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Models of Corporate Conduct: From the Government Dominated Corporation to the Corporate Dominated Government

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Models of Corporate Conduct: From the Government Dominated Corporation to the Corporate Dominated Government

I. INTRODUCTION

Since 1932 there has been scholarly discussion concerning the proper role of the private corporation in society and specifically whether or not the private business entity has social responsibilities.1 In recent years there has been a resurgence of interest in this issue with a number of commentators presenting divergent...
views. A comparison of the early commentators with those of the present day shows similar concerns but differences in emphasis because of changing times. More importantly, the disagreement among the scholars can best be explained and understood by first examining the perspectives from which they launch their attack.

If the matter is viewed purely as a question of the shareholder's proprietary interest in the corporation, one result will of course be dictated. Casting the issue in terms of the best interest of society will obviously lead to a different resolution. The various interests which must be considered in analyzing the effect and proper role of the modern business corporation are numerous. The interests of the shareholder are two-fold, and these interests can either coexist or exist as alternatives. First, the shareholder has a proprietary or ownership interest in the business, which may well include a desire for active participation in management; second, the shareholder has an investor interest which involves a desire for capital appreciation or income based on a more passive investment. A second interest group to be considered is the business employees; at issue here is the extent to which corporate decision-making should consider their particular problems. A third area of concern intrinsic to the corporate arena is that of the corporation as a distinct entity involving a combination of all of the various interests.

External to the corporate structure are other interests which must be considered. Business customers—whether they be other corporate entities or members of the general consuming public—require corporate management to consider such areas as product safety and other consumer-oriented matters. Depending, of course, on the size of the corporation, all of society is at least collaterally affected by corporate conduct. The fact that the largest

2. One commentator has attempted to break down current analysis into nine species of corporate reform: (1) widespread governmental involvement in the decisionmaking process of large corporations; (2) governmental regulation and taxation of corporate conduct; (3) basic recognition of a free enterprise system with governmental control in certain limited areas of corporate conduct; (4) protection of small business through the antitrust laws and Small Business Administration; (5) increased disclosure to protect investors; (6) increased shareholder democracy; (7) "minoritarianism"—protecting the minority shareholder against oppression by the majority; (8) all corporate decisions must be arrived at by a consensus of all individuals affected by the outcome; and (9) ensuring management accountability. Manning, Thinking Straight About Corporate Law Reform, 41 LAW & CONTEMP. PROB., Summer, 1977, at 3. See note 1 supra.


public issue companies have more wealth than the majority of the world's nations is clear evidence of their impact on American society as a whole. In addition to the expansive effects of the large corporation, the by-products of doing business, such as environmental pollution, will directly affect members of the community who have no other relationship to the business enterprise than physical proximity. Accordingly, much that has been said will also apply—albeit on a smaller scale—to medium sized and closely held entities.

In one way or another all of the foregoing interests have to be considered when examining the proper role of a corporation. In analyzing each of the major proposals for corporate reform, it is necessary to keep in mind the bias of the proposers and identify the interest group to which they are most sympathetic. The method of implementation as well as the general substance of the proposal or regulation suggested must be examined.

Corporate chartering statutes are concerned with protecting the interests of the shareholder-proprietor. Federal and state securities legislation is directed toward protecting the interests of the shareholder-investor. However, it may be necessary to look beyond these methods of controlling corporate management in order to place the regulation of the corporation in proper perspective. For example, there are independent regulatory schemes for labor, environmental impact, undue participation in the political process, and preservation of the free enterprise system through the breaking up of monopolies and contracts in restraint of trade. Additionally, some industries have been viewed as requiring even more specialized regulation—for example banks, investment companies, public utilities, communications, railroads, shipping, and airlines, as well as various other so-called regulated industries.

This article will examine the views of selected corporate com-

mentators concerning the proper scope, function and structure of corporate regulation, with emphasis on the interests to be protected by each. Examination of the individual proposals is a necessary prerequisite to answering the more overriding question of whether there should be one unitary system of regulation as opposed to the motley system that now exists.

II. THE PROBLEM DEFINED

The charge has been made that many of the prototypical public issue corporations have grown too big and too powerful. They frequently intrude into the private lives of individuals and consciously as well as inadvertently meddle with foreign policy. As bastions of modern technology, they are able to indulge themselves and portions of the public in luxuries at the expense of the environment and natural resources. The argument is that the large publicly held corporations are so entrenched in society that they should be responsible to it in more than merely an economic sense.

The demand that corporate activities should be determined not solely by the profit motive, but by the public interest as well, is not a new one. Corporations have always been expected to perform some sort of public function. However, only since the 1930's has legal scholarship placed a particular emphasis on the social, noneconomic role of corporations in society.17

The process of implementing affirmative social duties for modern corporations has not been a speedy one. Professor Edward S. Mason has identified one of the primary reasons for this lethargy: "[T]he business corporation is so much our most important economic institution and it is so thoroughly integrated into our business culture that to suggest a drastic change in the scope or character of corporate activity is to suggest a drastic alteration in the structure of society."18 According to Professor Mason, corporations obtained their current position in society as a result of the industrial revolution and the society's desire for economic growth.19 As the corporate sphere of influence increased, the public rapidly adapted to the fact that the forces of supply and demand were kept artificially in check by large, market-dominating corporations. This type of artificial stability appeared to have been

17. See notes 1-2 supra.

18. Mason, Introduction to THE CORPORATION IN MODERN SOCIETY 1 (E. Mason ed. 1959). Mason recognizes the necessity of the corporate form to meet capital, technological and managerial needs. Yet, the result is that the modern corporation permeates extensively our culture, and an attempt to change it will necessarily alter many elements of society.

19. Id.
brought about with no apparent need for effective controls. Concurrently, the consuming public's dependence on large corporations was perfected. Against this background, there has been a natural political, economic, and social reluctance that has delayed any monumental corporate reform.20

John Kenneth Galbraith has suggested that society is merely entertaining a myth to avoid dealing with corporate responsibility problems:

The myth that holds that the great corporation is the puppet of the market, the powerless servant of the consumer, is, in fact, one of the devices by which its power is perpetuated. Colonialism, we saw, was possible only because the myth of higher moral purpose regularly concealed the reality of lower economic interest. Similarly here. Were it part of our everyday education and comment that the corporation is an instrument for the exercise of power, that it belongs to the process by which we are governed, there would then be debate on how that power is used and how it might be made subordinate to the public will and need. This debate is avoided by propagating the myth that the power does not exist. It is especially useful that the young be so instructed. By pretending that power is not present, we greatly reduce the need to worry about its exercise.21

Of course, there are other explanations for the failure to depart from the status quo and to redefine the corporation's role in society, the primary one being the divergence of views on the proper corporate role.22

As Mason further points out, there is no consensus as to how the problem of corporate responsibility ought to be solved. A "cacophony of voices" speaks of "new feudalism" and "self-perpetuating oligarchies," and at the same time of "professionalism of management," and "beneficence of the 'corporate conscience.' "23 Legislators, courts and the public are left with no clear view as to how to go about solving this national dilemma.24

The first view which will be considered is that of Professors Adolph A. Berle and Gardiner C. Means, as elaborated upon in their seminal work.25 These authors adopted a social scientist's abstract and philosophical approach to the issue. Less concerned with the mechanics for gaining control of the corporate giants in modern society, Berle and Means traced the deterioration of shareholder rights and, in their view, the consequent inapplicability of traditional notions of private property. These developments, said Berle and Means, led the way to rearrangement of corporate re-

20. Id. at 1-4.
22. See note 2 & accompanying text supra.
23. Mason, supra note 18, at 2.
24. Id.
sponsibilities. Rather than suggest a systematic overhaul of the corporate superstructure, they preferred to wait until viable "rear-rangements" had been suggested before scrapping the traditional role of corporations in society.26 The contemporaneous view of Professor E. Merrick Dodd provides an alternative to the Berle and Means paradigm.27 Dodd asserted that corporate managers owed a duty not only to shareholders but to other rectors of society as well.28

An extension of Dodd's view is exemplified by the writings of consumer advocate Ralph Nader and his co-authors, Mark Green and Joel Seligman.29 Essentially, they urge extensive legislative reforms to regain state control over corporations, and to direct corporate activities. An interesting counterpart of the Nader approach is found in the works of Christopher Stone which delineate an internal structural approach to corporate reform.30 These proponents of corporate reform do not hesitate to subordinate the profit motive to the public interest. For those who favor corporate assumptions of social obligations, the comprehensive proposals of the Nader group and Professor Stone reveal several methods by which corporations might be made more responsible to the public.

