through the price mechanism, regulate the economy in detail and in aggregate.” *Id.* at 33.

⁵⁶ See *id.*

⁵⁷ *Id.* at 36.

⁵⁸ *Id.* at 57 – 58.

⁵⁹ *Id.* at 357.

President Clarence Francis, who told a Congressional committee in 1949 of his “three-way responsibility to the American consumer, to our associates in this business, and to the 68,000 men and women whose faith has been shown by their investment in General Foods. We . . . would serve (the company’s) interests badly by shifting the fruits of the enterprise too heavily toward any one of those groups.”⁶⁰

The ubiquity of managerial assumptions appeared as well in the renewed popularity of “social responsibility” during this era.⁶¹ Few businessmen failed to at least give a nod to the concept during the 1950s, and by 1959 so popular was it that the business writer Theodore Levitt launched an assault on the concept in the *Harvard Business Review*, writing that the movement had left “the profit motive compromised in both word and deed. Today’s profits must be merely adequate, not maximized.” It was, he continued, “no longer fashionable for the corporation to take gleeful pride in making money. . . [it was] fashionable for the corporation to show that it is a very great innovator, more specifically a great public benefactor, and, very particularly, that it exists ‘to serve the public’.”⁶²

Some skepticism is, of course, due these statements, designed as they were for public consumption. Looking back, there is little evidence to support a claim that managers of large public corporations in the 1950s actually governed their firms for the benefit of multiple constituencies, or cared less about profits than their predecessors or successors (they might have been complacent about them, but that is a different matter).⁶³ What the above discussion does show is that a surprisingly wide swathe of individuals, from leftist social critics, to moderate theorists of the corporation, to senior executives themselves, shared a set of assumptions about

⁶⁰ Id. at 64 n.31

⁶¹ See, e.g., Krooss, Executive Opinion 50-58. Despite Levitt’s polemic, few businessmen were actually interested in making fewer profits during this period; they just hoped to do so responsibly. See id. at 55-57.

⁶² Theodore Levitt, The Dangers of Social Responsibility, 36 Harv. Bus. Rev. 42 (Sept.-Oct. 1958).

⁶³ Indeed, as the *American Business Creed* made clear, the “classic” ideology of small business and competitiveness did not disappear during the 1950s.

the corporation that varied both from what was believed earlier in the century and what is believed today. As I shall argue in the next section, this managerial ideology also structured the discourse of corporation law in the 1950s.

Corporation Law as a field of Intellectual Effort

The first point to be made about corporation law scholarship in the long 1950s is that its practitioners certainly didn’t act as though it was dead. In 1959, NYU law professor Miguel de Capriles published a retrospective *Fifteen-Year Survey of Corporate Developments, 1944-1959*, where he made what might seem a surprising claim: “The post-World War II year hold a particular fascination for corporation lawyers.”⁶⁴ In Manning’s account, the success of enabling acts, the end of concern with corporate personhood, and the waning of shareholder power had drained the life from corporation law. To De Capriles, however, the 1950s were particularly vital time for corporation law, due in part to the Cold War, when the “battle for men’s minds overshadowed the conquest of territories [and] in a very real sense the corporate system of economic activity became a symbol of the ‘American way of life’ for a large sector of our population.”⁶⁵ Managerialism shaped new views of the corporation and corporate management; “the notion that the corporate system should be a ‘socially responsible’ capitalism has gained broad acceptance,” he wrote, while the “steady rise of professional management had also seen its leaders publicly express views concerning the obligations of modern corporate enterprise that before World War II were largely limited to academicians and New Dealers.” In the years after World War II, he continued, “[c]ontrol of corporate management for the protection of the investor and the public is a central theme; its counterpoint is the demand of management for the freedom to manage.” The survey concluded by claiming that “it is hard to find another comparable period

⁶⁴ 13 Vand. L. Rev. 1, 1 (1959)

⁶⁵ Id.

in the history of corporation law and practice that has been so rich in legislative, administrative, judicial, and scholarly activity.”⁶⁶

Some of de Capriles’s enthusiasm may be mere authorial puffery—after all, who wants to write a survey of 15 years of law and admit nothing very interesting happened? So, too, some of the developments identified in his article had been issues well before World War II, such as issuance of shares at prices above par value, or new means of executive compensation.⁶⁷ But he also identifies as significant a series of issues and developments that are tied together by the assumptions of managerialism. Indeed, these developments can only really be appreciated by understanding them within the frame of managerialist ideas. This paper argues not only that managerialist ideas were woven through corporation law during the 1950s, but that those ideas gave coherence and heft to the period’s corporation law.⁶⁸ When that intellectual frame was abandoned, the significance of the legal developments was lost. Simply put, to understand the main currents of this period’s corporation law we must look at them through a managerial lens. The managerial vision appears with greatest force in three issues seen as vital then, and either treated as peripheral or changed utterly, today: corporate charitable contributions, proposals to “constitutionalize the corporation,” and the struggles over shareholder democracy.

Corporate charitable contributions were a major scholarly issue during the 1950s. Nowadays, such contributions are specifically provided for in statute, and when justified at all are typically tied to some form of long-term benefit, however tenuous, claimed to inure to the

⁶⁶ Id. at 2.

⁶⁷ See id. generally. See also Wells, *Modernization of Corporation Law (par value)*, Wells, “No Man Can be worth \$1,000,000 a Year” (executive compensation).

