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Berle, The Modern Corporation and Progressive Corporate Governance

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Berle, The Modern Corporation and Progressive Corporate Governance

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King's College London

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Juanita Rasiah

ABSTRACT

Fundamental questions about the nature of the modern corporation and how it should be governed continue to preoccupy economists, sociologists, lawyers and management scholars. If we are to provide adequate answers to questions about the nature and governance of the corporation it is imperative to consider closely its historical evolution and transformation and recognise that it constitutes a social institution. This dissertation explores and evaluates the relevant contributions of one author, namely Adolf Augustus Berle, who developed an approach to the corporation and its governance that was profoundly historically sensitive and deeply interdisciplinary.

Berle produced numerous contributions over an extended period exploring the nature, evolution and regulation of the corporation. In the contemporary literature his work is often seen narrowly as a precursor to the shareholder primacy doctrine. The argument developed in this thesis is that it is an error that obscures Berle's current significance to draw too close a connection between his approach and the modern shareholder primacy perspective. It is demonstrated that by considering Berle's work on the corporation in the context of the contributions of the institutional economists who influenced him and in relation to recent ontologically sophisticated accounts of the corporation the distinctiveness and relevance of his approach can be more effectively identified.

This dissertation is divided into three main parts. The first section examines the intellectual connections linking Berle and Thorstein Veblen. It is demonstrated in this part of the dissertation that there are clear and substantial links between Berle and Veblen but also some significant differences in orientation. The second main section of the thesis explores the nature and evolution of the corporation with a focus on Berle's own writings on these subjects and the recent ontologically informed perspective outlined by Tony Lawson. The final main section of the thesis considers Berle's views on shareholder primacy and traces out how his thinking developed on this and related matters. This section concludes with some speculations regarding the features that a contemporary corporate governance model inspired by Berle's work might include.

1. INTRODUCTION

Since the financial crisis of 2008 the corporate world has been the subject of much critical scrutiny. Fundamental questions have been raised once again about the nature and function of the modern corporation and how it is to be effectively governed. The idea that corporations need to be governed in such a way that the interests of the broader community are recognised has once more been forwarded and gained some ground. Yet, at the level of mainstream corporate governance models the focus remains very much on creating and maximising shareholder value. Corporate governance theory and practice has as a consequence contributed to promoting an environment characterised by short termism and excessive risk taking and jeopardised corporate sustainability and resilience. The conventional paradigm has encouraged directors and executives to try and ‘unlock shareholder value’ even if this involves cutting back on training and development for their employees, selling vital company assets, reducing product support and laying off significant numbers of workers regardless of their loyalty or commitment.¹

It is my belief that in order to understand the nature of the corporation and advance and evaluate competing proposals for how corporations ought to be regulated in the future we must move beyond the kinds of narrow contractual approaches that have been so dominant in recent decades. In particular if we are to make progress in crafting powerful new approaches to corporate governance then it is crucial that our theories display a greater degree of historical sensitivity. In order to understand the nature of the corporation it is essential that we appreciate

¹ For commentary and critique of this conventional paradigm see Aglietta and Reberieux (2005); Buchholz (2012) and Stout (2012).

its development as a social institution and this implies abandoning the “history silent neo-classical approach” (Pagano, 2011: 1298). One way to promote such a historically sensitive approach would be to engage directly in historical research on the emergence and development of the corporation in specific geographical contexts. In this dissertation I have chosen to take a different route. The importance of situating the modern corporation in the context of its historical evolution and transformation can also be highlighted by examining closely those authors who have previously done most to bring an historical sensitivity to our understanding of the corporation as a social entity. One such author was Adolf Augustus Berle, Jr.² In this dissertation I consider various of Berle’s contributions to the theory of the corporation and its governance and suggest that he provides an example of how historically sensitive research can productively proceed in this area.

Before introducing the aspects of Berle’s work that will form the focus of the dissertation it is useful to first provide some very brief biographical context. Born in Boston, Massachusetts in 1895, the young Berle displayed by all accounts exceptional intellectual capacity. Receiving an accelerated and extensive education by means of home schooling, Berle was academically prepared for Harvard at the age of thirteen. He enrolled a year later “in order to allow for more social maturity” (Schwarz, 1987: 13). Although many have assumed that he performed extraordinarily well as an undergraduate, he in fact attained 4Bs and 2Cs in his first year, receiving his first A only in his second year. He is quoted as advising his own son, Peter, who was to follow in his father’s footsteps at Harvard, not to be “buffaloed by the myth of your

² Berle was born January, 1895, son of Mary Augusta (Wright) and Adolf Augustus Berle. His father was an extremely influential and well connected figure and helped Berle Jr. secure a position at his first law firm owing to Louis Brandeis being a close friend. Berle, Jr. married Beatrice Bishop (1902 – 1993) and had two daughters, Beatrice Berle Meyerson and Alice Berle Crawford and a son, Peter A. A. Berle. Berle died in New York City, in 1971, aged 76 (Schwarz, 1987).

father's alleged brilliance which the record in the Dean's office would not substantiate," (Schwarz, 1987: 13).

Upon graduation, Berle entered the Harvard Law School in 1913. In 1916, at the age of 21, Berle left Harvard, the Law School's youngest graduate in its history. He joined the Boston law firm of *Brandeis, Dunbar and Nutter* for a brief period of time. Soon after, Berle entered the United States military during World War I and was sent as an intelligence officer to the Dominican Republic. There he was responsible for helping promote sugar production by means of sorting out property and contractual conflicts that existed among rural landowners.

After World War I, Berle became a member of the American delegation that attended the Paris Peace Conference - the meeting of the Allied victors to discuss the peace terms for the Central Powers. Berle showed an incredible capacity for hard work. Berle did not, however, wholly agree with the process. In his letter requesting reassignment, Berle stated that the spirit of the treaty was not right, that it neither served "the idealistic or material interests of America, or, indeed, of humanity," (Berle quoted in Schwarz, 1987: 30).

Berle was one of many other Americans who visited Europe for the first time in 1919. The reporting of the war had left a deep impression on the American public. In April Berle and a colleague took a staff car and drove 250 miles, toured the Marne, Chateau-Thierry, and other battlefields that held so much significance given the events that had so recently unfolded. Berle returned "so exhausted and depressed by what he saw of the battlefields that he ended the day by downing a half bottle of heavy wine" (Schwarz, 1987: 28).

As a commentator on foreign affairs, Berle's writings often showed an astute understanding of extremely complex international relationships, both economic and political ones. Speaking of the Second World War Berle observed:

“The war educated us in sociological cause and effect... As America is the world's banker she bears not only her own burden but those of nations abroad... As never before, foreign relations and policies depend on the view of the mass of men as distinct from their governments, and the extreme responsibility of the press is once more violently illustrated” (Schwarz, 1987: 34 - 35).

During the 1920s Berle temporarily stopped writing about foreign affairs and focused on his career in law. While working at a corporate law office on Wall Street, Berle lived in the Lower East Side of New York, among the urban poor (Schwarz, 1987) and while living there also assisted the American Indian Aid Association with their efforts to restore lands to the Navajos of New Mexico. Schwarz speculates that it was these two experiences in young Berle's career that “contributed to a reputation for putting himself on the line for liberal causes – thereby identifying him with social workers, labour leaders, and others who sought to organise the poor both to enhance opportunity and to ameliorate their lot. The aspiring attorney exhibited social conscience and noblesse oblige, at the same time developing a useful network of wealthy liberal friends and associates” (Schwarz, 1987: 37).

In the late 1920s, Berle became a professor of corporate law at Columbia Law School and he remained on the faculty there until his retirement in 1964. In 1927, Berle obtained a grant from the Rockefeller foundation to study the corporation with an economist. He hired an economics graduate student from Columbia, Gardiner Means, and together they published the now well-known book, *The Modern Corporation and Private Property*.

In 1932 Berle also began a long and illustrious public service career involving a series of high level government assignments. In the early years of President Franklin Roosevelt's first

administration, when the Great Depression and financial crisis struck, Berle served as a close advisor to Roosevelt and was one of the original members of the “Brain Trust” that forged the New Deal. It is widely acknowledged that Roosevelt’s “Commonwealth Club Address” was a speech written by Berle and according to a poll of public address scholars, ranks as the second-best presidential campaign speech of the twentieth century (Lucas and Medhurst, 2000).

Following Roosevelt’s election, Berle left Washington and returned to New York. He was a key consultant in the (successful) mayoral campaign of Fiorello LaGuardia. He also served as special counsel to the Reconstruction Finance Corporation from 1933 up until 1938. Later in 1938, Berle was Assistant Secretary of State for Latin American Affairs. He continued to informally assist Roosevelt with speech-writing but also provided advice on a wide range of economic matters (Schwarz, 1987).

After World War II, Berle served as Ambassador to Brazil from 1945 for three years, before returning to government service for a brief period in 1961. He served under President John F. Kennedy, heading an interdepartmental task force on Latin American affairs. During this period he also returned to his academic career at Columbia University and continued writing. He wrote over a long period of time from the 1920’s through to the late 1960’s. Apart from *The Modern Corporation and Private Property*, his other significant works include *The Twentieth Century Capitalist Revolution* (1954), *Tides of Crisis* (1957), and *Power without Property* (1959) and *The American Economic Republic* (1963).

Berle produced numerous contributions that were largely concerned with the nature, evolution and regulation of the corporation and they still continue to be of enormous significance

today.³ However, in the contemporary literature, his work has often been perceived of as being a significant precursor to the shareholder primacy doctrine. The shareholder primacy view – which has become increasingly dominant in recent decades – states that the only legitimate role of the modern corporation is to maximize shareholder wealth (Stout, 2013) and argues that the best way to secure this objective is by increasing the accountability of managers to shareholders.⁴ The shareholder primacy perspective was given a particular articulation in a 2001 article “The End of History for Corporate Law,” by Reinier Kraakman and Henry Hansmaan, two leading corporate scholars from Harvard and Yale law schools, respectively. They argued that the best means of pursuing aggregate social welfare was by making corporate managers strongly accountable to shareholder interests (Hansmaan and Kraakman, 2001). To Hansmaan and Kraakman (2001) the central features of the doctrine were quite clear: managers should only focus on shareholders’ interests and this was the best possible way to achieve “aggregate social welfare,” (Hansmaan and Kraakman, 2001 in Weinstein, 2010: 2). These authors and many others take it for granted that this shareholder-centric approach had become dominant and been adopted so widely due to its demonstrable efficiency enhancing attributes.

Many scholars have interpreted Berle - particularly his earlier work – as an important precursor to the contemporary “shareholder primacy” view of the corporation (Million, 1990: 220-1, Winkler, 2004, 115-6; Matheson and Olson, 1992: 1330; Hill, 2010; Stout, 2012 and 2013). Bratton and Wachter summarise the conventional view of Berle’s significance by stating:

³ Contributions that relate directly to various different aspects of the corporation include Berle, 1921, 1931, 1932, 1947, 1952, 1954, 1959, 1962 as well as Berle and Means 1932.

⁴ The influence of the shareholder primacy doctrine has been considerable and been manifest in various developments such as granting shareholders greater control with regard to boards and incentivizing managers by tying executive pay to company share price performance.

“The generally accepted historical picture puts Berle in the position of being the grandfather of modern shareholder primacy” (Bratton and Wachter, 2008: 101).

Meanwhile Moore and Reberioux suggest Berle has come to be seen as “the original defender of the shareholder wealth maximisation norm in corporate governance” (2010: 1110) and others have suggested that “Berle’s argument was premised on the conception of shareholders as owners of the corporation” (Fisch, 2006: 647). This is despite the fact that some of his other writings suggest very different orientations.

This might encourage the view that Berle was radically inconsistent in his writings on the corporation and its governance. However, it is my belief that the various strands of his work are very tightly interlinked and display degrees of both continuity and change. Although Berle was certainly concerned from early on about the growing power of managers, the intellectual framework out of which he worked was quite at odds with contemporary shareholder primacy views. The argument developed in this dissertation is that it is a fundamental error to draw too close a connection between the perspective Berle develops and the modern shareholder primacy perspective. Much of Berle’s work has been misconstrued and interpreted out of context. For example, with regard *The Modern Corporation and Private Property*, which has captivated scholars for over eighty years now, many commentators have focused on the one chapter where Berle discusses issues to do with managers within the modern corporation and ignored much of the rest of the book and thereby failed to consider the spirit in which it was written or relevant context. If we recognise *The Modern Corporation and Private Property* as part of a much wider inquiry that Berle carries out over a period of decades into the various multifarious civil society pressures that corporate managers face then we can appreciate more fully the real significance of the book. Berle in fact developed the arguments highlighted in the final chapter of *The Modern*

Corporation in his later book, *Power without Property*. In trying to appreciate Berle's contributions to our understanding of the nature and governance of the corporation it is crucial to not focus too narrowly on just one of his papers or books but to consider his relevant writings more broadly and trace through where, how and why his views changed.

I seek to demonstrate in this dissertation that Berle's work carries a much stronger message regarding the governance of corporations than is typically assumed and one that still remains relevant today. This dissertation seeks to draw out and evaluate Berle's broader intellectual framework with a particular focus on Berle's ideas about the emergence and changing nature of the corporation and his views on the impact of the corporation on the community at large. Of course Berle's work is famous for raising the issue of separation of ownership and control and this too will be critically evaluated and discussed. I will be extensively reviewing his core works: *The Modern Corporation and Private Property*, *Twentieth Century Capitalist Revolution* and *Power without Property* with consideration also being given to his numerous journal articles.

This dissertation will be divided into three main parts. The first part of the dissertation focusses on the relationship between Berle and Thorstein Veblen and considers the extent to which Berle adopts an approach to the study of the corporate system that is in line with the one that Veblen had earlier established. The second part of the dissertation focusses on the fundamental question of the nature of the corporation. It is remarkable that the core question of what kind of entity a corporation ultimately is so often gets neglected within conventional economics and corporate governance circles. Berle has many important things to say about the nature of the corporation and how the legal system interacts with the economic sphere when it comes to the constitution of the modern corporation. The second part of this dissertation explores

in detail Berle's writings on the nature of the corporation and draws out certain correspondences with recent theories of the corporation developed by those elaborating a specific position in social ontology. The third and final part of the dissertation considers the relevance of Berle's analysis for contemporary debates in the area of corporate governance. Let me motivate the dissertation further by considering in a little more detail the nature of each part of the dissertation.

The first part of this thesis set out in Chapter 2 examines Berle's connection to Veblen. Many scholars have interpreted Berle's work as an extension to Veblen's while others have argued that the two writers are opposed in certain important respects. Berle himself makes certain references to Veblen's work in the opening paragraphs of *The Modern Corporation and Private Property* (Berle and Means, 1991 [1932]). Additionally, Berle joined the law faculty at Columbia at a time when it held its largest group of institutional economists. This is possibly indicative of the fact that Veblen's work did influence him in some shape or form but the connection to Veblen's work arguably goes beyond a few scattered citations. Ultimately the question remains as to whether any of this matters – is it essential that we pick apart Veblen's own school of thought and his connection to Berle in order to better understand Berle?

My reasons for reviewing Veblen's work are twofold. First in order to understand any individual's work it is vital that we have a clear idea of the intellectual background that they came from and the schools of thought they drew upon. Arguably if any writer is assessed without sufficient attention being paid to his or her scholarly background and the sources upon which he or she drew then only a very partial reading of his or her contributions is likely to arise.

Second, it is important to note that Thorstein Veblen was a leading figure in a very particular school of economic thought, that of institutional/evolutionary economics. Veblen

himself was eager to distinguish his own work from not only classical economics but also what he referred to as neoclassical economists (a term that was in fact coined by Veblen). Neoclassical economics stems from the idea that human actors are rational and only concerned with utility maximisation. Institutional evolutionary economics, on the other hand, argues that human activity is an *evolutionary process* and that all individual action is a product of habits of thought and the dynamic interplay with other facets around them. It further argues that human action is not best understood in terms of procedures of utility maximisation but insists that it is important to recognise a host of dimensions including the cultural, devotional, sexual, etc. Veblen believed “any science, such as economics, which has to do with human conduct, becomes a genetic inquiry into the human scheme of life; and where, as in economics, the subject of inquiry is the conduct of man in his dealings with the material means of life, the science is necessarily an inquiry into the life-history of material civilization, on a more or less extended or restricted plan” (Veblen, 1909: 628). If it can be established that Berle adopted something like this institutional/evolutionary approach, albeit one enriched by his own legal background, then it seems most unlikely that he is best understood as a supporter/contributor to the theory of shareholder primacy in any straightforward way. The latter is a discourse that has emerged in part as a development within conventional, mainstream neoclassical economics. The kinds of assumptions and narrow contractual models associated with the shareholder primacy perspective are consistent with much of modern day neoclassical economics. The kind of historically sensitive, institutionally sophisticated, approach that I argue Berle adopts at least in part from Veblen is quite different from and opposed to the conventional framework that underpins the shareholder primacy view.

In order to better understand Berle it is vital that we closely examine Veblen's work and consider how similar/different the methodological approaches the two men adopt were. Reviewing Veblen's work gives us a more comprehensive understanding of where Berle's ideas and concepts stemmed from facilitating a richer evaluation of his work. Going further, understanding Veblen's influence on Berle is especially important in clarifying the methodological approach that Berle himself adopts.

The first main part of the dissertation presented in Chapter 2 focuses on identifying core elements of Veblen's methodological approach and the differences/similarities between Veblen and Berle in terms of their approach to social science. Questions such as 'How does Veblen distinguish between neoclassical and evolutionary economics?' and 'How does Veblen use his institutional approach to characterise the evolution of the corporate system?' are tackled. The question of whether Berle's writings are best seen as an extension of Veblen's work rather than Veblen's work merely being a stepping stone upon which he developed a new and quite different framework is also addressed. This chapter reviews key similarities between the two authors. One example of this concerns their methodology but there are also more substantive similarities that are also considered. Both Veblen and Berle discuss the issue of ownership and control extensively in their writings and explore the changing nature of property relations. Additionally I explore the differences that distinguish the two authors. For example, Veblen often distanced himself from any kind of political engagement. He has been described by some as a "political quietist" (Plotkin, 2010: 80). Berle, on the other hand, adopts a far more optimistic attitude towards the possibilities for positive political intervention. Furthermore Berle was of course actually directly involved in the national political sphere as part of the Brains Trust, President Roosevelt's group of core political advisors.

The second main part of this thesis presented in Chapter 3 explores the nature and evolution of the corporation with a focus on Berle's own writings on this subject and more recent writings, specifically those of Tony Lawson (2015a and 2015b). Key issues addressed in Chapter 3 include how are we to characterise the nature of the corporation and how does the corporation differ from the unincorporated firm? What role does the legal system play in the constitution of the corporation? The nature and likely influence of the corporation was a central preoccupation for Berle throughout his career. The corporation was growing to be an immensely sophisticated and complex phenomenon and with its growth Berle saw that many fundamental issues arose that he sought to address in his writings. He outlined how the corporation could be understood as a real entity and explored whether it could be legitimately characterised as legal in nature. Berle seems to have been committed to the view that the corporation is a real, as opposed to a fictional, entity. This part of the dissertation explores how Berle defends this position and considers the similarities and differences with the account of the corporation as a form of community that is socially positioned in a specific manner that has recently been developed by Tony Lawson as part of his broader project in social ontology. Central to Lawson's account of both the firm and the corporation is the notion of social positioning. I suggest that Berle was also sensitive to issues of social positioning especially in his famous 1947 paper 'The Theory of Enterprise Entity'.

In considering similarities with Lawson's account it is important to point out that Berle did not believe that the corporation could be treated in the same way that the business units of the early nineteenth century had been. The corporation had grown to such tremendous proportions, responsible for hundreds and thousands of livelihoods, and represented a new and hugely significant kind of social institution. He viewed the corporation as a complex social totality that

impacted on the community in numerous ways and believed that its regulation had to be consistent with that line of thinking. Community is a crucial category for Lawson and the treatment of community in these two accounts of the corporation is a further focus in this part of the dissertation. Lawson in fact contends that both the firm and the corporation are fundamentally communities of specific sorts that are *irreducible* to the sum of their parts. He writes: "... all social 'organisational forms', indeed all social entities that include human beings as components, are forms/examples of communities, and indeed that all are organised through relations of rights and obligations which rest on the exercise of human capacities of trusting and being trustworthy" (Lawson, 2015b: 7).

While certain important similarities between Lawson's account of the corporation and that provided by Berle can be identified there are also significant differences. Most especially Lawson adopts a view that sees the contemporary corporation as dangerously out of control and an institution that is inflicting serious damage on many communities. Berle at least by the later stages of his career has an altogether more optimistic view of the potential contribution of the corporation. In Chapter 3 this crucial difference is carefully reflected upon. A key conclusion drawn from this part of the dissertation is that many of the fundamental ontological questions about the nature of the corporation that Berle raised still have not been, or are only very recently starting to be, at all adequately addressed.

As noted previously Berle has been frequently regarded as the original precursor to the shareholder value model of governance by many commentators and has even been described as the grandfather of modern shareholder primacy. Scholars have stated that one of Berle's beliefs was that the democratic deficit that existed in the management of the American economy in the 1920s and 1930s would have been largely corrected if shareholder primacy was ensured

(Stewart, 2011). It was believed that Berle's collaboration with Gardiner Means in *The Modern Corporation and Private Property* and his individual writings laid the foundations for shareholder capitalism as well as shareholder-centric theories of corporate governance (Coiffi, 2011: 1081).

It cannot be denied that Berle did at times during his career adopt a supportive stance towards shareholder primacy principles. However those passages in his writings that point to such support have often been taken out of context and it has sometimes been assumed that his views on this issue remained constant and anticipated arguments only fully developed much later by others. The third main part of the dissertation set out as Chapter 4 seeks to provide a contextual understanding of Berle's work. Both Berle's own theoretical perspective and the economic circumstances he encountered and was attempting to understand changed significantly from the 1920's through to the late 1960's. This section traces through the major shifts in Berle's views on shareholder primacy and considers the contemporary relevance of his ideas.

This chapter begins by reviewing some of the key arguments that have been advanced in support of the shareholder primacy view in the contemporary corporate governance literature and explores their assumptions. Reviewing these kinds of arguments is essential if we are to develop an accurate appreciation of Berle's contributions as it will enable us to see the distance between Berle's various positions and the shareholder primacy perspective as developed later. This shareholder primacy perspective, it has been argued, offers a solution for the problem of shareholder apathy that was seemingly rife in the corporate system of the 1970s. The managers of a public corporation held by thousands or even hundreds of thousands of shareholders, all of whom owned a mere fraction of shares on the market, could become effectively insulated from and pursue objectives at odds with the interests of owners. The shareholder primacy view

provided a perspective on the nature and purpose of the corporation that seemed to indicate how the tensions that characterised the corporation ought to be resolved. It had its roots in agency theory and mainstream approaches to economics.⁵ Outside academia, CEOs and other top corporate executives also seemed to specially benefit from the shareholder primacy perspective and adopted the framework. During the managerialist era of the 1950s and 1960s, professional executives typically earned most of their compensation in the form of flat salaries and bonuses that would seem astonishingly reasonable when compared to the amounts that their counterparts earn today.⁶ In the 1980s and 1990s however, due in no small part to the spreading influence of shareholder primacy thinking, the top executives pay at public corporations was altered towards a more performance-related pay scheme and the stock price was the metric used to measure this. These are a few examples highlighting the fact that shareholder primacy theory was viewed by many as the light at the end of the tunnel at a time when the efficacy of managerialism⁷ was being questioned.

The shareholder primacy doctrine was quickly taken up by various influential groups including academic scholars, policy makers, hedge fund strategists and corporate executives. Academically, for example, shareholder primacy seemed to offer a straightforward story about corporate structure and purpose while answering the question, “What are corporations for?” Additionally, it seemed to offer an exceptionally simple way to measure corporate performance – depending primarily on whether the prices of stocks went up or down (Stout, 2005; Stewart,

⁵ See Jensen, M.C. and Meckling, W. H, 1976, Jensen, M.C. and Fama, E.F. 1983 Jensen, M.C. 2000.

⁶ Bebchuck and Fried, 2006, noted that the ratio of CEO pay to average employee pay rose from 140 times in 1991 to around 500 times in 2003.

⁷ Rather than seeing themselves as agents of shareholders, managers instead viewed themselves as stewards or trustees left with guiding a vital social and economic institution; see Dodd, (1932) and Stout (2013).

2011; Stout, 2007). Seeing Berle as a founding father of this kind of approach serves to place him in a very specific context.

Drawing on recent contributions to the history of legal and economic thought⁸ I distinguish between various phases in the development of Berle's thinking on the role of shareholders. I demonstrate that partitioning his arguments into 'early', 'middle' and 'late' phases enables us to understand his work in a more comprehensive manner and avoid an overly partial assessment. When considering the nature of Berle's position in the early phase of his career I review some of Berle's earliest papers from the 1920s in order to provide a better contextual understanding of his arguments. A middle phase commencing in the 1930's and developed as he entered the national political arena is considered. In this section it will be shown that in response to the transformed political and economic context Berle significantly changed his views on the most effective model of corporate governance. Berle's later writings where he discusses at length the role of the institutional investor and the significance of corporate culture will also be explored. Such an examination of the degree of continuity and change in Berle's ideas allows us to see how mistaken it is to select one particular work or phase, for example Berle's early views towards shareholder primacy, and reference this as definitive of his overall position. The argument that Berle ought not to be seen in any straightforward sense as a defender of the shareholder primacy view is taken further in later sections of Chapter 4 where I show that many of the criticisms that have been recently developed against the shareholder primacy perspective can actually be seen as having been anticipated by Berle.

Berle initially wrote during the first era of financialisation. His later writings were written during a period where the destabilizing impacts of processes of financialisation had seemingly

⁸ In particular much valuable work tracing the evolution of Berle's thinking has been completed by Bratton and Wachter, 2008 and 2010, and Stewart, 2011 and is considered in Chapter 4.

been brought under regulatory control. It is often observed that we are currently living through a second era of financialisation. The final section of Chapter 4 speculates on what form a progressive corporate governance regime⁹ inspired by Berle's insights might take.

Scholars have argued that Berle truly believed shareholding was indicative of an efficient, well-developed capital market (Coiffi, 2011). Berle believed that managers were untrustworthy and his "prime concern was controlling the self-interested and irresponsible actions of management, who controlled one of the most important political actors within American society: the corporation" (Stewart, 2011: 1465). It has been further argued that these kinds of concerns largely made up the driving forces that pushed Berle to promote shareholder rights, believing that managers were effectively trustees for shareholders and naught else (Stewart, 2011). So it would be important that we review his work pertaining to this issue. Additionally, it would be useful to review the history of the shareholder primacy view itself. Chapter 4 seeks to do both.

Berle enjoyed a long career and produced a substantial amount of work. He is a contributor who has been extremely influential and his analyses have continued to resonate in present times. That in itself makes his work interesting to explore. However Berle's thought and ideas have widely been misinterpreted. Many scholars have chosen to 'cherry-pick' or take snippets from Berle's writings and removed them from their wider context. History of thought done in this way is problematic. Firstly such work is prone to misinterpret the author's ideas and contributions and the true meaning behind a particular expression may be lost if taken out of context. Second, many authors are likely to change their points of view over time, given this it

⁹ It is perhaps useful here to provide some clarification regarding the use of term progressive as deployed within this dissertation. I follow Talbot in associating progressiveness with those interventions that promote the interests of the broader community rather than narrow sectional interests such as shareholders alone (see Talbot, 2013: 73).

becomes vital to carefully trace through both continuity and change in an authors' thinking. The result of taking small extracts from Berle's work and stringing them together so as to generate a specific interpretation has led some to drastically misinterpret Berle's writings and see them as laying the foundations for a shareholder primacy model of corporate governance.

The task undertaken in this dissertation is to identify some of the key trajectories in Berle's thinking regarding the corporation, providing appropriate context. By exploring Berle's work in this way, it is hoped that this dissertation will demonstrate that Berle's contributions are of interest not merely from the perspective of the history of ideas but also because they provide an example of how historically sensitive research can productively proceed and continue to carry significant insight regarding governance issues today.

2. BERLE AND VEBLEN: VISIONS, METHODS AND POLICY ENGAGEMENT

2.1 Introduction

Over the last century the nature of the modern corporation has periodically been a central concern for economists, legal scholars and social scientists generally. Thorstein Veblen was one economist who early on displayed considerable interest in the emergence and nature of the corporation. Understanding the significance and changing nature of the corporation was also a central preoccupation for Adolf Berle. Both Berle and Veblen were concerned with understanding the significant economic transformations that were in part being ushered in by the development of the corporation. The new corporate era brought with it tremendous change in the patterns of life both at home and at work. On the back of technological developments there was a significant increase in the productive potential of society and both Berle and Veblen were interested in understanding how the corporation channeled the new possibilities in particular directions.

In order to obtain a fuller appreciation of Berle's work it is particularly useful to consider relevant aspects of Veblen's contributions. Veblen's ideas and approach help us to contextualise and understand Berle's analysis. As Malcolm Rutherford (2004) has demonstrated during the period between 1913 and the early 1930s Columbia University became the academic home of a large concentration of institutional economists. Berle joined the Law Faculty at Columbia in 1927 and it is very likely that the institutional economists located there would have had some

substantial impact on him. Given that Veblen's seminal 1898 article '*Why is Economics not an Evolutionary Science?*' provided significant initial impetus to the development of Institutional Economics and that Veblen is viewed as one of the founders of Institutional Economics it is important in the context of this thesis to explore some of Veblen's key themes and examine how they correspond to relevant elements of Berle's contributions. Moreover there is direct evidence of Veblen's influence on Berle, at the very beginning of *The Modern Corporation and Private Property*, in the third paragraph of Chapter I, Berle makes a reference to Veblen's *Absentee Ownership* when opening his discussion on the organisation of property (Berle and Means, 1991[1932]: 4). This is one of very few references included in the entire book.

Some scholars who have previously explored the relationship between Veblen and Berle have especially highlighted the connections. The argument has been made that there is very significant levels of continuity both at a methodological and substantive level between the work of Veblen and Berle. For example O'Kelley (2011) goes so far as to view *The Modern Corporation and Private Property* as in part an extension of Veblen's earlier work on absentee ownership. O'Kelley discusses in detail some key issues raised by Veblen (1924) in *Absentee Ownership and Business Enterprise* and then places *The Modern Corporation and Private Property* very much in the context of Veblen's ideas.¹⁰ In this chapter I review the case suggesting substantial commonality between Veblen and Berle and find much to support it. Understanding these similarities is important in its own right and enriches our reading of Berle but it is also helpful in appreciating differences between Berle and modern day advocates of the doctrine shareholder primacy. Contemporary defenders of the shareholder primacy doctrine tend to build up from arguments derived from contractual accounts of the firm and the corporation.

¹⁰ Meanwhile Wang describes Berle as adopting an "institutionalism - rooted in the theoretical work of iconoclastic economist and intellectual Thorstein Veblen" (Wang, 2010: 1223).

These contractual accounts very much adopt the assumptions and presuppositions of conventional neoclassical economics. If Berle's work can be understood as drawing on, or embedded within, the older institutional economics then it becomes easier to appreciate how distinct Berle's work is from contemporary shareholder primacy perspectives.