Another major view is that of Theodore Levitt,31 professor at the Harvard Business School. The essence of Levitt's position is that corporations should not be coerced to assume social responsibilities. He foresees dangers under such a coercive scheme. The corporate role in society is, and should be according to Levitt a narrow one. He suggests that private enterprise is properly committed to the profit motive and that other sources may be tapped for solving the more grandiose societal problems.

A fourth view of corporate responsibility emerges from the writings of the free-market economist Henry Manne.32 Professor

26. Id. at 356. See also Berle, For Whom Corporate Managers Are Trustees, 45 Harv. L. Rev. 1365, 1368 (1932).
28. Id.
32. See Manne, Should Corporations Assume More Social Responsibility?, in THE
Manne, following the lead of pure laissez-faire economics, would allow the profit motive and the striving for efficiency to stand as the primary control against corporate misconduct. Manne's philosophy of corporate self-governance is much more optimistic than that of Professor Levitt, and would equally preclude the public sector's taking care of social needs.33

These four basic approaches each have their acolytes and have set the stage for much embellishment. After discussing these views, this article will extract the benefits from each to frame a suggested approach for possible legal reform in the regulation of the large, publicly held corporation.

III. BERLE AND MEANS

A. The Initial Recognition of the Need for Redefinition

In 1932, Berle and Means explained:

[A] society in which production is governed by blind economic forces is being replaced by one in which production is carried on under the ultimate control of a handful of individuals. The economic power in the hands of the few persons who control a giant corporation is a tremendous force which can harm or benefit a multitude of individuals, affect whole districts, shift the currents of trade, bring ruin to one community and prosperity to another. The organizations which they control have passed far beyond the realm of private enterprise—they have become more nearly social institutions.34

The authors, lawyer and economist, teamed up in 1930 to study this awesome corporate system. Their findings were published in 1932,35 and they have since been credited with initiating the intellectual revolution in the theory of corporate behavior.36

Berle and Means attempted to explain the changes that had occurred in the philosophical underpinnings of the corporation in society. They focused not on reform nor adjustment of the corporate role in modern society, but on the traditional economic and property doctrines that they posited were no longer applicable to the corporate system. They maintained that the abandonment of these old doctrines removed restraints on corporate activity that in the past required corporations to act exclusively in the interest of shareholders.37 After stating the problem, Berle and Means proposed a new framework for analysis, which they asserted would

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33. See text accompanying notes 157-72 infra.
34. A. BERLE & G. MEANS, supra note 25, at 46 (footnote omitted).
35. A. BERLE & G. MEANS, supra note 25.
36. See, e.g., Mason, supra note 18, at 3; Note, supra note 3, at 477.
better enable the corporation to serve the interests of society as a whole.  

Surprisingly, however, Berle and Means did not urge a radical change in the corporate purpose, even though the opportunity to make corporations more socially oriented existed and was seized upon by later commentators. The Berle and Means paradigm was based upon a legal theory that attempted to keep corporations operating in the same basic manner they had previously while promoting recognition of the corporation as a socially oriented institution. Berle and Means were reluctant to enlarge the role of business as evidenced by their refusal to encourage the expansion of the corporate purpose beyond its traditional economic function in society.

This initial attack on the existing corporate system provides an excellent introduction to the current debate over corporate social responsibility. Berle and Means' conclusions have been considered important scholarly breakthroughs. Yet, in contrast to those of modern reformers, Berle and Means' proposals were quite modest, for they concluded that the corporation's social responsibilities extended only so far as its business purposes would naturally require.

Berle and Means began by expressing their alarm with the increasing concentration of power in the hands of management and by tracing the causes for this development. Since the mid-nineteenth century, state corporation statutes had been increasingly liberalized to give management more flexibility and power. For example, shareholders had lost power to nominate and remove directors without cause, the states had relaxed the requirement that contributions to capital be made in cash, mandatory pre-emptive rights had been lost, certain restrictions on payment of dividends had been eliminated, and the states had granted additional authority to management to change the terms of stock contracts. It is significant that these changes were not brought about by any public outcry for efficiency, but rather to promote the design of legislators to have firms incorporate in their states, thus providing ad-

38. Id. at 7-8.
40. See text accompanying notes 59-60 infra.
41. A. Berle & G. Means, supra note 25, at 139.
42. Id. at 139-40.
43. Id. at 141-44.
44. Id. at 144-46.
45. Id. at 146-48.
46. Id. at 148-51.
ditional revenue.47

A second explanation offered for increasing management power was corporate growth, which expanded the corporation's bureaucratic structure and necessarily the number of employees under management control.48 Berle and Means also found corporate growth to be accompanied by increasing dispersion of stock ownership. As the number of shareholders grew, it became more difficult for any non-management shareholders to exert significant control over corporate actions. Consequently, more power was lodged in corporate management as shareholders became less able to control its actions and command its accountability.49

Berle and Means devoted most of their attention to this third explanation for increased management authority. They speculated that the dispersion of stock ownership and the resultant loss of ownership control would have an increasingly greater effect on the traditional theories of property underlying our economic system:

Outwardly the change is simple enough. Men are less likely to own the physical instruments of production. They are more likely to own pieces of paper . . . . Beneath this, however, lies a more fundamental shift. Physical control over the instruments of production has been surrendered in ever growing degree to centralized groups . . . . Power over industrial property has been cut off from the beneficial ownership of this property—or, in less technical language, from the legal right to enjoy its fruits. . . . We see, in fact, the surrender and regrouping of the incidence of ownership, which formerly bracketed full power of manual disposition with complete right to enjoy the use, the fruits, and the proceeds of physical assets. There has resulted the dissolution of the old atom of ownership into its component parts, control and beneficial ownership.50

The logical extension of this dichotomy was more recently identified and supported by Bayless Manning, who suggested that, at least in the large corporate entity, shareholders be denied all voting rights.51

A concomitant development under Berle and Means' analysis

49. Id. at 3-5.
50. Id. at 7-8.

Assume a large modern corporation similar to its typical commercial counterpart in all respects but two. First, the model abandons the a priori legal conclusion that the shareholders "own the corporation" and substitutes the more restricted conception that the only thing they "own" is their shares of stock. Second, the shareholder in this model corporation has no voting rights. His position would be quite similar to that of a voting trust certificate-holder with all economic
was that management, no longer restrained by shareholder control, would not be bound to its traditional duty to make profits. Despite eliminating natural controls against self dealing and corporate waste, this shift left room for redirecting corporate obligations to the public through the abandonment of the profit motive:

There is no longer any certainty that a corporation will in fact be run primarily in the interests of the stockholders. The extensive separation of ownership and control, and the strengthening of the powers of control, raise a new situation calling for a decision whether social and legal pressure should be applied in an effort to insure corporate operation primarily in the interests of the "owners" or whether such pressure shall be applied in the interests of some other or wider group.52

Unlike some of the later commentators, Berle and Means never went so far as to conclude that corporations should be governed by public interests since management was no longer limited by the profit motive.53 They instead were preoccupied with the shareholder's proprietary interest.

By focusing on the shareholder's interest as an owner rather than as merely a passive investor, Berle and Means reached the conclusion that shareholders have a legitimate interest in the company which exceeds the mere dollar value of their interest. Certainly, in the closely-held concern it is likely that the shareholder will demand an active role in day-to-day operations or a check upon independent management. This proximity between the shareholder and the business creates strong ties. Accordingly,

52. A. BERLE & G. MEANS, supra note 25, at 333 (footnote omitted).
53. Id. at 356-57. While recognizing that the way has been cleared to look after the interests of "a group far wider than either the owners or control," they nevertheless qualify their remarks: "It remains only for the claims of the community to be put forward with clarity and force. . . . 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 interest of society." Id. at 356 (emphasis added).

there has long been a recognition of special statutory norms\textsuperscript{54} and other control devices\textsuperscript{55} to assist the shareholder of the closely-held concern in sharing control with management. Involvement in the closely-held corporation often extends beyond pure economic interest and includes emotional attachments, such as those centering around a family business. These emotional attachments need not be protected within the context of the larger corporation.