⁶⁸ I do not want to say these ideas constituted a “paradigm” for corporation law, as the term is overused and makes it appear that I am applying wholesale Thomas Kuhn’s model to an area, corporate law scholarship, where it may be inappropriate. See Cheffins, *The Trajectory of (Corporate Law) Scholarship* ___. The set of ideas discussed here are neither as fixed nor coherent as I understand a natural scientific paradigm to be. But I am employing a similar concept.

corporate donor.⁶⁹ They were still a comparative novelty in the postwar era, however; before the war the general assumption, and majority common-law rule, had been that corporate charitable donations were *ultra vires*, though gifts made with “a view of receiving material benefits therefrom” were sometimes permitted.⁷⁰ The landmark postwar case was *A. P. Smith Mfg. Co. v. Barlow*, in which the New Jersey Supreme Court upheld, under the common law, a corporation’s donation of \$1500 to Princeton University.⁷¹ Though the New Jersey court repeated the perennial justification for corporate charity – that it would ultimately redound to benefit the giver – the court also put forward a second, very different, justification for corporate charity, one unconnected to self-benefit but closely allied to the era’s vision of the corporation as a “social institution.” “[M]odern conditions require that corporations acknowledge and discharge social as well as private responsibilities as members of the communities within which they operate.”⁷² Citing *The Modern Corporation and Private Property*, and looking back to the classic defense of corporate social responsibility offered by Merrick Dodd’s 1932 article *For Whom Are Corporate Managers Trustees?*, the court noted that during the twentieth century “[c]ontrol of economic wealth has passed largely from individual entrepreneurs to dominating corporations,” justifying new demands on the corporation.⁷³ With the “transfer of most of the wealth to corporate hands, . . .” the court reasoned, individuals have “turned to corporations to

⁶⁹ See, e.g., James Cox & Thomas Lee Hazen, *Corporations* § 4.03 at 63-64 (2d ed. 2005); see also generally Nancy J. Knauer, *The Paradox of Corporate Giving: Tax Expenditures, the Nature of the Corporation, and the Social Construction of Charity*, 44 *DePaul L. Rev.* 1 (1994).

⁷⁰ See, e.g., Henry W. Ballantine, *Ballantine on Corporations* § 58, at 207-08 (1927) (rule to be drawn from cases cited was that that corporations had leeway to make donations, so long as there was a persuasive “material benefit” accruing therefrom). See also *A. P. Smith Mfg. Co. v. Barlow*, 98 A.2d 581, 584 (N.J. 1953).

⁷¹ 98 A.2d at 581. The Supreme Court also made sure to note that the gift could also be defended as providing long-run benefits to the corporation. See *id.* at 583-85

⁷² *Id.* at 586.

⁷³ *Id.* at 584.

assume the modern obligations of good citizenship in the same manner as humans do.”⁷⁴ The justification offered for corporate charity by the court was thus tied up with a particular vision of the corporation dating back to Berle & Means’s work, one expanded since, in which “dominating corporations” had gathered up the bulk of the nation’s wealth and thus found themselves with new responsibilities, called upon to assumed new duties not only to shareholders but the communities within which they operated.⁷⁵

A. P. Smith was not quite as groundbreaking as it may have appeared at the time; after all, one of the court’s justifications for upholding the gift to Princeton was that New Jersey and 28 other states had adopted statutes permitting corporate charitable giving.⁷⁶ It did, however, give corporation scholars another example to hammer their argument that the corporation was evolving into a social institution and to assert that new legal rules were evolving along with it. Berle contended that *A.P. Smith* showed that “the state has authorized corporations to withhold from their shareholders a portion of their profits, channeling it to schools, colleges, hospitals, research, and other good causes.”⁷⁷ Richard Eells, a Columbia Business School professor, claimed that the decision, and corporate charitable contribution statutes more generally, demonstrated that the modern corporation was no longer merely an economic unit but a social and political one as well, a “basic unit in our multigroup society” with its powers “an expression of a method for implementing the needs of society.”⁷⁸

⁷⁴ Id. at 586. In a fascinating and odd twist, *A. P. Smith Manufacturing Corp.* appealed the decision of the New Jersey Supreme Court to the U.S. Supreme Court, where cert. was denied; its attorney on appeal was A. A. Berle. Dalia Tsuk Mitchell, *From Pluralism to Individualism*, 30 *Law & Soc. Inq.* 179, 206-07 (2005). Tsuk Mitchell speculates, no doubt correctly, that Berle took this on so he could argue the question of a corporation’s powers in front of the highest court in the land.

⁷⁵ 98 A.2d id. at 586. The Court upheld the grant apart from the statute, but also held that the statute operated to alter the corporation’s preexisting charter. See id. at 589-90.

⁷⁶ See id. at 587. The MBCA included a provision allowing charitable gifts in its 1950 revisions.

⁷⁷ Adolf A. Berle, *The Twentieth Century Capitalist Revolution* 168 (1954).

⁷⁸ Richard Eells, *Corporate Giving in a Free Society* 83 (1956).

Even some more skeptical of the growth of corporate charity believed it was evidence that the corporation was evolving from a purely economic institution, devoted to shareholder wealth, to a social institution. In his 1960 article *Love and the Business Corporation*, NYU professor Bert Prunty sketched the connection between changes in the corporation’s social role and corporation law: “Social and economic evolution in our society inexorably brought about a mutation in the public image of one of its most important institutions—the business corporation. . . . As fear of the corporate Titan began to wither, legal doctrine rooted in that fear began to atrophy.”⁷⁹ That same year attorney Louis Kelso, writing in the *Business Lawyer*, attacked the new model “corporate ‘good citizen’” which was “coming to focus [its] institutional duty (as [its] executives see it) to serve mankind.”⁸⁰ Corporate charitable gifts, and more generally the use of the business corporation to carry out “social objectives,” were he feared, “another step towards the conversion of the business corporation from an economic entity into a political entity.”⁸¹ This view was not universal. Some scholars argued (in retrospect correctly) that corporate charity did not augur a change in corporate purpose, and that a gift could be justified as benefitting shareholders, but the fact that so many took corporate charity to herald a fundamental change in corporations’ orientations illustrates the pervasiveness of managerial beliefs.⁸²

The belief that the large corporation had become a dominant social institution gave rise to another proposal powerful in the 1950s, “constitutionalizing the corporation.”⁸³ As with much else, this can be traced back to Berle & Means, who warned in *The Modern Corporation and*

⁷⁹ Bert S. Prunty Jr., *Love and the Business Corporation*, 46 Va. L. Rev. 467, 468 (1960). It should be noted that Prunty seriously doubted that corporate charity would be as disinterested as its advocates hoped. See *id.* at 476.

⁸⁰ Louis O. Kelso, *Corporate Benevolence or Welfare Redistribution?* 15 Bus. Law. 259, 259 (1960).

⁸¹ *Id.* at 260.

⁸² For one skeptic about the larger import of corporate charity, see Wilber G. Katz, *Responsibility and the Modern Corporation*, 3 J. L. & Econ. 75, 82 (1960) (“The only statutes or cases which suggest any departure from [the standard set out in *Dodge v. Ford Motor Co.*] are those relating to corporate gifts”).

