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The Future of Enterprise Organizations

Eric W. Orts
The Wharton School, University of Pennsylvania

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*Eric W. Orts**

THE OWNERSHIP OF ENTERPRISE. By *Henry Hansmann*. Cambridge, Mass.: Harvard University Press. 1996. Pp. xi, 363. $39.95.

INSTITUTIONAL SHAREHOLDERS AND CORPORATE GOVERNANCE. By *G.P. Stapledon*. Oxford: Clarendon Press. 1996. Pp. vi, 376. $98.

Both the law and business schools at the University of Michigan offer a basic course in Enterprise Organization. This tradition owes to the influence of Professor Alfred Conard, one of the leading scholars of his generation, who taught during most of his career at the University of Michigan Law School.[1] The tradition persists in part because Enterprise Organization suggests an appropriately broad view of its topic, unlike more common course titles such as Corporations or Business Associations. We live in a world populated not only by people but also the organized legal entities we

* Associate Professor of Legal Studies, The Wharton School, University of Pennsylvania; Visiting Professor of Law, University of Leuven (1998) and University of Michigan (1997). B.A. 1982, Oberlin; M.A. 1985, New School for Social Research; J.D. 1988, Michigan; J.S.D. 1991, Columbia. — Ed. I thank Al Conard and Henry Hansmann for comments but emphasize that any errors are mine.

1. *See* ALFRED F. CONARD ET AL., ENTERPRISE ORGANIZATION: CASES, STATUTES, AND ANALYSIS ON EMPLOYMENT, AGENCY, PARTNERSHIPS, ASSOCIATIONS, AND CORPORATIONS (4th ed. 1987).

As Professor Conard tells the story, the development of Enterprise Organization had several influences. Letter from Alfred Conard, Henry M. Butzel Professor of Law, emeritus, University of Michigan, to Eric Orts, Apr. 6, 1998 (on file with author). First, as a law student, he took separate courses in Agency, Partnership, and Corporations, each organized in schematic rather than economic terms. He was introduced to a more integrated treatment during a year of graduate study for a J.S.D. at Columbia University when he came across a casebook by Magill and Hamilton. *See* ROSWELL FOSTER MAGILL & ROBERT P. HAMILTON, BUSINESS ASSOCIATIONS (1933-35). When teaching at the University of Illinois, Conard published a casebook combining agency and partnership. *See* ALFRED F. CONARD ET AL., AGENCY, ASSOCIATIONS, EMPLOYMENT LICENSING & PARTNERSHIPS (1972). When he moved to Michigan, he taught a course in Business Associations through a casebook by Laylin James. *See* LAYLIN JAMES, BUSINESS ASSOCIATIONS (2d ed. 1947). Conard believes James's text was the first to interweave agency, partnership, and corporate law in an integrated course; at least it influenced him to adopt this framework for his own casebook. Meanwhile, back at Columbia, Berle and Warren changed the name of their course to Business Organizations. *See* A.A. BERLE & WILLIAM C. WARREN, BUSINESS ORGANIZATIONS (1948). Conard's contributions were to put these influences together and to adopt the word "enterprise" — partly to comprehend nonprofit organizations, partly to capture the economic idea of an "undertaking," and partly to include problems in securities regulation. *See* Letter, *supra*.

create. Business firms and nonprofit organizations have legal frameworks, and economic forces affect them in various ways. An important topic for social research — including not only law and economics, but also other disciplines — is to uncover the springs of motivation, power, and belief that underlie the organizations that figure so largely in our everyday existence.

The Ownership of Enterprise and *Institutional Shareholders and Corporate Governance* confirm Professor Conard's broad view of the subject of Enterprise Organization, though they travel in two different directions. One direction focuses on what may be called the "microanalysis of institutions," which breaks down complex forms of organization in terms of their elements — namely, individuals and their motivations.[2] The other direction focuses on the big picture, a "macroanalysis of society" and its major developmental changes. These two directions correspond roughly with the functional differentiation between micro- and macroeconomics. In my estimation, the same division of labor makes sense in studying the law of enterprise organization and characterizes its likely future.

I. The Microanalysis of Enterprise

In *The Ownership of Enterprise,* Professor Henry Hansmann[3] collects the themes of a number of major contributions in his extraordinarily productive career. He combines law and economics in a refreshing and undogmatic fashion to explore the elemental forces that drive enterprise to be structured in various ways. Hansmann's choice of topics is eclectic, but this range derives from the impressive scope of his research. He is perhaps best known for his scholarship on employee ownership,[4] a fact that explains his continuing interest in the worker-owned manufacturing enterprises of the Mondragon system in Spain (pp. 98-103), as well as experiments in worker ownership at United Airlines and Weirton Steel in the United States (pp. 107, 117-18). His discussion of the ownership of golf courses (pp. 184-85) gives a case study in the analysis of "status organizations," which includes his own Yale Law School.[5] In short, *The Ownership of Enterprise* is worth reading if only for

2. *See* Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions,* 109 Harv. L. Rev. 1393, 1425-29 (1996).

3. Sam Harris Professor of Law, Yale Law School.

4. *See* Henry Hansmann, *When Does Worker Ownership Work? ESOPs, Law Firms, Codetermination, and Economic Democracy,* 99 Yale L.J. 1749 (1990); Henry Hansmann, *Worker Participation and Corporate Governance,* 43 U. Toronto L.J. 589 (1993).

5. *See* Henry Hansmann, *A Theory of Status Organizations,* 2 J.L. Econ. & Org. 119 (1986). Hansmann offers a humbling account for professors of the reasons students choose to attend elite universities — namely, "with an eye to the intelligence, previous education, social attractiveness, athletic ability, and future promise of its other students" and "for the sake of developing contacts that are later useful in life," rather than "the quality of the instructional program." Pp. 185-86. Faculty similarly are motivated to join schools "not only, or even

the purpose of appreciating the depth and breadth of Hansmann's scholarship to date.[6]

But the book also offers much more. It brings together a career's worth of thinking into a general thesis about how the world of enterprise organization works. Hansmann's main argument is that broad generalizations *cannot* be made about the most efficient or desirable structure of ownership in free enterprise societies. The "investor ownership" model of capitalism that puts shareholders and creditors at the center is "contingent" on the economics of enterprise, legal and political structures, changing technologies, and cultural differences (pp. 1-4, 287-88, 294-97).

Hansmann develops this thesis through an empirical analysis of various kinds of enterprise that do not fit the model of investor-owned firms. He then provides an economic explanation for the ownership structure of enterprise in terms of two criteria: the costs of contracting and the costs of ownership.[7] Unlike other economic theorists who assume that a capitalist model of investor ownership always makes better sense than other modes of organization, Hansmann recognizes a plurality of forms of enterprise. At the same time, he offers a "comparative study of organizational types" that explains why investor ownership is common in most, if not all, forms of business enterprise (p. 3).

A. *The Costs of Contracting*

Hansmann is a contractarian economist to the extent that he adopts a view of the firm as "a nexus of contracts" or, more precisely, as "the common signatory of a group of contracts" (p. 18). The costs of contracting therefore figure largely in his explanation for the structure of enterprise. There are at least six sources of these costs.

1. *Simple market power* includes both *monopoly* power of a firm with respect to its customers and *monopsony* power with respect to a firm's suppliers (pp. 24-25). The costs of market power provide a strong incentive for a potentially exploited group to exert influence to reduce the costs of dealing with a monopoly or monopsony through direct ownership or public regulation. For example, customers of electricity or telephone services who find themselves threatened with monopoly pricing may seek cooperative or public

primarily, on the basis of work conditions such as salary and teaching load, but also on the basis of the professional accomplishments of the other members of the faculty." P. 192.

6. The primary articles from which the book draws are listed, p. 363, and other articles are dispersed in various footnotes.

7. Pp. 20-22, 287. *See also* Henry Hansmann, *Ownership of the Firm,* 4 J.L. ECON. & ORG. 267 (1988) (introducing the basic concepts on which *The Ownership of Enterprise* elaborates).

ownership of the utility or lobby for regulation of prices (pp. 168-70, 176-80). Farmers who face monopsony pricing by cartels of grain purchasers may bypass them through cooperative ownership of grain elevators or cooperative marketing firms (pp. 122-25).

2. *Lock-in* refers to dependent relationships that may arise between various groups that contract with a firm over a long period of time (p. 25). For example, an individual who works for one firm may develop firm-specific human capital that cannot be transferred to another. Lock-in may provide an explanation for why some firms become employee-owned (p. 26), though Hansmann does not find empirical evidence to corroborate this view and concludes that other factors must play a greater role (pp. 71-72). Lock-in also explains, at least partially, the vertical integration of firms with their suppliers and distributors.[8]

3. *Long-term contracting risks* refer to the well-known problem that uncertainty increases as the duration of a contract lengthens. An example is life insurance (p. 27). Before advances in actuarial science and regulatory changes made investor-owned life insurance viable, mutual ownership of life insurance companies by the policyholders made sense because the contractual terms could be changed and the proceeds distributed as the future — and life expectancy — grew ever more certain with time (pp. 266-74).

4. *Asymmetric information and strategic bargaining* refer to a general problem involved in any complex economic enterprise: some groups have more accurate and complete information than others (pp. 27-29). Groups with better information enjoy a better bargaining position. A firm's managers, for example, often have better information than customers about the firm's products. If no other solution is found — such as consumer protection legislation or product liability rules — the costs of asymmetric information may lead customers to acquire ownership in the firm. For example, farmers band together in supply cooperatives to solve the problem of asymmetric information about the quality of feed and fertilizer.[9]

8. Pp. 26-27. For economic treatments of vertical integration, see Sanford J. Grossman & Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. POL. ECON. 691 (1986); Benjamin Klein et al., *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & ECON. 297 (1978).