In contrast to the closely-held concern, the shareholder's voice in a large public issue corporation falls upon the deaf ears of management. In the first instance, this is explainable purely on the basis of the proportionately insignificant vote of any shareholder or group of shareholders. Accordingly, it has been proposed that this "fact of life" be recognized by abolishing the shareholder vote.\textsuperscript{56} It has also been suggested that the divorce of ownership from control and the advent of management control have eliminated the goal of corporate profitability as a primary motive. Since traditional fiduciary standards are ineffective, the unchecked management looks out for its own interests, perhaps even to the extent of looting the corporation.\textsuperscript{57}

In light of the fact that actual practice did not bear out the theory that the profit motive had been discarded, Berle and Means searched out a rule that would explain its continued use. They found that in spite of increasing management powers, "it is clear that these powers are not absolute. They are, rather powers in trust. The controlling group is, in form at least, managing and controlling a corporation for the benefit of the owners."\textsuperscript{58} The powers in trust theory\textsuperscript{59} placed a legal restriction on management's ulti-


\textsuperscript{55} See generally F. O'Neal, Close Corporation Law and Practice (2 ed. 1971).

\textsuperscript{56} See note 50 supra.


\textsuperscript{58} A. BERLE & G. MEANS, supra note 25, at 335.

\textsuperscript{59} The theory had been substantiated by Professor Berle in 1931. See Berle, Corporate Powers as Powers in Trust, 44 Harv. L. Rev. 1049 (1931). An expansion of the strict trust theory can be found in the writings of Professor
mate abandonment of the profit motive. It would protect shareholder interests until the law placed corporate responsibility in the hands of some other group. Finally, the concept of such a trusteeship laid the burden for making corporations socially responsible on the shareholders.

Thus, in *The Modern Corporation*, Berle and Means had identified what they believed to be fundamental changes in the traditional theory of property ownership. They had recognized the increased power of corporate management and consequent vulnerability of shareholders and the public to corporate actions. Yet, their recommendation to control powerful management followed the traditional method of relying on shareholders to express their concerns and oversee corporate operations.

B. Berle-Dodd Debate

Professor Berle encountered resistance to his powers in trust theory from E. Merrick Dodd, a Harvard law professor. Dodd believed that corporate managers held powers in trust not only for shareholders, but for other groups affected by corporations as well. These groups included suppliers, employees and customers. Dodd viewed Berle as trying to protect shareholders from self-interested management by emphasizing the profit motive. According to Dodd this was unnecessary and unfortunate, in light of public demands for corporate responsibility. He further contended that the doctrine of maximizing profits for shareholder benefit would have to be modified if society ever hoped to meet its goals of assured production and employment for its members. Self-interested shareholders could hardly be expected to pursue society’s objectives. Thus according to Dodd, management would have to be relied upon to meet public demands. The profit motive would have to be subordinated to what he viewed as greater societal needs.

Berle responded that Dodd’s contentions might be correct in

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63. *Id.* at 1148:

[Berle] believes 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 future.

64. *Id.* at 1152.

65. *Id.* at 1153.
theory, but certainly not in practice.\textsuperscript{66} He maintained that the profit motive still controlled corporate actions and that the law had recognized no other responsibility of corporate managers, except to shareholders.\textsuperscript{67} Moreover, no viable alternative yet existed: "[Y]ou can not 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."\textsuperscript{68}

Years later Berle relented.\textsuperscript{69} The reason was the New Jersey Supreme Court's decision in \textit{A.P. Smith Manufacturing Co. v. Barlow}.\textsuperscript{70} The court there held that corporate directors could legitimately donate corporate funds to a private university.\textsuperscript{71} With this development, Berle realized that corporate management was no longer restricted to profit maximization by virtue of legal limitation. Management now had court approval to pursue non-profit activities. Berle conceded this portion of the debate to Dodd, and admitted that corporate management had been forced into a social statesmanship role by public demand.\textsuperscript{72}

\begin{itemize}
  \item \textsuperscript{66} Berle, \textit{supra} note 26, at 1367.
  \item \textsuperscript{67} Id.
  \item \textsuperscript{68} Id. Berle found sufficient public interest in the millions of individuals who depend upon investment income to justify protection of their interests via the current system of individual ownership of property. Until an alternative system is designed, it would be unimaginable to turn over the "economic power now mobilized and massed under corporate form . . . weakly to the present administrators with a pious wish that something nice will come out of it all." Id. at 1368.
  \item \textsuperscript{70} 13 N.J. 145, 98 A.2d 581, appeal denied, 346 U.S. 861 (1953).
  \item \textsuperscript{71} After concluding that the corporation has always had an obligation as a responsible member of society, the court validated the gift. It noted that in addition to corporate beneficence, by supporting private education the directors were furthering the economic interests of the corporation. 13 N.J. at 149-55, 160-61, 98 A.2d at 583-88, 590. The \textit{Barlow} holding has since been codified. ABA-ALI Model Bus. Corp. Act § 4(m) (1969).
  \item \textsuperscript{72} Berle, \textit{supra} note 26; Berle, \textit{Modern Functions of the Corporate System}, 62 Colum. L. Rev. 433 (1962); Note, \textit{supra} note 69, at 69-71.
\end{itemize}
In sum, it appears that Berle and Means only went so far. In *The Modern Corporation* they proclaimed the changing relationship of individuals to property brought about by development of the modern corporate system. They went no further because society had not yet developed a consensus on corporate social obligations. In theory, shareholder relinquishment of control over corporate property should have allowed management to pursue nonprofit goals. In practice, however, this did not occur. The reason, claimed Berle, was that under the present legal system corporate managers held their powers as trustees for shareholders interests which necessarily defined the profit motive as the primary, albeit not the exclusive, goal.

Under the Berle-Dodd dichotomy reformers are faced with two alternative frameworks if corporate social responsibility is truly desirable. The first is to put the burden of enforcing social responsibility on shareholders. This alternative is favored in *The Modern Corporation*, and appears to be the point with which the book concludes.

The second alternative is the Dodd approach of requiring by law that corporate managers tend to the interests of other members of the public besides shareholders. In effect, this would furnish legal acknowledgement of noneconomic corporate responsibilities to society, in contrast to the narrower powers in trust approach. In the end it would force subordination of the profit motive to broader public interests.

Throughout *The Modern Corporation* and his debate with Dodd, Berle clung stubbornly to the profit motive theory, reluctant to let it go until a viable alternative was presented. Berle was in fear of management's abuse of power and he hoped that society would arrive at a carefully designed replacement before management itself abandoned maximization of shareholder profit to further social welfare goals of its own determination. As time passed, however, Dodd's more expansive view of corporate responsibility continued to gain acceptance and Berle had to respond to these developments.

In 1968, Professor Berle elaborated on the development of corporate responsibilities as a matter of "inchoate law." He explained:

[T]he law affecting corporations falls in two categories. The first is familiar... the explicit rules laid down by decision or statute and setting out the existing legal capacities and liabilities. The second, more important and more difficult category, we call "inchoate" law. This relates to the du-
ties of corporations, not set out either in decision or statute, but arising from the impact on social and economic situations foreseeably resulting from a corporate course of action. When the impact point is reached, it is predictable that a hitherto undetermined liability or responsibility will suddenly emerge as explicit law.\textsuperscript{75}

Berle explained that his initial position thirty-five years earlier had been to allow government rather than the private corporation to look after the public interest.\textsuperscript{76} The course of history, he observed, provided otherwise. The corporation, as defined by the 1960's, was responding to societal demands—at least to a limited extent.\textsuperscript{77} Berle set out at least three social responsibilities which corporations might meet. The first was to supply the markets which are depending on them. The second was to carry on production with a minimum of waste. The third was “to police their own operations, [and] ascertain whether they are living up to the expectations they create,” and to “the best traditions of honorable merchants.”\textsuperscript{78}

While purporting to give some recognition to societal needs, Berle's view of the corporate mission remained parochial, for the social responsibilities of business were limited to the commercial and economic functions which business performs. Although he recognized that in the future, national needs and planning will be influential in business decisions,\textsuperscript{79} Berle believed corporations should not carry the burden of remedying social problems.

