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The Death of the Firm

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Article

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INTRODUCTION

> A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the people (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.[1]

In the Supreme Court's decision in *Burwell v. Hobby Lobby*—and more generally in corporate and employment law—the firm as entity is disappearing as a unit of legal analysis. We use the term "firm" in this Article in the sense that Ronald Coase did to describe a form of business organization that orders the production of goods and services through use of a system internal to the enterprise rather than through the use of independent contractors.[2] The idea of an "entity" in this sense

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1. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2768 (2014).

2. Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 390–93 (1937). The term "corporation," in contrast, refers to a particular type of business organization with a corporate charter. Stefan J. Padfield, *Rehabilitating Concession Theory*, 66 OKLA. L. REV. 327, 331 (2014). Thus, while all corporations are in some sense "firms," not all firms are corporations. For other discussions of the legal significance of the firm concept, see Reuven S. Avi-Yonah, Citizens United *and the Corporate Form*, 2010 WIS. L. REV. 999, 1001–33

refers to an institution that is greater than the sum of its parts, one that has a legal existence, recognizable identity, and loyalty claims independent of the individuals who may own it or control it at any given time.[3] Popular accounts sometimes read *Hobby Lobby* and similar decisions as conferring rights on the entity and thus enhancing the institutional character of the claims, insisting, as presidential candidate Mitt Romney did in 2012, that "[c]orporations are people, my friend."[4]

As Justice Alito's majority opinion in *Hobby Lobby* makes clear, however, reading these opinions as enhancing the institutional character of the rights conferred would be a mistake. Instead, these decisions are the culmination of a decades-long attack on the reification of the corporation and an assault on the very notion of corporate interests separate from the narrowly defined interests of a company's immediate owners. These decisions, even as they recognize corporate First Amendment claims, erode the status of the corporation as an entity that imposes *institutional* constraints on executive freedom of action, has *institutional* obligations to its employees, or can be held *institutionally* accountable as a community citizen. Within this jurisprudence, the corporation becomes, as Justice Alito observes, a means to an end,[5] no different from the corporate jet or the supply contract with a Chinese subsidiary. Thus, *Hobby Lobby* and the line of cases it represents signals the "death of the firm" as an important component of legal analysis across a variety of fields.

This Article is the first to consider the implications of this ideological shift in the treatment of the firm with respect to the corresponding construction of business entities as appropriate partners for the government in advancing public purposes. Following *Hobby Lobby*, many scholars have questioned the deci-

(summarizing the literature on the status of the corporation); Timothy P. Glynn, *Taking the Employer out of Employment Law? Accountability for Wage and Hour Violations in an Age of Enterprise Disaggregation*, 15 EMP. RTS. & EMP. POL'Y J. 201, 203 (2011) (describing the impact of firm disaggregation on employees).

3. This idea of an entity that supplies identity and commands loyalty is rooted in media theory and remains influential in the management literature as a way to motivate employees. *See infra* text accompanying notes 56–59.

4. Maureen Dowd, *Power to the Corporation!*, N.Y. TIMES, Aug. 14, 2011, at SR11.

5. *Hobby Lobby*, 134 S. Ct. at 2768; *see also* GERALD F. DAVIS, THE VANISHING AMERICAN CORPORATION: NAVIGATING THE HAZARDS OF A NEW ECONOMY 77–79 (2016) (describing the difficulty of holding corporations accountable for actions taken within their supply chains).

sion on three grounds. First, First Amendment scholars have challenged the Court's conclusion that a corporation can exercise religious rights and, if so, in what circumstances.[6] Second, constitutional scholars have explored the status of corporate entities, with some arguing that corporations are creations of the State, and thus can be defined and regulated in whatever ways the State chooses, and others arguing that corporations have constitutional standing that imposes some limits on government action.[7] Third, corporate scholars have revisited the issue of management fiduciary duties, questioning whether managers must seek to advance the firm's commercial interests or whether they can promote other values, such as religious or civic interests.[8] What all three critiques have in common is that they assume that a system of employer-provided, government-subsidized health care (and implicitly other benefits) is appropriate.

This Article takes a different approach. It takes seriously the Supreme Court embrace of the firm as a mere fiction[9] that

6. Besides questioning the reasoning of the *Hobby Lobby* decision itself, these critiques raise two additional questions that are beyond the scope of this paper. The first is who defines the religious stance of a corporate entity. The logic of the *Hobby Lobby* majority suggests that the question is a matter of contract among the owners. *See* Brett H. McDonnell, *The Liberal Case for* Hobby Lobby, 57 ARIZ. L. REV. 777, 790–91 (2015) (discussing the ability of corporate officers to advance ends other than profit maximization). Hobby Lobby is unusual in that it is a closely held corporation, with a religious statement of purposes in its corporate charter, and it is therefore not clear how many other entities will thus be able to assert such a purpose. *Hobby Lobby*, 134 S. Ct. at 2765–66. The second broader issue is whether commercial actors generally can impose their religious preferences on others who do not share such preferences in the context of commercial decisions. *See* Elizabeth Sepper, *Gendering Corporate Conscience*, 38 HARV. J.L. & GENDER 193, 232 (2015) (discussing interaction of religious liberty and anti-discrimination law).

7. *See* Avi-Yonah, *supra* note 2 (summarizing the literature on the status of the corporation and arguing that the issue has never been definitely resolved); Padfield, *supra* note 2, at 331–32 (arguing that corporations are creations of the State, and thus the government can impose conditions on the grant of corporate charters).

8. *See* McDonnell, *supra* note 6.

9. The firm is not, however, a complete fiction as it is an entity chartered by law with the power to enter into contracts and perform other binding acts. *See* Lynn Stout, *The Corporation as Time Machine: Intergenerational Equity, Intergenerational Efficiency, and the Corporate Form*, 38 SEATTLE U. L. REV. 685, 705 n.61 (2015) ("Even thoughtful observers sometimes describe corporations as 'legal fictions.' Any good lawyer knows this phrase is an oxymoron. There is nothing fictional about legal institutions, which exercise enormous influence over human beings. That corporations are invisible does not make them fictional or unreal. Gravity, too, is invisible."). In a similar sense, corpo-

serves no purpose and has no obligations other than the interests of its owners, and considers the consequences of that shift for the advancement of public purposes. It locates the Court's endorsement of this limited conception of the firm in two longstanding changes that reinforce each other. First, an ideological shift rejected mid-twentieth-century managerialism, which had treated firms as more than the sum of their parts, and replaced it with agency-cost theory that treated the firm as a mere nexus of contracts.[10] The agency-cost movement accused the managerial era firms of complacency, celebrated the corporate takeover market of the 1980s, embraced "pay for performance" schemes that greatly increased executive compensation, and today cheers on the activist investors who focus corporate attention on maximizing short-term share prices.[11] In this perspective, the owners of a privately held company like Hobby Lobby are free to treat the company (and its employees) however they like, and large publicly traded corporations, with thousands of employees, serve no interests other than to maximize the return to their shareholders. This ideological movement marked the "death of the firm" as a subject of importance in management theory and in the legal regulation of corporate interests.

Second, an era of technological change and globalization has replaced the brick-and-mortar behemoths of the industrial era with more network-like commercial entities. This second change marks the rise of companies that continually reconstitute themselves. They change product lines, spin off underperforming divisions and acquire new ones, employ an ever-changing cast of millennial "knowledge nomads"[12] in their

rations may voluntarily assume contractual obligations to their employees, it is just that these obligations do not follow automatically from the nature of the business entity.

10. *See, e.g.*, Frank Dobbin & Jiwook Jung, *The Misapplication of Mr. Michael Jensen: How Agency Theory Brought down the Economy and Why It Might Again*, *in* MARKETS ON TRIAL: THE ECONOMIC SOCIOLOGY OF THE U.S. FINANCIAL CRISIS 29–32 (Michael Lounsbury & Paul M. Hirsch eds., 2010), http://www.scholar.harvard.edu/files/dobbin/files/the_misapplication_of_mr._michael_jensen_dobbin_and_jung.pdf (summarizing agency-cost theory).

11. *See infra* text accompanying notes 178–79, 199, 246–51.

12. Mallory Stark, *High Turnover: Should You Care?*, HARV. BUS. WK. (July 26, 2004), http://hbswk.hbs.edu/archive/4277.html; *see also* PWC, TALENT MOBILITY: 2020 AND BEYOND 19 (2012) (noting that among millennials in business and technology, thirty-eight percent are "always actively on the lookout for other opportunities," while another forty-three percent are not actively looking, "but would be open to offers").

skilled ranks, replace the less skilled with a contingent workforce (or robots), and relocate factories, warehouses, and headquarters to the countries or regions with the lowest costs, best quality, and most attractive tax incentives.[13] Thus, a furniture company can sell sofas made with hardwoods that come from Thailand one year and Malaysia the next, with engineered fiberboard filling in. The sofa's heralded "Italian leather" may be processed in Italy, but the hides come from Northern Europe—or Argentina. The leather and the hardwoods may then travel across the globe with assembly in the Ukraine or China or Vietnam as labor market conditions shift, and robots that can substitute for the workers involved in riveting, shipping, or warehouse supply. A brand such as "Natuzzi" may signal a guarantee of quality, but its owners, employees, distribution networks, and even corporate headquarters can shift over time.[14]

These two movements reinforce each other: the ideological change contributed to a management focus on shorter-term and more reductionist objectives while technological change and globalization have created more opportunities for the flexible and the nimble. Taken together, both change the relationships between employers and employees, and both call into question the use of the firm to supply basic necessities such as health care and pensions, and to serve as suitable partners for public purposes.

In this Article, we document the "death of the firm," that is, the ideological shift from celebration of the firm as bigger

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13. Within the United States, these trends tend to focus on the movement abroad. Jim Tankersley, *America's Top Execs Seem Ready To Give up on U.S. Workers*, WASH. POST (Sept. 11, 2014), http://www.washingtonpost.com/news/storyline/wp/2014/09/11/americas-top-execs-seem-ready-to-give-up-on-u-s-workers. For example, one study of Harvard Business School alumni, many of whom are at the helm of major corporations, showed that fifty-six of those surveyed recounted instances of moving one thousand or more jobs abroad and zero cases of moving that number of jobs from abroad into the United States. *Id.* Jobs that move abroad, however, do not necessarily stay permanently in the country to which the move occurs.

14. For an examination of these trends, see LUC BOLTANSKI & EVE CHIAPELLO, THE NEW SPIRIT OF CAPITALISM (Gregory Elliott trans., 2007) (discussing major changes in capitalist systems, including subdelegation). In the nineties, *Business Week* heralded these developments as the rise of the "virtual corporation," which operated as a "network of independent companies—suppliers, customers, even erstwhile rivals—linked by information technology . . . [with] neither central office nor organization chart." John Byrne, *The Virtual Corporation*, BUS. WK. (Feb. 7, 1993), http://www.bloomberg.com/news/articles/1993-02-07/the-virtual-corporation.

than the sum of its parts to denigration of the firm as a "fiction" that obscures analysis of the human interests at stake, and the corresponding change from the large, stable corporations of the industrial era to the more dynamic networks of the technological age. We argue that just as the State of the industrial era grew in response to the concentrated power of manufacturing firms so, too, must the State of the technological era complement and offset the new concentrations of power and better equip workers to meet the challenges of the new era.

In Part I, we trace the rise of the corporation in America, examining the changing relationships between management and labor, and between firms and the State. This Part shows how corporate theory, even as it develops over time, keeps coming back to the same issues: the challenges of changing labor needs and the destructive tendencies of unchecked concentrations of power.

Part II explains the forces that have changed the ideological and material treatment of commercial production. This Part describes the rise of the agency-cost theorists of the seventies, the ideological assault they inspired on the idea of the firm, and the changing impact of executive compensation and financial markets on corporate objectives, culminating in the death of the firm of the industrial era and the rise of more fluid corporate networks.

Part III examines the implications of these changed relationships—between labor and management, between corporations and government—for the treatment of the firm. *Hobby Lobby*, in describing the corporation as no more than a vehicle to advance other interests, changes the assumptions on which public-private partnerships are based. Public subsidization of employer-provided health care arose in an era in which secure employment with a large employer was the norm. The recognition of the rights of owners to impose idiosyncratic limits on employee access to state benefits raises the issue of whether the State should subsidize employer benefits at all. Instead, the logic of the decision suggests that the ultimate goal of health care reform should be to eliminate the employer role altogether; health care can be provided directly to individuals either through exchanges that connect private companies with individuals or through a single-payer system. Employer-provided health care has become an anachronism.

The latter portion of Part III analyzes what such recreation of the relationship between State, firm, and individual might look like more generally. Unions—and the stable, well-compensated employment contracts they championed—arose in response to the nature of the firms of the industrial age. In an era of commercial entities as networks that continually reform in response to changing circumstances, the appropriate response may be to reconsider the sources of worker resilience and autonomy. Just as Hobby Lobby's owners are free to impose their religious values on the terms of corporate health care, so too should Hobby Lobby's employees be able to obtain health care and other forms of social insurance on terms independent of their employment. The rebuilding of the terms of exchange in the information age should be reciprocal and empower individuals on both ends of these transactions to become more nimble and adept players in a changing global marketplace.

As firms change from entities with stable identities, investments in long-term employees, and community-based commitments to ever-shifting networks designed to maximize the interests of the transient few,[15] the opportunities they offer for public-private partnerships change. The new partnerships should be based on flexibility rather than stability, and they should promote individual resilience rather than assume that employment alone will address long-term worker needs.[16] The idea of the firm, at least at the height of the managerial era in mid-twentieth-century America, assumed that business, employee, and public interests overlapped. In an era that dismisses firms as no more than vehicles to advance their owners' narrowly defined or idiosyncratic interests, the sources of individual flexibility and security also need to shift from within to outside private business structures. While the holding of *Hobby Lobby* is limited to closely held companies, its dictum is far-reaching: it marks the end of the firm as an instrument of collective well-being.

15. *See* DAVIS, *supra* note 5, at 122–24 (describing the move toward more transient employment); Erik P.M. Vermeulen, *Corporate Governance in a Networked Age*, 50 WAKE FOREST L. REV. 711, 713–15, 721–26 (2015).

16. For discussion of the idea of resilience, see Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 269–73 (2010).

I. THE RISE OF THE CORPORATION AND THE SUPPRESSION OF THE MARKET

The one part of Justice Alito's opinion for the Court in *Hobby Lobby* that commands widespread agreement is the statement that commercial entities are a means to an end rather than ends in themselves.[17] Nonetheless, the debate about the appropriate purposes of the firm is as old as the corporation itself, and for some ends, the nature of a firm as an entity distinct from its owners *is* important.

The starting point for the discussion is straightforward. Corporate form is an advantage in raising capital, and the advantages stem from the separation of ownership and control.[18] Legally, the corporation offers unlimited life, limited liability both for the investor acquiring an equity share and the entrepreneur undertaking the commercial enterprise, and the ability to transfer ownership of the shares and/or management of the company without liquidating the enterprise.[19] The growth of the corporation was thus important for large, complex undertakings,[20] and quite different in important respects from partnerships or sole proprietorships.[21]

The principal disadvantage of the corporation also comes from the separation of ownership and control.[22] Indeed, corporate form took hold more readily in the United States than the United Kingdom perhaps because of the latter's early, unhappy experiences with corporate entities.[23] Adam Smith wrote in *The*

17. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2768 (2014).

18. *See* Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 388–93 (2003) (arguing that the ability to lock in investors' capital was the primary advantage over other business forms).

19. *See, e.g.*, Paul G. Mahoney, *Contract or Concession? An Essay on the History of Corporate Law*, 34 GA. L. REV. 873, 885 (2000); Thomas S. Ulen, *The Coasean Firm in Law and Economics*, 18 J. CORP. L. 301, 320 (1993).

20. Blair, *supra* note 18, at 398–99.

21. Indeed, most businesses of all kinds were sole proprietorships or partnerships until at least the middle of the nineteenth century. David Millon, *Radical Shareholder Primacy*, 10 U. ST. THOMAS L.J. 1013, 1024 (2013).

22. *See* Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 435 (2000); *see also* 2 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 741 (R.H. Campbell & A.S. Skinner eds., Oxford Univ. Press, 1976).

23. *See, e.g.*, John C. Coffee, Jr., *The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control*, 111 YALE L.J. 1, 24–25 (2001) (maintaining that the United States led in the dispersion of ownership and did so in part because of the capital needs of large

Wealth of Nations that the directors of such companies, "being the managers rather of other people's money than of their own," cannot be expected to "watch over it with the same anxious vigilance with which the partners in a private copartnery frequently watch over their own. . . . Negligence and profusion, therefore, must always prevail."[24] At their worst, corporations can be "weapons" designed to exploit unwary investors or extend the reach of fraudulent schemes.[25]

The basic advantage—capital accumulation—and the disadvantages that come from the separation of ownership and control do not necessarily indicate very much about corporate purpose or the role of an entity as a means to those ends. Instead, as the corporation took hold in the beginning of the twentieth century, the major discussion concerned corporate size.[26] The rise of the industrial era marked the emergence of large-scale organizations that coordinated human activity.[27] Economists, like Adam Smith, associated the creation of wealth with specialization and trade; corporations brought that specialization in-house. John Kenneth Galbraith observed, however, that large organizations, which established prices and insured a demand for their products, were "enemies of the market."[28] In the view that dominated discussion of the firm from the beginning of the twentieth century through the end of the 1970s, the essential role of the corporation lay in the role of corporate size in creating distinctive advantages and risks. Understanding these advantages and the risks requires seeing the corporation as an institution that stood apart from the interests

railroads); *id.* at 39–45 (discussing later developments in the United Kingdom).

24. SMITH, *supra* note 22.

25. Coffee, *supra* note 23, at 28 (noting that because of the risks of corruption, prominent underwriters refused until the end of the nineteenth century to underwrite the common stock of industrial corporations); *see also* Stanton Wheeler & Mitchell Lewis Rothman, *The Organization as Weapon in White-Collar Crime*, 80 MICH. L. REV. 1403, 1422–26 (1982) ("[P]ersons who commit offenses under the aegis of an organization are able thereby to commit crimes of greater sophistication, complexity, and magnitude.").

26. *See* Donald J. Smythe, *The Supreme Court and the Trusts: Antitrust and the Foundations of Modern American Business Regulation from* Knight *to* Swift, 39 U.C. DAVIS L. REV. 85, 91 (2005) (describing the interplay between the growth of corporate size and antitrust regulation at the beginning of the twentieth century).

