REVIEW

The Structure of the Corporation. MELVIN A. EISENBERG. Little, Brown and Company, Boston and Toronto, 1976. Pp. xvi, 333. $16.50.

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There have been few attempts to construct an overarching view of the field of corporation law since that seminal volume of Berle and Means in 1932, *The Modern Corporation and Private Property.*[1] There has, of course, been some writing of textbooks and much commentary on various narrow issues of corporation law. But there seems to have been a waning of interest in the field of corporation law as such, attributable partly to the proliferation of so-called enabling statutes and partly to the virtual abandonment of state legislative efforts to impose norms and controls upon the affairs of corporations and upon the conduct of their officers and directors.

Much of the diminution of attention to this field of the law is also attributable to the widely-held view that the position of management in relation to shareholders is so invulnerable that no successful method can be devised for grappling with the fundamental problem of achieving a reasonable balance of power between the corporation's management and its shareholder body. Dean Bayless Manning has said that

> [C]orporation law, as a field of intellectual effort, is dead in the United States. When American law ceased to take the "corporation" seriously, the entire body of law that had been built upon that intellectual construct slowly perforated and rotted away. We have nothing left but our great empty corporation statutes—towering skyscrapers of rusted girders, internally welded together and containing nothing but wind.[2]

Similarly, Dean Elvin Latty, after many valiant efforts to impose corporate standards by statute in North Carolina, has written that corporation law is currently of relatively little intellectual interest.[3]

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[1] A. BERLE & G. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

[2] Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker,* 72 YALE L.J. 223, 245 n.37 (1962).

[3] Latty, *Why Are Business Corporation Laws Largely "Enabling"?,* 50 CORNELL L.Q. 599, 619 (1965).

In comparison with more important problems of basic social change the task of reforming corporation statutes seems but inconsequential and empty carpentry. Even Berle, in his later years, seemed to lose faith in the feasibility of developing state corporation statutes that might resolve some of the basic problems inherent in the system. Having despaired of law as a means of policing the excesses and improprieties of corporate management, Berle turned instead to a semi-mystical concept of professional elitism and executive self-restraint—a controlling managerial conscience like unto the conscience of the king, a form of noblesse oblige.[4]

These lugubrious conclusions concerning the likelihood of achieving an improved relationship between investors and management, and the possibilities for meaningful investor participation in managerial decisions, seem to me mischievous and perhaps untrue. Although it is undeniably accurate to say that state corporation statutes have become quite limited in intent and reach, that fact does not signify a general apathy. Recently there has been a sudden burgeoning of interest in the subject of corporation law, and particularly in the issues of management power and responsibility. That interest has manifested itself in the increasing intervention of the federal securities laws into the traditional concerns of the law of corporations. In addition, there has been a searching and fundamental reconsideration of "corporate responsibility," and extensive participation by legislative and public interest groups in the regulation of corporate conduct via the proxy statement. Indeed, institutional investors are beginning earnestly to consider involving themselves directly in the regulation of corporate conduct by using their voting power. There is also, for the first time in many decades, a vigorous stirring of interest in the formulation of a federal incorporation statute or a federal minimum corporate standards act. Recent disclosures of foreign and domestic bribery and other questionable corporate payments and practices have stirred a deep public concern which, in turn, has engendered a reexamination of business morality and the character of social and governmental control over corporate and fiduciary conduct.

In the midst of this budding renascence, the past year has witnessed the publication of two comprehensive examinations of the law of corporations in modern society: *The Structure of the Corporation,* by Professor Melvin Eisenberg of the University of

[4] *See* A. BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION (1954).

California at Berkeley,[5] and *Corporations in Perspective,* by Professor Alfred Conard of the University of Michigan Law School.[6] This review is concerned with the former volume; its subject is an important one, and merits extended consideration.

Professor Eisenberg's book is carefully structured and concentrated upon the single, well-integrated thesis that it is feasible to view the proper allocation of decisionmaking power within the corporation in terms of a stated normative model. The study focuses especially upon the division of voting power within the entity and upon the problem of access to proxy machinery. Eisenberg's conclusions, in general, run counter to the fashionable view that the modern corporation is so huge and its affairs so complex that the shareholder, dwarfed by the leviathan corporation, cannot play a significant role in management decisions. Opposing the "futilitarian" view put forth by those whom he calls "managerialists," Eisenberg urges that shareholders can and should play an important role in the making of major decisions concerning structural matters, such as mergers and sales of all or substantially all of the corporate assets. Eisenberg also suggests that many of the difficulties that now inhibit effective shareholder participation in major corporate decisions can be reduced or eliminated. He argues that the notion that the large public corporation is of necessity totally management-dominated—that non-shareholding members of management can perpetuate their control regardless of shareholder action—is a distortion of the truth. He asserts that even in many large corporations there exists a nucleus of shareholders large enough to challenge and influence management.