Despite Berle's view, the Securities and Exchange Commission (SEC) has in recent years been used as one vehicle for encouraging or even coercing corporations to help remedy social problems. By virtue of its jurisdiction under the Securities Act of 1933,\textsuperscript{80} and the Securities Exchange Act of 1934,\textsuperscript{81} the SEC requires public disclosure of relevant investor oriented information.\textsuperscript{82} While in the

\textsuperscript{75.} Id.
\textsuperscript{76.} Id. at 150-51.
\textsuperscript{77.} Id. at 152:

The corporate system of our time can do whatever in reason is asked of it in terms of production, expenditure of capital and distribution of profit. But the corporate system cannot, should not and should not be expected to produce a society. It can and should conform to social requirements; it can and should lend help to government and to quasi-public and other institutions whose task is to develop a society both good and just. On the other hand, nothing in the structure of corporations or in the training of their management entitles them to be philosophers.

\textsuperscript{78.} Id. at 152-53.
\textsuperscript{79.} Id. at 155-56.
\textsuperscript{80.} 15 U.S.C. §§ 77a to 77 (1976).
\textsuperscript{81.} Id. §§ 78a to 78.
past relevant—or material—information has generally been limited to matters concerning the economic well being of the issuer and the shareholder's investment interest, the SEC has been engaged in litigation over the past five years involving the propriety of requiring disclosure of socially relevant activities. There also has been a good deal of scholarly debate concerning the use of disclosure to ensure an enhanced corporate conscience. In addition to the issue whether Berle was correct in his position that corporations should not carry this burden, is the issue whether this extension of the purpose of the investor oriented securities acts is the proper method for increasing corporate responsibility. These questions become even more pressing in exploring the ideas of the current proponents of increasing social responsibility by restructuring the large corporate enterprise.

IV. THE NADER GROUP AND STONE: TOWARDS THE WELFARE ORIENTED CORPORATION

The views of consumer advocates Ralph Nader, Mark Green, and Joel Seligman are presented in this section along with those of Professor Christopher Stone. They have all recommended extensive legislative reform packages, similar in many respects, which are aimed at making corporations accountable to the public. Their views would go well beyond the scheme envisioned by the SEC. They find governmental and public intervention in corporate affairs, particularly corporate decisionmaking, desirable. The differences in their proposals will be examined.

A. The Nader Group's Approach

It is not merely the size of the corporation that bothers Nader but the power and social impact that have accompanied corporate growth: "Herbivorous dinosaurs were also huge—but weak, dumb and helpless before predators. Our giant firms, on the other hand,

86. See note 79 supra.
87. See Hazen, supra note 4, at 408-12.
89. C. Stone, supra note 30.
90. See text accompanying notes 80-84 supra.
have both size and power." Enraged by corporate crime and other abuses of power which the public thus far has been unable to control, Nader and his associates vehemently attack the modern corporate systems and urge extensive legislation to end all of its dirty ways. *Taming the Giant Corporation* is filled with extreme and angering examples of unscrupulous corporate behavior. Since these examples are not counterbalanced by ones demonstrating exemplary corporate behavior, it is the authors' clear intent that by the end of the book readers be as hostile towards the modern corporate giant as are the authors. The legislative framework for the Nader group's many reforms is to be provided by federal chartering of larger American corporations, an idea which is far from new.


92. E.g.,

In the early 1970s . . . Reserve Mining Company dumped 67,000 tons of waste rock and asbestos fibers a day into Lake Superior . . . .

Between 1946 and 1971, levels of pollution in many industries rose from 200 percent to 2,000 percent . . . . [T]he National Cancer Institute . . . estimated . . . up to 90 percent of all human cancers are caused by environmental factors, including industrial pollution.

*Id.* at 17-18.

When Elmer Bobst, chairman of Warner-Lambert and godfather to Tricia Nixon, had an antitrust problem, he felt free to bypass the Justice Department. "I never opened my mouth to the President about the case," protested Bobst, adding, however, "I did talk to other people in the White House about it, though."

*Id.* at 21.

In January 1974, four editors at Wilmington's *The Morning News* and *The Evening Journal*, both run by DuPont interests, either resigned or were fired; the editors said that their boards of directors opposed news stories that embarrassed or reflected adversely on the DuPont family.

*Id.* at 24.

Potlatch Forests illustrated its environmental concern by a nationwide advertisement showing a picture of a spanking clean Clearwater River in Idaho, where Potlatch has a pulp mill, with the caption, "It cost us a bundle, but the Clearwater still runs clear." The photograph, however, had been taken many miles upstream from its polluting pulp mill.

*Id.* at 25.

Nine major grain companies have been convicted of a conspiracy to short-weigh—or steal from—wheat and rice shipments made by the U.S. to foreign nations under the Food for Peace program.

*Id.* at 31.

The Civil Aeronautics Board has uncovered how Braniff Airways failed to record the sale of 3,626 tickets in order to finance its illegal campaign giving.

*Id.*

The Nader rationale is no different from that of his predecessors: Controls must be exerted over corporate activities. He argues that current state corporate chartering statutes are inadequate for the task, and have already abdicated such responsibilities. Nader and his associates are not dissuaded in their goals by notions of increased government regulation. To the contrary, it is their position that the powers of corporations have already grown too large unchecked. The essence of the Nader group's new federal rules is to subject corporate operations to public scrutiny and to thereby prohibit deceptive and criminal activities. Rather than fearing excessive governmental interference, Nader welcomes regulation with open arms.

B. Stone's Approach

In contrast to the Nader group, Professor Stone approaches the corporate social responsibility problem with the self-assuredness of a social scientist dealing with abstract models. His intent is equally far reaching in scope: to create a new political system. However, rather than rely on government regulation to force the large corporation into the proper mode, Stone attacks the problem from the inside. The essence of the Stone proposal is a shift in the


95. [T]o control national and multinational corporations requires national authority. State chartering is a costly anachronism—as logical as the state printing of money or passports. If a criminal crosses state borders, the Federal Bureau of Investigation is called in; if a commodity or service travels interstate, so too, should the jurisdiction of the federal government—over the structure of corporate governance. Other than a few corporate lawyers and public officials in Delaware, who would not be embarrassed to defend the proposition that only a state, and not the federal government, can charter GM or ITT? The choice, ultimately, is between federal chartering and Delaware chartering.

internal corporate structure as a means of affecting corporate behavior.96

Professor Stone fashions his proposals upon restructuring the corporate decision-making process since “the proponents of corporate responsibility do wrong to put so much emphasis on what corporations are deciding rather than on how they are deciding—the corporate decision process itself.”97 Focusing on those at the top—directors and high management—Professor Stone urges intrusion not on the substance, but on the procedures and structures of the decision making process: “Instead of treating the corporation’s inner processes as a ‘black box,’ to be influenced only indirectly through threats laid about its environment like traps, we need more straight-forward ‘intrusions’ into the corporation’s decision structure and processes than society has yet undertaken.”98

The primary method of intrusion, and the crux of Stone’s proposals, is a systems approach. He would define by law the roles and functions of directors, committees, management, divisions and critical employees. In this manner, he argues that the public would be assured that certain corporate personnel will tend to specified public concerns. Under this scheme, when critical problems arise, the government would be in a position to inject qualified personnel into the corporate structure to resolve them.99 Structurally defined management roles and duties would also enable any failure to perform legislated duties to be traced to those responsible.100 Penalties, such as discharge or individual liability without corporate indemnification for injuries resulting, for example, from the failure of a manager to check the safety of a product for public use, would be provided to insure performance of public-oriented corporate responsibilities of manufacturing concerns.101

Professor Stone finds encouragement for his proposal in current corporate statutes,102 and in the commerce clause, which he sees as the constitutional authority for the enactment of his recommendations.103 He envisions a federal legislative scheme, al-

96. Stone is not alone in this structuralist approach. See, e.g., M. Eisenberg, The Structure of the Corporation (1976); Coffee, supra note 30. Not surprisingly, the efficacy of these proposals has been questioned. See, e.g., De Mott, Management Structure and the Control of Corporate Information, 41 Law & Contemp. Prob., Summer, 1977, at 182.