9. Pp. 28, 149-51. A similar analysis explains the economic motivation for some worker ownership structures. If a firm's managers see employees as merely "tools" or "factors of production," the managers have an incentive to withhold essential information from their employees, including any labor unions, in order to improve their bargaining position and enhance returns for investors. From the workers' point of view, a seat on the board for a labor representative or an employee buyout may reduce the costs of this informational asymmetry. Pp. 29, 70-73. From the perspective of outside investors, the converse is true: reducing the asymmetry of information vis-à-vis workers may increase the costs of supplying capital to these firms.

Hansmann argues persuasively, however, that the "conventional wisdom that employee

5. *Conflicts of interest* describe the inevitable costs of meeting the demands of the diverse groups of people involved in most enterprises. These costs grow larger as an enterprise increases in size and complexity. Hansmann emphasizes the importance of resolving conflicts among whom he calls the "patrons" of the firm. Patrons "comprise all persons who transact with a firm either as purchasers of the firm's products or as sellers to the firm of supplies, labor, or other factors of production."[10] Even within one group of patrons, interests can diverge. Among employees, for example, older workers may prefer lower-risk policies than younger workers who may accept greater risk in return for higher wages (p. 31). Or older workers with retirement savings invested in pensions or employee stock ownership plans may ally themselves more closely with investors than with younger workers (p. 90). Balancing the interests of patrons is central to structuring the ownership of enterprise. Hansmann concludes that the proper structure depends on the particular circumstances of an enterprise and the relative costs for patrons who have an interest in it.

6. *Alienation,* a concept from social psychology, refers to the tendency of workers in modern industrial societies to feel detached from the purpose of their work and therefore unmotivated.[11] Hansmann recognizes market contracting to be "adversarial" and sometimes "unpleasant." Many people prefer "relationships that are more cooperative, trusting, or altruistic" (p. 32). The motiva-

ownership is poorly suited to capital-intensive industries" is overstated. P. 75. Employees may often agree to supply capital even in the face of increased and nondiversified risk, and a great deal of financing may be obtained through debt rather than outside equity. Pp. 75-76.

10. P. 12. Other commentators refer to the various interests in firms as *stakeholders,* but Hansmann wants to avoid the ideological baggage that this term sometimes carries. He says that those who use the term "stakeholders" to include "workers, customers, suppliers, members of the local community, and environmental groups" believe these groups "should have representation on the firm's board of directors." P. 44. In fact, the literature on stakeholder management theory is more diverse, and much of it at least purports to be more descriptive than normative. *See, e.g.,* Thomas Donaldson & Lee E. Preston, *The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications,* 20 ACAD. MGMT. REV. 65 (1995); Eric W. Orts, *A North American Legal Perspective on Stakeholder Management Theory, in* PERSPECTIVES ON COMPANY LAW: 2 165 (Fiona Macmillan Patfield ed., 1997). The understanding of "stakeholder" as one who bears a risk in an enterprise seems roughly synonymous with Hansmann's "patron." To my knowledge, Hansmann's reference to "patrons" is unique, but it is no worse than "stakeholder." One might also refer simply to various "interests" in an enterprise. For convenience and to avoid confusion, however, I adopt Hansmann's use of "patrons" in this review.

11. This definition offers only one possible meaning of the complex idea of alienation, which has roots in religious thought as well as in the social theories of Rousseau, Hegel, and Marx. *See* ADAM SCHAFF, ALIENATION AS A SOCIAL PHENOMENON 24-55 (1980). Another commentator observes that alienation is "used to denote a great variety of often quite dissimilar phenomena . . . . within separate disciplines," including anthropology, economics, educational theory, literature, philosophy, political science, and sociology. Frank Johnson, *Alienation: Overview and Introduction, in* ALIENATION: CONCEPT, TERM, AND MEANINGS 3, 6-25 (Frank Johnson ed., 1973). Hansmann does not specify exactly what he means by alienation, but the general sense suggested in the text serves as an approximation.

tions of some people to be sheltered from the storms of constant market contracting and to avoid feeling alienated therefore explain some forms of enterprise organization. Although Hansmann avoids deeper ideological controversy about the concept of alienation, it is to his credit that he sees the phenomenon as important. Psychological preferences and social conditions, as well as calculations about economic efficiency, affect the structure of enterprise.

B. *The Costs of Ownership*

Although Hansmann emphasizes the costs of contracting, he recognizes that ownership also has costs. The costs of ownership combine with the costs of contracting to determine the structure of enterprise. These costs of ownership fall into four general types: controlling managers, collective decisionmaking, risk bearing, and organizational transition.

1. *The costs of controlling managers.* Because Hansmann argues that any group of patrons can own a firm in terms of rights to residual profits — whether the owners are shareholders, creditors, employees, or some combination — he portrays managers as a nearly universal cost of ownership.[12] This account is a refreshing reversal of the usual economic focus on the agency costs of employees and other lower-level functionaries.[13]

The costs of controlling managers divide into *monitoring* and *managerial opportunism.* Monitoring includes costs of information (finding out what managers are doing), communication (finding out what an often dispersed group of patron-owners want), and enforcement (getting managers to follow the patron-owners' preferences) (p. 36). Managerial opportunism refers to the possibility that managers will "malinger or engage in self-dealing transactions" (p. 37). A management leveraged buyout, for example, presents this kind of risk.[14]

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12. Some enterprises may dispense with managers if they are sufficiently small.

13. Alternatively, managers might also be described as patrons of the firm, a subclass of employees, and they may even purchase ownership of the firm, such as in a management leveraged buyout (MBO). In a MBO, the managers of a corporation buy a controlling equity interest from the shareholders, which is usually financed through increased debt. MBOs thus leverage the remaining equity (now owned by managers) with a higher debt-to-equity ratio. *See, e.g.,* Deborah A. DeMott, *Directors' Duties in Management Buyouts and Leveraged Recapitalizations,* 49 OHIO ST. L.J. 517, 519-24 (1988). Hansmann does not discuss MBOs, but presumably he could account for this kind of transaction in terms of managers-as-employees becoming managers-as-owners. The costs of controlling managers would be replicated for the new managers-as-owners, though an economic benefit of MBOs is arguably to reduce these costs.

14. *See* Victor Brudney, *Corporate Governance, Agency Costs, and the Rhetoric of Contract,* 85 COLUM. L. REV. 1403, 1425-26 (1985); Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?,* 44 UCLA L. REV. 1009, 1017-18 (1997).

2. *Collective decisionmaking* among patrons who participate in the governance of a firm imposes costs relating to "differences of opinion concerning the firm's policies and programs" (p. 39). These costs "result from heterogeneity of interests among the owners" (p. 40). They are "logically distinct" from the agency costs of managers because managers impose agency costs regardless of ownership structure (p. 39). According to Hansmann, the costs of collective decisionmaking often determine which group of patrons — investors, employees, suppliers, or customers — will assume ownership (p. 288).

The general rule of collective decisionmaking, subject to other costs of contracting and ownership, is that the most homogenous and unconflicted group in an enterprise will become its owners. One important implication is that collective decisionmaking costs will impede employee ownership in most situations of any complexity (pp. 91, 119). A corollary is that the relative uniformity of the interests of investors — "to maximize the net present value of the firm's earnings" — often provides an advantage for investor-owned enterprise (p. 62). At the same time, the interests of investors may conflict. For example, shareholders often have a greater tolerance for risk than creditors. Preferences may also vary within patron groups, such as among shareholders or different creditors.[15]

3. *Risk bearing* refers to the ability to bear the financial risk of loss. Ownership of an enterprise will tend to fall to the patrons who are best able "to bear those risks — for example, through diversification" (pp. 44-45). The ability to bear and diversify risks leads in most circumstances to investor ownership (p. 57). Although some commentators argue that this factor explains the relative scarcity of employee ownership, Hansmann argues that the empirical evidence does not support the claim.[16] One reason is that at least for non-unionized "at will" employees, the financial risks of layoffs often equal or exceed the risks of ownership (pp. 78-79).

4. *Entrepreneurship and the costs of transition.* Although Hansmann argues that the most efficient structures of enterprise

15. For two competing views of preferences among shareholders, compare Henry T.C. Hu, *Risk, Time, and Fiduciary Principles in Corporate Investment*, 38 UCLA L. REV. 277, 287, 389 (1990) (recognizing shareholders may have different preferences toward risk, but recommending "blissful shareholder wealth maximization" as a standard for enforcement of fiduciary duties) with Daniel J.H. Greenwood, *Fictional Shareholders: For Whom Are Corporate Managers Trustees, Revisited,* 69 S. CAL. L. REV. 1021, 1025-29 (criticizing the abstract conception of "fictional shareholders" with only wealth-maximizing preferences as dehumanizing). Shareholders' preferences will also diverge to the extent that some shareholders may *also* be managers, rank-and-file employees, or creditors. With respect to creditors, preferences will vary in accordance with risk, including such factors as interest rates and whether the debt obligations involved are secured, subordinated, or convertible into equity.