As well as exploring the similarities between Berle and Veblen I see it as important to highlight certain key differences between the approaches adopted by the two men. One particularly glaring difference relates to their respective responses to economic issues. Some commentators have argued that Veblen was broadly pessimistic about the prospects for conventional political intervention, carefully distancing himself from political engagements (O'Kelley, 2013; Dugger, 1984; Plotkin, 2010) and leading the life of a "political quietist" (Plotkin, 2010: 80). This characterisation of Veblen will be explored further along with a comparison with Berle who in many ways can be understood as a public intellectual and, of course, took a very active part in American public life. During the Great Depression and the financial crisis of the 1930s he had a very prominent public profile and was engaged directly in helping to formulate and introduce the policies associated with the New Deal. A further point of difference that will be considered concerns their radical credentials, an interesting issue relates to how far Berle rows back from certain elements of Veblen's critique of the emerging American corporate system¹¹.

Section 2 of this chapter will look at the similarities between the two authors. Initially the focus will be on methodological similarities. It will be shown that both Veblen and Berle were

¹¹ While the focus in this chapter is on the relation between Veblen and Berle it is important to acknowledge that Berle was also influenced by a range of institutional economists. Prominent institutional economists such as William Z. Ripley certainly had an impact on Berle's thinking and approach, see Kirkendall, 1961 for details. An obvious extension to the analysis provided in this chapter would be to consider how Berle's contributions were informed by his understanding of other institutionalists beyond Veblen.

critical of neoclassical economics in part for its failure to recognise that the kind of industrial structures that had been the focus of earlier economic theorising had been significantly transformed. I will then note how both Veblen and Berle do not take key social institutions such as private property and ownership for granted but in complementary ways explore how the practices of private property emerged and how they have been transformed over time. I also consider how both Berle and Veblen identify groups who they view as well placed to initiate progressive developments. In Section 3 I turn to the differences between Berle and Veblen and highlight Veblen's sustained criticism of contemporary pecuniary culture and note that this stands in contrast to Berle's more accommodating, less radical position. In this section I also explore differences between the two men in terms of their willingness to engage in practical political initiatives. Concluding remarks follow in Section Four.

2.2 Methodological and Substantive Similarities between Berle and Veblen

(i) Classical, Neoclassical and Evolutionary Economics

Veblen first began writing systematically towards the end of the nineteenth century and continued for twenty-five years, publishing numerous works in the form of books, articles, and reviews developing his evolutionary account of the emerging industrial system. Veblen (1898) provided the initial inspiration for a discourse that would soon become known as Institutional Economics in his article titled, '*Why is Economics not an Evolutionary Science?*' Answering this question became the project that Veblen devoted himself to for the remainder of his working

life. He became consumed with studying the American economic system from the point of view of an evolutionary science.

The term ‘neoclassical economics’ was first coined by Thorstein Veblen as he sought to clarify the intellectual constraints that limited the thinking of some of his contemporaries. When Veblen used the term ‘neoclassical economics’ he sought to group the work of his contemporaries like Alfred Marshall, his followers and those in the Austrian school like Menger and others including Jevons. Whatever Veblen’s own intentions may have been when introducing the term, by the 1930s neo-classical economics had come to signify the perspective on economics broadly identified with wealth or utility maximisation and marginal utility analysis.¹²

Veblen strongly believed that there was a distinction between his own work and that of neoclassical economists. Although the latter aspired to make economics an evolutionary science, he argued that for the most part their work was fundamentally pre-evolutionary (O’Kelley, 2011). Veblen writes:

[T]he work of the neoclassical economics might be compared, probably without offending any of its adepts, with that of the early generation of Darwinians... Economists of the present day are commonly evolutionists, in a general way. They commonly accept, as other men do, the general results of the evolutionary speculation in those directions in which the evolutionary method has made its way. But the habit of handling by evolutionist methods the facts with which their own science is concerned has made its way among the economists to but a very uncertain degree (Veblen (1900) in O’Kelley, 2011: 1322).

Veblen suggests that the neoclassical economics of his day was hopelessly backward and unable to adequately address the material it faces:

¹² Interestingly this usage continues today. For discussion of Veblen’s own use of the term see Tony Lawson 2013. For commentaries on Lawson’s discussion of Veblen’s account of neoclassical economics see the various contributions in Morgan, 2016.

“It may be taken as the consensus of those men who are doing the serious work of modern anthropology, ethnology and psychology, as well as those in the biological sciences proper, that economics is helplessly behind the times, and unable to handle its subject-matter in a way to entitle it to standing as a modern science” (Veblen, 1898a: 373)

A central element of Veblen’s critique of neoclassical economics concerns the assumptions it makes about the human agent. According to Veblen the human agent as conceived of by neoclassical economics is taken over from “the traditional psychology of the early nineteenth century hedonists”. Within conventional economics the human agent is conceived of as being farsighted and rational, concerned only with maximizing his pleasure and minimizing his pain. However, according to Veblen, neoclassical economists fail to recognize the human agent as a real actor in the sense of being a causative agent. Within neoclassical economics the human agent is not really an agent at all but rather a totally passive reactor to what the environment presents – a pleasure seeking machine:

“The hedonistic conception of man is that of a lightening calculator of pleasures and pains, who oscillates like a homogenous globule of desire of happiness under the impulse of stimuli that shift him about the area, but leave him intact. He has neither antecedent nor consequent. He is an isolated, definitive human datum, in stable equilibrium except for the buffets of the impinging forces that displace him in one direction or another ... When the force of the impact is spent, he comes to rest, a self-contained globule of desire as before. Spiritually, the hedonistic man is not a prime mover. He is not the seat of a process of living, except in the sense that he is subject to a series of permutations enforced upon him by circumstances external and alien to him” (Veblen, 1898a: 389).

According to Veblen if any kind of progress is to be made within economics then it is necessary to move beyond this atomistic conception of the human agent. It was Veblen’s belief that human activity was very much an evolutionary process. He viewed the way an individual acted on any given day as being a product of his habits of thought or circumstances of temperament. In the case of evolutionary economics, the human actor was far from passive -

merely reacting to events and processes of economic life. Instead, he/she was *actively* involved in making decisions about his/her life.

For Veblen it was vital that the human agent be recognized as being socially constituted in a fundamental sense. He writes: “Each move ... is necessarily made by individuals immersed in the community and exposed to the discipline of group life as it runs in the community, since all life is necessarily group life. The phenomena of human life occur only in this form” (Veblen, 1914: 103-4). Veblen argued that an individual’s action resulted from the interplay of the human actor and other facets around him. So the focus was not just about satisfying one’s “economic interest” i.e. material wants in life and acting rationally with the intent of utility maximisation. Instead it was about numerous other interests too such as aesthetic ones or sexual, humanitarian and devotional interests. All human activity took place adaptively and sequentially depending on the actions of others as fashioned by the institutions at that time. In emphasizing the socially constituted nature of human agents he is however careful to avoid any form of determinism. The human individual for Veblen is always a potentially creative element in the environment – “He is in an eminent sense an intelligent agent. By selective necessity he is endowed with a proclivity for purposeful action” (Veblen, 1964: 80).¹³

Another feature of classical and neoclassical economics that Veblen objects to is how institutions are treated as mere constraints within which agents conduct their optimizing behaviour. In the world of neoclassical economics, this reactor of a man is seen as living in a world where the major economic institutions affecting his life have been simplified to information points that are as lifeless and unchanging as the rational man himself. Key institutions, such as private property and ownership, are conceived of as being pre-existing fixed features of society that need not be and should not be explored. He writes:

¹³ For further detailed discussion of Veblen’s treatment of the human agent see, Nabers, 1958.

“The cultural elements involved in the theoretical scheme, elements that are of the nature of institutions, human relations governed by use and wont in whatever kind and connection, are not subject to inquiry but are taken for granted as pre-existing in a finished, typical form and as making up a normal and definitive economic situation, under which and in terms of which human intercourse is necessarily carried on. This cultural situation comprises a few large and simple articles of institutional furniture, together with their logical implications or corollaries; but it includes nothing of the consequences or effects caused by these institutional elements. The cultural elements so tacitly postulated as immutable conditions precedent to economic life are ownership and free contract, together with such other features of the scheme of natural rights as are implied in the exercise of these. These cultural products are for the purposes of the theory, conceived to be given a priori in unmitigated force. They are part of the nature of things; so that there is no need of accounting for them or inquiring into them, as to how they have come to such as they are, or how and why they have changed and are changing, or what effect all this may have on the relations of men who live by or under this cultural situation” (Veblen, 1909: 623).

In contrast to all of this Veblen insists that economics must focus on history, process and change. For Veblen it becomes important to trace through where for example the principles of ownership and private property have come from. An evolutionary science would inquire as to *why* the things described were as they were, and how such circumstances were to change in the future; nothing was preordained, everything was contestable and thereafter contested. Veblen argued that although the focus is often on human action, we must not lose sight of the connection between human action, habits of thought and social institutions and the affect each has on the other.

Both habits of thought and institutions are fundamental to understanding Veblen’s ideas. In *Limitations of Marginal Utility* Veblen describes institutions as “settled habits of thought common to the generality of men,” (Veblen, 1909: 626). We can understand habits of thought to be the ways and means of thinking and processing information. It provides a means for individuals to make sense of the world around them and act accordingly in appropriate situations (Lawson, 2015c). Veblen believed that institutions then comprised of these cumulative habits of thought:

“Like all human culture this material civilization is a scheme of institutions – institutional fabric and institutional growth. But institutions are an outgrowth of habit” (Veblen, 1909: 628)

Essentially, the habits that comprise an institution must be common to people generally and relatively enduring. They must provide accepted grounds for forms of behaviour or activity in particular situations. So an individual cannot create an institution just for him or herself. Veblen observed:

“The growth of culture is a cumulative sequence of habituation, and the ways and means of it are the habitual response of human nature to exigencies that vary incontinently, cumulatively, but with something of a consistent sequence in the cumulative variations that so go forward” (Veblen, 1909: 628).

Veblen believed “any science, such as economics, which has to do with human conduct, becomes a genetic inquiry into the human scheme of life” (Veblen, 1909: 627 – 628). With new situations – and dramatic ones like the industrial revolution – new habits of thought will arise, thereby giving rise to new institutions. In this way, Veblen always adopted the position that the social world was forever in process, continuously evolving and so the nature of important social institutions such as the corporation was also evolutionary - “rooted in the past but changing along with the fortunes of men and nations” (O’Kelley, 2013: 1002).

Veblen did not believe that any theory put forward at one point in time would necessarily still hold true a decade or two later. He illustrates this point in *Absentee Ownership and Business Enterprise in Recent Times* when discussing the concepts put forward by Adam Smith. Veblen points to the “luminous record of the state of things economic in his time” but “he stood at the critical point of transition to a new order in industry and in ownership, and what was ‘natural’ in his view of things, therefore, ceased to be the common run of things from and after the date at which his luminous formulation of economic laws was drawn up” (Veblen, 1924: 57).

This same concern also applies to his own contemporaries. Veblen was profoundly dissatisfied with the way in which the business enterprise was typically characterized by neoclassical economic theory. Within the conventional theory of the time the economy was seen as being composed in large part of numerous small firms purchasing factors in essentially competitive factor markets and accepting the prevailing prices in the corresponding product markets. Successful firms were understood as temporarily obtaining a premium and hence achieving above normal profits through better management and innovation. Within the conventional view it was superior management and the introduction of new productive techniques that allowed increased margins at given prices to be enjoyed in the short term. The profits were recognised as being short term because any advantage will be copied by competitors. Thus in due course the full advantages will accrue to consumers in the form of a greater quantity of the product being produced at a lower price. Veblen argued that neoclassical economics took as its basic model the stage of economic development characteristic of an earlier period where the entrepreneur–manager, the small firm, competitively organized markets and so on were the core elements. Veblen argued that this kind of economic context had been radically transformed, he insisted that we should be exploring the nature of an economic system where corporations were dominant and were able to engage in wide ranging, often deeply manipulative, activities.

We can now see the very significant methodological similarities between Berle and Veblen. Berle believed human activity, even when it came to economic activity, was an evolutionary process. He, like Veblen, believed that in order to understand the nature of the entity that was the modern corporation it was vital that we approached it from the point of view of its *evolutionary process*. Towards the latter part of *The Modern Corporation and Public*

Property, in a chapter with the very telling heading “The Inadequacy of Traditional Theory” he too raises the illustration of economic life as depicted by Adam Smith. He observed:

“Private property, private enterprise, individual initiative, the profit motive, wealth, competition, - these are the concepts which he [Adam Smith] employed in describing the economy of his time... Most writers of the Nineteenth Century built on these logical foundations, and current economic literature is, in large measure, cast in such terms. Yet these terms have ceased to be accurate, and therefore tend to mislead in describing modern enterprise as carried on by the great corporations. Though both the terms and the concepts remain, they are inapplicable to a dominant area in American economic organisation” (Berle and Means, 1991[1932]: 303).

In the remaining part of the chapter Berle proceeded to explain in detail how each of the concepts of private property, wealth, private enterprise, individual initiative, competition and the profit motive have all come to mean very different things compared to the time when Smith was writing.

These thoughts are reiterated many years later in his paper, *The Impact of the Corporation on Classical Economic Theory*. Berle (1965) has no qualms openly discussing the inadequacy of neoclassical economics and opens the paper by stating boldly: “In 1932, the thesis was presented by myself and Gardiner C. Means that the growth and functioning of large corporations introduced certain elements not adequately taken into account by classical economic theory” (Berle, 1965: 25). Over the course of this paper, Berle draws our attention to the “factual results of the flood-tide of institutional development which carries the bulk of the burgeoning industrial evolution” (Berle, 1965: 26) which have caused the nature of the corporation to shift tremendously and rather dramatically. He argues that the neoclassical economists seem unfazed by these changes and don’t take them into consideration. He adds, “the neoclassical school of economic thought rejects the idea that any change in theory is required by current phenomena... For neoclassical economists, business remains as usual... I think they are wrong” (Berle, 1965: 26 – 27). Berle argues that capitalism as a system is continuously evolving.

So we cannot assume that some of the economic terms have a stable referent. He states that it would be “as relevant as to assume that a modern motorcar is essentially the same as a fringed surrey because both have four wheels and transport passengers” (Berle, 1965: 26). Looking at a significant volume of factual and statistical evidence, Berle refutes the proposition “that ‘capitalism’ as classically understood has not evolved” (Berle, 1965: 26). He also argues that the shift in ownership away from “from an aggregate of small-scale individual family-or-ownership-directed enterprise” to “nearly one-third of all personally-owned property... representing ownership of the corporate system,” (Berle, 1965: 28) would require changes being made to fundamental concepts regarding industrial organisation. If the underlying features of the system have changed then we can no longer assume the theories will still hold true (Berle, 1965: 30).

Continuing in this line of thinking, Berle considers how even where the ultimate purposes of an organisation remain stable what that means in practice can vary significantly as the institutional context changes. Thus he writes with regard profit maximisation:

“Maximisation of profit, it is said, is the prime driving force of corporations now as always in the case of business. Agreed.

Classic (and neoclassical) theory assumes that this fact excludes possibility of significant use of the corporate assets and mechanism for social purposes. Both indeed add that such use not only cannot but should not be made. The corporation’s significance is thus limited to that of a profit-seeking unit, having the same motivations and acting in the same way as the classical entrepreneur-business-man. Fundamentally a good deal of this is true. Inaccuracy... in using the general concept as guide to assumed motivations and behaviour of the corporation arises from the changed state of fact. Maximisation of profit in the case of giant corporations not only may, but usually does, mean acting quite differently from the small-scale firm; thus the content of the phrase has changed.

Able-run corporations think of themselves as perpetual, as dependent on maintaining long-range position and as responsible for meeting market demands (which they hope to increase) for an unlimited future. Their policies thus require and include long-range planning, for periods of five to twenty years ahead. At any given moment, they will sacrifice a portion of immediate profit for long-range position. This takes many forms: tying up capital to assure future source of supply, foregoing immediate profit for better position in any given market; hazarding resources in experimental operations (some of great size) whose profit potential is undemonstrated, campaigning for a changed tax-position – to take only a few. Of course, they hope the policies adopted will eventually ‘pay off’ in revenue dollars, or in added

percentage of market, or otherwise, but the time dimension is changed.... Though the profit motive is regnant, it is modified in application, timing and direction by all manner of companion considerations” (Berle, 1965: 33 - 34).

At a methodological level then there does seem to be some very significant correspondences between Berle and Veblen, in the next sub section I maintain that there are also substantial correspondences at the level of some of their main substantive themes.

(ii) Veblen’s *Absentee Ownership* and Berle’s *Dissolution of the Atom of Property*

Veblen viewed absentee ownership as one of the most dominant institutions at the time of his writing. Its importance to the functioning of society operated at two levels. First, on a micro-level to individual men, Veblen observed: “In recent times absentee ownership has come to be the main and immediate controlling interest in the life of civilised men” (Veblen, 1924: 3). Secondly, absentee ownership was of significance on a macro-level as well: “[Absentee ownership] has now plainly come to be the prime institutional factor that underlies and governs the established order of society. At the same time and in the same degree it has, as a matter of course, become the chief concern of the constituted authorities in all the civilised nations to safeguard the security and gainfulness of absentee ownership” (Veblen, 1924: 4).

In *Absentee Ownership and Business Enterprise in Recent Times: The Case of America*, one of his most renowned works, Veblen (1924) sought to document the radical transformations taking place in the modern industrial system. He critically observed the way in which certain material conditions of life had changed with the coming of the Industrial Revolution, resulting in its disjointedness with prevailing habits of thought. He endeavoured to provide us with an understanding of how the system of ownership and control developed originally and how it later changed to a system of absentee ownership and control. In order to accomplish this task Veblen

(1924) explored the major social institutions that played central roles in creating the world of the 1920s: the Masterless Man, the Handicraft Industry, the Captain of Industry, the Technicians and finally the Engineers.

In order to understand any aspect of Veblen's analysis of the business enterprise including his discussion of the rise of absentee ownership it is useful to situate it in the context of his broader analysis of institutional change.¹⁴ Veblen considers four basic stages of social history – savagery, the barbarian era, the era of handicraft industry and the era of machine production.

According to Veblen the era of savagery was the initial and longest lasting period of human history. In this stage every individual in a community had to engage in productive labour because the primitive state of industrial knowledge prevented the society from producing an economic surplus that could feed non-producers. The constraints within savage society were such that each and every individual had to cooperate in the distribution of economic supplies so that everyone would get enough resources to maintain his or her capacity for work. There were no class distinctions in this savage era and industry was organized on the basis of *workmanship* alone. The picture Veblen paints of savagery is one of considerable solidarity between community members. Although the savages did engage in mythological speculations about the spiritual agents they took to be controlling their natural environment, their mythologies were simply an attempt to satisfy their *idle curiosity* and had little economic significance.

Veblen maintains that there is a fundamental transition from this classless state of society to the *barbarian stage* of culture in which a *leisure class* first emerges and in which interpersonal conflict becomes far more pronounced. He writes “the character of the struggle for existence

¹⁴ It is possible to only give here the briefest sketch of Veblen's treatment of institutional change. For more detailed discussions see Wenzler, 1998 and Barone, 2015.

changed in some degree from a struggle of the group against a non-human environment to a struggle against a human environment. This change was accompanied by an increasing antagonism and a consciousness between individual members of the group” (Veblen, 2009[1899]: 220). Veblen argues that this transition would have been impossible before society became productive enough to produce a significant surplus.

Force and fraud were, according to Veblen, the primary mechanisms by which the emerging leisure class of a barbarian society came to control the economic surplus. Warrior classes absented themselves from the *vulgar* requirements of industrial labour by directly appropriating the excess production of other community members through force. Priestly classes promoted themselves in less direct and more subtle ways in what, according to Veblen, amounted to fraud. They effectively turned primitive mythologies into economic assets by trading the intangible threats and promises of nonhuman spiritual agents for the tangible economic goods of others. As warriors and priests began to dominate the human environment the barbarian society was divided into two classes - the industrial class and the leisure class.

While the leisure class successfully freed itself from industrial labour it also constructed a complex system of cultural values that promoted the moral superiority of leisure class activities. At the heart of barbarian culture, according to Veblen, was a core and highly invidious distinction between *exploit* and *drudgery*. Exploit was linked to the ability to transform other essentially teleological (i.e. human) agents into nothing more than means rather than ends in themselves. Drudgery related to the industrial act of making new things out of inert material. Eventually industrial labour which had been satisfying to the savage because he possessed a native *instinct for workmanship* came to be experienced by the barbarian as fundamentally irksome. Labour came to be associated with the vulgar, ignoble and base and Veblen argued that

it remained so as modern civilization developed. Meanwhile the leisure class expresses its celebration of exploit and disdain for labour through various forms of conspicuous waste.

According to Veblen private property originated in the barbarian era and continued to promote the predatory values of the leisure class. Veblen sees ownership as a social institution and not a natural fact. Within the barbarian era Veblen traces ownership to the social institutions in which master/servant relations had originated – slavery and patriarchal marriage. The institution of ownership began for Veblen as a relationship between a human master and a human servant, rather than a relationship between people and things. Once this way of thinking about human relationships had become firmly established it could be and was, according to Veblen, transposed across to thinking about relationships with inanimate objects. In time the fact that a man possessed many objects became a symbolic demonstration of his prowess even if it was not clear that he had obtained his wealth through the domination of other community members. Soon owning and consuming products of labour stood in a metaphorical way for owning and exploiting other human agents. For Veblen the contrast between the modern businessman and the barbarian related merely to the fact that businessmen typically obtained their property and prestige via pecuniary exploits in the marketplace rather than physical exploits of military combat. This kind of analysis of the motives of accumulation explained why the quest for wealth seemed to be so insatiable even in a modern industrial society that had vastly increased its productive potentialities. On this perspective since the desire for wealth was inherently competitive no absolute amount of physical property would deliver satisfaction.

According to Veblen's account European *handicraft production* starts when *Masterless Men* escape from the control of their feudal lords in the late medieval period and move into protected cities. As they establish themselves as craftsmen selling their products in the petty

markets that emerged in this era the Masterless Men achieve a degree of economic independence. In order to succeed the handicraft worker had to combine a capacity for workmanship with a capacity for salesmanship. Over time, these congregated Masterless Men developed new habits of thought consistent with their new masterless status. This was a life without absentee landlords and one where they had total claim on the fruits of their labour: it belonged to them and no one else. Workmanship was of high value and the resultant products were their own to keep and do with as they saw fit. Through this process, Veblen observed this new experience in workmanship to give rise to “the common-sense notion that ownership was a ‘natural right’; in the sense that what a man has made, whatsoever ‘he hath mixed his labour with’ that has thereby become his own, to do with it as he will” (Veblen, 1924: 48). Hence in the realm of ideas the natural rights social philosophy corresponded to this feature of handicraft labour. The preconceptions of natural rights eliminated all of the privileges, rights and invidious distinctions of the feudal class system except the rights of property. From the perspective of the handicraft worker the privileges of property, unlike other aristocratic privileges, appeared necessary and natural as they seemed to arise directly from man’s relationship to nature and not from his relationship to other men. For Veblen this kind of perspective was incoherent.

Veblen described the “natural” right of property as that which has been “grounded in the workmanship of the man who ‘hath mixed his labour with’ the materials out of which a valuable article has been created” (Veblen, 1924: 50). By this right of ownership the owner holds the power to care for his property as he sees fit and if he so wishes “dispose of his property by bargain and sale”. The Masterless Men, however, also had the natural right to “turn their workmanship to account for a valuable consideration in working up materials owned by another, without becoming owners of the resulting product” (Veblen, 1924: 50). This brought about a

further variant of absentee ownership and it was along the lines of credit and hired labour that absentee ownership integrated itself into the industrial system and came to dominate the organisations of industry within the system.

Initially a typical business enterprise during the period of free competition was owned as well as managed by a sole proprietor or occasionally by a small partnership. This unification of ownership and industry was no longer representative of industrial communities by the third quarter of the nineteenth century. Veblen traces through the transformations involved in some detail - starting with trade. At first the petty trader was only engaged in small barter-like interactions. But the flow of goods grew greater in scale and volume, taking on a role more like “business” (Veblen, 1924: 54) wherein a new need surfaced: the management of contracts, bargaining and accounts became an occupation in itself separate from the physical handling and care of the finished goods bought and sold in the market-place. And gradually the petty trader became:

“an enterprising absentee investor who took care of the business; while agents, super-cargoes, factors took over the handling, carriage, and even the buying and selling of the goods, which so passed under the merchant’s ownership without passing under his hand” (Veblen, 1924: 54).

Soon the now-congregated Masterless Men underwent a change too – a minority of them became absentee owners while the majority became wage labourers thus surrendering ownership and control. Initially, absentee ownership had a significant presence owing to the craftsman’s “natural right grounded in his workmanship” (Veblen, 1924: 55). But absentee ownership in the way of business enterprise was viewed by Veblen as “commercial investment” (Veblen, 1924: 55). And the modern world became accustomed to the practice of investment for a profit when it was in this form of commercial enterprise. Appreciation for business principles and value for the investor and his work grew from here. When the handicraft era drew to a close and the transition

to the machine industry and the factory system had begun, investment in the way of business enterprise was already a customary fact.

The rapid increase in mechanization was linked with the extended scale and scope of factory operations. Slowly but surely, the habits of thought from the handicraft era made way for new patterns of thoughts. New relationships of ownership and control formed and the nature of work changed once again. This change was facilitated by, as well as promoted the rise of, a new institution. Veblen writes:

“...[F]rom this time on [the owner] became, in the typical case, an absentee manager with a funded interest in the works as a going business concern. The visible relation between the owner and the works shifted from a personal footing of workmanship to an impersonal footing of absentee ownership resting on an investment of funds. Under the new dispensation the owner’s guiding interest centered on the earnings of the concern rather than on the workmen and their work” (Veblen, 1924: 59).

For Veblen the *Captain of Industry* is an entirely mythological character but was nevertheless “one of the major institutions of the nineteenth century” (Veblen, 1924: 101). It was especially important as it embodied the spirit of initiative and adventure in the new industrial age that had emerged. Veblen notes:

“The prototype rather than the origin of the captain of industry is to be seen in the Merchant Adventurer of an earlier age, or as he would be called after he had grown to larger dimensions and become altogether sessile, the Merchant Prince. In the beginning the captain was an adventurer in industrial enterprise – hence the name given him... He was a person of insight – perhaps chiefly industrial insight – and of initiative and energy... He was a captain of workmanship at the same time that he was a business man; but he was a good deal of a pioneer in both respects, inasmuch as he was on new ground in both respects. In the typical case, he was business manager of the venture as well as foreman of the works, and not infrequently he was the designer and master-builder of the equipment, of which he was also the responsible owner” (Veblen 1924: 102 - 103).

As the volume of industry grew increasingly larger, extending the volume of transactions, employing larger numbers of workmen and larger equipment, business concerns increased along with it. Personal supervision of the work by the owners no longer seemed practical and business

interaction became increasingly detached. Impersonal wage contracts replaced personal contact and personal arrangements between the employer-owner and his workmen. The employer-owner shifted more and more to a “footing of accountancy in its relations with the industrial plant and its personnel,” and work was overseen by “technical experts” (Veblen, 1924: 105). The function of the captain of industry then broke into a two-fold division of labour, “between the business manager and the office work on the one side and the technician and industrial work on the other side” (Veblen, 1924: 106). Through this division, the captain of industry became the captain of business or ‘captain of finance’ and “that part of his occupation which had given him title to his name and rank as captain of ‘industry’ passed into alien hands” (Veblen, 1924: 106). This shift was especially significant for Veblen in terms of his positive evaluation of the engineers.

Veblen pointed out that there was a split between industry and business in that the employer-owner shifted further away from the business enterprise as absentee owners even though they still governed the volume of production and the conditions of life for the workmen, all based on the principle of net gain. The practical control of much of the work fell under the management of a new group: the technicians. However, Veblen believed that the shift was so gradual that even though it had started in the eighteenth century the process had still not worked itself out by the close of the nineteenth (Veblen, 1924: 107). Veblen argued that the disintegration of the captain of industry was due to the advance of industrial arts. The advancement occurred with such a high degree of specialisation and complexity that it was impossible for any industrial enterprise to be competently managed by one individual. He observed:

“So the interval since the middle of the nineteenth century stands in contrast to what went before, as more or less sharply defined period of special growth in the industrial arts, during which the mechanical industry has progressively shifted to a footing of mechanical science, and during which also the immediate designing and conduct of the

work has progressively been taken over by the technicians. At the same time and by force of the same drift of circumstance the captain of industry, the owner-employer, business manager, has progressively been shifted to one side, - to the business side, the “financial end” (Veblen, 1924: 259).

Now we can identify a significant connection between Veblen’s discussion of absentee ownership and Berle’s discussion regarding the separation of ownership and control. Like Veblen, Berle showed a particular interest in the shifting relationships of property. Berle’s discussion of ownership and property can be seen as developed very much in the spirit of Veblen’s previous research. The business enterprise had transformed dramatically and “ceased to be merely legal devices through which the private business transactions of individuals may be carried on” (Berle and Means, 1991[1932]: 3). Instead the corporate form had acquired a larger significance, one where it was viewed both as a means of holding property and a way of organizing economic life. The divorce of ownership from control is one of the most enduring themes of *The Modern Corporation and Private Property* (Moore and Reberieux, 2010).

For Berle, the biggest shift took place within the realms of ownership of private property. Up until the early nineteenth century, most writers came to denote private property as a unity involving possession and ownership (Berle and Means, 1991[1932]). It was assumed that ownership and control was combined. But in light of the modern corporation, this traditional concept of private property was quickly transforming into something very different.

In Book IV, Chapter 1, where Berle raises the question for whose benefit does the corporation operate, he critically analyses the effect of the changes on traditional economic concepts. The traditional logic of property is one such concept he reviews. In the past, ownership of business enterprise involved two attributes:

“...first the risking of previously collected wealth in profit-seeking enterprise; and, second, the ultimate management of and responsibility for that enterprise. But in the

modern corporation, these two attributes of ownership no longer attach to the same individual or group” (Berle and Means, 1991[1932]: 297).

Berle believed that the stockholder, having “surrendered control over his wealth,” had now become “a supplier of capital, a risk-taker pure and simple” (Berle and Means, 1991[1932]: 297). Ultimate responsibility, authority and control were attached to directors (Berle and Means, 1991[1932]: 297). Many parallels can be drawn to Veblen’s concept of absentee ownership here.

Berle identified the significant role property, and the organisation of it, played in the balance of powers that “make up the life of any era” (Berle and Means, 1991[1932]: 3). The new shift in the function of ownership, the “mobilisation of property interests” moved the corporate system forward as “the principal factor in economic organisation” (Berle and Means, 1991[1932]: 4). In this new light, the corporation became an avenue whereby the wealth of innumerable individuals was concentrated into massive aggregates and whereby control over these aggregates was “surrendered to a unified direction” (Berle and Means, 1991[1932]: 4). Just as Veblen makes a reference to the rise of ‘merchant princes,’ Berle refers to the ‘princes of industry, whose position in the community is yet to be defined” (Berle and Means, 1991[1932]: 4).