98. Id. at 121.
99. Id. at 192.
100. Id. at 124.
101. Id. at 191-92.
102. Id. at 125: “The very existence of legal requirements in this area is evidence that the corporate world can live with some intrusions into its ‘internal’ organization at least in principle.”
103. Id. at 144.
though not specifically federal chartering,\textsuperscript{104} with a "Federal Corporations Commission" to handle the tasks of enforcement, and of proposing and revising corporate functions.\textsuperscript{105}

C. Nader and Stone Compared

Like the Nader group, Stone's intent is to subject corporations to a great deal more government control and public scrutiny. While he posits his plan as a remodeling of the corporate decision-making process, it seems that the substance of his proposals would not provide a significantly different result than those advocated by the Nader group. In both instances the proposals seem to be geared to broader based societal reform rather than to a redefinition of the corporate structure and mission.

The areas of reform emphasized by the Nader group and Stone are compared below for clarification:

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<th>Nader, Green &amp; Seligman</th>
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<td>Board of Directors</td>
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The Nader group's proposals span more specific areas than do those of Stone. But this is no indication of the relative expansiveness of each of their reforms. Stone focuses more closely on the parties to the corporate decisionmaking process in an effort to change their roles to make them responsible for many public interest items beyond corporate selfishness.

1. Board of Directors

It is quite clear to the authors of \textit{Taming the Giant Corporation} that directors of large corporations presently serve no valid purpose.\textsuperscript{106} The chief criticism is that directors sit on boards but have little involvement in or understanding of the companies they direct. They are often mere figureheads, a reason inside management is able to seek out sympathetic, congenial and prestigious friends to fill the "outside" director slots.\textsuperscript{107} This is the starting

\textsuperscript{104} \textit{Id.} at 71-72 n.*.
\textsuperscript{106} Nader echoes the words of William O. Douglas to the effect that "directors do not direct." \textit{R. NADER, M. GREEN \\& J. SELIGMAN, supra} note 29, at 95 (quoting Douglas, \textit{Directors Who Do Not Direct}, \textit{47 Harv. L. Rev.} 1305 (1934)). He also looks to the writings of Peter Drucker who similarly observed: "[T]here is one thing all boards have in common, regardless of their legal position. \textit{They do not function.}" \textit{Id.} (quoting \textit{F. DRUCKER, MANAGEMENT} 628 (1973)).
\textsuperscript{107} \textit{R. NADER, M. GREEN \\& J. SELIGMAN, supra} note 29, at 97.
point for the Nader proposals.

The Nader group appears anxious to revitalize directors' roles. It argues that directors must be held to high standards of public accountability. Like the branches of government, the board should be separate and independent from corporate management. 108 Under both the Nader and Stone proposals directorships should constitute at least part time jobs for those filling them. 109 But here the views part. The Nader group urges that the board's control over management be enhanced, and that the board have specific responsibilities to the public; Stone proposes an intervening system of public directorships with specific responsibilities to the public.

More specifically, the Nader group takes a position reminiscent of Professor Dodd's 110 and recommends that the board of directors be charged with assuring that corporate executives are knowledgeable of federal, state and local laws and that in addition, it have a decisive reviewing power over important management decisions. The board should have more say in day-to-day operations including a decisive voice in the hiring and firing of key employees. Finally, it should be required to publicize the corporation's record of abiding by the law and of protecting shareholder interests. 111

In contrast, but perhaps for similar purposes, Professor Stone goes to great lengths and specificity in developing his concept of public directors. He suggests two categories: general public directors and special public directors. The number of general public directors to be placed on corporate boards would be determined by a formula: ten percent of all directors for each $1 billion in sales. Stone calculates that such a formula would place public directors on the boards of 260 American corporations (excluding financial corporations for which Stone provides another formula). 112 The Federal Corporations Commission would be charged with the responsibility of nominating general public directors, whom the regular directors would have the power to approve as well as

108. Similarly, Stone specifically suggests that all insiders be removed from the board, that not more than 10 percent of the board members have a financial interest in the corporation, and that liability for wrongdoing be increased. C. Stone, supra note 30, at 134-51. There is voluminous literature endorsing the concept of independent directors. See, e.g., Eisenberg, Legal Models of Management Structure in the Modern Corporation: Officers, Directors, and Accountants, 63 Calif. L. Rev. 375 (1975).


110. See text accompanying notes 61-68 supra.

111. R. Nader, M. Green & J. Seligman, supra note 29, at 119. Once again this is merely an extension of the current SEC philosophy.

112. C. Stone, supra note 30, at 158.
Some of the duties of general public directors would include representing public interests, conducting activities such as legal and efficiency audits of the corporation, and serving as legislative as well as public liaisons for the corporation. Special public directors would be similar to general public directors. However, their functions would differ slightly as they would be utilized as trouble shooters when necessary to remedy specific corporate problems and thus would have a temporary existence. In contrast to the broader charge of the general public directors, special public directors would provide the board with expertise for specific problems. They would be granted investigatory authority, and perhaps, sanctioning powers.

The Nader group disagrees with Stone's public directorship proposal primarily because it does not guarantee that "the public interest" will be protected. The group envisions another method by which the board of directors may protect the public interest. This is to be achieved by assigning each director a specific area of public responsibility. Stone does not agree that the Nader group's proposal would adequately affect the board's decision making. He acknowledges resistance to his public directorship alternative, but nevertheless seems satisfied with it: "[I]f the only virtue of the general public directorship system was a symbolic one—a more obtrusive, nagging reminder of these companies' obligations to society than the American flag over the plants—the system would, to my mind have justified itself." In sum, these two theories agree on the goal of a corporate conscience controlled by responsible directors, but differ on the means towards that end.

113. Id. at 159.
114. Id. at 163-65.
115. Id. at 174-83.
116. It seems impossible to design a general "interest group" formula which will assure that all affected constituencies of large industrial corporations will be represented and that all constituencies will be given appropriate weight. Even if such a formula could be designed, however, there is the danger that consumer or community or minority or franchisee representatives would become only special pleaders for their constituents and otherwise lack the loyalty or interest to direct generally. . . . Alternatively, federally appointed public directors might be frozen out of critical decision-making by a majority of "privately" elected directors, or the appointing agency itself might be biased.

117. The proponents list several such areas: employee welfare, consumer protection, environmental protection and community relations, shareholder rights, compliance with law, finances, purchasing and marketing, management efficiency, and planning and research. Id. at 125. See also, e.g., Conard, Reflections on Public Interest Directors, 75 Mich. L. Rev. 941 (1977).
118. C. STONE, supra note 30, at 174.
2. Shareholder Rights

The Nader group believes that the shareholders should be given enough authority to effectively oversee board and management activities.\textsuperscript{119} They should serve as a check on the corporate system. To meet this aim, the Nader group proposes that shareholders be given the power to nominate independent outsiders for directorships. Additionally, the proxy machinery should be revamped. Candidates for the board should be required to supply statements to all shareholders as to their qualifications for director positions. The costs, with certain upper limits imposed, would be borne by the corporation.\textsuperscript{120}

Better information would also enhance shareholder ability to monitor corporate action. For example, the Nader group suggests increased access to corporate records.\textsuperscript{121} It also proposes that all significant corporate board decisions be brought to the shareholders’ attention in advance. When decisions are reached, the board would be required to inform shareholders of the results and rationale for the decisions.\textsuperscript{122} Shareholder oversight abilities would also be improved by assuring private rights of action under federal law.\textsuperscript{123}

Although Nader is far from alone in calling for increased shareholder suffrage in the large public-issue company,\textsuperscript{124} this method


\textsuperscript{120}. R. NADER, M. GREEN & J. SELIGMAN, supra note 29, at 127-29.

\textsuperscript{121}. Id. at 129-30. In addition to the wide range of information available to the shareholders under the SEC disclosure requirements, state corporate charters give a right of inspection of all relevant books and records so long as the shareholder states a proper purpose. ABA-ALI MODEL BUS. CORP. ACT § 52 (1969).

\textsuperscript{122}. R. NADER, M. GREEN & J. SELIGMAN, supra note 29, at 127-29.