27. JOHN KENNETH GALBRAITH, THE NEW INDUSTRIAL STATE 40–41 (Princeton Univ. Press 2007) (1967).

28. *Id.* at 41. And, in Galbraith's era, he meant "men."

of its stakeholders and had importance greater than the sum of its parts.

A. CORPORATE IDENTITY AND THE SUPPRESSION OF THE PRICE MECHANISM

The idea of the firm as an entity greater than the sum of its parts has long been accepted as a defining feature of capitalism. In 1991, Ronald Coase received the Nobel Prize in Economics, with one of his two major contributions to the field entitled *The Nature of the Firm*.[29] His role in the corporate debate serves as a touchstone both for understanding the industrial age corporation at its height and as an inspiration for the information age theorists who would dismantle it. He wrote initially as a graduate student in the 1930s in an effort to provide an economic explanation for the increasing size of organizations. The paper was largely ignored for the next thirty years, and then rose to prominence less as an explanation for the phenomena Coase sought to explain than as an agent of its destruction.[30] The key to the paper's influence may well be its brevity. Coase would say in his Nobel Prize acceptance lecture that that his work has been criticized for its failure to "operationalize" its core insights, that is, to define the variables that underlie transaction cost economics in a way that allows them to be quantified and empirically tested.[31] That "failure" may well be the secret of his success: subsequent scholars can read into the work the interpretations that advance their own theories. We will do the same and argue that Coase's critical insight about the role of firms fits comfortably with explanations of large corporations at the height of their influence *and* the intellectual developments that mark their decline. "Operationalizing Coase" thus means identifying what role the suppression of the price mechanism, the factor he most identifies with the nature of the firm, plays as that role changes over time. While we make no pretense of engaging in formal economic modeling, we do emphasize the importance of singling out the factors that

29. Coase, *supra* note 2. To be sure, Coase was influenced by other economists. *See, e.g.*, FRANK H. KNIGHT, RISK, UNCERTAINTY, AND PROFIT (Univ. of Chicago Press, Midway Reprint ed. 1985) (1921).

30. Herbert Hovenkamp, *The Law of Vertical Integration and the Business Firm: 1880-1960*, 95 IOWA L. REV. 863, 869 (2010) (describing Coase's impact).

31. Ronald H. Coase, *The Institutional Structure of Production*, *in* NOBEL LECTURES IN ECONOMIC SCIENCES: 1991–1995, at 11, 18–19 (Torsten Persson ed., World Scientific Publ'g Co. 1997).

explain the rise of large business entities at their height and their more recent decline.

In his initial article, Coase argued that the rise of the large corporation should be treated as an economic mystery. Economists after all celebrated the price mechanism, that is, Adam Smith's unseen hand coordinating the supply of goods and services in accordance with market exchanges, as the hallmark of efficiency. Yet, Coase observed that "the distinguishing mark of the firm is the supersession of the price mechanism."[32] Given that economists posited that production did not require any organization at all, why did the firm arise and, indeed, why had large firms become so central to economic production?

To provide an answer, Coase framed the question in terms of a comparison between the advantages of the market and use of the price mechanism versus those of a command and control system where the entrepreneur owner could simply order the result.[33] His description of the alternatives—market transactions or command and control—is remarkably thin. Coase describes the character of a contract internal to the firm as one whereby "the factor, for a certain remuneration (which may be fixed or fluctuating), agrees to obey the directions of an entrepreneur within certain limits."[34] This description almost certainly reflects two influences. The first is the contrast between capitalist markets and socialist economies and it contains a measure of irony. Coase begins the article observing that "[t]hose who object to economic planning on the grounds that the problem is solved by price movements can be answered by pointing out that there is planning within our economic system . . . which is akin to what is normally called economic planning."[35] This "economic planning" is the boss telling his employees what to do.[36]

Second, the dominant management model of the era was "Fordism," modeled after Henry Ford's use of the assembly

32. Coase, *supra* note 2, at 389.

33. *Id.* at 390.

34. *Id.* at 391 (emphasis omitted). Coase italicized the words "within certain limits" and added in a footnote that "[i]t would be possible for no limits to the powers of the entrepreneur to be fixed. This would be voluntary slavery." *Id.* at 391, 391 n.2.

35. *Id.* at 387–88.

36. Coase explains, "If a workman moves from department Y to department X, he does not go because of a change in relative prices, but because he is ordered to do so." *Id.* at 387.

line.[37] As a more general term, Fordism has been defined in terms of the separation of conception from execution, the substitution of skilled workers with unskilled workers, and the use of universal machinery to produce one product for mass markets.[38] As a management principle (often called "Taylorism"), the idea required management control over labor in the name of efficiency.[39] While Coase does not discuss management theories per se, he viewed management's ability to direct labor as definitional. He accordingly wrote that what constitutes a firm in practice is tied to the legal relationship between employer and employee (or "master and servant") and that legal relationship involves the duty of the servant to render personal services to the master and the master's right to control the servant's work.[40] Indeed, the employer's ability to tell the employee when to work, what work to do, and how to do it becomes "the dominant characteristic in this relation and marks off the servant from an independent contractor" as a matter of law.[41]

In considering the value of the firm, Coase stresses the need to deal with uncertainty and (as always for Coase) transaction costs.[42] In this model, the critical role of the firm then becomes its ability to serve as an alternative to the price mechanism. To the extent that the use of markets has a high price, perhaps because of the unpredictability of future events, the firm gives the entrepreneur greater flexibility.[43] The value of Coase's insight, however, does not lie with his specification of how a firm organizes any particular activity; instead, it is the

37. Nancy K. Kubasek et al., *Putting Worker-Management Relations in Context: Why Employee Representational Choice Needs Greater Protection in Reform of Section 8(a)(2) of the NLRA*, 34 HARV. J. ON LEGIS. 53, 59 (1997).

38. CHARLES F. SABEL, WORK AND POLITICS: THE DIVISION OF LABOR IN INDUSTRY 32–33, 194–95 (1982).

39. These ideas are closely associated with Frederick W. Taylor. *See, e.g.*, Frederick W. Taylor, *Shop Management*, *in* SCIENTIFIC MANAGEMENT 17, 98–99 (Frederick Winslow Taylor ed. 1947) ("All possible brain work should be removed from the shop and centered in the planning or laying-out department."). For an evaluation of Taylor's impact, see HARRY BRAVERMAN, LABOR AND MONOPOLY CAPITAL: THE DEGRADATION OF WORK IN THE TWENTIETH CENTURY 90 (1974) (emphasizing the importance of Taylor's principles as a management tool in gaining nearly absolute control over the labor process).

40. Coase, *supra* note 2, at 403–04.

41. *Id.* at 404 (citing FRANCIS R. BATT, THE LAW OF MASTER AND SERVANT 6 (1933)).

42. *Id.* at 394–95, 400–03.

43. *Id.* at 391 (noting that the longer the contract term, the harder it becomes to specify what needs to be done).

contrast between market and non-market transactions and the startling conclusion, at least for an economist, that even in the productive realm, non-market organization may be superior.[44] Coase's conclusion suggested that the firm as an entity might have some importance.

B. THE INDUSTRIAL ERA AND THE ADVANTAGES OF THE FIRM

Coase tried in the thirties to create a schema that could predict when a firm would find it more useful to bring activities in-house rather than contract for the same goods and services on the market. His answer—when the advantages of command and control outweighed the market—did not give much insight into the forces that produced the advantages he described.[45] Two other bodies of work go into those advantages in much greater detail: those describing the coordination of labor within firms and those describing a large enterprise's advantages in addressing external conditions. The description of the former comes from John Kenneth Galbraith's work on *The New Industrial State* in the 1960s.[46]

The rise of large organizations in the twentieth century marked the rise of what Max Weber termed "bureaucracy," both within government and within business enterprises.[47] Like Coase, he assigned considerable credit to hierarchy—to the creation of a command structure that coordinated activities.[48] Weber, however, gave considerably more weight to the idea of expertise and to the association of authority with that expertise.[49]

44. Indeed, Coase addresses only the classical notion of efficiency in the production of goods and services. *See, e.g.*, *id.* at 394, 398–99.

45. *See, e.g.*, Robert Flannigan, *The Economics of Fiduciary Accountability*, 32 DEL. J. CORP. L. 393, 402–03 nn.33–34 (2007) (noting that "[t]ransaction cost methodology requires the evaluation of relative costs" but that "[t]ransaction costs are not consistently defined in the literature"); Oliver E. Williamson, *The Economics of Governance*, 95 AM. ECON. REV. 1, 3–4 (2005).

46. GALBRAITH, *supra* note 27.

47. *See* 3 MAX WEBER, ECONOMY AND SOCIETY 956–63 (Guenther Roth & Claus Wittich eds., 1968) (1922). Weber also noted a number of the dark sides of bureaucracy, such as reduced transparency—which permitted those with expertise to maintain the power that accompanies specialized expertise. *See, e.g.*, Louis M. Imbeau, *Transparency in the Budget Process of a Bureaucratic Organisation: A Principal-Agent Model of Budgeting*, *in* THE ECONOMICS OF TRANSPARENCY IN POLITICS 189, 189–90 (Albert Breton et al. eds., 2007) (discussing Weber's views on the danger of expertise).

48. *See* 2 WEBER, *supra* note 47.

49. *See id.*

Galbraith's work three decades later explained how the two came together as the hallmark of large corporations. In Galbraith's model, the individual entrepreneur and the all-powerful executive disappear.[50] Institutions, with large companies primary among them, had become more important than the individuals who direct them, and the connections between the company and its top officers central to the coordination of technocratic enterprises.

Modern media theory, when applied to organizational behavior, describes institutions as supplying an identity associated with a firm that in turn commands loyalty from those who embrace the identity.[51] Economists George Akerlof and Rachel Kranton used this idea of identity to examine the ability of a firm to create employee identification with firm objectives and values.[52] Workers who think of themselves as insiders rather than outsiders require less in the way of extra compensation to produce desired results and become less likely to game the compensation system that does exist.[53] Moreover, group cohesion increases feelings of loyalty and reduces turnover. Akerlof and Kranton concluded that "[w]orker identification may therefore be a major factor, perhaps even the dominant factor, in the success or failure of organizations."[54]

Galbraith's account of the corporation at mid-twentieth-century made the same point in explaining corporate success at the height of the manufacturing era. Written at a point almost equidistant between Coase and Akerlof and Kranton, Galbraith found that the principal problem for any organization is how to coordinate the activities of members.[55] Doing so requires addressing the issue of motivation. Like Akerlof and Kranton, he found that neither compulsion nor pecuniary incentives were enough.[56] Instead, the most effective motivation comes from

50. *See* GALBRAITH, *supra* note 27, at 115–22.

51. *See, e.g.*, DONALD HISLOP, KNOWLEDGE MANAGEMENT IN ORGANIZATIONS 230 (2013) (describing how the most effective way to deal with problems such as employee turnover is to develop institutional identity and employee loyalty and observing that institutional identity that encourages employees to identify with firm objectives creates stronger loyalty than instrumental measures such as merit pay or bonuses).

52. GEORGE A. AKERLOF & RACHEL E. KRANTON, IDENTITY ECONOMICS: HOW OUR IDENTITIES SHAPE OUR WORK, WAGES, AND WELL-BEING 59 (2010).

53. *Id.*

54. *Id.*

55. GALBRAITH, *supra* note 27, at 176–85.

56. Ironically, given the later emphasis on agency costs, Galbraith ob-

employees who identify with the goals of the firm and derive tremendous satisfaction from achieving them or, short of that, who partially identify with the firm's objectives and hope to be able to influence them in a direction more to their liking.[57] In short, Galbraith, too, believed in "identity economics" and found the firm as entity central to the creation of identity.

Galbraith nevertheless distinguished among different groups associated with companies. He maintained that identification with the company affected the productivity of all employees, though the effect was likely to be least pronounced among the less skilled. Still, the individual worker came to think of himself as "an IBM man, a Corning Glass man or a Sears man."[58] He observed further:

> Next, as one moves inward, are foremen and supervisory personnel and the clerical, sales and other routine white collar personnel. These merge at their inner perimeter with technicians, engineers, sales executives, scientists, designers and other specialists who comprise the technostructure. Beyond these at the center are the executives or management. As one moves through these inner circles, identification and adaptation become increasingly important.[59]

In other words, as employees move up the corporate ladder, positions require greater expertise and judgment; as the opportunity for discretionary judgment increases, the difficulty of specifying outcomes grows and the importance of motivation increases. Identity—with the corporation and with a professional role—supplies a significant portion of that motivation.

Within this schema, Galbraith identified shareholders as those most motivated by monetary incentives—and least interested in the health of the company beyond what might be a very limited investment.[60] In contrast, corporate officers of the

served that compulsion produced the highest cost to the firm in terms of oversight and monitoring and pecuniary incentives, such as bonuses tied to production goals, provided little basis for loyalty and, as Akerlof and Kranton would later observe, incentives to game the system, requiring that much greater oversight in turn. *See id.* at 164–67. For a fuller discussion, see Charles R.T. O'Kelley, *The Evolution of the Modern Corporation: Corporate Governance Reform in Context*, 2013 U. ILL. L. REV. 1001, 1040.

57. GALBRAITH, *supra* note 27, at 207–22.

58. *Id.* at 188. Akerlof and Kranton add that employees, like enlisted personnel in the military, may identify more with their unit than with the enterprise more generally, but that the unit identification can also be a strong source of motivation. AKERLOF & KRANTON, *supra* note 52, at 56–57.

59. GALBRAITH, *supra* note 27, at 152–53.

60. *Id.* at 150–51. For a more complex account of shareholder interests, however, see LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING

postwar era tended to see their role as one of company stewards who linked particular company objectives to technocratic norms that made the quality of their stewardship an indication of professional standing.[61] Galbraith observed that while corporate officers often did own stock or stock options, and while they often had access to information from which they could personally benefit, they rarely acted to advance their individual pecuniary interests at the expense of the firm—or their professional standing.[62] Instead, "[p]ower passe[d] down into the organization,"[63] and acting on self-interest was just not what "a good company man" did.[64]

Galbraith attributed the strength of the ethos to group decision-making and identification.[65] Indeed, he asserted that the prevalence of group, rather than individual, action "is a striking characteristic of management organization in the large corporation."[66] Galbraith even defended the committee. Committees were necessary, in part, because the complexity of the corporation required broad input.[67] With group sessions, the individual's actions, reasoning, and behavior were subject to scrutiny.[68] Individuals were expected to live up to a high level of personal honesty, and they benefitted as part of a group, rather than as individuals competing against each other for promotions or bonuses. Pay levels, whether generous or not, did not

SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC (2012).

61. Harwell Wells notes that this idea of stewardship even had a place in the Harvard Business School's conception of the Managerial Role. Harwell Wells, *"Corporation Law Is Dead": Heroic Managerialism, Legal Change, and the Puzzle of Corporation Law at the Height of the American Century*, 15 U. PA. J. BUS. L. 305, 323–24 (2013).

62. GALBRAITH, *supra* note 27, at 146–48.

63. *Id.* at 147.

64. *Id.* at 147–48.

65. Galbraith wrote:

> Thus decision in the modern business enterprise is the product not of individuals but of groups. The groups are numerous, as often informal as formal, and subject to constant change in composition. Each contains the men possessed of the information, or with access to the information, that bears on the particular decision together with those whose skill consists in extracting and testing this information and obtaining a conclusion.

Id. at 80.

66. *Id.* at 73 (citation omitted).

67. *See id.* (citing JUSTIN G. LONGNECKER, PRINCIPLES OF MANAGEMENT AND ORGANIZATIONAL BEHAVIOR 263 (Charles E. Merrill, 3d ed. 1973)).

68. *Id.* at 78.

vary with firm profits[69] and the CEO's income, which was not that much higher than that of other senior management officials, paled in comparison with the compensation levels of the twenties or today.[70] Galbraith concluded that business enterprise in "modern economic society" could "only be understood as an effort, wholly successful, to synthesize by organization a group personality far superior *for its purposes* to a natural person"—and it had the advantage of immortality to boot.[71]

To be sure, the advantages of this system did not come solely from the strength of individual corporate identities. Instead, it came from the combination of firm stewardship with something Galbraith called the "technostructure." This technostructure included "all who bring specialized knowledge, talent or experience to group decision-making."[72] This group, with its shared ethos and commitment to technocratic management, rather than top corporate officials per se, constituted "the guiding intelligence—the brain—of the enterprise."[73] While these corporate groups did bring different perspectives and types of expertise to bear on individual decisions, they also created reinforcing cycles that deepened identification with the firm. Charles O'Kelley explained: "Thus, decisions are made in order to enhance the ability of technocrats to identify with the firm, to reward team members who are able to further the goals of the technocracy, and, if possible, to subtly and incrementally adapt the corporation to the CEO's own values."[74]

This notion of scientific management had its limitations. The group did not necessarily seek to maximize short-term corporate profits.[75] Instead, with closer management identification with the firm itself, the first order of the day was the survival of the corporation.[76] Safe and dependable earnings expansion served that end better than risks, which, however much they promised exceptional returns, could also produce catastrophic losses. In addition, this group, confident in its own judgment,

69. *Id.* at 147.

70. *See id.* at 138–39 (discussing how lower executive pay tracks to a commitment to the success of the corporation over self-interest); O'Kelley, *supra* note 56, at 1022, 1046 (discussing the relatively high pay of CEOs in the twenties and today compared to that of their employees).

71. GALBRAITH, *supra* note 27, at 74.

72. *Id.* at 88.