Further similarities can be drawn between Veblen and Berle by considering Berle’s own attempt to describe the evolution of the business enterprise. He describes the enterprise as it was first envisaged and created in the nineteenth century and then maps out its transformation in the decades that followed. He wrote:

“The typical business unit of the nineteenth century was owned by individuals or small groups; was managed by them or their appointees; and was, in the main, limited in size by the personal wealth of the individuals in control. These units have been supplanted in ever greater measure by great aggregations in which tens and even hundreds of thousands of workers and property worth hundreds of millions of dollars, belonging to tens or even hundreds of thousands of individuals are combined through the corporate mechanism into

a single producing organisation under unified control and management” (Berle and Means, 1991[1932]: 5).

Berle refers to the *American Telephone and Telegraph Company* as an advanced example of this new kind of social institution. Holding assets worth almost five billion dollars, managing over 450,000 employees, and stockholders to the tune of 567,694, this enterprise could almost be termed ”an economic empire” (Berle and Means, 1991[1932]: 5). And it was not limited by any geographical boundaries but held together by centralized control. It was estimated that one hundred other companies existed of this size, controlling much of the American economy. If there was no duplication of shareholders then it could also be owned by nearly every family in the country (Berle and Means, 1991[1932]: 5).

Much like Veblen, Berle observed the changes brought about by the industrial transformations of the previous one hundred years. He focusses on two developments in particular as aiding the emerging corporate organisation of economic activity. First, the factory system, which formed the foundation of the industrial revolution, provided a platform whereby an incredibly large number of workers were able to be brought together under a single management. Second, the modern corporation placed the wealth of countless individuals under the same central control (Berle and Means, 1991[1932]: 4 – 9). Through these two changes the power of those in control was massively enhanced, further extending the area under unified control and thereby radically changing the status of all those involved whether they were a worker or property owner. Berle observed:

“The independent worker who entered the factory became a wage labourer surrendering the direction of his labour to his industrial master. The property owner who invests in a modern corporation so far surrenders his wealth to those in control of the corporation that he has exchanged the position of independent owner for one in which he may become merely recipient of the wages of capital” (Berle and Means, 1991[1932]: 5).

Furthermore, there was a deeper, more personal loss which seems to echo Veblen's privileging of the instinct of workmanship. There was now very little enjoyment derived from owning the company in the new form:

“The spiritual values that formerly went with ownership have been separated from it. Physical property capable of being shaped by its owner could bring to him direct satisfaction apart from the income it yielded in more concrete form. It represented an extension of his own personality. With the corporate revolution, this quality has been lost to the property owner much as it has been lost to the worker through the industrial revolution” (Berle and Means, 1991[1932]: 65).

Berle did not believe that in and of itself, the corporate device would not have brought about the monumental change that gave rise to massive units such as the American Telephone and Telegraph Company mentioned above. It had been long since possible for owners to incorporate their business in the nineteenth century even though it represented his own activities, his own investment and his own business transactions; the creation of an “alter ego” of sorts “by setting up a corporation as the nominal vehicle” (Berle and Means, 1991[1932]: 5). Berle noted that if this was all there was to it, then it would have only been noted as an interesting custom whereby individuals hoping to operate in business would have to abide by certain legal requirements. This would not have involved any kind of radical shift in economic activity or the potential creation of a whole new system.

The “corporate system” appeared when this type of private corporation gave way to a completely new form, namely “the quasi-public corporation: a corporation in which a large measure of separation of ownership and control has taken place through the multiplication of owners” (Berle and Means, 1991[1932]: 5). And emerging from this separation are two significant characteristics, size and the public market for its securities. Berle believed that this new form of separation of ownership and control had enabled massive aggregations of property.

Outwardly the changes seemed simple enough: men were unlikely to own any real physical instruments of production and instead were more likely to own pieces of paper. The position of ownership had changed from that of being an “active agent” to that of a “passive agent” (Berle and Means, 1991[1932]: 64). Ownership once stood for the individual holding physical properties over which they exercised control and responsibility, the owner now held a piece of paper that *represented a set of rights and expectations* regarding a specific enterprise, that excluded any say in the functioning of the actual instruments of production and control of business operations – aspects of the enterprise that would significantly interest the owner. These pieces of paper were loosely known as stocks, bonds and other securities, which had become increasingly mobile as the public markets became more sophisticated. This indicated the existence of a more fundamental shift that was of great significance to Berle. He writes:

“Physical control over the instruments of production has been surrendered in ever growing degree to centralized groups... Control of physical assets has passed from the individual owner to those who direct the quasi-public institutions, while the owner retains an interest in their product and increase... There has resulted the dissolution of the old atom of ownership into its component parts, control and beneficial ownership” (Berle and Means, 1991[1932]: 8).

Berle believed that this dissolution of the atom of property destroyed the very foundations that the economic order of the previous three centuries had rested upon. Private enterprise, which had helped shape economic life since the end of middle ages, up until then had been rooted in the institution of private property. Under the feudal system, which preceded it, economic organization had grown out of mutual obligations and privileges between various individuals from their relation to property which none of them actually owned. Private enterprise, its polar opposite, “assumed an owner of the instruments of production with complete property rights over those instruments” (Berle and Means, 1991[1932]: 9). Furthermore, the

system of private enterprise relied upon the property owner's self-interest as the best guarantee of economic efficiency:

“It has been assumed that, if the individual is protected in the right both to use his own property as he sees fit and to receive the full fruits of its use, his desire for personal gain, for profits, can be relied upon as an effective incentive to his efficient use of any industrial property he may possess” (Berle and Means, 1991[1932]: 9).

According to Berle, the dissolution of the atom of property more or less destroys the basis of this assumption because the owner is no longer in control. And so, Berle believed, that a new picture of economic life was emerging which required “a re-examination of basic concepts,” (Berle and Means, 1991[1932]: 64). Berle observed:

“It has often been said that the owner of a horse is responsible. If the horse lives he must feed it. If the horse dies he must bury it. No such responsibility attaches to a share of stock. The owner is practically powerless through his own efforts to affect the underlying property” (Berle and Means, 1991[1932]: 64).

(iii) Veblen's Industrial Experts and Berle's Conscientious Managers

According to Veblen, in a very short period of time, estimated to be from 1850 to 1875, the material conditions of industry transformed rather dramatically (O'Kelley, 2011). There was almost a feverish introduction of new inventions and by 1875, electricity, petroleum, rubber, structural iron and steel (which had little or no part in the industry at the start of the century) began to “edge their way into the everyday scheme of organized workmanship and become incorporated into the industrial system,” (Veblen, 1924: 74). With this sort of shift, new factories and forms of equipment were created and constructed. This opened up a new wave in demand for raw materials in addition to the old staples, thus providing a new source of unearned income and wealth to the absentee owners of these resources. Additionally there was new demand for returns on financial investments as financial institutions developed. In order to keep up production rates,

industrial plants and processes were becoming highly mechanised and more complex. This gave rise to new key social groups - namely the technicians and engineers. Veblen observed:

“It was an advance in the scale and complication of equipment and work, in specialization and standardization, in applied mechanics and chemistry, which entailed the substitution of technical precision in the place of rule-of-thumb; and along with this... there was a similarly exacting growth in the business to be done, an increasing volume and an increasing nicety and multiplicity of details. Out of this increasing recourse to detailed, exact, objective knowledge there arose the industrial experts, engineers, technicians, who progressively took over the industrial functions of the captain of industry and left him free to devote his attention to business alone” (Veblen, 1924: 258).

Furthermore, he noted:

“In effect, the technicians has come up and grown great as a factor in productive industry, has grown to be one of the major institutions in modern life...So the interval since the middle of the nineteenth century stands in contrast to what went before, as a more or less sharply defined period of special growth in the industrial art” (Veblen, 1924: 256 - 259).

He notes that eventually “while the tangible performance of so much work as the absentee owners considered to be wise, fell increasingly under the management of that line of technicians out of which there grew in time the engineering profession... It was a gradual shift and division, of course” (Veblen, 1924, 106).

It is of no surprise to anyone who is familiar with Veblen’s work that he held the engineers in high esteem. He did not just think they were beneficial to the economy but he also believed that they could help solve the problems brought about through the pursuit of pecuniary gain. In 1921, Veblen published the book entitled *The Engineers and the Price System* which was made up of a set of essays that seriously discussed the possibility of a revolution led by the engineering profession.

This work was viewed by some as something of an aberration on Veblen’s part because it seemed to be a severe departure from Veblen’s usual discussions. Some critics did not view it in a positive light. Layton (1962) stated that it was “one of the strangest predictions in the history of

social theory” (Layton, 1962 in Edgell, 2015: 64). Tilman (1972; 1973) described this book as a work of “utopian realism,” and not nearly as important as some of Veblen’s other works (Tilman, 1972: 313; 1973: 161). Meanwhile to Bell (1963) it seemed that “Veblen suddenly thought that he might become a prophet,” (Bell, 1963: 618). Others, however, have been more positive about this particular contribution. Malcolm Rutherford (1992a), for example, pointed out that perhaps we should view this work as “an attempt to point out and direct attention to [the engineers] opportunities,” (Rutherford, 1992a: 138). Similarly, Knoedler and May (1999) shed a different light on this work. They argued that Veblen had a longstanding interest in engineers throughout his career, believing they were prime candidates to remake the economy.

It is possible to understand Veblen’s thoughts in *Engineers and the Price System* as merely a restatement of old Veblenian arguments and it should not be viewed as a strange departure. What’s most interesting for the purpose of this chapter is that, as we will see was true for Berle, Veblen had a group of individuals who he viewed as well placed to bring about progressive social change. They both identified problems with the business and corporate world and believed that there needed to be some serious transformations. For Veblen it was the engineers and for Berle it was ultimately managers who might yet guide the system in a positive direction. Of course, there is some irony here in that Veblen was strongly opposed to the very group that Berle eventually held high hopes for but this will be reviewed in a later section when I discuss the differences between the two authors. For now, I wish to review Veblen’s discussion regarding the importance of the role of engineers and show that it wasn’t in fact as significant a departure from his other work as some argue.

In order to appreciate Veblen’s optimism with regard the role of engineers some further context is useful. According to Veblen extending from the late eighteenth to late into the

nineteenth century, production was not continually in danger of exceeding the capacity of the market. According to Veblen, industrial technique during this period, remained sufficiently primitive that businesses could push to maximum output and still maintain reasonably profitable price levels. Indeed competition in expanding markets forced firms to keep prices down. Shortage was embedded in the underdevelopment of material forms: populations were growing and simple human needs were both self-evident and forthcoming. Under these circumstances competitive market arrangements were a reasonable adaptation. But circumstances changed. Scientific and technological progress had by the close of the nineteenth century generated a remarkable but problematic productivity. More than enough industrial expertise was available so as to ensure popular wants for standardized staple products were satisfied at declining prices and was done so with less strain for the workers. For the underlying population of consumers and workers Veblen suggested this was unambiguously good news.

From the corporate and financial perspective however the heightened productiveness was a dangerous development. Excessive output threatened to radically lower prices and profits. Expanding production could flood consumer markets satisfying popular needs at prices too low to meet the accelerating financial expectations of investors. For financial and corporate groups industrial progress was therefore highly ambiguous, it could dramatically increase productivity but it could also undermine key pieces of the material and ideological foundations of the corporate capitalist system.

According to Veblen the corporations had to adopt aggressive advertising strategies so as to effectively artificially perpetuate scarcity. Business needed consumers with unsatisfied wants. Scarcity was also crucial in terms of upholding the legitimacy and rationality of the price system itself. It was also a powerful stimulus to keep workers sufficiently motivated. If plentiful and

cheap staple goods satisfied consumers, their habits of conspicuous consumption and industrial submission might fade away. Scarcity was at the core of a whole series of justifications and legitimations of social hierarchy. As technology developed this framework was threatened according to Veblen and advertising did much to shore it up. Advertising worked to fashion a new form of socially constructed and commercially functional scarcity. Advertising for Veblen involves a complex set of methods that corporations use to subvert economic common sense and direct the energies, desires and purposes of ordinary people away from preoccupations with material need and inexpensive items of use towards goods of invidious distinction, emulation and conspicuous consumption. Advertising helped to preserve the gap between human beings and their prospects for liberation from scarcity and the labour it extracted. This was what Veblen meant by describing advertising as involving an essential misdirection of effort (see Plotkin, 2014, for detailed discussion). Advertising illustrated for Veblen the extraordinary power of corporations to control the agenda of economic possibilities - to control what would and would not be done with the remarkable technology now available. The essential economic function of prices is to efficiently communicate information about the uneven availability of goods and services. Advertisers induced consumers to think of needs and wants not in terms of impersonal usefulness but in terms of invidious comparison. The added expense of advertising and salesmanship was Veblen argued just an additional crucial business advantage. At a time when technology lowered production costs at an ever faster rate raising sales costs helped to counteract such effects by supplying new justifications for higher prices.¹⁵

¹⁵ For a particularly detailed and interesting account of Veblen's analysis of the role of advertising within the modern corporate system, see Plotkin, 2014.

For Veblen the whole industrial system was being sabotaged just at the time when (with the aid of the engineers) it could satisfy human need on a substantially extended scale and was characterised by ever increasing levels of waste:

“So the business men who have controlled industry...have increasingly been content to let well enough alone and to get along with an ever increasing overhead charge of inefficiency, so long as they have lost nothing by it. The result has been an ever increasing volume of waste and misdirection in the use of equipment, resources, and man power throughout the industrial system” (Veblen, 1921: 43).

It is also useful to provide some context regarding the engineering profession at the time of Veblen’s writings. By the early 1900s the profession had witnessed a dramatic increase in numbers. In 1880, there was a total of 7,000 engineers in American industry which increased to 38,000 in 1900. By 1920 this figure had grown to 136,000 before ascending to 230,000 in 1930 (Knoedler and May, 1999). This was “a rate of increase a hundred times greater than that for the growth of the labor force as a whole” (Knoedler and May, 1999: 258). Veblen clearly identified this shift. He observed that “industrial experts, engineers, chemists... technicians of all kinds, have been drifting into more responsible positions in the industrial system and have been growing up and multiplying within the system, because the system will no longer work without them” (Veblen, 1921: 44). It was a group growing tremendously in terms of numbers due to their importance in the industrial system. This was not the first time Veblen noted this and so his focus on the engineers cannot be considered a strange departure from his other works as argued by some critics.

Along with noting the increase in the role of the engineer Veblen also highlighted that businessmen seemed unaware of the increased technological needs. In *The Instinct of Workmanship*, Veblen wrote of the “trained inability of the businessmen in control to appreciate... the visible technological requirements of the industries” (Veblen, 1914: 193). It was

Veblen's belief that "Twentieth-century technology has outgrown the eighteenth-century system of vested interests" and the managing of industry through "business methods has become highly inefficient and wasteful" (Veblen, 1921: 100). The captains of industry were preoccupied with the "purposes of business" for "the sake of private gain," and not "for purposes of industry" (Veblen, 1921: 112). Veblen writes:

"... the control of the requisite running balance of sabotage, have been reduced to a routine governed by ... suitably trained experts in corporation finance... the business men are increasingly out of touch with that manner of thinking and those elements of knowledge that go to make up the logic and the relevant facts of the mechanical technology. Addiction to a strict and unremitting valuation of all things in terms of price and profit leaves them... unfit to appreciate those technological facts and values that can be formulated only in terms of tangible mechanical performance... they are by training and interest, captains of finance" (Veblen, 1921: 38 - 39).

It would only be a matter of time before the "underlying population come to realize that all this wasteful traffic of salesmanship is using up their productive forces, with nothing better to show for it than an increased cost of living" (Veblen, 1921: 112). But for the time being, it seemed the underlying population would "put up with what they are so well used to... so long as they are not in the habit of thinking about these things at all" (Veblen, 1921: 117).

It was clear to Veblen that the emerging industrial system was one where the welfare of all depended upon the vast technology manned by these highly trained and experienced technicians and engineers. The "captains have no technological value" (Veblen, 1921: 133). So it seemed logical to Veblen that a possible revolutionary overturn of Vested Interests in the business world would be carried out by the technicians. And it seemed that Veblen had hoped this would be the case. He observed that it was "the industrial experts... who have finally begun to criticize this business like mismanagement and neglect of the ways and means of industry" (Veblen, 1921: 44). This made sense to him since the "Captains of Finance/financiers/Guardians

of Vested Interest... speak for the Vested Interests” while the technicians, “speak for the industrial system” (Veblen, 1921: 133). This is especially significant to understanding Veblen’s discussion of the rise of the engineers. It was not the case that Veblen believed the engineers would rise against the managers owing to dissatisfaction regarding their own incomes, status and the like. It was not about their position in the industrial hierarchy. Veblen believed they were the right group for the task and in turn, believed in them owing to their direct involvement in the work. It gave them a different perspective, one that was detached and devoid of the pursuit of pecuniary gain. He observed that “the mechanical technology is impersonal and dispassionate, and its end is very simply to serve human needs, without fear or favour or respect of persons, prerogatives, or politics” (Veblen, 1921: 132). Veblen was of the strong belief that industrial policy decisions should be made by the “general staff of production engineers” who would be “driven by no commercial bias” (Veblen, 1921: 55).

As previously mentioned, these were not new ideas or concepts. In 1900, Veblen wrote *Industrial and Pecuniary Employment* where he discussed the problem of sabotage and the possibility of “highly trained technological experts and engineers as well as the highly skilled mechanics” coming to work together to help end it (Veblen, 1901: 317 in Knoedler and Mayhew, 1999).

Initially, the businessmen of small firms engaged in both industrial and managerial activities. But as firms grew massively in scale as well as scope, the same business men came to shift their focus on pecuniary issues alone. The investment bankers were dominant in 1920, but to Veblen, they seemed to lack any real knowledge of the industrial process. Engineers, on the other hand, were free “from the constraint of [the] conventional norm of truth and validity [regarding property and ownership]” (Veblen, 1901: 317 in Knoedler and Mayhew, 1999). Over

the course of this paper, Veblen challenged the old system of classification under the three-fold division of the factors of production, namely land, labour and capital arguing that they were inadequate (Veblen, 1990: 279). Veblen argued the division in the title of this paper (“Industrial versus Pecuniary Employment”) was far more significant than the older division.

It seemed to him that restructuring would come about when the engineers/technological experts all grouped together in order to take control of the management of the economy’s industrial system. And just as Veblen believed that positive change would occur through the actions of one group in particular, Berle, too, believed this to be the case albeit with a different profession.

As previously mentioned Berle was greatly concerned regarding the separation of ownership and control. He believed that the corporation now needed to be closely analysed not just in terms of business enterprise but also social organization. It raised the “question of the motive force back of industry, and the ends for which the modern corporation can be or will be run” (Berle and Means, 1991[1932]: 9). Berle came to hold a strong belief that corporations could be kept in check and positively influenced through public opinion and a sort of ‘corporate consciousness’. For this reason, he was of the view that corporations could operate in the interests of the control group, namely the managers and yet at the same time operate in the interests of the whole community. He wrote:

“For the fact seems to be that the really great corporation managements have reached a position for the first time in their history in which they must consciously take account of philosophical considerations. They must consider the kind of community in which they have faith, and which they will serve, and which they intend to help to construct and maintain. In a word, they must consider... how their operations in the community can be adapted to affording or fostering it... explicitly or implicitly, the premises are there” (Berle, 1954: 135).

Berle believed in what he termed the “public consensus” i.e. public opinion to which management would respond to. In his paper, *Limitations on Corporate Activity*, he observed:

“... there are pressures not yet hardened into any form of law, but solidly based on wants and expectations of the community. To violate these settled expectations entails immediate controversy, leading to political action... Many industries, some concentrated and some frankly monopolistic, have avoided serious impact with the state because of the care with which they have anticipated these community expectations and the fidelity with which they have fulfilled them” (Berle, 1952: 945).

Like Veblen, Berle also believed that there was a group well positioned to guide the system in a way that would benefit the wider community or the underlying population but ironically for Berle this group, namely business or corporate managers, were one constituent member of the group that Veblen was most suspicious of.¹⁶

2.3 Veblen and Berle’s Conceptual Differences and Opposing Orientations to Policy

Up until now, I have highlighted important similarities between Berle and Veblen starting with their views on neoclassical economics and methodology and moving onto shared ideas and themes in their substantive contributions. However, as much as a clear link can be drawn between the two scholars there are also marked differences between them and these will be considered in this section.

(i) Veblen’s Concerns over Pecuniary Culture

The period from 1900 to 1923 witnessed a steady increase in the America’s overall wealth and corporations continued to take actions that maximised the value of corporate

¹⁶ I will be exploring the notion of corporate consciousness in more detail in chapters 3 and 4 of this dissertation. It is worth also clarifying that Berle’s optimistic attitude toward managers developed only gradually and with changing political and economic circumstances. Initially in the 1920’s he had grave reservations about the power being accumulated by managers.

securities – values based on the premise of capitalizing the corporation’s expected earnings. Net gain had become the underlying principle of business. This resulted in everything else, including production, having no choice but to yield to its demands. Veblen observed:

“The business man’s place in the economy of nature is to “make money,” not to produce goods. The production of goods is a mechanical process, incidental to the making of money; whereas the making of money is a pecuniary operation, carried on by bargain and sale” (Veblen, 1919: 92)

Of the principle of net profit he wrote:

“This principle has come to be formally recognised and accepted as good and final ever since the corporation came into general use as the standard form of business concern... [S]ince the dominant interest of the civilised nations has shifted from production for a livelihood to investment for a profit... this principle of net gain has come to stand out naked and unashamed, as the sound and honest rule that should govern and limit the production of goods for human use. And the corporation incorporates this underlying principle of business enterprise more singly and adequately than any form of organisation that had gone before” (Veblen, 1924: 85 - 86)

Over the course of his work Veblen developed a powerful critical framework for understanding the business enterprise. Having observed that the group which seemed to reap the most benefits were the absentee owners, Veblen noted that the rest of the population fell behind and did so rapidly. Veblen (1899) first discusses this disparity in *The Theory of the Leisure Class*. As noted previously differentiates a leisure class from a labouring class (Veblen, 1899). The leisure class was seen as a relatively small and extremely wealthy class. They often exploited other groups and were not productive of their own accord. The labouring class, on the other hand, were fully engaged in the production process as well as manufacturing and services. What concerned Veblen was that the labouring class represented the majority of the population while the leisure class represented a very small percentage. Veblen viewed the leisure class as holding a sort of pecuniary link to the overall economic process (Veblen, 1899). Veblen (1904) discusses these themes further in his work, *The Theory of the Business Enterprise*. In 1901, when Veblen mentioned these two groups in *Industrial and Pecuniary Employments*, as the title would

indicate, he referred to them as “pecuniary employment” versus “industrial employment,” (Veblen, 1901: 214). In a later work, *Vested Interests and the Common Man*, Veblen (1919) takes up these discussions again describing the division as a cleavage running through the advanced industrialised societies. He observed that a new order had been brought into being with “machine industry, corporation finance, big business, and the world market” (Veblen, 1919: 160). Under this new order, business controlled industry and invested wealth in large holdings controlled the country’s industrial system. Control was exercised either “directly by ownership of the plant, as in the mechanical industries, or indirectly through the market, as in farming” (Veblen, 1919: 160). Once again Veblen observed that this divided the population in two main classes: those with wealth attributed to investments in large holdings and “vested interests” (Veblen, 1919: 160) and those who did not hold sufficiently large holdings. A vested interest is defined as a “legitimate right to get something for nothing” (Veblen, 1919: 162) and Veblen identifies this wealthy group with vested interests as the ones “who thereby control the conditions of life for the rest” (Veblen, 1919: 160). Those who did not hold adequately large holdings, ‘the common man’ (Veblen, 1919: 161) were controlled by those individuals in the former group and faced a great deal of uncertainty and insecurity.

Veblen describes this division as one that is “not between those who have something and those who have nothing... but between those who own wealth enough to make it count, and those who do not” (Veblen, 1919: 161). He further states:

“But the gravest significance of this cleavage that so runs through the population of the advanced industrial countries lies in the fact that it is a division between the vested interests and the common man. It is a division between those who control the conditions of work and the rate and volume of output and to whom the net output of industry goes as free income, on the one hand, and those others who have the work to do and to whom a livelihood is allowed by these persons in control, on the other hand” (Veblen, 1919: 161)

The ever increasing pervasiveness of the pecuniary culture was also highlighted in 1914, in Veblen's *The Instinct of Workmanship and the State of the Industrial Arts*. Veblen, noted with concern, that the acquisition of wealth was equated with economic efficiency as opposed to technological mastery or productive effort.

Business enterprise, it seemed to Veblen, was absolutely preoccupied with pecuniary gain and seeped into the activities of the businessmen. And once again vested interests lay at the heart of it all. Veblen writes:

“The business men make use of the mechanical appliances and powers of the industrial system, but they make a pecuniary use of them. And in point of fact the less use a business man can make of the mechanical appliances and powers under his charge, and the smaller a product he can contrive to turn out for a given return in terms of price, the better it suits his purpose” (Veblen, 1919: 92).

Veblen observed that these attributes associated with a competitive market were constraining the ‘good working efficiency of the industrial system’ (Veblen, 1919: 88). He believed that the “loose corrective control which is exercised by a competitive market” was “too slow, at the best, and too disjointed” (Veblen, 1919: 87). Additionally, it brought about a clear division amongst the population as previously explained. He argued that the “industrial system is now a wide-reaching organisation of mechanical processes which work together on a comprehensive interlocking plan of give and take, in which no section, group, or individual unit is free to work out its own industrial salvation” and it all seemed “a more or less delicately balanced affair” (Veblen, 1919: 87).

Previously, we discussed the reign of the Masterless Men. Their era shifted to one of the absentee owner over a brief period of time, roughly between 1775 and 1850 (see O’Kelley, 2011). It was during this era that the need for capital exceeded the capacity of the Masterless Men for the very first time. It was truly the time of free competition. The business-like

management of industry primarily focused on net earnings and endeavoured to provide a reliable means of income for the creditor (by that time credit had become an established attribute of the industrial business).

By the end of the nineteenth century it seemed that the modern corporation had become the most dominant institution of civilised life. It would seem that through its sheer size and resultant change in form it became conducive to facilitate absentee ownership owing to the complete separation of ownership and control. The corporation seemed to hold a new purpose that being one of profit maximisation for its absentee owners. Veblen believed that this combined with the increasing role of corporate finance prevented the country's industrial system from being utilised effectively. He observed that the corporation had become a means of making money as opposed to one of producing goods. And it was during this era that a new staple manner of ownership and control was established in civil law and custom: investment for a profit (O'Kelley, 2011). Veblen observed:

“[T]he corporation is always a business concern, not an industrial appliance... The production of goods or services, wherever that sort of thing is included among the corporation's affairs, is incidental to the making of money and is carried only so far as will yield the largest net gain in terms of money – all according to the principal of “what the traffic will bear,” or of “balanced return,” which underlies all sound business, and more particularly all corporation business” (Veblen, 1924: 85).

Veblen was also concerned with the growing influence exerted by the business enterprise not only over industry as a whole but also over social life and representative democracy. Moreover, it seemed that it was extremely well protected (Veblen, 1904) with the constitutional government increasingly a “business government... guided by the advice of business men”.

Veblen's relentless critique draws a sharp contrast to the tone Berle often adopts. Although he voiced concerns over the corporation, there was a part of him that seemed almost

enthralled and fascinated by the changes and possibilities this form of the business enterprise brought with it. In the opening chapter of *The Modern Corporation and Private Property*, Berle wrote: “Though the American law makes no distinction between the private corporation and the quasi-public, the quasi-public corporation may fairly be said to work a revolution” (Berle and Means, 1991[1932]: 7). Then, later, in the opening paragraph of *The Twentieth Century Capitalist Revolution*, Berle observed:

“This is a study of one aspect of the revolutionary capitalism of the mid-twentieth century... This singular organisation [the modern corporation] has succeeded in being at once legal institution, economic institution, and agency and chief heir of the explosion of technical progress which is the outstanding achievement of our generation” (Berle, 1954: 1).

Berle provides further positive commentary in the paper, *Corporations and the Modern State* stating that the large corporation “has become a unique institution,” and “malleable” (Berle, 1950: 38). Owing to chief judgements and rules being made internally by the various governing groups, as opposed to rules imposed by law, a change in thinking could alter a corporation’s entire persona and function. This, Berle believed, was extremely beneficial.

A further contrast lies in the fact that Berle did not think that the managers’ personal goals would get in the way all the time. Interestingly, he refers to the term, ‘vested interests’ and it would almost seem like he is making a reference to Veblen’s discussions here. He states:

“The men who manage large corporations usually do not have a “vested interest” in the ordinary sense of property motivation. (There are, of course, notable exceptions – they are exceptions and not norms)” (Berle, 1950: 38).

Berle believed there was a difference in the management groups’ motivations compared to individual owners of the small business enterprise. Whereas the latter would be motivated by property, the former represented more “political interests, in the wide sense of the term” (Berle, 1950: 39). For example, the United States Steel Corporation was the largest single producer of

steel at the time of writing. Considering that the net value of the corporation's assets amounted to roughly two hundred dollars per share (Berle, 1950) it would have been advantageous to the board of directors (who represented the stockholders) to close down the plants and distribute its profits to the shareholders, in cash. Nothing could prevent it from doing so, legally. But, Berle argued, "no sane board of directors would entertain such a proposition for a moment. Because continued production of steel is essential to the life of the country... The legal and economic theory that an enterprise can go out of business, as it suits the owner, exists only on paper, when the community depends on its products" (Berle, 1950: 45).

Veblen believed that financial management was only interested in pecuniary gain and so corporations would only be involved in activities that further enabled the attainment of this goal. He believed that they could not be monitored or controlled and a complete overhaul was the only way towards progressive change. Berle, although he noted the influence of the profit motive, he did not, however, believe that managers would act out of purely selfish reasons. The political community, the public and their opinion now held pivotal roles when management groups decided on a corporation's operations and these, Berle argued, meant that managers would be mindful and so corporations could change in a positive way if need be. No dramatic overhaul was required a more gradual evolution could be expected. He observed:

"... they [management] are rather dependent on the point of view of men around them, of the political community, and so much of public opinion as influences the group on whose approval they depend to hold office. The modern corporation is an institution capable of change, in much the same sense that a city or a political party is capable of change" (Berle, 1950: 40).

On the whole, Berle believed that changes to the capitalist system brought about by the arrival of the corporation were massive and he had no doubt they would change further, "but the changes seem natural and, on the whole, healthy" (Berle, 1950: 55).

(ii) Veblen's Quietism vs Berle's Activism

“The common man does not know himself as such, at least not yet, and the sections of the population which go to make up the common lot... have not yet learned to make common cause” (Veblen, 1919: 174 – 175).

Upon reading quotations such as the one above one might be encouraged to characterise Veblen as being quite negative regarding the prospects for meaningful progressive change. Critics have noted Veblen's overall sardonic tone in his writings especially when discussing “imbecile institutions” “parasitic industries” (Veblen, 1914) the “vested interests” of the wealthy controlling the livelihood of the “common man” (Veblen, 1919: 160).