\textsuperscript{123}. Id. at 253.

does not seem to be either an appropriate or effective vehicle for increasing corporate responsibility. In the first instance, the separation of ownership from control is not only a fait accompli, it has been suggested that it should be formally adopted as the norm. Even if the shareholder vote is not eliminated entirely, the practical recognition of the public issue shareholder's investor rather than proprietary interest orientation calls for less emphasis on increased suffrage as an effective measure. This is not to say, however, that increased disclosure under the proxy rules should not exist at least to the extent that it relates to the shareholder qua investor and will indirectly affect managerial action.

3. Employee Rights

The Nader group is concerned that huge corporations are not restrained, as are many less influential governmental units, by the constitutional protections of individual rights. The "Raiders" see more and more problems in corporate dominance of employees' personal lives. To remedy the increasing problems, they propose an "Employee Bill of Rights," which will guarantee protection of some constitutionally protected rights. Specifically, the Nader group proposes that corporations respect individual freedoms of speech, press, religion, peaceable assembly, the right to privacy, and the guarantee of equal protection. This is one of many examples of the overreaching of this proposal.

Placing the private corporation in the position of establishing employee rights that are already guaranteed to all citizens under the Constitution is an unwarranted transfer of responsibility from the public to the private sector. Under our present system corporations, like all other citizens, must respect others' individual freedoms. To establish the separate and duplicative employee bill of rights as advocated by Nader is not only unnecessary but inappropriate as well. Under the proposed scheme, the private corporation would be granted increased power which would carry with it more legitimacy. Such an increase in power could well result in a more corporate dominated society than we have today—the precise problem that Nader seeks to alleviate. The inevitable result

126. Manning, supra note 119, at 1490; see note 51 supra.
127. Id.
128. See, e.g., Cary, Corporate Standards and Legal Rules, 50 Calif. L. Rev. 403 (1962); Hazen, supra note 4; Weiss & Schwartz, Using Disclosure to Activate the Board of Directors, 41 Law & Contemp. Probs., Summer, 1977, at 63.
would be increased corporate influence in the public sector which would create a type of big brotherism that is clearly undesirable.

4. Information and Disclosure

While both the Nader group and Professor Stone agree that the external and internal information flows of corporations ought to be improved, Professor John Coffee sees this as the heart of his proposal.\footnote{Coffee, \textit{supra} note 30.} Coffee's plan is for a more systematic series of information networks within the corporate structure. In contrast, the Nader plan is but an expansion of the SEC's current position which focuses on disseminating more information to the public. For example, it recommends sending shareholders the corporation's annual 10-K form, required by the SEC, in place of the present annual report. It suggests the more informative but less colorful 10-K forms should also be sent to government agencies and libraries.\footnote{\textsc{Id.} at 140-79. \textit{See also}, e.g., Branson, \textit{supra} note 85.} The primary aim is to require the corporation to inform the public of the social impact of its operations (pollution clean-up, occupational safety and health policies, employment discrimination, advertising and lobbying) and of its financial procedures (ownership, control, government relations, largest security holders, executive income, and product line financial data).\footnote{\textsc{Id.} at 140-79. \textit{See also}, e.g., Branson, \textit{supra} note 85.} The Nader oriented disclosure not only transcends notions of shareholders' proprietary interests, it also goes beyond the investors' interests by utilizing the corporate chartering machinery to protect other outside interests.

In contrast to Nader, Professor Stone makes more specific structural recommendations to improve the internal flow of corporate information.\footnote{\textsc{Stone}, \textit{supra} note 30, at 201-09.} The question arises: Why should this be of public concern? Stone offers the following explanation:

\begin{quote}
[T]here is, in the environment of each corporation, a great deal of information bearing upon its own activities that it never receives. This is part of a more general problem in the society—so often critical information is available, but simply is not being steered to the appropriate place for action. One of the more extraordinary facts we discovered in our "autopsy" of the MER/29 [drug] affair was that within three months of the drug's release the chief of cardiology at Los Angeles's Cedars of Lebanon Hospital had announced that he was discontinuing use of MER/29 because of its effects on his patients. There is no indication as to whether, and in what form, these doubts might have been relayed to [the manufacturer] Richardson-Merrell, much less the FDA. But we know that E. F. Hutton, the stockbrokerage house, picked up the story almost immediately and alerted its brokers across the nation—for it portended a possible decline in Richardson-Merrell stock. In other words, the information processes of our society are
\end{quote}
such that across America doctors were prescribing MER/29, oblivious to dangers that their stockbrokers had long been alerted to.\textsuperscript{134}

To prevent incidents, such as that described above, Stone suggests that certain designated employees be charged with gathering and disseminating certain kinds of information, and that top executives and the board of directors be required to keep themselves informed of these and other items.\textsuperscript{135}

D. A Recapitulation

Legislative solutions to problems will always be suggested, but the costs that they entail may prevent their ever being adopted. The proposals of the Nader group and of Professor Stone are but the most recent examples, following a long line of predecessors.\textsuperscript{136}

Professor Stone advocates a remaking of the corporate "thinking" process. He hopes to make corporations behave more as individuals would, by requiring them to weigh all the consequences of their actions. Under such a plan, there would be no guarantee that public interests would be uniformly protected. But, Stone remedies this by having a government agency regulate, and hence unify the roles and functions of the corporate decision makers. Thus, it appears that the federal agency in charge of enforcing Stone's legislative scheme would have great power to determine the public interests to be respected by modern corporations.

The Nader group, in contrast, recognizes the risks of assigning public responsibilities to profit-minded corporate officers and directors. It, therefore, provides a more typical legislative scheme: regulations and prohibitions. The Nader group attempts to change corporate behavior, not by restructuring it, but by providing a comprehensive set of rules designed primarily to make corporations report their activities to the public.

The foregoing views represent by far the most sweeping proposals for corporate reform. The proponents envision a structural revolution that would be accomplished pursuant to legislative normative reform. However, it is not clear that these goals can be accomplished entirely through structural reform. Success along these lines is dependent upon acceptance of an entirely new perspective on the corporate mission. Far beyond recognizing the ability of private enterprise to adopt social responsibilities, the Na-

\textsuperscript{134} Id. at 201-02. See, e.g., Lewis v. Baker, 243 Or. 317, 413 P.2d 400 (1966).

\textsuperscript{135} C. Stone, \textit{ supra} note 30, at 203-09.

der-Stone paradigm envisions the corporate entity as the guardian of society’s needs. Here lies the essential shortcoming of this view. The proponents fail to provide any meaningful guidelines for balancing the competing interests of the profit motive and the general welfare. An attempt to deal with both interests within the confines of corporate chartering statutes—be they state or federal—is too monumental a task. Contrary to Stone’s and Coffee’s assertions, there is a limit to the areas which may be effectively regulated by focusing on structural reform. For example, while such reform, including more open information systems, can go far towards corporate efficiency and a balancing of public and private interests, it is not an end in itself.

V. LEVITT: SEPARATING THE PUBLIC AND PRIVATE SECTORS

Professor Theodore Levitt does not advocate sweeping reforms. His view of corporate social responsibility is more restrictive than those heretofore presented.\(^{137}\) According to Levitt, writing in 1958, the whole idea of corporate social responsibilities was being taken too seriously. It had become the vogue for businessmen to speak out on their companies’ social responsibilities. Accordingly, the public was not only beginning to believe in the idea, but businessmen were also beginning to believe their own words.\(^{138}\) Professor Levitt argued that all this “talk” should be put to rest since it could only create an unrealistic situation.\(^{139}\)

Levitt had two major objections to the corporation becoming a “great public benefactor.” In the first place, it would have required subordination of the profit motive to these loftier goals. This, Levitt believed, would be difficult to accomplish.\(^{140}\) In the second place, and even more importantly, it would place corporations in an exalted position in society; expansion of their authority would lead to the eventual demise of the democratic system.\(^{141}\) Placing too much power in any sector be it public or private can lead to a dictatorship. The risk in the private sector is substantially greater

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137. *See, e.g.*, Dangers, supra note 31. One gets an inkling of Levitt’s feelings simply by the title of his article. His more recent book, T. Levitt, *The Third Sector, New Tactics for a Responsive Society* (1973) [hereinafter cited as *The Third Sector*], repeats those feelings, at the same time suggesting other sources for resolution of society’s ills.