73. *Id.*

74. O'Kelley, *supra* note 56, at 1042.

75. *Id.*

76. *Id.* at 1041.

sought to insure its own autonomy.[77] CEOs did not have dictatorial power in an era of management by committee,[78] but they did enjoy considerable independence from shareholders, who remained more broadly dispersed than today's institutional investors, and from other outside actors.[79]

In this system, the firm did become more important than the individual. Few would confuse the world dominated by behemoths like General Motors, International Business Machines Corporation (IBM), or Ma Bell with entrepreneur-run enterprises such as Ford or Standard Oil of a half century earlier, or the Steve Jobs–run Apple or Mark Zuckerberg's Facebook of more recent times. And with longer worker tenure in both the senior management and production ranks, corporate officers identified their own success and well-being far more with the health and prestige of their companies than with their individual bank accounts. It therefore made sense to bring activities inside the firm to the extent that this technocratic motivation, which came from the combination of firm and professional identity, provided greater advantages than from more contingent arrangements. And with greater firm investment in workers and a correspondingly greater commitment to worker tenure, employment became a foundation for individual security and employee well-being.[80] One way of "operationalizing" Coase therefore becomes the calculus: When does identification with firm objectives and ethos offer advantages that outweigh the costs of commitment to a long-term workforce?[81]

As firms grew, however, and their size in itself contributed to the impact of these behemoth firms, primary among the ef-

77. *See id.*

78. *See* GALBRAITH, *supra* note 27, at 70. These limits on the CEO came from the CEO's need to defer to those with superior technical expertise. *Id.* at 72.

79. *See* O'Kelley, *supra* note 56, at 1002–03.

80. *See* Mary Ann Glendon, *The New Family and the New Property*, 53 TULANE L. REV. 697, 701–02 (1979) ("[A]n inference is justified that arbitrators have both sensed and contributed to the heightened importance of the job relationship as a focal point of security and standing in society . . . .").

81. The answer, of course, depends in part on whether the labor market is tight or slack, and partly on whether the benefits of firm identity and corresponding worker loyalty justify a commitment to long-term stability in employment. For a discussion of the propriety of loyalty in the absence of employer commitment to employees, see David W. Hart & Jeffery A. Thompson, *Untangling Employee Loyalty: A Psychological Contract*, 17 BUS. ETHICS Q. 297 (2007).

fects was greater insulation from market pressures. This produced a different body of analysis, emphasizing the risks as well as the advantages to the public of large organizations.

C. THE RISKS OF LARGE ORGANIZATIONS

Coase, in identifying the advantages of firms, mentioned several kinds of effects. The first was the ability to command employees, but the second involved the ability to plan free from immediate market pressures.[82] Galbraith also mentioned the advantages large firms have to set prices (often with the tacit agreement of other firms) and to create demand (often through product design, packaging, and advertising).[83] For much of the twentieth century, debate about corporations involved debate about their insulation from market forces, not to achieve competitive advantages in planning for uncertain future events, but in order to acquire greater control over the events themselves.[84] Another way to operationalize Coase suggests that firms continue to grow in size so long as the contribution of greater size to their ability to control events does not outweigh the costs. Stated in these terms, size becomes connected to political and market power rather than production efficiencies.[85]

With increased growth, corporations became more powerful. The largest corporations of the industrial era tended either to be part of cartels such as big steel, big auto, and big oil, or heavily regulated utilities, such as General Electric (GE) and the American Telephone and Telegraph Company (AT&T). The sheer size of the institutions increased their political clout and

82. *See* Coase, *supra* note 2, at 390–92.

83. GALBRAITH, *supra* note 27, at 251–54, 319.

84. Harwell Wells summarized these observations:

> [Corporations] were unique not just because of their size, but because they were competing in oligopolistic or highly regulated markets and were insulated from intensive competitive pressures. Capable of generating capital internally, they also were independent of capital markets. Buffered from external controls, the largest firms resembled independent states: they could command an army of employees, determine what to produce, set prices, direct scientific progress, decide which communities received new investment, and even set the rate of capital expansion.

C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L. REV. 77, 102 (2002).

85. *See* Charles R.T. O'Kelley, *Berle and Veblen: An Intellectual Connection*, 34 SEATTLE U. L. REV. 1317, 1339–40 (2011) (quoting THORSTEIN VEBLEN, ABSENTEE OWNERSHIP AND BUSINESS ENTERPRISE IN RECENT TIMES: THE CASE OF AMERICA 220 (A.M. Kelley 1964) (1923)).

their impact on the communities in which they were located. General Motors layoffs could devastate Detroit, and wiping out a class of shareholders—often employees without diversified portfolios—could create ripple effects throughout affected communities.[86] The initial responses at the turn of the twentieth century addressed the power size conferred.[87] The growing influence of monopolies and cartels spurred antitrust measures with the aim of recreating competitive markets, and justified the creation of a more powerful State capable of countering the growth of private power.[88] In the 1930s, concern about corporate power took a different direction, focusing on the changing nature of the firm itself. This commentary critiqued the separation of ownership and control as the hallmark of large corporations, and the increasing impact of large corporations not just on business arrangements, but on important aspects of the lives of the communities they affected.[89] Adolph Berle and Gardiner Means's magisterial volume, *The Modern Corporation and Private Property*, published in 1932, called corporate managers of this era "princes of industry" and likened their power to the overseer of a principality.[90]

Berle and Means argued that, by the Great Depression, the corporation as entity had taken on a significance that made it something more than the tools of its owners. They maintained that the corporations of the era oversaw economic empires that aggregated capital from widely dispersed sources and used it to create complex, unaccountable enterprises.[91] Taking together

86. *See* ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 306 (1932) (noting that the "great associations" of the industrial age "are so different from the small, privately owned enterprises of the past as to make the concept of private enterprise an ineffective instrument of analysis").

87. *See* Wells, *supra* note 61, at 316–17 (emphasizing the role of oligopolistic concentration in increasing firm power).

88. *See* HERBERT CROLY, THE PROMISE OF AMERICAN LIFE 374 (1909) (advocating for the need to break up monopolies through legal and political means due to their threat to "any thoroughly democratic and constructive system of municipal economy").

89. BERLE & MEANS, *supra* note 86, at 5 (noting, however, that many corporations were not necessarily geographically bound).

90. *Id.* at 4.

91. *Id.* at 4–5. Berle observed that corporate managers obtained greater independence not just from shareholders, but also from creditors. By restricting stock dividends, the managers could generate additional cash internally for new investments, limiting their dependence on creditors as well. *See* ADOLF A. BERLE, JR., THE 20TH CENTURY CAPITALIST REVOLUTION 35–41 (1954).

the corporation's impact on its shareholders, employees, and the communities it affected, Berle and Means concluded that corporations had become "quasi-public" entities akin to principalities that affected, in one way or another, every household in America.[92]

In discussing the separation of ownership and control, Berle and Means raised two different types of issues. The first involved the ability of a control bloc of shareholders to fleece other shareholders.[93] In the decade that preceded Berle and Means's book, stock ownership had increased dramatically, with the stock market boom of the twenties fueled in part by the increased participation of small investors. These investors often had limited voting rights and less control over corporate policies.[94] Moreover, during the same period, corporate executives often commanded outsized salaries with minimal disclosure or accountability.[95] Indeed, one commentator of the period observed that "the fat boys, no longer content with their ancient perquisite of milking the public, are now engaged in the dizzy and lofty job of squeezing their own shareholders dry!"[96] Concern that managers, who were often controlling shareholders, served to advance their own ends at the expense of other shareholders was widely shared, and thought to be one of the principal causes of the Great Depression.[97]

The second concern had to do with the impact of large corporations on communities. Large industrial firms depended on established supply chains and a large supply of workers.[98] This

92. BERLE & MEANS, *supra* note 86, at 4.

93. *See id.* at 128–218 (arguing that, because the law had gradually reduced the rights of shareholders, it was questionable whether they could be termed owners at all).

94. Indeed, Berle and Means devoted nearly a hundred pages to detailing the legal changes that gave shareholders less corporate power. *Id.*

95. *See, e.g.*, Harwell Wells, *"No Man Can Be Worth $1,000,000 a Year": The Fight over Executive Compensation in 1930s America*, 44 U. RICH. L. REV. 689, 707–08 (2010).

96. Stuart Chase, *Professor Quixote*, THE NATION, Mar. 9, 1927, at 264.

97. Berle and Means commented further that:

> 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.

BERLE & MEANS, *supra* note 86, at 46.

98. *See, e.g.*, Ronald J. Gilson et al., *Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration*, 109 COLUM. L. REV. 431 (2009)

in turn made such companies vulnerable to labor or supply chain disruptions.[99] A major source of the uncertainty Coase described involved insuring that supplies and workers would be available when needed. A solution was the creation of ever-larger, vertically integrated entities.[100] Berle explained that by the time of the early thirties, 200 corporations had amassed wealth equal to almost half the industrial assets of the country, and the profits generated by these companies had an effect through their shareholders on perhaps half of the country.[101] The larger the entities, however, the greater their power and potential impact on the communities in which they were located, and hence the greater the potential disruptive effects from the wrong-doing Berle and Means described.[102] Moreover, the change from entrepreneurial firms to firms characterized by the separation of ownership and control also meant that community norms had less impact on owners and managers.[103] An entrepreneurial owner, for example, might find that if he fleeced his customers, mistreated his employees, or sold shoddy products, his personal standing in the community would drop.[104] Management committees or a control bloc of sharehold-

(summarizing literature that describes vertical integration as a response to firm dependence on supply chains and observing that modern innovative firms no longer follow the same patterns).

99. Indeed, the *Wall Street Journal* routinely writes articles today explaining the difficulty manufacturing companies have in locating such plants in the United States because of the difficulties of reestablishing supply chains and skilled labor forces. *See, e.g.*, James R. Hagerty, *For U.S. Manufacturing, Opportunities and Challenges*, WALL ST. J. (June 2, 2015), http://www.wsj.com/articles/for-u-s-manufacturing-opportunities-and-challenges-1433300938 (emphasizing trained workers, infrastructure, and supply chains); Ted Mann, *Otis Finds 'Reshoring' Manufacturing Is Not Easy*, WALL ST. J. (May 2, 2014), http://www.wsj.com/articles/SB1000142405270230451870457951943294657442 4; *see also* Mark Muro, *Reshoring: Strong Regions Will Determine Where, How*, BROOKINGS: THE AVENUE (Oct. 2, 2014), http://www.brookings.edu/blog/the-avenue/2014/10/02/reshoring-strong-regions-will-determine-where-how.

100. *See* Gilson et al., *supra* note 98, at 438–39 (describing industries for which vertical integration was initially seen as a superior model).

101. *See* A.A. Berle, Jr., Note, *For Whom Corporate Managers* Are *Trustees: A Note*, 45 HARV. L. REV. 1365, 1368 n.8 (1932).

102. *See* Harwell Wells, *The Birth of Corporate Governance*, 33 SEATTLE U. L. REV. 1247, 1290 (2010) (citing BERLE & MEANS, *supra* note 86, at 352).

103. *See* Berle, *supra* note 101, at 1367–68 (suggesting that, in systems that emphasize individual ownership, managers are subject neither to market discipline nor community norms).

104. *See* E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1153 (1932) (arguing that a changing public attitude about a business's obligations to the community will lead to changed behavior in managers).

ers, on the other hand, were often relatively anonymous and their membership could change over time, making them that much less accountable to anyone.

At the beginning of the twentieth century, breaking up these concentrations of power was the preferred solution. Berle and Means instead sought to tame them. In their view, this increasing concentration of wealth in the hands of a relatively few, unaccountable entities rendered "the corporation an organization with an impact comparable to the medieval church or the modern state."[105] They concluded that the power of the modern corporation and the unaccountability of its managers "placed the community in a position to demand that the modern corporation serve not alone the owners or the control but all society."[106]

D. THE TAMING OF CORPORATE POWER

Berle and Means, who emphasized the problems stemming from the separation of ownership and control, have defined the corporate governance debate ever since. Ironically, they remain iconic figures in the area where their work hit an inescapable dead end: the private law that governs the relationships among corporate stakeholders. They have been less influential in the arena they most sought to influence at the time: the role of State and community in offsetting the accumulation of corporate power.[107] To operationalize Berle the corporate scholar and Berle and Means collectively requires asking the question: As the nature of corporate power shifts, what measures become necessary to protect the interests of other stakeholders, that is, how can parity be restored among business, labor, and community interests?

To answer the question requires separating the two issues Berle and Means identified: the use of corporate structure to enrich a control bloc at the expense of customers, workers, and other shareholders; and the use of corporate structure to advance the interests of corporate actors at the expense of the larger community. The classic debate between Berle and law professor E. Merrick Dodd, Jr. in the pages of the *Harvard Law Review* explains the dilemma for systems of private govern-

105. Wells, *supra* note 102, at 1290.

106. BERLE & MEANS, *supra* note 86, at 312.

107. *Cf.* Lynne L. Dallas, *Two Models of Corporate Governance: Beyond Berle and Means*, 22 U. MICH. J.L. REFORM 19, 20 (1988).

ance. Berle, concerned about unaccountable control blocs victimizing other shareholders, argued for stronger fiduciary duties by corporate officers and directors to maximize shareholder wealth.[108] In 1932, Dodd, more concerned about corporate community obligations, challenged the idea that stockholders should be the "sole beneficiaries of the corporate enterprise," preferring broader duties to multiple stakeholders.[109] Berle objected that the problem was that the "relatively unbridled scope of corporate management has, to date, brought forward in the main seizure of power without recognition of responsibility—ambition without courage."[110] To allow corporate managers to focus solely on corporate earnings might shortchange community interests, but to allow corporate managers to advance a broader array of interests meant, as a practical matter, that they would be subject to no legally enforceable standards at all.[111] In short, corporate law, limited to private enforcement of private obligations, offered no real answer to the full set of challenges corporate power posed.[112]

Ultimately, what changed the exercise of corporate power was less a shift in corporate governance or a change in fiduciary duties, than factors extrinsic to the corporation itself. These changes ultimately tamed the unaccountable exercise of corporate power as the corporations themselves retained and even expanded their dominant position in economic life. Thus, Berle and Means wrote that the increasing power of corporations gave rise to increasing public sentiment that those exercising corporate power "accept responsibility for the well-being of those subject to the organization, whether workers, investors, or consumers."[113] The obligation to others came from the fact of corporate power, and corporate power came from corporate in-

108. *See* Berle, *supra* note 101, at 1367–68.

109. Dodd, *supra* note 104, at 1147–48.

110. Berle, *supra* note 101, at 1370.

111. *Id.* at 1367–68.

112. *See* Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063, 2065 (2001) (arguing that shareholder wealth maximization may be the best rule of corporate governance because "a stakeholder measure of managerial accountability could leave managers so much discretion that managers could easily pursue their own agenda, one that might maximize neither shareholder, employee, consumer, nor national wealth, but only their own"); *cf.* McDonnell, *supra* note 6, at 792–93 (arguing that the Hobby Lobby owners are free to pursue their own definitions of corporate interest because they should not be limited to narrow requirements to maximize corporate or shareholder wealth).

113. BERLE & MEANS, *supra* note 86, at 310.

sulation from competitive forces and outside control. This insulation would, at the height of the managerial era, give corporate managers the latitude to advance a broader set of interests.[114] The more interesting question is why they did so.

The conventional wisdom has three overlapping components. First, mid-nineteenth century scholars, Galbraith notably among them, argued that that "countervailing powers," principally unions and the State, limited corporate freedom of action.[115] Galbraith thus argued that the very power of corporations encouraged the organization of opposition.[116]

Take unions, for example. In accordance with Galbraith's analysis, corporate power both encouraged and made possible union power. The very dominance of large employers encouraged organizing efforts to target them. The insulation of these employers from competitive markets allowed their managers to engineer union settlements and, as Dodd had argued in the thirties, increased public pressure on them to do so. Moreover, postwar corporations, insulated from greater competition, also decided that a labor truce—and higher worker compensation—created greater demand for corporate products.[117] Given the size of the unionized plants, the labor rights won in these actions influenced wages and benefits more generally as the unionized plants played an outsized role in the labor market.[118] Union victories in turn reduced employee turnover[119] and union organiza-

114. *Cf.* GALBRAITH, *supra* note 27, at 207–08, 221–22 (noting that the "mature corporation . . . identifies itself with goals which have, or appear to . . . have, social purpose"); Wells, *supra* note 61 (discussing the evolution of corporate social power).

115. *See* JOHN KENNETH GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER 196–200 (1952).

116. *See id.*

117. Wells observed that:

> By the end of that decade, though, the endemic struggle between capital and labor was replaced, at least in the public eye, by a labor-management concordat in which corporate managers were left to run their businesses as they saw fit, and, in return, labor unions received income and benefits sufficient to carry their members into the middle class.

Wells, *supra* note 61, at 322.

118. *See* John W. Cioffi, *Fiduciaries, Federalization, and Finance Capitalism: Berle's Ambiguous Legacy and the Collapse of Countervailing Power*, 34 SEATTLE U. L. REV. 1081, 1105 (2011) (maintaining that these reinforcing effects work well in a slack economy, but have destabilizing inflationary tendencies over time).

119. Union victories both made it harder to fire employees and made jobs more attractive as they provided benefits, raises, and other advantages that

tion, as it created more cohesive worker groups, also had the effect of reinforcing employee identification with the company.[120] Union and management interests, both tied to large organizations, became somewhat less antagonistic.

Second, the State, which increased in power along with corporations, used regulation of institutions to advance state interests. In the process, the institution itself became important to the vindication of public purposes. Galbraith certainly recognized, for example, that large corporations did not necessarily welcome union organizers[121] and federal labor relations laws promoting union organization and collective bargaining may have been "the most critical, controversial, and divisive manifestation of governmental intervention to promote countervailing power."[122] Other federal laws, perhaps most notably the Civil Rights Era employment discrimination statutes, used the regulation of hiring practices in large, private organizations to model country-wide expectations about appropriate behavior. Individuals could choose to discriminate; organizations, particularly large organizations, could not.

The State and large private organizations began to provide societal benefits in parallel ways. The New Deal initiation of social security benefits marked a major expansion of the role of the State in providing a social safety net.[123] Still, the expansion of private pensions, particularly those supplied by large corporations, established a broad-based complementary system as an incentive to stay with a single employer.[124] Larger corporations provided more pension security, and pension benefits further cemented the importance of firms as institutions with longer-

increased with seniority. *See* Alfred W. Blumrosen, *Seniority Rights and Industrial Change:* Zdanok v. Glidden Co., 47 MINN. L. REV. 505, 505–06 (1963).

120. *See* Cynthia L. Estlund, *What Do Workers Want? Employee Interests, Public Interests, and Freedom of Expression Under the National Labor Relations Act*, 140 U. PA. L. REV. 921, 952 (1992).

121. *See* Cioffi, *supra* note 118, at 1102–03 (noting the contradictions in Galbraith's analysis as he simultaneously suggests that countervailing powers arise spontaneously and that their effectiveness may depend on government intervention).