Some critics have described Veblen as being bitterly critical, cynical (O'Kelley, 2013) and sceptical of political action and see him as consciously avoiding direct political engagement altogether, leading the life of a “political quietist” (Plotkin, 2010: 80). Some have stated that Veblen “never fantasised that human beings were born free,” (Dugger, 1984: 981) but instead recognised they were born into an existing institutional structure that they could not escape from. They were accustomed to being ruled by others and trapped in archaic habits of mind.

The distance Veblen maintained from direct political action is very significantly different from the approach that Berle chose to adopt. Unlike Berle, Veblen felt no compulsion to adopt a political position on questions or issues regarding political strategic action. Veblen systematically challenged institutions in his work but did not typically map out detailed ways in which they could be changed. And for some critics, this showed a sense of despair in Veblen's work. Plotkin states Veblen “never lets us forget the raw violent, outright seizure and harsh coercions that social institutions enable and mask” (Plotkin, 2010: 90) and suggests he might be understood as a “tragic writer” (Plotkin, 2010: 81). Veblen seemed to depict human beings as

“creatures frustrated by blind evolutionary change, confused by the unsuitability of their cherished habits to altered conditions, and manipulated by propaganda and salesmanship” (Plotkin, 2010: 94).

In some early writings like *Some Neglected Points in the Theory of Socialism* (Veblen, 1891) Veblen displayed some hope that constitutional democracy might be able to constrain power politics. But his contempt for politics seemed all encompassing in later works:

“The commonwealth in such a case would no longer be a political engine to be turned to account for political traffic by the politicians. It would be nothing to bluster and give off fumes about; nothing better, in fact, than an unsanctified workday arrangement for the common use of industrial ways and means” (Veblen, 1924: 28).

Like Berle, power was an issue that was of great interest to Veblen. He provides us with much insight into the hegemonic as well as disciplinary aspects of power both on a microsocial and macrosocial level. However, unlike Berle, Veblen refuses to provide detailed plans for processes of state action. Veblen focused on the issue of power but seemed to downplay the mediating impact of the state on economic power. He also seemed to ignore the potential for change through a positive democratic government which could discipline, monitor and control corporate power (Diggins, 1999 in Plotkin, 2010).

It is important to note the context within which Veblen made his observations. The second wave of the industrial revolution took place on a colossal scale. The average industrial plant size had increased massively as well as the organisational scale of its operations. The proportion of Americans living in towns and cities was growing at an increasingly rapid rate. The overall economic growth of the country was also on the increase along with an increase in capital accumulation. With these changes, however, there was also other new factors that didn't seem altogether beneficial for the economy or the population at large. For example, there was a larger

disproportionate appropriation by a capitalist class and with it the presence of ostentatious displays of wealth and an increase in conspicuous consumption. It was a period that gave us a group of tycoons such as J.D. Rockefeller, Andrew Carnegie and J.P. Morgan. By 1890, the richest 9% of the population owned approximately 71% of personal wealth in the United States (Smart, 2015). Between 1893 – 1897, however, the United States saw one of its very first serious economic depressions; banks and businesses closed down and millions were left unemployed.

The country and economy underwent such tremendous transformations that perhaps Veblen felt a critical stance was most fitting at the time. Writing in 1899, in response to John Cummings' critique of his work, *The Theory of the Leisure Class*, Veblen pointed out that he had not “had the fortune to reach a conclusion, or to attempt one” (Veblen, 2009[1899]: 110).

Although he did not argue for state intervention or propose detailed plans for strategic economic action, he was not as pessimistic as some critics claim him to be. When discussing the system of industrial competition, for example, he observed:

“[We cannot deny] that the system of industrial competition, based on private property, has brought about... the most rapid advance in average wealth and industrial efficiency that the world has seen. Especially can it fairly be claimed that the result of the last few decades of our industrial development has been to increase greatly the creature comforts within the reach of the average human being... The claim that the system of competition has proved itself an engine for making the rich richer and the poor poorer has the fascination of epigram; but if its meaning is that the lot of the average, of the masses of humanity in civilised life, is worse to-day, as measured in the means of livelihood, that it was twenty, or fifty, or a hundred years ago, then it is farcical” (Veblen, 1891: 60 – 61).

As much as Veblen steered away from political action, Berle was at the heart of it. He became a member of the Brain Trust, the group of political advisors aiding President F. Roosevelt through the crisis of the 1930s.

Berle was of the view that the corporations needed to be and could be brought under control. Berle states:

“Such a great concentration of power and such a diversity of interest raise the long-fought issue of power and its regulation – of interest and its protection... Observable throughout the world, and in varying degrees of intensity, is this insistence that power in economic organization shall be subjected to the same tests of public benefit which have been applied in their turn to power otherwise located... In the strictly capitalist countries, and particularly in time of depression, demands are constantly put forward that the men controlling the great economic organisms be made to accept responsibility for the well-being of those who are subject to the organization, whether workers, investors, or consumers... How will this demand be made effective?” (Berle and Means, 1991[1932]: 309 -310).

Berle argued for a more dynamic partnership between the state and the modern corporation. In the decade following World War I – commonly referred to as the Roaring Twenties – the American economy witnessed “a period of unprecedented wealth creation” (Berle and Means, 1991[1932]: 1023) unlike any other. It was not to last however. First came the stock market crash of October 1929 and then the descent into the Great Depression. In the years preceding the crash there came about a massive shift in the control of U.S. productive assets and the dominant U.S. business enterprises.

The stock market crash and the Great Depression that ensued was an immense shock to the American psyche. At first, business leaders and government assumed that there would be a natural turnaround with only very mild government intervention necessary. But soon it became clear that this depression would be very different to the ones experienced in the last three decades of the nineteenth century. Various policy makers flirted with the idea of a new relationship between government and the modern corporation which would serve the nation better. Herbert Hoover intended to continue to maintain the status quo as opposed to creating a new model of corporate capitalism (O’Kelley, 2013). Franklin Roosevelt opted for a more assertive role for government, albeit cautiously, with particular focus on its relationship with the modern corporation.

In 1932, drawn by Berle's visionary work on the modern corporation, Roosevelt invited him to be a part of his campaign team. Though Roosevelt was not an intellectual himself, he understood the need for a positive far reaching framework within which the necessary changes could be articulated and Berle seemed to offer an intellectually robust but practical vision. He and a small group of other public intellectuals and leaders fought to create a new vision that would form the framework for Roosevelt's first administration.

Berle once believed that the distance of the shareholders and the growing control of the managers would grant the corporation a sort of 'unownedness' that would free it to pursue a corporate governance model which would ensure that the 'paramount interests of the community' were met (Berle and Means, 1991[1932]: 311). He suggested that the "depersonalisation of ownership, the objectification of enterprise, the detachment of property from the possessor, leads to a point where the enterprise becomes transformed into an institution which resembles the state in character" (Berle and Means, 1991[1932]: 311). The crash of 1929 and its aftermath made it evident to Berle that this would not necessarily be a natural outcome and state regulation was the only way to bring about a satisfactory outcome.

Berle wished to bring an end to *laissez-faire* individualism and wanted Roosevelt to develop a new understanding, one where the individual could not succeed unless the modern corporation was reined in (O'Kelley, 2013). One of Berle's primary goals whilst aiding to set up the above New Deal framework was to increase management accountability. During the New Deal period financial markets became more closely regulated, by law and stock-exchange regulation it became a requirement for management to file and publish annual accounts as well as quarterly interim progress reports (Berle, 1962). Furthermore they had to make general

disclosures of their operations (this was in fact a recommendation made by Berle in *The Modern Corporation & Private Property*).

Berle's governance strategy was a broad one, designed to increase managerial accountability but also to promote progressive social outcomes by empowering other actors within the corporation to act. The setting up of institutions such as the Securities and Exchange Commission, other various regulatory commissions, the passage of the Securities Act 1933 (which helped to ensure an informed market of investment) and the Securities Exchange Act 1934 (which was aimed at correcting trade abuses) all aided in this. The provision of the two latter Acts in particular enabled the openness of information which was viewed as key to regulate competition.

Berle now believed that an interventionist state was the only way in which shareholder passivity could be made to be consistent with progressive social developments. He was uncertain whether management would always consider wider societal interests and sought to reduce their abuse of power. With the rise of general Incorporation Acts corporations had become private, unregulated entities. Berle argued that this was made apparent by court decisions: by the end of the century, a director's position was interpreted as one which gave him total control and complete discretion over managerial activities. Additionally, according to Berle, it seemed that shareholder power could be passed on a more or less permanent basis to management and this was seen by Berle as a regressive step. Berle's solution was to reregulate corporate activity with the help of corporate law and a wider set of social reforms – fair wages, job security, sound products and general business stability. Berle strongly believed that these kinds of reforms could encourage management to pursue a more progressive governance path which would be in the interests of the community as a whole.

Berle also encouraged the introduction of certain New Deal policies which sought to promote a somewhat more balanced bargaining position between groups. These reforms sought to empower those who had become powerless in the modern corporate era. In such policies as the radical National Industrial Recovery Act (NIRA) 1933, the New Deal sought to empower the labour unions. This act gave a substantial amount of power to labour's representative institutions by providing them with the right to organise themselves as unions and to engage in collective bargaining when need be. Supporting unions in this way, the Act and the government helped to characterise union membership as an act of patriotism and no longer 'un-American'.

Furthermore in his later writings Berle came to the view that the corporate world was moving into a sphere where public opinion had a growing influence on the actions of managers and business-managers now operated under this perpetual glare of public scrutiny. Misconduct could trigger state intervention:

“Whereas in the past public opinion had little influence on the conduct of corporate managements, today it is crucial, and every management knows it... Within the past few years the heads of two of the nation's largest life insurance companies resigned because they were thought to have transgressed, albeit without breach of law, standards of ethics to which public opinion held them accountable. The executive head of the country's largest electronics corporation demoted himself from direct executive power because some of his associates had indulged in criminal bid-rigging and pleaded guilty thereto; as he was commanding officer, public opinion held him accountable. The preventive effect of a public consensus on standards of conduct cannot be precisely measured. Undeniably it is great” (Berle, 1962: 440).

2.4 Concluding Remarks

The similarities between the work of Veblen and Berle are very substantial. They both adopt a critical stance toward neoclassical economics and go to some trouble to highlight its inadequacies. They view neoclassical economics as being at best only relevant for an industrial

context that has in fact long been displaced by the development of the corporation. They both argue that any theory regarding the corporation must adopt an approach that is highly historically sensitive and see neoclassical economics as transparently failing this test.

Dugger once wrote:

“Inherent to the process of evolutionary theory-building is the drive to make human beings a part of nature by demystifying our view of ourselves so that we become products of evolution rather than products of wishful thinking...” (Dugger, 1984: 972)

Evidently both Berle and Veblen recognize the significance of this. They are both keen to explore how things have evolved over time as opposed to presupposing that the social world is fixed. This comes across very clearly where Berle and Veblen each insist that central social institutions such as property and ownership ought not to be understood as fixed but rather must be historically examined with careful explanations being provided for how they emerge and are transformed. A further similarity relates to a shared optimism regarding the possibilities of specific groups being the agents for progressive change.

There are also significant differences that need to be acknowledged. Veblen often viewed corporations as being out of control and perhaps uncontrollable. The corporations were captured by narrow sectional groups interested in pecuniary gains. Furthermore, as long as the business enterprise functioned under the rule of managers pursuing pecuniary gain, Veblen saw only limited positive benefits arising from its operations and argued that corporations would primarily serve to exploit those who had little or no say in the economy. He strongly believed that the industrial experts, the engineers, were best suited to run the industrial enterprises in the interests of the underlying population.

Berle, on the other hand, did not ultimately see management in such a negative light. He came to the view that through corporate consciousness and state regulation corporations could be

kept in check. Berle increasingly put forward the notion that corporations could respond to wider social interests and act for the benefit of the community as a whole.

This leads us to a further difference that concerns the engagement with policy of the two men. Veblen has been viewed by many as a pessimist in terms of politics. But here, following Plotkin, it has been argued that the most appropriate term to describe him would be that of a 'quietist'. For whatever reason he may have had, Veblen did not feel the need to engage in a sustained fashion in politics. This, of course, stands in sharp contrast to Berle who not only viewed state intervention as a way to keep corporations in check but personally became heavily involved in policy making especially during the New Deal period.

3. THE NATURE OF THE CORPORATION: COMMUNITY, POSITIONING AND CONTROL

3.1 Introduction

The aim of the present chapter is to compare the community based account of the firm and the corporation recently outlined by Tony Lawson with relevant aspects of Adolf Berle's account of the modern corporation. Lawson's discussion of the corporation is part of a much broader project in social ontology. Lawson suggests that the problems associated with mainstream economics stem in large part from a profound neglect of ontological issues that has characterized the discipline for some considerable time.¹⁷ The implicit ontological presuppositions of atomism and isolationism implied by the methods that mainstream economists insist upon are highly problematic and are shown by Lawson to be unsustainable. He outlines and defends a particular structured and relational account of the nature of the social realm¹⁸ and has recently sought to draw on this general social ontology in order to develop particular accounts of the nature of certain key social categories such as gender systems, money and the corporation.¹⁹

¹⁷ For Lawson's critique of mainstream economics see Lawson, 1997 and 2003.

¹⁸ For Lawson's account of the social realm see Lawson, 2003 and 2012.

¹⁹ For Lawson's discussion of gender systems see Lawson 2014, for his analysis of money see Lawson 2016 and for his account of the firm and the corporation see 2015a and 2015b. Lawson's argument is that more compelling accounts of these key social categories can be developed if an explicit ontological orientation is adopted. When it comes to developing a satisfactory account of the nature of the corporation Lawson is not alone in emphasising the importance of ontology. Orts, 2016, for example, emphasises that when forwarding arguments about the nature of the corporation it is especially important to revisit issues in legal and social ontology. Orts notes: "To ignore organizational ontology is actually to adopt one or another ontological view unconsciously, ignorantly or manipulatively" (2016: 562).

In this chapter I argue that at a basic ontological level there are interesting and significant similarities between Lawson's recently elaborated and ontologically sophisticated account of the corporation and the account of the corporation that Berle provides. These similarities include a shared emphasis on social positioning, a common recognition that the corporation is both economically and legally constituted and a parallel focus on the historically contested nature of the purposes of the corporation²⁰. While highlighting the significant similarities between the two accounts of the corporation I also note that the two authors develop very different understandings of the extent to which the corporation can be controlled in a way that ensures that the public interest is effectively served.

I first set out in some detail the key elements of Lawson's account of the firm and the corporation, I then turn to similarities between the community based account of the corporation developed by Lawson and various commentaries Berle's provides on the nature of the corporation. A particular point of reference here is Berle's 1947 paper "The Theory of Enterprise Entity" within which I argue one can find a partial recognition of the importance of the process of social positioning. Differences between Berle and Lawson are considered in the fourth section of the chapter where it is noted that while Lawson sees the modern corporation as a mechanism that is largely out of control Berle ultimately comes to view the corporation as a social institution that can be directed so as to serve broader social interests. Concluding remarks then follow.

3.2. The Community Based theory of the Firm and the Corporation

²⁰ To the extent that correspondences can be drawn between the kind of ontological commitments implicit in Berle's writings and the ontological position that Lawson explicitly elaborates and defends then this also serves to highlight the distance between Berle and contemporary orthodox economics. Appreciating these differences is important when making any assessment of how Berle's work relates to current positions prominent within the corporate governance literature.

An important initial point that Lawson makes when setting out his community based account of the firm and the corporation is that even those economists who have seemingly sought to address fundamental questions like what is the nature of the firm have done so in highly partial ways. So with regard to Coase (1937) Lawson notes that despite the title of the famous 1937 paper “The Nature of the Firm” Coase in fact does not very directly address the question of the essential nature of the firm. Rather Coase’s main concern relates to the issue of why firms exist in a context where contemporary conventional economics indicate that they ought not to from an efficiency point of view. Coase is interested in the question why we have firms when we could have markets which are seen as preeminently efficient institutions? Coase in fact provides only the briefest sketch of the essential nature of the firm. Those who have followed in his wake or attempted to respond to Coase’s main arguments have not shed much light on the *nature* of the firm either. Lawson finds this unsatisfactory and seeks to address the issue of the essential nature of the firm and the corporation in a much more direct manner drawing on an elaborate and sophisticated position in social ontology as he does so.

By adopting an explicitly ontological perspective Lawson argues that a robust account of both the nature of the firm and the peculiarities of the corporation can be developed one that helps to clarify and resolve certain outstanding puzzles. Prominent and pressing questions include: whether and in what sense the corporation represents a real entity, in what sense are the firm and the corporation legally constituted and fundamentally legal in nature, what is the actual meaning of the process of incorporation and what are the significance of legal fictions and legal personhood in understanding the essential nature of the corporation? The ontologically informed account of the corporation that Lawson develops not only helps clear up these kinds of puzzles but also provides a perspective from which to appreciate more fully the sense in which the

contemporary corporation is out of control. Many well informed commentators criticize multinational corporations noting that almost everywhere they seem to operate beyond the control of various regulators and tax authorities. Some even express concern that modern corporations are seemingly beyond control as well as ‘out of control’ (Drutman and Cray, 2004 and Bakan, 2004) and the framework that Lawson sets out is one that helps to ground such commentaries in a broader system of analysis.

Within Lawson’s approach both the firm and the corporation are argued to be best understood as particular communities that are positioned in specific ways. Some of Lawson’s terms need extended introduction. Lawson (2015a and 2015b) argues that all social phenomena involve the coming into being of distinct totalities²¹ and their structures and he sees a particularly common form of totality as being the community. Essentially Lawson focusses on two general types of emerging social totalities: the first he refers to as *artefacts* and the second as *communities*. The former consist mostly of organizations of physical components. This is a sharp contrast to the latter group, namely communities, which are constituted by organized sets of human individuals and artefacts. Communities typically include smaller or nested communities as components. Communities are viewed as pervasive within the social realm. Communities for Lawson are structured social entities that emerge from human interaction and include human individuals amongst their components. He writes: “All social ‘organisational forms’, indeed all social entities that include human beings as components, are forms/examples of communities” (Lawson 2015b: 7). He adds, “rarely, if ever, is a community self-standing anymore. Typically it is contained or nested within others (like a village [community] within a nation [community])” (Lawson 2015b: 4).

²¹ A *totality*, for Lawson, is a system of organized elements that reveals a coherence/integrity at the system level.

It is positions and associated rights, obligations and collective practices that form the structure of communities and relationally organize the human components. Ultimately for Lawson all communities are organized through relations of rights and obligations that rest on the exercise of human capacities of trusting and being trustworthy. He writes: “A fundamental, indeed integral and constitutive, if often barely recognized, feature of all social life is a pervasive, if always changing, structure of social positions with various associated properties” (Lawson, 2015a: 211). Lawson further argues that another equally fundamental, and often unrecognized, aspect of the social realm,²² are *processes* where these social positions and their properties are created, reproduced, transformed and allocated. It is believed that this latter feature is at the core of many mechanisms of social development, including those of large scale social change.

Elaborating on this account of social reality Lawson writes:

“... it is the matching of specific rights of some to the obligations of others that constitute social relations. It is the sets of positions, and associated positional social relations and collective practices that form the structure of human groups, systems or communities. The cement of such groupings consists especially in the human capacities for trusting and being trustworthy. If, typically, individuals either could not be, or were never, trusted to fulfill their positional obligations, society as we know it would fall apart” (Lawson, 2015b: 4).

Lawson’s basic argument is that both the firm and the corporation are fundamentally forms of community. He argues that certain communities take on the identities of a firm or a corporation by being appropriately *positioned*. Crucial to Lawson’s whole analysis is the recognition that social positioning is central to the constitution of the firm and the corporation. It is the focus on social positioning that is particularly novel in Lawson’s account and this is a

²² Note that Lawson takes the social realm to refer to the set of all phenomena whose existence essentially depends upon human interaction (Lawson, 2015b).

feature of many social processes that he suggests go largely unnoticed in most social theorizing. According to Lawson a community can first be positioned as a firm and then further positioned as a community. He suggests that this process of multiple positioning is complex. In order to understand his analysis fully it is useful to consider first how on his account artefacts acquire identities by being positioned and then explore how he sees human individuals acquiring identities by being positioned. This is important because Lawson argues that the corporation is a community that goes through a complex process of hybrid social positioning. Initially a community obtains an identity as a business firm in a process that parallels the way an artifact obtains an identity and then it goes through a further round of positioning to acquire the identity of a corporation where it is treated somewhat like a human being and acquires rights and obligations.

According to Lawson when an artefact is positioned as, for example, a paperweight the object acquires its identity through certain of its capacities becoming interpreted within the relevant community as its positional functions:

“... when an artefact is positioned as, for example a paperweight, traffic beacon, door, or identity card, certain of its causal capacities become interpreted as its (positional) *functions*. The latter are interpreted as functions within and relative to the system in which it is positioned” (Lawson, 2015b: 9).

More extensively he writes:

“... objects become positioned as say tables, seats, eating and drinking and serving utensils, etc. Over different times, places and cultures, the objects so positioned will vary in shape, size, form and material content (just as, in any point in time and space, there are very often entirely different inanimate objects that could have been successfully positioned in place of each). But in all cases, positioned objects of the sort listed facilitate the needs of a system of human beings participating in collective practices bound up with sharing food together. And the set of powers of each of the objects that contributes to this end is seen as its set of functions. In turn of course the meal itself may be a component of a wider system, functioning perhaps to facilitate regular family or tribal gatherings, or in

specific cases perhaps to celebrate a family members' birthday or mark another occasion” (Lawson, 2012: 376).

Human individuals acquire identities in an analogous but slightly different process. Lawson suggests that when a human individual is positioned as, for example, a judge or teacher, it is not the case that capacities possessed are interpreted as functions, but rather that the individual becomes the bearer or agent of novel positional powers and specifically rights and obligations. Positions and positional rights and obligations are he suggests typically in place in order that certain perceived needs of the system can be met by appropriately allocated occupants. So Lawson suggests the positioning of human beings is typically also functional but in the case of the positioned human individual it is rights and obligations that are acquired.

So for Lawson in the case of communities, individuals are bound together through their occupation of a potential multitude of positions formed within the community. These positions are then linked via (possibly multiple) various sets of rights and obligations that are associated with these particular positions. For example, if we take roles such as University Lecturer, Bishop, Bus Driver, Employee, etc. these Lawson describes as *positions* that individuals enter – or statuses they acquire – and through occupying them individuals acquire the social identities associated with the relevant positions. Being positioned in this way, individuals gain positional identities and are able to access certain rights and obligations associated with the positions they have entered. By coming to occupy the position of University Lecturer within a UK community an individual acquires the identity of university lecturer and is permitted to follow various practices as they are the bearer of the associated (positional) rights to use libraries and work in offices in the university, etc. Additionally, the rights that can be accessed through the position of University Lecturer are matched by obligations shouldered by other parties – so those in charge of the university administration have the obligation to keep rooms maintained and libraries

stocked and so on. The university lecturer also has certain obligations they must meet - he/she is also expected to follow various practices such as giving lectures, setting and assessing student work, etc. On Lawson's view the obligations associated with one position facilitate the rights enjoyed by others.

Lawson (2015b) further states that the rights and obligations that relate to the various social positions can be seen as positional powers. They can be viewed as powers in the sense that the agents who hold the rights have the causal capacity to intentionally get other agents 'to do something whether the latter want to do that something or not' (Lawson, 2015b: 6). Obligations give cause for action and such power will exist so long as the subject in question is willing (and able) to fulfill their obligations. Lawson believes that all social relations that exist within matched positional rights and obligations in this way are power relations.

The social identities of various human beings depend on the very unique sets of positions occupied. A given individual may take on the social identity of a university lecturer as mentioned before, a UK citizen, doctor, ballerina, mother, charity worker and so on if appropriately positioned. According to Lawson it is normally the case that the process of positioning will take into account the characteristics/traits of the individuals concerned so that appropriate positions will often be found. However ultimately it is all a matter of community agreement so it is quite possible that a person may be positioned as a member of choir even if they have no singing ability whatsoever, if the community accept it then the individual will acquire the relevant identity, but often such situations will be avoided.

Thus according to Lawson both human beings and artefacts can be positioned and by being so positioned they come to acquire social identities. Going further, Lawson (2015a) argues that communities can be socially positioned too and in fact this is fundamental to understanding

both the nature of the firm and the nature of the corporation. More specifically in acquiring the social identity of a firm Lawson suggests that a community goes through a process of social positioning analogous to the process whereby an object acquires the social identity of a specific kind of social artefact. That is to say a particular capacity that the community already possesses is picked out within the relevant community as constituting its positional function. So just as the capacity of the pebble to weight down papers is picked out as the positional function when it becomes incorporated into the household as a paperweight, when a community is positioned within a relevant community as a firm it is its ability to provide goods and services for a profit that is picked out as the communities positional function.

In a little more detail Lawson notes that generally recognized examples of firms in the UK include sole trader, business partnership and limited company. He argues that conditions that need to be in place in order for a community to become a member of a particular firm type are that: (i) it has to be appropriately legally positioned or registered, (ii) it has to possess a legal structure associated with the relevant position and (iii) all such legal structures presuppose a conception of the set of capacities of the community that any would be firm must possess and which, on positioning, are to constitute the community's characteristic function. This kind of analysis leads Lawson to provide the following provisional definition of the firm:

“The (modern) firm is simply a specific community, currently legally positioned, that is formally registered, within the wider, typically national (or international) community, as an emergent sub-community of the latter, oriented to the collectively coordinated production of goods and/or services to be sold to others, in a way that is intended to be advantageous to (at least some of) the community members. It is normally the case that (at least some of) that advantage is interpreted as ‘profit’” (Lawson, 2015b: 15).

For Lawson the notion of social positioning not only helps us to gain a better understanding of the nature of the firm but it also allows us to see how firms and corporations are

differentiated from one another. According to Lawson any community that is initially positioned as a firm can actually be further positioned through the process known as incorporation. However, crucially for Lawson, when this occurs, the relevant positioning process parallels not that of an artefact (as was the case with respect to the establishment of the firm) but that of a human individual. For in this instance, Lawson suggests that what is going on is that the community acquires a set of rights and obligations. This process requires further analysis and in order to help with this, Lawson elaborates three ontological notions: *multiple (vertical) positioning, legal fiction and legal person*.

As the name suggests, multiple positioning occurs when multiple positions are occupied by the same occupant simultaneously (Lawson 2015b: 9). Both artefacts and people can be positioned in various systems. Lawson writes:

“Very often it is the case that certain items can be and are positioned in two or more different systems simultaneously and so possess two or more sets of functions, one for each system just as a human individual can simultaneously serve as say a parent and a grocer. Thus an item of clothing may serve both as part of a system providing protection from the elements for a particular human being in winter, say, and also by identifying the wearer of the clothing as a police person, members of a specific football team or a bride or a priest, as part of an additional more collective system. A house or painting or ornament may function according to the specific uses made of it in servicing say as family home, but share in a common a power to retain, and so function as a store of value in another system. Similarly, of course, those powers or properties interpreted as functions can change as objects are repositioned. An item for sale in a shop is identified as a commodity and has the function of being tradable for credit at a given price. But from the perspective of a different system and once purchased it can be inserted into a system where its function is in line with its more specific uses (as a hammer, screwdriver)” (Lawson, 2012: 376).

Thus on Lawson’s account a human individual may simultaneously be positioned as an employee of Company X, an organizer of the local dance community, a marriage partner, an aunt, and so on. “Multiple *vertical* positioning occurs when the positions occupied are effectively nested in (or nesting of) each other. Thus an individual may be positioned as a UK citizen, a

member of university X, a member of the local social ontology group (XSOG), the secretary of XSOG, and so on” (Lawson, 2015a: 9). Similarly, an artefact may be multiply positioned. So Lawson provides the example of a computer that may function simultaneously as a time keeping system, a system of emailing, a music system. Artefacts can also be multiply vertically positioned here Lawson’s example is that of a table in an Oxford College’s dining room that is positioned not only as a table but as the ‘high table’.

According to Lawson, it is obvious that when an artefact is allocated to more than one position that is nested within those already occupied, an additional set of causal powers is added to the list of its characteristic functions. Similarly when a human being is allocated to an additional position – also nested within those already occupied – a further set of rights and obligations is obtained. For Lawson the corporation represents a particularly interesting and unusual form of social positioning. It is an odd case in that the incorporation of a community involves a hybrid form of positioning. First, when positioned as an *unincorporated* business, a set of causal properties is identified as the characteristic function set; but when it is given a new position through the process of incorporation, the community acquires a set of rights and obligations analogous to what happens when human individuals are positioned. Thus by becoming incorporated a community obtains certain rights such as the right to own property and the right to sue in a legal system.

In order to understand the nature of the corporation and appreciate its status as a real social entity Lawson suggests that certain other terms need to be clarified most especially those of legal fiction and legal person. According to Lawson:

“A legal fiction is usually interpreted as something like a ‘fact’ assumed or created by courts or other regulatory body to enable a legal rule to be applied in a manner for which it was not designed or intended. Mostly, as far as I can determine, the term is used where

the outcome is somewhat more specific in that some person or entity is allowed occupancy of a position in order to achieve access to a set of rights or obligations that were never intended for such a person or entity. Certainly this is a dominant case” (Lawson 2015a: 217).

Lawson refers to the case of adopted child as an example of a legal fiction whereby because the community wished to extend the rights and obligations associated with the relation between natural biological parent and child to certain other cases a new position was created which allowed the rights and obligations to be extended in certain specific circumstances. It is not the case that an adopted child is a natural child of a parent but through the mechanism of a legal fiction the community is able to treat them as if they were.²³

The term *Legal Person* is a position such that the occupant acquires the right to hold various other rights and obligations that exist within a wider community, the latter typically being a national community (Lawson, 2015a: 218). Lawson states:

“Although sets of rights and obligations were originally intended only for human beings, they came in due course to be extended to specific communities through the legal fiction of their being positioned legally as (legal) persons. The reason for adopting this particular

²³ Lawson also draws on a further example to illustrate the principles involved. He notes that in the UK, any member of parliament who sits in the House of Commons is technically forbidden to resign. There is of course some considerable historical background to this. Some centuries ago, MPs were given a trust to represent their constituencies but many considered being an MP an onerous undertaking and resignations were frequent. Consequently a law was passed in 1624 that removed the right of MPs to resign. In the contemporary period, resignations are not too problematic but remain technically forbidden. In order to make a resignation possible a *legal fiction* is employed. At the time of introducing the new law that forbade resignations, and indeed for some time afterwards, considerable tensions existed between the Crown and Parliament. As a result of these strained relations anyone in an office of profit under the Crown was not trusted by the parliamentarians. On occasion, however, such offices came to be occupied by a few MPs themselves. Due to any such simultaneous adoption of roles being considered likely to compromise the MPs in question an exception was then made to the previous law regarding resignations. More specifically, with the help of a provision of an Act of Settlement 1701, an exception was created to the restrictions on resignation. In fact, MPs who accepted an office of profit in an office of the Crown were actually *obliged* to resign from the parliament. Furthermore they were forced to seek re-election if they wished to stay an MP. This has remained the sole exception allowed to the rule forbidding resignations from parliament. The *legal fiction* was invented whereby any MP who held a desire to resign simply applied to the Crown for an office and this has then facilitated their actual resignation.

legal fiction has seemingly always been to achieve, in the first instance at least, a separation between those rights and obligations widely considered desirable as acquisitions for *specific individual* members of any particular community and others considered desirable as acquisitions for that same community as a *whole*, that latter understood as an irreducible entity, and interpreted as a formally/legally separate one” (Lawson, 2015a: 218).²⁴

Lawson suggests that it is via the mechanism of the legal fiction and being positioned as a legal person that the modern corporation comes to be an agent of rights and obligations usually assigned to human beings. These rights include the owning of assets such as buildings, shares, etc. and also the acts of contracting, suing, being sued, and so on. Lawson argues that key advantages of incorporation include that it enables both the firm and individual members to be considered separately from one another and to be protected from each other in circumstances where misdemeanours, financial failures occur. Such divisions and safeguards are of course especially useful once we recognize the fact that humans die and are liable to pay death duties whereas corporations/companies might last for centuries.²⁵

²⁴ An early example of a community being positioned as a legal person that Lawson refers to is that associated with Pope Innocent IV (1195-7) who used the device of Legal Person as a means of separating the rights and obligations obtained by monks from those allocated to the monastery. In the case of monks, they could own nothing, but could be sued for legal wrong doings. Whereas in the case of the latter, through becoming a legal person, the monastery could formally own assets but, due to it lacking a soul, could not be considered negligent or be excommunicated.