138. Dangers, supra note 31, at 43.

139. *Id.* at 42. Levitt described this utopian, socially responsible corporate entity as “a voluntary association of selfless entrepreneurs singularly dedicated to creating munificence for one and all—an almost spiritually blissful state of cooperative and responsible enterprise.” *Id.*

140. *Id.* at 46.

141. *Id.* at 44.
since there is an absence of the necessary checks and balances against the abuse of power. Certainly, this fear seems justified in view of the massive Nader/Stone proposals and the spectre of 1984 which they raise.

Levitt explained that "[t]he essence of free enterprise is to go after profit in any way that is consistent with its own survival as an economic system."\textsuperscript{142} He saw societal benefit as a possible side effect of corporate success but not as its primary focus:

Corporate welfare makes good sense \textit{if} it makes good economic sense—and not infrequently it does. But if something does not make economic sense, sentiment or idealism ought not let it in the door. Sentiment is a corrupting and debilitating influence in business. It fosters leniency, inefficiency, sluggishness, extravagance, and hardens the innovationary arteries. It can confuse the role of the businessman just as much as the profit motive could confuse the role of the government official. The governing rule in industry should be that \textit{something is good only if it pays}. Otherwise, it is alien and impermissible. This is the rule of capitalism.\textsuperscript{143}

Levitt thus feared that the expansion of the corporate mission would in fact hinder the goals of the reformers since the social obligations would always take a second seat to the profit motive.

According to this view, the fallacy of the public interest corporation is that even though the idea of corporate responsibility becomes more prevalent, as long as business has a choice it will opt for economic efficiencies over social needs.\textsuperscript{144} The rationale for corporate action can always be made to conform to some powerful public interest.\textsuperscript{145} If the profit motive underlies business behavior, is it possible to turn corporations into socially responsible institutions? Professor Levitt said yes, but only at the cost of destroying our pluralistic democracy. He contended that broadening business responsibilities would turn us towards a monolithic society, in which one exalted institution ministers to all.\textsuperscript{146}

Society depends on the expression of all views. But, as the corporation grows more powerful and dominant, it quashes opposing

\textsuperscript{142} Id. at 44.

\textsuperscript{143} Id. at 48.

\textsuperscript{144} See id. at 47-48.

\textsuperscript{145} E.g.,

when it comes to choosing between the small Arkansas supplier whose town would be ruined if orders stopped and the Minneapolis supplier who can make it cheaper, there is no doubt that even the most socially responsible corporation will take the latter. It can always fall back on responsibility to its employees, stockholders, or customers, and still pretend it is being fashionable.

\textsuperscript{146} "The corporation would eventually invest itself with all-embracing duties, obligations, and finally powers—ministering to the whole man and molding him and society in the image of the corporation's narrow ambitions and its essentially unsocial needs." Id. at 44.
viewpoints while representing only one determination of the public interest. In the long-run, society would suffer because it no longer had the freedom to express contrary viewpoints, and even if it did, it would no longer have any power to enforce them. Thus, Professor Levitt returned to the original complaint that had been made against modern corporations—that they are too powerful—and urged readers to reconsider endeavors to make corporations more powerful by requiring them to fulfill social welfare needs:

We all fear an omnipotent state because it creates a dull and frightening conformity—a monolithic society. We do not want a society with one locus of power, one authority, one arbiter of propriety. . . . We do not want our lives shaped by a single viewpoint or by a single way of doing things, even if the material consequences are bountiful and the intentions are honorable.147

Levitt recognized that society is divided into several sectors. Private business is only one of them. There are also the sectors of government, education and the military. Each sector is expected to perform its particular function in society. As long as each sector is left to perform its singular chore, a pluralistic society will exist. Each sector will protect the interests and needs of the function for which it is responsible. The function of government, said Levitt, is to protect the public interest. Similarly, the function of business is to procure profits. Leave business to business or the function of business will overlap that of government. The resulting blur of the distinction between the functions of government and business in society will cause development of a partnership between the two sectors. Then Levitt argued, there will be no guarantee for the public that government is protecting their interests, and that business desire for profits is not dominating government action.

According to Levitt, the risk of having private enterprise administer the public welfare is that in the end a single institution will be providing “womb-to-tomb ministration” to its millions of dependents.148 This would be big brother originating in the private rather than public sector.149 Or, as Levitt describes it:

Even if its outlook were the purest kind of goodwill, that would not recommend the corporation as an arbiter of our lives. What is bad for this or any other country is for society to be consciously and aggressively shaped by a single functional group or a single ideology, whatever it may be.150

This is not to say that corporations will become villains under the guise of private enterprise. Even if corporations are not required

147. Id.
148. Id. at 45.
149. See G. Orwell, 1984 (1949).
to perform socially-oriented programs, as Professor Levitt recom-
mended, there is no reason not to expect corporations, and corpo-
rate personnel "to obey the elementary canons of everyday face-to-
face civility (honesty, goodfaith, and so on). . . ."151

In his 1973 work, The Third Sector, New Tactics for a Responsive
Society, Professor Levitt stands firm in his view that business is
governed by the profit motive and ought not be engaged to protect
social interests.152 Instead, social interests can be furthered by en-
couraging the actions of reformist groups and organizations, i.e.,
"the third sector."

Professor Levitt maintains that the problem of which young ac-
tivists complain is that the large institutions have grown insensi-
tive to individual needs and concerns:

In the past, they wanted specific reforms. Today they want a more respon-
sive society. Specifically, they want more responsive and benign behavior
on the part of the large bureaucracies—government, corporate, judicial,
professional, and educational—the big bureaucracies that make the cru-
cial decisions that affect our lives and whose combined efforts have pro-
duced in such massive abundance precisely what America has always so
undeviatingly valued. . . .

. . . .

. . . .The real problem, they feel, is that society is in the iron grip of a
group of involuted and bovine bureaucracies, both public and private
. . . . Furthermore, the old machinery for conflict resolution and social
accommodation—like political participation, legislation, pressure groups,
and voluntary association—has, in the view of the new activists, itself be-
come bureaucratized, sluggish, and often just plain obsolete.153

The solution is not to change the roles of various institutions in
society, but to make institutions more sensitive and more respon-
sive. The means for accomplishing this, are provided by what Pro-
fessor Levitt has termed "the third sector." These are public
interest groups, which sway public opinion, fight in Congress, and
even attack directly the gigantic and callous bureaucracies.

Levitt claims business depends on stability and certainty. It
can be made to respond to social needs only by the disruption of
these valued conditions.154 In his view, corporate executives "do
more than merely talk back" once provoked by outside sources.155

151. Id. at 49.
152. THIRD SECTOR, supra note 137, at 3-4.
153. Id. at 3-4, 10-11.
154. The problem is how to get large bureaucracies to continue to do
their bureaucratic jobs with their accustomed narrow efficiency
while also making them quickly aware of and effectively responsive
to the social and human consequences of their actions.

Fortunately, the answer lies precisely in the nature of the bureau-
cratic organization itself. The sudden disruption of its routine is its
greatest vulnerability.

Id. at 44. See also Soderquist & Vecchio, Reconciling Shareholders' Rights
L.J. 819.
155. Id.
He cites as an example the Coca Cola Company which was publicly attacked in 1970 "for fostering the unseemly living conditions of migrant workers at its orange groves." He asserts that public criticism and threats to current economic security will motivate corporations to respond most effectively to social needs. While it might not produce the drastic results desired, some changes will be made, and they will be made immediately.

Professor Levitt maintains that there are too many examples of corporations paying lip service to their social obligation, while following the course to higher profits in making final business decisions. This is certainly to be expected. In Levitt's view it is not bad for business to follow the profit making motive. The way to make corporations more responsive to public needs is to make it economic for corporations to be so. This is to be accomplished not only through the activities of the "third sector" but also through the responsiveness of the public sector in carrying out its charge.

VI. MANNE: ONE ECONOMIST'S VIEW

In contrast to the previous views, Professor Henry Manne, in the tradition of laissez-faire free market economists, favors the profit motive as the sole internal as well as external factor in shaping corporate conduct. The essence of Manne's analysis is that free market forces, left unregulated, will guide the corporation in the proper direction.

