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## Reflection: Corporate Capitalism's Moral Lack

Corporate capitalism changed dramatically in the early 2000s. The 1980s mantra that “greed is good” gave way to corporate vows to prioritize social and environmental values alongside profit. The rise of the “new corporation” purported to answer a question first raised in the nineteenth century: How do we ensure corporations are legally and morally accountable to those their actions impact? By the late nineteenth century, capitalism had become corporate, and the corporation had become capitalist. This created a moral lack in capitalism that inspired the “new capitalism” in the 1920s, the New Deal administrative state, and today’s “new corporation.” Understanding its historical antecedents reveals the “new” corporation’s limitations and dangers.

**Keywords:** corporate capitalism, new corporation, moral lack

Corporate capitalism changed dramatically in the early 2000s. The 1980s mantra that “greed is good” gave way to corporate vows to prioritize social and environmental values alongside profit. Firms embraced the notion that, “while [they] must be profitable if they are to thrive, their purpose must be not only to make money but also to build prosperity and freedom in the context of a livable planet and a healthy society,” as Rebecca Henderson describes (and prescribes) a vision that is now mainstream.<sup>1</sup> Though variously called ESG (environment, social, governance), stakeholder capitalism, inclusive capitalism, conscientious capitalism, shared value, connected capitalism, and creative capitalism,

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<sup>1</sup> Rebecca Henderson, *Reimagining Capitalism in a World on Fire* (New York, 2020), 36.

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that vision's basic tenet is the same: corporations should serve multiple social and environmental interests, not only shareholders' financial interests.

This "new corporation" is a twenty-first-century answer to a question first raised (in its modern form) in the nineteenth century: How can we ensure corporations are legally and morally accountable to people and interests beyond their equity-holders? By the end of the 19th century, that question was front-of-mind, largely due to two developments. First, capitalism had become *corporate*, and second, the corporation had become *capitalist*. The resulting corporate capitalist system—one dominated by large and commercially self-interested companies, their owners remote or absent and shielded from legal liability—lacked moral constraint, and was widely perceived as such. A bevy of "solutions" were proffered: "new capitalism" in the 1920s, the New Deal (and its legacy, the administrative state) beginning in the 1930s, and, finally, today's "new corporation." Drawing on that history, this essay shows how the latter, the new corporation, emerged as a strategy to protect capital from democracy's threat to its production and power.

### Capitalism Becomes Corporate

During the late nineteenth century, in Britain and the United States (and elsewhere too), the corporation became capitalism's dominant business form. Unincorporated partnerships, previously the business form of choice, gave way to limited liability companies as a "Limited-Company' Craze" swept across England and the United States. One commentator wryly noted at the time:

No sooner do we rise from our bed (furnished by Somebody, Limited), than we use a limited soapmaker's soap. Very likely some of our garments bear a limited address. When we have donned them and gone down to breakfast we find on our table some prospectuses arrived by the first post; our bread and our jam bear the limited brand, and very likely our tea and butter would bear it if they could.<sup>2</sup>

By the early twentieth century, capitalism had fully assumed a corporate form, which differed significantly from what had preceded it. In the previously dominant partnership, individuals would join together to invest in, own, and manage firms while remaining personally liable, without limit, for failures and misdeeds of those firms. Such *unlimited* liability made it risky to invest in firms, and, through the nineteenth

<sup>2</sup> S. F. Van Oss, "The Limited Company Craze," *Nineteenth Century* 43 (1898): 731–744, 731, as cited in Kristen Guest, "Jekyll and Hyde, Inc.: Limited Liability, Companification, and Gothic Subjectivity," *Victorian Literature and Culture* 44, no. 2 (2016): 315–329, 316.

century, as the industrial economy expanded, that risk was increasingly seen as a cause of stagnation and a barrier to growth. The proposed solution was incorporation, which created a separate legal entity that could assume liability for a firm's actions and thus shield owners and investors from risking anything but their equity stakes. The effect was to incentivize investment as investors could now control and limit risk while anticipating unlimited gain.

The advance of industrial technology, especially through the latter half of the nineteenth and beginning of the twentieth centuries, further propelled the corporation to dominance. Steam and petrochemical power, electricity, telegraphs, telephones, and assembly-line production, among other innovations, made it possible for industries to operate at massive scale. The resulting large enterprises needed large pools of investment capital, much larger than partnerships could generate (limited as they were to the relatively few people who could practicably run a firm together). Corporations were ideally fit for purpose. Their separation of management from ownership made it possible—especially with the availability of transferrable shares that could be publicly bought and sold in stock markets—for large numbers of anonymous and dispersed investors to pool contributions and finance large enterprises run by professional managers. Beginning in the 1860s, railways, and soon after that steel milling, oil drilling and refining, and manufacturing concerns, were organized as corporations, large in size and often publicly traded. By the 1890s, such companies were rising quickly in the United States (more so than in Britain).<sup>3</sup>

By the early twentieth century, these companies had emerged as central institutions in modern capitalism, a “radical break,” according to Olivier Weinstein, “both in the nature of the firm. . .and in the structures of capitalism.”<sup>4</sup> As Adolf Berle and Gardiner Means observed in 1932:

Corporations have ceased to be merely legal devices through which the private business transactions of individuals may be carried on. . . .The corporation has, in fact, become . . . a means of organizing economic life. . . . there may be said to have evolved a “corporate system”—as there once was a feudal system.<sup>5</sup>

<sup>3</sup>C.A. Harwell Wells, “The Cycles of Corporate Social Responsibility: An Historical Retrospective from the Twenty-first Century,” *Kansas Law Review* 51 (2002): 77–106, 83–87; Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (New York, 2004), 8–16.

<sup>4</sup>Olivier Weinstein, “Firm, Property and Governance: From Berle and Means to the Agency Theory, and Beyond,” *Accounting, Economics, and Law: A Convivium* 2, no. 2 (2012): 1–55.

<sup>5</sup>Adolf A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (New Brunswick, 1932), 3.

In other words, by the 1930s, capitalism had transformed into a system dominated by large companies wielding power and influence over all sectors of society. And while, as Eric Hilt observes, Berle and Means underplayed the number of large public companies operating prior to the 1930s, they were nonetheless “correct in their judgment that the largest businesses of their time had achieved a scale that was historically unprecedented.”<sup>6</sup> After the 1930s, corporations continued to grow in size and were increasingly publicly traded, trends continuing into the present and resulting in a form of capitalism, corporate capitalism, dominated by large companies.

### The Corporation Becomes Capitalist

It was not, however, only capitalism that changed as the corporation became its dominant institution. The corporation changed too. When Weinstein notes a “radical break . . . in the nature of the firm” (not only in “the structures of capitalism”), he describes the corporation’s transformation into a *capitalist* institution, one oriented *fundamentally* toward profit, growth, and creating wealth for its owners.<sup>7</sup> Importantly, a corporation does not have to be this way. There is nothing inherently capitalist about incorporation. It can be, has been, and is used to create separate legal entities for numerous non-commercial purposes, including religious worship, public provision, and the organization of universities, municipalities, and charities.