²⁵ Lawson recognizes that a company/corporation can take many forms. He notes that the most common form of company is a private company limited by shares. This is an (incorporated) corporation where, in the instance of financial difficulty, the shareholders’ liability is limited to the original value of the shares. In a company, shareholders, directors and officers are typically not liable for much of the company’s debts and obligations. Any debts that are accrued by the firm are interpreted as the property of the company instead of the shareholders. Consequently such enterprises tend to be referred to as a company with limited liability. The company is effectively distanced and safeguarded from the transgressions of individual members of that particular community and specifically the shareholders. Where a shareholder is involved in say bankruptcy a creditor of such a shareholder cannot seize the assets of the firm. This stands in sharp contrast to the example of an ordinary (unincorporated) business partnership, where the partners are jointly responsible for all the liabilities of the enterprise.

Lawson is careful to note that the initial reasoning for the construction of legal fictions may have had nothing to do with corporations but nevertheless in modern times this he suggests seems to be one of its dominant applications.

Lawson takes particular care to consider the history of the modern corporation (Lawson, 2015a and 2015b). In the contemporary environment it is of course very much taken for granted that a profit seeking community can be incorporated as a limited company. However, Lawson emphasizes that even after the introduction of the idea of legal personhood into the UK the route leading to the current situation has been a particularly long and highly contested one. There has been an enormous amount of debate over various issues ranging from the types of communities that could be positioned as legal persons to the specific rights and obligations acquired by those so positioned. Lawson demonstrates that one issue that has been continuously contested is the idea of granting legal-person status to profit-seeking communities. Lawson in fact considers such issues to be of such importance as to deserve specific and extended treatment which I can only very briefly summarize here.

Before the seventeenth century, Lawson reports, it was only not-for-profit entities such as charities that were positioned as legal persons. Eventually municipal councils were also included in this group. These enterprises held various rights – they could own buildings, land, etc. Each possessed constitutions that were drafted and approved by the crown or the government. These constitutions set out the incorporated community's rights and obligations as well as the objectives it sought to achieve. In cases where a corporation acted inconsistently with its constitution, that is acted *ultra vires*, the courts held the power to declare the offensive actions void and unlawful. During this period, it was clearly unacceptable for any charitable community to undertake commercial activities in order to seek a profit.

Lawson notes that the (English) East India Company was the UK's first profit seeking corporation to obtain a status of a corporation in the early seventeenth century but emphasizes that it did so in a rather questionable (and possibly illegal) way. The East India Company's actions went unchallenged in the courts and elsewhere even though it was clear that the corporation was acting in an *ultra vires* manner. In fact, upon viewing the successes of the company, the crown granted charters to other up and coming enterprises encouraging them to trade as commercial corporations.²⁶ Eventually, new commercial corporations were set up by both royal charters and acts of Parliament in order to develop new patents and domestic trade. By this time, they were also seeking outside investors to provide the finance.

However the new arrangements gave rise to numerous difficulties - Lawson suggests it was not the most stable of circumstances. By the start of the eighteenth century extremely suspicious corporations were discovered where individuals were merely pretending to operate as commercial corporations. They were fraudulently seeking out funding from investors. Additionally, financial scandals such as the South Sea Bubble and others that occurred at that time were the cause of further losses to 'investors' and generated considerable public concern. Now that the responsibility had passed on from the shareholder to the corporations it was not easy for the victims to receive compensation. To make matters worse the courts could not penalize the corporations either as technically they could not be imprisoned. Things did not change or get better until the government introduced the Bubble Act of 1720. This Act legislated "that all commercial undertakings (not just in corporations) would be illegal that tended 'to the common grievance, prejudice and inconvenience of His Majesty's subjects'. The law also

²⁶ For interesting analysis of the significance of the East India Company for discussions of the nature of the modern corporation see Stern, 2016.

banned speculative buying and selling of shares; they could be bought only by persons genuinely taking over a role in running a firm” (Lawson, 2015b: 14).

Lawson explores how circumstances were further transformed during the period between 1825 and 1856. A series of Acts of Parliament relaxed the controls existing on the creation of commercial corporations. It was during this period that ‘limited liability’ became established. The Bubble Act was repealed in 1825 after which shares were freely traded. Nearly twenty years later, the president of the Board of Trade at the time, William Gladstone pushed through the Joint Stock Companies Act. Companies would no longer need a special charter. Instead they could be incorporated by a single act of registration alone. It did not however include the right of automatic limited liability for shareholders. The idea of limited liability was greatly opposed by many liberals during this period. Limited liability only came about a decade later. After a series of intense debates the Limited Liability Act of 1855 was instituted. There were, however, reasons for the massive change during this period, the main one being the building of canals, railways and similar projects that required substantial agglomerations of capital. For example, in 1840, 2000 miles of railway track had been laid out (Micklethwait and Wooldridge, 2003 in Lawson, 2015a: 14). It was argued that the best way to attain this would be through chartered joint stock companies.

Notwithstanding these developments the courts remained reluctant to give shareholders full benefits of limited liability or to even fully recognize that profit seeking corporations had a separate legal identity. All the way through the nineteenth century they made it clear that in their view it was the courts that controlled corporate behavior. Yet at the same time court rulings were often successfully challenged. Lawson notes that it was the enactment of the Companies Act 1862 that finally put an end to courts periodic attempts to constrain how the commercial

corporation pursued its activities. The Act simply required commercial corporations to include a statement of their objectives in the constitution. Under Section 3A, corporations were permitted to (a) simply state that it was a “general commercial company” and (b) that the corporation held “power to do all such things as are incidental or conducive to the carrying on of any trade or business by it”. Going further, in section 35(1) of the same Act the law was changed so that “the validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company’s [object clause]”.

Lawson highlights how the debate over whether profit-seeking communities should be granted corporate status lasted nearly 400 years. He outlines how the state initially opposed the idea and imposed many mechanisms designed to restrict corporate activity in cases where the latter was seen to be at odds with the public interest. He traces through how these restrictions ultimately came to be abandoned. Lawson concludes:

“If the idea of a for-profit company or corporation is currently taken-for-granted, as a familiar component of the modern social landscape, such a strange entity has not been widely well-received at all for the most part of the its own history”(Lawson, 2015a: 223).

3.3. Berle and Lawson on the Nature of the Corporation

Although Berle doesn’t explicitly use the term ‘positioning’ in his work it can be seen as being implicit in at least some of his contributions and I wish to argue more generally that there are some interesting commonalities between Lawson and Berle on the issue of the nature of the corporation. For example, Berle (1947) in his famous paper *The Theory of Enterprise Entity*, in arguing that there was a pressing need for systematization in the field of corporation law so as to bring consistency to the various rules governing so called ‘de facto’ corporations and cases

requiring ‘piercing the corporate veil’, seems himself to draw on something very like the idea of social positioning.

In *The Theory of Enterprise Entity* Berle argued that there were a steady and growing number of disputes coming before the American courts for which the traditional concept of corporate personality was unable to provide satisfactory solutions because it failed to recognize the underlying factual relationships obtaining between the corporate economic entity and both its shareholders and its employees and creditors. In such cases the courts Berle suggested were forced to fashion rather *ad hoc* solutions by either recognizing the existence of corporate personality before it had been formally granted by the state (the ‘de facto’ corporation cases) or alternatively disregarding corporate personality altogether (the veil piercing cases). Berle in the paper reflects on these kinds of case and suggests the courts were increasingly beginning to regard the corporation as “an enterprise bounded by economics, rather than mystic personality bounded by forms of words in charter, minute book and books of account” (Berle, 1947: 345).

Berle here appears to be dealing with a series of cases where the legal recognition of the corporation has become detached from the underlying economic realities. He considers for example cases where all concerned believed themselves to be engaged in a corporate entity but because of some administrative error they did not in fact have the associated legal status:

“Here a group of individuals have agreed with each other that they will carry on an enterprise as a unit, limiting their liability to stated contributions of capital. So far as entity could be created by agreement, and liability limited by agreement, they did it. The group thus created embarked on the intended enterprise. Outsiders accepted this enterprise fact and dealt with it. So far as economics and agreement between the parties was concerned, the unit was complete. Unhappily, for the failure to conform to some condition, the state did not sanctify the union. In effect we have something like a common-law marriage. The union is not contrary to any policy of the state; the ‘colorable’ compliance, and the fact that (if the associates had been more careful) they could have had the state’s blessing sufficiently indicate that. In consequence the acts of

the entity have the same result and effects as the corporate acts – subject of course to possible attack by the state, but not otherwise” (Berle, 1947: 347).

According to Berle the courts seek to bring the legal status into line with the underlying economic realities. He writes:

“the general rule is stated as being that where the component individuals have endeavoured to form a corporation, have, in good faith, believed that they were such a legal entity, and have colorably complied with the incorporation law, they will be protected from individual liability; and, equally, they have lost their power to enforce liabilities against outsiders in favor of themselves as individuals. Various arguments are used to reach this result, and most of them are highly persuasive of the proposition that the dealings of this enterprise, though defectively incorporated, should produce the same results in the respective cases as though it were well, fully and truly incorporated” (Berle, 1947: 346 - 347).

Berle is also interested in those cases where the boundaries of independent corporations become unclear and how such ambiguous situations are cleared up by the courts. He writes:

“In effect what happens is that the court, for sufficient reason, has determined that though there are two or more personalities, there is but one enterprise; and that this enterprise has been so handled that it should respond, as a whole, for the debts of certain component elements of it. The court thus has constructed for purposes of imposing liability an entity unknown to any secretary of state comprising assets and liabilities of two or more legal personalities; endowed that entity with the assets of both, and charged it with the liabilities of one or both. The facts which induce the courts to do this are precisely the facts that most persuasively demonstrate that, though nominally there were supposed to be two or more enterprises, in fact, there was but one. The economic fact pushes through the paper differentiations embodied in the corporate certificates; and liabilities are dealt with in accord with business, instead of the fact of corporate entity” (Berle, 1947: 350).

In such cases Berle once again suggests that the courts are increasingly carefully considering the underlying economic realities and seek to bring legal status into line with those basic facts. He argues:

“If it be shown that the enterprise is not reflected and comprehended by the corporate papers, books and operation, the court may reconstruct the actual enterprise, giving entity to it, based on the economic facts. Thus one corporation may be shown to be in fact only an ‘instrumentality’ of a larger enterprise, or to be so intermingled with the operations of such larger enterprises as to have lost its own identity. On such reconstruction of the true

entity, the court may assign liabilities of the paper fragment to the economic whole” (Berle, 1947: 354).

He acknowledges that the picture can be complicated:

“this is not at all to say that in a case in which one corporation owns a controlling stock interest in another it has by that fact alone made a single enterprise out of two different ones. The controlling corporation has a choice. It can, if it chooses, elect to permit, or perhaps require, its subsidiary to manage its own affairs, make its own decisions, and operate as a separate enterprise, the parent retaining only an investors interest. Or it can integrate the operations of the subsidiary with its own, in whole or in part, thereby bringing the two operations together into a single enterprise entity. There is no compulsion on it to adopt or refrain from either course; but the legal consequences vary with the choice. Where in these cases the separate entity of the enterprises as well as their separate corporate personality has been preserved, there is no need of departing from the paper organization – if the paper organization corresponds to the fact” (Berle, 1947: 357).

In all of this there appears to be strong correspondences with Lawson’s community based view of the firm and the corporation. In particular there appears to be a recognition of some process of multiple positioning associated with the constitution of the corporation whereby an underlying economic entity or community is then positioned so as to obtain the status of legal personhood - “below the corporation papers there is always an enterprise” (Berle, 1947: 354). Berle and Lawson each seem to highlight how the corporation is both economically and legally constituted. Lawson is especially interested in the normal cases where the firm as a business enterprise is positioned as a corporation and thereby acquires certain rights. Berle is interested in his 1947 paper particularly in cases where the positioning of the underlying economic entity as a corporation with rights hits up against problems and is concerned to explore how the courts respond to such cases.

If an emphasis on multiple positioning and a recognition on the economic and legal constitution of the corporation are two commonalities between Berle and Lawson then an emphasis on the need to carefully consider the historical evolution of the corporation is a third common theme. Berle, like Lawson, believed that in order to understand the nature of the

corporation it was vital that we understood how it came into existence and explore its evolution over the years. This was one of the core ideas behind the 1932 opus, *The Modern Corporation and Private Property*. What Adolf Berle and Gardiner Means (1991) [1932] set out to do in that book was precisely to document the *evolution* of this new economic phenomenon, otherwise known as the public corporation.²⁷

Many of the themes touched on in Lawson's sketch of the historical emergence of the modern profit seeking corporation are treated in depth by Berle in his various contributions. In his 1952 paper *Constitutional Limitations on Corporate Activity* Berle wrote that corporations in early English law were formed 'in fact, and in legal cognizance a device by which the political state got something done. They were far more like the bodies corporate we call "public authorities" today. A ferry had to be run; a harbor needed wharves; a colony needed to be developed; a particular line of industry needed encouragement" (Berle, 1952: 944). Berle notes that a royal charter was granted often with the intention of attracting capital. The charter granted more or less defined privileges but for the most part the state retained residual control over the operations. Berle argues that few people in the seventeenth or eighteenth centuries would have disputed the idea that a corporation in fact was an agency of the state. It wasn't until the early nineteenth century when this began to change in England or the United States (Berle, 1952).

In another contribution this time from 1950 Berle was especially concerned with tracing through the gradual decline in the *ultra vires* doctrine in America during the nineteenth century.

He writes:

"Courts from having been astute to assure limitation of corporations in the early part of the Nineteenth Century, became almost equally astute to find ways of eluding galling and

²⁷ For discussion of the Berle and Means account of the rise of the corporate economy in America see Chapter 2 above.

frequently obsolete restrictions. Either the right of any person to assert that a corporation had acted beyond its power was cut off in some fashion ... or the corporate powers were constructed as including power to do all acts 'incidental' to the main purpose. Of the 'incidents' of an enterprise there is no end. A Florida railroad was permitted to engage in the hotel and winter resort business, since this 'incidentally' provided traffic for its line; and so on *ad infinitum* depending on the commercial views of the Courts. Only where the limitation coincided with some pretty clear policy of the state was it given teeth and vigor. From a business point of view this was as it should be. The corporate clothing of the early Nineteenth Century did not fit the burgeoning industry of the second half; and the community, perhaps wisely, decided that it would rather have economic growth than social control" (Berle, 1950: 12).

Lawson, we have seen, is acutely aware of the need to avoid any assumption that the current profit oriented corporation has always been a feature of the social landscape. He insists that a careful analysis is required of exactly how it came to be accepted within the community that profit oriented entities could be positioned as corporations with special rights. We can now see that Berle both in *The Modern Corporation and Private Property* and in later contributions was equally aware of the need to situate the modern corporation in the context of a broader analysis of its historical development.

3.4. Prospects for Meaningfully Controlling the Modern Corporation

As much as there are similarities between Berle and Lawson there are sharp contrasts too. This is especially true when it comes to their respective views on the prospects for effectively governing the corporation so that it might serve broader community interests.

To a great extent, Berle, like Lawson, voiced concerns of the potential power exuded by the controlling groups. Power was a central theme in all his work and *The Modern Corporation and Private Property* was in itself a book that questioned existing power systems. (Berle, 196).

Berle observed:

"It is amusing to recall that, in 1932, *The Modern Corporation and Private Property* was thought so dangerous as to be almost worth suppressing. It was in fact first brought out

by a law publishing house then affiliated with the corporation trust company. Discovering the viper they had nourished in their corporate bosom, publications was promptly suspended after a few copies had been sold... Shortly after, the book was reissued by Macmillan and circulated under their imprimatur ever since. This is somewhat more than a romantic incident. Books questioning power systems – as did *The Modern Corporation* – often do have initial rough handling by the power system whose rationale and bases are analyzed” (Berle, 1962: 434).

In *The Modern Corporation and Private Property*, Berle cautioned against the growing reach of the “new princes of industry” (Berle and Means, 1991 [1932]: 69), created by the new corporate form. He observed:

“The rise of the modern corporation has brought a concentration of economic power which can compete on equal terms with the modern state – economic power versus political power, each strong in its own field. The future may see the economic organism, now typified by the corporation, not only on an equal plane with the state, but possibly even superseding it as the dominant form of social organization” (Berle and Means, 1991 [1932]: 313).

But the similarities on the matter end there. Berle came to be far more optimistic than Lawson on this issue. Although the 1930s recession that hit the American economy may have shaken his beliefs and made Berle very aware of the disastrous socio-political consequences arising from leaving the corporate managers effectively unconstrained, Berle still remained very positive. He identified a new group of stakeholders that was growing in its influence on the corporation, namely the community.

In the final chapter of *The Modern Corporation and Private Property* he wrote:

“Observable throughout the world, and in varying degrees of intensity, is this insistence that power in economic organization shall be subjected to the same tests of public benefit which have been applied in their turn to power otherwise located” (Berle and Means, 1991 [1932]: 310).

Berle also added that “when a convincing system of community obligations is worked out and is generally accepted, in that moment the passive property right of today must yield before the larger interests of society” (Berle and Means, 1991 [1932]: 312).

These ideas, although written at the very end of *The Modern Corporation and Private Property* did not fall on the intellectual wayside. It led Berle to believe that the corporation could be a benevolent economic entity and its leaders could act in a socially responsible manner. Berle continued to voice these views in his later works. In his paper, *Limitations on Corporate Activity* (1952) Berle wrote:

“... there are pressures not yet hardened into any form of law, but solidly based on wants and expectations of the community. To violate these settled expectations entails immediate controversy, leading to political action... Many industries, some concentrated and some frankly monopolistic, have avoided serious impact with the state because of the care with which they have anticipated these community expectations and the fidelity with which they have fulfilled them” (Berle, 1952: 941).

With regard the specific example of the American Telephone & Telegraph Company he observed:

One of the largest corporations in the United States is the American Telephone & Telegraph Company; it has held a substantial monopoly over a vital community service for many decades; yet its standards of performance have so well satisfied the community that impacts between it and the state have been singularly slight as industrial history goes” (Berle, 1952: 941).

A few years later Berle (1954) reiterated these ideas in his book *The Twentieth Century Revolution*. He discussed what he saw as significant limitations on corporate activity. He stated that there was a very clear desire for the production required by the community to be made available to them on terms which *they* recognized as being substantially fair (Berle, 1954). The kind of influence the public could have carried certain disadvantages as ‘movements of public opinion tend to be sluggish in commencing, and extreme once they start’ (1954: 42).

Furthermore Berle suggested that a situation had to be seriously out of hand before public pressure would begin to assert itself, and in the instance that it did, passions would run high. But on the whole, Berle believed public opinion to be a very effective tool to keep the great corporates in check. The community standards could assert themselves and corporations were capable of adhering to them and often endeavoured to do so. In fact, he suggested most of the proceedings brought by the Department of Justice at the time were a testament to this as they stemmed directly from one form of public movement or another (Berle, 1954).

In *The Twentieth Century Capitalist Revolution* Berle suggests that the time had come when corporate management could no longer ignore the impact of their decisions, so great was their power and control. He writes:

“For the fact seems to be that the really great corporation managements have reached a position for the first time in their history in which they must consciously take account of philosophical considerations. They must consider the kind of community in which they have faith, and which they will serve, and which they intend to help to construct and maintain” (Berle, 1954: 135).

Berle recognizes that many businessmen in senior management positions were not accustomed to this sort of thinking. Most corporate executives believed that this kind of foresight was extremely difficult. However, according to Berle the ‘greatest leaders in the corporate field take a contrary view’ (Berle, 1954, 136). They put forward the argument that corporations were always citizens of the community in which they operated. These same men he reports stated that it simply was not possible for corporate management to separate the enterprise and its operations from the main context of American life because if they did so, government must then step in. This was not something people wanted. As a result, corporations were urged to share the burdens and provide support to various non-governmental philanthropic endeavours. Berle notes that some senior executives were speaking out about the role corporations needed to take on. The then Chairman

of the Board of Directors of U.S. Steel Company as well as the Chairman of the Board of Standard Oil Company of New Jersey Berle notes both insisted corporations must contribute to the country's educational facilities such as universities and graduate schools. Both corporations made substantial gifts to liberal arts colleges, emphasizing their acceptance of this role at this time (Berle, 1954). Berle also states that at the time of writing twenty-nine states had already passed statutes whereby corporations were authorized by the state 'to withhold from their shareholders a portion of their profits, channeling it to schools, colleges, hospitals, research, and other good causes' (Berle, 1954: 137).

Berle seemed to believe that large corporations were starting, albeit hesitatingly, to recognize how much power they had accumulated and appreciate the impact their organizations had on community development. An enterprise could choose a certain locality, develop its operations over time thereby generating growth within that locality or it may choose to withdraw from a community as quickly as it had entered, leaving it a ghost-town. With increasing international trade, profit-making opportunities were being created on a continuous basis and with it brought disadvantages for the areas companies chose to leave behind. Growing consciousness of this power created a considerable discussion in the corporate world especially among the directors of the largest and most responsible companies (Berle, 1954). They were acutely aware of the issues it would raise and there seemed to exist a division of opinion. One group believed that it was their responsibility to pick up the load and deal with the emerging issues while others felt it was too much of a burden and that they were not adequately equipped to engage. After all, it was argued, a board of directors is chosen with the primary task of running a certain business. Could it possibly be prepared to deal with a whole series of extraneous problems that covered methods of administering individual justice to the

development and organisation of local communities. Some believed that it was for others to confront these issues.

At the moment when Berle was writing in the 1950's he believed that corporations still had some kind of choice – either to take on the additional responsibility or not – but he also believed the choice was probably less free than it would appear. He wrote:

“Power has laws of its own. One of them is that when one group having power declines or abdicate it, some other directing group immediately picks it up; and this appears constantly throughout history. The choice of corporate managements is not whether so great a power shall cease to serve as the nuclei of its organization or pass it over to someone else, probably the modern state. The present current of thinking and insistence that private rather than governmental decisions are soundest for the community are clearly forcing the largest corporations towards a greater rather than a lesser acceptance of the responsibility that goes with power”(Berle, 1954: 140).

Many corporations, Berle suggested, realized this – they recognized that the decisions they were making in the second half of the twentieth century would play a role in shaping the framework of the American community in the twenty-first. To a large extent Berle seems to have believed that corporations could be kept in check and positively influenced through public consensus and a sort of corporate consciousness. He strongly believed managers could act conscientiously, guided by a personal sense of responsibility to society.

Berle was so optimistic that he believed in the possibility of the creation of an economic Utopia: “... in broadest outline we are plotting the course by which the twentieth century in America is expected to produce an evolving economic Utopia, and, apparently, the potential actually exists, bringing that dangerous and thrilling adventure within human reach for the first time in recorded history” (Berle, 1954: 142).

It was evident to Berle that the corporation had been ‘compelled to assume in appreciable part the role of conscience-carrier of twentieth-century American society’ (1954: 148). But

interestingly, unlike other great groups that actually intended to be involved in such a task, it seemed that leaders of modern corporations had acquired the role without such intent to dominate. Additionally there was no clearly defined doctrine or instructions for them to follow. Considering the tremendous power and influence they held over a community, this was a rather serious issue. However, Berle adopted a positive stance even to this.

This concept whereby Berle believed corporations could be kept in check and positively influenced through obligations to the community manifested itself in his book *Power without Property*. He strongly believed managers could act conscientiously, guided by a personal sense of responsibility to society. Berle discussed the idea of a “Public Consensus” or “Corporate Conscience” (Berle, 1959: 90). He defined it as:

“... the existence of a set of ideas, widely held by the community, and often by the organization itself and the men who direct it, that certain uses of power are ‘wrong’ that is, contrary to the established interest and value system of the community. Indulgence of these ideas as limitation on economic power, and regard for them by the managers of great corporations, is sometimes called... the ‘corporate conscience’” (Berle, 1959: 90 – 91).

Berle argued that while the former property owner no longer held the same importance in terms of carrying on economic initiative through private property, he was “increasingly becoming important as a consumer and as a political factor through his opinions and through his vote” (Berle, 1959: 117). And Berle remained optimistic when he discussed this new power of the consumer:

“The ultimate power which the individual thus has is the fact of his independent political existence... In terms of industrial property, the system has unquestionably reduced most owners to a passive-receptive role. But in terms of choice of life and choice of political expression, the citizen of American economic republic probably has as effective a means of control as individuals have ever achieved in a large country”(Berle, 1959: 138).

Berle described the public consensus as “indefinite, almost completely unorganized, and without traceable form, none the less is a hard-core fact,” (Berle, 1959: 111). Although it is unwritten and unsystematic, it cannot be “applied merely by the business community since that community is directly subject to it” (Berle, 1959: 113). Alternatively, it can be elicited by referring to “the conclusions of careful university professors, the reasoned opinions of specialists, the statements of responsible journalists, and at times the solid pronouncements of respected politicians” pointing out that “[t]hese, and men like them, are thus the real tribunal to which the American system is finally accountable” (Berle, 1959: 113). Furthermore, he observed:

“Public consensus obviously is not a spontaneous fact in the minds of many individuals. It is the product of a body of thought and experience, sufficiently expressed in one form or another so that its principles are familiar to and have become accepted by those members of the community interested in the relevant field” (Berle, 1959: 111 – 112).

So Berle believed that through the informal enforcement of the public consensus and corporate conscience, managers would be encouraged to make decisions in the corporation for the betterment of the community at large.

Berle also believed that management would uphold positive values as a whole. In another paper, *The Modern Functions of the Corporate System*, Berle noted:

“The fact is that boards of directors or corporation executives are often faced with situations in which quite humanly and simply they consider that such and such is the decent thing to do and ought to be done,” (Berle, 1962: 444).

It would seem that Lawson does not hold similar beliefs about the conscience of the corporate leaders encouraging them to adopt strategies that respond to the wider community interest. Lawson's negative attitude towards the corporation is clear in much of his work and he does not see it as in any way representing a progressive force within the community. He openly discusses the idea that at the heart of capitalism itself lies an incessant drive for money and power so great that it has no space for considering the wellbeing of others. He writes:

“Although is it possible to imagine forms of human society in which the structure of power relations is (as say in many households) designed with the aim of facilitating human flourishing... this is not the nature of capitalism. Rather the system is all about the pursuit of power over others where the flourishing of those others is very often barely a consideration. In this manner, changes in technology are harnessed by those in power in ways that transform the labour processes worldwide often resulting in untold damages to the lives of many that are involved” (Lawson, 2015b: 7).

A significant difference distinguishing Berle and Lawson relates to their respective views on the corporation and its relationship to power. It is often the case that multinational corporations have come under much scrutiny for carrying out operations beyond the control of various local regulators and tax authorities. This is an issue that has occurred across almost all borders. For example in 2012, BBC NEWS Business broadcasted the spectacle of executives from Starbucks, Amazon and Google appearing before the UK Parliament's Public Accounts Committee to explain why they appeared to make little profit despite their far-reaching operations in the UK. The point that Lawson makes is that the modern corporation is able to manipulate legal procedures in such a way that they avoid regulations and tax liabilities. Complex systems of subsidiaries and the relations between them allow the corporation to make the most of differences across regulatory regimes. Moreover Lawson notes that to the extent that the ideology of shareholder primacy is taken for granted then the managers, whatever their personal values might be, are constrained to pursue these manipulative practices. Lawson describes

situations where many have expressed their concern that ‘modern corporations are not only frequently ‘beyond control’ (of local regulators and so forth) but also, on occasion at least, seemingly ‘out of control’” (Lawson, 2015a: 1).

Lawson and Berle approach the issue of power in different ways. Although both are concerned by it these concerns don’t appear to stem from the same questions. In the case of Berle, for example, the question is whose interests the corporation should operate for and making it function in a way that makes it compatible with promoting community interests. In the case of Lawson, his concerns about power raise different questions. He states that although the mechanisms that underpin the functioning of a modern corporation are ‘dynamic, pervasive and consequential’ (Lawson, 2015a: 1) there is less agreement ‘as to the extent to which these mechanisms, or their effects, are especially desirable’ (Lawson, 2015a: 1). Lawson hopes that by studying and identifying certain aspects of the structuring of the corporation and its conditions of operation we can better understand what gives rise to this immense and tremendous source of power. Furthermore, through exploring the structural conditions of the corporation (in particular the multinational) we will understand that:

“... any (generative) mechanism, at its most basic, is a property of some structured entity. A mechanism is a way of acting of that entity that is made possible by its organizing (relational) structure; and it is triggered under various conditions. Put differently, it is a causal power of a structured entity in play” (Lawson 2015a: 1).

Lawson is particularly interested in considering the source of this power wielded by corporations that enables them to operate in the way that they do.

Berle addresses this topic very differently. As noted previously in this section, he highlights that corporations hold a lot of power – albeit unintentionally or as a by-product of their long-term operations – and focuses on the responsibilities associated with such power. Of

particular significance is the idea that the corporation can no longer be viewed lightly, Berle sees the corporation as being very much like a political institution. He writes:

“... it [corporate management] must tell the truth, and so conduct itself that it retains the confidence of its customers, its labour, its suppliers and the sector of the public with whom it deals. In the corporate situation this is the equivalent of the ‘just consent of the governed.’ The corporation is now, essentially, a non-statist political institution, and its directors are in the same boat with public office-holders. If ever corporate managers base their continued tenure on power and not on reason, the end is disaster” (Berle, 1954: 44).

Berle is eager to explore how power manifests itself at the level of the corporation: He writes:

- I. Managers have the power to ‘give or deny employment and to affect wage standards of its competitors.’
- II. A corporation management has power to ‘determine whether and how it will carry on operations.’ This in turn will determine the towns or areas that will be developed and become industrialized.
- III. Corporate managers can determine what kind of goods and services they will produce and sell – whether they ‘either meet a public desire or create it’ although the latter is difficult and expensive, the success of the American tobacco companies in making the United States a nation of cigarette smokers is indicative of the fact that it is possible.
- IV. Corporate management have power to ‘forward and pursue technical development within the general scope of their enterprises and determine the speed with which they will push that development.’
- V. Finally they hold the power to ‘decide (within limits) the extent and rate of capital expansion... this power aggregated in, say, the 200 largest corporations may make the difference whether the national economy advances or retards (Berle (1954): 21 – 23).