Manne takes issue with Berle and Means' concern for the separation of ownership from control in the form of management rule. As an economist he views this separation as a positive good which reflects the realities of the modern large corporation:

156. "[T]he company did not rush out quickly merely to put up, say, neat new placating mobile homes . . . . [Instead it] set into motion a far-ranging program to build new housing, raise wages, and include the citrus pickers in many of the nonwage benefits enjoyed by permanent CocaCola employees." Id. at 46.

MODELS OF CORPORATE CONDUCT

[T]he corporation [is] operated financially in the interest of "control" . . . . Not that the "control" or the managements have become thieves; quite the contrary. Rather, they have come to recognize (perhaps as "business statesmen") that first claim on accumulated profits is the claim of the enterprise itself—that, for example, the first duty of a steel company is to make steel, and have it there in sufficient quantity to meet the existing or foreseeable future requirements of the community. These needs take precedence over the dividend desires of any body of passive stockholders—as indeed they should.158

A corollary to this view of the proper focus of management control is the concept of a market for control.159

Manne argues against significant shareholder voting rights and stringent, externally imposed management norms since the market operates as the arbiter. Under this view shareholders voice their disapproval of management by selling their shares and this increased supply drives the price of stock downward. This is seen as one direct incentive against mismanagement. Additionally, if the stock price drops low enough, the company becomes ripe for a takeover which, of course, would act as further incentive for existing corporate managers to rule effectively.160 Certainly, the stock market is a factor in controlling management.161 However, this control market will only react to extreme mismanagement and thus gives management far too much leeway, clearly even more than does the judicially-created "business judgment rule" that gives a presumption of validity to management actions.162 Accordingly, the framers of our current corporate system have determined that more than market forces are necessary to keep corporate management in tow.163

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158. *The “Higher Criticism,”* supra note 32, at 449. Ironically, Manne’s formulation of the corporation’s “first duty” sounds more akin to a social responsibility approach than to the supremacy of the profit motive.


161. Manne’s observations put an economist’s slant on the observation that shareholders in a public issue corporation have their interests more properly aligned with those of an investor than those of a proprietor. *See Hazen,* supra note 4. *See also,* e.g., J. LIVINGSTON, *THE AMERICAN STOCKHOLDER* 66-67 (1968).


Pursuant to the market approach to corporate conduct, it is maintained that economic forces may well result in a socially responsible institution, but only to the extent that social responsibility would be in the best economic interest of the corporation—be it short or long range. For example, consumer-oriented companies may increase their public esteem by beneficent acts and thus, in turn, may increase sales. One obvious limit to the market view of social responsibility is that it is inapplicable to a major portion of the private sector since many concerns do not operate in a market that is responsive to a corporate image. Also, limiting a corporation's responsibility to such narrow parameters fails to meet an adequate level of responsibility. For example, market forces would not and did not lead automobile manufacturers to install pollution control devices or to give adequate consideration to automobile safety.

Another basic fallacy in this analysis is the unfounded assumption that the pure economic market model is reproducible in the real world. Additionally, Manne's economic analysis has been questioned in terms of its failure to consider social responsibility as a method of ensuring long-run profit maximization.

Even beyond the theoretical problems of Manne's analysis are the faulty examples that he provides. Manne's single issue focus ignores the reality of the multidimensional impact of a steel company upon society, including the American economy. For example, the environmental impact of steel production can demolish communities and ruin other industry. The company's relations with its employees can affect the entire economy. A steel strike cripples several other major enterprises such as American automobile manufacturers, not to mention construction and other heavy industry. Certainly there must be some check on this


166. See text accompanying note 158 supra.

167. Of course, this "ripples on the water" analysis represents an oversimplification of the direct and collateral impact that a major public issue company can have on society. There are numerous forces that combine to produce such
type of corporate power, whether it be coerced corporate altruism or a well-reasoned system of government regulation to protect the public interest. Manne's reliance on "the need for a comprehensive analysis of economic forces" in lieu of a "rule of law" may work on the models in the economist's laboratory but not beyond those four walls.

Another basis of Manne's attack on the socially responsible corporations is his observation that "[an] important thing to note about the economics of nonproductive expenditures is that the ultimate costs are apt to be borne by persons whom we would probably not choose to bear such costs." Specifically, he is pointing to the consumer or "society" as bearing the cost. At question here is his assumption that this is not the proper basis of cost accounting. In the first instance, since these costs will occur to offset or prevent the otherwise adverse collateral impact of the enterprise in question, it is fitting, at least within the confines of an economic model, that the costs should be borne by the beneficiaries of the product or service in question. To the extent that these costs become too high to make the product saleable, there are two alternatives: (1) abide by the market's determination that the costs do not outweigh the benefits; or (2) look to either the public sector or to the "third sector" to ensure that the costs are further spread out in order to bring the price down to one that the market can tolerate.

In sum, the model chosen by Professor Manne is simply the polar opposite of Nader's corporate big brotherism. As is the case in any system, the extremes provide thought provoking concepts in theory, but do not offer much in terms of wholesale adoption. However, much of the knowledge to be gained from both of these extremist views reflects the types of balances which must be struck in order to arrive at a workable paradigm.

VII. OBSERVATIONS AND CONCLUSIONS

The views presented above are intended to illustrate the wide divergence of opinion among commentators on the subject of corporate responsibility and the role of corporate law and manage-
The striking absence of a consensus has prevented development of a unified workable theory which might in the long run be implemented to solve the corporate responsibility problem.

As important as the differences are the similarities that exist in the views of Berle and Means, the Nader group, Stone and Levitt. Several common threads do exist, and tie their views together. In the first instance, it is generally agreed that there exists a problem with the corporate role in society. Public demand for more responsible corporate behavior is acknowledged. Secondly, the strong and guiding force of the profit motive is recognized. While Manne is blinded by it, Berle and Means cling to it. Levitt demands that profit maximization dominate business goals. The Nader group and Stone claim not to negate the profit motive, as Berle and Levitt seem to fear. They purport to merely require that business pursue it by paying the additional social costs incurred. Thirdly, there appears to be a consensus among Berle and Means, Nader, Stone and Levitt that a certain minimum standard of corporate responsibility is required. In other words, blatant corporate misconduct may and should be prohibited. The difficulty exists, still, in how this meager level of responsibility ought to be enforced. Fourthly, these paradigms all express the long-standing American fear of large uncontrolled accumulations of power which, by contrast, Manne exalts.

The items yet in disagreement provide drawbacks, however. Among them are, first, whether a long or short run approach ought to be taken to make corporations more accountable. The Nader group advocates immediate action. But it does not consider the long term effects of increased state and public involvement in corporate actions. It objects to the current partnership existing between government and business, and urges more strict government regulation. If Levitt's predictions of the future prove true, however, the current partnership is nothing compared to the merger of government and business that will evolve if corporations are forced to become truly social institutions. Indeed, this theoretical disagreement must be worked out.

Second, is the discord with respect to the importance of the profit motive as an incentive to business. The question becomes whether it can be adequately replaced. This is a question that deeply concerned Berle and Means; they reluctantly approved reforming the corporate function in society without an equally impelling incentive. Levitt, in contrast, admits of no substitute without dissolution of our current political system.

Third, is the obvious difference of opinion as to the meaning of corporate social responsibility. This definitional problem is so considerable that Professor Stone devotes a chapter to it in Where the
The trouble, he believes, is that

the notion is so open-textured that people who might plausibly claim to
be "responsible" in one sense of the term could be made to appear, with
no disagreement as to the facts, "irresponsible" in another. For example,
some people undoubtedly consider Daniel Ellsberg's releasing of the Pen-
tagon Papers "irresponsible," while others, without any significant disa-
greement as to the facts or even as to a position on the Vietnam War,
could support him as a paragon of responsibility.

The issue, then, that needs to be decided is whether corporate re-
sponsibility ought to emphasize obedience to law, or to a higher
morality. In the latter sense, responsibility would constitute fuller
consideration of the larger ramifications of corporate behavior. It
would also bring about the subordination of the profit motive, a
development to which Levitt so violently objects.

The final disagreement, once corporate responsibility is de-

173. C. STONE, supra note 30.
174. Id. at 113.