Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy

A Reply to Professor Rock

By Leo E. Strine, Jr.[*]

This reply to For Whom Is the Corporation Managed in 2020? The Debate Over Corporate Purpose *by Professor Edward Rock supports his depiction of the current state of corporate law in the United States. But by contrast to Professor Rock, I do not trace the debate over corporate purpose to recent statements by business elites belatedly recognizing that our corporate governance system has failed to work for the many and is contributing to growing inequality. Rather, I source the debate to the work of advocates and scholars who have long been trying to restore fairness to our economy by updating an outdated mid-twentieth century corporate governance system to address evolving market and political developments. Taking a more positive view than Professor Rock, I argue that the most promising corporate governance reform proposals do not involve a revolution, but a restoration. They build on traditional corporate law techniques and restore the balance among stakeholders that characterized governance in the period when the U.S. economy worked best.*

In his excellent article, *For Whom Is the Corporation Managed in 2020? The Debate Over Corporate Purpose*, Professor Edward Rock articulates his understanding of the current debate over corporate purpose and surfaces four separate, but related, questions that he views as central to that debate:

> First, what is the best theory of the legal form we call "the corporation"? Second, how should academic finance understand the properties of the legal form when building models or engaging in empirical research? Third, what are good management

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> strategies for building valuable firms? And, finally, what are the social roles and obligations of large publicly traded firms?[1]

He argues that what he calls "populist pressures" have led contestants to the debate to confuse the separate questions he highlights.[2] Professor Rock finishes by fearing that these populist pressures could bring about changes to long-standing principles of American corporate governance that would result in more harm than benefit.

In this reply, I echo and applaud Professor Rock's clear vision as to the current state of corporate law in the United States. Professor Rock's willingness to be accurate about the state of affairs that actually exists is admirable, and all too rare in a debate where many obscure what "is" to make it their "ought." I also admire Professor Rock's willingness to shine a light on the academy, and its role in bringing us to where we are, and in particular its obsessive focus on equating the value of corporations to society with their expected value to those who hold their equity capital—that is, to their stockholders.

Where I take issue with Professor Rock is that I do not source this debate to the business elites whom he credits with pushing society toward a more stakeholder-, and less stockholder-, focused conception of the corporate purpose. It may be that these business elites are confused about his four questions, but that is not fair to say of the advocates and scholars who have, for many years before these elites spoke a word about stakeholders, believed that our corporate governance system was out of whack and causing social harm.

And Professor Rock's four questions are themselves in some way a natural outgrowth of an elite academic culture that, as he admits, has largely looked at corporate governance through a monocular lens focused solely on stockholder welfare. His first two questions are largely hobbyhorses of law and finance professors, while the third is the focus of business school courses. These may be the lens through which law and economic elites look at the issue of corporate purpose, but they are far narrower than that of the general public affected by our corporate governance system.

Professor Rock's last question gets closer to the mark about the real causes of the current debate; he suggests that those who have been driving the debate since its inception are concerned with the "social roles and obligations of publicly traded firms."[3] For sure, they are and have been.

But, even then Rock's prism is too narrow. That elites like money managers and the Business Roundtable ("BRT") are recognizing that things need to change is not because they have come to question the simplifying legal and finance models that professors use to understand corporate law or the outcomes the corporate governance system produces, nor is it because there are profound new

1. Edward B. Rock, *For Whom Is the Corporation Managed in 2020? The Debate Over Corporate Purpose*, 76 BUS. LAW. 363 (2021) [hereinafter Rock].
2. *Id.* at 363.
3. *Id.*

insights into management technique, linking business performance to articulated purpose.

Rather, they are doing so because the outcomes of a corporate governance system that has increased the power of stockholders, in the form of institutional investors, and decreased the power of workers and other corporate stakeholders are unsustainable, both in terms of their effect on the environment and on the social fabric. And the debate is not narrowly focused on just public companies, but demanding more accountability from all societally influential private companies whose actions have contributed to these problems. For at least forty years, a strain of economic thinking, typically embraced by those who believe that society is best served when corporations focus solely on making profits for stockholders, has increased the power of economic elites and gone to war against the regulatory state and externality protections put in place by the New Deal and Great Society to protect workers, consumers, the environment, and society generally.

What has resulted is wage stagnation, growing inequality, climate change that threatens humanity, repeated bailouts by the many of the few, consumer exploitation, and increased insecurity, social division, and racial and economic inequality. The late recognition of business elites that a corporate governance system contributing to such results needs reform was not the start of this debate; it was a signal that they knew that a long-standing debate threatened to come to a head and produce outcomes that they could not control.

For decades now, there have been advocates and scholars bemoaning the tilt in our corporate governance system, and the effect that the embrace of Milton Friedman- and Ronald Reagan-style thinking has had on our economy's basic fairness and sustainability. It is the elites in business and in law and economics scholarship who are catching up. They are not in the vanguard; they were slow on the uptake, and the questions being asked are more fundamental and involve this: Isn't it time for all societally important business entities—not just public companies, but large private companies and money management firms as well—to have to use their power in a socially responsible manner? And if the current power allocation lets economic elites use corporate power to decrease the effectiveness of the political process to protect corporate stakeholders, isn't it necessary to address the power and purpose dynamics within corporate governance itself so that they align better with the outcomes we want for our society's well-being and equity?[4]

In my view, the answer to both questions is yes, and I further believe that the most promising proposals to move our corporate governance system in a positive direction do not involve a dangerous revolution. Instead, they involve a restoration of balance that takes into account the different market, political, and resulting power dynamics that exist in the twenty-first century and that would move the American system of corporate governance into greater harmony with systems

4. A natural third question, which I briefly touch upon in Section V of this essay, is: What policy and internal changes should occur for corporations to better promote social welfare?

that exist in many high-functioning market economies that compete effectively in the global markets while producing better outcomes for the many.