122. *Id.* at 1103–04.

123. *See* Patricia E. Dilley, *The Evolution of Entitlement: Retirement Income and the Problem of Integrating Private Pensions and Social Security*, 30 LOY. L.A. L. REV. 1063, 1124 (1997) ("[O]ut of 6.5 million people over age sixty-five in the United States [in the thirties], only 150,000 aged people were receiving 'industrial and trade-union pensions,' with possibly an equal number receiving veterans' or public retirement system pensions.").

124. *See id.* at 1117.

term time horizons and a larger significance to the lives of their employees.

This role of large institutions in remaking communities perhaps reached its height with health care. The United States, unlike most of the developed world, did not build a public system of universal health insurance in part because of its reliance on the private employment system to do so. Many scholars view the reliance on private plans as an accident of timing—the public pressure to establish universal insurance came as employers embraced private benefits as a way around the price controls established during World War II.[125] The ubiquity of larger employers made it possible to envision widespread health coverage with only limited public provision for the elderly and the poor. Large corporations within this system collectively performed societal roles that did not depend on the individual missions of particular firms.

Third, corporate managers, at least during the period that ran from the forties through the seventies, did take a broader view of corporate interests.[126] Here, however, the law's most important contribution may have been to stay out of the way.[127] A New Jersey decision in the fifties concluded that corporate managers were free to make charitable contributions where they could show the "gift tends reasonably to promote the goodwill of the business of the contributing corporation."[128] Other decisions gave greater weight to shareholder interests. Most decisions, however, acknowledged the directors' fiduciary obligations to the corporation *and* its shareholders, and as a practical matter gave corporate managers a wide berth. Dodd's view in the debate with Berle appeared to have prevailed.[129]

125. *See* Thomas C. Buchmueller & Alan Monheit, *Employer-Sponsored Health Insurance and the Promise of Health Insurance Reform* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 14839, 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1373348 ("The link between employment and private health insurance was strengthened during World War II when in 1943 the War Labor Board ruled that controls over wages and prices imposed by the 1942 Stabilization Act did not apply to fringe benefits such as health insurance.").

126. GALBRAITH, *supra* note 27, at 191–94.

127. *See, e.g.*, Wells, *supra* note 61, at 311–12 (concluding that the different eras of corporate theory had little impact on corporate legal developments).

128. A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581, 585 (N.J. 1953) (citation omitted).

129. But then Berle changed his position over the course of his lifetime as well. For a summary of these developments, see Wells, *supra* note 61. In contrast, corporate scholars at the turn of the twenty-first century were hailing

E. THE PINNACLE OF FIRM PROMINENCE

The idea of the firm that reigned from the beginning of the twentieth century through the 1970s was neither constant nor reified into a fixed legal construct. Instead, it encompassed two notions that ran through these decades. Both involve the ideas of institutions as greater than individuals and more than the sum of their parts. These ideas add content to Coase's notion of the firm as a device that suppresses the price mechanism and does so as a way to coordinate human behavior.

The first idea is the role of identity and loyalty in coordinating behavior within the firm. With the rise of great corporations, the individual entrepreneurs, the Henry Fords or the John D. Rockefellers, faded in importance.[130] In their place, less recognizable, and perhaps more fungible, corporate managers embraced the corporate brand and saw their role as one of stewardship of the institution.[131] This stewardship made the company's well-being a hallmark of professional success, and encouraged alignment of individual and corporate values. The individual gained personal status through identification with the firm and saw the firm's well-being as intimately linked with personal advancement.[132] As modern researchers show, this conception of the firm provides a better motivator for employee efforts than monetary rewards, and makes it easier to coordinate management efforts than more competitive management systems.[133] This strong conception of firm identity, however, also tends to be an obstacle to more radical restructuring of firm mission or structure.

This alignment between firm identity and employee motivation, of course, can exist within any enterprise. The extent to which it characterizes the employment relationship depends on bonds of reciprocity. Firm commitment to employees—through training, opportunities for promotion, secure tenure, and bene-

the triumph of shareholder supremacy. *See, e.g.*, Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001).

130. GALBRAITH, *supra* note 27, at 115–19.

131. *See id.* at 122.

132. *See, e.g.*, LYNN STOUT, CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE 169 (2011) (describing how firms influence team unity and bonding by encouraging loyalty to the firm).

133. *See, e.g.*, Michael E. Murphy, *Dispelling Tina's Ghost from the Post-Enron Corporate Governance Debate*, 43 SANTA CLARA L. REV. 63, 105 (2002).

fits—encourages greater identification and loyalty.[134] On the other hand, temporary, routine, or changing activities may be better supplied through the arm's length market transactions. The balance between internal and external activities is a changing one.[135]

The second role of the large firm came with the coordination of external and internal obligations. This, too, involved bonds of reciprocity. Large firms benefitted most from the suppression of the price mechanism not with respect to their internal operations, but from the ability to limit competition from rivals.[136] Thus, Berle and Means and a host of reformers in the early part of the century emphasized the unaccountability that came from oligopolistic industries and the dispersion of shareholders that left managers free to increase their salaries, risk other people's money, and fleece the firm's various constituents.[137] These very same traits—relative freedom from competitive pressures and from narrow wealth maximization objectives—contributed to the managerial era that reached its height in the postwar era.[138] In this period, managerial utility, in the form of personal professional standing and satisfaction, came from the identification of firm well-being with technocratic management. Managers—from CEOs to foremen—derived a greater part of their personal standing from identification with the firm *and* they identified the firm's well-being less with the short-term bottom line and more with professional standards and societal objectives.[139]

In this context, the relationship between external constraints, such as unions and insulation, and external pressures, such as market competition, operated in tandem. Managerial inclination to recognize multiple constituencies was possible in large part because of insulation from external threats. None-

134. *See, e.g.*, Mats Alvesson, *Social Identity and the Problem of Loyalty in Knowledge-Intensive Companies*, 37 J. MGMT. STUD. 1101, 1111–15 (2000).

135. For discussion of the changing nature of these calculations, see BOLTANSKI & CHIAPELLO, *supra* note 14, at 63 (discussing the continuing role of non-monetary incentives in motivating employees); *id.* at 224–29 (describing the casualization of work).

136. Indeed, unionization and full employment policies in the postwar era ultimately gave workers more bargaining power within firms even as the firms of the postwar era gained greater insulation from competition from other companies. *See* GALBRAITH, *supra* note 115, at 121–23.

137. *See supra* text accompanying notes 111–13.

138. GALBRAITH, *supra* note 27, at 145–47, 274–81.

139. *See id.* at 159–61.

theless, the managerial inclination to promote broader interests may also have come from greater elite unity in the postwar era (management and State were inclined to see their interests as aligned to a greater degree than today), and from the subordination of individual perspectives and incentives to a group dynamic. This group dynamic selected for team managers, rather than individualists, and produced a shared decision-making process that moderated extreme views.[140] Both encouraged commitment to distinctive firm identities and alignment of these identities with broader societal interests. Unlike the managers of the twenties or the nineties, these captains of industry did not amass extraordinary fortunes, though they did quite well.[141] Perhaps more importantly, the corporate leaders of this era, unlike those of the twenties or the nineties, identified to a greater degree with their communities and their employees.[142]

In both of these ways, the idea of the firm as greater than the individuals who comprised it contributed to the coordination of relationships within the firm, and the relationships between firm, state, and community interests. The law in turn responded by building high marginal tax rates, securities disclosure and other regulations, and health care, civil rights, and other worker protections into the new foundation. The firm as an entity that provided security and stability and advanced interests greater than the sum of its parts became central to the life of the nation.

II. THE DEATH OF THE FIRM

If the first seven decades of the twentieth century marked the rise of the firm as an institution greater than the sum of its parts, the last part of the twentieth century has marked its dismantling. Corporate behemoths exemplified American prosperity in the immediate postwar era; they were less nimble in facing global competition at the end of the century. The intel-

140. *See id.* at 96.

141. *See* Claudia Goldin & Robert A. Margo, *The Great Compression: The Wage Structure in the United States at Mid-Century*, 107 Q.J. ECON. 1, 16–19 (1992).

142. *See, e.g.*, Carl Kaysen, *The Social Significance of the Modern Corporation*, 47 AM. ECON. REV. 311, 314 (1957)*; see also* Mark S. Mizruchi & Daniel Hirschman, *The Modern Corporation as Social Construction*, 33 SEATTLE U. L. REV. 1065, 1094 (2010) (arguing that the corporate leaders of the era showed greater concern for the communities where they were headquartered).

lectual cohesiveness of American elites in the immediate postwar era that contributed to the greater alignment of management and labor, public and private interests gave way to renewed ideological division. Central to these changes was the reconceptualization of the firm, from an entity greater than the sum of its parts to the tool, if not play-toy, of a revitalized group of entrepreneurs.[143] In the process are two central ironies. The attack on the firm was aimed not on large corporations' multiple weaknesses in entering a new, more competitive era, but on what had been their strengths. And the attack did not reject the seminal insights of Coase or Berle and Means. Instead, it embraced and reinterpreted them.

A. THE NEXUS-OF-CONTRACTS AND AGENCY-COST THEORY

While we now think of Coase's *The Nature of the Firm* as one of his two most important contributions to economic thought, leading ultimately to a Nobel Prize in 1991,[144] economists paid relatively little attention to the piece at the time of its publication.[145] Instead, Coase's article became far more influential only after its embrace—and reinterpretation—by nexus-of-contract scholars decades later.[146] Coase had clearly distinguished between a firm's external affairs, characterized by markets, and its internal affairs, with their supersession of the price mechanism.[147] The later scholars who would create the law and economics literature that has dominated corporate theory over the last forty years recharacterized Coase's insight. They argued the firm could be best understood as "a nexus of contracts" and that both external and internal affairs involved market-driven contracts; they were just different kinds of contracts produced by different types of market forces.[148]

Two economists, Armen Alchian and Harold Demsetz, provided the initial reconstruction.[149] They referred back to neo-

143. *See* Mark J. Roe, *Delaware's Politics*, 118 HARV. L. REV. 2491, 2500 (2005) (describing nexus-of-contracts theory by stating that "[m]anagers and shareholders get to play; no one else does").

144. Coase, *supra* note 31.

145. Ulen, *supra* note 19, at 301–02.

146. Ulen characterized it as a "reworking." *Id.* at 310. In so doing, Ulen was referring, in particular, to Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972).

147. Ulen, *supra* note 19, at 310.

148. *Id.* at 319.

149. Alchian & Demsetz, *supra* note 146, at 794.

classical theories of the firm.[150] These theories had focused primarily on returns to scale that compared, for example, the individual dressmaker to the clothing factory.[151] Both the involvement of multiple employees performing specialized tasks and the investment in expensive machinery produce returns to scale, which in turn make the processes of securing adequate supplies and selling the finished products more complex,[152] justifying the growth of the organization coordinating the activities.[153]

Coase's insight had been that these firms managed the coordination involved in these more complex organizations through something other than price; Alchian and Demsetz objected that the problems of coordination involved something more than simply the substitution of employer direction for contract terms. Instead, they observed that what the firm did was to assemble teams of workers who needed to work together to produce the desired output and production teams inevitably produced shirking—some team members would invariably work harder than others in a system in which it was impossible to determine whose input contributed what to net value.[154] Alchian and Demsetz argued that firms solved the problem through the entrepreneur's role as a "residual claimant."[155] The entrepreneur serves as a monitor who supervises the team to insure that no one shirks. The entrepreneur pays the team members a fixed price, which restricts the employees' jockeying

150. *Id.* at 781–85.

151. *See id.* at 784.

152. *See* Ulen, *supra* note 19, at 305.

153. *See id.* at 302.

154. *Id.* at 310. Robert Flannigan described shirking as follows:

> Generally, shirking means reduced effort expenditure. In many instances, shirking is not legally actionable at all. For many tasks, there is a band of effort between maximal and minimal effort that remains contractually undefined and therefore subject to unilateral variation by the agent. That is, workers have a degree of latitude in the performance of their work. This band or range of discretionary effort typically exists because of information and monitoring weaknesses that prevent more precise specification and enforcement of effort levels. . . . Principals normally prefer that their agents operate at or near the maximal level. Agents may prefer to operate near the minimal level. Within any given band of effort, the equilibrium effort level will be determined by the commitment or enthusiasm of the agent as influenced by the incentives offered by the principal.

Flannigan, *supra* note 45, at 397.

155. Alchian & Demsetz, *supra* note 146, at 782–83.

for positions against each other,[156] and keeps the residual profit left from team efforts, which creates an incentive to guard against shirking.[157] In effect, Alchian and Demsetz's analysis reintroduced price mechanisms within the firm. They characterized the firm's internal contracts as ones in which the entrepreneur had an incentive to monitor in return for the ability to maximize residual value, and the employees agreed to work for a fixed price subject to such monitoring.[158]

This analysis reconciled Coase's transaction cost insights (specifying individual contracts for team units engaging in ongoing production may be costly and inefficient) with the nexus-of-contract theories central to modern corporate theory. It narrowed Coase's concern with uncertainty from a broad range of issues that include changing consumer tastes, available supplies, and labor conditions to a relatively narrow focus on shirking. It also validated the entrepreneur/owner's dominant position in the firm. Most fundamentally, however, it eliminated the developments of the preceding forty years. The idea of firm identity providing motivation for employee efforts disappeared from consideration. So, too, did the notion that relationships within a firm depend on something different from relationships outside it. Alchian and Demsetz took Coase's idea of suppression of the price mechanism, which opened the door to consideration of alternative forms of human motivation, and used it to validate narrow self-interest. The result presented a fundamental challenge to the importance of the firm itself.

B. THE ASSAULT ON THE FIRM

Alchian and Demsetz, in emphasizing the risk of shirking, focused attention on an issue that Coase had not made central

156. Margaret Blair and Lynn Stout explain that if all employees are simply paid a flat rate, the incentive to shirk increases. If, instead, each employee is paid after the fact in accordance with his or her contributions, the problem of rent seeking will increase; that is, of employees seeking to maximize their share through behavior that may undermine others and impose additional costs. *See* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 266 (1999).

157. Alchian & Demsetz, *supra* note 146, at 781.

158. Like Coase, Alchian and Demsetz drew no distinction between an initial entrepreneur like Henry Ford and later corporate managers who come and go without long-term identification with the firm. *See* Charles R.T. O'Kelley, *Coase, Knight, and the Nexus-of-Contracts Theory of the Firm: A Reflection on Reification, Reality, and the Corporation as Entrepreneur Surrogate*, 35 SEATTLE U. L. REV. 1247, 1262–64 (2012).

to his analysis: the separation of ownership and control. Alchian and Demsetz, after all, posited that the solution to the problem of corporate organization lay with owners' ability to monitor and the incentive that their retention of the corporate residual gave them to do so.[159] This incentive disappears, however, if those receiving the corporate residual (the owner/shareholders) are not those responsible for the monitoring (the executives). Law and economics scholars came to call this problem "agency costs."[160]

Coase had not addressed the issue. He described an "entrepreneur" who controlled the company and could be expected to oversee employees.[161] Instead, Berle, and Berle and Means together, had galvanized discussion of these issues. Berle, a corporate lawyer, had seen the shenanigans (and often outright fraud) of the twenties, when companies diluted the value of common stock, effectively fleecing shareholders, or took "heads I win, tails you lose" risks with publicly traded companies that left shareholders holding the bag for ill-advised ventures. Rather than see corporate owners as the solution, he distrusted them.[162] The agency-cost theorists needed to rewrite Berle as fundamentally as they had reinterpreted Coase—and they did.

When the corporate governance debate resumed in the seventies, the corporation no longer symbolized the concentration

159. While many people assume that shareowners "own" corporations, firms employ a variety of ownership structures that suggest various possible meanings (and multiple groups) associated with the idea of ownership. *See* Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1190–92 (2002).

160. *See, e.g.*, Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308–10 (1976).

161. *See* O'Kelley, *supra* note 158, at 1248, 1250 (stating that Coase asserted that the firm depended on the entrepreneur, its "distinct central actor"). Coase's failure to mention Berle is itself interesting. Some scholars have suggested that it reflects the balkanization of academic disciplines in that era. Berle was a law professor, Coase an economist. Berle's co-author, Means, was, however, an economist, though they wrote more for legal and policy audiences than a more technical academic one. *See* Wells, *supra* note 61, at 307. Of course, Coase was a graduate student in economics in London at the time he conceived of the paper, and he may simply not have been aware of Berle and Means's work. Another possibility, however, is that he thought of the nature of his inquiry as fundamentally different. Coase, after all, sought to explain the advantages of large corporations in coordinating production. Berle and Means addressed the threat large corporations posed to interests that had relatively little to do with production.

162. Though as we noted above, Berle and Dodd's views both changed over time. *See* discussion *supra* note 129 and accompanying text.

of unaccountable power in the hands of a few. Instead, the new concern was complacency. Charles O'Kelley writes that the reality of the mature corporation "was not risk-taking and swashbuckling leadership by individualistic CEOs. Rather, planning and collective decision making by experts was the key to survival and success."[163] The new theorists of the firm argued that managers had become too fat and happy. Instead of using corporate assets to their own ends by engaging in risky or unwise ventures, they failed to take risks that might benefit shareholders, particularly if such risks threatened their own (or in some cases their employees') comfortable sinecures.[164] The problem was not that they failed to look out for the corporate entities' interests—in the sense of longer-term interests associated with the firm; it was that they were too eager to do so—at the expense of the shareholders' prospects for short-term returns.[165]

Empirical findings by scholars sympathetic to the new theories provided support for their conclusions. They found, for example, that CEOs tended to resist takeover bids, even when the acquirers offered a substantial premium.[166] The CEOs further favored corporate acquisitions that did not necessarily increase corporate valuation.[167] These studies also showed that when CEOs enjoyed a substantial ownership stake in the company, their behavior changed—making them more willing to entertain hostile bids or to resist acquisitions unlikely to produce a quick payoff.[168]

163. O'Kelley, *supra* note 56, at 1005.

164. *See, e.g.*, Jensen & Meckling, *supra* note 160, at 312.