Not until the mid-nineteenth century was the corporate form routinely used for purely commercial purposes, though it had existed at least since Roman times, and, in its modern iteration—as a separate “person” that can own property, enter contracts, and sue and be sued—since the late Middle Ages.<sup>8</sup> Through the seventeenth, eighteenth, and early nineteenth centuries, in England and other European countries, as well as the American colonies, and (after 1776) the United States, incorporation was a *privilege*, not a *right*, stingily granted by monarchs (in England) and state legislatures (in the United States) in exchange for firms’ commitments to deliver public benefits on behalf of governments (such as, among other things, canals, roads and bridges, the organization of universities and religious institutions,

<sup>6</sup> Eric Hilt, “The ‘Berle and Means Corporation’ in Historical Perspective,” *Seattle University Law Review*, 42, no. 2 (2019), 417, 420.

<sup>7</sup> Olivier Weinstein, “Firm, Property and Governance: From Berle and Means to the Agency Theory, and Beyond,” *Accounting, Economics, and Law: A Convivium* 2, no. 2 (2012): 1–55.

<sup>8</sup> Reuven S. Avi-Yonah, “Citizens United and the Corporate Form,” *Accounting, Economics, and Law*, 1, no. 3 (2011): 1–54, 2–3.

and the exploration and exploitation of foreign lands).<sup>9</sup> In this way, “corporations were not initially private profit-making machines, as they are viewed today,” as Shepherd observes. “Instead, the state permitted a corporation to exist only if it and its leaders furthered the public interest.”<sup>10</sup>

By 1688, fifteen joint stock companies were operating in England, all chartered by the king to pursue particular sovereign interests. An incorporation boon yielded ninety-three such companies between 1690 and 1695, but, due to reckless speculation and fraud (the commissioners of trade for England concluded in 1696 that the corporate form had been “wholly perverted” by promoters who sold stock “to ignorant men, drawn in by the reputation, falsely raised and artfully spread, concerning the thriving state of the stock”), only twenty remained in 1698. As if to underline the commissioners’ concerns, the South Sea Company, formed in 1710 to carry on exclusive trade with the Spanish colonies of South America, including in slaves, collapsed in a flurry of fraud and scandal ten years later. Fortunes were destroyed and the British government, a major investor, was nearly bankrupt. Parliament reacted with the Bubble Act (in reference to what quickly came to be known as the “South Sea Bubble”), making it a criminal offense to create a firm “presuming to be a corporate body” and to issue “transferrable stocks without legal authority.” The law, which effectively banned joint stock companies, would not be repealed until 1825.<sup>11</sup>

<sup>9</sup> Paul Johnson, *Making the Market: Victorian Origins of Corporate Capitalism* (Cambridge, UK, 2010), 110.

<sup>10</sup> George Shepherd, “Not Just Profits: The Duty of Corporate Leaders to the Public, Not Just Shareholders,” *University of Pennsylvania Journal of Business Law* 23, no. 3 (Spring 2021): 823–861, 839. Importantly, in relation to early corporations’ exploration and exploitation of foreign lands, the “public interests” that companies were chartered to pursue included brutal colonial policies, slavery among them. As Sundhya Pahuja and Anna Saunders write: “The long backstory to the question of the multinational corporation is colonialism. . . . [And] two elements bear mention. The first is that regardless of how they are theorised, the chartered or ‘colonial’ companies had been experienced in much of the world not simply as agents of empire, but as themselves imperial masters. This mastery was not effected simply through the exercise of ‘private’ power, but of political, or public authority. As Bedjaoui was later to put it, the chartered companies enjoyed ‘the right to recruit armed forces, levy taxes and make regulations’. They also made laws, adjudicated disputes and administered territory. The second element is that by the middle of the nineteenth century, and after several crucial shifts in the quality of the ongoing encounters between the European and non-European worlds the idea of private property, and its ownership by foreigners, was being protected outside Europe through multiple modalities of violence. Colonialism, economic coercion and force or its threat in the form of ‘gunboat diplomacy’ were all elements of that protection.” See Pahuja and Saunders, “Rival Worlds and the Place of the Corporation in International Law,” in *The Battle for International Law: South-North Perspectives on the Decolonization Era*, ed. Jochen von Bernstorff and Philipp Dann (Oxford, UK, 2019), 141, 144.

<sup>11</sup> This paragraph summarizes a more detailed account of this history in Bakan, *The Corporation*, 8–10. Notably, the economic crisis caused by the South Sea Bubble contributed to a raft of deer poaching in the English countryside that, in turn, led to Parliament’s enactment of the

While joint stock companies were banned in England, they proliferated in the United States. The number of incorporated firms grew significantly during the post-Revolutionary era (from 33 to 328 between 1781 and 1790, for example), and, in response to widespread corruption infecting the legislative chartering system through the 1820s and 1830s, state legislatures did away with special grants. By 1865, most states had enacted general incorporation laws that effectively transformed incorporation from a privilege into a right, making it available to any business regardless of its size or purpose.<sup>12</sup> As Naomi Lamoreaux and John Wallis observe, the trend was in part a product of crisis in public finances, and it had considerable impact in laying the groundwork for modern capitalism in the United States.<sup>13</sup> To similar effect in England, through a series of legislative enactments through the mid-nineteenth century—the 1844 Companies Registration Act, the 1855 Limited Liability Act, the 1856 Joint Stock Companies Act, and the 1862 Companies Act—Parliament transformed incorporation from a privilege into a right.<sup>14</sup>

Thus, from the mid-nineteenth century forward, firms could, as a matter of right, incorporate for any purpose, including purely commercial purposes. No longer were they obliged to pursue sovereign goals in exchange for the benefits of incorporation. Commercial self-interest was a legitimate goal for incorporation, and it would become a legal *requirement* as corporate law evolved through the latter half of the nineteenth century. By the end of the century, the corporation's overarching mandate was to create wealth for its equity holders, as a matter of both law and custom. Corporations were thus shorn of other-regarding capacity, and, because incorporated firms were separate from the human beings who owned and invested in them, no longer could they be "'moralised' by the people who held shares in them, unlike partnerships whose character was wholly determined by the partners," as James Taylor writes.<sup>15</sup> The late-nineteenth-century company thus represented, in Johnson's words, "the final removal of the vestiges of a 'moral economy' in which property owners were expected to take some responsibility for the welfare consequences of their actions."<sup>16</sup>

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notorious "Black Act." See E. P. Thompson, *Whigs & Hunters: The Origins of the Black Act* (New York, 1975).

<sup>12</sup> Shepherd, "Not Just Profits," 835–838.

<sup>13</sup> Naomi R. Lamoreaux and John Joseph Wallis, "Economic Crisis, General Laws, and the Mid-Nineteenth-Century Transformation of American Political Economy," *Journal of the Early Republic* 41, no. 3 (2021): 403–433.

<sup>14</sup> Bakan, *The Corporation*, 10–12; Johnson, *Making the Market*, 110.

<sup>15</sup> James Taylor, *Creating Capitalism: Joint-Stock Enterprise in British Politics and Culture 1800–1870* (London, 2006), 27, as cited in Guest, "Jekyll and Hyde, Inc.," 318.

<sup>16</sup> Johnson, *Making the Market*, 70.