In this light, there would seem to be a newly formed power held by a new group called management. Managers could be seen as holding power that is absolute (Berle, 1954) and he was concerned about whether there was anything in place to keep this power in check. In doing so, he discussed the issue of the organization of power and the phenomenon of counterpoise. He used the example of the history of politics whereby it was noted that that absolute power in any organized form was commonly accompanied by the emergence of some form of countervailing power elsewhere. This opposing form of power would be present in the same organization but

usually in a very different form. Berle describes a situation where the two nuclei of power exist side by side albeit in opposition to form a balance. He notes “Creation of that balance indeed seems to be the fact which preserves the continuity of the power itself. Absolute power unbalanced is anarchic; it eventually destroys both its surroundings and itself. Wise statesmanship from earliest times has recognized and accepted this fact. The history of American common law affords a striking example” (Berle, 1954: 49). In the contemporary corporate context he believed that the courts had a role to play in counter-balancing the power of corporations. He writes:

“Deep in human consciousness is embedded the assumption that somewhere, somehow, there is a higher law which imposes itself in time on princes and powers and institutions of this terrestrial globe... It is here suggested that a somewhat similar phenomenon is slowly looming up in the corporate field through the mists that hide from us the history of the next generation. There is beginning to be apparent a realization of a counter-force which checks, and remotely acts on, and in time may modify in certain areas the absolute power of business discretion. In our system it emerges in time as law; and good lawyers watch for it” (Berle, 1954: 53).

It is interesting to note that this is again in sharp contrast to Lawson who believes that courts and legal systems are just as likely to be manipulated by corporations as controlled by them.

What seemed to be more concerning to Berle was the fact that corporate leaders were missing ‘clearly defined doctrine’ that would help modern corporations to use their power effectively. The modern corporation became so great a force that the aggregate of their day-to-day decisions did indeed shape the life and development of the community. Previously organisations that had obtained such power tended to have clear objectives when it came to the community (Berle, 1954). No one, Berle pointed out, had made a blueprint of the kind of community desired by Standard Oil of New Jersey, by the Southern Pacific Railroad, or by Ohio Edison, leave alone the corporations themselves (Berle, 1954). Berle did not seem to be apprehensive or pessimistic about the possible effects of the corporation’s operations. It seems he

strongly believed that the corporate consciousness would hold out and work effectively to address all problems that arose. He believed that the decision-making machinery of the modern enterprise worked as a 'collective soul' (Berle, 1954: 149).

3.5. Concluding Remarks

There are significant similarities between Lawson's community based account of the firm and the corporation and the account of the corporation that Berle provides. Specifically both Berle and Lawson emphasise multiple social positioning when it comes to the constitution of the corporation. Both men also highlight the economic and legal nature of the corporation and spend a lot of time carefully considering the historical emergence of the modern corporation. There are of course important differences between the two accounts. Lawson's account is very much embedded in a particular position in social ontology and his arguments about the importance of social positioning are far more developed. More generally Berle is much more optimistic compared to Lawson about the possibility of the corporation performing a progressive role in modern society.

Even where there are similarities there are important differences of emphasis. For example Lawson and Berle argue that it is important to recognize that the corporation is both economically and legally constituted but it might be suggested that Berle prioritizes the economic over the legal. Lawson's position is very much one where both aspects are of substantial significance. He recognizes both elements: the legal constitution of a corporation as well as the underlying economic entity that is positioned as the corporation. Lawson first discusses the idea of the community being situated as a firm and the latter going on to be situated as a corporation. Being situated as a firm is closely linked to its economic function whereby it generates profits but also involves being legally positioned and having the appropriate legal

structure. Being further situated as a corporation is closely linked to its legal constitution whereby it attains various rights and obligations. In the case of Berle's work (1947), however there is a greater emphasis on the legal status of the corporation conforming to the outlines of the underlying economic entity.

Lawson is interested in exploring the structural foundations behind corporations in order to better understand how we can improve their governance and reduce the extent to which they are 'out-of-control'. Berle views the modern corporation as an essentially political institution. He recognized that this was not an idea that corporate executives particularly warmed to. In fact, Berle pointed out, they belonged to one of the few groups in history whereby political power had arrived unsought, or as a sort of by-product of the main objective. The example of General Motors highlights this:

"It is probable that when Mr. Harlow Curtice and Mr. Alfred P. Sloan, Jr., wrote in General Motors Report for 1953 that 'with the elimination of controls and with the trend away from a centrally managed economy, industry is possessed of the opportunity to make its maximum contribution to the forward march of our country' they did not think they were talking politics at all. Still less, perhaps, would they consider they had assumed in substantial measure the philosophical burden of judging what is and what should be the 'forward march' of a very great country. But they had done just that" (Berle, 1954: 146).

In considering the similarities and differences between the two accounts context is of course very important. Had Berle lived to see the kind of corporate landscape that exists today who is to say that he would not have adopted a far more pessimistic viewpoint?

4. BERLE, THE FAIRYTALE OF SHAREHOLDER PRIMACY AND PROGRESSIVE CORPORATE GOVERNANCE

4.1. Introduction

It cannot be denied that Berle did at times during his career adopt a supportive stance towards shareholder primacy principles. However those passages in his writings that point to such support have often been taken out of context and it has sometimes been assumed that his views on this issue remained constant and anticipated arguments only fully developed much later by others. This chapter provides a contextual understanding of Berle's work and explores how his views on shareholder primacy developed over the years. Viewing his work in this manner provides a different way of understanding Berle's ideas and discussions and avoids the overly selective reading of his work that has characterized much of the literature to date. Both Berle's own theoretical perspective and the economic circumstances he encountered and was attempting to understand changed significantly from the 1920's through to the late 1960's. This section traces through the major shifts in Berle's views on shareholder primacy and considers the contemporary relevance of his ideas.

Berle's contributions are often read through the lens of more recent arguments in favour of shareholder primacy. Even where Berle can be seen as supporting a shareholder primacy perspective it is crucial to appreciate the motivation he had for doing so and to understand that his arguments are different from those that underpin the shareholder primacy paradigm as it is constituted today. By way of initial context I begin by reviewing some of the key arguments that have been advanced in support of the shareholder primacy view in the contemporary

corporate governance literature and explore their assumptions. Within this contemporary literature it is maintained that shareholders are the owners of the business and that therefore they are entitled to its profits while it is also often argued that creating and prioritizing shareholder value is the most effective way of promoting economic efficiency more generally. Reviewing these kinds of arguments is essential if we are to develop an accurate appreciation of Berle's contributions as it will enable us to see the distance between Berle's various positions and the shareholder primacy perspective as developed later.

Drawing on recent contributions to the history of legal and economic thought I distinguish between various phases in the development of Berle's thinking on the role of shareholders. I demonstrate that partitioning his arguments into 'early', 'middle' and 'late' phases enables us to understand his work in a more comprehensive manner and avoid an overly partial assessment. When considering the nature of Berle's position in the early phase of his career I review some of Berle's earliest papers from the 1920s in order to provide a better contextual understanding of his arguments. A middle phase commencing in the 1930's and developed as he entered the national political arena is considered. In this section it will be shown that in response to the transformed political and economic context Berle significantly changed his views on the most effective model of corporate governance. Berle's later writings where he discusses at length the role of the institutional investor and the significance of corporate culture will also be explored. Such an examination of the degree of continuity and change in Berle's ideas allows us to see how mistaken it is to select one particular work or phase, for example Berle's early views towards shareholder primacy, and reference this as definitive of his overall position.

The argument that Berle ought not to be seen in any straightforward sense as a defender of the shareholder primacy view is taken further in section 4 where I show that many of the

criticisms that have been recently developed against the shareholder primacy perspective can actually be seen as having been anticipated by Berle. For example, Berle expresses serious concerns over the growing role of institutional investors and the negative impact this can have on the corporation as well as the community. It is highlighted how Lynn Stout echoes these arguments in her recent work but among the several scholars referenced as supporting her views Berle is not present. The only mention of Berle is when she discusses shareholder primacy and those who have provided support for that perspective. In addition to Berle anticipating certain key criticisms of the shareholder primacy view in this section I also show that some of his ideas have been rediscovered, albeit without Berle's contributions being acknowledged, by authors developing progressive approaches to corporate governance. Throughout his later writings Berle voiced his support for enhancing corporate culture (as opposed to developing formal regulations) as part of efforts aimed at reigning in potentially out of control managers. He believed that the media and public consensus did have a significant role to play in keeping corporate executives in check as maintaining a positive public image was vital to their chances of retaining their positions. It will be shown that these sorts of arguments have been picked up by many contemporary scholars but there has been little mention of Berle.

Berle initially wrote during the first era of financialisation. His later writings were authored in a period where the destabilizing impacts of processes of financialisation had seemingly been brought under regulatory control. It is often observed that we are currently living through a second era of financialisation. Can anything of contemporary relevance be drawn from Berle's various contributions? The final section speculates on what form a progressive corporate governance regime inspired by Berle's insights might take.

4.2. Attempted Defences of the Doctrine of Shareholder Primacy

The significant focus of corporations on shareholder value in the Anglo-Saxon economies of the United States and Britain is a relatively recent phenomenon, in the 1950's and 1960's shareholders were a seemingly largely passive group and corporate managers appeared to have very substantial autonomy. The prioritization of shareholder interests became a preoccupation in the 1980s during the Reaganite and Thatcherite revolutions (Lazonick and O'Sullivan, 2000). By the end of the century the shareholder primacy norm had become well entrenched and almost taken for granted. The following comment from Hansmann and Kraakman (2000) is representative:

“The triumph of the shareholder-oriented model of the corporation over its principal competitors is now assured... Logic alone did not establish the superiority of this standard model or of the prescriptive rules that it implies, which establish a strong corporate management with duties to serve the interests of shareholders alone, and strong minority shareholder protections. Rather, the standard model earned its position as the dominant model of the large corporation the hard way, by out-competing during the post-World-War-II period the three alternative models of corporate governance: the managerialist model, the labor-oriented model, and the state-oriented model” (Hansmann and Kraakman, 2000: 32).

Prior to the 2008 financial crisis, a decade-long boom enjoyed by the US and other stock markets tempted other nations to see the shareholder primacy norm as a principle for corporate governance that ought to be adopted. It became increasingly widely believed that the best means to pursue aggregate social welfare was to “make corporate managers strongly accountable to shareholder interests, and (at least in direct terms) only to those interests” (Hansmann and Kraakman, 2000: 9).

Hansmann and Kraakman characterize the ‘Standard shareholder-oriented model’ as centrally involving the following propositions:

“That ultimate control over the corporation should rest with the shareholder class; the managers of the corporation should be charged with the obligation to manage the corporation in the interests of its shareholders; other corporate constituencies, such as creditors, employees, suppliers, and customers should have their interests protected by contractual and regulatory means rather than through participation in corporate governance; non-controlling shareholders should receive strong protection from exploitation at the hands of controlling shareholders; and the market value of the publicly traded corporation’s shares is the principal measure of its shareholders’ interests” (Hansmann and Kraakman, 2001: 440-1).

In order to understand the rapid rise to dominance of the shareholder primacy principle in the US it is necessary to provide some context. The arguments supporting the prioritization of maximizing shareholder value took shape during a period in the United States where there was much concern regarding the extent of corporate control (Lazonick and O’Sullivan, 2000). The economy was seen as dominated by giant corporations, employing tens or even hundreds of thousands of people, generating massive revenues. These revenues were allocated according to a certain corporate governance principle termed “retain and reinvest” (Lazonick and O’Sullivan, 2000: 14). These corporations tended to “retain both the money that they earned and the people whom they employed, and they reinvested in physical capital and complementary human resources” (Lazonick and O’Sullivan, 2000: 14). Retentions in this way helped build the financial foundation necessary for corporate growth while they were also able to invest in plant, equipment and the required personnel to succeed.

In the 1960s and 1970s, however, the principle of retain and reinvest began raising some problems. One problem was to do with the growth of the corporation itself and the other concerned the increasing number of competitors. Due to tremendous internal growth and also through mergers and acquisitions, corporations were growing too large and there were too many divisions in too many different types of businesses. Additionally, the corporations weren’t handling the employees and their capabilities at all effectively:

“US companies tended to use their managerial organisations to develop and utilize technologies that would enable them to dispense with shop-floor skills so that ‘hourly’ production workers could not exercise control over the conditions of work and pay” (Lazonick and O’Sullivan, 2000: 15).

This very real problem of excessive centralization gave rise to the development of an approach to corporate governance known as agency theory. It was drawn together by a group of American financial economists who were “ideologically predisposed against corporate – that is, managerial – control over the allocation of resources and returns in the economy” (Lazonick and O’Sullivan, 2000: 15). They believed that managers had proven they would act opportunistically pursuing personal goals that may be contrary to the interests of shareholders.

A particularly influential article was Jensen and Meckling’s 1976 contribution ‘Theory of the Firm: Managerial behavior, agency costs and ownership structure’. Jensen and Meckling argue that it is efficient and agency cost reducing for the large corporation to be organized such that managers should be exclusively accountable to shareholders. For Jensen and Meckling the shareholder oriented corporation will ensure that the value of the corporation is maximized and this will be of benefit to not only all those involved with the corporation but also the wider community. At root the argument builds on the idea that within the modern corporation shareholders constitute the ‘residual claimants’ whose participation in the surplus from production is entirely dependent on the business success of the firm. Others involved with the corporation have income rights defined in contracts that are to a large extent fixed. The returns to ordinary shareholders are variable depending on dividends and the market value of their transferable shares. Thus the returns to shareholders are tied to the profitability of the corporation and proportionate to it. Jensen and Meckling specifically argue that shareholders had the incentive and the means to monitor the performance of managers in a way which would ensure an efficient balance between effort and reward for all concerned. In this contractual model the

key governance issue is that of agency costs. These costs arise because managers (the agents) may frequently find themselves in a position where their contractual duty to their principals (the shareholders) comes into conflict with their own self-interest. The cost of making the agent and principal relationship functional involves management inducements such as performance related pay (bonding costs) and disciplinary measures such as those provided by the market for corporate control.

A striking feature of Jensen and Meckling's argument was that for them it was crucial to recognize "that most organizations are simply legal fictions which serve as a nexus for a set of contracting relationships among individuals" (1976: 310). They further note that "by legal fiction we mean the artificial construct under the law which allows certain organizations to be treated as individuals" (1976: 310). It would seem that for Jensen and Meckling (1976) the corporation ought to be understood as an ontological as well as a legal fiction and that the only real entities existent in the social domain are individuals.²⁸ It is worth noting here how Jensen's and Meckling's argument chimes with Milton Friedman's earlier views expressed in *The Social Responsibility of Business is to Increase Its Profits* (1970). In this short piece Friedman had also forwarded the idea that businesses cannot hold any responsibilities. He maintained that a corporation was "an artificial person and in this sense may have artificial responsibilities, but 'business' as a whole cannot be said to have responsibilities ... Only people have responsibilities" (Friedman, 1970: 1), and therefore shareholders must be given top priority especially considering the corporation's money is theirs.

²⁸ For analysis of the category of legal fiction and its relevance in understanding the nature of the modern corporation see Lawson, 2015a and the discussion in chapter 3 of this dissertation. Lawson recognises the importance of legal fictions in understanding the nature of the corporation but insists that just because the corporation involves legal fictions this most definitely does not make the corporation itself an ontological fiction. Rather Lawson maintains that the corporation is best understood as a real social totality.

Despite a variety of rather devastating critiques of Jensen and Meckling's analysis²⁹ this kind of contractual approach had a very significant practical impact. The reasons why the contractual approach became so influential and promoted the widespread adoption of a shareholder primacy norm are complex and involve various factors. One factor is related to the ever increasing importance of the institutional investor. The transfer of stockholding from individual households to institutions such as mutual funds, pension funds and life insurance companies seemed to "facilitate the takeovers advocated by agency theorists and gave shareholders much more collective power to influence the yields and market values of the corporate stocks they held" (Lazonick and O'Sullivan, 2000: 16). Whatever the exact reasons for its rise to prominence, the contractual approach has had massive implications for management pay and corporate governance. Corporate governance has promoted performance related pay as a mechanism to reduce agency costs and management pay has as a direct result of this approach increased exponentially in recent decades. It has come to be believed that the existence of efficient financial markets and specifically a takeover market would help discipline managers in situations where the company was performing poorly. The rate of return on corporate stock was deemed the new measure of performance. Maximizing shareholder value became the main company objective.³⁰

4.3. Berle, Shareholder Primacy and the Public Interest Oriented Corporation

²⁹ For a powerful critique of Jensen and Meckling, see Ireland, 1999 and 2003.

³⁰ For a detailed discussion of the rise of shareholder primacy views in America and Britain see Buchanan, Chai and Deakin, 2012, chapter 4.

Considering that so many scholars have cited Berle as an advocate of the shareholder-oriented model of governance³¹ it is useful here to consider closely those of his contributions that can legitimately be seen as broadly in line with such a perspective but also clarify how these relate to his broader output. As previously mentioned, I do not dispute the fact that Berle did at times support the prioritization and protection of shareholder interests but, drawing on recent contributions to the history of legal and economic thought,³² I argue that it is a mistake to take the parts of Berle's work where such support can be found out of context and suppose that he consistently maintained such a position over his career or assume that the kind of support offered anticipates the arguments that are developed by those supporting the modern day version of shareholder primacy. To cast him as the grandfather of shareholder primacy is in many ways I suggest mistaken. Such a characterization is an example of a failure to understand his work in its appropriate historical and intellectual context.

In order to understand Berle's arguments favouring shareholder primacy it's important to provide some initial context. America at the beginning of the twentieth century experienced a period of turbulent labour relations (Stewart, 2011). The concentration of economic power in the hands of certain elite groups seemed a dangerous development to Berle who feared that escalating economic and class conflicts could significantly destabilize American society (Schwarz, 1987). The Berle of the 1920s outlines ways in which power relations might be rebalanced suggesting industrial arrangements that could place greater economic and corporate

³¹ See, for examples, of this tendency to link Berle closely with shareholder primacy views in Coiffi, 2011: 1081; Million, 1990: 220-1; Winkler, 2004: 115-6; Matheson and Olson, 1992: 1313; Fisch, 2006: 647.

³² Bratton and Wachter (2008) and Stewart (2011) are legal scholars who have done much to situate Berle's work in its historical context and trace through the complex development of Berle's thinking and their work will be considered in detail in this section.

power in the hands of the middle and working classes and thereby give them a standing corresponding to that of bankers and managers. He published an early plan for how this transfer of power might come about in a short popular article titled *How Labour Could Control* (1921).

In this paper, Berle (1921) sought to “examine the tools in the economic tool house,” pointing out that “the most effective of them are the great corporations” (Berle, 1921: 37). He defined them as “great” because they had “developed effective cooperation beyond any other known machinery” somehow enlisting “the financial cooperation of the general public through issues of various classes of securities” (Berle, 1921: 37). These ‘classes of securities’ have appealed to the public’s “saving instinct, the sporting instinct or the exploiting instinct as the case happens to be” (Berle, 1921: 37). This has resulted in “a huge group of investors whose combined power to achieve is infinite” (Berle, 1921: 37). Berle believed that for these reasons “corporations are worth studying and worth respecting” (Berle, 1921: 37). Over the course of the paper, Berle then proceeds to identify problematic issues with the current corporate system and offers an alternative vision whereby the corporation could be used “as a tool for the redistribution of wealth and power” (Stewart, 2011: 1461) rather than as a means to exploit individuals.

He begins to address the relevant issues by asking the following:

“Who are the people who have a right to capitalize the hope of the plant’s earnings? Who are the people who can decently gamble on their output? Who are the people who have most right to ask for control of the plant?” (Berle, 1921: 38).

Berle responds to these questions with the following answer: “the people who have most right to ask for control of the plant” were “obviously... the staff of the plant, including, of course, the chairman of the board, the directors, as well as the oilers and feeders and loom fixers” (Berle, 1921: 38). Berle believed it vital for every member of staff – from the board at the top of the

hierarchy to the labourers – to have a say in the control of the business enterprise. He stated, “That the large majority of employees should have to spend their spare time devising means to fight the control of their own plant is simple foolishness” (Berle, 1921: 38). Berle, instead suggested a system whereby each worker would be given ownership and control of the corporation, proportionate to his/her contribution to the firm. He further added:

“Questions of detail arise. How shall the stock be distributed? According to the fairest appraisal of the value of the employee-stockholder’s services. The general manager ought to have more stock than the unskilled worker. His vote at a stockholders’ meeting ought to be worth more. He has earned it. What about wages? Every employee ought to draw a regular base pay just as a partner in a firm is entitled to his drawing account; he must live. How about labour turnover? One hopes this scheme would lessen it; but men will always leave old jobs for new. When a man leaves his job he must leave his stock too – resell it to the corporation, to use the vocabulary of corporation law, - for a price. What price? The amount by which the value of the stock has been increased while that employee held it” (Berle, 1921: 38).

Berle further suggested “well-managed” labour unions, could purchase or create corporations, and then could grant the shares of such corporations to the members. He does note that this system “sounds a little like romance” but he believed it to be “possible” and even “simple” (Berle, 1921: 38). He writes:

“Suppose... the union decided to make yarn on its own behalf; it knows the processes, needs only management, which it would have to hire, and capital, which it would also have to hire in the open market. Thereupon it hires managers and borrows money, buys or rents a yarn factory, runs it on approved business lines, sells at a profit, sets aside part for depreciation, for repayment of its borrowings, for a wage reserve in bad years. No single process in the industry would have to be changed, but each man would be working for himself and his “wage slavery” would become merely an occupation in cooperative endeavor... This is the dream, and we seek for possibility of its realization” (Berle, 1921: 38).

Berle argued that this would give ownership and control to employees. The term ‘wage slavery’ gives us an indication of Berle’s opinion of the prevailing system of governance at the time. His opposition to the current state of affairs is also made evident when he specifically addresses the role of traditional shareholders in the corporation:

“All corporations are controlled by their common stockholders. These stockholders are, in many corporations, not true investors; they “took a chance”. They backed their knowledge of the industry and the stock market and business prospects, and they expect a large return through dividends and through growing value of the stock. They would not say so, but they looked for something for nothing; they bought the stock for a rise, and to collect large dividends if they can. This class is under attack as exploiters” (Berle, 1921: 38).

It is evident here in this early piece that Berle wanted to see shareholder control of the corporation but he wanted to see it in a context where those who constituted the shareholder class were radically reconfigured.

Shortly after this paper in 1921, Berle witnessed greater dispersion of share ownership leaving the hands of business elites and making its way into the hands of the middle and working classes (Schwarz, 1987: 65 – 66). He viewed this development as a positive one, still believing his earlier devised scheme for redistributing economic power could be effectively realized. He anticipated that a shareholder class largely populated by the working- and middle-class would be more empowered to better manage the American corporations. As Schwarz (1987) observed:

“Berle maintained that an ethical public interest could be attained and group conflict averted only by broadening wealth to expand the shareholding class; the middle and working classes should entrust their savings, through organisations such as savings banks or pension funds, to the security – rather than the risk – of the stock exchanges” (Schwarz, 1987: 65).

Unfortunately, and to Berle’s disappointment, the legal community did not typically view the dispersal of share ownership as positively as he did. They compensated for the change in ownership by advocating that an increased level of managerial control and discretion be allowed for and that shareholder control be diluted (Stewart, 2011). Berle grew concerned that this kind of advocacy of managerialism would hinder the transfer of power from the business elites to the middle and working-class. In his more personal writings, Berle admitted that these concerns were what motivated him to promote shareholder primacy (Berle, 1973: 19). Understanding

these motivations and concerns helps us appreciate both Berle's early emphasis on shareholder interests and his shift away from shareholder primacy later in his work. The emphasis on shareholder interests early on in his career arose in a very particular context, one in which promoting shareholder interests seemed the best way to guard against certain narrow sectional interests becoming dominant. Although he soon moved away from prioritizing shareholder interests he remained preoccupied with exploring ways in which economic power could be made more democratic.

The papers that Berle produced in the mid 1920's – i.e., *'Non-Cumulative Preferred Stock'* (1923), *'Problems of Non-Par Stock'* (1925), *'Participating Preferred Stock'* (1926a) and *'Non-Voting Stock and "Bankers' Control'*, (1926b) - can be understood as in line with a position that prioritises the interests of shareholders in a context where major structural political transformations seemed unlikely and where share ownership was increasingly being dispersed. Berle stated in his personal diary:

“The attempt I was then making was to assert the doctrine that corporate managements were virtually trustees for their stockholders, and that they could not therefore deal in the freewheeling manner in which directors and managers had dealt with the stock and other interests of their companies up to that time” (Berle, 1973: 19).

Berle further added that these articles “led to the next stage of [his] career” (Berle, 1973: 19). Throughout these papers Berle emphasized shareholder rights. He argued that managers held preexisting obligations towards the shareholders and in formulating their actions they ought to keep this in mind. This was the way, in the specific circumstances of the time, to ensure some kind accountability on the part of management and minimize cases where managers might exploit their positions.

The first paper, *Non-Cumulative Preferred Stock*, published in 1923, pointed to the extensive powers granted to directors with regard to the distribution of dividends. Berle felt this could violate shareholder's rights which required a more narrow interpretation of managerial power (Stewart, 2011). Keeping this in mind, Berle argued that a manager's discretion was limited in that he had to respect the contracted procedure in place for the distribution of dividends. He developed this approach further in 1925 in *Problems of Non-Par Stock*. Berle in that paper focused on the introduction of non-par stock:

“Until 1912 stock corporations were required to divide their capital into shares each having a stated par value. In that year New York passed a statute permitting such corporations to issue shares having no nominal or par value, since which time a majority of states have followed its example” (Berle, 1925: 43).

Berle was worried by the issue of what rights, if any, “holders of non-par stock have against their corporation, its directors and other stockholders, upon issues of new shares” (1925: 43). Berle believed that the issue was a significant one because existing contractual arrangements could not have foreseen such financial innovations. He was concerned that these kinds of unforeseen developments potentially freed management to act without sufficient attention being paid to the interests of shareholders. So he further asserted that shareholders' rights encompassed an obligation on the part of managers to manage the corporation in the best interest of shareholders whatever might be the exact contractual wording.

In the latter two papers, both written in 1926, Berle explored the way in which management allocated dividends between different share classes of the corporation. *Participating Preferred Stock* (1926a) took the standpoint that equity guided managerial discretion beyond what was contractually agreed. So when contractual safeguards (put in place to protect the minority shareholders) failed, managers still held an equitable duty to defend those shareholders who were weaker against the more powerful ones – especially when the latter

exercised their influence over management in an aggressive manner for their personal gain but to the detriment of minority shareholders. In *Non-Voting Stock and "Bankers' Control"* (1926b) Berle took this argument further by showing that equity actually compensated for the imbalance of power that existed between all the shareholders. He argued that legally, management was required to treat all shareholders fairly. Berle viewed this as a sort of guarantee that the different interests of ownership would all be attended to (Stewart, 2011: 1465).

If we take these papers at face value we could conclude that Berle whole-heartedly supported shareholder primacy. But when these articles are understood in the wider context of Berle's interests and broader political orientation we gain a different picture altogether. Berle wished to see a change in the constitution of the shareholder class. He felt that the increasing dispersion of share ownership was a welcome development and in such a context ensuring that managers operated in the interests of shareholders would be a progressive move and help promote a greater degree of democratic control over the industrial system.

It is worth noting that early on Berle was not overly optimistic about the prospects of judicial intervention and preferred a contractual approach. He noted the need for constraints on management discretion but wanted the problem to be primarily addressed by the "business men themselves" and supported self-regulatory reforms. In *Studies in the Law of Corporate Finance*, Berle observed:

"[C]ourts cannot be expected to work out rules of conduct for the business community except with the guidance and assistance of business men themselves, and for this purpose business standards themselves must be made apparent" (Berle, 1928: 36).

Berle had certain significant suggestions regarding how this could be achieved. He suggested: (1) that the stock exchanges refrain listing from enterprises whose managers abused their power and additionally demand disclosure of corporation information; (2) that investment bankers organize

themselves into an enforcement body so that they can help scrutinize firms making public securities offerings; and (3) that large institutional shareholders such as insurance companies position themselves in such a way in order to obtain accurate information about issuers and to protect shareholder rights (Berle, 1928: 37 – 39 and for commentary and discussion see Bratton and Wachter, 2008: 106).

Berle's attitude towards regulation was to soon change significantly. In 1927, Berle received a Rockefeller Foundation grant to carry out an interdisciplinary study of the corporation (Schwarz, 1987). This project lasted five years and resulted in *The Modern Corporation and Private Property*. The Rockefeller grant required the involvement of an economist which is what prompted the participation of Gardiner Means, Berle's childhood friend (Bratton and Wachter, 2008: 107). Means was an economics graduate student and he contributed the empirical studies of dispersed share ownership and corporate concentration to the book. Means' projections highlighted the fact that economic power was concentrated in the hands of a group of corporate managers and it seemed to Berle that something had to be done regarding this ever growing corporate power – more so than what he had thought before. What he initially viewed as an issue that could be rectified contractually within the financial and business community, he seemed to now see as a case for judicial control in order to protect wider interests and not just shareholder interests. Berle began drafting *The Modern Corporation and Private Property* in 1927 and it was published in 1932. We now come to what seems a key pivotal moment in Berle's writings. According to Bratton and Wachter *The Modern Corporation and Private Property* “captures Berle in the middle of his metamorphosis from friend of shareholders to advocate of the corporation as an instrument for furthering national social welfare policy. The book thus provides a window into the evolution of his thinking” (2008: 118).

It is useful to note at this point that the Berle of the 1920s was very suspicious of managerialism. He feared that if no safeguards were put in place managerialism would only further increase the already growing economic inequalities in American society. It is against this background that *The Modern Corporation and Private Property* was written. In the opening pages of the book, Berle observed:

“Size alone tends to give these giant corporations a social significance not attached to the smaller units of private enterprise. By use of the open market for securities, each of these corporations assumes obligations towards the investing public which transform it from a legal method clothing the rule of a few individuals into an institution at least nominally serving investors who have embarked their funds in its enterprise... In creating these new relationships, the quasi-public corporation may fairly be said to work a revolution... This revolution forms the subject of the present study” (Berle and Means, 1991[1932]: 7).

Berle proposed the creation of a new corporation – one that focused especially on the interests of the community. He believed there was a dilemma in corporate governance: on the one hand, owing to the owners surrendering all control and responsibility over the active property, they had also “surrendered the right that the corporation should be operated in their sole interest – they have released the community from the obligation to protect them to the full extent implied in the doctrine of strict property rights” (Berle and Means, 1991[1932]: 312). Additionally, “the controlling groups, by means of the extension of corporate powers, have in their own interest broken the bars of tradition which require that the corporation be operated solely for the benefit of the owners of passive property” (Berle and Means, 1991[1932]: 312). Berle pointed out, however, that just because the sole interest of the passive owner was eliminated, it didn’t necessarily mean that there was now a basis for an alternative claim whereby new powers had passed on to the control group i.e. managers. Berle had mixed opinions with regard to managers and believed they had not presented “in acts or words, any acceptable defense of the proposition that these powers should be so used” (Berle and Means, 1991[1932]:

312). He felt that recent developments pointed in quite a different direction. The controlling groups had cleared the way for a whole new group to stake their claims, a group far wider than either the owners or the managers: “They have placed the community in a position to demand that the modern corporation serve not alone the owners or the control but all society” (Berle and Means, 1991[1932]: 224 – 252).