Inaction and failure to take sensible steps forward is the real danger now, and those stuck in a tired debate between what version of elite corporate rule should prevail are the ones who are confused and risk social upset. With clear eyes, sound consciences, and stiff spines, we have the capacity to make the American corporate governance system evolve in a productive way. It is the failure to admit that the current model is as Professor Rock describes, and to go further than he will and admit that it needs an overhaul to fit a twenty-first century economy, which long ago outgrew its ability to function fairly for the many, that is endangering not just our economy, but the ties that bind us together as Americans.

I. Roadmap

In considering how to reply to Professor Rock's richly textured essay, it was tempting to simply track his sections and comment upon his dilation of each of the four questions he considers central to the current conversation about corporate purpose. But after reading his article repeatedly, I decided to take a different approach. There are two primary reasons for that. The first is that Professor Rock's characterization of the legal state of affairs and the predominant elite academic take on the debate is characteristically measured, and I find far more to agree with than to disagree. For the reader, therefore, an approach that simply bought into his framework and considered the four questions he does as primary would not be interesting. Second, and more importantly, by taking a different approach, I hope to identify some perspectives on the debate that supplement Professor Rock's and to give readers some other ways of thinking about how we got to where we are.

In particular, I wish to highlight the different way in which I see the origins of the debate and the central questions our society faces about the purpose of corporations, and of corporate governance more generally.

To do that, I proceed this way. First, I address Professor Rock's accurate and balanced discussion of how the dominant corporate law in the United States—that of the State of Delaware—addresses corporate purpose, and how other models—including those in constituency states and under public benefit corporation ("PBC") statutes—do.[5] This is important to the public policy discussion, because, for far too long, too much time has been wasted in arguments not grounded in reality about corporate law, instead of arguing about the real issue, which is: whether and how that reality should change.

From there, I pivot to discussing the reasons why I do not find the four questions Professor Rock identifies to be as central as he sees them to the public debate over corporate purpose. In particular, I highlight ways in which the questions

5. I do not burden the reader with a discussion of Professor Rock's discussion of how constituency statutes operate, or his recognition of the emerging public benefit corporation model. That discussion is equally balanced, and it is not as subject to the same attempts at confusion that characterize the debate about what Delaware corporate law says about corporate purpose.

themselves tend to perpetuate the viewpoint of academics who have looked at the question of corporate purpose through a very narrow, and stockholder-focused, lens.

I then move from the issue of legal and market reality to addressing Professor Rock's view of the origins of the immediate controversy. In doing so, I note my view that Professor Rock has confused the elite's late-arriving recognition of the debate—a symptom—with the actual forces that have brought it about. I argue that it is important to be clear about why the debate is occurring, if the outcome of it is to be productive, and if it is not just to descend into small arguments among the "haves" about just how little change the establishment can get away with while remaining the establishment.

I turn from there to a discussion of the blinkered way in which many key contestants to the debate are proceeding, by highlighting two key techniques used by traditional corporate law that are not stressed by Professor Rock and that have relevance to the policy debate. These techniques are: i) the use of the business judgment rule to give directors and management more space to be other–regarding toward stakeholders other than stockholders; and ii) the importance of normative obligations imposed on directors, even when those obligations are not enforceable by way of money damages. In highlighting these successful techniques, I suggest that some of the pending policy proposals to move corporate law in a more stakeholder-focused direction have more promise than left-wing skeptics think, and pose less of a threat to traditional corporate law efficiency than Professor Rock or more conservative commentators fear.

Finally, I finish by expanding on the same themes, and by differing with Professor Rock to the extent that he contends that adhering to the status quo is less risky than adapting our system of corporate law in an evolutionary way to address the needs of a twenty-first century market economy, in which the power dynamics are markedly different than in the post-war era during which American capitalism functioned most effectively for the many. By evolutionary means, which build on current techniques of corporate law, and that restore the regulatory framework within which corporate power used to be exercised, we can build a sounder basis for sustainable prosperity and greater social unity, because we will create incentives for our economy to more fairly share its gains with the workers whose hard work and innovation is primarily responsible for creating them. And we can also better align our corporate governance system with the interests of humanity in ensuring that in trying to build wealth, we do not destroy the planet, injure consumers, or otherwise cause more harm than good.

II. Getting Real About *Revlon*: Professor Rock's Accurate Description of American Corporate Law

One of the most refreshing aspects of Professor Rock's article is its balanced and accurate statement of what Delaware corporate law says about the means and ends of corporate governance. Great fiction is part of what makes human life worth living, but obscurantism and deception about what the law is undermines the ability of society to make good decisions about how the law should evolve.

As Professor Rock explains, the rule in Delaware is plain: corporate fiduciaries may take actions benefiting other corporate stakeholders so long as there are "rationally relat[ing] benefits" to the stockholders, as famously expressed in the Delaware Supreme Court case *Revlon Inc.* v. *MacAndrews & Forbes Holdings, Inc.*[6] This rational relationship test is the general rule and not a rule that applies in only one situation.