### The Moral Lack

In 1886, Robert Louis Stevenson published *The Strange Case of Dr. Jekyll and Mr. Hyde*. The book was popular on both sides of the Atlantic, not least, according to Kristen Guest, because its story—about the creation of an amoral alter-ego to avoid moral and legal responsibility—tapped into growing concerns about the proliferation of limited liability companies. Jekyll's living off of a “multifarious, incongruous and independent” self, as the character describes it, free from the “morbid sense of shame” attendant to pursuing base self-interested desires, resonated with a public anxious about businesspeople being able to free themselves from legal and moral responsibility through incorporation. By “dividing himself into two beings, one of whom is a construct intended to exonerate the other of responsibility,” Jekyll mimics the process of incorporation, Guest observes, “approximat[ing] in human terms . . . companification,” and, along with it, “the movement from the social situated-ness associated with moral constraint to the pure individualism and self-interest of the economic subject.”<sup>17</sup>

Beyond *The Strange Case of Dr. Jekyll and Mr. Hyde*, late-Victorian periodicals, plays, and novels channeled growing public anxiety about limited liability companies, continuing earlier-rooted unease about rising markets and their detachment of commerce from moral and social normativity.<sup>18</sup> In W. S. Gilbert and Arthur Sullivan's 1893 satirical opera, *Utopia, Limited*, the king of a fictitious Pacific Island, Utopia, decides to emulate the incorporation craze happening in England by converting his subjects into limited liability companies. A lead character—Mr. Godbury, a company promoter—excitedly proclaims at one point that there is “no scheme too great and none too small for Companification!” Which should be cause for concern, not celebration, Gilbert and Sullivan imply in a lyric sung by another character: “Though a Rothschild you may be, in your own capacity/As a company you've come to utter sorrow/But the liquidators say, 'Never mind—you needn't pay'/So, you start another Company Tomorrow.”<sup>19</sup>

<sup>17</sup> Guest, “Jekyll and Hyde, Inc.,” 320–321.

<sup>18</sup> Guest, 315–317. For example, Rob McQueen notes how Charles Dickens scathingly sets out the moral failings of limited liability in his 1857 novel *Little Dorrit*—published just a year after the Companies Act of 1856 had made limited liability widely available to businesses. See Rob McQueen, *A Social History of Company Law: Great Britain and the Australian Colonies 1854–1920* (Surrey, UK, 2009), 100, 107. Concerns about the moral lack created by limited liability extended and built on broader concerns through the rise of capitalism about the way markets “disembedded” (to use a concept from the economist Karl Polanyi) the economy from broader social institutions and relations, including moral and ethical commitments.

<sup>19</sup> This discussion of *Utopia, Limited* draws on Bakan, *The Corporation*, 12–13, and Johnson, *Making the Market*, 105–106.



*Utopia, Limited*, like *The Strange Case of Jekyll and Hyde*, aligned with critiques and concerns circulating with increasing frequency as limited liability companies proliferated. The tenor of these is evident in S. F. Van Oss's observation in 1898 that "personal ownership has ceased to be the controlling power in trade, and when it left it took along with it that personal care, personal supervision, and personal responsibility which made our business great."<sup>20</sup> In similar spirit, a parliamentarian speaking against the introduction of limited liability in the mid-nineteenth century claimed it attacked "the first and most natural principle of commercial legislation . . . that every man was bound to pay the debts he had contracted, so long as he was able to do so"; and that it would "enable persons to embark in trade with a limited chance of loss, but with an unlimited chance of gain," thus "encourag[ing] a system of vicious and improvident speculation."<sup>21</sup> Religious overtones were not uncommon, as in economist John Ramsay McCulloch's statement that "in the scheme laid down by Providence for the government of the world, every man [is] personally answerable to the utmost extent for all his actions," yet advocates of limited liability "proclaim in their superior wisdom that the scheme of Providence may be advantageously modified, and that debts and obligations may be contracted that the debtors, though they have the means, shall not be bound to discharge."<sup>22</sup>

Despite all the criticism and worry, corporations proliferated during the late nineteenth century and quickly grew into massive concerns. Owners and investors often had little, if any, involvement in managing firms and no responsibility for their actions. Industrial consolidation through the 1900s and 1910s propelled further growth in corporations' size and power, and by the 1920s core sectors of the United States economy were dominated by relatively few enterprises. All of which exacerbated concerns about the corporation's moral lack, as it now dangerously combined with massive size and power. Condemned as uncaring behemoths, corporations became the targets of widespread dissent, with populist movements and governments, along with an increasingly

<sup>20</sup> S. F. Van Oss, "The Limited Company Craze," 734, as cited in Guest, "Jekyll and Hyde, Inc.," 315.

<sup>21</sup> Bakan, *The Corporation*, 13.

<sup>22</sup> J. R. McCulloch, *Considerations on Partnership with Limited Liability* (London, 1856), 10–11, as cited in Johnson, "Making the Market," 137. Guest observes that there was broad concern at the time that traditional notions of the self as a moral actor in all endeavors, including economic ones, was being replaced "with a new concept of the self as *homo economicus*: an empty, merely economic unit governed by calculations of personal advantage rather than a fixed moral framework." The focus on greed, competition, and self-gratification were, says Guest, "fundamentally at odds with the values of altruism and duty to others that anchored socially privileged gentlemanly and professional ideals from mid-century onwards." See Guest, "Jekyll and Hyde, Inc.," 319.



militant labor movement, taking aim at their growing power and impunity.<sup>23</sup>

*A new capitalism.* No remedy to the moral lack could be forged from the moral character of large corporations' owners. They were typically remote from the companies they owned, entirely absent from publicly traded ones (where owners were anonymous and dispersed stockholders), and largely immune to liability for their firms' actions. Thus, to gain favor with an increasingly skeptical public and the governments that represented it, some companies began suggesting that they *themselves* were possessed of human qualities and moral characters. AT&T, for example, in advertising and public relations campaigns beginning in 1908, claimed to be a "friend and neighbor" as well as a "a new democracy of public service ownership," encouraging people to, in the words of one company official, "love it—to hold real affection for it." General Motors ran ads designed, according to the agency that created them, "to personalize the institution by calling it a family." Other major corporations—General Electric, Eastman Kodak, National Cash Register, Standard Oil, US Rubber, and the Goodyear Tire & Rubber Company—presented themselves in similar terms, and undertook various kinds of related social initiatives.<sup>24</sup>

With the rise of this "new capitalism," as it was described at the time, "the corporate manager of the 1920s seemed to have developed, for the first time, a concept of social responsibility from a corporate rather than an individual perspective," as Hoffman notes.<sup>25</sup> Key to that concept were notions of *service* (to consumers, employees, communities, and the nation, not only to shareholders), *trusteeship* (of those various interests, not only of shareholders' interests), and *professionalism* (in the sense of managerial duties to public, not only private, interests).<sup>26</sup> Also key was the idea that reforming a company along these lines would benefit, not cost, the company, as it could help legitimate firms' operations and stave off government regulation.

Thus understood, "new capitalism" was not about restoring legal constraints lost to limited liability but rather about signaling such constraints were unnecessary. Imagining corporations as imbued with human and moral qualities, and thereby capable of conscientious and responsible behavior, implied they could act in socially responsible ways without being compelled to do so by law. The corporation's moral

<sup>23</sup> Bakan, *The Corporation*, 16–17.

<sup>24</sup> Bakan, *The Corporation*, 17–18. See also Richard Hoffman, "Corporate Social Responsibilities in the 1920s: An Institutional Perspective," *Journal of Management History*, 13, no. 1 (2007): 55–73, 62.

<sup>25</sup> Hoffman, "Corporate Social Responsibilities," 56.