⁸³ This movement was most popular in the 1950s and early 1960s, though it did not disappear immediately. See, e.g., Ralph Nader, Mark Green, and Joel Seligman, *Constitutionalizing the Corporation: The Case for the Federal Chartering of Giant Corporations* (1976).

Private Property that the corporation might succeed the state, but by the 1950s the proposal to somehow impose constitutional limits on the corporation fit with broader social and legal currents. By then, many accepted that the corporation would soon be as powerful as the state, if it wasn’t already. Drucker, for instance, had written in the *Concept of the Corporation* that the corporation was now “the institution which sets the standard for the way of life and the mode of living of our citizens; which leads, molds, and directs; which determines our perspective on our own society; around which crystallizes our social problems and to which we look for their solution.”⁸⁴ Amherst College political scientist Robert Latham appears to have made a of career of insisting that the corporation had become chief rival to the state, claiming that it “governs as surely as the state in the formal literature . . .” and therefore there needed to be applied to corporations “the whole pattern of controls laid upon the states when the Federal Republic was created under the Constitution of 1787.”⁸⁵

This push to impose constitutional limits on corporations was one aspect of a movement to impose those limits on a range of large institutions, perhaps under the influence of pluralist theories of the polity.⁸⁶ According to Columbia law professor Wolfgang Friedmann, not only corporations but unions, trade associations, and even foundations, were among the “highly organized groups [that] have taken over the substance of sovereignty” and therefore needed to be tamed.⁸⁷ Yale’s labor law specialist (and later Dean) Harry Wellington agreed, summing up this development in 1960 by writing that “[r]anging wide through society and deep into the

⁸⁴ Drucker, *Concept of the Corporation* 6-7 (quoted in Wolfgang Friedmann, *Corporate Power, Government by Private Groups, and the Law*, 57 *Colum. L. Rev.* 155, 170 (1957)).

⁸⁵ Robert Latham, *The Commonwealth of the Corporation*, 55 *Nw. U. L. Rev.* 25, 32, 35 (1960). Latham’s statements appear extreme, but he was a respected voice in debates over the corporation in the 1950s. See, e.g., Robert Latham, *The Body Politic of the Corporation*, in *The Corporation in Modern Society* 218 (Mason ed. 1959).

⁸⁶ See, e.g., Arthur S. Miller, *The Constitutional Law of the ‘Security State’*, 10 *Stan. L. Rev.* 620, 656 (1957) (“With the continuing ‘pluralizing’ of American society and increasing recognition of the governmental power of private groups, it can be forecast with some certainty this the trend of the Court of *public-izing* private groups will continue. It is the important constitutional law development of the mid-twentieth century.”)

⁸⁷ Friedmann, *Corporate Power*, 57 *Colum. L. Rev.* at 165.

Constitution commentators have suggested that all or most ‘powerful’ private groups should be subject to all or most provisions of the Constitution. The business corporation and the labor union have been the principal target of these suggestions, and the Bill of Rights and the fourteenth amendment have been envisioned as the principal instruments for control.”⁸⁸ Though the literature on corporations was not inconsiderable,⁸⁹ more appears to have been written on the constitutionalizing of unions during this period.⁹⁰

Advocates of constitutional limits on private institutions could draw support from contemporary constitutional developments.⁹¹ Recent Supreme Court decisions appeared to stretch the notion of who constituted a “state actor” for purposes of constitutional protections. In *Shelley v. Kramer* (1948), the Supreme Court barred state judicial enforcement of private racial covenants.⁹² In *Marsh v. Alabama* (1946), it had applied First and Fourteenth Amendment protections to block attempts to suppress leafleting in a company-owned town.⁹³ “The basic emerging concept,” Berle asserted in 1951, “appears to be a restatement, in economic terms, of the constitutional requirement that every man is entitled to ‘equal protection of the laws,’ and that no arm of the state shall deny him life, liberty, or property without due process of law.”⁹⁴

But what would it mean to apply the constitution to corporations? Here, as in many of the 1950s debates over the corporation, details were lacking. In his 1951 article Berle suggested

⁸⁸ Harry Wellington, *The Constitution, the Labor Union, and “Government Action”*, 70 *Yale L.J.* 345, 346 (1960). Wellington’s article asked whether union acts were “state action” under the Fourteenth Amendment.

⁸⁹ [W. Friedman, Berle, Miller, Manning 1960]

⁹⁰ See, e.g., Wellington, *The Constitution, the Labor Unions*, supra note ____; Joseph Rauh, *Civil Rights and Liberties and Labor Unions*, 8 *Labor L.J.* 874 (1957); Clay P. Mallick, *Toward a New Constitutional Status for Labor Unions*, 21 *Rocky Mtn. L. Rev.* 260 (1951); Clyde W. Summers, *The Right to Join a Union*, 47 *Colum. L. Rev.* 33 (1947);

⁹¹ See Miller, *Constitutional Law of the ‘Security State’*, 10 *Stan. L. Rev.* passim; Tsuk Mitchell, *From Pluralism to Individualism*, 30 *Law & Soc. Inq.* 204-06 (Berle).

⁹² 334 U.S. 1 (1948)

⁹³ 326 U.S. 501 (1946).

⁹⁴ Adolf A. Berle, Jr., *The Developing Law of Corporate Concentration*, 19 *U. Chi. L. Rev.* 639, 656-57 (1952); see also Berle, *Twentieth Century Revolution* ____.

that “if, for instance, a corporation dealing in goods or services essential to the life of the individual discriminates against a customer on the ground of race or in a matter which invades his Constitutional right of freedom of speech or religion,” it would violate the Fourteenth Amendment.⁹⁵ Latham speculated, perhaps fancifully, on how applying constitutional provisions could change the corporation. Citing the Privileges and Immunities clause, he asked, “[d]oes this mean that stockholders of General Motors should be given free access to the public facilities of duPont or General Electric? Can executive personnel of AT&T demand keys to the more private precincts usually reserved for the executive personnel of Metropolitan Life?”⁹⁶ Other constitutional provisions also raised questions. “Section 1 of Article I would forbid [corporations] to remit bills of credit and so centralize—nationalize—all banking in the country. Nor could they grant titles of nobility, a blow against fraternal orders, surely. And they would all be disarmed, having lost to the Federal government the power to raise and maintain armies. This would presumably put Pinkerton’s and Brink’s out of business.”⁹⁷

The move to allow corporate charity for the general good might seem to conflict with proposals to impose new constitutional limits on the corporation. The former development, after all, broadened the discretion of corporate managers, while the latter sought to curb it. Yet each grew out of the new view of the corporation as a dominant social institution, capable of wielding great power over, and therefore having obligations towards, employees, communities, and other constituencies. This does not, however, explain the third topic here, the movement for shareholder democracy. 1950s campaigns for shareholder democracy were in some ways pushback against the managerial ethos. They also, however, reflected the degree to which

⁹⁵ Id. at 658.