This third alternative suggested to Berle, “a wholly new concept of corporate activity” (Berle and Means, 1991[1932]: 312). The claims of the other two contending parties had been weakened by the developments reported on in the book and so he believed that there was a need for the claims of a new group to be clearly spelt out. He wrote:

“Neither the claims of ownership nor those of control can stand against the paramount interests of the community... It remains only for the claims of the community to be put forward with clarity and force. Rigid enforcement of property rights as a temporary protection against plundering by control would not stand in the way of the modification of these rights in the interest of other groups. When a convincing system of community obligations is worked out and is generally accepted, in that moment the passive property right of today must yield before the larger interests of society” (Berle and Means, 1991[1932]: 312).

It was essential that corporate leaders created a programme that comprised of fair wages, employee security, a reasonable service to the public and basic stabilization of the business environment – such a scheme was to Berle, “a logical and human solution of industrial difficulties” (Berle and Means, 1991[1932]: 312). In turn, the judicial system would in due course be forced to recognize the result, justifying it by means of whatever legal theories they deem fit. Berle’s concluding remarks leave us with no doubt as to which stakeholder group he viewed as being of most important:

“It is conceivable – indeed it seems almost essential if the corporate system is to survive – that the ‘control’ of the great corporations should develop into a purely neutral technology, balancing a variety of claims by various groups in the community and assigning to each a portion of the income stream on the basis of public policy rather than private cupidity” (Berle and Means, 1991[1932]: 312 - 313).

The kind of political framework presupposed by at least the famous last chapter of the *Modern Corporation and Private Property* is one in which government is in negotiation with other major groups in society and can reliably identify and articulate what is in the *public interest*. Once some agreement is reached regarding what is the public interest government calls for the various groups including corporate business interests to adapt their positions to support it. It follows that on this kind of view corporations are in a certain sense entities that are operating in part as instruments of the state. Corporations participate in a state facilitated set of negotiations where they engage with the state and other interest groups such as labour unions to determine the public interest. Once some accommodation has been reached between the parties, the calculus of corporate rights and duties must adjust and recognize that the public interest constitutes a constraint on managerial action. In the mid 1920's Berle felt that an emphasis on shareholder interests represented the least damaging realistic alternative to unconstrained managerial control. By 1932 a rather different political and economic context had been established in which altogether more dramatic transformations could be realistically articulated.³³

This consideration of how Berle's thinking develops and is expressed in the *The Modern Corporation and Private Property* provides a useful vantage point from which to examine the famous Berle-Dodd debate which is often referenced when Berle is identified as an early and key supporter of the shareholder primacy doctrine. The debate began with the article *Corporate Powers as Powers in Trust* published in 1931 - where Berle clearly argued against the apparent

³³ For discussion of the political assumptions underpinning Berle's various positions see Bratton and Wachter, 2008: 113-114.

unlimited powers bestowed upon corporate management.³⁴ These powers only seemed to increase with certain corporation statutes and charter provisions enacted at the time (Weiner, 1964). Berle's attitude towards the corporate climate at the time is made apparent very quickly in the opening paragraph of the paper:

“It is the thesis of this essay that all powers granted to a corporation or to the management of a corporation, or to any group within the corporation, whether derived from statute or charter or both, are necessarily and at all times exercisable only for the ratable benefit of all the shareholders as their interest appears. That, in consequence, the *use* of the power is subject to equitable limitation when the power has been exercised to the detriment of such interest, however absolute the grant of power may be in terms, and however correct the technical exercise of it may have been. That many of the rules nominally regulating certain specific uses of corporate powers are only outgrowths of this fundamental equitable limitation, and are consequently subject to be modified, discarded, or strengthened, when necessary in order to achieve such benefit and protect such interest; and that entirely new remedies may be worked out in substitution for or supplemental to existing remedies. And that, in every case, corporate action must be twice tested: first, by the technical rules having to do with the existence and proper exercise of the power; second, by equitable rules somewhat analogous to those which apply in favour of a *cestui que trust* to the trustee's exercise of wide powers granted to him in the instrument making him a fiduciary” (Berle, 1931: 1049).

Berle opens a lengthy discussion of fiduciary duty in an attempt to address the problem, pointing out that managers are trustees of the shareholders and can only exercise their powers if it were for the benefit of the shareholder. He further asserts that “whenever a corporate power is exercised” its use must be “judged in relation to the existing facts with a view toward discovering whether under all the circumstances the result fairly protects the interests of the shareholders” (Berle, 1931: 1074). Berle argues in favour of the active role of the judicial system: “New remedies may be worked out and applied by the courts in each case, depending on the circumstances” so that in this way the “powers of courts of equity... are as broad as may be necessary to adjust and maintain the relative participations of the various classes of

³⁴ Berle's paper *Corporate Powers as Powers in Trust* was actually an almost exact replication of a chapter from the book *The Modern Corporation and Private Property*.

shareholders” (Berle, 1931: 1074). But Berle seems to hesitate in asserting that this understanding of the fiduciary duty of management could eventually evolve into another branch of trust law. For the remainder of the paper, Berle examines five different scenarios in which management was granted wide discretion over corporate conduct by shareholders, for example, the power to declare or withhold dividends, and the power to issue additional stock. In each instance, irrespective of how absolute the discretion appeared, he argued that such powers held by management had to be exercised in line with equitable limitation (Berle, 1931). Berle consistently argued that all powers given to management were solely for the benefit of shareholders. Given the discussion of *The Modern Corporation and Private Property* we can take it that in this contribution Berle was focusing on the currently prevailing political situation rather than the one he hoped would soon be ushered in.

In May 1932, Professor E. Merrick Dodd published an article entitled, *For Whom Are Corporate Managers Trustees?* challenging Berle’s key arguments. The paper begins on a sympathetic note as Dodd seems to appreciate Berle’s desire to constrain managers from transferring the assets of the corporation to their own pocket: “The present writer is thoroughly in sympathy with Mr Berle’s efforts to establish a legal control which will more effectually prevent corporate managers from diverting profit into their pockets from those of stockholders, and agrees with many of the specific rules which the latter deduces from his trusteeship principle” (Dodd, 1932: 1147). But Dodd’s tone quickly changes, stating that Berle’s shareholder trustee view was problematic because “it is undesirable, even with the laudable purpose of giving stockholders much-needed protection against self-seeking managers, to give increased emphasis at the present time to the view that business corporations exist for the sole purpose of making profits for their stockholders” (Dodd, 1932: 1147 -1148). Dodd adds that he believed:

“public opinion, which ultimately makes law, has made and is today making substantial strides in the direction of a view of the business corporation as an economic institution which has a social service as well as a profit-making function, that this view has already had some effect upon legal theory, and that it is likely to have a greatly increased effect upon the latter in the near future” (Dodd, 1932: 1148).

Dodd argued that historically, when business enterprises were “small affairs involving the activities of men rather than the employment of capital” common law adopted the position that business was “a public profession” as opposed to a “purely private matter” (Dodd, 1932: 1148). This view had been limited to business enterprises that were considered to be affected with a public interest. Dodd believed that business activity would become a public issue and companies would need to act in line with what was best for the wider community. He referred to the “duty of one engaged in business activities toward the public who are his customers” and the “public duty of one who has devoted his property to public use, the conception being that property employed in certain kinds of business is devoted to public use” (Dodd, 1932: 1149). Interestingly – and ironically – Dodd then brings in a line of thinking that is extremely similar to what Berle raised in his first paper *How Labour Could Control* and which he later developed in *The Modern Corporation and Private Property*:

“Our present economic system, under which our more important business enterprises are owned by investors who take no part in carrying them on – absentee owners who in many cases have not even seen the property from which they derive their profits – alters the situation materially. That stockholders who have no contact with business other than to derive dividends from it should become imbued with a professional spirit of public service is hardly thinkable” (Dodd, 1932: 1153).

Dodd believed that if “incorporated business” was to “become professionalized” we should look to the managers “not to the owners” to help accomplish this result. He further added that “there is in fact a growing feeling not only that business has responsibilities to the community but that our corporate managers who control business should voluntarily and without waiting for legal

compulsion manage it in such a way as to fulfill those responsibilities” (Dodd, 1932: 1153 – 1154).

Berle’s response was prompt stating in the opening pages that Professor Dodd had communicated “a point of view which cannot be ignored,” (Berle, 1932: 1366). He goes on to state that “Professor Dodd’s argument is not only sound but familiar” and that there was an element of truth to it. Berle agreed that the scale of production corporations operated on requires a tremendous degree of financial concentration in the shape of the corporate enterprise. In turn, this level of financial concentration has caused a shift to occur in the roles of industrial managers and corporate executives, or the “control” group (Berle, 1932, pp. 1366). They no longer function as “promoters” or “merchants” but more as “princes” and “ministers” (Berle, 1932: 1366 – 1367). However, Berle is quick to point out:

“But it is theory, not practice. The industrial ‘control’ does *not* now think of himself as a prince; he does *not* now assume responsibilities to the community; his bankers do *not* now undertake to recognize social claims; his lawyers do *not* advise him in terms of social responsibility” (Berle, 1932: 1367).

Berle continued his argument going on to write the following lines unaware that they would be some of the most referenced out of all his work:

“Now I submit that you cannot abandon emphasis on “the view that business corporations exist for the sole purpose of making profits for their stockholders” until such time as you are prepared to offer a clear and reasonably enforceable scheme of responsibilities to someone else” (Berle, 1932: 1367).

Many scholars cite this paragraph whenever they source Berle as a precursor for shareholder primacy. But what is often missed out or ignored is what he wrote in the paragraphs that immediately follow:

“Roughly speaking, there are between five and eight million stockholders in the country (the estimates vary); to which must be added a very large group of bondholders and many millions of individuals who have an interest in corporate securities through the medium

of life insurance companies and savings banks. This group, expanded to include their families and dependents, must directly affect not less than half of the population of the country, to say nothing of indirect results. When the fund and income stream upon which this group rely are irresponsibly dealt with a large portion of the group merely devolves on the community; and there is presented a staggering bill for relief, old age pensions, sickness-aid, and the like. Nothing is accomplished, either as a matter of law or of economics, merely by saying that the claim of this group ought not to be ‘emphasised.’ Either you have a system based on individual ownership of property or you do not. If not – and there are at the moment plenty of reasons why capitalism does not seem ideal – it becomes necessary to present a system (none has been presented) of law or government, or both, by which responsibility for control of national wealth and income is so apportioned and enforced that the community as a whole, or at least the great bulk of it, is properly taken care of. Otherwise the economic power now mobilized and massed under the corporate form, in the hands of a few thousand directors, and the few hundred individuals holding ‘control’ is simply handed over, weakly, to the present administrators with a pious wish that something nice will come out of it all” (Berle, 1932: 1367 – 1368).³⁵

As mentioned previously, *The Modern Corporation and Private Property* was published in 1932 and it can be seen as marking a transition in Berle’s thinking from an early phase to a middle phase. The publication of the book coincided with Berle’s entrance into the world of politics. In 1932, Governor Franklin Roosevelt “reached out to academics for assistance with policy positions early in his 1932 presidential campaign” and Berle was one of those recruited for “expertise on credit and corporations” (Bratton and Wachter, 2008: 109). Along with Raymond Moley, a government professor at Columbia, and Rexford Tugwell, an economics professor also from Columbia, they made up the core of what would be called Roosevelt’s ‘Brains Trust’ (Schwarz, 1987: 70 – 73).

Berle seemed to have sketched out his position even before he joined the group. In an open letter to Louis Brandeis, a prominent ‘New Freedom’ progressive at the time (Bratton and Wachter, 2008: 110) Berle advised:

³⁵ For detailed discussions and evaluations of the significance of the Berle-Dodd debate see Bratton and Wachter, 2008, 122-134 and Stewart, 1474- 1491.

“If the next phase is to be virtually a non-political economic government by mass industrial forces, possibly something can be done to make such government responsible, sensitive and actuated primarily by the necessity of serving the millions of little people whose lives it employs, whose savings it takes in guard, and whose materials of life it apparently has to provide” (Berle in Schwarz, 1987: 74).

When Berle joined the Brain Trust the American economy was entering the Great Depression. Prior to that it had experienced “a period of unprecedented wealth creation” (Berle and Means, 1991[1932]: 1023) unlike any other. In the decade following World War I – commonly referred to as the Roaring Twenties – the modern corporation had taken over the product and labour markets in all possible ways and its managers – termed by Berle as ‘Princes of Industry’ – had conquered the market for corporate control (Berle and Means, 1991[1932]: 1366 - 1367). As the 1920s came to a close, it was fair to say that the modern U.S. corporation and its managers were seated at the summit of the most powerful economy in the world: “Through the decade, profits rose over 80 percent as a whole, or twice as much as productivity” (Schlesinger, 1957: 66). In two generations since the Civil War, the great business magnates of the United States and their successors had created the modern corporation and this modern corporation had conquered the entire market. The U.S. President at the time, Herbert Hoover, was running the country on strong business principles being a self-made man and a wealthy former engineer and entrepreneur himself (Schlesinger, 1957).

An extremely large portion of America’s industrial assets were owned completely by these few hundred corporations and their reign was ever-growing. Additionally, an increasing dispersal of voting control moving into the hands of the public who invested was another noteworthy trend. This trend was clear and appeared non reversible until everything came to a crashing halt with the fall of the stock market in October 1929 followed by the Great Depression. At first, business leaders and government assumed that there would be a natural turnaround with

only very mild government intervention. But soon it became clear that this depression would be very different to the ones experienced in the last three decades of the nineteenth century.

Roosevelt delivered a campaign speech drafted by Berle and edited by his wife, Beatrice Berle, at the Commonwealth Club of San Francisco in September, 1932 (Bratton and Wachter, 2008). The speech represented a “philosophical statement of the candidate’s economic policy” and was not received well, but has since received a great deal of attention among political scientists, even making it into a list of the one hundred most important political speeches in American history (Bratton and Wachter, 2008: 110). The speech was titled *New Individualism* and the ‘new individuals’ referred to in the speech were ordinary citizens. It called for their rights to be protected – and Berle had in mind specifically their economic rights such as the right to make a living and the right to own property. The parties seen to be infringing on these rights were corporate managers, the “princes of property” (Berle, 1973: 69). Now it seemed that Berle was not as concerned about the shareholders – indicated in his paper, *Corporate Powers as Powers in Trust* – as much as he was about the rest of the public, reverting back to original points of discussion raised in his paper in 1921, *How Labour Could Control*.

The speech also called for a more dynamic partnership between the state and the modern corporation. He believed that corporate power had passed above and beyond the realm of the small private enterprise of the nineteenth century. It was time for corporate managers to become accountable and additionally assume responsibility for the public good. They needed to come together as industrial groups and work together towards a common end. And if any group failed to do so, the government would need to intervene with consequences (Berle, 1973: 69). The corporation could serve the people in this way. As long as the United States continued with its

laissez-fair policies, the Princes of Industry would be the sole determinants of how industry gains were to be distributed. Berle viewed this as a limitation on individualism:

“When nearly seventy per cent of American industry is concentrated in the hands of six hundred corporations; when not more than four or five thousand directors dominate this same block; when more than half of the population of the industrial east live or starve, depending on what this group does; when their lives, while they are working, are dominated by this group; when more than half the savings of the country are dominated by this same group; and when the flow of capital within the system is largely directed by not more than twenty great banks and banking houses – the individual man or woman has, in cold statistics, less than no chance at all” (Berle in Schwarz, 1987: 77).

At a time when the economic crisis seemed to call for new ways of thinking Berle was a “most persuasive thinker” articulating novel schemes for economic planning which he set out with the “technical vocabulary of corporation and public finance as well as historical precedents others had forgotten”. He came to be viewed as the Brain Trust’s “crafty lawyer, financial genius, and historian par excellence” (Schwarz, 1987: 73).

Now one of the reasons Berle came to question the shareholder primacy view was due to the separation of ownership and control. He believed that the stockholder, having “surrendered control over his wealth” had now become “a supplier of capital, a risk-taker pure and simple” (Berle and Means, 1991[1932]: 297). Ultimate responsibility and authority were attached to directors and those in “control” (Berle and Means, 1991[1932]: 297). It seemed to Berle that the new owners, i.e. shareholders, seemed to have exchanged control for liquidity. Here Berle takes liquidity to represent the compensation for the loss of effective corporate control. This kind of increased liquidity also brought with it corresponding changes. The dominance of a stock-market-based system gave rise to an ever increasing role for financial motives, financial actors and financial institutions. The latter was of great concern to Berle as it shone a light on the rising significance of the institutional investor. He viewed institutional investors as being very distant from industrial activities and divorced from any sense of responsibility towards the corporation.

Although Berle's observations regarding the separation of ownership and control have been widely referenced and discussed, lesser known are his remarks on the separation of ownership and responsibility. This is an important point because many scholars citing Berle for his discussions around managers possibly abusing their position of control argue that he was therefore consistently arguing for greater shareholder control. But Berle came to be very skeptical of shareholder control owing to the fact that outside shareholders had no responsibility for the enterprise itself. In *The Modern Corporation and Private Property* Berle observed:

“In place of actual physical properties over which the owner could exercise direction and for which he was responsible, the owner now holds a piece of paper representing a set of rights and expectations with respect to an enterprise” (Berle, 1991[1932]: 5).

Turning from middle Berle to his later writings, late Berle seemed to increasingly realize the theory of property rights no longer held the same position it had decades before. He returned to this point of absent responsibility on the part of outside shareholders in his later papers. For example, in *Modern Functions of the Corporate System*, he writes:

“For the fact is that purely passive property – that is property divorced from any responsibilities of ownership, whose values grows or diminishes in the owner's hands without any relationship to his risk-taking, work or effort-has outlived most of the economic justification that gave it birth. It must seek new philosophical as well as economic bases” (Berle, 1962: 448).

Upon concluding that “traditional theories of property no longer applied” to “the relation of stockholders in large corporations to the underlying production and wealth” Berle called for a new way of thinking with regard to ownership and passive property (Berle, 1962: 449). He further voiced his concerns, stating: “I find this failure to redescribe and rethink passive property frightening” (Berle, 1962: 449). Berle argues that stockholders of a corporation do not undertake any kind of risk equivalent to that which had previously been associated with ownership rights. Instead, he describes the purchase of stock much like “a bet between outsiders on its success or

failure – when it is not a blind bet on the ‘market’” (Berle, 1962: 445). He rehearses these ideas again in his 1965 paper *Property, Production and Revolution* where he writes:

“The purchaser of stock does not contribute savings to an enterprise, thus enabling it to increase its plant or operations. He does not take the “risk” of a new or increased economic operation; he merely estimates the chance of the corporation’s shares increasing in value” (Berle, 1965b: 16).

These concerns over the separation of ownership from responsibility only heightened when he observed the increasing concentration of stock ownership by institutional investors that began in the late 1960s. Berle noted that large numbers of shares were “not held by individuals, but by intermediate fiduciary institutions which in turn distribute the benefits of shareholding to participating individuals” (Berle, 1965b: 14). Berle identified that “shares nevertheless have become so desirable that they are now the dominant form of personal wealth-holding,” (Berle, 1965b: 13) and referring to pension funds, mutual funds and life insurance policies, he predicted (rather accurately) that “this form of stockholding is likely to become dominant in future years” (Berle, 1965b: 14).

Berle viewed the significance of this trend as being twofold: First, it greatly increased the “number of citizens who, to some degree, rely on the stockholding form of wealth” and second, it removed the “individual still further from connection with or impact on the management and administration of the productive corporations themselves” (Berle, 1965b: 14). In an interview in 1968, Berle pointed out further concerns:

“Surely the most spectacular development is the emergence of a new concentration of power countervailing that of corporate management. In recent years, stock has become more and more concentrated in the hands of institutional investors” (Dun’s Review, 1968 in Margotta (2010): 65).

Berle voiced concerns about the effect such a concentration of power would have on management's long-term strategies:

“It is a definite step backward... such a concentration of power is a very dangerous thing from the point of view both of the public and corporate management. Power is best exercised when it is close to reality. Corporate managements are much closer to reality than bank officers who sit in front of piles of paper with only figures to guide them. The banker owns even less of the corporation than the corporate official. He is merely acting as a fiduciary for other people's money. The way things are going, we will soon have an economy dominated by fiduciaries, who not only do not own the corporations they dominate but have little knowledge of their day-to-day affairs” (Dun's Review, 1968 in Margotta (2010): 65).

He further notes:

“Frankly, when it comes to doing right by the public, I have far more faith in management than I do in the institutions whose reputations are not dependent on the results of their work in a particular corporation. When institutions get into the management act, too often they are not wise enough to resist the temptation to make a fast stock market buck. Historically, banker control has not proven good either for a company or the economy” (Dun's Review, 1968 in Margotta (2010): 66).

It would seem then that to Berle the contribution made by a purchaser of stock to the enterprise was unclear. Continuing in this line of thinking Berle noted:

“Why have stockholders? What contribution do they make, entitling them to heirship of half the profits of the industrial system... Stockholders toil not; neither do they spin, to earn that reward. They are beneficiaries by position only. Justification for their inheritance must be sought outside classic economic reasoning” (Berle, 1965b: 16).

Most observers of the public corporation are likely to respond to Berle's rhetorical question above with the seemingly obvious answer, that shareholders provide equity capital. Interestingly, Berle pre-empted this by saying that a mature corporation would rarely seek capital from shareholders. Instead, mature corporations are mainly financed through retained earnings, i.e. part of the company's profits not distributed as dividends but re-invested into the company, but not through newly issued shares. He addresses this in the paper, *Property, Production and Revolution*:

“Both in direction and effect, this preoccupation of the Securities and Exchange Acts recognizes a new economic fact: that stock markets are no longer places of “investment” as the word was used by classical economists. Save to a marginal degree, they no longer allocate capital. They are mechanisms for liquidity” (Berle, 1965b: 15).

Berle had already raised this point in a previous paper, *Modern Functions of the Corporate System*, where he described the process of purchasing shares:

“When I buy AT&T or General Motors, I do not remotely “invest in” either concern. I have bought from Nym, who bought from Bardolph, who bought from Pistol, who bought through ten thousand predecessors in title from Falstaff, who got the stock when originally issued... By folklore habit we say the buyer of stock of AT&T or General Motors has ‘invested in’ these companies; but this is pure fiction” (Berle, 1962: 446).

Berle further pointed out that purchases and sales made on the New York and other stock exchanges “do not seriously affect the business operations of the companies whose shares are the subject of trading” (Berle, 1965b: 15) further adding that the “[I]mmense dollar values of stocks” bought and sold on a daily, monthly and yearly basis, “indeed hundreds of billions of dollars – do not, apparently, enter the stream of direct commercial or productive use” (Berle, 1965b: 15). It seemed to Berle that the sole contribution of the purchaser of stock was “the maintenance of liquidity for other shareholders who may wish to convert their holdings into cash” (Berle, 1965b: 16). It also important to note that Berle had little faith in the idea that equity prices in any way reflected the functioning of an efficient market: “the market arrives at a purely romantic estimate of what a share of General Motors or General Electric is worth. It imports all sorts of considerations, which have little to do with the company itself” (Berle, 1963: 32). This all stands in sharp contrast to the image created by those who believe that Berle was a tenacious supporter of the shareholder primacy theory throughout his writings.

In the later phase of his career Berle also continued to emphasize the potential value of the corporation to the community. Some critics may argue that Berle was merely toying with this

new concept in the final chapter of *The Modern Corporation and Private Property*. In truth, however, he carried this argument forward in to many of his later contributions. For example, writing in 1950, in a book titled, *The Future of Democratic Capitalism* he observed:

“In America today, the corporation has reached a position in which its operations have become essential to the life of the national community. Although the corporation is not an instrument or a form of government, its existence and continued function are relied on by government” (Berle, Ernst, Garrison, Thurman and Zimmern, 1950: 36).

Berle identified that the operations carried out by large corporations were often “essential to continued smooth functioning of economic life” and if anything were to negatively impact the corporation, “distress” at a general social level would follow (Berle et. al, 1950: 48). Going further in this book, Berle added:

“The difference between the large private corporation and its predecessor, the smaller enterprise, is yet undefined, but it is important. The latter is controlled considerably, if not entirely, by the ordinary relations of property in a free economy. The former has, almost without exception, moved into a position where it is subjected to limitations and controls of an essentially political nature. This development arises from the companion fact that the large corporation, having apparently become essential to the community, is relied on and, with present techniques, it cannot be dispensed with” (Berle et. al, 1950: 36).

As much as early Berle was concerned about managerialism in his later writings he started to believe that circumstances had altered to such an extent that managers could be expected to oftentimes act in the public interest. Berle believed that managers had to some considerable extent become ‘enlightened’, that they had developed a broader perspective on how corporations should be run due to the development of a ‘corporate conscience’. The main form of control which could guide or limit the economic and social action of the enormously powerful mid- century American corporations was for Berle the real, though undefined and tacit, philosophy of the men who compose them. He believed “the men who comprised [the] organization” to be “far more conscious of the organization itself” than they were of “charters,

stockholders, or title deed” (Berle et. al, 1950: 38). Owing to the fact that the main rules and decisions controlling a corporation’s actions were made internally, “that is, are made by the various governing groups of the corporation itself, rather than imposed by law” a simple change in thinking within these groups would be sufficient to alter the organisation’s nature and function” (Berle et. al, 1950: 38). Berle believed this could be an efficient way for the corporation to be effectively governed. In this sense the later Berle could be viewed as favouring attempts to enhance corporate culture rather than impose more formal processes of regulation:

“Corporations are composed of and managed by men. Each of the administrative group does have a conscience and thus consensus does influence corporate action... Managers have also absorbed the idea that corporations (for better or worse) are also held responsible by an appreciable sector of opinion for some at least of the social conditions proceeding from their operations – also that, if offensive, these conditions may bring into action the powerful machinery of the state” (Berle, 1965a: 36).

Berle defined the ‘public consensus’ as “the existence of a set of ideas, widely held by the community, and often by the organization itself and the men who direct it, that certain uses of power are ‘wrong,’ that is, contrary to the established interest and value system of the community” (Berle, 1959: 90). This public consensus was essentially ‘enforced’ on managers by means of the corporate conscience. In his paper, *Modern Functions of the Corporate System*, Berle (1962) argued that although public opinion “had little influence on the conduct of corporate management” in the past, “today it is crucial, and every management knows it” (Berle, 1962). He observed the following example:

“Within the past few years the heads of two of the nation’s largest life insurance companies resigned because they were thought to have transgressed, albeit without breach of law, standards of ethics to which public opinion held them accountable... The preventative effect of a public consensus on standards of conduct cannot be precisely measured. Undeniably it is great” (Berle, 1962: 438).

In an earlier paper, he noted:

“... they [management] are rather dependent on the point of view of men around them, of the political community, and on so much of public opinion as influences the group on whose approval they depend to hold office. The modern corporation is an institution capable of change, in much the same sense that a city or a political party is capable of change” (Berle et al, 1950: 40).

Berle believed managers to hold a “vested interest” and this interest was less to do with “immediate financial return than that of retaining the prestige and power which goes with high corporate office” (Berle et al, 1950: 38 – 39). If, in any given circumstances, managers have to choose between sacrificing money or prestige, Berle strongly believed that it would very probably be the former that would be sacrificed. Berle viewed a manager’s tenure of office as depending on three things: first, the record the corporation makes financially; second the general standing the particular office-holder and his fellows make for it in the community; and third, “[P]artly on the acceptability of his personality and ideas – his reputation, in a word- in the business and financial community whose adverse opinion could end his career” (Berle et al, 1950: 39). Considering this, then public opinion was extremely important to the control group. And it seemed evident that the corporate world had reached a time where both the media and political processes no longer tolerated negative results resulting from the pursuit of purely economic and competitive objectives (Berle, 1965a). Berle once again pointed out the influence and effect of the community, stating:

“It follows that a general change in ideas in the business community could change the senior personnel, and then change the functioning and, in a large measure, even the objectives – economic and social – of the corporation itself” (Berle et al, 1950: 39).

4.4. Echoes of Berle in Contemporary Debates on Progressive Corporate Governance

Over the decades Berle has been regarded as especially significant as an early and prominent advocate of shareholder primacy principles. But as laid out in the section above, Berle's ideas and discussions were much more complex than this characterisation would suggest. Moreover his views clearly developed significantly and responded to perceived transformations in the corporate system and the political and economic environment he was observing. It is unfortunate that there has been so much focus on his writings around shareholder primacy since this has resulted in many valuable insights having gone largely unnoticed. It is particularly interesting to note that some of Berle's points have been restated in current corporate governance debates by contemporary critics of shareholder primacy views – who are seemingly unaware of the link to Berle's thought. In this section I provide some illustrations.

Up until the early nineteenth century, most writers denoted private property as a unity involving “first the risking of previously collected wealth in profit-seeking enterprise; and, second, the ultimate management of and responsibility for that enterprise. But in the modern corporation, it seemed that “these two attributes of ownership no longer attach to the same individual or group” (Berle and Means, 1991[1932]: 297). Specifically the “owner” is viewed as merely holding “a piece of paper representing a set of rights and expectations with respect to an enterprise” (Berle and Means, 1991[1932]: 5). Berle believed that this kind of “passive property” had “outlived most of the economic justification that gave it birth” and so “new philosophical as well as economic bases” must be sought (Berle, 1962: 448). It seems evident here that Berle did not believe shareholders to be able to defend their claims to the corporation's profits through the arguments of ownership.

Lynn Stout (2002) puts forward an argument in a similar vein in her paper, *Bad and Not-So-Bad Arguments for Shareholder Primacy*. She considers the argument “that the public

corporation ‘belongs’ to its shareholders” as “the most common, and worst, of the standard arguments for shareholder primacy” and suggests it is “misleading to use the language of ownership to describe the relationship between a public firm and its shareholders” (Stout, 2002: 1190 - 1191). Arguing that lawyers are aware that shareholders do not own a corporation but instead own a type of corporate security commonly known as “stock” (Stout, 2002: 1191).

Robe³⁶ (2012) has also vehemently argued against the ownership principle underlying shareholder primacy stating:

“The first version of the fairytale [of shareholder primacy] runs like ‘shareholders own the firm so those who run the firm must obey the owners’ orders (they are their “agents”) and their purposes must be to maximize “shareholder value” *i.e.* today’s present value of the share price.’ Of course, as should be obvious to any lawyer at least half awake, shareholders do not own firms. They own shares. And owning shares does not make of them the firms’ owners in any way, shape or form” (Robe, 2012: 2).