165. *See, e.g.*, John C. Coffee, Jr., *Shareholders Versus Managers: The Strain in the Corporate Web*, 85 MICH. L. REV. 1, 11, 30 (1986) (noting "basic tension[s] between managers and shareholders," including managerial preferences "biased in favor of growth over profitability"); Comment, *The Attorney-Client Privilege in Shareholders' Suits*, 69 COLUM. L. REV. 309, 318 (1969) ("Management . . . is encouraged to represent interests broader than those of the shareholders or any group of shareholders—interests which include those of the public and the labor force.").

166. Patrick Bolton & David S. Scharfstein, *Corporate Finance, the Theory of the Firm, and Organizations*, 12 J. ECON. PERS. 95, 101 (1998); *see also* Andrei Shleifer & Robert W. Vishny, *A Survey of Corporate Governance*, 52 J. FIN. 737, 747 (1997) (discussing current literature regarding managers' views towards takeovers).

167. Bolton & Scharfstein, *supra* note 166; *see also* Schleifer & Vishny, *supra* note 166, at 746–47 (observing that managers often chose acquisitions that served management objectives even if they lowered firm valuation).

168. Bolton & Scharfstein, *supra* note 166.

The new generation of corporate theorists again saw this very different problem as arising from the separation of ownership and control.[169] The solution, however, was not to reinforce Berle and Means's call for greater judicial or government oversight. Instead, their solutions would be to bring back the price mechanism both within the firm and without. To do so, they did not just inveigh against the corporation as a fiction that could and should be ignored.[170] They ultimately sought to reduce the entity to no more than a vehicle to facilitate market exchanges.[171]

Economists Michael Jensen and William Meckling fired off an influential salvo in this effort soon after Alchian and Demsetz.[172] They seconded Alchian and Demsetz's findings that the separation of ownership and control created monitoring problems, which they termed "agency costs."[173] They observed, however, that if this apparent conflict of interest were in fact insurmountable, no rational shareholder would buy stock. Instead, they argued that agency costs were ubiquitous. The conflicts of interest between management and shareholders, for example, also existed between management and bondholders. The financial composition of the firm could therefore be explained in terms of the optimal tradeoff among these types of costs and their associated risks. In explaining this process (and incorporating it within the nexus-of-contracts approach), Jensen and Meckling went to great lengths to emphasize that the corporation as entity was not in any way special:

> Viewing the firm as the nexus of a set of contracting relationships among individuals also serves to make it clear that the personalization of the firm implied by asking questions such as "what should be the objective function of the firm," or "does the firm have a social re-

169. *See, e.g.*, FRANK EASTERBROOK & DANIEL FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 1 (1991) (advancing the idea that "investors are 'powerless'" because managers control the firm, and can control how much investors know about the firm); FOUNDATIONS OF CORPORATE LAW (Roberta Romano ed., 1993) (discussing agency problems in a collection of writings).

170. Jensen & Meckling, *supra* note 160, at 310–11.

171. Jensen and Meckling thus defined the private corporation or firm as "simply one form of legal fiction which serves as a nexus for contracting relationships and which is also characterized by the existence of divisible residual claims on the assets and cash flows of the organization which can generally be sold without permission of the other contracting individuals." *Id.* at 311 (emphasis omitted).

172. *Id.*

173. Indeed, this was the title of their article: *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*. *Id.* at 305.

> sponsibility" is seriously misleading. The firm is not an individual. It is a legal fiction which serves as a focus for a complex process in which the conflicting objectives of individuals (some of whom may "represent" other organizations) are brought into equilibrium within a framework of contractual relations. In this sense the "behavior" of the firm is like the behavior of a market; i.e., the outcome of a complex equilibrium process. We seldom fall into the trap of characterizing the wheat or stock market as an individual, but we often make this error by thinking about organizations as if they were persons with motivations and intentions.[174]

This denial of the importance of the firm as an entity served several purposes. It reinforced Alchian and Demsetz's conclusion that the focus should be on the incentive effects of contracts within the firm rather than characterization of the firm's operations in non-market terms. To the same end, it rejected Coase's distinction between the firm's external and internal relationships. Instead, within the nexus-of-contracts model, the conception of firm boundaries became meaningless and it thus made "little or no sense to try to distinguish those things which are 'inside' the firm (or any other organization) from those things that are 'outside' of it."[175] Recasting the firm this way made it possible to explain how market discipline, rather than the suppression of the price mechanism, explained firm structure. Jensen and Meckling wrote that analysis decrying the separation of ownership and control "is equivalent in every sense to comparing a world in which iron ore is a scarce commodity (and therefore costly) to a world in which it is freely available at zero resource cost" and then concluding that the first world is "non-optimal."[176] They dismissively termed this line of reasoning the "Nirvana" form of analysis and attributed the "Nirvana" reference to Coase himself.[177]

C. EXECUTIVE COMPENSATION AND MANAGEMENT INCENTIVES

Legal scholars embraced the nexus-of-contracts approach to argue that all that was necessary was to get the law out of the way so that the market could perform its magic.[178] Within

174. *Id.* at 311 (emphasis omitted).

175. *Id.*

176. *Id.* at 328.

177. *Id.*

178. *See, e.g.*, EASTERBROOK & FISCHEL, *supra* note 169, at 15 ("The normative thesis of the book is that corporate law should contain the terms people would have negotiated, were the costs of negotiating at arm's length for every contingency sufficiently low."); *see also* Millon, *supra* note 21, at 1025–34 (summarizing developments).

this framework, the firm itself and, indeed, obligations to the firm as an entity and the firm's obligations outside of voluntary contracts became meaningless. Eisenberg concluded that "at bottom the nexus-of-contracts conception is not a theory of the firm: It is a theory of why there are no firms"; a conclusion that conflicts with Coase, Berle and Means, and "reality as it is normally understood."[179]

As these scholars wrote, however, corporate markets themselves were changing. In another era, changes such as dramatic increases in executive compensation might have been cause for concern.[180] Instead, this new generation of scholars became cheerleaders for critical moves away from the cautious managerial era in which executives identified with multiple firm constituencies and arguably the firm itself. Instead, multiple forces institutionalized the "death of the firm" by reducing the multiple purposes identified with business entities to short-term shareholder value.

First, corporate compensation packages changed to emphasize stock options.[181] Law and economics scholars celebrated the move as a way to better align management and shareholder interests.[182] Favorable tax treatment of the options increased the incentives to use them.[183] So, too, did the fact that under the accounting standards of the time, the options did not have to be expensed, which effectively disguised what were in fact large increases in executive compensation.[184] Between 1980 and 1994,

179. Melvin A. Eisenberg, *The Conception That the Corporation Is a Nexus of Contracts, and the Dual Nature of the Firm*, 24 J. CORP. L. 819, 832 (1999).

180. *See, e.g.*, MICHAEL PERINO, THE HELLHOUND OF WALL STREET: HOW FERDINAND PECORA'S INVESTIGATION OF THE GREAT CRASH FOREVER CHANGED AMERICAN FINANCE 142–66 (2010) (concluding that one of the most startling revelations to come from the Pecora Commission hearings was the size of the compensation packages senior banking executives received); Wells, *supra* note 61, at 319–20 (observing that at the height of the Great Depression, many questioned the morality of outsized corporate compensation on any basis).

181. Lynne L. Dallas, *Short-Termism, the Financial Crisis, and Corporate Governance*, 37 J. CORP. L. 265, 320–21 (2012).

182. *See, e.g.*, Randall Morck et al., *Management Ownership and Market Valuation: An Empirical Analysis*, 20 J. FIN. ECON. 293, 311–12 (1988); David I. Walker, *Evolving Executive Equity Compensation and the Limits of Optimal Contracting*, 64 VAND. L. REV. 611, 617–18 (2011) ("Clearly, long-term, equity-based compensation can play a role in shaping managerial incentives that straight salary cannot.").

183. Dallas, *supra* note 181, at 320.

184. *Id.*

stock option grants rose by 683%, with the average grant to the top executive rising from $155,000 to $1.2 million.[185]

Second, the market for corporate control flourished in the eighties. During that period, one-half of publicly traded corporations received tender offers, many of them hostile.[186] Corporate theorists argued that the takeover market would police management; CEOs who failed to maximize corporate opportunities would find themselves to be the subject of takeover actions by those who thought they could better optimize firm value.[187] The increase in takeover bids[188] had two reinforcing effects. If managers resisted bids that shareholders favored, it reinforced the conviction that shareholder and manager interests diverged, increasing the risk of shareholder activism designed to undermine management control.[189] At the same time, as stock options became a larger component of corporate compensation packages, it also made managers more focused on stock price, both because they benefitted from share increases and because low stock prices made it more likely that the company would become a takeover target.[190]

185. Lynne L. Dallas, *The New Managerialism and Diversity on Corporate Boards of Directors*, 76 TUL. L. REV. 1363, 1378 (2002).

186. Mark L. Mitchell & J. Harold Mulherin, *The Impact of Industry Shocks on Takeover and Restructuring Activity*, 41 J. FIN. ECON. 193, 199 (1996).

187. *See, e.g.*, Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288, 295 (1980) (arguing that the viability of a "large corporation with diffuse security ownership" can be explained by the policing of market forces within and outside the firm, "with the market for outside takeovers providing discipline of last resort"); Daniel R. Fischel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers*, 57 TEX. L. REV. 1, 9 (1978) ("[I]nefficient performance by management is reflected in share price thus making the corporation a likely candidate for a takeover bid. Since a successful takeover bid often results in the displacement of current management, managers have a strong incentive to operate efficiently and keep share prices high.").

188. *See* David R. Meals, *CEO & Employee Pay Discrepancy: How the Government's Policies Have Encouraged the Gap*, 6 J. BUS. ENTREPRENEURSHIP & L. 297, 307 (2013) ("[I]n the mid-1980s . . . [a]s a result of court decisions, legal entitlement to approve hostile takeovers shifted from a firm's shareholders to its management and board of directors. . . . At about the same time there was a push for pay-for-performance by big institutional investors that caused a dramatic increase in the use of stock options and restricted stock in CEO pay packages.").

189. *See* Dallas, *supra* note 181, at 320.

190. *Id.* at 320–21; *see also* Fischel, *supra* note 187, at 5 ("The lower the market price of the securities . . . the more attractive the firm is to outsiders with the ability to take the firm over.").

Third, overall executive compensation increased, whether premised on base salaries or incentive pay, and became more steeply hierarchical. The ratio between CEO and average worker compensation changed from 20.3 in 1965 to 28.5 in 1978 to 55.9 in 1989 to 106.9 in 1999.[191] By 2013, the pay ratio between CEOs and average wage workers was 331:1 and the pay ratio between CEOs and minimum wage workers was 774:1.[192] While the greater use of stock options constituted the major shift,[193] salaries increased as well, often in accordance with reductionist merit pay regimes that intensified competition among managers and created greater disparities even among a firm's top executives.[194] Between 1993 and 2014, the percentage of CEO compensation attributable to incentive pay increased from thirty-five percent to eighty-five percent.[195] And together with both the greater risk of takeovers and the winner-take-all mentality of executive compensation, management tenure decreased.[196] Larry Ribstein described the emergence of a new breed of executives who are the "hyper-motivated survivors of a highly competitive tournament."[197] These executives, socialized to believe that their out-sized compensation packages are a measure of their worth, have "the proven ability to make money while putting on a veneer of loyalty to the firm."[198]

191. LAWRENCE MISHEL ET AL., THE STATE OF WORKING AMERICA, 2000–2001, at 211 (2001).

192. *Executive Paywatch: High-Paid CEOs and the Low-Wage Economy*, AFL-CIO, http://www.aflcio.org/Corporate-Watch/Paywatch-2014 (last visited Nov. 27, 2016).

193. Executives also faced greater risk of dismissals if stock earnings did not increase. *See* Andrew C.W. Lund & Gregg D. Polsky, *The Diminishing Returns of Incentive Pay in Executive Compensation Contracts*, 87 NOTRE DAME L. REV. 677, 695 (2011) (indicating that CEO terminations can be linked to share price performance).

194. For a discussion of the move toward incentive pay, see MICHAEL B. DORFF, INDISPENSABLE AND OTHER MYTHS: WHY THE CEO PAY EXPERIMENT FAILED AND HOW TO FIX IT 78–79 (2014) (discussing assumptions that incentives would spur better performance).

195. Lynn A. Stout, *Killing Conscience: The Unintended Behavioral Consequences of "Pay for Performance*,*"* 39 J. CORP. L. 527, 533 (2014).

196. Between 2000 and 2011, CEO tenure declined from about ten years to 8.4. *Average Tenure of CEOs Declined to 8.4 Years, the Conference Board Reports*, PR NEWSWIRE (Apr. 12, 2012), http://www.prnewswire.com/news-releases/average-tenure-of-ceos-declined-to-84-years-the-conference-board-reports-147152135.html. With the economic recovery, turnover may be decreasing.

197. Larry E. Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. CORP. L. 1, 9 (2002).

198. *Id.*

Cumulatively, these changes in fact created a closer alignment between CEO and shareholder perspectives. Both saw the firm as a source of profit.[199] Both linked firm health to share price and had incentives to do so. Shareholders (at least in theory) celebrated executives' willingness to take greater risks, in part because they most typically held their individual shares as part of a mutual fund or other collective investment device designed to diversify investment risk; today's silent majority shareholders are more likely than in the twenties and thirties to be institutional investors rather than individuals with their life savings at risk.[200] Executives, spurred on by stock options and merit pay incentives, measured their success (or failure) in terms of short-term fluctuations in share price.[201] By the end of the 1990s, corporate officers and directors had adopted measures, such as "poison pill" provisions, that tamed the 1980s' market for corporate control; yet, the changes attributable to greater use of stock options, increased overall compensation, and the tournament mentality that took hold in the executive ranks remained.[202] Whereas the law and economics scholars had viewed perks such as use of the corporate jet as examples of a reallocation of shareholder assets to management, the new generation of scholars was more likely to view the increase in compensation as the product of a competitive market that served shareholder interests.[203]

199. *See, e.g.*, Stout, *supra* note 9, at 721 (noting that not all shareholders want immediate profit maximization; some may want to benefit human welfare through "very large-scale, very long-term enterprises").

200. Shareholders nonetheless are a diverse lot with varied motivations. *Id.* at 721–22.

201. *See* Dallas, *supra* note 181; Millon, *supra* note 21, at 1040.

202. *See* Stout, *supra* note 9, at 711–13 ("Toward the end of the twentieth century, however, American public companies began to change. . . . [S]hare price became a popular metric and stock options the favorite form of compensation. . . . Directors and executives now often run public companies with a single goal in mind: maximizing shareholder value.").

203. Indeed, Henry Hansmann and Reinier Kraakman argued that shareholder primacy marked "[t]he [e]nd of [h]istory for [c]orporate [l]aw." Hansmann & Kraakman, *supra* note 129, at 440. They explained that academic, business, and governmental elites shared a consensus that

> ultimate control over the corporation should rest with the shareholder class; the managers of the corporation should be charged with the obligation to manage the corporation in the interests of its shareholders; . . . and the market value of the publicly traded corporation's shares is the principal measure of its shareholders' interests.

Id. at 440–41.

In these calculations, the firm as entity, with longer term or more broadly defined interests, fades from view.[204] The result, however, is not some type of shareholder primacy in which majority shareholders assert greater control over the company.[205] Instead, the firm becomes something closer to what Berle feared: the plaything of controlling owners, directors, or managers.

D. THE REDEFINITION OF CORPORATE PURPOSE

The economic analysis of the seventies and eighties combined with a new wave of corporate law scholarship and a more dynamic stock market to redefine corporate purpose. In accordance with the new analysis, the firm as an ideal that has value on its own terms disappears. In its place comes a reductionist notion of relationships—the firm becomes a vehicle for maximizing shareholder investments and short-term share values become the measure of success.[206]

To examine the limitations of this model, it is necessary to go back to the questions that Coase and Berle and Means posed initially. For Coase, the secret to the firm lay with the suppression of the price mechanism. Eighty years later, management studies emphasize the same thing Coase did—motivation tied to firm identity is a more powerful motivator than price—though for reasons that transcend the ability to command employees directly.[207]

204. What did not happen, however, was an increase in the rights of shareholders to control management. *See* Lucian A. Bebchuk, Reply, *Letting Shareholders Set the Rules*, 119 HARV. L. REV. 1784, 1813 (2006) (advocating greater shareholder power to amend the corporate charter or change the state of incorporation); Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 679–94 (2007) (documenting unsuccessful challenges to corporate management from 1996 to 2005).

205. Lynn A. Stout, *New Thinking on "Shareholder Primacy"* 6 (Univ. of Cal., L.A. Sch. of Law, Law & Econ. Research Paper Series, Paper No. 11-04, 2011), http://www.ssrn.com/abstract=1763944.

206. *See* Vermeulen, *supra* note 15, at 714 (noting that current firm "culture is characterized by a short-term mentality that often leads to stricter control mechanisms on corporate executives and demands for increased dividends and stock buybacks").

207. *See* Claire A. Hill & Erin Ann O'Hara, *A Cognitive Theory of Trust*, 84 WASH. U. L. REV. 1717, 1751 (2006) (discussing the relationship between trust, loyalty, and reciprocity); Stout, *supra* note 205 (arguing against a "shareholder primacy" rule and discussing several theories suggesting that price motivation is not in shareholders' best interest).

For Berle and Means, the meaning of the firm lay not just with the role of the entity in directing its employees, but the obligations of the corporation to the broader community, including other stakeholders.[208] These obligations came from the nature of the firm itself as a powerful actor in shaping communities. With globalization, more competitive markets, more intense ideological divisions, and the resurgence of class differences, however, firms do not play the same roles in their communities as they did in the beginning of the century and they do not depend to the same degree on the well-being of their communities.[209]

To deal with these changes, therefore, it is necessary to rethink the nature of the firm in the three roles it has played over the course of the twentieth century. First is the re-identification of the risks: Where does unaccountable power reside today? Second is the question of the good: Has the loss of firm as motivator become an obstacle to more cohesive and productive workplaces? Third are the ugly issues that remain: If the firm no longer serves societal interests in individual security and community membership, what should take its place?

III. BACK TO THE FUTURE

The firm *is* dead. That is, the nearly century-long arc that saw the rise of the large American corporation, its dominance within American communities, and its emergence as a co-equal partner with Big Government and Big Labor has reached its end. To be sure, corporations and firms of various sizes and structure remain.[210] They do not, however, play the same role in

208. *See supra* text accompanying notes 105–06.

209. Of course, some large employers continue to have a disproportionate impact on some communities. *Compare* DAN DIMICCO, AMERICAN MADE: WHY MAKING THINGS WILL RETURN US TO GREATNESS 3 (2015) (boasting of avoiding layoffs while CEO of Nucor, a large American steel company), *with* William Lazonick, *Profits Without Prosperity*, HARV. BUS. REV., Sept. 2014, http://www.hbr.org/2014/09/profits-without-prosperity (describing role of Wall Street in prompting plant closings).

210. Major manufacturing firms—machinery, automakers, and extractive operations—still exist, of course. However, these sectors now only employ about twenty percent of U.S. workers. Alvaro Santos, *Labor Flexibility, Legal Reform, and Economic Development*, 50 VA. J. INT'L L. 43, 91 (2009). Furthermore,

> [i]n the 1990s, the percentage of large firms in the manufacturing sector dropped considerably while the share of microenterprises surged. . . . The number of medium-sized and small firms also de-

assembling and motivating labor or coordinating commercial and civic well-being. In addition, while corporate excess and malfeasance persist, the sources of the problem—and their solutions—will not be the same.[211] It is accordingly time to reckon with the death of the firm, as the Coasean,[212] Berlean,[213] Galbraithian[214] firm has been understood over the course of much of the twentieth century, and to consider what part of its functions need to be replicated elsewhere.

This Part will address the two topics carrying through this Article. First, we will discuss Coase's insight about the suppression of the price mechanism in the context of human motivation and ask what remains about the role of firm identity in motivating behavior. We will argue that both management and labor have more tenuous connections with their places of employment than they did in the middle of the twentieth century and that the reinforcing roles of firm identity and employee loyalty now persist primarily in distinct niches that characterize the minority of employment relationships.[215] The role of firm as entity has accordingly become less important in either moti-

> clined considerably. While the share of large firms dropped from 1.5% to 0.9%, microenterprises grew from 86.9% to 92.6%.

Id. at 91 n.209 (citing Enrique de la Garza Toledo, *Estructura Industrial y Condiciones de Trabajo en la Manufactura*, *in* LA SITUACIÓN DEL TRABAJO EN MÉXICO, 2003, 251, 253–54 (Enrique de la Garza & Carlos Salas eds., 2004)). The microenterprises tend to grow into much larger entities, get acquired by larger entities, or go out of business. The result, overall, contributes to labor insecurity. *See* discussion *infra* note 237.

211. Indeed, a full discussion of the new sources of misfeasance would require a substantial discussion of the financial sector. *See, e.g.*, Lazonick, *supra* note 209 (noting that since the late 1970s, a "*downsize-and-distribute* regime of reducing costs and then distributing the freed-up cash to financial interests, particularly shareholders[,] . . . has contributed to employment instability and income inequality").

212. In the sense of Coase's initial article exploring the firm's suppression of the market mechanism in favor of internal markets. *See supra* text accompanying notes 29–36.

213. In the sense of Berle's and Berle and Means's classic works from the twenties and thirties exploring the concentration of power that made the abuses leading to the Great Depression possible. *See supra* text accompanying notes 95–97, 105–06.

214. In the sense of Galbraith's chronicle of the distinctive features of firm management during the managerial era. *See supra* text accompanying notes 55–74.

215. *See Declining Employee Loyalty: A Casualty of the New Workplace*, KNOWLEDGE@WHARTON (May 9, 2012), http://knowledge.wharton.upenn.edu/article/declining-employee-loyalty-a-casualty-of-the-new-workplace (stating that relationships with organizations are getting weaker, and some people believe that "company loyalty is dead").

vating management or securing employee stability. It cannot therefore be a reliable foundation for extending public benefits such as health care or securing public purposes such as non-discriminatory employment policies.[216]

Second, we will consider Berle's concern about the impact of corporations on polities and argue that with the death of the firm or, more specifically, the end of the insulation from market competition that large corporations enjoyed, that relationship needs to be re-examined. The managerial era involved a public-private partnership that conferred benefits on firms premised on the presumption that firms would serve public as well as private ends. The end of this relationship and of the assumptions on which it was based requires re-examination not just of corporate obligations, but of public ones.

Third, we will consider the question of abuse of power in the new era. Both the reinterpretation of Coase in the agency-cost literature and Berle and Dodd's various positions in their iconic debate involved the conflicts of interest that arose from the separation of ownership and control. We will consider the risks of an era that has produced a greater alignment of ownership and control, raising a different set of issues. In this new technological age, corporate management's greater flexibility has permitted it to outpace public regulation and unionization to acquire greater leverage in labor markets and cross-border transactions. Rather than recreate the older model of static regulation, we will consider the possibilities for alternative approaches that increase labor flexibility and mobility in parallel ways.

A. THE FIRM OF THE TECHNOLOGICAL ERA AS NETWORK

The firm of the industrial era, with its dependence on static supply chains; a large, trained labor force; and insulation

216. Gerald F. Davis, *How Financial Markets Dissolved the Society of Organizations*, RASSEGNA ITALIANA DI SOCIOLOGIA 13, 19 (2012), http://webuser.bus.umich.edu/gfdavis/Papers/davis_12_RIS.pdf ("Large-scale employers that provided job security, career mobility through job ladders, and generous health and retirement benefits seem to have been artifacts of the corporate-industrial age in the US."). For further discussion of the relationship between the changing structure of employment and worker security, see Mark Berger, *The Contingent Employee Benefits Problem,* 32 IND. L. REV. 301, 303–05 (1999) (emphasizing the importance of workplace benefits and the related problems inherent in contingent employment); Glynn, *supra* note 2 (explaining how the disaggregation of firms into several, often independent parts presents a difficulty in holding firms liable for violations of the Fair Labor Standards Act).

from competition, is fading.[217] As commercial organization has become more fluid, the entity-based corporate theory of the managerial era has also given way to a more individualistic regime that, like Justice Alito, treats the firm as a legal fiction that can be discounted or ignored, except where it chooses to contractually bind itself.[218] These changes in commercial organization and legal theory parallel and often accelerate a corresponding set of economic changes. Large corporations no longer depend to the same degree on a large labor force, nor with globalization do firms enjoy the same degree of insulation from competition.[219] Instead, commercial actors strive for flexibility, organizing their enterprises to minimize and concentrate core sectors, and coordinate them with a rapidly changing mix of subsidiaries or independent contractors.[220] As a result, the reciprocity that existed because of corporate dependence on employee stability and employer provision of secure employment is rapidly disappearing.[221]

Firms of various sizes and structures still exist, of course, and so do a number of relatively secure positions.[222] Yet even large and successful firms cannot guarantee their survival in any particular form. One need only think of the trajectory from IBM to Microsoft to Apple and perhaps on to Google and its competitors to underscore the difference. The same firms that dominated the American landscape in 1910 continued to do so in 1970.[223] The firms that do so today involve a mix of financial (Berkshire-Hathaway), tech (Apple), and retail (Walmart) gi-

217. *See* BOLTANSKI & CHIAPELLO, *supra* note 14, at xv, 75 (noting that flexibility, mobility, and network forces have become more dominant, and "the main source of value added is no longer the exploitation of geographically located resources (like mines, or especially fertile land), or the exploitation of a labour force at work, but the ability to take full advantage of the most diverse kinds of knowledge, to interpret and combine them").

218. *See supra* text accompanying notes 5, 9, 17.

219. BOLTANSKI & CHIAPELLO, *supra* note 14, at 73 (describing the relationship between global competition, innovation, and "lean" firm principles that emphasize innovation).

220. *Id.* at 75.

221. *See* Davis, *supra* note 216, at 16–20.

222. *See generally* ARNE L. KALLEBERG, GOOD JOBS, BAD JOBS : THE RISE OF POLARIZED AND PRECARIOUS EMPLOYMENT SYSTEMS IN THE UNITED STATES, 1970S-2000S (2011) (arguing that the information economy tends to produce more good jobs and bad jobs, hollowing out the center).

223. *Cf.* GALBRAITH, *supra* note 27, at 92–94, 118–19 (citing to *Fortune* financial reports to illustrate the scale of prominent corporations like AT&T and General Motors, and describing the security inherent in executive life based on longevity of positions).

ants in addition to more traditional energy and auto companies.[224] In this era, individuals may well be bigger than the firms they head; it remains to be seen whether, twenty years from now, Apple prospers without Steve Jobs and whether Bill Gates's philanthropic ventures become more important than Microsoft's business outlook.

For individual employees, the changes are more dramatic. Neither top executives nor blue collar employees expect to remain at a single firm. The ambitious see many positions as stepping stones in a personal saga rather than as a source of commitment.[225] Workers have minimal or no loyalty—nor should they, when they have become fungible commodities and their employers have become transitory.[226] And the business stars of the new economy are start-ups, willing to take risks that, if they pay off, will transform the nature of the operation and, if they fail, will doom its existence.[227] In this new model, the firm has become a nexus of private contracts in which identity, loyalty, and reciprocity play diminished roles, where they survive at all.[228] Scholars call the change in the nature of work the "casualization of employment."[229] In this system, Uber, which supplies automobile rides much like a taxi service, is the new exemplar. Uber sets up software that will hook up people who want labor services with people who will provide them.

224. Indeed, the top ten in the Fortune 500 list now include Walmart, Apple, Berkshire Hathaway, and CVS Pharmacy in addition to auto and energy giants such as General Motors, Exxon, and Chevron. *Fortune 500*, FORTUNE, http://www.fortune.com/fortune500 (last visited Nov. 27, 2016).

225. BOLTANSKI & CHIAPELLO, *supra* note 14, at 93–95 (observing that "the transition from one project to the next . . . increase[s] one's employability," and also increases opportunism and self-interested behavior; even if the employee succeeds in becoming more valuable to the company, the company promises in turn not security, but employability both within the firm and elsewhere).

226. Richard Bales et al., *A Comparative Analysis of Labor Outsourcing*, 31 ARIZ. J. INT'L & COMP. L. 579, 617 (2014) ("In contrast to the long-term, relatively stable employment relationships that characterized the manufacturing-based economy of most of the twentieth century, an increasing proportion of workers in the United States today are 'contingent.'").

227. For a discussion of efforts to capture the entrepreneurial spirit (and employee loyalty) within large companies, see Mark Fenwick & Erik P.M. Vermeulen, *The New Firm, Staying Relevant, Unique & Competitive* (Lex Research Topics in Corp. Law & Econ., Working Paper No. 2015-5, 2015), http://www.ssrn.com/abstract=2659763.

228. Indeed, even though the management literature continues to emphasize the importance of employee loyalty, such loyalty depends on bonds of reciprocity that are in much shorter supply. *See* Hart & Thompson, *supra* note 81.

229. BOLTANSKI & CHIAPELLO, *supra* note 14, at 224.

The infrastructure disappears. The software (and the entrepreneurs who design it and keep it going) links independent contractors who provide monetized services directly with paying customers. While the company makes money, the drivers providing services may be considered independent contractors rather than employees (a matter that is currently being litigated).[230] They have independence, including the ability to structure their working hours and conditions, but no security and no benefits. And, as Geoffrey Fowler noted, "There's an Uber for everything now. . . . Heal sends a doctor on a house call, while Saucey will rush over alcohol. . . . Dufl will pack your suitcase and Eaze will reup a medical marijuana supply."[231]

In this world, the firm as entity has neither a fixed identity nor a permanent existence. The meaning of the firm, if it is to remain viable, has to be seen in different terms.

B. WHAT REMAINS OF CORPORATE IDENTITY AND LOYALTY?

The firms that remain, for better or worse, are subject to greater competitive pressures and more dynamic marketplaces. They need to be more nimble to adjust to rapid changes in technology and the challenges of global markets.[232] Within this framework, companies have adopted leaner production—and employment—systems.[233] Firms invest less in employees, preferring those who obtain training and experience elsewhere. Firms also offer less security in terms of employment or benefits to the employees they do hire.[234] The most ambitious employees in turn recognize the need to acquire experience, but

230. The misclassification lawsuits against Uber and Lyft, alleging that the companies erroneously classify their drivers as independent contractors rather than employees, are probably just the first wave of such suits. *See, e.g.*, O'Connor v. Uber Techs., Inc., No. 13-CV-03826-EMC, 2016 WL 4398271 (N.D. Cal. Aug. 18, 2016) (upholding a $100 million settlement and retaining the independent contractor classification, but having Uber agree to implement drivers' associations in each state to review grievances); Cotter v. Lyft, Inc., No. 13-CV-04065-VC, 2016 WL 3561742, at *6 (N.D. Cal. June 23, 2016) (upholding a new settlement agreement with both nonmonetary and monetary aspects, the latter of which "contemplates payment of roughly 17 percent of the value of the $156 million reimbursement claim").

231. Geoffrey A. Fowler, *There's an Uber for Everything Now*, WALL ST. J. (May 5, 2015), http://www.wsj.com/articles/theres-an-uber-for-everything-now-1430845789.

232. *See* BOLTANSKI & CHIAPELLO, *supra* note 14, at 73–75.

233. *See id.*

234. *See id.* at 94.

may view companies as no more than vehicles to the next position.[235]

In this new system, how do we understand Coase's insight that the advantage of the firm comes from the suppression of the price system? Part of the answer is that it vindicates that insight. If we compare skilled and unskilled workers, firms today contract out (that is, they use market contracts) to secure an increasing percentage of the unskilled labor they need.[236] This outsourcing may be to call centers in India, to independent contractors in the United States who provide janitorial services, or to temp agencies who supply individual workers. The firms presumably make the calculation Coase described, determining that the price mechanism works quite well in securing essentially fungible labor at a time of international competition and slack markets for unskilled labor.[237] Corporations remain more likely to bring employees in-house to perform more sophisticated tasks, such as engineering or product design, that are harder to specify, to supervise, or to divide into discrete parts. Companies, of course, are also more likely to

235. *See id.* at 93–95.

236. *See* James M. Cooper, *The North American Free Trade Agreement and Its Legacy on the Resolution of Intellectual Property Disputes*, 43 CAL. W. INT'L L.J. 157, 176–77 (2012) ("We are living, at least in the United States, in a post-industrial, or knowledge-based, economy. As the United States outsourced millions of manufacturing jobs to Mexico, China, and any number of other industrializing countries with abundant low-cost unskilled labor, the United States was able to base its economic growth on services and new innovations." (footnote omitted)); *see also* DAVID WEIL, IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT 9–10 (2010), https://www.dol.gov/whd/resources/strategicenforcement.pdf.

237. While large firms may thus choose to outsource unskilled services such as janitorial work, the small businesses that provide such services make independent calculations about whether to encourage longer worker tenure through greater investment in their employees. Even if these firms do so, however, the individual worker may still experience greater employment instability if the small businesses are more likely than large ones to go bankrupt, close, and reopen with different management. *Cf.* Timothy Bates & Alfred Nucci, *An Analysis of Small Business Size and Rate of Discontinuance*, J. SMALL BUS. MGMT., Oct. 1989, at 1, 4 (discussing statistical findings demonstrating that firm size inversely correlates with rate of discontinuance). The creation of these companies, however, has occurred in large part because larger companies have chosen to deal with potential uncertainty in demand through outsourcing these activities, in effect shifting the risk of future market conditions to the small businesses. *See* BOLTANSKI & CHIAPELLO, *supra* note 14, at 73–74 (describing this outsourcing as part of the process of creating "leaner" organizations).

bring employees in-house where the skills are valuable, firm specific, and/or hard to find.[238]

This dynamic contributes to the growing inequality in American wages and it recreates a form of class structure within American firms. If we go back to Galbraith's description of the managerial era, he describes different groups within the firm with varying levels of identification with the firm brand and varying degrees of loyalty associated with that identification.[239] The technological era's reorganization of commercial activities makes the concept of firm as entity less critical for each group:

1. Shareholders. This group, both in the managerial era and today, combines the greatest emphasis on monetary incentives with the least identification with the firm's identity and mission.[240]
2. Unskilled workers. Galbraith argued that identification with the firm was least likely to affect the productivity of these workers.[241] In the production line era, these were the workers most likely in fact to be subject to employer commands (rather than enjoy discretion), and they are the group most likely to be outsourced today.[242]
3. Supervisory personnel (such as foremen), clerical, sales, and other routine white collar personnel. Today, this category is much smaller, with the supervisors outsourced with the employees they supervise, routine clerical work done by computer, and the remaining tasks often becoming more sophisticated.[243]

238. Andy Sealock & Christopher Stacey, *Why Some U.S. Companies Are Giving up on Outsourcing*, FORBES (Jan. 16, 2013), http://www.forbes.com/sites/ciocentral/2013/01/16/why-some-u-s-companies-are-giving-up-on-outsourcing/#1f368f9a51ba.

239. GALBRAITH, *supra* note 27, at 187–91.

240. *Id.* at 187–88.

241. *Id.* at 188–90.

242. *Id.*; Laurie Monahan, *Re-Organized Labor: Affirming Labor's Relevance by Reframing Its Image and Merging with Allies*, 3 AM. U. LAB. & EMP. L.F. 438, 458–59 (2013).

243. For example, the typing pool is gone, and the group of personal assistants is much smaller at the same time that administrative assistants often do things that require more firm-specific knowledge and judgment. *See What Happened to All the Secretaries*, GREENKEY RESOURCES: GREEN KEY BLOG (Feb. 11, 2014), http://www.greenkeyllc.com/blog/what-happened-to-all-the-secretaries ("According to one study of the data, the five years since 2007 saw businesses eliminating 1.9 million office and administrative support jobs." (citation omitted)).

4. Skilled workers: technicians, engineers, sales executives, scientists, designers, and other specialists who comprise the technostructure. This is the group for whom firm identity and loyalty remains most critical, with employers eager to attract and retain professionals.[244] At the same time, however, information itself has become much more readily accessible; the most valuable employees are those adept at finding it, assembling the needed components, and motivating those around them.[245]
5. Executives or management. Galbraith wrote that "[a]s one moves through these inner circles, identification and adaptation become increasingly important."[246]

Consider now today's large firm. The two groups whose tenure has shortened and whose loyalty to the firm has become more contingent are the unskilled and senior management.[247] And these changes correspond with the creation of more clearly defined class differences.