⁹⁶ Latham, *Commonwealth of the Corporation*, 55 *Nw. U. L. Rev.* at 36.

⁹⁷ Id. at 37.

managerialism was the dominant assumption of the time—as both the movement’s hopes and disappointments show.

“Shareholder democracy” (or “corporate democracy”) is one of the perennial issues in modern corporate law. No matter the balance of power between managers and shareholders, advocates for shareholders believe they should have more.⁹⁸ In the 1950s shareholder democracy was often in the public eye. Wide media coverage attached to two shareholder gadflies, James Gilbert⁹⁹ and Wilma Soss (and her Federation of Women Shareholders in America’s Business, Inc.), who visited dozens of annual meetings each year and loudly demanded a raft of reforms from meetings in convenient locations, to better disclosure, to cumulative voting for directors, to a woman on the board of directors. The rhetoric of “shareholder democracy” was encouraged by publicity from the New York Stock Exchange, which commissioned studies announcing that one family in three owned stock and that the nation had entered an era of “people’s capitalism.”¹⁰⁰

In practice, shareholder democrats were swimming against the tide. When two corporate law scholars published a work advocating *Shareholder Democracy* in 1954, they concluded not with a ringing defense of shareholder primacy, but by couching their arguments in managerial rhetoric, claiming that “[t]he interests of shareholders are not the only interests besides management’s that must be recognized by today’s publicly held corporation. There are the interests of labor, of the consumer, of the country as a whole, and ultimately of the entire international community that must be considered.”¹⁰¹ They then defended easy shareholder access to the proxy machinery not solely as a way for shareholders to defend their own interests,

⁹⁸ I do not mean this dismissively, simply as an observation. For a good introduction to changes in SEC voting rules and notions of shareholder democracy during this period, see Dalia Tsuk Mitchell, *Shareholders as Proxies: The Contours of Shareholder Democracy*, 63 Wash. & Lee L. Rev. 1503, 1547-60 (2006).

⁹⁹ See generally James Gilbert, *Dividends and Democracy* (1956), and Lewis D. and John J. Gilbert, *Annual Reports of Stockholders’ Activities at Corporate Meetings* (1939-)

¹⁰⁰ Livingston, *American Stockholder* 27.

¹⁰¹ Frank D. Emerson and Franklin C. Latham, *Shareholder Democracy: A Broader Outlook for Corporations* 149 (1954).

but as a vehicle for “affording a broader social outlook in solving corporate issues.”¹⁰² Despite this concession, a reviewer of the work in the *Harvard Law Review* dismissed much of its concerns by asking whether “is it not time to recognize that shareholder democracy, with its exclusive focus on the profit-making element in corporate activity, has a slightly old-fashioned ring?”¹⁰³

More evidence of the decline of shareholder power, and the ascent of management, comes from two areas that should have offered hopes for shareholder empowerment. One concerned Shareholder Proposals, the usually precatory shareholder statements that SEC regulations require be included in a company’s proxy statement.¹⁰⁴ SEC Rule 14a-8, which mandates inclusion of such proposals, was first adopted in 1942 in what could be seen as a late burst of New Deal enthusiasm for grassroots (shareholder) democracy; the requirement is still sometimes referred to as the “Town Hall rule.”¹⁰⁵ It was justified as giving shareholders notice of policy issues to be raised at annual meetings.¹⁰⁶ While the initial rule was broadly worded, however, its scope steadily eroded during the 1950s.¹⁰⁷ As early as 1945 the SEC’s Division of Corporate Finance allowed firms to omit proposals of a “general social, political, or economic nature,” an approach that justified the 1951 exclusion by Greyhound Corp. of a proposal attacking segregation on its buses in the South.¹⁰⁸ In 1954, the Rule was further scaled back, now requiring

¹⁰² Id. at 150.

¹⁰³ L. C. B. Gower, Book Review, 68 Harv. L. Rev. 922, 927 (1955).

¹⁰⁴ Assuming certain requirements are met [SEC Rule 14a-8]

¹⁰⁵ See Alan Palmiter, The Shareholder Proposal Rule: A Failed Experiment in Merit Regulation, 45 Ala. L. Rev. 879, 879-80 (1994); see also Frank D. Emerson and Franklin Latcham, The SEC Proxy Proposal Rule: The Corporate Gadfly, 19 U. Chi. L. Rev. 807 (1952).

¹⁰⁶ See id. at 893.

¹⁰⁷ See Tsuk Mitchell, The End of Corporate Law, 44 Wake Forest L. Rev. at 718-19.

¹⁰⁸ Joel Seligman, *The Transformation of Wall Street: A History of the Securities and Exchange Commission and Modern Corporate Finance* 270 (3d ed. 2003) (citing *Peck v. Greyhound Corp.*, 97 F.Supp. 679 (S.D.N.Y. 1951)); see also Robert B. von Mehren and John C. McCarroll, *The Proxy Rules: A Case Study in Administrative Process*, 29 Law & Contemp. Prob. 728, 738 (1964) (quoting SEC Rel. No. 34-4775 (1952)).

that proposals that were resubmitted to corporations receive increasing percentage votes each year or face exclusion, and also allowing corporations to exclude proposals that impinged on their “ordinary business operations.”¹⁰⁹ As one group of critics put it, the changes could not be described as “other than imposing new restrictions on shareholders and affording further protection for management.”¹¹⁰

Nor did advocates of shareholder democracy find much succor in the rare instances when shareholders’ votes were actively sought: proxy contests.¹¹¹ While looked down upon by many as mere struggles to see who would feed at the corporate trough,¹¹² proxy contests involving entrenched management and corporate “raiders” did enjoy an uptick during the decade, and a few of the contests, such as that for the New York Central Railroad or Montgomery Ward, drew wide attention.¹¹³ The contests did not, however, produce greater shareholder empowerment. If anything, they served mainly to allow further managerial entrenchment, as they produced judicial decisions making clear that while incumbent managers could always claim reimbursement from their corporation for expenses in a proxy contest, challengers could only receive reimbursement if they won and then received shareholder approval.¹¹⁴ Far from democratizing the corporation, “the modern proxy contest [was] at best a device for tempering autocracy by invasion.”¹¹⁵

¹⁰⁹ See David C. Bayne et al., Proxy Regulation and the Rule-Making Process: the 1954 Amendments, 40 Va. L. Rev. 387, 427-28 (1954).

¹¹⁰ Id. at 427.

¹¹¹ Shareholder proxies were also, of course, sought annually for board elections, but since these elections were not contested they offered little in the way of active democracy.

¹¹² See, e.g., Eugene Rostow, To Whom and For What Ends is Corporate Management Responsible? in *The Corporation in Modern Society* 47-48.

¹¹³ See Tsuk Mitchell, *The End of Corporation Law*, 44 Wake Forest L. Rev. at 719.

¹¹⁴ See Lucien Babchuk, *The Myth of the Shareholder Franchise*, 93 Va. L. Rev. 675, 697-98 (2007). The leading case is *Rosenfeld v. Fairchild Engine & Airplane Corp.*, 128 N.E.2d 291 (N.Y. 1955).

¹¹⁵ Bayless Manning, *Book Review*, 67 Yale L.J. 1477, 1488 (1958).

While challenging shareholder democracy would seem akin to attacking apple pie or motherhood, prominent advocates of managerialist ideas were against it, and indeed were skeptical of shareholder suffrage altogether. Berle had long dismissed the shareholder vote as ceremonial, seeing the possibility of shareholders voting out management as nil; “[m]anagements of the major giants,” he wrote, “are for practical purposes impregnable.”¹¹⁶ Drucker believed that shareholder voting in large enterprises should be abolished, with shares replaced by “certificates of investment” entitling the holder only to a share in profits and in assets upon liquidation.¹¹⁷

Other legal scholars were also skeptical of schemes to empower shareholders, and pointed to managerial ideas to justify their beliefs. In a 1958 review, Bayless Manning concluded that for all of the claims of shareholder democracy, its results largely proved Berle & Means right. In 1932, he wrote, Berle and Means had found “a virtually omnipotent management and an impotent shareholdership.”¹¹⁸ Since then, there had come a new world of “SEC regulation, extensive disclosure requirements, elaborate proxy machinery, Stock Exchange self-discipline, corporate Good Citizenship, People’s Capitalism and Corporate Democracy.”¹¹⁹ And what was the result of all this in 1958? “A virtually omnipotent management and an impotent shareholdership.”¹²⁰ Shareholder democracy, he decided, was a diversion from genuine reform based on a misunderstanding of the modern corporation:

Thanks to the pioneering work of Berle, Drucker, and a few others, we have long known that in our modern industrial system, it is the corporation as an institution which is permanent and the shareholders who are transitory. . . . We have known,

¹¹⁶ Adolf A. Berle, Jr., *Power Without Property: A New Development in American Political Economy* 63 (1959). Berle did not necessarily believe in abolishing the shareholder vote, he just didn’t think it performed any real function.

¹¹⁷ Drucker, *The New Society* 341.

¹¹⁸ Manning, *Book Review*, 67 *Yale L.J.* at 1485 (reviewing James A. Livingston, *The American Stockholder*)

¹¹⁹ *Id.*

¹²⁰ *Id.*

too, that today’s corporations may for many purposes best be viewed as an intricate, centralized, economic-administrative structure run by professional managers who hire capital from the investor.¹²¹

Given that, Manning urged, at least as a thought-experiment, that the law be made to conform more closely to reality and that shareholders be deprived of voting rights, with their interests protected by some mechanism overseeing “management’s behavior in corporate matters affecting their personal interest.”¹²² Other legal scholars voiced equal skepticism; in 1960 Abram Chayes (also citing Drucker) attacked shareholder democracy because, he argued, “[o]f all those standing in relation to the large corporation, the shareholder is least subject to its power.”¹²³ Far better, he claimed, would be a system that gave power to other constituencies more directly affected by corporate power.¹²⁴

Managerialist assumptions even found their way into more popular writings about shareholder power. In 1958 James Livingston, longtime business editor of the *Philadelphia Inquirer*, opened his study of *The American Stockholder* by referencing two touchstones of managerialism, *The Modern Corporation and Private Property* and Burnham’s *Managerial Revolution*.¹²⁵ Those works, he said, demonstrated managers’ overwhelming power. “[M]anagers of corporations control the proxy machinery, the ballot, even as a politician dominates a ward, a county, or a city. . . . Further, through their control of men, materials, machinery, and money—the corporate organization—these managers exert great power in

¹²¹ *Id.* at 1489.

¹²² *Id.* at 1491. Manning was clear that he did not actually believe in abolishing shareholder voting, but he thought that entertaining the possibility would bring into focus what protections and rules were actually needed. See *id.* at 1491-93.

¹²³ Abram Chayes, *The Modern Corporation and the Rule of Law*, in *The Corporation in Modern Society* 40 (Mason ed. 1960).

¹²⁴ *Id.* at 41.

¹²⁵ Livingston, *The American Stockholder* 14-16. It should be noted that Livingston had one advantage other journalists may have lacked; he was a friend of Bayless Manning’s. See Manning, *Book Review*, 67 *Yale L.J.* at 1477 n.1.

American affairs—politics, society, and business.”¹²⁶ In his book Livingston demolished the claims of shareholder democracy, arguing that shareholders were not and would not become a self-conscious class, and that their power was illusory. While a few gadflies might insist that managers were just shareholders’ hirelings, the fact was “that the stockholder hires nobody. He is the hireling—or at least his money is. A cynical economist would say ‘Capital doesn’t hire management, management hires capital’.”¹²⁷ While shareholders were the ostensible subject of Livingston’s book, management loomed over it. Citing Drucker, Livingston concluded that corporations’ main concerns were their “permanent relatives,” unions, customers, and suppliers, and not shareholders, whom they treated like “poor relations.”¹²⁸ Livingston was no friend of corporate management – he particularly attacked what he believed was excessive compensation – but he did not think empowering small shareholders would change management’s behavior.¹²⁹

To be sure, not everything in corporation law from the 1940s through the 1960s can be explained by managerialism. Indeed, as I discuss below, there are reasons to question whether managerialism influenced the substance of corporation law as much as it did its discourse. Much of the daily substance of corporation law really had been settled by the end of the 1930s, and much of the ordinary operations of corporation law flowed along unhampered by scholars’ managerial visions.¹³⁰ But, that being said, managerial discourse and assumptions appeared even in some of the more incremental changes that occurred in corporation law during this period, and when the law did bend, it tended to bend towards greater managerial autonomy, sometimes with explicit nods to managerialism. As one commentator noted in the 1960s, because of the growth

¹²⁶ Id. at 15.

¹²⁷ Id. at 23.

¹²⁸ See id. at 221.

¹²⁹ He held our somewhat greater hopes for institutional investors. See id. at 245-48.

¹³⁰ For example, one major development in corporation law during this period was the growth of a separate body of statutory and judge-made law for the close corporation, which had little to do with managerialism.

of managerial power “it might be assumed that legislatures would have acted to increase the safeguards surrounding managerial discretion. . . . such an assumption would be erroneous.”¹³¹

One area where managerial assumptions fit well with legal developments was the Business Judgment Rule. Since at least the late nineteenth century, the rule, a general presupposition that directors in the execution of their duties have exercised reasonable diligence and care, has been the first line of defense for corporate directors against shareholder challenges to their decisions.¹³² As Gregory Mark has pointed out, the 1950s were the heyday of the Business Judgment Rule; the two decades after the war’s end “include the highest points of judicial deference to managerial discretion in the history of corporate law.”¹³³ In New York’s Courts, according to Dalia Tsuk Mitchell, the Business Judgment Rule was expanded during this period so that it no longer blocked judicial inquiry into decisions made with ordinary care, but even of grossly negligent decisions.¹³⁴

Statutory developments also made it more difficult to challenge managerial decisions. Derivative suits, long the avenue for shareholders to attack self-dealing by managers, were sharply limited in the 1940s. Perhaps as a reaction to the perceived problem of frivolous “strike suits” in the 1930s, legislatures in a number of jurisdictions, beginning with New York, passed laws making such suits more difficult.¹³⁵ New York’s law, which required small shareholders (those owning less than \$50,000 or 5% of a corporation’s shares) suing a corporation derivatively

¹³¹ Daniel J. Dykstra, *The Revival of the Derivative Suit*, 116 U. Pa. L. Rev. 74, 80 (1967)

¹³² See, e.g., Henry Ballantine, *Ballantine on Corporations* § 63a, at 121 (2d ed. 1946).

¹³³ Mark, *The Corporate Economy* supra note ____ at 636. A similar point is made in Dalia Tsuk Mitchell, *Status Bound: The Twentieth Century Evolution of Directors’ Duties*, 5 N.Y.U. L. L. & Bus. 63, 116-20 (2009). My account of the BJR here depends on their work.

¹³⁴ See Tsuk Mitchell, *Status Bound*, 5 N.Y.U. J. L. & Bus. at 118-120 (discussing *Everett v. Phillips*, 43 N.E.2d 18 (N.Y. 1942)) [Not the same as DE concept of “gross negligence”].

¹³⁵ See George Hornstein, *The Death Knell of Stockholders’ Derivative Suits in New York*, 32 Cal. L. Rev. 123 (1944). After New York’s 1942 act similar statutes were adopted by a number of other states, including New Jersey, Pennsylvania, Wisconsin, see *id.*, and in 1949 California, see Henry W. Ballantine, *Abuse of Shareholders Derivative Suits*, 37 Cal. L. Rev. 399 (1949).

to post security for the corporation’s expenses and attorneys’ fees, drove down the number of suits in that state and was soon copied in many others.¹³⁶ Only in the early 1960s would there be seen a revival of derivative suits.¹³⁷ It is illustrative of how managerial ideology seeped into legal thought during this period that, when derivative suits began a comeback in the 1960s, one scholar attributed their increased popularity to the continuing power of the Berle-Means corporation, noting that corporate dominance of the American economy, and managers’ domination of the corporation, made all the more important the retention of the derivative suit, especially considering how few other checks remained on managerial power.¹³⁸

Similar issues also arose in the period’s more thoroughgoing statutory reform, the Model Business Corporation Act (“MBCA”).¹³⁹ First mulled at the end of the 1930s, the American Bar Association began work on the MBCA in 1943 and issued a first draft in 1946, with revisions in 1950, 1953, and 1955.¹⁴⁰ As a Model Act, it was to provide flexible guidance for states revising corporate statutes that had, in some instances, not been thoroughly updated since the late 19th century, and was also intended as a more straightforward alternative to Delaware’s corporation statute, which the Model Act drafters rejected as excessively pro-management, making “little or no effort to protect the rights of investors.”¹⁴¹ The Model Act was not, however, a radical

¹³⁶ George Hornstein, *New Aspects of Stockholders’ Derivative Suits*, 47 *Colum. L. Rev.* 1, 5 (1947) (noting that in the two and a half years following the laws’ adoption only 4 derivative suits were filed in New York County, three of which were immediately dismissed for failure to comply with the statute). New York’s statute also imposed a requirement for contemporaneous ownership and shortened the statute of limitations. See *id.* at 5-7

¹³⁷ Dykstra, *The Revival of the Derivative Suit*, 116 *U. Pa. L. Rev.* at 74-75.

¹³⁸ See *id.* at 78-80.

¹³⁹ Though the MBCA’s evolution was towards greater managerial power, and deserves discussion here, it is probably less marked by the period than some other developments discussed in this paper, as statutes seem over the century to have consistently evolved toward greater managerial power.

¹⁴⁰ See Whitney Campbell, *The Model Business Corporation Act*, 11 *Bus. Law.* 98, 98-99 (1955)

¹⁴¹ *Id.* at 100. The MBCA was in turn modeled on Illinois’s 1933 corporation act. See *id.* The MBCA was also a successor to the 1920s Uniform Corporation Act, perceived as unsuccessful by the 1940s. See Harwell Wells, *The Modernization of Corporation Law 1920-1940*, 11 *U. Pa. Bus. L. J.* ____ (2009).

departure from existing statutes; like them it was an enabling act, intended to provide some investor protections along with a more up-to-date template for incorporators.¹⁴²

The Model Act, however, soon came under fire from critics for being too management-friendly, both in its departures from earlier acts and in its evolution during several revisions in the early 1950s.¹⁴³ The first version of the Model Act, for instance, provided for mandatory cumulative voting, a strong protection for minority shareholders, but when revised in 1953 this was watered down both by making cumulative voting permissive and by creating “classified” boards of directors.¹⁴⁴ The 1950 Model Act barred loans to directors and officers, while allowing them to employees; the 1953 Act, through a subtle change in wording, opened the door to such loans by allowing a corporation to “assist” its employees, officers and directors.¹⁴⁵ While the 1946 Model Act required that the rights of shareholders be included on stock certificates, the 1953 revision omitted this in favor of a weaker provision giving shareholders the right to request such information from the corporation.¹⁴⁶

By themselves, these revisions were merely further steps in the long progression of limitations on shareholders’ rights; they may have reflected faith in management power, but such revisions were not unique to the 1950s. Yet even battles over these changes show the infiltration of managerial concepts. When corporate law scholar Frank Emerson (also an advocate of shareholder democracy) attacked the MBCA revisions, he cited work by Berle and C. Wright

¹⁴² Katz, *Philosophy of Midcentury Corporation Acts*, [Cite]

¹⁴³ See Benjamin Harris, Jr., *The Model Business Corporation Act—Invitation to Irresponsibility?* 50 *Nw. U. L. Rev.* 1 (1955); Frank D. Emerson, *The Role of Management and Shareholders in Corporate Government*, 23 *Law & Contemp. Probs.* 231 (1958).

¹⁴⁴ Emerson, *Role of Management*, 23 *Law & Contemp. Probs.* at 233.

¹⁴⁵ Harris, *Model Business Corporation Act*, 55 *Nw. U. L. Rev.* at 3.

¹⁴⁶ See *id.* at 11.

Mills to argue that there was greater need than ever for shareholder power because, as others had shown, “management power is becoming increasingly dominant.”¹⁴⁷

This last point is telling, for the language and assumptions of managerialism were pervasive enough that even skeptics could find themselves arguing in its terms. In 1960, for example, Manning published an article replying to recent works in the “political sociology of the business corporation,” focusing his ire on their habit of reifying the “corporation,” which was after all only a legal form, and of treating corporate “power” as an undifferentiated lump, available to be used in any way managers desired.¹⁴⁸ Yet even this skeptic shared many of the managerialists’ assumptions. While he decried vague attacks on “corporate power,” Manning agreed that the United States contained many giant institutions (he dubbed them “Alpha Institutions”), apparently including business entities, unions, and foundations, whose main features were “centralized control, large scale organization, substantial capital resources and relative independence of formally constituted government.”¹⁴⁹ He was all for analysis and criticism of them, he just disliked what he perceived as the intellectually lazy path followed by others.¹⁵⁰ Another example is provided by Yale Law School’s Dean, Eugene V. Rostow, who in *To Whom and For What Ends is Corporate Management Responsible?*, his contribution to the symposium on *The Corporation in Modern Society*, blasted advocates of managerialism and pushed, on economic grounds, for a return to a doctrine requiring directors to maximize profits on behalf of shareholders.¹⁵¹ Yet Rostow also acknowledged in his essay, perhaps with slight exaggeration, that he was pushing against “the emerging ethos of the second half of the twentieth

¹⁴⁷ Emerson, *Role of Management*, 23 *Law & Comtemp. Probs.* at 238.

¹⁴⁸ Manning, *Corporate Power and Individual Freedom*, 55 *Nw. L. Rev.* at 38-39.

¹⁴⁹ *Id.* at 43.

¹⁵⁰ *Id.*

¹⁵¹ See Rostow, *Responsibility of Corporate Management* 70-71. One of Rostow’s major concerns was that managerialism would lead to pricing decisions divorced from economic requirements, leading to serious economic malfunctions.

century . . . [that] corporate property [is] really that of the directors and the management, to dispose of, as many suggest, in accordance with their own standards of business foresight, social statesmanship, and generalized good citizenship.”¹⁵²

After Managerialism

There is no moment when managerialism suddenly went away, when it ceded its position as a shaping framework for corporate law. Writings that fit into the managerial mode appeared well into the 1960s,¹⁵³ and an attenuated form of those beliefs can be found long after.¹⁵⁴ But historical developments knocked out many of its central assumptions in the late 1960s (as Americans rapidly lost faith in large institutions, including big business) and early 1970s (as overseas challengers smashed assumptions about American corporations’ escape from competition).¹⁵⁵ In partial response, corporation law scholars turned to developments in economics and finance that promised to illuminate the corporation in these turbulent times, and the ascent of law-and-economics approaches began.¹⁵⁶ The managerialists, preeminently Berle, believed they had discerned the future of American capitalism; instead, their work fit well with only a moment in the development of the American economy, and when that moment passed, so did their work.

¹⁵² Id. at 49-50.

¹⁵³ See, e.g., David S. Ruder, *The Public Obligations of Private Corporations*, 114 U. Pa. L. Rev. 209 (1965).

¹⁵⁴ Similar, though by no means identical, ideas appear for instance in some of the essays in *Progressive Corporation Law* (Lawrence Mitchell ed. 1995). Contemporary “stakeholder” theories of corporation law do bear resemblances to managerialism, but I think they lack the optimism about management, and the vision of the corporation as dominant and “embedded,” that characterized managerialism at its height. One could argue that more recent ideas repackage managerialism, notably Margaret Blair and Lynn Stout’s team production theory of corporate law, which depicts a public corporation’s board of directors as acting as mediator among different groups, shareholder and not, participating in corporate wealth-creation, but under this theory boards only mediate among participants in the corporation and lack the “social ethos” of 1950s managerialism. See Margaret M. Blair and Lynn A. Stout, *A Team Production Theory of Corporation Law*, 85 Va. L. Rev. 247, 251-52 (1999).

¹⁵⁵ [Citations]

¹⁵⁶ See Roberta Romano, *After the Revolution in Corporation Law*, 55 J. Legal Ed. 342 (2005).

Some of these developments were foreshadowed in 1962, when Henry Manne published a groundbreaking attack on managerialism, *The Higher Criticism of the Modern Corporation*, in the *Columbia Law Review*.¹⁵⁷ Though not fully appreciated at the time – it was published with a condescending reply from Berle¹⁵⁸ – Manne’s article insisted that corporation law had to be understood in “traditional economic terms” and decisively rejected the notion that corporations or managers had escaped the pressures of the market, arguing for the importance of both managerial markets and the market for corporate control in shaping managerial and corporate behavior.¹⁵⁹ The same year, then, that Manning declared the death of corporation law as an intellectual enterprise, what we can now call “green shoots” of its intellectual successors were beginning to appear.

I want to close by asking what the “managerial moment” in corporate law scholarship can tell us about the relationship between this scholarship and the law.¹⁶⁰ One strange thing when writing about managerialism is discovering both how pervasive its assumptions were in the two decades following World War II, and then how quickly and thoroughly it disappeared. It’s not that corporate law scholars utterly neglect the development of their field before the 1960s; they know of Ronald Coase and his Theory of the Firm, of course, and the Berle & Means of *The Modern Corporation* are still essential, albeit as discoverers of the separation of ownership and control rather than prophets of a managerialist future. But the managerial thinkers, the Drucker of the *Concept of the Corporation*, the Berle of *The Twentieth Century Capitalist Revolution*, and

¹⁵⁷ Henry G. Manne, The “Higher Criticism” of the Modern Corporation, 62 Colum. L. Rev. 399 (1962)

¹⁵⁸ See Adolf A. Berle, Jr., Modern Functions of the Corporate System, 62 Colum. L. Rev. 432 (1962). On the initial reception of Manne’s work, see Romano, After the Revolution in Corporation Law, 55 J. Legal Ed. at 343.

¹⁵⁹ Manne, Higher Criticism, 60 Colum. L. Rev. at 407. Manne would expand on this in a series of articles during the 1960s. On The “Higher Criticism” and its times, see William J. Carney, The Legacy of “The Market for Corporate Control” and the Origins of the Theory of the Firm, 50 Case W. Res. L. Rev. 215, 221-32 (1993)

¹⁶⁰ One difficult thing about writing about the relationship between scholarship and law here is that we use the same term, “corporate law,” for both the substantive law and scholarship about it (a problem as well with the term “history”). [Citations]

their contemporaries, who so occupied the field in the 1950s, are largely gone, at least from contemporary awareness.

Managerialism also left few traces on the law. Indeed, for all the ubiquity of managerial precepts during the 1950s, for all their invocation by corporate theorists and corporation law scholars, managerialism did not seep very deeply into the substance of the law during this time. Management enjoyed a significant degree of autonomy during this period, but it did so before World War II. Corporation law at the end of the 1930s was very similar to corporation law thirty years later; the most notable innovation, the MBCA, was not a sharp departure from recent developments but was intended to bring states with outdated corporation statutes in line with recent developments in the law.¹⁶¹ The lack of effect managerialism had on the quotidian corporate law was noted at the time; Dean Rostow, in his attack on managerialism, pointed out that for all managerialism’s claims the “law books have always said that the board of directors owes a single-minded duty of unswerving duty to the stockholders,”¹⁶² while a review of mid-century corporation acts noted that, apart from authorizing charitable gifts, the “‘social responsibility’ philosophy [had] almost no influence upon recent statutes.”¹⁶³

What then was the relationship between corporate law scholarship and corporate law? There seems to have been a remarkable disconnect between the two. Despite writing and opining about the changing nature of the corporation, the new face of management, and its “social role,” the law governing the corporation moved very little in response. True, the law had some flexibility to it, enough perhaps to accommodate some managerialist assertions; but the basic

¹⁶¹ The law, of course, did not stand still [de Capriles]. But as one economic history notes, “[u]nlike the period of almost perpetual crisis from the Progressive Era through the Second World War, the years after 1945 witnessed almost no fundamental changes in the rules governing business decision-making.” Galambos & Pratt, *Corporate Commonwealth* 153.

¹⁶² Rostow, *Responsibility of Corporate Management* 63.

¹⁶³ Katz, *Philosophy of Midcentury Corporation Statutes*, 23 *Law & Contemp. Probs.* at 189.

framework, the doctrines and statutes, did not change much.¹⁶⁴ One reason managerialism may have passed from the scene so quickly is that, for all that it claimed to predict and explain the law, it was never that closely woven into corporation law at all.

Conclusion

As a historical matter, it is of some worth to restore managerialism to our account of the development of corporation law. But is this just filling in a gap, or is there more to be learned? I suggest there are at least two larger lessons we can draw from the above account. First, it reminds us of the shifting nature of our stories of corporation law. While Bayless Manning and Henry Manne may have doubted the value of corporate law scholarship during the long 1950s, they did not, from what I can tell, speak for most scholars, who busied themselves with questions and concerns shaped or at least inflected by managerialism. Corporation law lacked a sophisticated economic theory of the firm, but it is not clear that many scholars thought it needed one. Seeing the corporation as a political and social institution, insulated from competition and wielding enormous power, they concluded that political and sociological analyses were more useful and timely. Only in retrospect do we judge the 1950s a dull era between the upheavals of the 1920s and 1930s, with statutory reforms and then the Federal securities laws, and the 1970s, when the economy began to teeter and so raise a host of new issues regarding corporate governance. Looking back, and judging that corporation law in the 1950s fell short because its practitioners did not take approaches more useful in another era or devote themselves to questions that preoccupy us now, we are in danger of failing to understand it on its own terms. Second, this account reminds us that questions corporate law scholars now cabin off or leave to others were once central to corporation law – questions of the social role of corporations, of corporate power, of corporations’ ability to undermine and bend government. As a new decade dawns, perhaps these questions deserve new consideration.

¹⁶⁴ [Cite Millon]

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Comments welcome: harwell.wells@temple.edu