Furthermore, just as Berle was extremely concerned about the separation of ownership and responsibility, Robe raises these issues too, arguing that creating shareholder value works against “one of the pillars of a ‘free market economy’” (Robe, 2012: 3):

“Just one ironical comment... in a ‘free market society’ an owner is responsible for his acts and things and for the damages they create. But as everybody knows, shareholders enjoy limited liability for the damages created in connection with the firm’s activity. Hence the genius of the shareholder supremacists: they treat shareholders as owners of the firm while leaving shareholders isolated from any liability or responsibility deriving from the firm’s activities. They advocate a governance system in which the ‘owners’ interests are paramount while these ‘owners’ are not responsible for the ‘thing’ they are deemed to own and the damages it can generate” (Robe, 2012: 3).

Over the course of the paper, Robe reiterates this by pointing out that ‘shareholders are not the managers’ “principals,” and so there is no “classic agency problem,” (Robe, 2012: 4). Instead, he argues, the corporation is “an autonomous legal person” so managers are not the shareholder’s agents but act “on behalf of the corporation and not of the shareholders”. There is a significant

³⁶ Interestingly, Robe believes Stout to be “excessively generous” in her criticisms towards shareholder primacy and mentions it in the abstract of this particular paper (Robe, 2012).

difference between the shareholders' interests and those of the corporation precisely "because shareholders have limited liability" (Robe, 2012: 4). The creation of such "irresponsible owners" has forced the "taking of excessive risks and the creation of massive negative externalities" (Robe, 2012: 4).

With regard to Berle's concerns about the rise of institutional investor some of these same reservations have been mentioned in another work by Lynn Stout (2012) titled *The Shareholder Value Myth*. She draws our attention to the ever growing presence of institutional investors and the resultant hyperactive stock market. In order to have a better understanding of the scale of operation of current financial markets she gives the following figures: In 1960, the annual share turnover for firms listed on the New York Stock Exchange (NYSE) was merely 12 percent. This implied an average holding period of around eight years. By 1987, however, this figure had risen to 73 percent. And by 2010, the same figure had grown to an astonishing 300 percent *annually* which in turn implied an average holding period of only around four months. Stout (2012) explains that part of the reason for the expansion is the rapid deregulation of the market and advances in information technology which have made stock trading much cheaper and easier than it used to be. In previous times, someone who wanted to trade would need to call a broker, pay a fixed commission and then possibly pay a heavy transfer tax as well. Now, however, "trading has become so inexpensive that some funds specialize in computerized 'flash trading' strategies in which shares are bought and held for mere seconds before being sold again" (Stout, 2012: 66).

However, there is an additional consideration she draws our attention to when discussing the causes of the spike in short-term trading and that is the growing role of the institutional investor. These include mutual funds, pension funds, and hedge funds. Such funds most often

invest on behalf of individuals with long-term goals. But the drawback lies in the fact that “these individual clients tend to judge the fund managers to whom they have outsourced their investing decisions based on their most recent investing records” (Stout, 2012: 67). This provides an explanation as to why many actively-managed mutual funds have a turnover of 100 percent or more when it comes to their annual equity portfolios. In fact, hedge funds that choose to make long-term investments in order to improve corporate performance don’t usually hold shares for more than two years (Stout, 2012). The latter would no doubt have a knock-on effect when it’s time to decide what kind of management strategies they would choose to support. In these kinds of instances, for example, a mutual fund manager would find it hard to resist strategies that would raise share prices for just the right period of time in order for her to sell and move on to the next stock that she foresees a short-term bump in its stock value. Stout writes:

“In the words of corporate lawyer Martin Lipton, directors must decide ‘whether the long-term interests of the nation’s corporate system and economy should be jeopardized in order to benefit speculators interested not in the vitality and continued existence of the business enterprises in which they have bought shares, but only in a quick profit on the sale of those shares?’” (Stout, 2012: 67)

These comments are very much in line with the concerns we have seen that Berle expressed concerning the role of institutional investors.

The shareholder primacy model of governance sought to align managers and shareholders’ interests but it would seem evident through the various corporate crises and collapses witnessed over the last few decades that whatever their efforts may have been, something is not working. But rather than taking a closer look at this model of governance, the US and UK have both instead invested time and resources into another means of curbing managers who seem ‘out of control’: an increase in the formalization of corporate governance codes has taken place. This was especially the case following the corporate fraud and resultant

collapse in organisations such as Enron and Worldcom in the early 2000s. Where corporations once had significant freedom (from the perspective of regulation) regarding benchmarks of corporate governance practice, they soon had to abide by formal rules.

Despite the fact that over the last century, corporate law and securities regulation has become more complex and sophisticated and the formal requirements on corporations and their participants has increased, we still continue to witness a wide range of corporate collapses and misconduct. To mention just a few famous recent cases - in April 2010, the Deepwater Horizon explosion in the Gulf of Mexico, caused by BP's negligence, resulted in the deaths of 11 people and 4.9m barrels of oil being poured out into the ocean; JP Morgan's senior management denying the board of directors access to information led to their portfolio's being overvalued and resulted in a fines of \$920m and more recently still VW falsifying their emissions tests. Some contemporary corporate governance literature have adopted a view where emphasis is placed on enhancing corporate culture over formal regulation - which seems to echo Berle's thought to some extent.

The debate over whether to enhance corporate culture rather than introduce further formal regulations has been ongoing since the early 2000s. For example, Jeffrey Sonnenfeld (2002) stated that corporate scandals occurred not because of bad corporate governance per se but rather due to governance abuse. He further highlighted the 'importance of the human element' when discussing directive boards (Sonnenfeld, 2002: 4) stating:

“So if following good-governance regulatory recipes doesn't produce good boards, what does? The key isn't structural, it's social... What distinguishes exemplary boards is that they are robust, effective social systems” (Sonnenfeld, 2002).

Continuing in this line of thinking, Ribstein (2005) outlined that collapses like that of Enron and WorldCom were caused by a “new breed” of ruthless company executives. They were

the exception rather than the rule and he believed that such individuals would cause havoc within organizations irrespective of the formal controls implemented to prevent such abuse. Accordingly, Ribstein believed that it was best to improve the *actual culture within the corporation*. In this way, anyone behaving differently would be deemed inconsistent with the best interests of the corporation and would not be tolerated. He deemed this to be a better method than bypassing corporate culture altogether and choosing to focus instead on formal regulation.

One possible means of changing senior executive's attitudes is by changing the norms within corporate culture. 'Stewardship theory' is yet to attract the attention of legal commentators but would arguably be one that Berle would favour. In Thomas Clarke's (2004) work, *Theories of Corporate Governance*, stewardship theory acknowledges a wider range of human motives which include orientations towards altruism, achievement and the commitment towards work that is meaningful.

In another paper by Ribstein (2005) that reviews the effectiveness and ineffectiveness of formal regulation, it was observed:

"A consequence of stewardship theory is that it is argued there is not the same imperative to separate the roles of chairman and chief executive in the corporation; rather it is considered favourable that boards have a majority of specialist executive directors rather than a majority of independent directors. According to stewardship theorists, this is the case as the corporation's directors and executives 'identify' with the corporation, meaning directors and executives are naturally drawn to pursue what is best for the corporation, and to build corporate prestige rather than focusing on building personal wealth" (Ribstein, 2005: 32).

Additionally, McConvil's (2006) observes:

"Bad apples, as opposed to bad corporate governance structures, are the major source of corporate collapses, and there will always be bad apples who find their way into public corporations, regardless of whether the laws of corporate governance take up 5 pages or 500 pages – just as there will always be murderers regardless of the penalty we impose for homicide offences" (McConvil, 2006).

Other areas of the contemporary corporate governance literature have also partially echoed Berle's arguments about there being a public consensus keeping corporations in check. In a paper titled "Managers' and Investors' Responses to Media Exposure of Board Ineffectiveness" Joe, Louis and Robinson (2009) examine the influence of media exposure on board ineffectiveness. The authors analyse the impact of the press on the behavior of various economic agents. The paper strongly puts forward the view that media exposure of board effectiveness or ineffectiveness affects not only corporate governance but also investor trading behavior.

Dyck and Zyngales (2002) review various cases where the media has been influential in shaping corporate policy. The authors believe the media can play a role in corporate governance by affecting a company's reputation in at least a couple of ways: First, media attention had the potential to drive politicians to introduce corporate law reforms owing to the belief that "inaction would hurt their future political careers or shame them" (Dyck and Zyngales, 2002: 4). Second, and perhaps most relevant to Berle, Dyck and Zyngales (2002) argued that media attention could not only affect a manager's reputation in the eyes of shareholders and employees but also in the eyes of society at large. In this way, the media can be seen as helping to shape the public image of those running the corporation and in doing so, pressure them to behave according to what is viewed as acceptable within society.

They use the interesting case in 1988 where all the major U.S. networks broadcast a tape where hundreds of dolphins were killed during the process of fishing for tuna as an example. The Panamanian tuna boat brought on much public outrage and building on this, the Earth Island Institute, Greenpeace, and the Humane Society launched a campaign to boycott tuna. Restaurant chains and school boards followed suit taking tuna off the menu until it was 'dolphin safe,' i.e. fished with nets that weren't killing dolphins (Dyck and Zyngales, 2002). Then in 1990, Heinz

announced that it would only be selling tuna that was dolphin-safe. Within hours of this announcement another of the two largest tuna producers made a similar commitment.

A further example occurred with the passage of the Pollution Act in 1990 whereby firms were required to disclose the amount released of each listed chemical by facility annually. Environmental groups like the Natural Resource Defense Council and the National Wildlife Federation collected the information and passed it on to the press in the form of publications such as *The Who's Who of Toxic Polluters* and *The Toxic 500*. These were then selectively picked up on by print media as well as the broadcasting stations. The resulting impact of the public opinion pressure created by all this information was huge. Firms high on the list sought to get off the top ten as fast as possible and listed it as a point of corporate strategy. One firm, Allied, for example had “more than tripled its expenditures on environmental control facilities and voluntary cleanup following the release of this information” (Dyck and Zyngales, 2002: 8). Interestingly, this was all in the absence of any legal requirement.

In his book, *Fixing the Game*, Roger Martin (2011) raised the interesting (and significant point) that focusing on a corporation's stock price can drive directors and executives to become preoccupied with what Martin dubs as the “expectations market” instead of focusing on real corporate performance such as sales, revenue, etc. We can see a direct link here to Berle's argument that ‘owners’ were becoming devoid of any responsibility towards the corporation and its business activities. Stock-based compensation schemes has created an unhealthy alliance between short-term institutional investors such as activist hedge funds and mutual funds and

executives whose compensation targets drive them to focus almost obsessively on the short term expectations of the stock market.³⁷

4.5 Elements of A New Governance Model Inspired by Berle

It is of course sometimes suggested that a more socially responsible form of capitalism can be promoted by reforming corporate governance structures. For example political parties from time to time suggest policies that might tackle excessive executive pay in the hope this could usher in a more responsible and better capitalism.³⁸ Such policy proposals have not only been advanced but adopted. Firms in the UK for example are now required by law to publish a single remuneration figure for the CEO in their annual reports. In essence, this means that shareholders have more information regarding what the chief executive is earning and this enables them to vote in a more informed manner on such matters. Meanwhile in 2015, the Securities and Exchange Commission (SEC) set about enforcing a rule that requires companies to disclose the pay ratio of their CEOs as well as the median pay of their workforce.

The popularity of these kinds of policy proposals is understandable: they simultaneously encourage restraint when it comes to executive pay while also empowering shareholders, but ultimately the impacts of such reforms are likely to be limited. From the kind of perspective that Berle finally arrives at we can see that for him where capitalism becomes irresponsible it does so

³⁷ Examples of this kind of short termism are legion, Stout considers the case of Kraft and their plan to split itself into two companies under pressure from hedge fund shareholders (Stout, 2012). This split is unlikely to cause any dramatic changes in the corporation's manufacturing process or marketing strategies but this action was sought owing to the hedge-fund shareholders' and stock-compensated executives' belief that they "...can't rev its shares by mixing together higher-growth brands such as Cadbury chocolate with refrigerator staples such as Oscar Mayer lunch meats and Jell-O desserts" (Chon et al., 2011) and hope that by splitting the organization in two, they will be 'unlocking shareholder value'.

³⁸ See press releases issued by BBC, 2011 and 2012 and also, Channel4 News 2012.

not as the result of excessive executive pay but in part through the pursuit of incorrect shareholder orientated governance objectives. For example the crisis of 2008 did not result from directors not doing what shareholders wanted but on the contrary because they did so. As illustrated previously, it is the aligning of shareholder and manager's interests that have brought about such a damaging focus on short termism. As Talbot (2013) observes:

“Shareholders are not the bulwark against financialisation and short-termism; they are the engine of it. Executive pay is a convenient distraction. The key issue is what executives do for their pay. What they do now is to serve shareholders' interests. What they should be doing is to serve in the public interest” (Talbot, 2013: 220).

As reviewed earlier, the idea that corporations ought to serve the public interest was a belief that Berle strongly held to, which is just another example of how he further anticipated some of the problems now facing us in the 21st Century. In *Power without Property*, Berle wrote:

“If we were building the American economic system anew, we might wonder whether the present system of stockholders' votes was the best way, or even a good way, of choosing managers or of locating power. It continues chiefly because no one has come up with a better scheme” (Berle, 1959: 107).

Berle, although often viewed as the grandfather of shareholder primacy, in fact believed that in order for the corporation to fulfill its role in promoting the public interest the sectional interests of shareholders would need to be given much less prominence. If his ideas were not rooted in shareholder primacy and the shareholder primacy model of corporate governance is not in line with the broad sweep of his thinking then an important question that emerges is what kind of contemporary interventions would be more in line with his overall orientation?

While it is beyond the scope of the current research to spell out in detail a model of corporate governance consistent with the principles Berle sets out in his later work it is possible to discuss a few illustrative reconceptualisations and reforms that could be seen as consistent with aspects of his thinking. One suggestion is reconceptualising the corporation so as to recognize the legitimacy of a broader range of objectives and linked to this might be a recasting

of the way directors see themselves and their assessment of professional achievement. Another would be to enhance the rights of employees and give them more prominent roles in corporate governance.

The shareholder primacy model of governance promotes a very simplified and highly quantitative account of the corporation. The corporation is reduced to a single purpose which is to maximize shareholder wealth. In this way, its success or failure can be measured on a purely quantitative level. It is quite evident that Berle believed that there was much more to running a corporation. He viewed the corporation in a holistic way. Many of Berle's discussions recognise that the corporation was an institution that had undergone and was continuing to experience tremendous change. The corporation had evolved into an entirely new and enormously significant social institution and Berle appreciated that its actions would have a great impact on the community at large along a range of different dimensions. This could be the reason why he strongly argued for the need to reconceptualise the corporation in the final chapter of *The Modern Corporation and Private Property*.

Some contemporary writers develop similar arguments about the need for a thoroughgoing reconceptualisation of the corporation. Writing in *Ethics and Excellence*, Robert C. Solomon for example writes:

“What makes a corporation efficient or inefficient is not a series of well-oiled mechanical operations but the working interrelationships, the coordination and rivalries, the team spirit and morale of the many people who work there and are in turn shaped and defined by the corporation. So, too, what drives a corporation is not some mysterious abstraction called “the profit motive.” It is the collective will and ambitions of its employees, few of whom work for a profit in any obvious sense. Employees of a corporation do what they must to be part of a community, to perform their jobs, and to earn both the respect of others and self-respect. To understand how corporations work (and don't work) is to understand the social psychology of communities, not the logic of a flowchart or the organizational workings of a cumbersome machine” (Solomon in Buchholz, 2012: 222).

Buchholz (2012) puts forward a similar argument, stating that:

“From a pragmatic perspective... the corporation is a community and the individuals who are in such an organization are what they are in part because of their membership in the organization, while the organization is what it is because of the people who choose to become part of the organization” (Buchholz, 2012: 221).

According to Buchholz the current context is one calling out for the development of new relationships between employees and employers that will encourage the corporation to function as a true community, recognizing individual human beings who:

“cannot be dismembered to become a diversity of cogs in a corporate machine, but who can, in their individuality, function as diverse centers of creativity in a unified corporate community. It is the corporate community as a whole that is responsible for the success of the organization in the larger society” (Buchholz, 2012: 227).

Buchholz continues by extending this line of thinking to the corporation’s connection to society as a whole, echoing Berle’s own ideas on the subject: “Reduction of the corporation to a single purpose in society fails to recognize that the corporation is a multipurpose organization that has multiple responsibilities in society” (Buchholz, 2012, pp. 227).

Berle recognized that the corporation is guided by the people who are a part of the organization and the moral agency located within these individuals. This is evident through his belief in the “corporate consciousness” reminding us that corporations are composed of men and women. Understanding the corporation as a complex institution with many constituent elements and numerous impacts means that any kind of moral responsibility and accountability only makes sense when it is applied to these individuals. The corporation ought not to be reified, on its own it does not make decisions, is not a moral entity and has neither a conscience or feelings of moral obligation. It is the people that run the corporation, who comprise its workforce that act intentionally, who make decisions and are morally responsible for their decisions as well as actions.

If corporate executives are to take a broader perspective then it is apparent that there needs to be some sort of ideological shift, one that occurs at a societal and very possibly a political level too. As it presently stands, the company has come to be viewed as an entity that largely functions for the benefit of one group, shareholders, too often to the detriment of other groups such as employees, local communities and consumers. If we are to consider a governance model in the spirit of Berle's work then it would call on those managing the corporation to recognize interests beyond those that shareholders have.

The role of the corporate executive has been shaped in recent years by the influence of the shareholder primacy perspective. At present profit maximization and maximizing shareholder value is promoted as the standard by which managerial achievement is to be judged. Goals such as long-termism, corporate social responsibility and good industrial relations are not as highly prized (Talbot, 2013). Enhancing the value of the corporation as registered in its current share price is seen as the most valued achievement of them all and is therefore the most consistently pursued. In this way, the multiple purposes of a corporation are often lost sight of owing to management's quest for profit.

Berle highlighted the growing ineffectiveness of the profit motive in *The Modern Corporation and Private Property* and pointed out that ultimately it does not reach the most important individuals, vital to the organisation:

“... we have already seen how the profit motive has become distorted in the modern corporation. To the extent that profits induce the risking of capital by investors, they play their customary role. But if the courts, following the traditional logic of property, seek to insure that all profits reach or be held for the security owners, they prevent profits from reaching the very group of men whose action is most important to the efficient conduct of enterprise” (Berle and Means, 1991, [1932]: 307).

In current times, directors are recognized and rewarded in various forms of remuneration and promotion. The performance related pay packages available to senior management have encouraged a reckless pursuit of a narrow set of goals. Remuneration packages for top management in the UK as well as the USA have increased extraordinarily over the last thirty years but the number of corporate failures have also increased alongside it. It is not just that the number of corporate scandals and failures have increased over recent years but so too has their scale. Observing these corporate debacles we can hardly ignore the huge financial and social costs involved. Some form of radical reform is required if we are to shift focus to the pursuit of progressive goals such as product development, community interests and employee contentment to name a few. Talbot (2013) observes that radical reform is necessary if we are to successfully ‘reconceptualise share value as just one part of a director’s remit’ (Talbot, 2013: 225). In this context, substantial reform would be required so as to ensure that directors come to judge their own professional achievements on the basis of advancing a set of progressive goals. An example of a reform that could be considered is highlighted in her book, *Progressive Corporate Governance for the 21st Century*, where Talbot (2013) points towards the work of Nadar, Green and Seligman who, in the 1970s, suggested that directors should operate as ‘public directors’ (Nadar et al., in Talbot, 2013: 225) with duties as public fiduciaries. This could be an excellent starting point as it would involve directors having to make socially responsible decisions and to act in the interest of the public. Talbot writes:

“In so doing the corporation could be moderated by the state in order properly to realize what it really is, a public institution with public responsibilities that affects employees, consumers, neighbouring communities and the environment, as well as shareholders” (Talbot, 2013: 225 – 226).

In the UK she notes that amending Section 172 of the Companies Act 2006 would be another move forward. At present, a company’s success is defined by whatever benefits shareholders. A

progressive move would be to give more of a balance and take into consideration the interests of other stakeholders such as employees, consumers and the wider community. It could then be possible to look into the creation of a *progressive* board.

It is sometimes suggested that encouraging employees to become shareholders of the company in which they work is a progressive step since it helps align the interests of employees and shareholders. One of the dominant features of modern corporate governance has been the strategy to make individuals act as if their interests matched those of shareholders. It may have worked with directors by means of share options but this may not necessarily mean that employees would follow suit. Additionally, it has been evident that aligning these interests may not have been the best development from the perspective of the wider community. Employees face far greater risks from corporate failure as their entire livelihood depends on the longevity of the company. The sums involved from any share holdings is most unlikely to override their interests as employees of the enterprise. Talbot (2013) argues that progressive governance should represent employees in more direct ways. If progressive corporate governance is described as an environment where the interests of the people as a whole are promoted, it is imperative that the interests of labour become a central focus within corporate governance. It is worth mentioning that the level of importance placed on short term profit maximization by a shareholder may not – and most probably will not – match the employee’s list of priorities. Perhaps an employee committee given the responsibility of purely representing the interests of the employees rather than the company as a whole would be a good starting point.

It is worth mentioning one further reform that might prove extremely progressive namely the reconceptualization of company law as public law. Under the current voting process, shareholders hold the final say on whether a director is made accountable for failing to fulfil their

duties. If we work to disempower shareholders then the question remains as how directors would be accountable. It has to come from another source. Talbot (2013) puts forward the suggestion this could be a government body, responsible for overseeing the proper governance of public companies under public law (Talbot, 2013). Private law is responsible for governing the relationships between private individuals whereby the state is very much excluded. Public law, on the other hand, is charged with overseeing the exercise of power by public bodies. It is evident that the largest corporations have reached a size and reach that makes their private status questionable. If company law were to become public law, the implementation of socially responsible standards could be more easily introduced. Furthermore, Talbot suggests reconceptualising company law as public law would also enable action to be taken against directors if they were found to be acting in breach of their duties or going beyond their authority. This kind of reform would ensure that there would be an alternative source of authority to shareholders, namely a government body, who would have the responsibility of ensuring that corporations follow proper governance with progressive goals.

4.6. Concluding Remarks

This chapter has sought to delve further into Berle's discussions regarding shareholder primacy as an effective mode of governance. It has been established that although Berle early on voiced some significant support for prioritizing the interests of shareholders this was done in a very specific context. This idea was forwarded in a context where Berle hoped and anticipated that the constitution of the shareholding class would be altered very substantially and where the prospects for meaningful political structural change seemed limited. In *The Modern Corporation*

and Private Property, contrary to what many commentators suggest, Berle successfully challenged the notion that corporations should operate for the benefit of shareholders and felt that the political environment was such that a more substantial refocusing of the priorities of the corporation was possible. Berle wanted the community at large to benefit from the presence of the corporation therefore he called for it to be conceptualized in a different way and ultimately oriented to the public interest. He argued that corporations could be encouraged to operate in the interests of the community and did not have to be orientated towards the interests of shareholders alone.

Following *The Modern Corporation and Private Property*, Berle voiced many concerns regarding the shareholder primacy model. The separation of owners from the creative decision-making process but also from any form of responsibility was of great concern to Berle. In his later work Berle came to adopt a more favourable view of managers, believing that the political and economic conditions had evolved in such a way that managers could guide the corporation in a way that could further the general public interest.

Berle's general framework of analysis can be seen as being at odds with the kind of theoretical frameworks and assumptions used to defend the contemporary emphasis on shareholder primacy principles. In fact we have seen that Berle anticipated many of the criticisms that are now regularly levelled against the shareholder primacy model. Some of Berle's writings have also been seen to anticipate certain of the more progressive contemporary commentaries and proposals in the field corporate governance.

5. CONCLUSION

One objective of the current dissertation has been to demonstrate the importance of historical sensitivity when approaching questions concerning the nature and governance of the corporation. The accounts of the corporation provided by many mainstream economists are largely ahistorical in nature. Many mainstream scholars display a remarkable disregard for historical context. For example, the contractual accounts of the firm and the corporation that underpin the shareholder primacy perspective have been shown to be naïve if considered as attempted historical explanations of the nature and evolution of the corporation.³⁹ These social institutions are crucially important and complex phenomena and these conventional theories do not offer compelling explanations of their emergence or current functioning.

This dissertation has focused on Adolf Berle and demonstrated that his approach stands in stark contrast to the largely ahistorical approach adopted by mainstream economists. Berle takes substantial care to consider the historical evolution of the corporation in the US context and his theorization of the corporation recognizes the changing nature of the entity he focused upon. For Berle the corporation was in no sense fixed but an institution that was evolving rapidly and subject to significant change and situated within a broader social setting that was also characterized by substantial change. For example, as part of his analysis of the corporation he was careful to discuss broader issues related to private property. Berle noted how the enterprise was increasingly no longer owned by individuals involved in day to day management and decision-making processes. His discussions of the issue of the separation of ownership from

³⁹ See Ireland, 2003, for a careful discussion of the various historical problems associated with the contractual account of the corporation.

control highlight that the very meaning of ‘ownership’ had changed and he insisted that this had to be recognized if an adequate understanding of the emerging corporate system was to be developed. Berle’s sensitivity to history and the need to ensure that our categories keep pace with the changing systems being studied are features of his work from early on right the way through to his last contributions. In one of his later books *Power without Property* Berle highlights the importance of not becoming trapped by out of date categories. Under the section heading “The Changing Picture of Capital” he wrote:

“We live under a system described in obsolete terms. We have come to believe our own repeated declarations that our society is based on individual initiative – whereas, in fact, most of it is no more individual than an infantry division. We assume that our economic system is based on “private property”. Yet most industrial property is no more private than a seat in a subway train, and indeed it is questionable whether much of it can be called “property” at all” (Berle, 1959: 27).

A further aim of the dissertation has been to situate Berle’s contributions within broader developments in institutional and evolutionary approaches. The argument developed especially in the first main part of the dissertation is that Berle needs to be understood as having been substantially influenced by earlier institutional writings, particularly those of Thorstein Veblen. The kind of fine grained historical analysis of the emergence of the corporate form that Veblen provides is to a large extent taken over and developed further by Berle. Chapter 2 discussed these themes in detail showing similarities in both methodological approach and in their respective substantive analyses of the emerging corporate system. This is not to suggest that Berle was some straightforward and uncritical follower of Veblen. There are significant differences between Berle and Veblen especially regarding their views on the possibility of significant policy interventions effectively promoting the public good. Nevertheless, in terms of methodological approach and orientation this dissertation supports those who note that there are important correspondences between Veblen and Berle. Furthermore unless these links are

appreciated it is easy to exaggerate the connections between Berle and modern shareholder primacy perspectives on corporate governance. Once the similarities between Veblen and Berle are fully understood then the methodological distance between Berle and the kinds of theories that are most typically used to support contemporary shareholder primacy norms can be recognized.

This dissertation has also sought to demonstrate that Berle was prepared to address fundamental questions about the nature of the modern corporation and its status and was interested in clarifying the role that the law played in the constitution of the corporation. Berle's willingness to address these fundamental issues has been brought out in this dissertation by comparing certain of his writings with a recent philosophically informed account of the nature of the corporation developed by Tony Lawson. The argument developed in Chapter 3 is not that Berle adopted anything like the explicitly ontological approach that Lawson advances as he outlines his own community based account of the corporation. Rather the argument that I put forward is that Berle was at least prepared to raise certain fundamental questions concerning the essential nature of the corporation and the legal framework underpinning its foundations. These foundational questions are often not considered at all in modern conventional economics approaches. The comparison outlined in Chapter 3 shows that there is much to be gained by addressing these basic ontological issues and suggests contemporary corporate governance could benefit significantly if it were to take an ontological turn.

Another major objective of the dissertation has been to contextualize Berle's views on the role of shareholders and their significance for regulating the corporation. In view of his famous exchange with Merrick Dodd in 1932 Berle has often been identified as the original defender of shareholder wealth maximization in corporate governance. It was shown in Chapter 4 that such

an interpretation is highly partial and ultimately misleading. Even Berle's early position that does indeed support the protection of and prioritizes shareholder interests needs to be considered alongside his anticipation of very significant changes in the make-up of the shareholding class. Moreover it was also shown that Berle's initial position soon gave way to views that very much saw shareholders' interests as being of altogether more limited significance. There is, of course, some continuity in Berle's views but there is also substantial change. Berle's writings spanned over forty years and during this period the American economy underwent tremendous change and Berle's thinking about the corporation and the role of shareholders often responded to these changes.

Many scholars have isolated particular elements of Berle's writings, removed them from context, and attempted to piece together his discussions and arguments in a manner that makes them consistent with contemporary views. This dissertation suggests that there are serious problems with such approaches. History of thought done in this way is problematic for at least a couple of reasons. One problem is that such exercises are prone to misinterpret the target author's ideas and contribution with the true meaning of passages and whole phases of argumentation being lost when taken out of context. Second, many authors, like everyone else, are likely to change their points of view over time and in seeking a single consistent perspective that an author develops over time many subtle changes of emphasis and focus are likely to be downplayed or ignored entirely. In the context of the reception of Berle's work the result of taking small extracts from his work and stringing them together for a specific interpretation has been to attribute to Berle a view that is more in line with contemporary shareholder primacy arguments than is credible once the context and the full range of his relevant arguments are

considered.⁴⁰ If we are to truly appreciate the value of Berle's contributions a method for exploring the history of his ideas is required that values context and searches for both continuity and change in his views.

A further and final objective of the dissertation has been to demonstrate the contemporary relevance of Berle's work at various levels. At a methodological level Berle provides numerous powerful examples of how historically sensitive research can be undertaken. When discussing different facets of the corporation Berle takes into consideration its historical evolution and the changing current context it faces. His arguments around the separation of ownership and control are one example of this. Secondly, on a theoretical level, Berle does not shy away from asking fundamental theoretical questions such as how are corporations constituted and do they represent real as opposed to fictional entities? Thirdly Berle's work still holds much relevance at a practical level. As shown in Chapter 4, it would seem that many of the suggestions associated with progressive approaches to corporate governance have roots in Berle's work.

The various aspects of Berle's work that have been considered in this dissertation suggest that far from being a figure of purely historical interest Berle retains considerable significance for us today. His methodological approach and substantive theorizing provide those seeking to

⁴⁰ Using concepts introduced by Tony Lawson we can note that some of the history of thought literature on Berle has fallen into a couple of related fallacies. Lawson argues that the notion "that small extracts of an author can always be understood in isolation" is the "fallacy of context-independent meaning" (Lawson, 2015c: 995). Meanwhile he describes "any supposition that an author's intentions can always be usefully unearthed by arbitrarily stringing together extracts from different sources possibly appearing years apart as the fallacy of presumed fixity of meaning" (Lawson, 2015c: 995). Lawson acknowledges that in some contributions the aim may be to simply demonstrate that an author has at some point made a specific claim or used specific categories, in which case identifying selected extracts he concedes could be informative. The need to avoid both the noted fallacies occurs, Lawson suggests, when "the goal is to determine an overall position of an author, at least on a certain set of issues" (Lawson, 2015c: 995). It is possible that on certain aspects an author might actually maintain a consistent position over a considerable length of time. However, even in such a scenario demonstrating the continuity is an exercise that is quite different from merely joining numerous isolated snippets together without further argument.

develop a deeper understanding of the contemporary corporation and question if and how the corporation can be controlled in a manner that will assist in improving the lives of all members of the community with both inspiration and a wealth of insights.

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