<sup>26</sup> Hoffman, "Corporate Social Responsibilities," 62–64.

lack was thereby putatively solved without intervention by the state. By corollary, embracing social responsibility was understood as a strategy for firms to hold at bay governments with increasing regulatory ambitions. As Gerard Swope, president of General Electric from 1922 to 1940, described it in 1931, “Organized industry should take the lead recognizing its responsibility to its employees, to the public and to its shareholders, *rather than that democratic society should act through its government.*”<sup>27</sup>

The threat of democratic society acting through its government was indeed significant during the “new capitalism” era. Despite industry chiefs’ fine talk of corporate responsibility, public antipathy toward big business continued to grow and increasingly found expression in populist calls for legal constraints. States had already begun experimenting with regulating companies in the 1890s, but the practice truly gained prominence with the election of President Theodore Roosevelt in 1901. “Great corporations exist only because they are created and safeguarded by our institutions,” Roosevelt proclaimed in his first annual message to Congress, “and it is therefore our right and our duty to see that they work in harmony with these institutions.” Incorporation is a “privilege,” he said, that “frees [men] from individual responsibility, and enables them to call into their enterprises the capital of the public.” In exchange for that privilege, they “should be regulated if they are found to exercise a license working to the public injury.” They are, after all, “creatures of the state,” which “not only has the right to control them, but it is duty bound to control them whenever the need of such control is shown.” The vast power conferred by vast wealth, “and especially by wealth in its corporate form,” should be used “for and not against the interests of the people as a whole.”<sup>28</sup>

Roosevelt’s rationale for legally regulating corporations echoed the eighteenth-century and early nineteenth-century ideas that incorporation is a privilege, not a right; and that, in exchange for its considerable benefits to equity holders, like limited liability, firms taking advantage of it had obligations to serve public interests. Regulation, in the form of mandatory legal norms enforced by courts and industry-specific agencies, was the mechanism to ensure that happened. Following through on these ideas, Roosevelt’s administration promulgated robust antitrust

<sup>27</sup> Gerard Swope, *The Swope Plan: Details, Criticisms, Analysis* (New York, 1931), 22 (emphasis added). Cited in E. Merrick Dodd, “For Whom Are Corporate Managers Trustees?” *Harvard Law Review* 45, no. 7 (1932): 1145–1163; also in Bakan, *The Corporation*, 19.

<sup>28</sup> A fuller summary of Theodore Roosevelt’s speech can be found in Shepherd, “Not Just Profits,” 841–842. Also see President Theodore Roosevelt, First Annual Message, 3 Dec. 1901, Miller Center, accessed 5 May 2023, <https://millercenter.org/the-presidency/presidential-speeches/december-3-1901-first-annual-message>.

laws and laid the groundwork for broader use of regulation to control corporations in the name of public interests. The resulting administrative state would be further broadened and deepened by Theodore Roosevelt's distant cousin, Franklin Roosevelt, when he became president in 1933.

*A new deal.* The 1929 crash and the ensuing Great Depression quickly dampened enthusiasm for "new capitalism" ideas. Notions that big business could be trustworthy and public-minded seemed implausible in the wake of an economic disaster that, in both public and scholarly opinion, was widely understood to be its fault. Viewed as "Frankenstein monsters," Justice Louis Brandeis's apt description at the time, corporations' amorality was an animating concern behind Roosevelt's New Deal.<sup>29</sup> It was a key part of his first public pledge of "a new deal for the American people" when he accepted his nomination at the 1932 Democratic Convention in Chicago. During the "vast cycle" of economic growth and expansion in the years preceding 1929, Roosevelt said in his speech:

There was little or no drop in the prices that consumers had to pay, although those same figures proved that the cost of production fell very greatly; corporate profit resulting from this period was enormous; at the same time little of that profit was devoted to the reduction of prices. The consumer was forgotten. Very little of it went to increased wages; the worker was forgotten, and by no means an adequate proportion was even paid out in dividends; the stockholder was forgotten. And, incidentally, very little of it was taken by taxation to the beneficent government of those years. What was the result? Enormous corporate surpluses piled up—the most stupendous in history.<sup>30</sup>

Moreover, as Roosevelt reflected later, "during those years of false prosperity," corporate concentration had become a "dangerous thing," whereby "half of the industrial corporate wealth of the country had come under the control of less than two hundred corporations," stifling competition as companies became "tied together by interlocking directors, interlocking bankers, [and] interlocking lawyers."<sup>31</sup>

<sup>29</sup> *Louis K. Liggett Co. v. Lee*, 288 US 517, 53 S. Ct. 481 (1933).

<sup>30</sup> Franklin D. Roosevelt, "Address Accepting the Presidential Nomination at the Democratic National Convention in Chicago," 2 July 1932, The American Presidency Project, accessed 5 May 2023, <https://www.presidency.ucsb.edu/node/275484>.

<sup>31</sup> Franklin D. Roosevelt, "Campaign Address at Chicago, Ill. 'It Was This Administration Which Saved the System of Private Profit and free Enterprise,'" 14 Oct. 1936, in *The Public Papers and Addresses of Franklin D. Roosevelt, Volume Five: The People Approve, 1936*, ed. Samuel I. Rosenman (New York, 1938), sec. 176, p. 486.

The size and increasingly concentrated power of corporations threatened not only competition but also democracy, Roosevelt claimed in another speech. The rise of fascism in Europe had taught two simple truths about “the liberty of a democratic people”:

The first truth is that the liberty of a democracy is not safe if the people tolerate the growth of private power to a point where it becomes stronger than their democratic state itself. That is, in essence, fascism—ownership of government by an individual, by a group, or by any other controlling power. The second truth is that the liberty of a democracy is not safe, if its business system does not provide employment and produce and distribute goods in such a way as to sustain an acceptable standard of living.<sup>32</sup>

Once he became president, Roosevelt’s solution, manifest in the New Deal, was to (among other things) promulgate broad and robust mandatory legal controls of corporations, designed both to diffuse their concentrated power and to protect public interests. Authority to manage economic life had to be in the government’s hands, not “vested in any private group or cartel, *however benevolent its professions profess to be*” (emphasis mine, a clear reference to, and rejection of, new capitalism notions that corporate leaders could be trusted to protect and promote public interests).<sup>33</sup> Therefore, Roosevelt said in 1937, “the Government itself was going to use affirmative action to bring about its avowed objectives rather than stand by and hope that general economic laws would attain them. . . . Because the American system visualized protection of the individual against the misuse of private economic power, the New Deal would insist on curbing such power.”<sup>34</sup> By 1937, the federal government (and many state governments too) had established broad-ranging legislative and administrative controls aimed at regulating corporations, and protecting vulnerable groups, such as workers, farmers, and the unemployed, from their exploitative predilections.

The New Deal was met with considerable hostility from big business quarters, though it had strong support in other places, including among

<sup>32</sup> Roosevelt, “Recommendations to the Congress to Curb Monopolies and the Concentration of Economic Power,” 29 Apr. 1938, in *The Public Papers and Addresses of Franklin D. Roosevelt, 1938 Volume: The Continuing Struggle for Liberalism* (New York, 1941), ed. Rosenman, sec. 59, pp. 305–306. The passages cited are included in Joseph L. Weiner, “The New Deal and the Corporation,” *The University of Chicago Law Journal* 19, no. 4 (1952): 724–738, 724–725, 729.

<sup>33</sup> Roosevelt, “Recommendations to the Congress to Curb Monopolies,” 313, and Weiner, “The New Deal,” 730.