16. P. 45. Counterexamples include worker ownership in relatively risky enterprises such as farming, investment banking, and the plywood industry. P. 78.

will win out in the long run (pp. 287, 295-96), he recognizes that the start-up costs of organizing a firm and the costs of transferring ownership from one group of patrons to another can raise barriers to otherwise desirable ownership structures.[17] Such transitional transactions entail costs that may outweigh the gains to be achieved by the change.[18] The costs of transition, in other words, result in some degree of path dependence.[19]

Hansmann notes two sources of organizational inertia. First, "the presence of established brokers who specialize in ownership transactions" and "standardized procedures for handling those transactions" are needed to reduce the costs of transition (p. 46). Corporate lawyers and investment bankers, for example, are often needed to serve as transactional engineers to change ownership structure.[20] Second, those who benefit from current ownership structures often entrench themselves, even when change would be in the best interests of other patrons of the firm (p. 46). To paraphrase the Delaware Supreme Court, there is an omnipresent risk that a controlling group may act primarily in its own interest rather than the interests of the enterprise as a whole.[21]

17. A common route for the growth of an enterprise in the United States is to fund a closely held corporation initially through venture capital and then, when the firm has become established, "going public" through an initial public offering to shareholders. P. 45. *See also* Bernard S. Black & Ronald J. Gilson, *Venture Capital and the Structure of the Capital Markets: Banks Versus Stock Markets,* 47 J. Fin. Econ. 243 (1998) (exploring the functional link between venture capital and stock markets, especially the role of the initial public offering); Curtis J. Milhaupt, *The Market for Innovation in the United States and Japan: Venture Capital and the Comparative Corporate Governance Debate,* 91 Nw. U. L. Rev. 865 (1997) (comparing the entrepreneurial approach of the United States with Japan's system). Other kinds of transitions include the purchase of a firm by its employees, suppliers, or customers through leveraged transactions or otherwise. The employee buyout of United Airlines, for example, was a leveraged transaction. *See* Ezra R. Field, Note, *Money for Nothing and Leverage for Free: The Politics and History of the Leveraged ESOP Subsidy,* 97 Colum. L. Rev. 740, 749-51 & n.77 (1997).

18. For example, a leveraged transaction may provide efficiency gains through the structural power of increased debt to discipline managers. For an overview of this functional use of debt, see George G. Triantis & Ronald J. Daniels, *The Role of Debt in Interactive Corporate Governance,* 83 Cal. L. Rev. 1073 (1995). However, if the transaction costs of changing the capital structure exceed the economic gains anticipated through increased leverage, then the transitional transaction needed to improve the organizational structure will not take place.

19. *See* Mark J. Roe, *Chaos and Evolution in Law and Economics,* 109 Harv. L. Rev. 641, 643-62 (1996) (discussing concept of path dependence).

20. *Cf.* Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing,* 94 Yale L.J. 239, 243, 253-55 (1984) (describing lawyers as "transaction cost engineers").

21. *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985).

C. *Explaining the Structure of Ownership in the Real World*

Hansmann offers a rich and knowledgeable empirical account of the current structure of enterprise organization in addition to his theoretical analysis of the costs of contracting and ownership. He explodes the myth that capitalism inevitably follows a paradigm of investor ownership by showing how the world is populated by a variety of ownership structures. Rather than a monotonous world of enterprises owned always by a class of capitalist investors, there are a number of competing organizational forms.

For example, firms that offer professional services are often owned by the same people who do the professional work, including doctors, lawyers, accountants, architects, engineers, management consultants, and investment bankers (p. 67). Hansmann overstates the point when he says that these firms are "among the world's purest examples of employee ownership," given their usual hierarchical structure.[22] But his general point is well taken. Partners in professional firms are not equivalent to outside capital investors.

Other examples of employee ownership dot the contemporary landscape. Taxi cab companies are often employee-owned, as are some garbage removal companies (p. 67). Experiments in employee ownership of large enterprises are underway in the United States and Europe.[23] The expansion of employee stock ownership plans, the popularity of profit-sharing plans, and European codetermination show at least the potential for substantial employee participation in ownership and governance of business enterprise in the future.[24]

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22. P. 67. Most professional firms of doctors, lawyers, and others are very hierarchical in depending on a number of lower-level employees, including nurses, paralegals, and clerical staff. They also often conduct a "tournament" or "winner-take-all" competition among entry-level professionals for advancement to status as equity owners — for example, associates in law firms competing to "make partner." *See* MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 100-02, 137 (1991); ROBERT H. FRANK & PHILIP J. COOK, THE WINNER-TAKE-ALL SOCIETY 7-8 (1995).

23. *See supra* text accompanying note 4. Hansmann points out, however, that some cases often cited as involving employee ownership, including the Avis rental car company, Norton publishers, and the failed PeopleExpress airline, are not in fact employee-controlled. Instead, a small group of top-level managers control these firms, and rank-and-file employees participate only as equity investors without effective voting power. P. 108.

24. Pp. 105-12. For an optimistic view of the economic prospects for employee ownership, see Alan Hyde, *In Defense of Employee Ownership,* 67 CHI.-KENT L. REV. 159, 162-63 (1991). On the expanding use of ESOPs, see JOSEPH RAPHAEL BLASI & DOUGLAS LYNN KRUSE, THE NEW OWNERS: THE MASS EMERGENCE OF EMPLOYEE OWNERSHIP IN PUBLIC COMPANIES AND WHAT IT MEANS TO AMERICAN BUSINESS (1991). On the increasing use of profit-sharing plans, see Martin L. Weitzman & Douglas L. Kruse, *Profit Sharing and Productivity, in* PAYING FOR PRODUCTIVITY: A LOOK AT THE EVIDENCE 95 (Alan S. Blinder ed., 1990). For an introduction to the codetermination debate that remains salient in Europe, see Klaus J. Hopt, *Labor Representation on Corporate Boards: Impacts and Problems for Corporate Governance and Economic Integration in Europe,* 14 INTL. REV. L. & ECON. 203 (1994); Klaus J. Hopt, *New Ways in Corporate Governance: European Experiments with Labor Representation on Corporate Boards,* 82 MICH. L. REV. 1338 (1984).

Less familiar examples — at least to urban dwellers — expand one's perspective of enterprise ownership in other directions. Marketing cooperatives are the rule in agriculture. Ocean Spray cranberries, Sunkist oranges, Sun Maid raisins, Land O'Lakes butter, and Welch's grape juice are all marketing and processing cooperatives rather than integrated firms owned by investors (p. 121). Consumer cooperatives for the supply of livestock feed, seed, fertilizer, and pesticides are also common in farming (p. 149).

Even in urban environments, non-investor-owned enterprises are plentiful. True-Value, Ace, and Servistar are retailer-owned hardware wholesale cooperatives (pp. 157-58, 336 n.23). Associated Press is a cooperative owned by thousands of participating newspapers and broadcasting networks (p. 158). MasterCard and Visa are also cooperatives owned by hundreds of participating banks.[25]

What explains these departures from the norm of investor-owned firms in capitalist societies? For example, why are some utilities provided by public or consumer cooperatives rather than investor-owned firms? Why are some banks and hospitals organized as nonprofits and others investor-owned? Why is selling cranberries, oranges, raisins, butter, and grape juice like selling news stories and credit cards?

Like the reviewer of a good mystery, I will leave these questions unanswered. Suffice it to say here that Hansmann suggests answers along the lines of comparative costs of contracting and ownership. Those who examine these specific areas of enterprise organization as well as those who wish to argue for alternatives, such as worker ownership or consumer cooperatives, should consult his arguments. In each case, Hansmann gives economic arguments that favor investor ownership, but he also addresses the most obvious objections

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In Hansmann's analysis, employee ownership proves superior to traditional investor-owned enterprises in some circumstances. Employee ownership tends to reduce costs of lock-in, asymmetric information, alienation, and controlling managers. The benefits of employee ownership are often offset, however, by other costs — especially when firms grow large. Diverse groups of employee-owners tend to increase the costs of collective decision-making and risk bearing. *See supra* sections I.A, I.B. Strong empirical evidence of employee ownership in some businesses suggests that competition between employee-owned and investor-owned enterprises will continue in the future, and the mix will fluctuate according to changing economic, legal, technological, and cultural conditions. For a recent economic analysis of employee ownership emphasizing its role in corporations, see Jeffrey N. Gordon, *Employee Stock Ownership in Economic Transitions: The Case of United Airlines*, in CORPORATE GOVERNANCE TODAY 437 (Sloan Project on Corporate Governance, Columbia Law School, May 1998).

25. Pp. 158-59. Note, however, that the cooperatives in hardware, news, and credit cards are almost always controlled by members who are investor-owned enterprises. Hansmann does not always distinguish between integrated firms and groups of firms. For example, the banks issuing Visa cards and newspapers using Associated Press reports are mostly investor-owned. This observation undercuts the implication that might otherwise follow from Hansmann's analysis that investor-owned enterprises do not constitute the vast majority of business firms.

that pure free-enterprise spirits may raise to his claim that investor ownership is not always the most efficient form of enterprise. He considers the possibilities that regulatory bias in the form of tax breaks, antitrust rules, or special subsidies may skew the structure of enterprise away from an ideal of investor ownership. In the end, Hansmann argues persuasively that a mix of economic factors combine to produce the diversity of ownership forms that we observe in the real world.

II. Some Criticisms of Hansmann's Account of Enterprise Organization

I turn now to offer several constructive criticisms of Hansmann's microanalysis of enterprise. The first two are broadly theoretical. A third focuses on the concept of ownership in nonprofit organizations. The last reconsiders the role of the business corporation.