At the top, executive pay has increased, it is more tied to stock options, and executive tenure has shortened.[248] Top executives, in turn, make considerably more than the next tier of managers. At the same time, boards have become more influential and the percentage of outside directors has increased.[249] As a result, the identification of boards (often comprised of executives from other companies), top managers, and shareholders with each other has grown, with all of the groups placing more emphasis on quarterly earnings and share price.[250] This group of officers and directors, whose income and wealth has reached extraordinary levels, identify to a greater degree with each other.[251] They share similar perspectives and often set each other's salaries.[252]

244. GALBRAITH, *supra* note 27, at 190–91.

245. BOLTANSKI & CHIAPPELLO, *supra* note 14, at 75–76.

246. GALBRAITH, *supra* note 27, at 191.

247. For discussion of the impact of these changes, see generally Steven N. Kaplan & Bernadette A. Minton, *How Has CEO Turnover Changed?*, 12 INT'L REV. FIN. 57 (2012).

248. *Id.* at 58; Nitzan Shilon, *CEO Stock Ownership Policies—Rhetoric and Reality*, 90 IND. L.J. 353, 362 (2015).

249. *See* Kaplan & Minton, *supra* note 247, at 59, 75.

250. *See* andré douglas pond cummings et al., *Toward a Critical Corporate Law Pedagogy and Scholarship*, 92 WASH. U. L. REV. 397, 401 n.19 (2014); Shilon, *supra* note 248.

251. *See* cummings et al., *supra* note 250, at 401 ("The ability of the CEO to stack the board of directors with cultural clones is key to the new power of the

Their benchmarks for success have become more focused on the short-term, and their careers are less likely to take place within a single company. The motivation of this group has accordingly changed most, from identification with a particular firm's objectives to a more generic management focus that combines a greater association of firm well-being with share prices and individual success with financial rewards.[253] This group, which constitutes a new elite, identifies much less with particular firms than either entrepreneurs (think Mark Zuckerberg's association with Facebook) or the technical class of engineers and other professionals.[254]

At the same time, companies still compete for skilled workers and seek to motivate their employees through identification with the firm.[255] These workers continue to have relatively secure positions with substantial benefits,[256] even as overall firm employment has declined.[257] Nonetheless, their career trajectories have also changed as they see advancement less in terms of the climbing of a fixed career ladder within a given firm and more in terms of "employability," that is, the acquisition of skills and experiences that make them more marketable both within the firm and without.[258]

While differences in pay have increased between top management and the professional group, so too have the wages in these skilled positions increased faster than the wages of the unskilled. Looking at the economy as a whole, blue collar work-

CEO.").

252. *See* Bernice Grant, *Independent Yet Captured: Compensation Committee Independence After Dodd-Frank*, 65 HASTINGS L.J. 761, 778 (2014) ("CEOs who serve as directors of other companies have self-interested incentives to approve high compensation for the CEOs of the companies on whose board they serve because CEO pay is set using peer group comparisons.").

253. *See, e.g.*, cummings et al., *supra* note 250, at 399 ("CEOs act as the new potentates in American society and manage their firms as personal fiefdoms.").

254. *See* WILLIAM LAZONICK, SUSTAINABLE PROSPERITY IN THE NEW ECONOMY? BUSINESS ORGANIZATION AND HIGH TECH EMPLOYMENT IN THE UNITED STATES 12–13, 197 (2009) (reporting on the change in orientation of executives from a career ladder in a single company to salaries that are set by the external market).

255. HISLOP, *supra* note 51.

256. KALLEBERG, *supra* note 222, at 70–71, 78, 86.

257. *Id.* at 92–93.

258. BOLTANSKI & CHIAPELLO, *supra* note 14, at 93. The authors emphasize that this acquisition of experience increases personal capital and thus "employability," but it also increases opportunism and self-interested behavior. *Id.* at 94–95.

ers (particularly men) saw their wages stagnate and their employment instability increase in the period from 1979 to 2008.[259] In contrast, male college graduates' employment stability did not change and their income continued to increase, though those with only Bachelor of Arts degrees have seen their incomes level off after 2000.[260]

This creates three groups with radically different identification with companies: (1) a management elite that views the company from without, as part of a group of directors, managers, and shareholders likely to see the company as a means to produce profits rather than as an entity of importance in itself; (2) an unskilled group with little job security; and (3) a skilled group that management would like to retain. This third group constitutes the core of most firms and the group for whom corporate ethos remains important to the coordination of behavior. Even for this group, however, the strength of firm identity and corresponding employee loyalty have weakened as the firms themselves have become more dynamic and employee career paths have become more likely to involve lateral moves.[261]

Part III.B has considered the distinct paths charted by various pools of employees, managers, and directors of the new era corporation. Part III.C addresses what has happened to the interests of the firm itself. It also offers a normative vision of what corporate rights and responsibilities should be after the death of the managerial firm.

C. THE NEW ERA OF CORPORATE INTERESTS, RIGHTS, AND RESPONSIBILITIES

> Corporation, n. An ingenious device for obtaining individual profit without individual responsibility. –Ambrose Bierce[262]

The analysis in this Article suggests that the description of the firm in *Hobby Lobby*, a description that treats the firm as no more than a legal fiction that serves as an instrument of its owners, is an accurate description of the shift in management thinking and the corresponding celebration of shareholder supremacy in corporate law.[263] What neither the case nor the

259. *See* JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY 46 (2014).

260. *See id.* at 80–81.

261. BOLTANSKI & CHIAPELLO, *supra* note 14, at 94 n.lxix.

262. AMBROSE BIERCE, THE DEVIL'S DICTIONARY 29 (1999).

263. *See supra* text accompanying notes 11, 97, 199–203.

commentary on it adequately addresses are the consequences of that description. Firms have in fact become more fluid, dynamic networks.[264] The accompanying changes have remade the relationship between owners and companies, management and labor, financial elites and other citizens. Much of this change, like the analysis in *Hobby Lobby* itself, has been unidirectional rather than reciprocal; that is, corporate owners have remade the terms of the commercial entities to reflect their own interests, while support for workers has not similarly adapted to more fluid, dynamic, and network-like workplaces.[265] To do so requires going beyond the decision itself to examine the realignment of public, corporate, and individual interests, rights, and responsibilities.

It also requires asking the question Ambrose Bierce raised in 1911 and Dodd and Berle debated in 1930: Is corporate form once again an opportunity for individual profit without individual responsibility? And if so, how should the State of the technological era respond?

1. *Hobby Lobby* and the End of Reciprocity

With the changes in the nature of the firm, legal and social policy have only just begun to adjust. The decision in *Hobby Lobby*, on the one hand, recognizes the changes in the nature of the firm, as it has become principally an instrument to advance the interests of its owners.[266] It does not, however, fully acknowledge the implications for programs like the Affordable Care Act (ACA) that follow. Nor can it. Just as the Berle-Dodd debate of the thirties ended in stalemate because the solutions to the corporate abuses of the twenties lay outside of corporate law, so, too, does the debate over *Hobby Lobby*'s conception of the corporation fail to the extent it focuses solely on the legal characterization of corporate actors. Instead, the focus ought to be on the nature of the public-private partnerships possible in an area in which the firm as entity disappears from view. In

264. Vermeulen, *supra* note 15, at 712–13.

265. *See, e.g.*, Thomas L. Friedman, *How To Beat the Bots*, N.Y. TIMES (June 10, 2015), http://www.nytimes.com/2015/06/10/opinion/thomas-friedman-how-to-beat-the-bots.html?action=click&pgtype=Homepage&module=opinion-c-col-left-region&region=opinion-c-col-left-region&WT.nav=opinion-c-col-left-region&_r=0.

266. *See infra* note 282 and accompanying text.

accordance with this analysis, employer-subsidized health care becomes an anachronism.[267]

At the height of the managerial era, the government sought to promote the greater public good through corporations. The public safety net that took hold during the New Deal and continued through the Great Society reforms of the 1960s assumed that large employers were part of the solution, conferring health care insurance, pension benefits, and greater employment security on employees. Public programs such as Social Security and Medicaid supplemented what were seen as more primary employment-based systems and large corporations were seen not just as private commercial entities serving exclusively private ends, but public citizens. Corporations in turn expanded provisions of these benefits because of generous tax subsidies,[268] and favorable tax treatment of corporations has often been justified by assumptions that the firms would take significant responsibility for employees.[269] The history of special tax treatment and of federal, state, and local economic development incentives for corporations has been premised on the idea that businesses will create jobs, build community partnerships, and pump revenue into both the national economy and particular locales.[270] These assumptions are no longer reflected in fact nor, after *Hobby Lobby*, in law.

Instead, Justice Alito's analysis, in simultaneously treating the firm as a fiction and imbuing it with the constitutional rights of its owners, leads to the conclusion that the owners *are*

267. Our purpose here is not to compare the benefits of employer-provided coverage—natural risk-pooling, low overhead costs, generally high-quality coverage, and employers serving as advocates in the claim process—with the costs or against the advantages of other systems. The point is one of structural ideology: with the disappearance of longer term employment, the logical question is whether benefits should be attached to a single job.

268. *See* JOINT COMM. ON TAXATION, JCX-141R-15, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2015-2019, at 28–42 tbl.1 (2015), http://www.jct.gov/publications.html?func=startdown&id=4857. Before adoption of the ACA, the exclusion for employer-provided health insurance was the largest federal tax expenditure, with an annual value of $246.1 billion in 2007. David Gamage, *Perverse Incentives Arising from the Tax Provisions of Healthcare Reform: Why Further Reforms Are Needed To Prevent Avoidable Costs to Low- and Moderate-Income Workers*, 65 TAX L. REV. 669, 681 (2012).

269. Katharine V. Jackson, *Towards a Stakeholder-Shareholder Theory of Corporate Governance: A Comparative Analysis*, 7 HASTINGS BUS. L.J. 309, 318 (2011).

270. *See, e.g.*, Randle B. Pollard, *"Was the Deal Worth It?": The Dilemma of States with Ineffective Economic Incentives Programs*, 11 HASTINGS BUS. L.J. 1, 2, 8–10 (2015).

the firm and they therefore have rights without obligations to anyone else.[271] The corollary to the conclusion ought to be that neither the corporation nor its owners are suitable partners to advance community ends. The public-private partnership that reached its height with the Galbraithian firm cannot therefore continue, and the focus should shift from corporate rights to the vindication of community responsibilities in other ways.

While the implications of *Hobby Lobby* go well beyond health care, it is perhaps fitting that heath care underlies the decision because what has happened to health care perhaps best represents the unsustainability of continuing efforts to advance public purposes through corporate firms. As we indicated above,[272] the United States to a much greater degree than other developed countries has tied health care to employment and done so because of the nature of the industrial firm at mid-nineteenth century. The critical government decision came through the tax system, allowing firms to deduct the cost of health insurance as a business expense without counting the benefit as income to the worker.[273] The result allowed the government to promote a taxpayer-subsidized benefit by acting through private parties. Firms received a tax break for something they wished to do anyway to remain competitive in an era of tight labor markets, and the government relied on the firms' willingness to offer insurance to advance public ends that justified the relaxation of wartime controls on wages.[274]

The change in the nature of employment, on the other hand, is part of what necessitated health care reform in the first place, touching off cascading changes many viewed as a crisis in insurance coverage. First, fewer employees work in long-term positions that provide health care.[275] Younger work-

271. *See infra* notes 281–83 and accompanying text.

272. *See supra* note 134 and accompanying text; *see also* DAVIS, *supra* note 5, at 117 (describing provision of social services through employers rather than government).

273. *See infra* note 284 and accompanying text.

274. *See* Eleanor D. Kinney, *For Profit Enterprise in Health Care: Can It Contribute to Health Reform*?, 36 AM. J.L. & MED. 405, 409 (2010) (describing the shift from direct payment with only ten percent of the American public insured in 1940 to employer-provided insurance covering seventy-two percent of the American public by 1957).

275. *See, e.g.*, Elizabeth A. Pendo, *The Health Care Choice Act: The Individual Insurance Market and the Politics of "Choice*,*"* 29 W. NEW ENG. L. REV. 473, 474 (2007) ("[T]he erosion of employer-sponsored coverage has increased the ranks of the uninsured."); *see also* U.S. Bureau of Labor Statistics, *All*

ers, in particular, have become less likely to have secure employment or employer-provided health care than their parents; yet, the presence of younger, healthier workers contributes to the creation of low-cost insurance pools.[276] Without the presence of these workers, employer insurance costs go up. Second, with more employee mobility, voluntary or not, the ability to gain coverage for pre-existing conditions has become critical to more families as wage-earners switch jobs more frequently.[277] Third, with greater outsourcing, more employees who would have worked in large companies now work in smaller units. These smaller units are less likely than larger ones to have a representative population and, as a result, may have a harder time finding affordable private health insurance. A single employee with cancer, who would not affect the insurance pool of a General Motors, can dramatically increase the insurance premiums in an office of ten. Fourth, as fewer employees have health care and as premiums rise both in many places of employment and for non-employer plans, these plans become a bad deal for the healthy, and people who are already sick become an even larger portion of those who purchase them.[278] The ACA sought to counter these trends (and avoid what some predicted would be a "death spiral" in insurance coverage)[279] by mandating employer provision of health insurance, individual participation, state exchanges for those without employer coverage, and specification of the minimum level of coverage qualifying plans had to provide.[280] The mandate that employers provide insurance and the inclusion of contraception in the mandated coverage set up

Employees: Professional and Business Services: Temporary Help Services, FED. RES. ECON. DATA (Feb. 5, 2016), http://www.research.stlouisfed.org/fred2/series/TEMPHELPS (charting the rise of temporary workers).

276. Kara Brandeisky, *Why Young Millennials Are Turning down Health Coverage at Work*, TIME (Apr. 15, 2015), http://www.time.com/money/3821525/health-insurance-age-26.

277. Pendo, *supra* note 275, at 479 (discussing high rates of rejection for those with pre-existing conditions).

278. *See* Joseph P. Newhouse, *Assessing Health Reform's Impact on Four Key Groups of Americans*, 29 HEALTH AFF. 1714, 1716 (2010) ("[T]he individual and small-group market is dysfunctional.").

279. Elizabeth A. Pendo, *Uninsured in America: Life and Death in the Land of Opportunity*, 29 J. LEGAL MED. 117, 118 (2008) (book review) ("The death spiral is a term used to describe the process by which a pool of people covered by an insurance plan loses its relatively healthy members, causing costs to increase for the remaining members. Unchecked, the spiral continues until the insurance plan can no longer be sustained and ultimately 'dies.'").

280. 26 U.S.C. § 36B (2012); 42 U.S.C. § 18041 (2012).

the First Amendment clash in *Hobby Lobby*, but the declining relationship between employment and health insurance is one of the factors that made the ACA necessary in the first place.

Alito's analysis in the *Hobby Lobby* decision underscores the rejection of the assumptions that once made employer-provided insurance appropriate, without acknowledging the broader implications. The analysis combines two elements. First, the majority opinion reflects the perspective of the seventies' agency-cost theorists, who rejected the conception of the corporation as an entity tied to the well-being of employees and community. In language that could be drawn from the Jensen-Meckling article, he observes that the firm is a fiction and, since the firm is a fiction, it has no importance as an entity.[281] That is, when the owners decide to act through corporate form, the corporation has no meaning separate from the identity and interests of its owners—and the owners are free to assert whatever rights they would have as individuals.[282]

Second, Alito further concludes that when the owners choose to act through corporate form, and to take advantage of the benefits state-chartered corporate form confers, they acquire no obligations to either employees or the community by virtue of that decision.[283] Thus, in acting through corporate form, the Hobby Lobby owners can insist on a First Amendment right to claim the tax and other competitive advantages of government-subsidized health care for their employees[284] *and* still pick and choose among the provisions included in the plans on the basis of their individual, idiosyncratic preferences.[285]

281. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2768 (2014).

282. Indeed, at least one scholar argues that the religious freedom rights granted to Hobby Lobby as a corporation exceed those available to individuals. *See* Yvette Ann Walker, Note, *More than Human: Modern Expansion of Corporate Personhood Rights in* Hobby Lobby, 24 S. CAL. REV. L. & SOC. JUST. 297, 324 (2015).

283. As Justice Ginsburg's dissent indicates, the decision in this respect is at odds with earlier decisions about the structure of the marketplace that applied to individual proprietors as well as companies. *Hobby Lobby*, 134 S. Ct. at 2797 (Ginsburg, J., dissenting).

284. *Id.* at 2776–77 (majority opinion) (emphasizing benefit to employer from the ability to provide health insurance benefits, and from the substantial tax benefits); *see also* Matthew A. Melone, *Corporations and Religious Freedom:* Hobby Lobby Stores—*A Missed Opportunity To Reconcile a Flawed Law with a Flawed Health Care System*, 48 IND. L. REV. 461, 479 (2015).

285. In *Hobby Lobby*, the owners objected to the morning-after pill as an abortifacient, even though the weight of scientific opinion is that it prevents ovulation but cannot prevent the implantation of an embryo in the uterine wall, and therefore does not cause abortion. *See, e.g.*, INT'L FED'N OF GYNE-

Moreover, while Alito gives considerable weight to the employers' right of access to health care tax subsidies, in spite of the fact that they could choose not to provide health care at all, he minimizes the employees' interests because of the government's purported ability to deliver contraceptive access in other ways.[286]

The logical extension of this analysis, however, is the separation of employment and health care altogether, and not just because it solves the religious freedom issue. Employers, of course, acted to advance their own interests during the managerial era as well, but the provision of heath care through employer subsidies arose during an era in which management and labor issues were more aligned.[287] Today, the larger question is why employers should continue to be a vehicle for the extension of benefits necessary to human flourishing at all. The initial adoption of government-subsidized employee benefits reflects the particular constellation of forces at play in the United States during World War II and its aftermath.[288] The net effect of employer-provided health care, however, was broad-based coverage through large, private entities that disguised the cost of a large-scale public program. Subsequent changes in the nature of employment change the justifiability of such an approach, for reasons implicit in the Alito opinion.

As a practical matter, the large firms of the managerial era both sought to advance secular, commercial interests and saw more of a unity of interests when it came to accessing public subsidies to provide worker benefits. This is true in part because of the existence of a tighter labor market, which encouraged greater efforts to invest in and retain workers,[289] and be-

COLOGY & OBSTETRICS & INT'L CONSORTIUM FOR EMERGENCY CONTRACEPTION, MECHANISM OF ACTION (2012), http://graphics8.nytimes.com/packages/pdf/health/contraception/ICEC_FIGO_MoA_Statement_March_2012.pdf (collecting research).