<sup>34</sup> Franklin D. Roosevelt, “Introduction,” 1 Nov. 1937, in *The Public Papers and Addresses of Franklin D. Roosevelt, Volume Two: The Years of Crisis, 1933*, ed. Rosenman (New York, 1938), as cited in Cass Sunstein, *The Partial Constitution* (Cambridge, Mass., 1993), 57–58, and in Joel Bakan, *The Corporation*, 86.

scholars.<sup>35</sup> Adolf Berle, a—if not *the*—leading scholar of the corporation at the time, was one such supporter. For him, the New Deal was a necessary response to massive failures by big business. In 1963, he wrote:

The 1929 crash, the slow recovery of 1930, and the ensuing spiral descent into an abyss of unemployment, bank failures, and commercial paralysis was not corrected by market processes. The contemporary business captains, working desperately (as they did) to meet the situation, failed completely. Following established precepts of the American political process, the public . . . increasingly asked that the political state propose a program and act.<sup>36</sup>

For Berle, legal regulation was the only solution to the corporation's moral lack, and, in particular, the dangerous combination of corporate amorality and power that characterized corporate capitalism at the time of the New Deal.

Berle famously rejected “new capitalism” in 1931 by opposing Merrick Dodd, who viewed the corporation as “an economic institution which has a social service as well as a profit-making function.”<sup>37</sup> For Berle, the corporation was no such thing. “All powers granted to a corporation or to the management of the corporation [are],” he claimed, “at all times exercisable only for the ratable benefit of the shareholders.”<sup>38</sup> There was neither authority nor incentive within the corporate form for genuine social responsibility, Berle wrote, which made it necessary, as he would argue one year later (with co-author Means), to *legally* bind managers to account for public interests when making their business decisions.<sup>39</sup>

Berle's preference for legal rules over trust in corporate benevolence was in step with a growing consensus among scholars and policymakers in the early 1930s. Notably, Karl Polanyi, who famously worried that

<sup>35</sup> There was even a corporate-led plot to overthrow Roosevelt and his administration and install a retired Marine general, Smedley D. Butler, effectively as a fascist leader. See Bakan, *The Corporation*, 86–95, and Jules Archer, *The Plot to Seize the Whitehouse* (New York, 1973). Some business leaders were supportive of the New Deal. See Robert M. Collins, “Positive Business Responses to the New Deal: The Roots of the Committee for Economic Development, 1933–1942,” *The Business History Review* 52, no. 3 (Autumn 1978): 369–391.

<sup>36</sup> Adolf A. Berle, *The American Economic Republic* (New York, 1963), 91. Cited in William W. Bratton, “The Separation of Corporate Law and Social Welfare,” *Washington and Lee Law Review* 74 (Spring 2017): 767–790.

<sup>37</sup> Merrick Dodd, “For Whom Are Corporate Managers Trustees?,” *Harvard Law Review* 45, no. 7 (May 1932): 1148. This quote and the next one are from the famous exchange between Berle and Dodd. For an account of their debate, see, Joel Bakan, *The New Corporation*, 31.

<sup>38</sup> A. A. Berle, Jr., “Corporate Powers as Powers in Trust,” *Harvard Law Review* 44, no. 7 (May 1931): 1049.

<sup>39</sup> Adolf A. Berle and Gardiner Means, *The Corporation and Private Property* (New York, 1932), 312.

capitalism disembedded economic relations from social and moral normativity, lauded Roosevelt's New Deal as a corrective.<sup>40</sup> More broadly, "by 1933," Harwell Wells notes, "the deepening depression had thrown into doubt not only the beneficence but even the survival of large corporations. In the New Deal, many of the abuses Berle and Dodd attacked were solved by legislation . . . drawing scholars' attention away from issues of corporate social responsibility."<sup>41</sup> Dodd himself had, by 1934, stepped away from "new capitalism," no longer invoking the social responsibility of corporations but now, alongside Berle, seeing law as the main mechanism for addressing the corporation's moral lack. "If corporations generally are to be conducted in such a manner as to give due regard to the interests of all classes in society, including wage earners and consumers as well as investors and management," he wrote, "it is primarily through legislation that the change can be brought about."<sup>42</sup>

Berle would continue to develop his arguments for legal regulation into the 1960s. The New Deal, he stated approvingly in 1963, was the beginning of an "American economic republic" in which the state was clothed with authority and responsibility to manage the economy and shape its outcomes.<sup>43</sup> Robust legal control of corporations was at the heart of this, though, he added, rejecting his and Means's earlier views, such control should be achieved through externally imposed laws, not through the law of incorporation. "Classic corporation law is almost never availed of to adjust relations between the corporate enterprise and the community," he wrote. "That law is vigorously used to adjust relationships between management and stockholders." Controls were instead to be found in the "rapidly growing and extremely powerful field of law, quasi-law, and public expectations as to conduct hardening into law" that began with the New Deal.<sup>44</sup> In that spirit, Berle argued forcefully for legislation and regulation that commanded corporations to act in ways that served, rather than undermined, public interests,

<sup>40</sup> See Gareth Dale, *Karl Polanyi: The Limits of the Market* (Cambridge, UK, 2010); and David Schneiderman, "Hayek's Dream: International Investment Law and the Denigration of Politics," *Leiden Journal of International Law* (advanced online publication, 26 Aug. 2022), accessed 5 May 2023, <https://doi.org/10.1017/S0922156522000425>.

<sup>41</sup> C. A. Harwell Wells, "Cycles of Corporate Social Responsibility," 99.

<sup>42</sup> E. Merrick Dodd, review of *The Modern Corporation and Private Property*, by Adolf Berle, *University of Pennsylvania Law Review* 81, no. 6 (April 1933): 782, as cited in Wells, "Cycles of Corporate Social Responsibility," 98.

<sup>43</sup> Adolf A. Berle, *The American Economic Republic* (New York, 1963).

<sup>44</sup> Berle, "Constitutional Limitations on Corporate Activity: Protection of Personal Rights from Invasion through Economic Power," *University of Pennsylvania Law Review* 100, no. 7 (May 1952): 933–955, 936.

suggesting that corporations should even be subject to constitutional constraints to protect individual rights.<sup>45</sup>

Through the Second World War, the decades following it, and into the late 1970s, the spirit of the New Deal—and indeed many of its actual regulatory regimes—defined the nature of corporate capitalism. New laws were created, regulatory agencies were expanded, and legal protections were extended to workers, consumers, human rights, and the environment. Corporations were legally restrained in the name of fairness, equality, social welfare, and, later, environmental protection. During this period, which Peter Hall details and describes as “the era of modernization,” the moral gap that had so worried nineteenth-century critics of limited liability was, at least to some extent, narrowed, not by reviving personal moral responsibility, or by humanizing the corporation, but by subjecting corporations to value-driven legal constraints designed to protect social and environmental interests.<sup>46</sup> In this way, regulatory law was used to address the corporation’s moral lack—a moralizing effect in which, as Robin West describes it, “the capitalist relinquishes some economic power he or it possesses in law’s absence, and the hierarchy created through wealth is regulated,” thus “displac[ing] cruel and brutal realms of private sovereignty, and thereby serv[ing] egalitarian ends.”<sup>47</sup>

Rapid growth, strong public regulation, and the development of a social safety net and workplace protections, including collective bargaining, characterized the era of modernization.<sup>48</sup> And, for the most part, as Hall describes it, managerial ideologies came into line with the new order. “Although far from benevolent,” he writes, “the corporate strategies of the 1950s and 1960s tended to treat the firm as an entity with considerable responsibilities to its employees and other stakeholders.”<sup>49</sup> The modernization regime would not last, however. By the late 1970s and early 1980s, business leaders were attacking regulation as unduly constraining free markets and yielding inefficiency. They lobbied governments, mounted public relations campaigns, created free market think tanks, funded campaigns of anti-regulatory politicians, and, before long, governments—everywhere and of all political stripes—were purging regulations, curbing the creation of new ones, and

<sup>45</sup> Berle, “Constitutional Limitations on Corporate Activity,” 933.

<sup>46</sup> Peter Hall, “Growth Regimes” [this volume].

<sup>47</sup> Robin L. West, *Re-Imagining Justice: Progressive Interpretations of Formal Equality, Rights, and the Rule of Law* (Aldershot, UK 2003), 173, 175, as cited in Joel Bakan, “The Invisible Hand of Law: Private Regulation and the Rule of Law,” *Cornell Int’l Law Journal* 48 (2015): 279, 288.

<sup>48</sup> Hall, “Growth Regimes” [this volume page #].

<sup>49</sup> Hall, “Growth Regimes” [this volume page #].



gutting the agencies responsible for their enforcement.<sup>50</sup> Any lingering sense that corporations should have duties to stakeholders beyond their shareholders faded, and, again as Hall describes it, “the orientation of large American corporations shifted . . . to assign primary importance to increasing the value of the firm’s shares.”<sup>51</sup>

*The new corporation.* Ronald Reagan’s 1981 inaugural address was an impassioned plea against big government, as much as, a half-century earlier, Roosevelt’s nomination speech had been a plea for it. The two speeches are united, however, by the fact each articulated ideas that would define an era. “Government is not the solution to our problem; government is the problem,” Reagan famously asserted in his speech, pithily capturing an idea that has driven public policy for the last four decades. Whether the Trump administration—which seemed intent on making good on Stephen Bannon’s (when he was a Trump advisor) vow to “deconstruct[] . . . the administrative state”—was the apex of this era, or simply a point on its continuance, is as yet unclear.<sup>52</sup> What is clear, however, is that, in the early 1980s, the idea that democratic governments should robustly regulate corporations and markets to promote and protect public interests lost its privileged place in the political imagination. Taking that place was a set of ideas and practices generally described as “neoliberalism.”<sup>53</sup>

By the early twenty-first century, legal regulations targeting corporations had been rolled back, agencies tasked with enforcing them were diminished (and increasingly aligned with the industries they regulated), and judicial decisions increasingly weakened corporate-controlling laws and regulations.<sup>54</sup> Robust legal regulation as a solution to the corporation’s moral lack was, in effect, delegitimized and significantly (though not entirely) undone.<sup>55</sup> That, combined with companies’ increasing transnational capacities (due to new transportation and communications technologies, as well as liberalized international trade laws), enabled them to roam the globe with impunity in search of cheap labor and lax regulation. The rise of a new public anxiety about

<sup>50</sup> Bakan, *The New Corporation*, 59–90.

<sup>51</sup> Hall, “Growth Regimes” [this volume].

<sup>52</sup> For more on the Trump administration and deregulation, see Bakan, *The New Corporation*, 62.

<sup>53</sup> Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Cambridge, UK, 2018); Bakan, *The New Corporation*, 63.

<sup>54</sup> A trend recently manifest in, for example, *West Virginia v. EPA* 985 F. 3d 914 (2022).

<sup>55</sup> These deregulatory moves have been politically and ideologically justified as necessary to make markets free by loosening the grip of the state, though, in fact, they do no such thing. While it is true deregulation diminishes the use of law to protect public interests from corporations, it leaves unmitigated law’s protection and enabling of corporations (the very basis, as noted earlier, of Theodore Roosevelt’s argument for regulatory constraints). See Bakan, “The Invisible Hand of Law,” 283–288.

corporations and their power emerged in response, building on and energized by growing worries and social movement activity around inequality, environmental destruction, climate change, human rights, and global poverty. Worldwide anti-globalization protests in the early 2000s pointedly focused on corporate power, and the Occupy movement a decade later—in direct response to the debacle of 2008, and the austerity policies that followed—did the same.

Astute business leaders took note, seeing the public opinion churn as evidence of a legitimacy crisis rooted in big business' great success in beating back regulation over the previous decades. Their call, however, was not to restore robust legal regulation. Rather, taking cues from their early twentieth century “new capitalism” predecessors, who faced not dissimilar challenges, they responded with vows to humanize the corporation, to imbue it with a moral conscience. Social responsibility, previously pursued around the edges of corporations, would now, they said, be embedded at the core, granting social and environmental values equal, or near-equal, status with business values. No longer would corporations be part of the problem in relation to world ills, but now they would be part of the solution, working to mitigate pollution and climate change, ending poverty and hunger, and promoting gender and racial justice and equality.<sup>56</sup>

Such ideas now define the mainstream of business thought and practice, as noted at the outset of this essay. Today, as World Economic Forum Chief Klaus Schwab describes it, “companies . . . recognize that they have a special responsibility in the world; social and environmental responsibility [must] . . . be, part of corporate action and corporate decision-making.” Richard Edelman adds that such responsibilities now lie at the *core* of corporate operations, “in the supply chain, in the hiring practices, throughout the corporation,” no longer peripherally expressed through mere “philanthropic exercises.”<sup>57</sup> As Michael Porter summarizes it, “the corporation has really reshaped and redefined itself, it’s quite remarkable how big a shift that’s been.”<sup>58</sup>

A rich and voluminous scholarly literature supports, and sometimes critiques, such ideas. It asks questions like: How far can and should corporations go in championing social and environmental values?<sup>59</sup> What metrics and methods should be used to evaluate their

<sup>56</sup> For a fuller description of the rise of new corporation movement, see Bakan, *The New Corporation*, 7–35.

<sup>57</sup> Interview with Richard Edelman, Bakan, *The New Corporation*, 12.

<sup>58</sup> Interview with Michael Porter in Bakan, *The New Corporation*, 13, 116.

<sup>59</sup> See, for example, Henderson, *Reimagining Capitalism in a World on Fire*; Aaron K. Chatterji and Michael W. Toffel, “Assessing the Impact of CEO Activism,” *Organization and Environment* 32 (2019): 159–185; Tom C. W. Lin, *The Capitalist and the Activist: Corporate Social Activism and the New Business of Change* (San Francisco, 2022).

commitments?<sup>60</sup> To what extent does, and should, corporate law allow, forbid, or compel companies to consider social and environmental values?<sup>61</sup> Why are some companies exemplary of the trend, and others laggards?<sup>62</sup> How does and should business education cultivate commitment to social and environmental values in future business managers?<sup>63</sup> What is the role of investors and creditors in encouraging and demanding performance on social and environmental values?<sup>64</sup> How and to what extent do managers and boards' fidelity to creditors and investors limit companies' pursuit of such values?<sup>65</sup> How does and an pursuit of social and environmental goals create value for corporations?<sup>66</sup>

It is a vast literature, united by common belief in the desirability of corporations pursuing social and environmental values, and an overarching telos of encouraging that pursuit, whether by highlighting possibilities or revealing shortcomings. Rarely are questions asked about whether the pursuit itself is a good thing. A recent discussion among Kellogg Business School faculty is illustrative. The question was posed, "What is the purpose of the corporation today?," and faculty variously expressed hope and skepticism about the capacity of corporations to realize social and environmental values.

Only one intervention questioned whether corporate pursuit of those values was, in itself, desirable. "If you think that businesses are

<sup>60</sup> See, for example, Robert S. Kaplan and Karthik Ramanna, "How to Fix ESG Reporting," *BSG Working Paper Series*, BSG-WP-2021/043, July 2021; Galit Sarfaty, "Crowdsourcing Compliance: The Use of WikiRate to Promote Corporate Supply Chain Transparency," *Law & Ethics of Human Rights* 17 (forthcoming 2023).

<sup>61</sup> See, for example, Lynn Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations and the Public* (San Francisco, 2012); Carol Liao, Beate Sjaafjell, Aikaterini Argyrou, "Corporate Law and Sustainability in a Reimagined Post-Pandemic World," in *Innovating Business for Sustainability: Regulatory Approaches in the Anthropocene*, ed. Beate Sjaafjell, Carol Liao, and Aikaterini Argyrou (Northampton, MA, 2022).

<sup>62</sup> See, for example, George Serafeim, *Purpose + Profit: How Business Can Lift Up the World* (New York, 2022).

<sup>63</sup> See, for example, Sertan Kabadayi and Greer Jason-DiBartolo, "An Exploratory Study of How Business Schools Approach AACSB's Societal Impact Standards," *Journal of Education for Business* 97, no. 8 (2022): 521–530; Jenny Gross, "Business Schools Respond to a Flood of Interest in E.S.G.," *New York Times*, 13 Nov. 2021.

<sup>64</sup> See, for example, Pedro Matos, "ESG and Responsible Institutional Investing Around the World: A Critical Review," CFA Institute Research Foundation Literature Reviews, 28 May 2020, accessed 5 May 2023, <https://www.cfainstitute.org/en/research/foundation/2020/esg-and-responsible-institutional-investing>.

<sup>65</sup> See, for example, Stout, *The Shareholder Value Myth*; Henderson, *Reimagining Capitalism in a World on Fire*.

<sup>66</sup> See, for example, Michael E. Porter and Mark R. Kramer, "Creating Shared Value: How to Reinvent Capitalism and Unleash a Wave of Innovation and Growth," *Harvard Business Review* (January-February 2011); Ilze Zumente and Julija Bistрова, "ESG Importance for Long-Term Shareholder Value Creation: Literature vs. Practice," *Journal of Open Innovation: Technology, Market, and Complexity* 7, no. 2, 127 (2021), accessed 5 May 2023, <https://doi.org/10.3390/joitmc7020127>.

going to solve all the problems, good luck to you. . . . People must collectively come up with institutions that meet the demands of the time,” finance professor Ravi Jagannathan opined.

The discussion facilitator responded: “So you are still envisioning a political solution to these social problems? Even in a country as deeply divided as the US?”

Jagannathan’s answer: “There’s nothing that is likely to solve the social and environmental problems except a political solution. The CEOs of large companies are not the right people to make these kinds of decisions. . . . If they want to have a leadership role in formulating policies that affect people in general, they should go through the electoral process and get elected.”<sup>67</sup>

The implication of the facilitator’s question—that “political solutions” for major social problems may be irrelevant now—along with Jagannathan’s felt-need to provide a refresher on basic democratic principles in response, manifest a larger neglect in business thought and practice. Rarely is it asked whether increasing corporate leadership on social and environmental issues might be a problem for democracy. Indeed, like their “new capitalism” counterparts from the 1920s, today’s new corporation advocates often present corporate do-gooding as an *alternative* to democratic governance. *Because* corporations are “good actors,” their logic goes, they can be trusted to regulate themselves and be relied on to play more substantial roles in governing society. As Porter explains, the corporation’s “quite remarkable” shift makes it “the most powerful force for addressing the pressing issues we face,” positioning it well for “standing up and filling [the] void” left by “lack of faith in government.”<sup>68</sup> Schwab implies a similar logic in prescribing “strong collaboration between government and business, a permanent platform for public-private cooperation” as necessary for solving world ills.<sup>69</sup> Edelman marvels at the “big changes in the reliability of business as a potential good actor,” and the fact corporations are now “agents of change” that can “fill a void left by government.”<sup>70</sup> Bill Gates prescribes focusing more of “the caring and innovation power of corporations . . . on the needs of the poorest,” while limiting the role of governments mainly to “creat[ing] market incentives for business activity that improves the lives of the poor.”<sup>71</sup>

<sup>67</sup> Kellogg Insight, “What Is the Purpose of the Corporation Today,” 17 Jan. 2023, accessed 5 May 2023, <https://insight.kellogg.northwestern.edu/article/purpose-corporation-shareholder-value>.

<sup>68</sup> Interview with Michael Porter, in Bakan, *The New Corporation*, 116.

<sup>69</sup> Interview with Klaus Schwab, in Bakan, *The New Corporation*, 116.

<sup>70</sup> Interview with Richard Edelman, in Bakan, *The New Corporation*, 116.

<sup>71</sup> Bill Gates, from speeches and interviews, as cited in Bakan, *The New Corporation*, 121.

Such ideas are reflected in the expanding role of corporations in a broad range of global governance areas, not least in replacing mandatory legal regulation with voluntary self-regulation.<sup>72</sup> “Construction of a ‘corporate conscience,’” as Ronan Shamir observes, is necessary for “securing a rationale for private and self-regulation,” and with the rise of the new corporation such regimes have proliferated.<sup>73</sup> Voluntary codes of conduct are now ubiquitous across industries, promulgated and monitored by companies and industry groups, sometimes in collaboration with non-governmental organizations and governments (though the latter in the role of partners, as Schwab envisions it, not as sovereign regulators). These regimes are often sophisticated and far-reaching, as in the case of carbon (and other) off-set regimes; they sometimes include consumer-facing elements, such as certification; and they tend to be created with the clear intent to avoid public regulation—to operate in its place.<sup>74</sup> Their overall effect, according to Muir-Watt, is to “push the once-central ‘official’ or state law to the global edge.”<sup>75</sup>

The new corporation movement is tied intrinsically to claims that self-regulation can take the place of legal regulation, and hence to neoliberalism’s larger project of freeing corporations and markets from democratic constraints.<sup>76</sup> It calls, in effect, for corporations to govern themselves and society more, and to be governed by society less. It allows leaders of major corporations to proclaim—as they regularly do—that they and their companies are committed to social and environmental values, while they vociferously fight to roll back, avoid, and frustrate legal protection of those same values. It puts a progressive shine on policies that, since the 1980s, have diminished democratic oversight of corporations and expanded corporations’ profit-seeking operations in previously public domains. In short, constructing corporations as conscientious and socially responsible makes it putatively sensible to free them from regulation (as now they can be good without legal compulsion), and to grant them more control over public goods (as now they can be public interest-oriented). Though these trends are acute in the United States

<sup>72</sup> See, for example, Tanka Brühl and Matthias Hofferberth, “Global Companies as Social Actors: Constructing Private Business in Global Governance,” and John Mikler, “Global Companies as Actors in Global Policy and Governance,” in *The Handbook of Global Companies*, ed. John Mikler (New York, 2013).

<sup>73</sup> Rosen Shamir, “Capitalism, Governance, and Authority: The Case of Corporate Social Responsibility,” 6 *Ann. Rev. Law & Soc.* 534 (2010), as quoted in Bakan, “The Invisible Hand of Law,” 291.

<sup>74</sup> Bakan, “The Invisible Hand of Law,” 281–282; Bakan, *The New Corporation*, 76–88.

<sup>75</sup> Horatia Muir-Watt, “Private International Law Beyond the Schism,” *Transnational Legal Theory* 2 (2011): 347, 352.

<sup>76</sup> For more on this, see Bakan, *The New Corporation*, 59–90.

(and in some states more than others), they are, to greater and lesser degrees, prominent streams of policy, practice, and ideology across the globe.<sup>77</sup> Their overall effect is to diminish democratic governance of corporations and society.

### Conclusion

The corporation emerged as capitalism's dominant business form in the late nineteenth century. By then it had become fundamentally capitalist, in the sense of being primarily oriented toward commercial self-interest. Anxiety about the resulting moral lack was expressed in popular culture, among other places, and amplified when, over ensuing decades, corporations evolved into powerful behemoths. Two solutions to the moral lack emerged during the twentieth century. First, in the early decades, major corporations presented themselves as possessed of human qualities and moral agency. Then, when such notions lost credibility after the 1929 crash, legal regulation became the solution of choice. The resulting administrative state began to unravel in the 1980s, and the corporation's moral lack was once again laid bare. By the early twenty-first century, corporations were again presenting themselves as imbued with human qualities and moral agency, as they had during the early twentieth century, now self-consciously as an argument against state regulation. Which is where we are today, in the age of the new corporation.

The "new corporation" should be rejected for largely the same reasons New Dealers rejected "new capitalism." First, it is a chimera. There is nothing really new about the new corporation. Its self-interested legal mandate—to serve its own "best interests" by increasing shareholder value—has not changed. While there have been small modifications to corporate law—consideration of stakeholder interests is now permitted and sometimes required; emphasizing long-term rather than short-term value is prescribed; benefit corporations are legally facilitated—none dethrone shareholder value, and wealth-creation more generally, as primary imperatives. No new corporation advocate claims corporations should *sacrifice* business values to social and environmental values, only that the former should be pursued in ways that, as much as possible, promote the latter. The new corporation is about "doing well by doing good," not jettisoning "doing well" as the corporation's primary mandate. And that severely restricts the kinds and amounts of "good" corporations can do, while also licensing them to

<sup>77</sup>Slobodian, *Globalists*; Dani Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy* (New York, 2011).

do bad when that, rather than doing good, is the most effective way to do well.<sup>78</sup>

The second reason for rejecting the new corporation is that it is anti-democratic. Recall President Franklin Roosevelt's claim that democracy is at risk when private power becomes "stronger than the democratic state itself," and when the business system fails to ensure people are economically secure.

The rise of neoliberalism since the late 1970s has revealed the power of these two truths. It has, in relation to the first one, led to growth and concentration of private economic power, to the point such power plays an inordinate role in shaping politics and public policy. Arguably private economic power is now, in some regards, "stronger than the democratic state itself," as large corporations, compelled by legal mandates to create wealth for their shareholders, lobby governments, finance election campaigns, and exert other forms of political influence to lessen the profit-dampening effects of regulatory protections and taxes, and to open up previously public domains to private exploitation. In relation to Roosevelt's second truth, neoliberalism—in particular, lax corporate taxes, slashed social services, privatization, and other austerity measures—propels spiraling inequality and corrodes social solidarity, in turn creating fertile ground for illiberal and anti-democratic political movements and parties.<sup>79</sup> Accelerating climate change and other environmental crises, also connected to neoliberal policies, particularly deregulation, further exacerbate this destructive mix.<sup>80</sup>

Importantly, in relation to the new corporation movement's anti-democratic thrust, the problem is not the call for corporations to find synergies between doing good and doing well. Taken on its own, it is arguably a good thing when companies incorporate social and environmental values into their decision making; or non-governmental organizations set and monitor social and environmental standards for corporations; or consumers and investors demand corporations be guided by social and environmental values. In theory, such measures have potential to promote tangible social and environmental benefits; and, less tangibly, to foster social and environmental awareness and commitment within business communities and among citizens. Thus, even if the new corporation is a chimera—in the sense of being

<sup>78</sup> See Bakan, *The New Corporation*, 36–58. The contrast between the impression of corporation as "good actors" and their actual characters and behaviors is the basis for critics' various charges of greenwashing (environment, climate), pink washing (gender), blue washing (related to partnerships with UN organizations), fair washing (fair trade movement), and woke washing (race, LGBTQ, etc.).

<sup>79</sup> See Bakan, *The New Corporation*, 135–143.

<sup>80</sup> Bakan, *The New Corporation*, 43–49.



profoundly limited in how much and what kind of good it can do—it is arguably, at least in theory, better than nothing.

In *practice*, however, the new corporation is worse than nothing. While new corporation commitments to social and environmental values could theoretically help enrich the public good and democratic governance, what is happening in practice is precisely the opposite. As noted above, leading new corporation advocates present corporate conscientiousness as an *alternative* to democratic control, not a call for more of it. The same message is implicit in the actions of corporate leaders, as they piously promise to expand their companies' promotion of social and environmental values while simultaneously lobbying to diminish regulatory protection of those values. The effect of the message, and, more generally, the ideological construction of corporations as conscientious actors, is to help legitimate governments' retreat from governance of social and environmental domains.

When I asked Richard Edelman if he worried about the consequences for democracy of corporate “good actors” filling voids left by government (which he had prescribed earlier in our interview, see above), his answer was telling. “I’m not much of a believer in political citizenship,” he told me. “I actually believe much more in the power of the market-place.”<sup>81</sup> This frank admission of a preference for markets over political citizenship—in other words, *democracy*—is emblematic of the new corporation movement’s intrinsic link to neoliberalism.<sup>82</sup> With the latter aiming to “inoculate capitalism against the threat of democracy,” as Quinn Slobodian describes it, the former, the new corporation, is best understood as a key ideological strategy for achieving neoliberal ends.<sup>83</sup> It claims corporations should govern society more and be governed by it less. It cajoles citizens to place their faith in corporations rather than in the governments they elect. It positions the corporation—an undemocratic institution, compelled by law to prioritize capital’s interests above all others—as an *alternative* to democratic government. Through all this, it jettisons democratic aspirations and readies the political imagination for a post-democratic world. As such, the new corporation movement is fundamentally anti-democratic, despite its feel-good pretense.

<sup>81</sup> Interview with Richard Edelman, Bakan, *The New Corporation*, 127–128.

<sup>82</sup> Which, as noted above, articulates a widely held view among new corporation advocates.

<sup>83</sup> Slobodian, *Globalists*. As Dani Rodrik observes in *The Globalization Paradox*, maintaining and deepening democracy requires choosing between it and neoliberal globalization. Importantly, as Slobodian notes, while today’s far-right purports to reject neoliberal globalization, they, in fact, only propose an even more anti-democratic alternative. “The formula of right-wing alter-globalization,” he says, is “yes to free finance and free trade. No to free migration, democracy, multilateralism, and human equality.” Slobodian, “Trump, Populists and the Rise of Right-Wing Globalization,” *New York Times*, 22 Oct. 2018.

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