In certain respects, Eisenberg's book harks back to an earlier viewpoint which was epitomized by the early writings of Berle.[7] Berle recognized the many difficulties inherent in the legal and economic position of the shareholder in the large modern corporation, but he suggested a number of specific legal changes to deal with these difficulties. Eisenberg is also optimistic regarding the possibility of devising corporate machinery to remedy the present misallocation of power between management and shareholders.

Eisenberg examines, *inter alia,* the status of various provisions of state corporation acts that prohibit the taking of certain kinds of

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[5] M. EISENBERG, THE STRUCTURE OF THE CORPORATION (1976) [hereinafter cited as EISENBERG].

[6] A. CONARD, CORPORATIONS IN PERSPECTIVE (1976).

[7] *E.g.,* A. BERLE & G. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

important actions until specified preconditions have been met. One example is the provision proscribing mergers concluded without two-thirds affirmative vote and providing rights of appraisal for dissenters. Eisenberg argues that such a statutory provision reflects a significant public purpose, and that the accomplishment of the prohibited objective by an alternative route subverts the policies underlying the corporation act. He criticizes the Delaware doctrine of "equal dignity," under which an objective prohibited by one statutory provision may be achieved legally through a different mechanism specifically permitted by the corporation act. The provision sanctioning the means is said by the Delaware courts to be of equal dignity with the provision prohibiting the end. Eisenberg advocates that corporation law elevate substance over procedure and realism over form. He would apply this jurisprudence to the problem of de facto mergers, to the enforcement of provisions requiring shareholder approval for major decisions, and to the proper allocation between the shareholders and directors of a parent corporation of the parent's power to vote the stock of a major subsidiary—possibly, he suggests, by pass-through of the voting power to the parent's shareholders.

The corporate bar and corporate management exert strong pressure in support of the freedom of arrangement and ease of action made possible by the least normative of the enabling acts. Professor Eisenberg, nevertheless, does not consider the corporate scene to be the wasteland that others declare it to be nor does he despair of the utility of a normative statute. His thesis is that the present corporate model provides a starting point for considering how a corporation ought to act and how society ought to view the relationship between "shareholders and the managerial organs taken together"[8] and among the managerial organs themselves. He describes the received legal model of how a corporation acts: "[T]he board of directors manages the corporation's business and makes business policy; the officers act as agents of the board and execute its decisions; and the shareholders elect the board and decide on 'major corporate actions,' or 'fundamental,' 'extraordinary,' or 'organic changes'."[9]

Eisenberg criticizes this legal model as inadequate because it attempts to embrace all corporations, and he regards it as "insufficiently articulated to provide useful guidance on the difficult issues which relate to the allocation of powers between share-

[8] EISENBERG 3.
[9] *Id.* at 1.

holders and management."[10] The purpose of the book, he says, "is to develop new and more highly articulated models of corporate structure"[11]—models that address the more difficult and least discussed issues. Professor Eisenberg believes that a normative model and a normative statute are consistent with wise social policy and more useful than the prevalent type of corporate enabling statute.

Professor Eisenberg's book begins with a consideration of the closely-held corporation. He constructs

> a normative model of decisionmaking power in the close corporation . . . by placing the kinds of decisions which arise in a business enterprise into four general categories: business decisions in, and out, of the ordinary course; decisions involving a substantial change in the structure of the enterprise; and decisions relating to the control structure of the entity in which the enterprise is enveloped.[12]

His proposed model for voting rights in a closely-held corporation does not differ much from the currently accepted model, except that Eisenberg would define the nature of structural changes in the corporation with greater precision. He would agree that the requirement of two-thirds approval for structural changes is normally an appropriate technique for allowing some flexibility of action while providing some type of protection for the dissenting minority. With respect to the fundamental question of whether management's approval should continue to be required for structural change, he would prefer to protect the minority primarily by imposing stronger fiduciary controls upon majority shareholders, rather than by continuing to allow management its present veto power—a power that is currently rationalized on the ground that it protects the corporation against hasty or ill-considered actions. He rejects the assumption that management will act in a disinterested capacity to protect the minority against oppression.