Those who say that portion of *Revlon* is dictum or does not state the general rule of Delaware law do not understand what it means for something to be essential to the resolution of the case.[7] In fact, it is not clear to me that they have ever read the full case. For starters, they ignore the fact that no constituency could have been more sympathetic to a stockholder primacy advocate than the Revlon noteholders. Why? Because they had gotten their notes weeks before the end stages of the bidding contest for Revlon, when they were advised by the board that it was in their interests as stockholders to exchange some of their shares for notes, and that the value of the notes would be protected by the independent directors.[8]

So when the Revlon board argued that it was favoring the bidder that would provide the best price for stockholders while protecting the value of the notes, the board knew that many Revlon stockholders now had a Revlon portfolio consisting of both stock and notes, and that they only owned the notes because the board encouraged them to accept them on the promise of value protection. After the statement by the Delaware Supreme Court in *Unocal* that boards might have the discretion to give stakeholder interests equal weight in mergers and acquisitions ("M&A"),[9] no doubt the Revlon board and its legal advisors thought they were on solid legal ground in arguing that fairness to noteholders could be taken into account in their decision-making.

6. 506 A.2d 173, 176 (Del. 1986) ("Moreover, while concern for various corporate constituencies is proper when addressing a takeover threat, that principle is limited by the requirement that there be some rationally related benefit accruing to the stockholders.").

7. As a judge for twenty-one years, I had to deal with the reality of *Revlon* as precedent, and as a professor during the same period at Harvard and the University of Pennsylvania Law Schools, I always had my students read the full series of cases running from *Smith* v. *Van Gorkom*, 488 A.2d 858 (Del. 1985), to *Paramount Communications, Inc.* v. *QVC Network, Inc.*, 637 A.2d 34 (Del. 1994), in more or less full form, with special emphasis on *Unocal Corp.* v. *Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985), and *Revlon*. Early in this century, I explained in full the difficulties I perceived that *Revlon* caused for the ability of boards to protect other stakeholders. Leo E. Strine, Jr., *The Social Responsibility of Board of Directors and Stockholders in Change of Control Transactions: Is There Any "There" There?*, 75 S. Cal. L. Rev. 1167 (2002). Others have argued the same. *See, e.g.*, Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. Cal. L. Rev. 1189, 1197–99, 1205–07 (2002) (arguing that *Revlon* is bad for diversified investors as a class because a rule allowing stockholders to cash out and ignore the interests of other stakeholders discourages prior-period firm-specific investments by those stakeholders to the detriment of overall value creation by corporations).

8. *Revlon*, 506 A.2d at 177.

9. *Unocal*, 493 A.2d. at 955 (suggesting that a board could reject a takeover bid based on its "impact on 'constituencies' other than shareholders (that is, creditors, customers, employees and perhaps even the community generally)").

But, as we know, the Delaware Supreme Court in *Revlon* firmly rejected that idea. And its reasoning was clear, whether one agrees with it or not. Because the Revlon board was selling the company for cash, it was the final opportunity for stockholders to profit from their investment. That being so, there was no way that protecting the value of the notes could have a rational relationship to the best interests of stockholders, and thus the board was breaching its fiduciary duty of loyalty by preferring the interests of the noteholders to those of the stockholders.[10]

This rational relationship test was in no way incidental to the holding—it was crucial. Had Revlon been selling a division to which the value of the notes were tied, a decision to accept a bid that protected the value of the notes could have been rationalized on the ground that it would benefit stockholders in the future, as the company would likely need debt financing, and thus it would benefit stockholders for the company to maintain a reputation for treating its noteholders well since that would help the company get favorable financing terms in the future. But because Revlon was selling the entire company, and there was no tomorrow, the generally forgiving rational relationship test could not be satisfied, and the board lost.[11]

Say what you will about the rational relationship test, but don't say it's dictum.[12] The reason why the movement for anti-takeover and constituency statutes took on so much prominence is because critics of *Revlon*, like Marty Lipton, knew that the Delaware Supreme Court had rejected giving boards the discretion to treat stockholders as just one among many equal stakeholders, and had done so in a way that substantially limited the ability of boards to protect stakeholders at a critical point in time to them: when the business will go under the control of new management.

Relatedly, Professor Rock also makes clear that his understanding of the Delaware general rule is not idiosyncratic.[13] He grounds his view in the governing

10. *Revlon*, 506 A.2d at 182.

11. *Id.* at 182–83. Admittedly, there is a different way to understand *Revlon*: that the board did not even-handedly deal with both bidders for the benefit of the stockholders and noteholders, but instead locked up a deal with Forstmann because of the antipathy its management and board had toward Ronald Perelman. *Id.* at 175 (noting the Revlon CEO's "strong personal antipathy" for Perelman). But it would have been easy to write the decision in that way without relying on the need in a sale—because of the lack of a relationship between noteholder and stockholder welfare—to focus solely on stockholders, and the court's holding hinged on that reasoning.

Folks who give short shrift to *Revlon* often fail to cite to the Delaware Supreme Court's own statement that it viewed itself as addressing for the "first time the extent to which a corporation may consider the interests of constituencies other than shareholders," to which it gave a clear answer: "while concern for various constituencies is proper when addressing a takeover threat, that principle is limited by the requirement that there be some rationally relating benefits accruing to the stockholders." *Id.* at 176.

12. In earlier work, I addressed this issue at more length, and cited and addressed the arguments of the many scholars who claim that Delaware's common law of corporation law is ambiguous on this issue of purpose, and also underscored the critical importance of the Delaware General Corporation Law's power structure in understanding Delaware law. *See* Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 Wake Forest L. Rev. 477 (2015).

13. Because he is focused on Delaware common and statutory law, Professor Rock does not cite distinguished scholars like Robert Clark, Stephen Bainbridge, Jonathan Macey, Mark Roe, and

source of corporate law and its stockholder-focused power framework, the Delaware General Corporation Law ("DGCL"), showing that it grants rights only to stockholders and is written to protect their interests. Rock then shows how the Delaware judiciary has understood that statute. If you don't agree with Vice Chancellor Laster's view,[14] he directs you to Chancellor Chandler.[15] If you don't agree with Chancellor Chandler, he points you to Chancellor Allen.[16] If you don't agree with the Court of Chancery, there is a unanimous decision of the Delaware Supreme Court to the same effect.[17] These distinguished judges had very different judicial approaches and writing styles, but they all agree on what Delaware law means.[18]

If observers would like Delaware law to be different than it is, then it is time for them to acknowledge reality and to do the hard work to advocate amendments to the DGCL to make it as they wish it was. That is what the advocates of the Delaware PBC statute did when they passed a law giving corporations the option to embrace a mandatory stakeholder model of governance. If the managerialists who prefer a general "may" regime such as exists in constituency states want to overrule the rational relationship rule of Delaware law, they must do so, as has happened in thirty-three other states.[19] Professor Rock does a service by

Roberta Romano, who take a similar view to his of what traditional corporate law's view of corporate purpose is. Leo E. Strine, Jr., *Corporate Power Ratchet*: *The Courts' Role in Eroding "We the People's" Ability to Constrain Our Corporate Creations*, 51 Harv. C.R.C.L. L. Rev. 423, 440 n.63 (2016) (citing each scholar's views to this effect). For another recent article addressing the debate within academia about corporate purpose with clarity, see Mark J. Loewenstein, *Shareholder Primacy and the Moral Obligation of Directors* (U. Colorado L. Legal Stud., Research Paper No. 20-52, Nov. 20, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3689979.

14. *In re* Trados Inc. S'holder Litig., 73 A.3d 17, 40–41 (Del. Ch. 2013) (V.C. Laster) ("[T]he duty of loyalty . . . mandates that directors maximize the value of the corporation over the long-term for the benefit of stockholders."); *see also In re* Rural Metro Corp. S'holder Litig., 88 A.3d 54, 80 (Del. Ch. 2014) (same).

15. Rock, *supra* note 1, at 371 (citing eBay Domestic Holdings, Inc. v. Newmark, 16 A.2d 1, 34 (Del. Ch. 2010) (V.C. Chandler)).

16. Rock, *supra* note 1, at 371 (citing TW Servs., Inc. S'holder Litig., Nos. 10427, 10298, 1989 Del. Ch. LEXIS 19, at *21 (Del. Ch. Mar. 2, 1989) (V.C. Allen)); *see also* Paramount Commc'ns, Inc. v. Time, Inc., Nos. 10866, 10670, 10935, 1989 Del. Ch. LEXIS 77, at *22 (Del. Ch. July 14, 1989) (V.C. Allen) (noting the board has a "duty to seek to maximize in the long run financial returns to the corporation and its shareholders"), *aff'd*, 571 A.2d 1140 (Del. 1989) (V.C. Allen); Katz v. Oak Indus., Inc., 508 A.2d 873, 879 (Del. Ch. 1987) (V.C. Allen).

17. N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 100 (Del. 2007).

18. It should not be forgotten in this discussion that many stockholder primacy advocates were upset that Delaware did not embrace their "means" argument in cases like *Paramount Communications, Inc.* v. *Time, Inc.*, 571 A.2d 1140, 1153 (Del. 1989) (giving a strong hand to directors to reject takeover bids and issuing dictum harshly criticizing the ruling in *City Capital Associates L.P.* v. *Interco, Inc.*, 551 A.2d 787 (Del. Ch. 1988), that put limits on the ability of a board to use a pill to block a non-coercive bid permanently), that stockholders should be able to dictate what is best for them in mergers and acquisitions, and not be subject to fiduciary blocks on their ability to sell. This "means" debate has often confused the debate about the "ends," as scholars like Stephen Bainbridge have shown. *See* Stephen Bainbridge, *The Means and Ends of Corporate Governance*, 97 N.W. L. Rev. 547, 547–52 (2003).

19. Lucian Bebchuk, Kobi Kastiel & Roberto Tallarita, *For Whom Corporate Leaders Bargain*, 93 S. Cal. L. Rev. (forthcoming 2021) (finding thirty-three states with constituency statutes in force during the period from 2000 to 2019). Additionally, thirty-eight states, including the District of

putting paid to those who continue to obscure the reality of what Delaware law is, and thereby to, intentionally or unintentionally, impede making progress on what that law could be.

III. Professors and Their Models: The Real World Consequences of Ignoring the Way the Real World Works

As someone who has spent a lot of time around corporate law and finance scholars during the last quarter century, it is not surprising that Professor Rock views the current debate as centering around these questions:

> First, what is the best theory of the legal form we call "the corporation"? Second, how should academic finance understand the properties of the legal form when building models or engaging in empirical research? Third, what are good management strategies for building valuable firms? And, finally, what are the social roles and obligations of large publicly traded firms?[20]

I find these questions unintentionally revealing, especially in an article that is in many ways refreshingly clear of academic cant. The first question, by way of example, seems one that only professors would put the way Professor Rock does. Most statute writers and policy makers do not think about the best theory in that verbiage; those who are focused on the right thing—positive and fair public policy—think about what structure of regulation or governance will produce the most socially desirable outcome. In this domain, my sense is that the real-world participants to the debate divide on this basic question: is it better for society if corporations focus solely or mostly on making profits for stockholders? Or should corporations focus in equal measure on treating all their stakeholders with respect? From this, they then proceed, or should, to more instrumental questions, such as what allocation of powers to various corporate stakeholders best facilitates their view of the good? In this calculus, I dare say most drafters of corporate law statutes have had little regard for late-arriving theories like "nexus of contracts" or the "associational model."[21] They have historically drawn analogies to techniques of direct and republican democracy to channel the exercise of corporate power.[22]

Columbia, have passed PBC legislation. *Why Pass Benefit Corporation Legislation*, Benefit Corp., https://benefitcorp.net/policymakers/why-pass-benefit-corporation-legislation (last visited Dec. 26, 2020).

20. Rock, *supra* note 1, at 1.

21. *See, e.g.*, Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. Fin. Econ. 305 (1976) (setting forth nexus of contracts theory of the firm).

22. Some scholars resist this notion. The scholarship of Nikolas Bowie undermines their position. *See generally* Nikolas Bowie, *Corporate Personhood v. Corporate Statehood*, 132 Harv. L. Rev. 2009 (2019) (reviewing Adam Winkler, We the Corporations: How American Businesses Won Their Civil Rights (2018)) (describing the connection between the charters of colonies and corporations, and how their development has been influenced by political philosophy); *see also* David A. Ciepley, *Is the U.S. Government a Corporation? The Corporate Origins of Modern Constitutionalism*, 111 Am. Pol. Sci. Rev. 418, 418–22 (2017) (discussing the historical connection between corporations and the government, and the impact of the "corporate form" on the "business firm" and modern states). Interestingly, those who do so often find an article written by Michael Jensen and William Meckling in the

Likewise, Professor Rock's second question—"how should academic finance understand the properties of the legal form when building models or engaging in empirical research"—is one specific to law and economic scholars, not policy makers. But that question and the third—what are good management strategies for building valuable firms—underscore just how influential academic framing can be in skewing not only academic thought itself, but public policy. The second question, for example, uses the "properties of the legal form" as a building block for how finance professors should think about the value of corporations. But if that means that finance professors should assume, by way of example, that what is important in valuing firms is only their value to the holders of their equity, then the model they build will tend to reflect that. Similarly, if the value of the firm to society is equated with solely its value to stockholders, that will affect what is a "valuable firm" and what management strategies best create them.[23]

To this point, one of the most interesting parts of Professor Rock's paper was his discussion of how elite finance professors and their law school counterparts look at the value of corporations. Professor Rock persuasively shows that the predominant way to measure the value of a corporation to society is just to figure out the value at which its equity will sell. Even more sophisticated metrics than just current stock price, such as Tobin's Q, ultimately focus on figuring out a proxy for the value of a company to just one constituency—stockholders.[24]

Another way that these measures have historically affected the debate about corporate purpose is not discussed by Professor Rock, but his incisive essay alludes to it. In discussing his third question about the relationship of purpose to corporate value in a related essay, Rock cites literature that attempts to show that corporations with a clear purpose beyond just profit—some mission of making the world a better place, if only by the quality of the products or services sold—are more valuable.[25] But the measures of values used are ones traditionally associated with stockholder value. This method of measuring value has long had a distorting effect on the purpose debate. As far back as Marty Lipton's iconic *Takeover Bids in the Target's Boardroom* article,[26] advocates of stakeholder governance have tried to show that their view of the world is actually better, not just to

year of the bicentennial a source of inspiration and novel insight. *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305 (1976). This article is, in essence, a recitation of how, with the right use of checks and balances, disaggregated investors can productively entrust their capital to centralized management. This was the same problem that the Federalist Papers and that thinkers like John Locke and Henri Montesquieu had pondered in forming a national government, and corporate law statutes employ many of their same tools.

23. In another paper, Professor Rock focuses more deeply on the connection between business purpose and firm outcomes, and cites scholars such as Claudine Gartenberg, Andrea Prat, and George Serafeim, who show that purpose-driven companies create more value by focusing on stockholder-focused metrics, like return on assets and Tobin's Q. Edward B. Rock, *Business Purpose and the Objective of the Corporation* (NYU L. & Econ. Research Paper No. 20-44, Nov. 10, 2020), https://ssrn.com/abstract=3724710.

24. Rock, *supra* note 1, at 381.

25. *See* Rock, *supra* note 1, at 384–387.

26. Martin Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW. 101, 108 (1979) (explaining that "shareholders have profited in the overwhelming majority of defeated takeovers").

diversified investors, but to a hypothetical stockholder who is long just the particular company that is subject to a takeover or an activist campaign. They do so by trying to show that takeover bids and activism were not associated with higher firm values based on metrics solely addressing stock price over some time horizon.[27] As some of the scholarship Rock averts to in the debate about corporate purpose and value illustrates, this essential framing of the debate continues, with the fight being over whether a focus on short-term stock price maximization is likely to foster or harm long-term value creation.[28] But even this framing necessarily tilts the debate by making advocates of stakeholder governance play uphill and against the wind. Even from the standpoint of stockholders, a focus solely on one target company's fate, rather than the effect of corporate governance rules on overall outcomes relevant to investors, is wrongheaded. For diversified investors, the system that is most beneficial is the one that produces the most sustainable growth in stock value, net of externalities they must bear.[29] Profits at one

27. In prior work, I collected abundant citations to scholars on both sides of the debate on the question of whether activism increased or decreased firm value, almost of all which use share price or share price proxies for that purpose. *See*, *e.g.*, Leo E. Strine, Jr., *Who Bleeds When the Wolves Bite?: A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System*, 126 YALE L.J. 1870, 1938–42 (2017); Strine, *The Dangers of Denial*, *supra* note 11, at 787 n.102 (collecting scholarly articles on this and related subjects, such as whether "say on pay" increases shareholder value).

Some scholars have even tried to analyze whether corporate governance changes proposed by policy makers, such as the Securities and Exchange Commission's proxy access proposals, or made by judicial decisions, such as *Airgas, Inc.* v. *Air Products & Chemicals, Inc*., 8 A.3d 1182, 1194–95 (Del. 2010), were good for stockholders by doing event studies about the correlation of the stock market to those decisions. *See, e.g.*, Joseph A. Grundfest, *Measurement Issues in the Proxy Access Debate* (Rock Ctr. for Corp. Governance Stanford U., Working Paper No. 71, Jan. 18, 2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1538630 (discussing empirical data indicating that the SEC's proxy access proposal reduced shareholder wealth); Bo Becker, Daniel Bergstresser & Guhan Subramanian, *Does Shareholder Proxy Access Improve Firm Value? Evidence from the Business Roundtable's Challenge*, 56 J.L. & ECON. 127 (2013) (same); Alma Cohen & Charles C.Y. Wang, *How Do Staggered Boards Affect Shareholder Value? Evidence from a Natural Experiment*, 110 J. FIN. ECON. 627, 628–35 (2013) (finding that the Chancery Court's decision in *Airgas*, upholding a shareholder-initiated bylaw amendment to accelerate the date of the next annual shareholder meeting and thus shorten the terms of staggered directors, positively impacted firm value, while the Delaware Supreme Court's decision reversing course negatively impacted firm value); Lucian A. Bebchuk & Alma Cohen, *The Costs of Entrenched Boards*, 78 J. FIN. ECON. 409 (2005) (finding that staggered boards are associated with lower firm value).

28. Rock, *supra* note 1, at 384. A distinguished scholar has made the important observation that "most studies do not expressly consider the implications of using shareholder wealth as a measure of firm value, despite the fact that they purport to be conducting a general efficiency analysis in which the primary goal should be maximizing the size of the corporate surplus, while considerations of the appropriate division of the corporate surplus should be secondary." Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637, 639–40 (2006).

29. For an emerging voice's incisive perspective on this, see Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1, 5 (2020) (arguing that apparently paradoxical behavior of broadly diversified investors in encouraging companies to, for example, reduce carbon emissions "can be explained by revising traditional corporate governance theory to account for institutional investors' motivations at a *portfolio* rather than a *firm* level"). Of course, most shareholders, regardless of their level of diversification, are individuals who benefit from internalized externalities, because they depend for most of their wealth on their access to a good job, and they do not benefit economically when a company contributes to economy-wide arbitrage against working people and their wages, externalizes costs to the government that the investors must cover as taxpayers, and externalizes costs to

company, because it received a premium, may not matter if the buyer was another company whose stock the stockholder also held, and if the combined companies then struggle with excessive debt or because the combination did not make sense. And of course, most investors do not own just stock—they also hold debt as a substantial portion of their portfolio, and governance rules that promote equity value at the expense of debt holders may at best involve a value shift, and worse.[30] Put simply, simplified models that are based on the assumption that a corporation's value can be equated with its equity value distort good thinking about corporate governance.[31]

Further to this point, Professor Rock gives a bit less prominence to an accompanying assumption that many of the scholars who do this use to salve their consciences, and to silence the noise from their brain that screams the obvious: the value of a corporation cannot be reduced to just the price its equity would sell for. That moral balm comes out of the residual claimant theory. A simpler intellectual compound has perhaps never been conceived. It rests on the idea that as a matter of law, creditors get paid before stockholders. For stockholders to profit, all creditors must be satisfied. Therefore, if we run corporations in a way that maximizes the surplus for stockholders, that will be best for the world, because all other corporate claimants will get their just desserts, and by seeking to grow the pie to benefit stockholders, the maximum social benefit will result.[32]

That not much of this is close to true has not mattered much in turning scholars toward the more complex inquiries that are necessary to measure the real-world value of and, just as important, the costs imposed on society by specific firms. If the way the world worked was that stockholders could harvest every ten to twenty years, perhaps the residual claimant theory would have some power. In that kind of summing-up, workers who had relied upon corporate promises and had made sacrifices would be treated fairly and get their due.

them as consumers in the form of unsafe products or deceptive services and in terms of their health and future by polluting and warming the environment.

30. Strine, *Wolves*, *supra* note 27, at 1938–42 (collecting studies suggesting that gains to stockholders from activism do not result from increases in firm value but transfers of value away from workers and creditors to stockholders, and that activism may lead to decreased R&D spending).

31. This is why Professors Hart and Zingales, cited by Professor Rock, propose that companies focus on making decisions maximizing the overall welfare of presumably diversified investors. Rock, *supra* note 1, at 18 (citing Oliver Hart & Luis Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J.L. FIN. & ACCT. 247 (2017)). Similarly, for an excellent article arguing that pension fund trustees should not only be allowed but required to consider the broader economic interests of their fund beneficiaries in key issues, such as preserving their jobs, in governing the fund, see David H. Webber, *The Use and Abuse of Labor's Capital*, 89 N.Y.U. L. REV. 2106 (2014).

32. For a good description of the basic argument for this perspective, see William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 269–70 (1992). For a succinct takedown of the residual claimant model, see Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, *supra* note 7, at 1192–95. For other incisive takedowns of the residual claimant model, particularly from the perspective of whether stockholders are more exposed to risk than workers as residual claimants, see Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283, 302–11 (1998); William Lazonick, *Labor in the 21st Century* 32–33 (Inst. for New Econ. Thinking, Working Paper No. 4, 2015).

Communities that gave tax subsidies and other benefits to companies would get repaid for broken promises, or have the corporation be forced to honor them. Creditors who got short shrift would get trued up. Consumers who were injured would get compensated. Environmental damage would be remediated. Only then would the stockholders feed.

But that is not the way the world works. Diversified stockholders in fact bear less firm-specific risk than most other stakeholders, particularly corporate workers, small creditors, pensioners, and corporate communities who cannot diversify away the risk of getting shafted. And stockholders take all the time. They take when M&A and other activist-driven events occur. They take when they benefit from dividends and buybacks. And after these events, the corporations involved have not infrequently gone insolvent, downsized due to excessive leverage, shirked pension plans at the expense of pensioners and taxpayers, left communities out substantial tax dollars and without the benefits they were promised for forsaking them, and caused environmental and consumer harm that is not fully remediated.

To be fair to my friend Professor Rock, he mostly averts to the academic models to say that they reflect an insight into what elite finance scholars believe is the purpose of for-profit corporations.[33] Because their models all focus on stockholder value, he rightly argues that this suggests that they believe the purpose of corporations is primarily to benefit stockholders.[34]

But Professor Rock's acknowledgment that ideas and ideology matter[35] also suggests that the unthinking perpetuation of these models has itself contributed to a mistaken approach to corporate governance that embraced the idea that making companies more and more responsive to stockholders was a good thing. If something had the effect of durably raising stock prices, then it must have been positive.[36]

Lost in this, of course, is the reality that the measure of a company's equity value just comprises the collective view of traders as to what they can extract as stockholders from a company. If the workers of a company can be squeezed successfully, so that there is more for its stockholders, then the equity value goes up. If a company's environmental compliance is less costly and effective than other competitors and tolerated by local regulators in its pockets, its equity value can go up.[37] The reason is simple: what the market is measuring is simply what traders think stockholders can get out of investing.

33. Rock, *supra* note 1, at 381–83.

34. *Id.* at 379.

35. *Id.* at 386–87.

36. Admittedly Professor Rock says that the question for finance scholars "is how firms are actually managed" and that their measures assume that the answer to that question is for the benefit of stockholders. *Id.* at 382. But Professor Rock's framing question is larger, and equating firm value solely with the value to stockholders is problematic not just normatively, but as an accurate description of economic reality.

37. *E.g.*, Roy Shapira & Luigi Zingales, *Is Pollution Value-Maximizing? The DuPont Case* (Nat'l Bureau Econ. Res., Working Paper No. w23866, Oct. 2, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3046380 (showing that it can be valuable for stockholders for companies to pollute and create harm if the expected gains outweigh the probability of regulatory detection and action sufficient to strip the company of its gains from improper conduct).

That narrow measure has no compelling relationship to the overall value that a corporation provides to society. A company that provides a 6 percent return to equity, but that employs 10,000 workers at fair wages and in safe conditions in all its global operations, uses only contractors who do the same, and creates no externalities may well provide more value to society than an industry competitor that provides a 9 percent return to equity, but employs far fewer workers directly and at much lower wages, that relies on even lower paid contracted labor, takes few safety protections, and generates externalities such as consumer and environmental harm. Companies can be very competitive in product markets, but decide how to use the proceeds in a way that is much more distributionally useful to society and creates real economic value. And companies can and often have done the opposite, yet the increased value of their equity does not get discounted for the harm done, because the stock market does not care about that—at least until the company gets caught and there is some short-term sell-off. Importantly, because corporate power has been used to undermine the regulatory protections for stakeholders, the probability that corporate wrongdoing will be punished in a way that makes overreaching more harmful to stockholders than beneficial to them has diminished. In sum, equity value prices this lack of stakeholder protection as a positive, not a negative.

The overall corrosion of this obsession with equity value is also underestimated. By measuring value in a cramped manner that does not take into account important elements of real economic value to society—providing workers with the ability to live decent lives and with the financial resources to spend on goods and services that in turn produce more growth—and that does not take into account costs—externalities imposed on taxpayers, workers, consumers, and diversified investors—these models create a collective incentive for more responsible companies to be more callous to workers, consumers, creditors, the environment, and their communities so that they can compete with companies all too happy to please the stock market by shorting stakeholders and taking regulatory shortcuts.

Not only that, but the single-minded focus on company-specific equity value obscures the question of whether the sum total of each company's rent-seeking is a gain or drag on overall economic growth and social welfare. The sum total of stockholder gains resulting from corporate externalities is not a gain in societal wealth; it is a shift of ill-gotten gains to stockholders. And because stockholders are much wealthier than average, this involves an unfair shifting of money from those who have less to those who have more. And it fundamentally involves diverting societal resources that could do greater good to remediating corporate harm, or leaving the injured to take care of their own wounds. Furthermore, the more companies can generate profits by shorting stakeholders and skirting the law, the less they are driven to improve their products and services in a way that creates the potential for a more prosperous society. A society where corporate rent-seeking instead of ingenuity becomes more prevalent faces, as Professor Coates so rightly calls out, the risk of becoming

Russia.[38] Models that simplify away anything but what stockholders expect to receive increase that risk, and the current societal debate about the purpose of the corporation is a rebellion in at least some meaningful part against the failure of elite academics to evolve their models to take into account the real world. The strong push for companies to disclose more information about employee, environmental, social and governance ("EESG") factors is just one manifestation of dissatisfaction with the equity value proxy.

Finally, the reasons to be suspicious of equity value as a proxy for overall value have grown considerably. With advances in technology and globalizing markets, the prosperity of a company, its top managers, and its stockholders need not coincide with gains in employment in its headquarters community, an expansion of its worldwide direct workforce, or other positive externalities such as increases in its charitable giving. Instead, it can involve huge gains for a small number of key employees, a large market cap, and the company's conducting its business through contracted labor lacking the wages, benefits, and conditions of employment we would want our children and grandchildren to receive. Corporations not only often have no local identity; they have even been willing to abandon their nations in tax-avoiding inversions. If more people are unwilling to indulge the idea that the "value" of these socially important institutions can be summed up in their stock price, they have good reason.

IV. The Sources of the Current Debate: The Justifiable Concerns and Discontent of the Many, Not the Late-Coming Recognition of Elites that Things Must Change

One of my only genuine quibbles with Professor Rock's incisive essay is his sourcing of the current debate over the purpose of corporations in our society to late-arising symptoms of long-simmering discontent. To trace this debate to statements by the head of a huge money management firm and the Business Roundtable[39] is like tracing the American Revolution to Cornwallis's surrender and the ceding of the colonies by George III. In fact, John Adams said it was a mistake to say the American Revolution started even at the much earlier skirmish at Lexington and Concord, tracing it to the prior acts of civil resistance that preceded the start of formal warfare.[40] When representatives of the very business

38. John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 Const. Comment. 223, 224 (2015). Professor Coates sums up the corporate rent-seeking race nicely, worrying that the concerted efforts of big corporations to tilt the regulatory system in a direction that serves their selfish interests "risks economic harms—a package of risks one could call (with some but only some exaggeration) 'the risk of Russia.'" *Id.* In other words, it leads to a crony capitalism that lacks fairness, integrity, and dynamism.

39. Rock, *supra* note 1, at 2 (tracing the current debate to statements by Larry Fink, the head of the investment management firm BlackRock, and the Business Roundtable, in 2018 and 2019 respectively).

40. *From John Adams to Hezekiah Niles, 13 February 1818*, Nat'l Archives, https://founders.archives.gov/documents/Adams/99-02-02-6854 (last visited Dec. 26, 2020) ("The Revolution was effected before the War commenced. The Revolution was in the Minds and Hearts of the People. A Change in their Religious Sentiments of their Duties and Obligations.").

elites who have been the winners of the redistribution signal their recognition from the working many to the "haves" that our corporate governance system is broken, that is not the start of something; it is the signal that the simmer is threatening to boil over. Before an establishment gets burned, its wiser and more enlightened leaders often speak up to push for a rebalancing that largely preserves the existing order and ameliorates the conditions that have given rise to widespread discontent. In my view, that is what the statements of the Business Roundtable and money managers like BlackRock, State Street, and Vanguard signal: a recognition that an economic system that is so skewed toward the few will not continue to be tolerated by the many.

As a matter of fair attribution, I would have liked to see Professor Rock credit not these late-arriving elites, but rather the many activists and scholars who came to this view and acted on it before it was popular to do so. Within the corporate law academy, scholars who worried about the skewed outcomes produced by our corporate governance system for working people and our environment never got as much attention as those who pushed for tearing down takeover defenses and making it easier for activist investors to influence company policies, and to tie CEO pay to total stock returns. This stockholder-focused scholarship was not without contention, but it primarily centered on the question of whether corporate governance changes would have the effect of increasing stock prices (or some proxy for it like Tobin's Q)—the blinkered metric that many corporate law academics took to be the correct measure, often without thinking deeply about it.[41] As Professor Rock himself points out, this narrow prism was often justified by the idea that other bodies of law took care of matters like the fair treatment of workers or even creditors, consumer safety, and the protection of our environment. Plus, positive law could theoretically even out the portions of the economic pie by redistributive taxing and spending policies.[42] Corporate law itself could just focus on the more burning question of whether the rules of

41. The debate between Rob Daines and Guhan Subramanian illustrates this. *Compare* Robert Daines, *Does Delaware Law Improve Firm Value?*, 62 J. FIN. ECON. 525 (2001) (presenting evidence that Delaware corporate law improves firm value), *with* Guhan Subramanian, The Disappearing Delaware Effect 32–59 (Dec. 2002) (unpublished manuscript available at https://ssrn.com/abstract=345040) (refining Daines's methodology and presenting evidence that his identified trend did not continue after 1996). Another example is the various debates between Lucian Bebchuk, on the one hand, and those more skeptical of takeovers and activism on the other. *Compare* