THE 'CORPORATE GOVERNANCE' MYTH

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Capitalism relies as heavily on ideology to maintain its dominance as it does physical power. For the past seventy years a cornerstone of capital's ideological framework has been the view that the corporation must be managed so that it creates value for shareholders to the exclusion of any concern for other potential constituencies. Thus, it came as a surprise to many on the left and right when the Business Roundtable, a leading US-based business advocacy group made up of some of the most important CEOs from finance and industry, announced in 2019 that in addition to shareholders, corporations had a wider responsibility to 'stakeholders', including employees, customers, and communities.[1] This commitment from the 'commanding heights' of capital triggered a new global debate about the purpose and social impact of the corporation. The debate emerged in tandem with the rise of substantial pools of capital devoted to so-called 'ESG', an investment strategy that allocates funds based on an assessment of environmental, social, and governance metrics. In addition, there have been new efforts to use legislation to alter corporate governance in favour of a stakeholder approach. Corporations in several states, including California, Illinois, and New York, are under political and legislative pressure to diversify their boards of directors by including more women as well as members of under-represented communities. At the national level, Senator Elizabeth Warren has introduced the Accountable Capitalism Act, which would mandate a more significant role in corporate governance for stakeholders, including board representation for employees.[2]

Instead of heralding a new post-neoliberal era, however, this apparent momentum towards an alternative to the shareholder wealth maximization norm only highlights the impasse that exists in law and theory about the structure and purpose of the corporation. Both 'stakeholder' and 'shareholder value' advocates maintain that the corporation can serve their agenda. Ironically, this impasse is due, in large part, to a view shared by both camps about how the corporation, capitalism's central institution, is structured and operates – in other words, how it is 'governed'. According to this century-old view, first crystallized in the New Deal era, the 'separation of ownership and control' in the modern corporation can lead to an outcome that is either 'efficient' (the right-wing 'shareholder value' view) or 'progressive' (the predominantly left-wing 'stakeholder' view).[3] The field of corporate law and governance remains wholly occupied by this 'separation thesis', as broken into these competing camps. As a result of this intellectual monopoly, no genuine alternatives to the dominant legal and theoretical framework that shapes our understanding of how capitalism governs itself have emerged.

I argue here, however, that the foundational concept shared by the left and right – 'corporate governance' – is itself an ideological construct, more myth than reality. Its advocates largely draw a veil over what is actually occurring inside the corporation and in inter-corporate relationships. I explain that, instead of a structural divide between outside investors and inside managers, a relatively coherent and dominant class of investors and share-owning senior executives jointly run modern corporations in order to carry out key capitalist processes, namely *capital accumulation* and the *valorization* of capitalist profits. To be coherent, any discussion of 'corporate governance' must place that centralized ownership structure and that concomitant animating purpose of the corporation at the heart of its analysis.

I apply this alternative approach here to help break apart the current intellectual and political impasse. First, I place in historical context the development of the two major, if illegitimate, offspring of the founder of modern corporate governance theory, the New Deal-era legal scholar Adolph Berle. Second, I describe the capitalist mandates of accumulation and valorization that, in turn, drive the governance of the corporation by real capitalists. Third, I chart the emergence of the 'actual capitalist class' from the early twentieth to the early twenty-first century. Finally, I conclude by pointing to some of the broader political and intellectual implications of this reframing of corporate governance theory.

BERLE'S EPIGONES

Both the dominant shareholder value school, also known as 'agency' theory, as well as the alternative minority 'stakeholder' view, trace their lineage to the collaboration between legal scholar, and later, architect of the New Deal, Adolf A. Berle and the economist Gardiner C. Means. Berle and Means' ground-breaking empirical work and innovative theoretical approach, published in their iconic 1932 text *The Modern Corporation and Private Property*, appeared to settle the question of whether a new managerial class had displaced capitalist control of large public corporations. Berle and Means told a rich story of political usurpation, in which the rise of a managerial class portended a potential dark turn for democratic life. However, their late-twentieth century agency school adherents (who now dominate every major American economics department and law and business school) ignored this wider context, and maintained narrowly that the 'separation' of ownership and control in the corporation was a rational evolution of the corporate form.[4]

Their bastardization of Berle and Means enabled a metaphor of 'separation' to emerge as a form of capitalist ideology. In the eyes of these orthodox thinkers, the alleged 'separation' resulted in a centralization of authority in the corporation's board of directors that created efficiencies, i.e., greater profitability, thus enabling the corporation to exploit larger and more complex investment opportunities. They deftly recast the Berle-Means socio-political dynamic as simply a problem of potential conflict between shareholder 'principals' and their managerial 'agents'. Shareholders risk incurring so-called 'agency costs' for the delegation of authority to the board as its agent. These arise because of the potential for 'shirking' at some level by corporate insiders. However, such costs can be minimized, agency theorists contend, by contract-based monitoring mechanisms that emerge from 'private ordering' supplemented by the surrounding markets for corporate control and executive talent, occasional judicial gap-filling and, where helpful, default fiduciary or statutory provisions made available by courts and legislatures.[5] In fact, I argue here that because the original concept of a separation of 'ownership' from 'the control' itself is incorrect, there is little or no basis to use a 'principal-agent' metaphor in assessing the relationship among key elements or layers of the corporate power structure at all.

The minority stakeholder approach to corporate governance also accepts the separation thesis. It largely builds its case, however, on the critical, but long neglected and misunderstood, 'pluralist' dimension of the Berle and Means argument. Stakeholders assert that because of their dominant scale and scope, corporations should be viewed as powerful *political* institutions not just as objects of mere economic interest.[6] Instead of a narrow rational calculus of 'net present value' by directors and executives (which Berle and Means called 'the control' and which today are widely known simply as 'managers') aimed at maximizing the value of a firm's equity, modern corporate managers must, and should, negotiate among a complex array of constituencies that include shareholders, employees, creditors, and the surrounding community. A corporate manager who ignores this pluralistic 'political' environment risks destruction of firm value. It is within this tendency that one finds the strongest support today for what have become known as 'corporate social responsibility' (CSR) obligations and investment strategies that promote ESG norms. Corporations are viewed by this school as largely fixed, stable centres of social and economic power that must (objectively, for success) and should (a normative side of the argument) take on what is, in essence, a political function akin to traditional democratic institutions like legislatures or administrative agencies. The skills of a 'post-capitalist' bureaucrat, therefore, are arguably required to lead today's large corporate structures.

When thought of as political institutions, corporations must then exercise their power 'legitimately' to minimize the risk of dysfunctional social and political conflict. Socio-political 'conflict' emerges because a failure to internalize costs through appropriate governance mechanisms can lead those who are, instead, asked to bear those costs to protest. Examples might include the longstanding debate over pollution, the lack of labour rights in China, or the mining of 'conflict diamonds' under horrific conditions in Central Africa. All of these can be seen as 'negative externalities'.[7] Arguably, only a political approach allows the firm to internalize those costs that should properly be borne by the firm. The legitimacy of firm governance can only be generated then, the argument goes, if the mechanisms that control the corporation, such as the board and senior management, are themselves reflective of, and answerable to, the constituencies that make up, or are impacted by, the corporation. Thus, if the corporation legitimately represents and serves its stakeholders it can serve as part of a pluralist bulwark against concentrations of power, both private and public.[8]

It is, thus, the stakeholder school that holds closest to the idea of the corporation as an *agora*, a new centre for social and political decision-making.[9] Seen as such, it is understandable that many modern stakeholder advocates want to 'democratize' the corporate entity. This is taking on extreme forms today as some in this milieu attempt to replace traditional business structures entirely with 'decentralized autonomous organizations', widely known as DAOs, to carry out tasks via 'smart contracts' (essentially tightly focused algorithms) on distributed computer networks. This was not quite what Berle and Means had in mind, even if one could credibly claim they held a similar normative preference. Their best hope was to rein in the new 'princes of industry', not to dethrone them. But the fatalistic limit of Berle and Means dooms the analysis of even the more radical wings of the stakeholder school as well. There is no place for genuine democratic decision-making in an institution designed for other, namely capitalist, purposes. And, as I will explain, the myth of a 'democratic' or 'progressive' capitalism that captivates so many within the stakeholder camp is not enough to overcome this problem.[10]

REAL CAPITALISTS OWN *AND* CONTROL

The illusory 'managerial revolution'

Freeing us from the conceptual monopoly held by the Berle-Means paradigm requires, first, a reconsideration of its origins and evolution, in other words, of its 'original meaning'. Berle and Means' core idea of a 'separation' of ownership from control was deeply flawed or, at best, comprehensible only as, and when, used by the authors in the very particular historical and ideological context in which they were working. Earlier Progressive-era thinkers were important influences on Berle, particularly Louis Brandeis whom Berle knew personally through his father. Brandeis's famous 1914 articles on the role of investment bankers in forming large new corporate structures were widely read and certainly influenced the young Berle.[11] The emergence of powerful investment banks in the transition from small 'sole proprietor' capitalism at the *fin de siècle* led to the first wave of criticism of centralized corporate power. For Brandeis and the young Berle, this meant a preference for competition, trust-busting, and a kind of 'small is beautiful' ideological orientation.[12]

The techniques used by the newly dominant *corporate* capitalists to maintain their control of ever larger firms were subject to ruthless and detailed criticism by Berle in a series of law journal articles that he collected and published in 1928 as *Studies in the Law of Corporation Finance*.[13] He focused his concern on the fact that these capitalists both owned shares *and* controlled the management of the firms they operated. The full implications of the emerging tensions between that group and the everyday small retail shareholder were just coming into focus as the stock market mania of the 1920s unfolded. Only with the publication of *The Modern Corporation* in 1932 did Berle make the more dramatic argument that those tensions had evolved into a rupture in the nature of private property itself.

Arguably, the singular theoretical contribution that Berle makes with *Corporation Finance* was to recognize a shift in the nature of capitalist operations that laid the groundwork for the deeper claims of *The Modern Corporation*. Namely, Berle notes that with the rise of the new massive 'quasi-public' firms such as United States Steel, Standard Oil, Goodyear Rubber, and the Union Pacific Railroad Company, power was no longer exercised in a personal manner by 'a closely knit body of stockholders, generally located near the business and able to stroll down to the plant or call at the office at will'.[14] Instead,

> [t]oday, with the growth of American business, the concentration into large financial units, and the increased liberality of incorporation statutes, the center of interest has shifted. The problems now revolve about *financial relationships* between the various participants in the corporate enterprise.[15]

The personal domination of a single natural person or small localized group of persons over a business's operations was now expressed through these new arms-length 'financial' relationships. In *Corporation Finance* Berle wrote about the 'controlling power' and the 'controlling influence' but not always, or simply, about 'managers', much less managers who controlled but did not own (a key category of the typology found in *The Modern Corporation*). Instead, it was clear from his analysis of the impact of potentially manipulative financial techniques such as the issuance of no-par stock,[16] or new methods of concentrating corporate power such as non-voting stock, that he was concerned about a *subset of owners* who were able to exercise control out of proportion to their ownership stake:

> [T]he system of corporation finance is based on the thesis that a small, dominant, management group will control the business operations of any corporation of reasonable size; although the substantial property interests have been contributed in large measure by non-management security holders …. one group with a relatively small beneficial interest, controlling large amounts of property beneficially owned by others.[17]

Thus, he promoted expanded 'fiduciary duties' in the new corporate context, clearly foreshadowing the legal obligations a dominant or controlling stockholder today owes to minority stockholders or the fiduciary obligation of all directors to the entire body of stockholders.[18] At this stage his 'thesis' is evolutionary, not revolutionary, although he concludes that 'this is a power over private property probably exceeding any which has been asserted in modern civilization'.[19]

It is with the publication of *The Modern Corporation* four years after *Corporation Finance*, likely influenced by the 1929 crash and the unfolding Great Depression and bolstered by the empirical work of his economist partner Means, that Berle concludes that something truly revolutionary has taken place with the shift of power inside the corporation to a new *non-owning* managerial class. As the authors concluded about the nature of the modern corporate form: 'This dissolution of the atom of property destroys the very foundation on which the economic order of the past three centuries has rested.'[20] Instead of individually owned and controlled 'private' property we have a new system where 'those who control the destinies of the typical modern corporation' no longer own enough shares to worry about their, and their fellow shareholders', financial interests. 'The explosion of the atom of property *destroys the basis of the old assumption that the quest for profits* will spur the owner of industrial property to its effective use.'[21]

It cannot be overemphasized how important Berle's point about 'the quest for profits' is. If the profit motive, in his eyes, has given way to something else (e.g., managerial entrenchment) then capitalism itself has really come to an end. 'The basic premise of all "technocratic" and corporatist thought,' Arthur Lipow noted in his study of Edward Bellamy, 'from Veblen, who was one of Bellamy's heirs, to Burnham and the neo-corporatists such as Berle, is that as the result of the separation of ownership from actual control, those who run the corporation, the managers, are free of the "profit motive"' thus enabling this 'elite without commercial motives to serve society through full production of superior products'.[22]

This conclusion is far reaching and has largely escaped the attention of prior work on corporate governance. Thus, Berle would now describe his research as indicating 'a major shift in civilization' towards a post-capitalist 'industrial feudalism'.[23] It was this development that led Berle to now call these corporations 'quasi-public' because they were, in fact, a new kind of social institution. ATT, for example with a centralized management team overseeing billions in assets, 450,000 employees and more than 500,000 shareholders, was, in his eyes, by 1930 'perhaps the most advanced development of the corporate system'. Thus, the problem of 'finance' described in *Corporation Finance* would give way to the problem of 'government' (both in the sense of intra-corporate governance and of state intervention) in *The Modern Corporation*. It was at this point that the modern myth of 'corporate governance' was born. As Berle's biographer Jordan Schwarz recognized,

> It was a powerful thesis: American capitalism headed toward an oligarchical concentration of economic power unless Washington's regulation of the marketplace protected a liberal economy from a dictatorship of unscrupulous corporate interests. Congress would have to regulate corporations with laws consistent with financial practices.[24]

Powerful and risky: absent the emergence of a new kind of (non-capitalist, of course) 'statesman' to manage this system in the broad balanced interest of society Berle feared that something 'tantamount to a revolution' might occur.[25]

How are capitalist firms governed?

However, Berle was wrong, both logically and empirically.[26] He never provided an explanation for precisely why or how a rational capitalist who, *ab initio*, both owns *and* controls, would sacrifice such a position, or, rather, could engineer its literal dissolution. Certainly, a successful entrepreneur might be offered a high enough price to sell all or part of their interest, as, for example, Andrew Carnegie did to the investor group organized by J.P. Morgan to form the giant conglomerate known as U.S. Steel. But in doing so, ownership and control would and did move together to the new group which, collectively, would then own and control the new entity. The new corporate trusts did represent a significant financial and legal innovation consistent with the evolutionary conclusions reached in *Corporation Finance* but not supportive of the revolutionary pronouncement about a kind of post-capitalist era made in *The Modern Corporation*. As Berle notes in the former, the use of non-voting stock and other similar mechanisms do not do away with the idea of a unity of capitalist ownership and control, they only enhance it. Non-voting stock issued to new dispersed and passive investors reinforces the centralized power of the *shareholding* and profit seeking 'controlling group', it does not dissolve it.[27]

Not surprisingly, then, the problem of consolidation of ownership with control continues to this day in a similar form. Thus, dual- or triple-class stock that restricts voting rights of outside investors have appeared more frequently in the technology sector and beyond. One prominent social media company went public in 2017 with non-voting stock, the first time such an offering had been allowed on a major stock exchange in recent decades. Founders like Mark Zuckerberg at Facebook (now Meta) or Sergey Brin and Larry Page at Google (now Alphabet) wish to *retain* control together with ownership, rather than allow their power to slip away, in a manner never quite explained by managerialism's advocates, into the hands of a new layer of bureaucratic non-owning managers. The goal in the current environment is not to fend off a managerial class uprising but to avoid the rise of activists within the dispersed shareholder base coalescing into a competing power centre of potential owners. Thus, firms that go public with multiple class share structures in place are more able to prevent the emergence of competitive threats to the current owners' control of the business entity.

Attempts to use that centralized power for personal non-profit goals as is implied by managerial theory are rare and subject to judicial sanction. In a leading Delaware case, where most large US public corporations are chartered, the giant auction website company eBay successfully defeated such an effort by the idealistic founders of the online site craigslist.com. As the court held:

> Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders …. I cannot accept as valid … a corporate policy that … seeks *not* to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders.[28]

In another example, Etsy, an online marketer of handmade goods, including many from the developing world, was one of the first so-called 'Certified B Corporations' to go public. The B Corp. certification allegedly committed the firm to social responsibility. In its 2015 IPO prospectus Etsy claimed it was 'building a human, authentic and community-centric global and local marketplace'.[29] But when Etsy ran into financial difficulties just two years after its IPO, it dropped the B Corp. commitment, fired its founder CEO, and laid off 8 per cent of its workforce. Its stock price quickly recovered.

Instead of two fiercely contending forces ('shareholders' v. 'managers'), as Berle and Means, and now their epigones, argue are such a fundamental characteristic of the large public corporation, I maintain that a relatively coherent centralized class of capitalists occupy the three paradigmatic institutional layers that make up the superstructure of the corporation, namely:

- Large shareholding 'institutional' investors (i.e., 'financial capitalists');
- The board of directors (made up of representatives of both financial and industrial capital) who are also almost always themselves shareholders; and
- Senior shareholding executives led by the chief executive officer ('CEO') (i.e., the firm's 'industrial capitalist(s)').

Further, instead of being locked in a ceaseless conflict resembling that of Laocoön and the serpents, as the Berle-Means school contends, the occupants of these roles, largely *cooperate* in the execution of the common primary 'capitalist' mandates: *valorization* and *capital accumulation*.

I focus attention on these two key components of capitalism – valorization and accumulation – to highlight their role in shaping modern debates about corporate finance and governance. These are specialized terms that summarily express the core activities of a capitalist economy.[30] 'Valorization' refers to the increase in surplus value – the source of capitalist profits, interest, and rent – often measured at the end of a certain period (a quarter or fiscal year). Valorization should be understood, however, as a continuous process, as the means of production (labour, raw materials, machinery) are purchased and deployed to produce 'commodities' whose presumed 'value' must then be 'realized' or validated through exchange in the market and which are then redeployed, now as 'use values', in a new round of, usually or hopefully, *expanded* production. As a result of this ongoing 'valorization process', money capital is 'accumulated' to enable a new round of expanded production and thus, in turn again, to realize larger profits if possible.

Accumulation can both support and undermine the valorization process. Primarily, of course, accumulation is a positive driver of the valorization process – to compete successfully, capitalists *must* expand production. In other words, they must accumulate money capital via exchange of commodities from the first cycle to invest in varying combinations of new technology, more machines, and more workers to complete the valorization cycle successfully. Inevitably, they intensify productivity in order to do so. Both expansion and intensification are means of accumulation. Intensification has, in the modern era of science, taken on great importance, but it is also a source of risk because of the potential it has to undermine the nominal value of financial capital previously invested to purchase currently employed machinery and processes. This potential risk, in turn, weighs heavily on the valorization process because financial instruments sold to support that process are highly sensitive to changes in the pace of capital accumulation. Bourgeois theories, such as the 'efficient markets hypothesis', are efforts to capture and measure this sensitivity so that a crude form of 'planning' or allocating capital effectively can take place.

Of course, concisely explaining these concepts in print is one thing; carrying them out successfully in the real world of flesh and blood workers, technology, and competition is quite another. To pursue these twin goals of valorization and accumulation, therefore, the occupants of all three layers of the corporate structure *share* amongst themselves authority such that within each layer one can find a unity of ownership with control, not an antithesis. Thus, *contra* the view of leading agency school figures like the Nobel prize winning economist Eugene Fama and his co-author Michael Jensen, there is *no* meaningfully clear 'separation of decision and risk-bearing functions … in large corporations ….'[31] Both investors and executives desire the same thing: surplus value that can be accumulated in the form of expanded production of yet more surplus value.

Each institutional layer has appropriately distinct ownership interests and management rights, of course. Investors typically own the bulk of the firms' financial assets, its stock and debt instruments, but these always come with legally enforceable governance rights sufficient to ensure participation in the exercise of 'strategic decision making'. Characterizing them as 'outsiders' or as mere 'owners' misses this key point. One frequently finds the most financially powerful and concentrated elements of the ownership-control unity within this now quite large institutional investor layer. Warren Buffett's conglomerate Berkshire Hathaway, a large private equity buyout group like KKR or Blackstone, and the giant pension fund CalPERS, would all make suitable ideal types. Each manages hundreds of billions of dollars. These large asset managers, of course, are more easily able to diversify their holdings across firms in pursuit of an investment strategy that tailors their risk profile so that their returns are not dependent solely on the outcome at a particular firm. These 'outside' investors, far from being passive, as they are often characterized, are actively assessing the capitalist economy, as a whole, in a search for opportunities to maximize their returns from the *general* process of accumulation and valorization across individual firms. They trade off day to day influence over those processes at a particular firm against the value they gain by investing across the spectrum of capitalist firms.

Boards of directors, on the other hand, have historically been made up of either a smaller core group of owners (at start-up companies, for example, or at investment firms such as asset managers and hedge funds) or, more commonly today, hired agents of those owners who are rewarded with cash fees generated out of the firms' profits as well as stock or options, whose value is dependent on the firm's profit rate. Board members are compelled to act as fiduciaries to the extent they represent a distinct layer of outside owners. Their financial reward in the form of fees or stock is closely tied to their success in enabling capital accumulation and valorization as reflected, typically but not necessarily exclusively, in the firm's stock price.

Finally, CEOs, if not founder-owners themselves, are hired sub-agents of the board who also are obligated as fiduciaries and are compensated out of a firm's profits directly through cash payments and/or equity linked compensation such as stock or options. While they may seem to simply be acting at the behest of the board and large outside investors, quite often their equity position when combined with their direct operational knowledge of the particular entity and/or industry makes them, as I describe below in the case of Tim Cook at Apple, the dominant element within this structure. Together, boards and CEOs, inevitably, have more direct day to day control of the productive assets of a particular capitalist firm than financial investors.

The occupants at all three levels, however, share characteristics that enable them, collectively, to carry out the fundamental goals of the corporation, which is simply a legal form for executing those goals. Together, these three elements (investors, boards, and executives) hold the complete bundle of rights needed to carry out the purpose of the corporation: *sustaining the valorization and capital accumulation process*. And it is their shared commitment to that process, reinforced by their financial claims and legal rights, that holds these three elements together as a socio-economic milieu or class. 'The capitalists,' as Marx wrote, 'like hostile brothers, divide among themselves the loot of other people's labour which they have appropriated ….'[32]

The power to direct the activity of a corporation is within the hands of individual(s) and entities that *both own* a claim to a share of the firm's profits *and possess* (either individually or collectively) the legal rights to *control* the firm. In other words, *contra* Berle and Means, real capitalists both own *and* control. When the firm is understood as being owned and operated by a relatively coherent class of financial and industrial capitalists, it becomes clear that debates about shareholder, director, or CEO 'primacy' are either irrelevant or, at best, a second order concern.

This is a conclusion that is at odds with the view of those now raising an alarm at the apparent singular dominance of large institutional investors like BlackRock and Vanguard, with one research team even tagging them as 'the new titans of Wall Street'.[33] The key mistake made by these authors is that they discount the importance of the separate roles played within capitalism by what Marx called the 'money capitalist', on the one hand, and the 'industrial' or 'functioning' capitalist, on the other. When highlighting the 'specter of the giant three'[34] or the 'problem of twelve'[35] in their examination of the growing centralization of assets in a small number of investment firms these authors highlight an important new development in capitalism but ignore the persistent fundamental categories that explain more fully the nature of the system. These asset managers' power is heavily diluted by the complex internal decision-making structures that characterize these entities. Those scholars that highlight their rise fail almost entirely to account for the importance of the *industrial* capitalist, concentrating so heavily on the new forms that *financial* capital has taken. Both types of capitalists, however, have ownership *and* control rights in the firm. Occupants of both positions in the system of capitalist production and reproduction are entitled to membership in the capitalist class.

These authors most likely make this mistake because they labour in the wake of the widespread adoption of the Berle-Means paradigm. The major figures who helped solidify the dominance of this paradigm, including James Burnham, John Kenneth Galbraith, Henry Manne as well as Berle in later work, had as one of their major goals, in essence, the erasure of the very concept of the industrial capitalist in favour of their newly discovered 'managers'.[36] These managers were said by some to be a newly discovered third social class, in addition to workers and capitalists. These managers were allegedly evolving into leaders of a new American 'economic republic',[37] which was thought to be, even hoped to be, a form of non-Statist collectivism that could, indeed had to, compete globally with its rising statist counterpart, the Soviet Union.[38] Thus, Berle wrote that the role of 'the institutionalized corporation' 'was not purely economic' … it 'developed a vast, non-Statist organization of men and finance, an organization which increasingly raises problems of power'.[39] In the worldview of Berle and Keynes and Galbraith, both the money capitalist and the industrial capitalist were being phased out of existence. Keynes wrote, famously, of the 'euthanasia of the rentier' to describe what he thought of as the increasingly irrelevant role of the money capitalist.[40] Berle, together with Means, mis-stated the history of early-twentieth century corporate capitalism to eliminate the industrial capitalist from the picture.

THE ACTUAL CAPITALIST CLASS

It is the failure, then, to pay attention to the actual structure of the modern capitalist class that is responsible for the impasse that corporate governance theory has reached. The right to ownership and control held by that class emerged through long, and often conflict-laden, historical experience with the evolving demands of capital accumulation and valorization. As part of that historical experience those rights were designed and, in various ways, 'allocated' among the three institutional layers, largely through contracts, but also by statutory language that can be understood as a form of default built upon the many years of contractual experience. In that process the modern conception and design of those institutions themselves emerged. Those three layers comprise in the modern era (roughly, from *post-bellum* America forward) what can be called owners of 'capital',[41] and the occupants of those layers make up the broader 'capital*ist* class'. Every natural person who takes a seat within any of those layers will, therefore, find themselves obligated to pursue the mandate of the capitalist system: the creation and appropriation of value, the management of the valorization of that value, and the defence of the corporate entity's role in that process. The mandate comes from the overarching power of the laws of competition and exchange that drive this continuous process – in other words, from current economic reality. Thus, it is not a choice; and attempts to breach the mandate in favour of purely personal goals, or some undefined broader social purpose, are met with swift punishment, either financially or legally.[42] If, for example, ESG goals are consistent with that process – which can be the case – they may be advocated by investors and executed by boards and CEOs. If not, they are going to be met with swift resistance by those capitalists as well as their representatives in courts and legislative bodies.

One classic historical example often used to illustrate the alleged separation of ownership and control is the sale of Carnegie Steel to public investors engineered by J.P. Morgan. Berle and Means, in fact, cite the steel industry as an example of ‘management control’, the fifth, and most extreme, category in their typology where ‘ownership is so widely distributed that no individual or small group has even a minority interest large enough to dominate the affairs of the company’.[43] Yet, in fact, not only was this not true at the formation of the U.S. Steel conglomerate, the merged group into which Carnegie Steel was folded in 1901, it was not true thirty years later when Berle and Means conducted their research. Their own book lists the names of the members of the boards of directors of both firms, several of whom (4 out of 13) were, still in the early 1930s, ‘Carnegie men’, that is, major stockholders of the predecessor entity who had managed to hold on to sufficient shares in, and to lead, the new firm in such a manner that they retained control of its strategic decision making three decades later. Another board member at the time of *The Modern Corporation* was J.P. Morgan, Jr., the son of the architect of the original U.S. Steel structure. Others on the board have been categorized as part of the Morgan camp. Economist Robert Gordon thus easily concluded that the entity was under ‘a strong and continuing influence’ by the Morgan bankers, a group which owned *and* controlled, well into the 1930s.[44] Ferdinand Lundberg made a similar point about AT&T, Berle and Means’ quintessential example of ‘management control’, in his *America’s 60 Families*:

> J.P. Morgan and Company would, of course, deny that it controls A.T.&T., whose advertising stresses that no individual owns so much as one per cent of its stock. Working control, however, resides in a small Wall Street group, whose own stock is buttressed by shares under the control of brokers, although held ‘for account of others’. Undisputed control – a consequence of the extensive public dispersal of more than half the company’s shares – is exercised by the board of directors, and it is obviously a Morgan board …. The twenty largest stockholders held 4.6 per cent of stock, but – there was no one among the myriad small stockholders strong enough to dispute their sway.[45]

This ability of a minority investor to be a dominating capitalist force – both owning and controlling – continues to this day. Nonetheless, in a similar fashion to Berle and Means, decades later, Mark Roe argued that in the modern era General Motors offered a striking example of *management* control. In the opening pages of his 1994 book, *Strong Managers, Weak Owners: The Political Roots of American Corporate Finance*,[46] Roe repeats an anecdote about two representatives of pension funds with large but far from majority shareholdings in GM who complain to GM leadership about the company's failing business model in the late 1980s. They were summarily 'rebuffed', Roe notes, thus in his eyes confirming the Berle-Means thesis about managerial power in the large public corporation.[47] Yet, as Roe finally concedes in passing some 200 pages later, GM's CEO retired soon after the pension funds' concerns surfaced as 'his strategy for GM … had suffered punishing blows' according to *The Wall Street Journal*.[48] His immediate successor was ousted summarily within a year and a half under pressure from those same pension funds.

Roe provides no clear explanation for the inconsistency in his argument. GM executives may have been rude to the anonymous fund managers, their bosses, but they were not exercising autonomous power. Those same fund managers were capable of helping organize a sufficient number of stockholders to pressure one CEO into retirement, fire his replacement, and change the company's strategic direction. Similar campaigns to oust non-controlling CEOs took place across industrial America in the early 1990s.[49] While many of those executives may have resembled Berle's apocryphal managers, that did not mean there were no owning and controlling capitalists exercising real power. At General Motors those pension funds, together with a relatively small number of other institutional investors, had assumed the position previously occupied by the Du Pont family, which had long controlled GM through its large, though minority, stock position. A similar shift had taken place at numerous other corporations. The Du Ponts sold; institutional investors bought. Control and ownership moved together from one element of the capitalist class to another – first in the hands of a large family, then into the hands of a small number of large pools of capital such as pension funds and mutual funds.

By way of contrast to Berle and Roe, i.e., advocates for the standard 'separation thesis' model, the German socialist economist Rudolf Hilferding clearly understood the actual impact of the newly emerging 'joint stock companies' of the early twentieth century:

> With the development of the joint-stock system there emerges a distinctive financial technique, the aim of which is to ensure control over the largest possible amount of outside capital with the smallest possible amount of one's own capital. This technique has reached its peak of perfection in the financing of the American railway system ....[50]

He concludes that this leads to a new oligarchical power rooted in a combination of ownership and control:

> In fact the corporations – especially the most important, profitable and pioneering ones – are governed by an oligarchy, or by a single big capitalist (or a bank) who are, in reality, vitally interested in their operations and quite independent of the mass of small shareholders. Furthermore, the managers who are at the top of the industrial bureaucracy have a stake in the enterprise, not only because of the bonuses they earn, but, still more important, because of their generally substantial shareholdings.[51]

Unlike the liberals Berle and Roe, Hilferding was a student of Marx and developed his view of the new corporate and financial stage of capitalism emerging at the *fin de siècle* through intense political warfare inside the German socialist movement. His *Finance Capital* was, arguably, the most important study of capitalism since Marx. As it turns out, Hilferding's major intellectual opponent in that battle, the reformist socialist Eduard Bernstein, is the real intellectual father of the modern, if misguided, 'separation thesis' held now over several generations by scholars like Berle, Manne, and Galbraith, and down to today's agency and stakeholder theorists. Bernstein viewed the new joint stock companies as forms that enabled a democratization of capitalism from within to emerge, in part, via widespread stock ownership. To Bernstein,

> [T]he increasing platoons … of shareholders … represent a force with a powerful influence on the economic life of society. The share restores those interim stages in the social scale which, as heads of production, had been obliterated from industry by the concentration of businesses.[52]

This presaged the view held today, primarily by stakeholder advocates, that the corporation can itself be the locus of democratic life.

Capital had other ideas. A new form of capitalist class emerged by the end of the nineteenth century, and new forms of corporate 'governance' were being designed that would enable that class to oversee a new stage in the history of capitalism itself. An apparent form of ‘ownership’ was created to attract outside capital, but this only helped enable the continuing dominance of the capitalist class made up of shareholding executives, directors, and key elements among the non-managing shareholders and other investors. The central advantage of the corporate form was that it enabled control and mobility at the very same time – as founding owners stepped back into a ‘mere’ director or shareholder role, they could use both newly gained time and diversified, liquid, and fungible capital to reach out and found new firms or exercise influence across the economy through the capital markets and other governance mechanisms such as multiple directorships. Hence, the Du Ponts were able to expand from chemicals to the emerging car industry in the early twentieth century and take a substantial position in General Motors, which they held until the early 1960s, at least. The structures that emerged in the late-nineteenth and early-twentieth centuries, while understandably derided by figures like Berle and Louis Brandeis as manipulative and deceptive, were, in fact, powerful innovations that greatly strengthened the hold of the capitalist class over the capital accumulation and valorization process. As Hilferding described it:

> The expansion of the capitalist enterprise which has been converted into a corporation, freed from the bonds of individual property, can now conform simply with the demands of technology. The introduction of new machinery, the assimilation of related branches of production, the exploitation of patents, now takes place only from the standpoint of their technical and economic suitability. The preoccupation with raising the necessary capital, which plays a major role in the privately owned enterprise, limiting its power of expansion and diminishing *its* readiness for battle, now recedes into the background. Business opportunities can be exploited more effectively, more thoroughly, and more quickly, and this is an important consideration when periods of prosperity become shorter.[53]

A class of capitalists occupy positions as pure investors, as well as shareholding executives and directors, and thereby make up the ‘controlling group’ that exercises, collectively, *strategic* decision-making over the direction and functions of the firm. A focus on ‘strategic’ decision-making is a core feature of the British ‘Warwick School’, in whose path I situate my approach to the nature of firm governance. This classification is fundamentally distinct from the neoliberal agency school which poses the firm in a permanent, if contractually constrained, binary conflict between shareholder and managers.

Thus, as two key figures associated with the Warwick School noted:

> the power to make strategic decisions can be equated with the power to control a firm, where control implies the ability to determine broad corporate objectives. Put another way, it may be argued that the power to make strategic decisions is the power to plan the overall direction of production in the firm. This includes the power broadly to determine a firm’s geographical orientation, its relationship with rivals, with governments, and with its labour force.[54]

A third leading figure in that school, Christos Pitelis, summarized the school’s view of the relevant aspect of their theory of the firm as follows:

> As controlling group I define the group that can determine strategic decisions of the firms, despite resistance from others …. The controlling group consists of large-scale shareholders and big level managers. It follows that the rest of the shareholders, including those who take the operational decisions of the firms (small level managers) are not controlling.[55]

And later, in his book-length treatment of the issue of corporate control, Pitelis concluded that ‘the modern corporation of today is controlled by a group of big shareholders and high-level managers (capitalists) who exercise this control *via* only partial ownership’.[56] This system of *control with partial ownership* evolved, Pitelis argues, from a system where rational founders who owned firms outright expanded by selling some shares without surrendering control. This reverses the causality typically found in those who work within a model that combines alleged ‘managerial’ dominance with widely dispersed and passive share ownership.

It is within that controlling milieu or among those individuals or entities, almost always a very small group, that the critical judgments about the path of the firm are made – whether to change course in a significant manner or, perhaps, whether to give up the ship altogether as opposed to merely trimming the sails. The sharing or allocation of the original, *ab initio*, unity of authority of the firm amongst those layers can be thought of as existing on a continuum. Take as an example, a paradigmatic *industrial* capitalist like Tim Cook, the engineer of Apple’s global supply chain under Apple founder Steve Jobs who rose to the CEO position upon Jobs’ death. Cook has substantially more influence on the strategic direction of Apple than, perhaps, Safra Catz, the CEO of Oracle, where a dominant living founder like Larry Ellison still acts as board chair and Chief Technology

Officer. Thus, one portrait of Cook notes that his 'transformation of Apple's operations and deep understanding of every aspect of the business was pivotal to the success of the company's dramatic comeback'. This detailed description of Cook's overhaul of the guts of Apple's manufacturing and distribution systems is reminiscent of how iconic industrial capitalists like Andrew Carnegie and Henry Ford mastered the details of their respective firms' operational processes in order to maximize profits.[57] Thus, Cook has been able to withstand challenges to his control because he is CEO; and because he is CEO, he also owns, arguably, the largest single personal share of Apple's common stock. He both owns and leads the controlling group of shareholders at Apple.[58]

If, however, Apple were to run aground because Cook made serious strategic mistakes, there exists, within the quiver of arrows held in reserve by the company's largest *financial* capitalists, sufficient power to intervene and force Cook to change course or, perhaps, leave altogether. One might say, then, that large institutional investors with significant holdings in a particular firm, such as large asset managers, have a residual option to intervene at the margin when a firm faces critical turning points. This does not mean that they cannot, and do not, voice their opinions on strategic questions facing the firm on a regular basis, however. While such firms are traditionally viewed by managerial theorists as simply passively echoing managerial decisions (including, for example, voting with management on key decisions like re-election of the board of directors, a central example in Berle and Means' book), in fact, these savvy and powerful institutional investors can and do deploy a sophisticated engagement tool set with respect to their portfolio firms, once again eliding the binary distinction between risk and decision making that neoliberal agency theorists allege is so fundamental.[59]

Apple's Dividend Policy: A Case in Point

A striking example of how this relationship works in practice played out at Apple several years ago as the company amassed enormous sums of cash generated by its worldwide profits and its cross-border tax avoidance strategy.[60] Facially it appeared to be the kind of conflict that embodied the Berle-Means paradigm with beleaguered and widely dispersed shareholders denied access to cash payouts of accumulated surplus value by an empire-building centralized management team. In the face of this apparently unused pile of cash just sitting in the bank, the veteran corporate raider Carl Icahn took a minority but significant stake in Apple shares and loudly claimed that he was pressuring Apple to return cash to its shareholders. Icahn filed a proposal with Apple to increase its stock buyback program by a sizeable $50 billion.[61]

Arguably, at first glance, this looked like a classic example of a battle between powerful 'entrenched' inside *agents* (Cook and the Apple board) and weak outside *principals* (widely dispersed shareholders welcoming their white knight, activist Icahn) consistent with the story long told by Berle-Means influenced theorists, that outside investors must fight hard to defend their position against managerial dominance. Despite the publicity attached to Icahn's investment, however, his behaviour is more easily understood as that of an opportunistic non-controlling shareholder free-riding on strategic decision-making by those who both owned and controlled the company.[62] That 'controlling group', as the Warwick School would describe it, led by Tim Cook, was pursuing the inevitable logic of valorization and capital accumulation by reinvesting some of its profits, defending their value to shareholders by avoiding taxes and returning a portion of cash in the form of stock buybacks and dividend payments. Rather than policing management empire-building, Icahn was, in the eyes of that dominant control group, merely engaged in 'financial engineering' that interfered with a long term innovation strategy that required careful balancing between reinvestment of firm profits in research and development, on the one hand, and returning unneeded cash to shareholders in a tax efficient manner, on the other.[63] At the time, Apple was facing growing competition in its core product groups and needed to find a way to refresh its lineup.[64] As one industry expert expressed Apple's situation in the face of Icahn's offensive:

> This kind of financial engineering isn't in the long-term interest of Apple's shareholders … They're still a tremendously valuable company, but stock price boosts from financial engineering shouldn't distract from the fact that their business model doesn't look as solid and dominant as it did four years ago.[65]

New York City's Comptroller, trustee for a coalition of public sector pension funds managing $149 billion in assets including $1.3 billion of Apple shares, echoed this concern for innovation in a letter to fellow Apple shareholders:

> As Mr. Icahn himself notes … the majority of Apple's revenues come from two products, the iPhone and iPad, first released in 2007 and 2012, respectively. While Apple's impressive track record for innovation bodes well for the future, it would be short-sighted and foolish to deprive the company of a sufficient cash cushion to weather unwelcome setbacks and seize new opportunities, including major acquisitions. In last week's

interview with the *WSJ*, Tim Cook said, 'We have no problem spending 10 figures for the right company'.[66]

In fact, the real centre of control at Apple, Tim Cook, backed by a substantial number of other long-term institutional investors, had already instituted Apple's first post-Steve Jobs stock buyback and dividend program the year *before* Icahn publicly announced his position in the company.

Once clear opposition among institutional investors surfaced, Icahn withdrew his proposal. Icahn dumped his Apple shares in early 2016, two and a half-years after buying in to the company, clearing a $2 billion profit. The argument some had made that he was engaged in short term stock manipulation rather than voicing deeper concerns among shareholders about the direction of the company under Cook took on greater salience.[67] Apple has continued its policy of returning some cash to shareholders to the present day, years after Icahn sold his shares, yet has also continued innovating successfully enough to have become the first American company valued at more than a trillion dollars.[68] In other words, there is substantial evidence that Apple followed a balanced policy of retaining sufficient cash to valorize its profits successfully and otherwise return unneeded cash to its shareholders. This is a result that is consistent with a view that capitalist firms follow the demands of accumulation rather than succumb to the demands of an illusory managerial class or an anarchic array of dispersed non-controlling shareholders.

'CORPORATE GOVERNANCE' DEMYSTIFIED

If it is a myth to think that real controlling owners ever disappeared, much less capitalism itself, it is equally a myth to think that the corporation is, in any meaningful sense, 'governed' or 'governable' at all. It was very important for Berle and Means to use political metaphors because of the distinctive purpose that underlay their particular project – a project motivated by both the normative views of the authors themselves and the exceptional historical situation in which they worked, namely, during a deep crisis of legitimacy for the American system. Berle and Means were working within a distinct intellectual and political tradition that had its precedents in the reformist movement that grew out of the socialist movement, led by figures like Bellamy, Bernstein, and Brandeis. From the very first pages of their classic work Berle and Means make clear they are dealing with the 'corporate *system*' – not just the corporate form – because the corporation had become a 'major *social* institution', not simply an efficient or convenient means of carrying on economic activity.[69] The corporation, they wrote:

> is coming more and more to be the industrial unit with which American economic, social, *and* political life must deal. The implications of this fact challenge many of the basic assumptions of current thought.[70]

This reflects the 'socialism from above' perspective explored most notably by Hal Draper in a series of articles in the 1960s.[71] Draper makes clear that Berle, among others, was groping for a way to convey that the socio-economic system was evolving well beyond the confines of capitalism, namely, towards

> a new social order which is neither capitalist nor socialist, but which is based on the control of both economy and government by an elite bureaucracy – forming a new exploitive ruling class – which runs the fused economic-political structure not for the private-profit gains of any individual or groups but for its own collective aggrandizement in power, prestige, and revenue, by administrative planning-from-above.[72]

This new Berlean intellectual tendency very much wanted to see the emerging managerial layers of the increasingly complex and large corporation as a possible source of socially responsible leadership of the new, and to some, terrifying, industrial economy.

Once we strip away that (understandable) ideological concern, however, an objective view of the corporation eliminates any notion that it can or does function as an *agora*, as a substitute for political life itself, which the Berle-Means viewpoint implied and which the modern stakeholder approach still champions.[73] In fact, what we think of today as 'corporate governance' is an amalgam of two sometimes overlapping but distinct developments: first, the inevitable process of conflict resolution that must take place among and between the layers of the corporate power structure as the capitalists – financial and industrial – who reside there engage in the complex and unpredictable capital accumulation and valorization process; and, second, the effort by wider society to impinge on the exercise of authority by that power structure through various mechanisms of 'social control'. It is within the latter that one can situate many of today's CSR or ESG initiatives, particularly those led by organized labour, as efforts by society to impinge upon the rule of capital.

What, then, are the implications of placing the fundamental dynamic of capitalism at the centre of our analysis of corporate theory? It upsets the traditional dominant approach to corporate governance, an approach held in common by both the agency and the stakeholder schools of thought.

Consider once more Mark Roe's influential *Strong Managers, Weak Owners,* one of several major modern works written in the tradition of Berle and Means. Roe's *idee fixe* is the decline of General Motors in the late 1980s and early 1990s. At that point in time, it *appeared* to Roe that 'finance' – i.e., GM's apparently widely dispersed shareholders – was unable to generate sufficient strength to impact what is portrayed as a headstrong and destructive CEO backed by entrenched largely non-owning managers. Roe presents this acute situation as a metaphor for the entire modern history of western, or at least Anglo-American, capitalism. He then asks how this condition came to pass, how was it that finance had ended up in such a feckless and weak position relative to the *apparent* power of the ascendant managerial class. That mistaken presumption then serves to undergird his historical argument about the alleged political effort to weaken financial 'owners' in the wake of the Great Depression. As noted above, however, the financial capitalists that owned substantial stakes in GM were more than able to exert their strategic decision-making power when needed to oust the GM CEO. In contrast to, for example, the longstanding tenure of CEOs like Apple's Tim Cook, GM's CEO had no substantial ownership position sufficient to resist this pressure.

It is fair to say that the kind of thinking that Roe and others engage in has served as the 'great myth' of the modern corporate governance framework that dominates academia and the broader policy debate about corporate power. Whether it is conservative legal scholar Stephen Bainbridge, who advocates what he calls a 'director primacy' model of corporate governance, or his somewhat more liberal nemesis Lucian Bebchuk, who makes the case for 'increasing shareholder power', both, in essence, concede the Roe point of view: managers are strong in Bainbridge's view and justly so, while for Bebchuk financial 'owners' should be restored to their proper role in the governance framework of the corporation. Of course, Roe was, more or less consciously, simply restating the original Berle-Means myth as 'fragmented ownership, a shift in power to the CEO, and suppression of large owners'.[74] And in doing so, he and those who accept that myth cannot make sense of what happened to American capitalism in the late 1980s or early 1990s, or in fact during any period since the late nineteenth century.

These authors also seem blissfully unaware of the lack of originality in their argument.[75] It is not just that they have ended up repeating the Berle shareholder 'atomization' myth, but they are also seemingly unaware that Berle himself was simply, if with a new empirical patina, re-telling a myth created within the German social democracy at the turn of the century in response to the emergence of the then-new era of corporate capitalism.

The key to understanding this historical origin is noting the use, by Berle and others, particularly in the stakeholder school, of political metaphors – references to corporate democracy, the town hall, shareholders' franchise, etc. – as if a capitalist institution, the firm, can be subjected to governance at all. This represented an effort to inject some form of a legitimating culture inside a capitalist system that had largely left behind the era of small property holders which formed the foundation of early democratic theory. Thus, Eduard Bernstein first articulated such a 'political' or 'populist' approach to a fundamentally economic problem as modern corporate capitalism was emerging in late-nineteenth and early-twentieth century Germany.[76] His aim was to undercut the potential power of an increasingly militant new industrial working class by claiming that widespread share ownership was a strong indicator of the need for a gradual, not revolutionary, democratization of capitalism from within capitalist institutions themselves.

Berle's work came to prominence at a similar inflection point in the history of capitalism, the 1930s, when big capital once again feared the revolutionary potential of a new working-class uprising seen most clearly in the rise of the Congress of Industrial Organizations (CIO), which threatened not only Henry Ford's control of *his* company, but the entire capitalist system. As C.L.R. James wrote of this important social movement:

> It was no instrument for collective bargaining and getting out the vote for the Democratic Party. It was the first attempt of a section of the American workers to change the system as they saw it into something which would solve what they considered to be their rights, their interests, and their human needs.[77]

Capitalism in the 1930s was desperately in need of a new legitimating ideology which, in part, the Berle-Means theory of managerial power provided. Similarly, in the wake of industrial decline in the early 1970s there was a wave of working-class revolt. Neoliberal theory emerged then, led by figures like Milton Friedman, to justify the destruction of worker incomes by the combination of globalization and technological change, now claiming in a manner reminiscent of Bernstein that widespread share ownership in a competitive capital market could generate a socially legitimate allocation of capital. We see this approach still at work today in the now open class conflict emerging at giant firms like Amazon and Starbucks. The fear of this new social tension is likely driving the willingness of groups like the Business Roundtable to search for its own form of a legitimating ideology when it jumps on the new 'stakeholder capitalism' bandwagon. But no increase in the 'diversity' of corporate boards or sharper supervision of firms' 'agency' costs by courts is going to result in dramatic improvements in the lives of baristas or warehouse workers.

What Bernstein and Berle share with their modern counterparts like Friedman, Posner, and Roe, then, is the mistaken view that the corporation is, in any sense, 'governed' at all. In fact, corporations are not governed. They are ruled by capitalists in order that capitalists can rule society. And these rulers are a sophisticated class of controlling stockholders whose only 'purpose' is to carry out the laws of the capitalist economic system – capital accumulation and valorization – whatever the wider social consequences of that mandate may be.

NOTES

1 'Statetment on the Purpose of a Corporation', Business Roundtable, 19 August 2019, www.businessroundtable.org.

2 *Accountable Capitalism Act*, S.3348,115th Cong. (2018).

3 Adolf A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property*, New Brunswick: Transaction Publishers, 1991 [1932], p. 5; Michael C. Jensen and William H. Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure', *Journal of Financial Economics* 3(4) 1976, pp. 305-360; Gérard Duménil and Dominique Lévy, *Managerial Capitalism: Ownership, Management and The Coming New Mode of Production*, London: Pluto Press, 2018, pp. 58-9, 216.

4 While the story I tell here is predominantly one rooted in the Anglo-American capitalist world, it has taken on wider significance in the wake of the thirty-year post-Cold War effort to mold the global economy to the requirements of that world.

5 Jensen and Meckling, 'Theory of the Firm'; Richard A. Posner, *Economic Analysis of Law*, Boston: Little, Brown and Company, 2nd edition, 1977, pp. 289-314.

6 Adolf A. Berle, *The 20th Century Capitalist Revolution*, New York: Harcourt, Brace and Company, 1954, p. 5; Dalia Tsuk, 'From Pluralism to Individualism: Berle and Means and 20th-Century American Legal Thought', *Law & Social Inquiry* 30(1), 2005, pp. 179, 181.

7 Ronald H. Coase, 'The Problem of Social Cost', *Journal of Law and Economics* 3, 1960, pp. 1-44.

8 'Law and economics' adherents would respond by saying that there is a Coasean solution to any such externalities in the form of assigning appropriate property rights and then allowing trade to take place. Perhaps one way to dissolve the tension between these two camps is to argue that if externalities are pervasive, a governance solution in the form of stakeholders might be transaction cost efficient.

9 The *agora* was an open space considered the 'center of public activity' in ancient Greek city-states where 'all the citizens could assemble'. It was used for multiple purposes including markets, religious ceremonies, military activities, and theatrical performances. Buildings that housed activities essential to the carrying on of democratic life, including courts and civic offices, surrounded the space. Mabel L. Lang, *The Athenian Citizen: Democracy In The Athenian Agora*, 2d edition, Athens:

American School of Classical Studies at Athens, 2004, p. 5. Socrates carried on his famous conversations in the Athenian *agora*. Debra Nails, *Agora, Academy, and the Conduct of Philosophy*, Philosophical Studies Series Vol. 63, Dordrecht: Kluwer Academic Publishers, 1995, p. 205.

10 This is not to argue that democracy, *tout court*, is incompatible with capitalism. Clearly some democratic institutions and forms flourish within some (if not most) capitalist societies. But we are talking here about democracy *inside* the quintessential modern capitalist institution, the corporation.

11 Jessica Wang, 'Neo-Brandeisianism and the New Deal: Adolf A. Berle, Jr., William O. Douglas, and the Problem of Corporate Finance in the 1930s', *Seattle University Law Review*, 33(4), 2010, pp. 1221-1246, 1231.

12 Later, in the depths of the Depression, Berle would break sharply from the 'Brandeisians' and opt for a state driven crisis response that pointed clearly to his emerging post-capitalist ideological orientation. See Jordan A. Schwarz, *Liberal: Adolf A. Berle and the Vision of an American Era,* New York: The Free Press, 1987, p. 104.

13 Adolf A. Berle, Jr., *Studies in the Law of Corporation Finance*, Buffalo, NY: William S. Hein & Co. Inc., 1995/1928.

14 Berle, *Corporation Finance*, p. v.

15 Berle, *Corporation Finance*, p. v. (emphasis added).

16 No-par stock carries no value on the face of its certificate or in the corporate charter. This denies third party creditors any reassurance that the entity is financially stable. This was more controversial in the early twentieth century than it is today when disclosure requirements provide more information to third parties.

17 Berle, *Corporation Finance*, p. 190.

18 Berle, *Corporation Finance*, pp. 62-63.

19 Berle, *Corporation Finance*, p. 190.

20 Berle and Means, *The Modern Corporation*, p. 8. Marx famously noted near the end of Volume One of *Capital*: 'The centralization of the means of production and socialization of labour reach a point at which they become incompatible with their capitalist integument. This integument is burst asunder. The knell of capitalist private property sounds. The expropriators are expropriated.' Karl Marx, *Capital: A Critique of Political Economy*, Volume One, trans. Ben Fowkes, New York: Vintage Books, 1977 [1867], p. 929. Of course, as I suggest below, Marx's conception of the capitalist dynamic was fundamentally different than that held by Berle and his epigones.

21 Berle and Means, *The Modern Corporation*, p. 8. (emphasis added).

22 Arthur Lipow, *Authoritarian Socialism: Edward Bellamy and the Nationalist Movement*, Berkeley: University of California Press, 1982, p. 89.

23 Schwarz, *Liberal*, p. 56.

24 Schwarz, *Liberal*, p. 56.

25 Schwarz, *Liberal*, p. 56.

26 The relevant empirical work can be found in W.L. Crum, 'On the Alleged Concentration of Economic Power', *American Economic Review*, 24(1) 1934, pp. 69-83; Paul Sweezy, 'The Illusion of the "Managerial Revolution"', 6 *Science and Society* 6(1) 1942, pp. 1-23; Clifford G. Holderness, 'The Myth of Diffuse Ownership in the United States', *The Review of Financial Studies*, 22(4) 2007, pp. 1377-1408; Clifford G. Holderness, Randall S. Kroszner, and Dennis P. Sheehan, 'Were the Good Old Days That Good? Changes in Managerial Stock Ownership Since the Great Depression',

Journal of Finance 54 (2) 1999, pp. 435-469; Clifford G. Holderness, 'A Survey of Blockholders and Corporate Control', *FRBNY Economic Policy Review* 9(1) pp. 51-64, 2003; Alex Edmans and Clifford G. Holderness, 'Blockholders: A Survey of Theory and Evidence' in Benjamin Hermalin and Michael Weisback, eds., *The Handbook of the Economics of Corporate Governance*, Vol. 1, Amsterdam: North-Holland (Elsevier), 2017, pp. 541-636; but see Brian Cheffins and Steven Bank, 'Is Berle and Means Really a Myth?' *The Business History Review* 83(3) 2009 pp. 443-474, 463.

27 Berle, *Corporation Finance*, pp. 41-2.

28 *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 89 (Del. Ch. Ct. 2010). (Emphasis in original.)

29 Etsy, *Final Prospectus*, 15 April 2015, p. 1.

30 Detailed explanations can be found in Marx, *Capital* at pp. 293-306 and pp. 707 ff; Jacques Camatte, *Capital and Community*, New York: Prism Key Press, 2011; David Norman Smith, 'Sharing, Not Selling: Marx Against Value', *Continental Thought & Theory* 1 (4), 2017, pp. 653-695; and David Norman Smith, *Authorities, Deities, and Commodities: Classical Sociology and the Problem of Domination*, Department of Sociology, University of Wisconsin-Madison, Ph.D. dissertation, 1988, (on file with author), pp. 979 ff.

31 Eugene F. Fama and Michael C. Jensen, 'Separation of Ownership and Control', *Journal of Law and Economics* 26(2), 1983, pp. 301-325.

32 Karl Marx, *Theories of Surplus Value*, Part II, London: Lawrence & Wishart, 1969, p. 29.

33 Lucian Bebchuk and Scott Hirst, 'The Specter of the Giant Three', *Boston University Law Review* 99(3), 2019, pp. 721-741; John C. Coates, 'The Future of Corporate Governance Part I: The Problem of Twelve,' Harvard Law School Discussion Paper No. 1001, April 2019; Jill Fisch, Assaf Hamdani and Steven Davidoff Solomon, 'The New Titans of Wall Street: A Theoretical Framework for Passive Investors', *University of Pennsylvania Law Review*, 168(1), 2019, pp. 17-72; Edward B. Rock and Marcel Kahan, 'Index Funds and Corporate Governance: Let Shareholders be Shareholders', NYU Law and Economics Research Paper No. 18-39, 4 April 2019.

34 Bebchuk and Hirst, 'Specter of the Giant Three'.

35 Coates, 'The Problem of Twelve'.

36 Adolf A. Berle, *Power Without Property: A New Development in American Political Economy*, New York: Harcourt, Brace and Company, 1959; 'Modern Functions of the Corporate System', *Columbia Law Review*, 62(3), 1962, pp. 433-449; and *American Economic Republic* (1963); James Burnham, *The Managerial Revolution: What is Happening in the World Now*, New York: The John Day Company, Inc., 1941; John Kenneth Galbraith, *The New Industrial State,* Boston: Houghton Mifflin Company, 1967; Henry Manne, 'The "Higher Criticism" of the Modern Corporation', *Columbia Law Review*, 62(3), 1962 pp. 399-432.

37 Berle, *American Economic Republic*; and 'Foreword', in Edward S. Mason, ed., *The Corporation in Modern Society*, Cambridge: Harvard University Press, 1959, at pp. ix-xv.

38 Hal Draper rightly critiqued this as a form of 'socialism from above'. Hal Draper, 'Neo-corporatists and neo-reformers', *New Politics* 1(1), 1961, pp. 87-106.

39 Berle, 'Foreword', p. ix.

40 John Maynard Keynes, *The General Theory of Employment Interest and Money*, New York: Harcourt, Brace and Company, 1936, p. 376.

41 'Capital' is no longer well or widely understood. Thomas Piketty's wildly popular book, *Capital in The Twenty-First Century*, Cambridge: Harvard University Press, 2014, certainly put the concept back into wider social discourse. Unfortunately, Piketty adopts the economic convention (in the course of making an unconventional and important argument about inequality) that defines capital, simply, as an income-producing asset ('land, real estate, financial instruments, industrial equipment, etc.' that generate 'rent, dividends, interest, profits, capital gains, royalties, and other incomes', Piketty, *Capital,* 19). The position taken here is consistent with the long tradition started by Marx, based on a definition of capital as a *social relationship* through which capitalists, who occupy the three institutional layers in the corporation, carry out valorization and accumulation by appropriating value created via exchange in the market by the use of labor power they acquire from workers. Managing technological progress and the increasing productivity of capitalism is central to understanding how the capitalist system works.

42 This should *not* be interpreted to mean that efforts to build support for such a broader social purpose are wasted. Such efforts, led for the most part by non-controlling shareholders and outside non-shareholding activists, can raise broader social awareness of the pathological nature of capitalism and, on rare occasions, to actual compromises by the system itself in favor of progressive reforms.

43 Berle and Means, *The Modern Corporation*, p. 78.

44 Robert Aaron Gordon, *Business Leadership in the Large Corporation*, Berkeley: University of California Press, 1961, p. 207.

45 Ferdinand Lundberg, *America's 60 Families*, New York: The Vanguard Press, 1937, pp. 42-3.

46 Mark Roe, *Strong Managers, Weak Owners: The Political Roots of American Corporate Finance*, Princeton, NJ: Princeton University Press, 1994.

47 Roe, *Strong Managers, Weak Owners,* p. xiii.

48 Roe, *Strong Managers, Weak Owners*, pp. 223-4; Stephen Miller, 'GM Chief Tried to Transform Auto Maker But Couldn't Halt Its Decline', *Wall Street Journal*, 1 December 2007.

49 Micheline Maynard, *Collision Course: Inside the Battle for General Motors*, New York: Carol Publishing Group, 1995, pp. 6-7.

50 Rudolf Hilferding, *Finance Capital: A study of the Latest Phase of Capitalist Development*, London: Routledge & Kegan Paul, 1981, p. 119.

51 Hilferding, *Finance Capital*, p. 121.

52 Eduard Bernstein, *Preconditions of Socialism,* trans. Henry Tudor, Cambridge: Cambridge University Press, 1993, pp. 65-6; William Smaldone, *Rudolf Hilferding: The Tragedy of a German Social Democrat,* Dekalb, IL: Northern Illinois University Press, 1998, 48; and 'For Rudolf Hilferding, Socialism Was About Freedom', *Jacobin,* 12 October 2020.

53 Hilferding, *Finance Capital*, p. 123.

54 Keith Cowling and Roger Sugden, 'The Essence of the Modern Corporation: Markets, Strategic Decision-making and the Theory of the Firm', *The Manchester School* 66(1), 1998, pp. 59-86, 64; see also Maurice Zeitlin, 'Corporate Ownership and Control: The Large Corporations and the Capitalist Class', *American Journal of Sociology* 79(5), 1974, pp. 1073-1119.

55 Christos N. Pitelis, 'Corporate Control, Social Choice and Capital Accumulation: An Asymmetrical Choice Approach', *Review of Radical Political Economics* 18(3), 1986, pp. 85-100, 97.
56 Christos N. Pitelis, *Corporate Capital: Control, Ownership, Savings and Crisis*, Cambridge: Cambridge University Press, 1987, p. 4.
57 Leander Kahney, *Tim Cook: The Genius Who Took Apple to the Next Level*, New York: Penguin, 2019.
58 While asset managers nominally own far more stock in Apple than Cook, no single natural person owns nearly as much as Cook with the exception of longstanding board member and veteran of the Steve Jobs' era, Arthur Levinson. Firms like Vanguard and Blackrock are merely intermediaries collectively managing shares on behalf of thousands of smallholding individuals and yet other asset managers. And the ownership of those firms themselves is held among a larger number of outside investors. Thus, Cook stands at least *primus inter pares* in the Apple boardroom and at annual shareholders' meetings.
59 BlackRock, *2019 Investment Stewardship Annual Report*, August 2019; Carol Loomis, 'BlackRock: The $4.3 trillion force', *Fortune*, 7 July 2014; Fisch, Hamdani and Solomon, 'The New Titans', p. 43ff.
60 Josh Hoxie, 'Apple Avoided $40 Billion in Taxes. Now It Wants a Gold Star?', *Fortune*, 18 January 2018.
61 Carl Icahn, 'Open Letter to Tim Cook', May 18, 2015, available at carlicahn.com/carl-icahn-issues-open-letter-to-tim-cook.
62 See 'Apple Announces Plans to Initiate Dividend and Share Repurchase Program', *Agence France-Presse*, 19 March 2012; Won-Youn Oh and Seoyeon Park, Apple: Corporate Governance and Stock Buyback, Haskayne School of Business, University of Calgary, Case #W14736, Ivey Publishing, 27 March 2015. The latter noted that 'even before Icahn's proposal, Apple was engaged in a major stock buyback program'.
63 Among the opponents of Icahn's intervention were a coalition of large public pension funds who publicly backed Cook as well as the influential proxy advisory firm, ISS, which recommended that institutional investors oppose Icahn's proposal.
64 Oh and Park, *Apple*, p. 8.
65 Aaron Pressman, 'Icahn's Plans for Apple Unlikely to Help Long-Term Shareholders', Yahoo! Finance, 19 August 2013.
66 Scott M. Stringer, Letter to Apple Shareowners, Proxy Solicitation filed with SEC by Apple, Form PX14A6G, 10 February 2014, www.sec.gov/Archives/edgar/data/320193/000121465914001019/m210141px14a6g.htm.
67 William Lazonick, Matt Hopkins, and Ken Jacobson, 'Carl Icahn's $2 billion Apple stake was a prime example of investment inequality,' *MarketWatch*, 7 June 2016.
68 In fact, it soon became clear that the shortsighted Icahn had left a lot of money on the table by ignoring Apple's long-term investment strategy. Chuck Jones, 'Carl Icahn Sold Apple Too Soon & It Cost Him $3.7B', *Forbes*, 10 November 2017. Rob Davies, 'Apple becomes world's first trillion-dollar company', *Guardian*, 2 August 2018. Davies noting that, 'Apple's astounding recent performance has left rivals in the competitive technology sector trailing in its wake.' Apple has maintained its valuation even in the wake of the Covid-19 crisis, reaching a valuation of more than $1.6 trillion as of July 28, 2020.
69 Berle and Means, *The Modern Corporation*, p. 2 (emphasis added).

70 Berle and Means, *The Modern Corporation*, p. 44.
71 Hal Draper, 'Neo-corporatists'; Hal Draper, 'The New Social-Democratic Reformism', *New Politics* 2(2), 1963, 100-116; Hal Draper, 'The Mind of Clark Kerr', *New Politics* 3(4), 1964, pp. 51-61; Hal Draper, 'The Two Souls of Socialism', *New Politics* 5(1), 1966, pp. 57-84.
72 Draper, 'Neo-corporatists', p. 87-8.
73 See Merrick Dodd, 'For Whom Are Corporate Managers Trustees?', *Harvard Law Review* 45(7), 1932, pp. 1145-1163; Charles R.T. O'Kelley, 'Merrick Dodd and the Great Depression: A Few Historical Corrections', *Seattle University Law Review* 42(2), 2019, pp. 513-533; Lipow, *Authoritarian Socialism*.
74 Roe, *Strong Managers, Weak Owners*, p. 7.
75 The one exception to this characterization is Duménil and Lévy in their *Managerial Capitalism* who claim that Bernstein 'had a much more realistic assessment of the future of capitalism' (p. 185) than Marx, Engels, Kautsky, Luxemburg, and, for good measure, Lenin. Notably, their book fails to mention the important work of Hilferding.
76 Bernstein, *Preconditions*.
77 C.L.R. James, *American Civilization*, Cambridge: Blackwell Publishers, 1993, p. 173.