A. *The Benefits of Organization*

Although Hansmann provides a detailed account of the *costs* of enterprise organization, he omits a description of the *benefits*. He is correct that the forms of enterprise that we observe in free market societies are determined in part by the relative costs of contracting and ownership. The benefits of organization, however, are also considerable. They include not only the psychological fact that people often like to work together,[26] but also the increased productivity achieved through specialization and the division of labor within authoritative structures.[27] Organized enterprise often represents "a social community specializing in the speed and efficiency in the creation and transfer of knowledge."[28] Economies of scale and scope are also important.[29] Considering the benefits as well as the costs

26. In this respect, Hansmann's treatment of the cost of alienation might be restated as a benefit. *See supra* note 11 and accompanying text.

27. For classic economic theories that emphasize the benefits of specialization, see Frank Knight, Risk, Uncertainty, and Profit 271 (1964) (1st ed. 1921) (describing the "manifold specialization of function" in business enterprise); 1 Karl Marx, Capital: A Critique of Political Economy 368-94 (Samuel Moore & Edward Aveling trans., Random House 1906) (1st ed. 1859) (describing the economic benefits of specialization in capitalist manufacturing); 1 Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations 7-16 (University of Chicago Press 1976) (1st ed. 1776) (including the famous example of specialization of labor in pin-making). In fairness, Hansmann alludes to one benefit of specialization, though again negatively as a cost: the ability to bear risk. *See supra* text accompanying note 16.

28. Bruce Kogut & Udo Zander, *What Firms Do? Coordination, Identity, and Learning,* 7 Org. Sci. 502, 503 (1996).

29. "[E]conomies of scale" are "those that result when the increased size of a single operating unit producing or distributing a single product [or service] reduces the unit cost of production or distribution," and "economies of scope" are "[e]conomies of joint production or distribution" that result "from the use of processes within a single operating unit to pro-

of organization would provide a more comprehensive explanation for the ownership of enterprise than Hansmann provides.

B. *The Concept of Ownership*

Hansmann's treatment of the concept of ownership in enterprise organization is somewhat flawed — or at least unclear. He argues that ownership "has two essential attributes: exercise of control and receipt of residual earnings" (p. 35). He further maintains that "outright ownership of assets is not an essential aspect of what we call a firm" (p. 19), though he sees the various costs of ownership to be important. Unlike Hansmann, I believe that the concept of ownership of assets and property in organizations deserves a higher profile.[30]

Consider a hypothetical with which Hansmann supports his argument that some forms of enterprise have no ownership. He imagines a sports team in which the "only assets are contracts," including "(a) an exclusive claim on the services . . . of a group of football players and a coach, (b) access to a stadium . . . (c) and the right to play, and divide receipts from, a series of games against other teams . . ." (p. 301 n.16). Notwithstanding the doubtful assumption that such a team would not own any equipment — for example, uniforms, pads, helmets, and even footballs — the hypothetical includes a property right: the rental of the stadium, not to mention television rights. Hansmann implies that a lease does not amount to a property interest as well as a contract.[31] This view would represent a constricted concept of ownership.[32]

Despite Hansmann's claim that "ownership of a firm need have nothing to do with title to assets or with investment or ownership of

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duce or distribute more than one product [or service]." ALFRED D. CHANDLER, SCALE AND SCOPE: THE DYNAMICS OF INDUSTRIAL CAPITALISM 17 (1990).

30. For economic accounts of enterprise that emphasize property rights of ownership, see OLIVER HART, FIRMS, CONTRACTS, AND FINANCIAL STRUCTURE 29-72 (1995); Grossman & Hart, *supra* note 8; Oliver Hart & John Moore, *Property Rights and the Nature of the Firm,* 98 J. POL. ECON. 1119 (1990). *See also* STEPHEN R. MUNZER, A THEORY OF PROPERTY 317-79 (1990) (advancing a theory of corporations involving property rights); Tamar Frankel, *The Legal Infrastructure of Markets: The Role of Contract and Property Law,* 73 B.U. L. REV. 389 (1993) (emphasizing property as well as contracts); Eric W. Orts, *Shirking and Sharking: A Legal Theory of the Firm,* 16 YALE L. & POLY. REV. 264 (1998) (combining legal concepts of agency, contracts, and property in a theory of enterprise organization).

31. That a leasehold does not represent ownership of a "real" property interest is a feudal notion. *Nemo potest esse dominus et tenens* ("No man can be both tenant and lord."). For a summary of the broader modern view of property as a complex "bundle of rights," see Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets,* 111 HARV. L. REV. 621, 660-67 (1998).

32. For a broader view of ownership than Hansmann offers, see A.M. Honoré, *Ownership, in* OXFORD ESSAYS IN JURISPRUDENCE 107, 112-28 (A.G. Guest ed., 1961) (describing various "incidents" of ownership). *See also* John Kay & Aubrey Silberston, *Corporate Governance, in* PERSPECTIVES ON COMPANY LAW: 2, *supra* note 10, at 49, 52-56 (applying Honoré's view of ownership to companies).

capital" (p. 301), he does not adhere strictly to this contention in most of the book. He agrees that "for the purposes at hand there seems little point in trying to draw a strong distinction between contractual rights and property rights" (p. 301). Therefore, even if one disagrees with some aspects of Hansmann's contractarian theory of ownership, this disagreement does not detract from the contribution he makes to understanding the dynamics of the ownership of enterprise. On the contrary, Hansmann's account of ownership is broadly consistent with a view that enterprise consists of property as well as contracts.

C. *The Ownership of Nonprofit Enterprise*

Hansmann's limited conception of ownership weakens his analysis of nonprofit organizations, though he nevertheless provides an important contribution to understanding them (pp. 227-45). Hansmann maintains there are "no owners" of nonprofit enterprises (p. 228), though he then explains such enterprises through an analysis based partly on the costs of ownership (pp. 238-42). He admits that nonprofits have no owners only "by definition," and he again defines owners as "persons who have a share in both control and residual earnings" (p. 228). As discussed above, this definition of ownership is too narrow.[33] Nonprofit organizations indeed own property, even though they cannot distribute proceeds as "profits" to patrons.[34] Those who control a nonprofit organization have authority over its property. Nonprofits also have patrons, just as other firms do, and these patrons make conflicting demands on the nonprofit firm's resources. This is not to say the concept of ownership in nonprofit organization is unproblematic.[35] Defining the problem away, however, is not helpful.[36]

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33. *See supra* section II.B.

34. *See, e.g.,* 1 JAMES D. COX ET AL., CORPORATIONS § 1.18, at 1.48-49 (1995).

35. Consider, for example, the question of who owns the property of a religious institution. The answer can quickly become metaphysical.

36. One promising approach to the conceptual problem of ownership of nonprofit organizations emphasizes the "entity" theory of organizational personality as opposed to theories that insist on breaking down organizations into "aggregates of individuals" that compose them. *See* Orts, *supra* note 30, at 283 n.92 (collecting sources). Unlike investor-owned firms, nonprofit organizations have no residual owners who have a legal claim to profits. Because distribution of earnings as profits is legally prohibited, nonprofit managers and trustees make decisions about the use of surplus earnings for the benefit of the patrons whom the nonprofit organization is meant to serve. The metaphysical problem of the purpose of religious institutions may remain. *See supra,* note 35. At least on the secular level, however, Hansmann is correct to point out that nonprofit enterprises are similar to their more businesslike counterparts in responding to conflicting claims of their patrons. In this sense, the ownership of enterprise is a flexible concept — as Hansmann emphasizes — and its structure varies according to economic circumstances and the demands of patrons. At least in philanthropic nonprofit organizations, such as educational or religious institutions, the influence of interpretations of the purpose and objective of an enterprise by decisionmakers is also important.

Nevertheless, Hansmann's contribution, drawing on previous work that he has done in this area, is important.[37] Too often, scholars ignore the organizational principles and practices of nonprofit enterprise.[38] Nonprofits play a significant role not only in organizations devoted to charity, religion, and politics, but also in business. By one estimate, nonprofits account for approximately fifteen percent of total GNP.[39] They supply two-thirds of all hospital care, half of children's day care, a quarter of nursing care, a fifth of college education, and a tenth of primary and secondary education (p. 227). Hansmann applies his calculus of the costs of contracting and ownership to account for this significant presence of nonprofit organizations in the economy (pp. 228-44). His interesting conclusion is that nonprofit organizations do not exist simply because of tax exemptions and other government benefits (p. 244). Other economic advantages, including solutions to collective action and public goods problems, help to explain the persistence of the nonprofit form.[40]

D. *The Missing Business Corporation*

A virtue of Hansmann's microanalytic approach in *The Ownership of Enterprise* is that it canvasses the many forms of organization that present alternatives to the business corporation. Nonprofit corporations, cooperatives of various sorts, and other interesting coalitions fill the pages of the book. Almost as a byproduct of his analysis, Hansmann describes the business corporation as "a capital cooperative."[41] It is puzzling that

Perhaps for business enterprises as well, a view of purpose and objective broader than economic gain should play a role. *See infra* section III.D, Part V.

37. *See* Henry B. Hansmann, *Reforming Nonprofit Corporation Law,* 129 U. PA. L. REV. 497 (1981); Henry B. Hansmann, *The Role of Nonprofit Enterprise,* 89 YALE L.J. 835 (1980).

38. *See Developments in the Law — Nonprofit Corporations,* 105 HARV. L. REV. 1578, 1583 (1992) ("For many years, only tax specialists and a few cognoscenti appreciated the unique legal issues related to nonprofit corporations. Only recently has the rest of the bar come to recognize that representing nonprofit corporations constitutes a separate legal discipline.... The academic literature in this field has mushroomed, and law schools have begun to integrate the field into their curricula.").

39. *See id.* at 1581. No doubt using a stricter definition, Hansmann gives a significantly lower estimate, but it confirms a rapidly increasing trend. By his account, relying on figures of the Bureau of Economic Analysis, the share of GNP accounted for by the nonprofit sector rose from 1.1% in 1929, to 2.8% in 1974, and to 3.6% in 1988. P. 227.

40. Pp. 239-41. Nonprofit organizations are also a common form of enterprise because the legal definition of nonprofit is easily met. Nonprofits need not serve a charitable or philanthropic purpose. They can be run in order to make money, though they cannot legally distribute earnings as profits to investors. P. 228. This nondistribution constraint does not prevent nonprofits from paying handsome salaries to executives, managers, and other employees.

41. P. 14. In a business corporation, according to Hansmann, stockholders contribute capital like any other lender, except that "the fixed rate paid on loans from the firm's lender-members ... is typically set at zero for the sake of convenience, thus obscuring the fact that the members' contributions of capital are, in effect, loans." P. 14. Hansmann concludes that

Hansmann does not extend his treatment of the business corporation, given its prominence. He limits himself to a short account of the advantages of "investor-owned firms" (pp. 53-64). However important they are becoming, nonprofit organizations and other alternatives represent only a small portion of economic activity compared to the organizational behemoth of the late twentieth century, the for-profit business corporation.[42]

Hansmann does masterful work in microanalysis. He suggests a useful theoretical framework to examine the organization of actual firms. He provides a convincing analysis of why the investor-owned corporation often has advantages — in terms of the costs of contracting and ownership — over other forms of enterprise. Corporations owned by shareholders usually have lower costs of contracting for capital than firms financed only through debt because creditors cannot as easily control the risks of managerial opportunism (pp. 53-56). In terms of the costs of ownership, the principal advantage of corporations owned by shareholders lies in the "homogeneity of interests" of maximizing profits and shareholder value (pp. 62-63, 288).[43] But Hansmann leaves the organizational punchline of his book undeveloped. It is important as well to look at broader developments at the level of ownership and control of large business corporations, the work horses in most capitalist economies.

The omission of a more extended treatment of business corporations can be forgiven, however, because the major contribution of *The Ownership of Enterprise* is to expand thinking about how enterprise is structured to meet the needs of its patrons. In this objective, Hansmann succeeds brilliantly. He demonstrates that investor ownership of enterprise should be subjected to critical analysis, not simply taken for granted. Alternatives to investor ownership may better serve the various patrons of enterprise in different situations. The viability and efficiency of these alternatives depend on the kind of enterprise and its social and economic circumstances.[44]

III. The Macroanalysis of Enterprise

In contrast to Hansmann's approach, a macroanalysis of enterprise organization should include four important social developments of the twentieth century. Two are uncontroversial: the rise

"a business corporation is just a particular type of cooperative . . . in which ownership is assigned to a group of the firm's patrons, and the persons who lend capital to a firm are just one among various classes of patrons with whom the firm deals." P. 15.

42. *See infra* section III.A.

43. *But see supra* note 15 and accompanying text.

44. Different circumstances include different countries. To an extent, Hansmann draws on international evidence to support his conclusions. p. 7. Examples include worker ownership and codetermination, pp. 98-105, 110-112, farm marketing cooperatives, p. 122, consumer retail cooperatives, pp. 163-64, utilities, pp. 180-81, and life insurance, p. 285.

to dominance of the business corporation as an organizational form in the global economy and the increasing importance of institutional investor-owners of these corporations. In *Institutional Shareholders and Corporate Governance,* G.P. Stapledon[45] focuses on these developments in a comparative study of Great Britain and Australia. In my view, two additional macroanalytic developments in enterprise organization also deserve attention: the effects that corporate ownership patterns may have on the distribution of wealth in society and the effects that legal imperatives in corporate governance may have on ethical decisionmaking. Each of these four large-scale developments are briefly reviewed, and then Stapledon's contribution to understanding them is considered.

A. *The Dominance of the Business Corporation*

This century, the for-profit business corporation became the primary engine of economic enterprise in the world.[46] By 1990, business corporations accounted for more than ninety percent of total sales and receipts in the United States, and the 7000 largest corporations, with assets of $250 million or more, accounted for more than half of all sales and receipts.[47] The corporate form has also become dominant abroad.[48] The largest business firms in most countries are corporations.[49]

In the late twentieth century, the exponential growth of multinational or transnational corporate enterprise qualifies as one of the most important historical developments.[50] From 1969 to 1990, the

45. Lecturer in Law and Associate of the Centre for Corporate Law and Securities Regulation, Faculty of Law, University of Melbourne.

46. For the classic history of the rise of the corporate form in the United States, see JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970 (1970). For a more general historical account, see STUART BRUCHEY, ENTERPRISE: THE DYNAMIC ECONOMY OF A FREE PEOPLE (1990).

47. *See* Carl Kaysen, *Introduction and Overview, in* THE AMERICAN CORPORATION TODAY 3, 5 (Carl Kaysen ed., 1996). Reasons for "the dominance of the corporate form of organization" include flexibility of capital structure, central management, limited liability, and free transferability of equity ownership in shares. *See* ROBERT CHARLES CLARK, CORPORATE LAW § 1.1 (1986).

48. *See, e.g.,* Phillip I. Blumberg, *The Corporate Entity in an Era of Mulitnational Corporations,* 15 DEL. J. CORP. L. 283, 285-87 (1990); Kaysen, *Introduction and Overview, supra* note 47, at 3-4. Today, Russia, China, and Eastern European countries have also adopted Western-style corporation laws. *See* Hendrik F. Jordaan, *A Comparative Analysis of Corporate Fiduciary Laws,* 31 INTL. LAW. 133, 134 (1997).

49. For a survey, see INTERNATIONAL ENCYCLOPAEDIA OF LAWS, CORPORATIONS AND PARTNERSHIPS, vols. 1-3 (Koen Geens ed., 1997).

50. *See* EDWARD M. GRAHAM, GLOBAL CORPORATIONS AND NATIONAL GOVERNMENTS 1-31 (1996); Eric W. Orts, *The Legitimacy of Multinational Corporations, in* PROGRESSIVE CORPORATE LAW 247, 247-52 (Lawrence E. Mitchell ed., 1995). According to the World Bank, the share of total global output produced by multinational affiliates increased from 4.5% in 1970 to 7.5% in 1995, and their share of global manufacturing output increased from 12% in 1977 to 18% in 1992. Martin Wolf, *The Heart of the New World Economy,* FIN. TIMES, Oct. 1, 1997, at 12.

number of multinationals tripled from around 7000 to almost 24,000.[51] These multinational corporations are often structured as parent-subsidiary groups.[52] By 1994, there were approximately 37,000 multinational parents, which accounted for more than 200,000 foreign affiliates or subsidiaries.[53] The largest 300 multinational corporations account for about one quarter of the world's total productive assets.[54] Half of all parents of multinational groups are incorporated in one of four countries: the United States, Great Britain, Germany, or Japan.[55]

B. *The Rise of Institutional Investors*

A second macroanalytic trend in the organization of corporate enterprise is the increasing concentration of share ownership in institutional investors.[56] These institutions include public and private pension funds, mutual investment funds, insurance companies, and banks. Collectively, they hold more than half the stock of public corporations in the United States, and even greater percentages of some of the largest corporations.[57] The data indicate a sea change in the last half of the century. In 1950, institutions held only 8% of the total equity of corporations in the United States. The percentage increased to 33% in 1980, 45% in 1988, and 53% in 1990.[58] In other countries, notably Great Britain, institutional holdings are even larger.[59]

The rise of institutional investors carries the potential to change the balance of power in corporate governance. The prospect that

51. *See* DeAnne Julius, *International Direct Investment: Strengthening the Policy Regime, in* Managing the World Economy 269, 276 (Peter B. Kenen ed., 1994).

52. *See* Alfred F. Conard, Corporations in Perspective 168-69 (1976); Detlev F. Vagts, Transnational Business Problems 129 (1986).

53. *See* U.N. Conference on Trade & Dev., World Investment Report, 1994: Transnational Corporations, Employment and the Workplace at 3-5 & tbl. I.1, U.N. Doc. UNCTAD/DCTI/10, U.N. Sales No. E.94.II.A.14 (1994).

54. *See Back in Fashion*, Economist, Mar. 27, 1993, at 5-6. The largest 100 multinationals hold one fifth of global assets. *See* Wolf, *supra* note 50.

55. *See* U.N. Dept. of Econ. & Soc. Dev., World Investment Report, 1992: Transnational Corporations as Engines of Growth at 13 box I.1 n.1, U.N. Doc. ST/CTC/130, U.N. Sales No. E.92.II.A. (1992).

56. Robert Clark describes the growth of institutional investors and financial intermediaries as the "third stage" of capitalism, arriving after the rise of the corporate form in the "first stage" and the professionalization of corporate managers in the "second stage." *See* Robert Charles Clark, *The Four Stages of Capitalism: Reflections on Investment Management Treatises,* 94 Harv. L. Rev. 561, 562-64 (1981) (book review essay).

57. *See* Carolyn K. Brancato, The Brancato Report on Institutional Investor Patterns of Institutional Investment and Control in the USA, Sept. 1996, at 4; Columbia Center for Law and Economic Studies, Institutional Investor Project, The Growth of Institutional Investors in U.S. Capital Markets (1988).

58. *See* John C. Coffee, Jr., *Liquidity Versus Control: The Institutional Investor as Corporate Monitor,* 91 Colum. L. Rev. 1277, 1291 (1991).

59. Stapledon reports that institutions own 60% of British public corporations. P. 5.

institutional ownership may close the famous "separation of ownership and control" in public corporations[60] provokes vigorous discussion among legal academics in the United States. The predominant view cheers the rise of institutional shareholders but also recognizes that legal reform is needed for their potential power to be realized.[61] Other scholars argue that even with legal reforms institutional investors may not have an economic interest in exerting influence over corporate managers.[62] At least, the rise of institutional investors has changed corporate culture in the United States in the sense that managers now pay more serious attention to shareholders' interests than they did before.[63]

The growth of institutional investors has also begun to influence views of corporate governance abroad through the rapid internationalization of the capital markets.[64] Institutional investors in the United States, Europe, and elsewhere seek to invest increasing amounts of capital throughout the world. This dynamic creates pressure that "disturbs preexisting factual and legal patterns of owner-manager relations within private firms" in different countries.[65] Stapledon gives an example of this trend in his study of institutional investors in Australia. British and U.S. foreign investors now own twenty-nine percent of outstanding shares of Australian corporations (p. 5).

C. *Effects on the Distribution of Wealth*

A third macroanalytic development concerns the effects that a dominant pattern of corporate organization and concentrated shareholder ownership may have on the distribution of wealth in

60. *See* ADOLPH A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 119-25 (1933).

61. *See* Alfred F. Conard, *Beyond Managerialism: Investor Capitalism?*, 22 U. MICH. J.L. REFORM 117 (1988); *see also* Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520 (1990) (arguing that institutional shareholder activism is possible but requires certain legal reforms); Bernard S. Black, *Agents Watching Agents: The Promise of Institutional Investor Voice*, 39 UCLA L. REV. 811 (1992) (arguing that institutional shareholder activism is not only possible with legal reform but desirable as a matter of policy); Coffee, *supra* note 58 (arguing that institutional investors are unlikely to tradeoff liquidity for control and outlining legal changes that would encourage them to do so).

62. *See, e.g.*, Edward B. Rock, *The Logic and (Uncertain) Significance of Institutional Shareholder Activism*, 79 GEO. L.J. 445 (1991) (arguing that agency costs and conflicts of interest, as well as legal rules, fail to give institutional investors incentives to discipline corporate managers).

63. *See* MICHAEL USEEM, INVESTOR CAPITALISM: HOW MONEY MANAGERS ARE CHANGING THE FACE OF CORPORATE AMERICA 10-11 (1996).

64. For accounts of the extent and causes of the internationalization of capital markets in the last few decades, see Uri Geiger, *The Case for the Harmonization of Securities Disclosure Rules in the Global Market*, 1997 COLUM. BUS. L. REV. 241, 243, 247-57; Richard A. Grasso, *Globalization of the Equity Markets*, 20 FORDHAM INT'L. L.J. 1108, 1110-14 (1997).

65. Richard M. Buxbaum, *Institutional Owners and Corporate Managers: A Comparative Perspective*, 57 BROOK. L. REV. 1, 5 (1991).

society. In a recent article, Professor Jeffrey Gordon highlights the fact that even though, in real terms, corporate profits and stock market prices increased 250% in the United States from 1980 to 1995, wages did not increase at all except for people in the top quintile of income, and the distribution of income has become more unequal.[66] Average wages for rank-and-file employees have in fact *declined* from 1980 to 1996.[67] In contrast to the happy days of the 1950s and 1960s, when "income for all income groups was rising and inequality was decreasing," we seem now to be living in a time when "shareholders are gaining and workers are not."[68] Gordon suggests a small solution that would enable employees to participate better in stock market gains through their retirement pensions,[69] but the phenomenon of soaring stocks and stagnating wages also implicates larger questions of the social organization of corporate enterprise, investment, and employment.

International trends in the distribution of income are also well known and intractable, dividing the globe into "first" and "third" worlds with radically different economic prospects and expectations of quality of life. Some economies in a transitional "second" world struggle for admission to privileged "first" world status, but in general the inequality of wealth between people in rich and poor nations continues to increase.[70] Although multinational enterprises play an important role in raising the average standard of living,[71]

66. *See* Jeffrey N. Gordon, *Employees, Pensions, and the New Economic Order,* 97 COLUM. L. REV. 1519, 1534 (1997).

67. From 1980 to 1996, average hourly wages in constant 1982 dollars fell in the United States from $7.78 to $7.42, and average weekly wages declined from $275 to $256. Bureau of the Census, U.S. Dept. of Commerce, Statistical Abstract of the United States 1997, at 429. I thank Kent Greenfield for pointing me to these figures.

68. Gordon, *supra* note 66, at 1526, 1534. While average wages have been declining, *see supra* note 67 and accompanying text, there is a controversy about the accuracy of the Labor Department's consumer price index, which is the index most often used for inflation adjustments. Other price indices, such as the Commerce Department's price index for personal consumption expenditures, and net gains in the worth of benefits for workers suggest that average real pay for workers has been "flat rather than declining between the early 1970s and early 1990s." John M. Berry, *Think the Boom Has Left Workers Behind? Think Again,* WASH. POST. Aug. 7, 1997, at E1.

69. Specifically, Gordon recommends a "pension equity collar" that would guarantee a minimum return to employees that approximates long-term average projected equity return while giving those who create this financial instrument any gain in excess of long-term averages. *See id.* at 1519, 1562-66.

70. According to one estimate, the ratio of income in the world between the richest 20% of people and the poorest 20% increased from 30-to-1 in 1960 to 60-to-1 in 1990. *See* Gerald Epstein, *Power, Profits, and Cooperation in the Global Economy, in* CREATING A NEW WORLD ECONOMY: FORCES OF CHANGE & PLANS FOR ACTION 19, 22-23, 25 fig. 1.4 (Gerald Epstein et al. eds., 1993).

71. *See* Robert Chote, *Risks Outweighed by Gains,* FIN. TIMES, Sept. 15, 1997, at 9 (discussing evidence that multinational investment brings spillover benefits as well as direct contributions to income and employment in developing countries); Andrew E. Serwer, *The End of the World Is Nigh — Or Is It?,* FORTUNE, May 2, 1994, at 123 ("In almost any way you

billions of people are left out of the emerging global business civilization.[72]

D. *Enterprise Ethics*

A fourth macroanalytic dimension of change concerns the effects that an increasingly concentrated corporate economy driven by the interests of large institutional investors may have on noneconomic or "social" issues. Although the rise of institutional investors promises to discipline managers,[73] their influence aims to increase economic competitiveness and bottom-line returns. This has obvious social benefits, but the increasing pressure on corporations for economic performance may also reduce the discretion that corporate managers have to balance economic decisionmaking with ethical considerations. In other words, the scope for corporate social responsibility may be narrowed. To give only one important example, the economic imperatives of institutional investors may lead to a systemic conflict with corporate governance practices and initiatives designed to protect the natural environment.[74] This detrimental macroanalytic trend may call for nontraditional regulatory solutions that include adjustments within the law of enterprise organization.[75]

IV. Stapledon's Contribution to the Macroanalysis of Corporate Enterprise

Although Stapledon's *Institutional Shareholders and Corporate Governance* does not paint with a brush as broad as the macroanalysis outlined above, it nevertheless contributes to understanding two large trends in enterprise organization. First, Stapledon's detailed account of corporate governance in Great Britain and Australia confirms the international trend toward the dominance of the corporate form. Second and more importantly, the book contributes to a detailed understanding of the rise of institutional investors and their influence in both countries (pp. 33-154, 157-203).

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care to measure, life is getting better for people in developing nations.") (quoting Barton Biggs, Chairman of Morgan Stanley Asset Management).

72. For a critique along these lines, see Richard J. Barnet & John Cavanagh, Global Dreams: Imperial Corporations and the New World Order 16 (1994) ("Of the 5.4 billion people on earth, almost 3.6 billion have neither cash nor credit to buy much of anything. A majority of people on the planet are at most window-shoppers.").

73. *See supra* notes 60-61 and accompanying text.

74. *See* Buxbaum, *supra* note 65, at 28 (arguing that "ecological imperatives" require "a new respect for a different, longer term vision of corporate behavior").

75. *Cf.* Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. Rev. 1 (1997) (arguing for collaboration between government and business in regulating environmental and other behavior); Eric W. Orts, *Reflexive Environmental Law*, 89 Nw. U. L. Rev. 1227 (1995) (recommending European-style environmental management and auditing systems to encourage corporate environmental responsibility).

Of particular interest, Stapledon presents Australia as an interesting hybrid case of corporate governance between two competing models: the "outsider" system of Great Britain and the United States characterized by the relative activism of institutional shareholders, and the "insider" system of Germany and Japan characterized by the relative passivity of shareholders as compared with the dominant influence of banks.[76] In other words, Australia provides a case study of possible convergence of the leading corporate governance systems in the world. Stapledon states this thesis as a conclusion, however, and he does not explain much further how the details of the Australian system relate to larger corporate governance issues. Instead, he is satisfied to transplant to foreign soil the recommendations of corporate law scholars in the United States who advocate increased monitoring of corporate boards and managers by institutional shareholders (pp. 285-95). But macroanalysis, and comparative macroanalysis in particular, is very difficult given the empirical complexity of large economic trends and the need to master the details of different legal systems in order to assess them. Rather than criticism on this ground, Stapledon deserves credit for providing a good reference source for others who may examine the Australian system of corporate governance and compare it, not only to Great Britain, but also to the United States, Germany, and Japan.[77]

V. The Uneasy Case for Investor Ownership of Enterprise

Reading *The Ownership of Enterprise* and *Institutional Shareholders and Corporate Governance* together leads one to think about the likely future of enterprise organization in the twenty-first century. From a microanalytic perspective, Hansmann's vision of the future is flexible. The structures of enterprise will fluctuate in accordance with the costs of contracting and ownership and in response to changes in other economic conditions, law, technology, and culture. The likely result will be a continuing diversity of organizations. Employee-owned, nonprofit, and other alternative forms of enterprise will compete with the investor-owned paradigm. At the macroanalytic level, Stapledon's study confirms the view of other observers that institutional investor ownership will remain a primary large-scale determinant of the structure of enterprise.[78]

76. Pp. 3-4, 279. (citing J.R. Franks & C.P. Mayer, *Corporate Control: A Synthesis of the International Evidence, in* Relational Investing (John C. Coffee et al. eds., 1996)).

77. For a useful example of this kind of comparative work, see Bernard S. Black & John C. Coffee, Jr., *Hail Britannia?: Institutional Investor Behavior Under Limited Regulation,* 92 Mich. L. Rev. 1997 (1994).

78. *See supra* section III B.

From different perspectives, both Hansmann and Stapledon make the case for investor ownership as the predominant mode of enterprise organization in the future, but this case is uneasy for two reasons.

First, descriptively, the likely future structure of enterprise organization is uncertain. Although Hansmann argues that some form of investor ownership is often the best available alternative, he also shows that investor ownership is not foreordained by economic logic. Alternative forms of ownership are not only possible; they exist in large numbers in the real world. From a microanalytic perspective, the case for investor ownership is uncertain because it depends on the particular circumstances and preferences of the various interests of patrons within firms. Investor ownership often, but not always, makes the most economic sense.

Second, normatively, some of the larger social effects of investor capitalism give cause for concern.[79] Stapledon's macroanalysis of corporate enterprise and institutional investors suggests that this model of enterprise organization is destined to continue in the future on a global scale. However, some attributes of the emerging system of investor capitalism remain uncertain. For example, the increasing international scope of institutional investors may either exert pressure for a convergence of "insider" and "outsider" models of investor capitalism — perhaps along the lines of a hybrid such as in Australia — or intensify competition among them.[80] In addition, the continuing primacy of investor-owned enterprise may worsen social problems with respect to the relative compensation of non-investor employees (and the unemployed) and the ability of managers to respond to other ethical imperatives as well as to the demands of investors.[81]

Reflecting on the uneasy case for investor ownership leads me also to conclude with two additional related themes. First, I consider whether a recent analysis of "the tragedy of the anticommons" may have an application for microanalytic theories of enterprise organization.[82] Second, I suggest on the macroanalytic level that the Anglo-American "outsider" investor model of the publicly held corporation may offer the best long-term hope for solving some of the social problems that arise in a global system of investor capitalism.

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79. I borrow the term "investor capitalism" from Michael Useem. *See supra* note 63. *See also* John C. Coffee, Jr., *The Folklore of Investor Capitalism,* 95 MICH. L. REV. 1970, 1986-88 (1997) (book review) (discussing various aspects of the uncertain future of investor capitalism).

80. *See supra* note 76 and accompanying text.

81. *See supra* sections III.C, III.D.

82. *See* Heller, *supra* note 31.

A. *The Firm as an Anticommons*

Hansmann's book provides convincing microanalytic arguments for why investor ownership proves to be relatively efficient in most circumstances.[83] In a recent article, Professor Michael Heller suggests a related reason for the primacy of investor ownership.[84] Heller introduces a theory of property that refers to the difficulty created when too many rights of ownership are granted in a particular asset.[85] This is "the tragedy of the *anti*commons," which contrasts with the better known "tragedy of the commons" that can appear when no private rights of ownership are granted in a collective asset.[86] As an illustration of the anticommons, Heller develops the case of Russian storefronts in the post-communist transition period in the early 1990s.[87] Although privatization created property rights in Russian stores, so many rights were created and distributed that nobody possessed a "core bundle" of ownership rights to make the stores useful.[88] Because the newly privatized storefront properties had too many owners, they could not be used efficiently.[89] Instead, metal kiosks cropped up outside empty storefronts on the streets of Moscow and other Russian cities.[90]

An analogous story may be told about the structure of enterprise organization. Hansmann treats the problem of ownership of enterprise in terms of the costs of managerial opportunism, collective decisionmaking, risk bearing, and transition.[91] Heller suggests another perspective on the ownership of enterprise that reinforces Hansmann's emphasis on the costs of collective decisionmaking. Lawmakers should avoid creating "a tragedy of the anticommons"

83. *See supra* text accompanying notes 15-16 & 43.

84. *See* Heller, *supra* note 31. For the gestation of my application of Heller's idea of the anticommons to the firm, I credit conversations with Heller, as well as Merritt Fox and Deborah Malamud.

85. *See id.* at 624 ("In an anticommons, . . . multiple owners are each endowed with the right to exclude others from a scarce resource, and no one has an effective privilege of use. When there are too many owners holding rights of exclusion, the resource is prone to underuse — *a tragedy of the anticommons.*") (footnotes omitted).

86. The classic article is Garrett Hardin, *The Tragedy of the Commons,* 162 SCIENCE 1243 (1968).

87. Heller, *supra* note 31, at 622-24, 633-47. Heller also adduces other examples of anticommons property in modern-day Canada, Japan, and the United States. *Id.* at 679 n.259, 682-84, 684-85.

88. *See id.* at 622-24, 632-42.

89. *See id.* at 622-23, 633-42.

90. *See id.* at 622-23, 642-45. The same phenomenon of kiosks in front of empty stores occurred elsewhere in postcommunist Eastern Europe, such as Poland, but lasted for a shorter time. *See id.* at 634 & n.65, 647 n.119.

91. *See supra* section I.B.

in the ownership structures of enterprise.[92] Effective governance of an enterprise requires a "core bundle" of ownership rights held by a relatively coherent group of patrons.[93] As Hansmann demonstrates, this core group of patrons need not be equity investors; employees or manager-owners may step forward to fill this role. Whoever the "core" ownership group may be, an anticommons perspective suggests that the law of enterprise organization should not split ownership rights into so many parts that no one can exercise effective control.[94]

These lessons from Hansmann and Heller should give pause to those who advocate a radical communitarian restructuring of the public corporation.[95] Overregulation of publicly held corporations would likely lead investors, managers, or employees to preserve the efficient "core bundle" of ownership rights by taking firms private through leveraged buyouts or simply leaving a public corporation and starting fresh as a new closely owned firm.[96] If these alternatives were legally barred, then a fate similar to that of vacant storefronts and flimsy kiosks in Russia might be recreated on a larger and more detrimental scale in enterprise organization.

B. *The Virtues of the Public Corporation*

From a macroanalytic point of view, the uncertain future of enterprise organization centers largely on whether any particular form of investor capitalism will prevail. Public corporations with a large number of equity shareholders are not always the rule. In other countries, most notably Germany and Japan, corporations usually depend instead on concentrated share ownership by large banks and other corporations.[97] To borrow from Hansmann, but to make

92. Heller makes this point specifically with respect to the privatization of enterprise in China and Eastern Europe. *See* Heller, *supra* note 31, at 680-82. I suggest that his approach might be expanded to apply to the law of enterprise organization more generally.

93. *Cf. supra* note 88 and accompanying text.

94. One may think that nonprofit organization threatens to splinter ownership rights, and this is true to an extent. *See supra* section II.C. Because profits in the enterprise cannot be distributed, however, the nonprofit structure effectively centralizes rights of control over the entity's ownership of assets in the board of trustees or a similar structure, while constraining the extent to which those in control may deplete the assets of the firm.

95. For a thoughtful introduction to this literature, see David Millon, *Communitarianism in Corporate Law: Foundations and Law Reform Strategies*, *in* PROGRESSIVE CORPORATE LAW, *supra* note 50, at 1, 22-31.

96. This analysis may explain the relative rarity of public corporations in countries, such as Germany, that mandate employee representation on corporate boards. *See infra* note 97 and *supra* note 24 and accompanying text.

97. *See, e.g.*, Mark J. Roe, *Some Differences in Corporate Structure in Germany, Japan, and the United States*, 102 YALE L.J. 1927, 1936-48 (1993); *see also* Ronald J. Gilson & Mark J. Roe, *Understanding the Japanese Keiretsu: Overlaps Between Corporate Governance and Industrial Organization*, 102 YALE L.J. 871, 882-95 (1993) (description of Japanese system); Friedrich K. Kübler, *Institutional Owners and Corporate Managers: A German Dilemma*, 57 BROOK. L. REV. 97, 97-102 (1991) (description of German system).

the point in a larger context, the future structure of corporate enterprise is also in this sense "contingent."[98]

In my view, the triumph of investor capitalism in the global economy since the Second Russian Revolution and the end of the Cold War[99] will not lead to a convergence of forms of organization, much less "the end of history."[100] Instead, it is more likely that a competition among different forms of investor capitalism and different varieties of investor-owned enterprise will continue into the next century.[101] The increasing globalization of both corporate organization and capital markets will most likely sharpen this competition.[102]

The practice in comparative corporate governance of making future predictions has proven treacherous for those scholars who have engaged in it. Only a few years ago, the "insider" system of investor capitalism in Germany and Japan looked good to legal theorists imbued with the doctrines of agency costs theory. According to this theory, a few large consolidated investors could better monitor managers than the dispersed shareholders in the Anglo-American model. Given the anemic condition of the German and Japanese economies as of this writing, however, the corporate governance system of "outsider" investors in the United States and Great Britain now looks comparatively good.

Capitalism is cyclical, and economic predictions are dangerous. It is not possible to predict with any certainty whether the "insider" or "outsider" model will prevail in the future. Perhaps both will coexist in different cultures and circumstances. Or perhaps Austra-

98. *See supra* text accompanying notes 6 and 7.

99. There are minor exceptions, such as in North Korea and Cuba, and the partial exception of the large communist-capitalist experiment in China.

100. *But see* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992). For an argument that corporate governance regimes are not likely to converge internationally in the near future because of cultural and legal path dependence, see Lucian Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance, in* CORPORATE GOVERNANCE TODAY, *supra* note 24, at 565.

101. *See* JONATHAN P. CHARKHAM, KEEPING GOOD COMPANY: A STUDY OF CORPORATE GOVERNANCE IN FIVE COUNTRIES (1994) (comparing Germany, Japan, France, the United Kingdom, and the United States); CHARLES HAMPDEN-TURNER & FONS TROMPENAARS, THE SEVEN CULTURES OF CAPITALISM: VALUE SYSTEMS FOR CREATING WEALTH IN THE UNITED STATES, JAPAN, GERMANY, FRANCE, BRITAIN, SWEDEN, AND THE NETHERLANDS (1993) (popular and informal account of differences in economic systems based largely on interviews with corporate executives); LESTER C. THUROW, HEAD TO HEAD: THE COMING ECONOMIC BATTLE AMONG JAPAN, EUROPE, AND AMERICA 247 (1992) (arguing that a competition among competing forms of capitalism will characterize the next century); Owen M. Fiss, *Capitalism and Democracy,* 13 MICH. J. INTL. L. 908, 919 (1992) ("A battle still needs to be fought. It will not be the battle that has dominated the twentieth century, between capitalism and socialism, but rather a battle within capitalism. Passions might not run as high, for the divisions are less clear-cut, but the stakes and concerns are every bit as great.")

102. *See supra* notes 48-55 & 64-65 and accompanying text.

lian-style hybrids will arise that combine the best aspects of both models.[103] Future work in the macroanalysis of enterprise organization should examine this important choice between different kinds of capitalism.

From a normative macroanalytic perspective, my tentative preference — recognizing my possible cultural bias — favors the Anglo-American model of the public corporation for two reasons related to the macroanalytic trends outlined above. First, this model permits the development of mechanisms to enable most people in the world economy to participate in the success of corporate enterprise. The relatively open structure of public corporations encourages widespread participation by average citizens who may invest in them through pensions, insurance, or investments of savings in mutual funds. Public corporations enable the "fourth stage of capitalism" heralded by Dean Robert Clark, which contemplates — and in part is already achieving — a world in which the benefits of corporate enterprise are shared by a broad range of people, not only wealthy individuals and corporate chieftains.[104] The development of fourth-stage capitalism is nascent, however, and nothing guarantees the continued dominance of the public corporation over other models of investor ownership.

The second reason that I believe the "outsider" model of institutional investors and public corporations offers the best hope for the evolution of a humane future is that this model will more likely give scope for ethical considerations in corporate decisionmaking. Although many legal scholars call for institutional investors to tighten the economic reins on public corporations, ethical considerations should also continue to play an important role in corporate management. Currently, we may have already begun to witness the effects of a system of enterprise organization that focuses too exclusively on the interests of investors to the harm of other important social interests. The public corporation, even with its various "diseases,"[105] offers the best alternative for addressing these social concerns at the same time as it pursues the central wealth-producing function of business. Public corporations owned by a broad range

103. The strength of the case for Australia as a corporate governance hybrid depends in part on its future economic success. One observer describes Australia as "having an infinite capacity to disappoint." Tony Walker, *Fortune's Favour Frittered Away,* FIN. TIMES, Oct. 27, 1997, Survey on Australia, at 1. At least with respect to corporate governance, however, changes are in progress. Banking has been deregulated. *See* Elizabeth Robinson, *Big Four Called to Account,* FIN. TIMES, Oct. 27, 1997, Survey on Australia, at 4. And individual share ownership has increased to include more than one-third of the population in response partly to privatizations and reform of Australia's main stock exchange, the ASX. Elizabeth Robinson, *Sharecroppers to Shareholders,* FIN. TIMES, Oct. 27, 1997, Survey on Australia, at 4.

104. Clark, *supra* note 56, at 565-69.

105. Alfred F. Conard, *Theses for a Corporate Reformation,* 19 U.C. DAVIS L. REV. 259, 262-79 (1986) (diagnosing various illnesses from "abuses of control" to "the profit fixation").

of investors are more likely to include the public interest, as well as private gain, as an objective in doing business compared with large corporations that are closely held by only a few very wealthy individuals.[106] A diverse body of individual owners will exert pressure to address various interests of social concern, often through different kinds of institutional investors.[107] In addition, securities regulation of public corporations often requires disclosure of information in annual and quarterly financial reports that focuses public opinion on issues of public interest. Recent examples include an emphasis on reporting information about executive compensation[108] and environmental liabilities.[109] A diverse and numerous group of owners with access to significant information about the social as well as financial performance of public corporations increases the likelihood that they will act as good institutional citizens.[110]

Conclusion

From different perspectives, Henry Hansmann and G.P. Stapledon support the view that investor capitalism will continue to provide the primary mode of enterprise organization in the twenty-first century. Their analysis does not, however, provide answers to some troubling social issues. A broad view of the law of enterprise organization should continue to address these issues from both micro- and macroanalytic perspectives.[111] This approach suggests a

106. The American Law Institute's *Principles of Corporate Governance* recognizes that "a corporation should have as its object the conduct of business activities" that includes "ethical considerations" as well as "enhancing profit and shareholder gain." Principles of Corporate Governance: Analysis and Recommendations § 2.01 (1992). The ALI also observes that "ethical considerations reasonably regarded as appropriate to the responsible conduct of business necessarily include ethical responsibilities that may be owed to persons other than shareholders with whom the corporation has a legitimate concern, such as employees, customers, suppliers, and members of the communities within which the corporation operates." *Id.* § 2.01 cmt. h. Corporate constituency statutes enacted in most states confirm the permissibility of a broad view of the objective of corporations. *See* Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes,* 61 Geo. Wash. L. Rev. 14, 26-35, 90-92, 134-35 (1992).

107. In this respect, the difference between public and private pension funds is well known. Public funds tend to be much more aggressive in pursuing issues that they see as in the public interest than private funds which are usually controlled by corporate managers. *See, e.g.,* Mark J. Roe, *The Modern Corporation and Private Pensions,* 41 UCLA L. Rev. 75, 78 (1993).

108. *See* Regulation S-K, Item 402, 17 C.F.R. § 229.402 (1997).

109. *See, e.g.,* John W. Bagby et al., *How Green Was My Balance Sheet?: Corporate Liability and Environmental Disclosure,* 14 Va. Envtl. L.J. 225, 287-337 (1995); Elizabeth Ann Glass Geltman, *Disclosure of Contingent Environmental Liabilities by Public Companies Under the Federal Securities Laws,* 16 Harv. Envtl. L. Rev. 129, 130-69 (1992).

110. *Cf.* James B. White, *How Should We Talk About Corporations? The Languages of Economics and of Citizenship,* 94 Yale L.J. 1416, 1423 (1985) (arguing that "good citizenship" requires recognition of the fact that a corporation is the "center of a web of mutually-beneficial relations extending in many directions").

111. *See supra* text accompanying notes 1 and 2.

merger of traditionally separate legal disciplines in the United States: combining, for example, corporate, employment, and labor law in the German sense of *Unternehmensrecht* ("enterprise law").[112] If a label for this research agenda is desired, one might refer to a "neo-liberalism" that advocates "the widest possible ownership of shares as a means for reducing further the class conflict and improving the working of the 'social market economy' *(soziale Marktwirtschaft)*."[113] As Jeffrey Gordon writes, "society should work in a way that benefits all of its economic groups."[114] Environmental and other ethical concerns should also be included in the equation. This approach to the law of enterprise organization seeks a middle course between the historically discredited doctrines of socialism and nationalism, on one hand, and the harsh social consequences of an unfettered global investor capitalism, on the other. A turn of legal research in this direction may help to find methods to harness corporate enterprises and their owners, including institutional investors, more strongly in the social interest.

112. *See* Eric Stein, Harmonization of European Company Laws: National Reform and Transnational Coordination 93 (1971); Richard M. Buxbaum, *Federalism and Company Law,* 82 Mich. L. Rev. 1163, 1163 n.4 (1984).

113. Stein, *supra* note 112, at 97. Some movement in this direction is discernible in both recent practice and scholarship. *See, e.g.,* Roger E. Alcaly, *Reinventing the Corporation,* N.Y. Rev. of Books, Apr. 10, 1997, at 38 (arguing that a "major new development in the relations between American workers and businesses has been quietly taking place" which exhibits "a trend toward a new kind of corporate culture in which the interests of managers, shareholders, and workers are closely and deliberately linked" through mechanisms such as profit-sharing and employee stock ownership plans).

114. Gordon, *supra* note 66, at 1520.