286. *Hobby Lobby*, 134 S. Ct. at 2780, 2782 (Ginsburg, J., dissenting) (explaining that the government could itself "assume the cost of providing" the contraceptives or could replicate the accommodation provided for religiously affiliated nonprofit organizations). *But see* Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2591 (2015) (noting difficulties with the proposal).

287. *See* DAVIS, *supra* note 5, at 42. In addition, given the dominance of large corporations in the American economy in the postwar era, the idiosyncratic preferences of a Henry Ford or owners like the family that controls Hobby Lobby became less important. *Id.* at 43–45.

288. *Id.* at 42.

289. *See* CLAUDIA GOLDIN & LAWRENCE F. KATZ, THE RACE BETWEEN ED-

cause companies strove for greater overall stability, seeking gradual growth to a greater degree than share price maximization.[290] In *Hobby Lobby*, the Supreme Court effectively concludes that corporate owners neither have a duty to maximize share price (or to act to promote secular, commercial corporate purposes) nor to take the interests of their employees into account in taking advantage of the tax subsidies of a program designed primarily for the employees' benefit.[291] The import of the decision is limited as a practical matter because large, publicly traded corporations are unlikely to choose to advance religious purposes, but such corporations are also more likely than Hobby Lobby to move plants overseas, outsource activities to independent contractors to reduce benefits, or convert full-time positions to part-time to avoid the need to pay for health care benefits.[292] As an ideological matter, the *Hobby Lobby* opinion underscores the conclusion that owners have no obligation, morally or legally, to consider the interests of their employees, and, legally, they have no obligation to do so even where exercise of their religious preferences imposes costs on the employees with respect to access to health care provisions designed to minimize public costs (pregnancy, which would be covered by Hobby Lobby's publicly subsidized employee plans, is more expensive than contraception) and increase employee benefits.[293]

Moreover, the continued existence of employer health care insurance continues to promote class-based differences in access that reinforce the impact of employment-based inequalities. Every person requires access to health care at some point in her life, and health care has become that much more expensive because of the availability of third party payers, further increasing the costs to those who lack health insurance.[294] Yet, not only do employers provide health care insurance in large part because of generous tax subsidies,[295] but the subsidies pro-

UCATION AND TECHNOLOGY 53–57 (2008).

290. GALBRAITH, *supra* note 27, at 104, 241–43.

291. *See* McDonnell, *supra* note 6, at 791.

292. *See* Roya Wolverson, *Outsourcing Jobs and Taxes*, COUNCIL ON FOREIGN REL. (Feb. 11, 2011), http://www.cfr.org/united-states/outsourcing-jobs-taxes/p21777.

293. *See* McDonnell, *supra* note 6, at 779 (discussing costs imposed on employees).

294. *See, e.g.*, Steven Brill, *Bitter Pill: How Outrageous Pricing and Egregious Profits Are Destroying Our Health Care*, TIME, Mar. 4, 2013, at 17–55.

295. Gamage, *supra* note 268, at 680–81 (noting that even before the ACA, health care was the largest tax subsidy).

vide perverse incentives to do so in ways that disproportionately benefit the well-off.[296] The ACA, by retaining most of the employer-oriented system, creates much larger subsidies for high-income individuals through employer-sponsored plans, and much larger tax subsidies for most lower-income taxpayers through the exchanges.[297] This increases the incentives for employers to recruit hard-to-get, higher-paid employees through employer-provided health care benefits while finding ways not to include low-income workers as full-time employees at all.[298] Even if the workers who end up with plans through the exchanges enjoy comparable health care benefits, the result reinforces employment-based inequalities, and undermines political support for the ACA.[299] In contrast, single-payer systems in other countries decouple health care and employment, creating more uniform identification (good or bad) with a single system.

Moreover, separating health care from employment would not only be fairer, it would be more transparent. The existing system disguises an important government benefit—health care insurance—as a perquisite of private employment.[300] It also cloaks the true cost to taxpayers, the cross-subsidization that benefits the wealthy at the expense of the poor, and employer choices, that in the absence of precedent-setting Supreme Court litigation, are often invisible to employees.[301]

296. Indeed, before the ACA, the individuals who did not have employer-provided plans faced both substantially higher health care costs if they paid out of pocket and substantially higher premiums for private insurance (if they could get it at all given pre-existing conditions) than they would probably have faced if employer-sponsored health insurance did not exist. *Id.* at 676–83.

297. *See id.* at 672.

298. *Id.* at 671–72.

299. That is, it undermines political support to the extent that those with employer-based plans fail to recognize that the taxpayers are also paying for their plans to a large degree through the tax system. In addition, the role of Medicaid-type benefits, which are often stigmatized where they are available, and which make many workers worse off where they are not, further complicates the effects. *See* Sally C. Pipes, *The Medicaid Poverty Trap Is Growing Worse*, N.Y. POST (July 29, 2015), http://www.nypost.com/2015/07/29/the-medicaid-poverty-trap-is-growing-worse.

300. Gamage, *supra* note 268.

301. In the absence of the publicity attending the *Hobby Lobby* decision, for example, employees might never know that the reason their health plan does not cover an intrauterine device (IUD) is because of their employer's religious objection to a benefit other employers are required to cover. *See* Seema Mohapatra, *Time To Lift the Veil of Inequality in Health-Care Coverage: Using Corporate Law To Defend the Affordable Care Act*, 50 WAKE FOREST L. REV. 137, 155 (2015); *see also* Frederick Mark Gedicks, *One Cheer for* Hobby Lobby*: Improbable Alternatives, Truly Strict Scrutiny, and Third-Party Employee*

While a sudden elimination of employer-sponsored health insurance would be destabilizing[302] and health care reforms of any kind may be impossible today,[303] the time has come to establish the principle that the government needs to counter more fluid and dynamic business enterprises through measures that make individual workers similarly nimble, mobile—and less dependent on particular employers. A health care system entirely independent of employment is, in this sense, similar to fully portable pension plans in contributing to worker autonomy.[304] Moreover, the ACA may ultimately speed voluntary employer choices to drop health care coverage.[305] The ACA's mandate, which only took effect during the 2015–16 enrollment period, provides that employers must provide a certain level of health care or pay a fine.[306] The fine in many cases is less than the cost of providing insurance, and the fines can be used to help finance the subsidies built into operation of the system.[307] Eliminating the employer mandate, recalibrating existing subsidies, and/or tailoring the requirements and the fine to encourage the gradual elimination of employment-based plans could gradually shift most insurance coverage to the exchanges,

Burdens, 38 HARV. J.L. & GENDER 153, 170 (2015) ("[A]ccording to counsel, [the Religious Freedom Restoration Act] should be read to protect a multi-billion dollar corporation against a marginal increase in its operating expenses as the cost of observing its religious beliefs against IUDs and other emergency contraception, but not to prevent the same corporation from shifting the costs of that observance onto lower-income employees and dependents who believe and practice differently.").

302. We are indebted to Daniel Schwarcz for this and several other points.

303. Indeed, many observers have noted the illusory nature of the Supreme Court's insistence that the government could find other ways to provide for employee access to contraception, given Congressional determination to undermine the ACA more generally. *See* Nejaime & Siegel, *supra* note 286, at 2550–51.

304. *See* Gamage, *supra* note 268, at 715 (proposing replacing existing tax subsidies with tax credits based on individual income). While this would not eliminate employer participation, it could be a first step in that direction.

305. Rick Lindquist & Paul Zane Pilzner, *The End of Employer-Provided Health Insurance*, FORBES (Mar. 11, 2015), http://www.forbes.com/sites/nextavenue/2015/03/11/the-end-of-employer-provided-health-insurance/#22c1232364d2 (predicting that "90% of all businesses will drop offering health insurance" in the next decade).

306. *Obamacare Employer Mandate*, OBAMACARE.NET, http://www.obamacare.net/obamacare-employer-mandate (last visited Nov. 27, 2016).

307. *See* LINDA J. BLUMBERG ET AL., URBAN INST., WHY NOT JUST ELIMINATE THE EMPLOYER MANDATE? 4 (2014), http://www.urban.org/sites/default/files/alfresco/publication-pdfs/413117%20-%20Why-Not-Just-Eliminate-the-Employer-Mandate-.pdf (finding that fines may generate substantial revenue from employers choosing not to provide coverage).

eliminating the employer role.[308] If that happened—if all health care depended on access to government-run exchanges or to public programs like Medicare—it would both increase worker flexibility and eliminate the fiction that employer-provided programs are private market creations. Whether one favors a single-payer, government-run system or a more free-market-oriented system of individually purchased private insurance policies, it is hard to justify the continuation of an employer-based system that provides substantially less coverage than it once did and whose primary effect is to disguise a substantial federal subsidy for favored employees.[309]

2. The Need for a New Social Contract

Ultimately, the State needs to contribute to a new model of the networked worker that matches the networked firm and resets the balance between the two. Silicon Valley provides a model. Highly sought-after workers start with technical skills, get entry-level jobs that give them experience, move to the next firm as they mature, and hope to start their own companies. They do so in an environment where private equity funding for start-ups is readily available, failure is not catastrophic in part because the entrepreneur's own assets do not finance new companies, and the forgiving job market provides other opportunities.[310]

Silicon Valley is obviously an elite model, but the elements that make valued employees better off than the rest of the country once characterized a larger part of the country as a whole. First, the job market for skilled workers is tight, just as the job market for blue collar workers was also tight in the

308. The Urban Institute has proposed eliminating the employer mandate in any event, arguing that it is unnecessary and has distorting effects on employment. *Id.*; *see also* Bob Seng & Holly Fistler, King v. Burwell*: Last Piece of Obamacare Puzzle?*, 72 BENCH & B. MINN., Aug. 2015, at 16, 18 ("There's a pretty good argument that the employer mandate isn't necessary. . . . [But] chances of [it] going away without eliminating the individual mandate are very low.").

309. *See* Gamage, *supra* note 268, at 686–87; Melone*, supra* note 284, at 465–66. A complete examination of health care alternatives is beyond the scope of this Article, and the purpose of this example is not to defend either a single-payer system or the existing exchanges, which allow individuals to buy private insurance policies at subsidized prices, but to evaluate the consequences of the uncoupling of employment and benefits—which is already occurring. *See* Gamage*, supra* note 268, at 690.

310. *See* DAVIS, *supra* note 5, at 125–26 (describing the flexicurity system in Denmark, which facilitates such a model).

postwar period of full employment policies.[311] Second, the financing of new ventures for employees who seek to set off on their own is equity-based, not debt-based.[312] This means the entrepreneur, even if not ultimately successful, acquires new skills and experience without being crushed by loans, leaving her free to go on to the next opportunity. In contrast, for most others, the acquisition of valuable education, experience, and skills has become riskier and more expensive. Third, employee benefits are highly portable. Pensions systems today are primarily defined contributions systems[313] and the ACA eliminates the ability of insurers to exclude pre-existing conditions.[314] Finally, the high demand for skilled employees creates reinforcing virtuous cycles: employers who need to compete for valued employees offer more to retain the employees they attract. Silicon Valley is known for its employee perks that include everything from on-site gyms to the notorious Google Bus that runs between San Francisco and the Google offices in the South Bay.

In contrast, the labor market for the country as a whole reflects policies that produce opposite cycles. Government policies have sought to battle inflation (even if that means a slack labor

311. If labor markets generally were tighter, employers would have greater incentives to invest in and retain workers. *See, e.g.*, Steve Matthews, *Tight Job Market in U.S. Cities Prompts Higher Pay*, BLOOMBERG BUS. (Apr. 16, 2014), http://www.bloomberg.com/news/articles/2014-04-16/tight-job-market-in-u-s-cities-prompts-higher-pay.

312. *See* Kurtis Urien & David Groshoff, *An Essay Inquiry: Will the Jobs Act's Transformative Regulatory Regime for Equity Offerings Cost Investment Bankers' Jobs?*, 1 TEX. A&M L. REV. 559, 568–69 (2014) (detailing venture capitalist, angel investor, and crowdfunding methods of equity financing). William Barker has explained the present, somewhat perverse, tax incentives as follows:

> The current system therefore results in high effective tax rates on equity-financed investments and low effective rates on debt-financed investment. This provides incentives for businesses to finance new investments with debt, and to maintain a higher level of debt in their capital structure, increasing the likelihood of financial distress and bankruptcy.

William B. Barker, *A Common Sense Corporate Tax: The Case for a Destination-Based, Cash Flow Tax on Corporations*, 61 CATH. U. L. REV. 955, 962 n.46 (2012).

313. *Just How Common Are Defined Benefit Plans?*, CNN MONEY, http://www.money.cnn.com/retirement/guide/pensions_basics.moneymag/index7.htm (last visited Nov. 27, 2016) (noting that four percent of private sector workers have only a defined benefit plan for retirement, "down from 60% in the early 1980s").

314. *See* Gamage, *supra* note 268, at 678 (noting that denial of insurance coverage to individuals with pre-existing conditions is "a practice banned by the ACA").

market), encouraged the atrophy of wage and hour laws, promoted trade to the detriment of worker protections, and undermined union protections.[315] Over the last thirty years, the law regarding responsibilities of corporations has changed, contributing to corporate flexibility (and slack labor markets) through a wholesale assault on fiscal stimulus, unionization, and worker protections.[316] Paradoxically, Congress and the U.S. Supreme Court have rewarded diminished corporate investment in workers and communities with reduced public obligations.[317] Moreover, with greater emphasis on short-term share prices and more competitive and rapidly changing markets, even executives who might ideally like to provide more for workers have a harder time doing so.[318] These policies reflect changes in which corporate owners and executives advance their own interests independently of the firm while workers increasingly enjoy neither reliable employment nor comparable ability to secure their own interests as independent actors. The result requires rethinking the relationship between individuals and firms not only at the top, where the transformation now appears to be largely complete, but throughout society, as reciprocal institutions that allow workers to adjust to the new economy have yet to be conceived.

To change these patterns requires changing the interlocking patterns of law, economics, and ideology. This requires policies that make workers more valuable, encouraging companies to invest more to train and retain the employees they have. Doing so requires rethinking the sources of investment in workers. These policies, first, start with education, making it more affordable. Second, basic benefits such as health care should be independent of employment. Third, unemployed workers should enjoy greater assistance in going back to school, retraining for needed skills, or relocating to be able to take advantage of new positions. Finally, the government should serve as an employer of the last resort, addressing infrastructure and service needs in schools, hospitals, and other arenas that serve

315. *See, e.g.*, RAYMOND J. AHEARN, CONG. RESEARCH SERV., GLOBALIZATION, WORKER INSECURITY, AND POLICY APPROACHES 4–7 (2012), http://www.fas.org/sgp/crs/misc/RL34091.pdf.

316. *See, e.g.*, Frank Clemente, *Congress' Corporate Tax Cuts Punish Americans*, CHI. TRIB. (May 28, 2015), http://www.chicagotribune.com/suburbs/daily-southtown/opinion/ct-sta-tax-fairness-st-0529-20150528-story.html.

317. *See* Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1470–73 (2013).

318. *See supra* text accompanying notes 11, 15, 139, 199, and 204.

public needs. With the adoption of programs that give workers greater flexibility, employers would have to compete more effectively for labor, touching off a change in private labor relationships. If, after all, the firm is no more than a fiction that serves the ends of its owners, new systems should arise that allow workers to compete in a dynamic, networked world.

CONCLUSION

This Article has described the broad set of changes that have allowed corporate owners to respond to a more competitive marketplace by becoming more flexible in the way they employ workers without giving workers the tools to become more flexible in turn. In the process, owners, like the Greens of the *Hobby Lobby* case, have become more independent of the firms they control, while the workers they employ remain dependent on the jobs they hold for basic requirements such as health care. The rise of the large industrial firm involved a concentration of power in a control bloc that could use the firms of that era to their own ends; the ultimate solution to that concentration of power required the creation of countervailing powers in labor and government that responded to the rootedness of larger brick-and-mortar entities.[319] The solutions did not come from corporate law itself, but from outside it.[320]

In similar fashion, it is possible to conclude that *Hobby Lobby* is correctly decided to the extent it holds that corporate owners can create a closely held company committed to religious principles,[321] and still unfair in the degree to which it privileges corporate owners over corporate employees in the implementation of a program designed to serve public ends. The larger solution, however, requires reconsidering the role of workers in a more fluid, dynamic marketplace, and that requires recreating labor markets in which workers enjoy greater negotiating power. In the immediate context of *Hobby Lobby*, that should mean separating employment and health care altogether. Employer-provided health care exists because of tax subsidies and these subsidies benefit those with higher marginal tax rates over those with lower marginal rates, those with secure benefit-paying jobs over those with more transient or part-time employment, and companies that wish to provide

319. *See supra* text accompanying notes 115–20.
320. *See supra* text accompanying notes 122–23.
321. *See, e.g.*, McDonnell, *supra* note 6, at 780.

health care to enhance their competitive advantage in tighter labor markets over those employers who do not feel the need to do so.[322] These distinctions have become untenable as a ground for public subsidies, and the most logical solution is to abolish them. Every individual should have access to health care and the greatest public subsidies should not be accorded on the basis of these distinctions.

The industrial firm is dead. It is time to recognize that the firm of the technological era is a different beast. The long-term forces have remade the commercial marketplace, simultaneously increasing competition among firms and allowing the well-positioned and the nimble to reap disproportionate rewards. The solution going forward should be new strategies designed to allow workers the flexibility to also realize the rewards of the new system, and to find security in ways more independent of long-term employment. To that end, the emphasis should be not on enhancing the "entity" nature of the corporation, but instead in strengthening the networks that allow individuals to become similarly independent actors. The active role of the State must be to help individuals thrive in a networked world. Just as health care should be reconceived as a state-individual relation without the employer as intermediary, so too does the State need to engage in a large-scale project to reconsider its role vis-à-vis corporations. With a more even playing field, corporate actors may once again find that entities capable of supplying identity and commanding loyalty obtain competitive advantages in the marketplace as well as in the world of public opinion. In the meantime, the price for leaner firms, which have jettisoned public obligations, ought to be fewer public subsidies with more explicit strings attached for those that remain.

322. *See* Linda J. Blumberg et al., *Why Employers Will Continue To Provide Health Insurance: The Impact of the Affordable Care Act*, 49 INQUIRY 116, 117–18 (2012). *But see supra* text accompanying notes 287–88.