In constructing a corresponding model for publicly-held corporations, Eisenberg believes that considerations of public policy are applicable beyond the limited objective of "protection of fair expectations,"[13] which is the criterion largely controlling in the model of the closely-held corporation. He asserts that the elements in the closed corporation model should be applicable to the publicly-held

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[10] *Id.* at 5.
[11] *Id.* at 6.
[12] *Id.* at 13.
[13] *Id.* at 18.

corporation as well, but with two exceptions and certain additions:

> The exceptions are that the rules governing the structure of such corporations should be mandatory rather than suppletory, that is, should not be subject to variation by the corporation's certificate or by-laws; and that all business decisions, including those which are out of the ordinary course, should be solely for the board.[14]

Eisenberg's suggested additions to the model for the closely-held corporation fall into two broad groups. First, there should be improved access to the proxy machinery for shareholders. Second, corporate machinery must be developed for monitoring executive performance, since the body of shareholders in a publicly held corporation cannot provide an effective "first-line check" on management. Any such structural changes should have two primary objectives:

> First, the board must be independent of the executives. To this end, at least 60 percent of the directors should be persons who are not officers of, suppliers to, or professionals retained by the corporation; and a nominating committee consisting solely of independent directors should have exclusive access to the corporate proxy machinery on the board's behalf. Second, the body of shareholders and the board must have a capacity for acquiring reliable information on the executives' performance.[15]

Furthermore, he would insist that management be divested of veto power over structural changes so that irreconcilable conflicts of interest might be avoided. "[T]he body of shareholders," he maintains, "is the most appropriate alternative organ in which to lodge that power."[16] Eisenberg would allow shareholders to initiate structural changes without their wishes being subject to frustration by management inaction.

Professor Eisenberg intensively examines the character of voting rights in the publicly-held corporation. He discusses various policy considerations pertinent to the relationship between the giant, publicly-held corporations in the United States and the economy and policies of the nation. He also examines various proposals for reform of that relationship, which he divides into three broad categories: proposals that would augment shareholders' democracy;

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[14] *Id.* at 317-18.

[15] *Id.* at 318.

[16] *Id.* at 319.

proposals that would grant participation in corporate management to various client groups, such as employees, suppliers, and customers; and "managerialist" proposals that would expand the power of management in giant corporations and relieve managers from certain existing restraints and requirements of shareholder approval.[17] Eisenberg criticizes this "managerialist" view as resting upon fundamentally unsound factual premises. These include the beliefs that (1) shareholders have no interest in or expectation of participating in structural decisions within the corporation or even in the election of directors, and (2) the managers of such corporations, if freed from present shareholder constraints, would generally make structural decisions for the corporation in the best interests of the corporation.[18]

In criticizing these premises, Eisenberg examines several possible methods of controlling conflicts of interest which might influence management were it freed from shareholder constraints. He considers such remedial techniques as judicial review, disclosure, and the California system under which certain actions must be submitted for prior administrative review for fairness.[19] Concerning the California system, he notes the general perception of the California bar and business community that such administrative regulation is unduly onerous, and points out that the system remedies only half the problem. "[W]hile such regulation can deal with structural changes that are proposed but not advisable, it normally cannot deal with structural changes that are advisable but not proposed."[20] With this observation Professor Eisenberg touches upon a problem that has received little attention in the cases or the literature, namely, the nondisclosure by management of merger offers and proposals for the acquisition of shares or assets which management chooses not to recommend. Perhaps the law should erect some requirements forcing management to disclose such opportunities so that shareholders might have the benefit of an independent evaluation of their holdings. At the very least, disclosure would better enable shareholders to assess the performance of directors so that they could more intelligently determine whether to re-elect the incumbents.

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[17] *Id.* at 19-29.

[18] *Id.* at 29.

[19] *See generally* Orschel, *Administrative Protection for Shareholders in California Recapitalizations,* 4 STAN. L. REV. 215 (1952); 16-18 H. MARSH, CALIFORNIA CORPORATION LAW AND PRACTICE (1977).

[20] EISENBERG 36.

Shareholders at present generally cannot take any significant action with respect to structural changes without prior initiative from the board of directors; they do, however, pass upon such changes once initiated by the board. Eisenberg believes that shareholders can initiate such important structural decisions on their own. Eisenberg analyzes available data on the distribution of shareholdings in order to test the assumption that shareholders are largely helpless. He concludes that there is a greater concentration of shareholdings in large, publicly-held corporations than is generally recognized. "[I]n many if not most of these corporations a substantial percentage of the stock is held by a relatively small number of shareholders."[21] Examination of the data "shows that a significant number of the very largest corporations have at least one very large—10 percent or more—block of stock outstanding."[22] Eisenberg sets forth figures concerning the percentages of stock held by the thirty largest shareholders of a number of major corporations, together with the aggregate figures of the accumulated total holdings of these top thirty holders in each corporation. Of course the relevance of such data is uncertain, absent some indication that many, if not all, of these top thirty shareholders are willing and able to work together as a unit. Such lumped data concerning unrelated groups of shareholders is interesting perhaps, but it is only the beginning of analysis and a suggestion for further inquiry. Since many of these thirty primary shareholders in various corporations are financial institutions—such as mutual funds, pension funds, insurance companies, and banks—the attitude of such institutions toward the voting process and their willingness to take action in opposition to management are crucial. While Eisenberg concedes that such institutions are primarily interested in protecting their beneficiaries and that, in many respects, they are not equipped to oversee the management operations of portfolio companies, he believes that with the passage of time, these institutions are more likely to increase their exercise of independent judgment as to structural changes within portfolio companies.

> [A]lthough an institutional investor may have no obligation to his fellow shareholders to retain a bad investment, it does have a clear obligation to its own beneficiaries to make sound decisions in connection with the investments it holds. Therefore, unless an institutional investor is prepared to sell every

[21] *Id.* at 44.
[22] *Id.* at 46.

> time a structural change is proposed, it is under a fiduciary obligation to use its best judgment in voting on the matter.[23]

Eisenberg next considers the question of whether the shareholders voting rights provide a genuine check on management efficiency. He concludes that, even if the shares are "atomistically dispersed," such voting rights do have significance because "a third party can reaggregate shares dispersed into a control block."[24] This possibility of unification of dispersed voting power can be realized by direct purchase or by tender offer. Such unification affords a means for preventing managerial self-perpetuation and its feasibility imposes real restraints upon management.

Eisenberg examines, in detail and with realistic insight, the position and role of the board of directors in the modern publicly-held corporation. Eisenberg asserts that the board cannot possibly be sufficiently well-informed to fulfill its traditionally prescribed role of managing the business and affairs of the corporation. He regards the traditionally prescribed role as unrealistic, and would redefine the role of the board to conform to that which it could in fact fulfill.[25] Various proposals have been put forth concerning the modification of that role—proposals to add independent professional directors, to require that directors devote full time to their duties, and proposals to provide directors with a paid staff to enable them to carry out their functions more effectively. Professor Eisenberg doubts that any such remedial measures could enable the modern day board to perform its role any more effectively than it does at present. He urges that the directors' role should be to monitor, supervise, and police the performance of the executives who actually manage the corporation's affairs.

Eisenberg dismisses as unrealistic the notion that management and policymaking are within the competence of the modern board of directors. He likewise doubts that the board can advise and counsel the chief executive in any meaningful or sustained fashion. However, he does regard as uniquely within the competence of the board the function of selecting and dismissing the chief executive, and of monitoring the performance of that officer. This role, Eisenberg recognizes, differs from that currently ascribed to the board. Indeed

[23] *Id.* at 58.

[24] *Id.* at 67.

[25] "The task of reform must lie not in aligning the working model of the board with the received legal model, but in structuring the board to ensure effectuation of any meaningful functions it can perform and particularly any functions it is uniquely qualified to perform." *Id.* at 156.

supervision of the chief executive is generally lax and, except in rare instances, exercise of the supervisory function comes too late. In order that the board might be utilized for this monitoring function, Eisenberg believes that it is essential, first, to make the board truly independent of the executive whose performance is to be monitored, and second, to assure the board a proper flow of adequate and objective information about executive performance, or, at the very least, to provide a suitable mechanism for the board to acquire the necessary information. Eisenberg's proposal for independent directors is in response to the kind of felt need that has recently led Stanley Sporkin, head of the SEC's Enforcement Section, to recommend consideration of mandatory registration of corporate directors.[26] It is also of interest to observe that the provision of the ABA Model Business Corporation Act concerning the role of the board of directors has recently been changed. The provision which formerly stated that "the business and affairs of a corporation shall be managed by a board of directors"[27] has been revised to state: "[T]he business and affairs of a corporation shall be managed . . . under the direction of a board of directors."[28] This revision accords with Eisenberg's perceptions of the realities of the matter, but the Model Act does not propose any methods for implementing this reform. Eisenberg views such methods as essential to ensure the independence of the board members, yet Eisenberg fails to suggest a suitable remedy. He is not convinced that the German two-tiered board structure—which features a supervisory board—is a desirable alternative to the present American structure, for he believes that the two-tiered structure, without more, does not adequately cope with the primary problem of ensuring the independence and ability of the board of directors.[29] Eisenberg identifies and emphasizes this primary problem; regrettably he proffers no promising solution.

Professor Eisenberg insists upon the need for a meaningful right of appraisal for shareholders of publicly-held corporations so that dissenters might have a means of extricating themselves from situations in which structural change is forced upon them. Here he takes issue with the Delaware statute, which remits shareholders in public corporations to market sales for relief from objectionable structural

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[26] *SEC Enforcement Aide Asks Laws to Rectify Some Corporate Abuse,* Wall St. J., May 5, 1977, at 3, col. 2.

[27] ABA MODEL BUS. CORP. ACT § 35 (1969).

[28] *Report of Committee on Corporate Laws: Changes in The Model Business Corporation Act,* 30 BUS. LAW. 501 (1975).

[29] EISENBERG 181-85.

changes and, with Dean Manning, who contends not only that the appraisal remedy is expensive and ineffective, but also that it imposes an undue cash burden on the issuer. Manning, the most prominent exponent of the view that the right of appraisal should be curtailed, argues that the economic position of the shareholder can be affected as dramatically by many internal corporate actions as by the kinds of changes that trigger appraisal rights. Since appraisal is, in his view, a relatively impotent and incomplete remedy, Dean Manning would abandon the remedy as we know it.

Eisenberg, on the contrary, would bolster the right of appraisal. He regards appraisal as a fundamental remedy,

> a mechanism admirably suited to reconcile, in the corporate context, the need to give the majority the right to make drastic changes in the enterprise to meet new conditions as they arise, with the need to protect the minority against being involuntarily dragged along into a drastically restructured enterprise in which it has no confidence.[30]

He disagrees with the view that the shareholder who is dissatisfied with the way his corporation is restructuring its constituent documents has an adequate remedy in the open market. He does not regard the market as a sufficiently accurate barometer of value at all times. Eisenberg is persuaded that market fluctuations within short periods of time are often wide and volatile, and that market prices for shares can be significantly affected by ephemeral forces and phenomena essentially unrelated to the condition of a particular enterprise. Moreover, the fact that a change is occurring or is contemplated—for example, a shearing off of accumulated preferred dividends, or a merger—has a self-generating effect which may artificially influence the market, particularly when the program is known in advance so that the market can correct for it. Furthermore, management has the power to time a particular transaction so that it takes place at a moment of temporary depression in either the general market or the market for the issuer's shares—a situation fraught with opportunities for management maneuvering and oppression. Many economists contend that the market is the only proper indicator of the value of corporate shares—even for appraisal purposes—but, to paraphrase Lord Keynes, although everything may come out all right in the long run, unfortunately we all live in the short run.

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[30] *Id.* at 78.

Several instructive examples of this problem come quickly to mind. One is the case of Pure Oil Corporation. Approximately ten years ago, Pure Oil stock was selling at roughly $35 a share due to an unfavorable earnings record. A New York investment house formed a syndicate to buy the assets of the corporation with the prospect of producing around $50 per share for the shareholders. When this offer was announced, another oil company offered to exchange its securities for Pure Oil stock at approximately $65 a share. This was soon followed by another exchange offer of approximately $70 a share. Thus, there was a fluctuation within a few weeks from $35 to $70. A dissenter who sought appraisal was awarded a price somewhere in the high 50's, rather than a price close to the top price offered.[31] An analogous situation arose in connection with the competitive bidding for the Irvine Land Company stock in 1976, when shareholders recovered double the price at which the stock sold at the time of its initial activity.[32] Another instance of gross disparity between market price and fair realization occurred in connection with the Texas Gulf Sulphur Company's discovery of the mineral bonanza. A stockholder whose shares of Texas Gulf Sulphur stock were measured by market valuation in November, prior to the public announcement of the mineral strike, would justifiably have felt shabbily treated when he compared his realized price to the doubled price of the stock the following April.[33]

The foregoing examples illustrate that the appraisal remedy is not presently an ideal remedy. However, if the appraisal remedy is further emasculated as it has been in Delaware and other jurisdictions, the law will have openly created and countenanced a situation in which a wrong could exist without a remedy. As Professor Sherrard has observed, "Commentators have agreed generally that the statutory appraisal remedy is cumbersome, expensive, and often ineffective, but it is conceded nonetheless that appraisal does have some value, if only 'as a last ditch check on . . . abuse of discretion by insiders.' "[34]

I approached Professor Eisenberg's book initially on the cynical assumption that it was a mere collection of the author's articles in the corporate field over the past decade, in accordance with the current fashion of frugally exploiting prior writings in order to con-

[31] Parten v. Pure Oil Co., No. 9023 (Ct. App., Franklin County, Ohio, July 1, 1969).

[32] N.Y.Times, May 21, 1977, at 27, col. 4.

[33] *See* SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 840 n.2 (2d Cir. 1968).

[34] Sherrard, *Fiduciaries and Fairness under Rule 10b-5*, 29 VAND. L. REV. 1385, 1421 (1976) (footnotes omitted).

struct an anthology for publication. I found, however, that this was not the case. The book is not a mere aggregation of available articles but is a carefully constructed, tightly mortised, and meticulously joined volume with a central thesis, well buttressed by supporting materials. Indeed Professor Eisenberg nonchalantly omits some of his writings in the corporate field, such as his trenchant discussion of the committee process of preparing amendments to the Model Business Corporation Act.[35]

In reading this volume the reader is aware that the author is ever conscious of his objectives, has full command of his materials, and has an exceptionally keen and controlled intellect. There are rumors that Professor Eisenberg plans now to turn his attention primarily to the law of contracts and will discontinue his research into corporation law. As a lawyer, I can only encourage Professor Eisenberg to continue his research into any field that intrigues him; as a lawyer primarily interested in corporation and securities law, I can only regret the withdrawal of so competent an analyst and so penetrating an observer from the field of corporation law. I hope that he will remain involved, to some degree, in the area of corporation law, where his further contributions would undoubtedly be valuable.

The building of models—normative or otherwise—can be a sterile intellectual diversion, or merely a descriptive exercise, or the construction of a pilot device to demonstrate the feasibility of building a full scale, operating plant. In this last instance the presentation of a realistic model constitutes the most persuasive argument in favor of the proposal. Professor Eisenberg's model of a publicly-held corporation is proposed as workable, feasible, and desirable. However, he does not tell us in any detail how the model should be put into effect, or by whom. He presents his intellectual construct and buttresses it with cogent arguments and some helpful supporting data. He then presumes, or trusts, that his powerful presentation will convince some interested persons who will eventually induce some legislature to adopt his normative model. Although Eisenberg does not set forth any detailed program for achieving his objective, he does, in his final sentence, state: "Whether state or federal action is sought, the first step toward thoroughgoing revision should be the creation, by public or private means, of a national board which can dispassionately study the problems of corporation

[35] Eisenberg, *The Model Business Corporation Act and the Model Business Corporation Act Annotated,* 29 BUS. LAW. 1407 (1974).

law and recommend objective solutions to serve as a staging-ground for reform."[36]

Professor Eisenberg has designed a well-reasoned normative model. He has argued persuasively for the establishment of norms of corporate conduct and management and against the leniency of the non-normative enabling acts. The strength of this book is in its author's power of analysis, his careful and complete marshalling of arguments, and the high level of his craftsmanship. It is not primarily a work based upon novel ideas or innovations, although in many areas he has carried his analysis somewhat past current thought. The book is lean and brief and does not discuss at length many of the issues it raises. For example, Eisenberg urges increased fiduciary controls over majority shareholders, but does not delineate the nature of such augmented duties. The book focuses upon model-building and does not move into detailed analysis of every collateral issue raised.

Eisenberg has inveighed valiantly against the arguments of futility advanced by the "managerialists" of whom he regards Dean Bayless Manning as the exemplar. The clash between Eisenberg and Manning, his bete noir, leads a reader inevitably back to Manning's incisive 1958 review[37] of Livingston's book, *The American Stockholder.*[38] Manning described that book as "useful" but criticized Livingston, a proponent of "Corporate Democracy," for failing to draw the conclusions demanded by Livingston's own assessment of the corporate scene:

> In 1932, Berle and Means vivisected the modern corporation. They found a virtually omnipotent management and an impotent shareholdership. . . . In 1958, Livingston surveys the lot of the shareholder in a reformed world—a world of SEC regulation, extensive disclosure requirements, elaborate proxy machinery, Stock Exchange self-discipline, corporate Good Citizenship, People's Capitalism and Corporate Democracy. His finding? A virtually omnipotent management and an impotent shareholdership.[39]

"What then," asked Manning, "of improving the situation by redoubling present efforts to enfranchise the shareholder?"[40] Manning

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[36] EISENBERG 320.

[37] Manning, Book Review, 67 YALE L.J. 1477 (1958).

[38] J. LIVINGSTON, THE AMERICAN STOCKHOLDER (1958).

[39] *Id.* at 1485.

[40] *Id.* at 1486.

pointed out that the "nostrums of Corporate Democracy" are taken largely from the tenets of turn of the century municipal reformers, tenets not obviously appropriate to the corporate context,[41] and declared that "Livingston's book supports the conclusion that Corporate Democracy in its present form has not accomplished, is not accomplishing and will not accomplish the visitatorial job set for it."[42] Were Manning to review Professor Eisenberg's book would he subject it to similar criticisms? Is it still fair to say, as Manning said in 1958, that management is omnipotent, shareholders impotent, and that nothing is likely to change this state of affairs?

In large measure the same observations could justifiably be made today. But there are factors at work in the contemporary world that at least give promise that a change in the model is possible—a promise that even the cynic and doubter must discern. This possibility is perhaps still astronomically distant, a ground for cautious optimism only and not a signal for jubilation on the part of those who seek an end to the enabling statute and the institution of a normative model for the publicly-held corporation. Grounds for hope exist—to the extent they exist at all—only by virtue of an environment that is now more hospitable to change.

Perhaps the most important development conducive to change is the growth of the tender offer, which provides the mechanism by which outsiders can aggregate the voting power of dispersed minority shareholders by acquiring their holdings. The tender offer exerts a strong influence on management by providing a means of ousting inept or self-perpetuating management. It is to be hoped that the wave of state legislation regulating tender offers on a normative basis does not become so one-sided in operation as to pose serious obstacles to successful offers. Otherwise these statutes could become charters for the perpetuation of incumbent management, and thereby destroy the utility to shareholders of the tender offer threat. If this happens let us hope that Congress and the courts will move to preempt the field of tender offer regulation.

Since 1958, moreover, there has been a growth in the concentration of shareholdings in institutional hands such as pension funds, mutual funds and trusts. The existence of numerous institutional holders with large investments and great expertise enhances the possibilities for stockholder action. It is true that these institutions have not yet acted as a check upon management, but the potentiality exists and the occasional instance of institutional opposition to

[41] *Id.* at 1486-87.
[42] *Id.* at 1487.

management suggests that the possibility of institutional check is very real, if only inchoate.

Another major development since Manning's 1958 review is the significant change in management's attitudes toward its own image and toward the image of business in general, a change in response to the evolution of concepts of corporate responsibility and social control of corporate conduct. Many management groups have come to accept certain social constraints upon their conduct; management now defers to social pressures that formerly it would have indignantly spurned. Other major changes since 1958 include the new role of the independent director, the development of the Audit Committee, and the great expansion of SEC and Stock Exchange regulation. Revelations of corporate misconduct, such as the Lockheed and Gulf Oil scandals, have engendered tremendous public and legislative outcry, and have induced many important executives to acknowledge the need for reform of the corporate image and structure, so as to prevent recurrence of the condemned practices. The pressure in Congress for legislation requiring improved accounting procedures and the renewed consideration of federal chartering evidence a change in climate that augurs well for the advocates of a normative corporation statute.

Professor Eisenberg's book provides a useful model against which to measure possible changes. Due to the character of the times, the reconsideration which Eisenberg invites is less likely to be the sterile academic exercise it might have been when Manning's review was published in 1958.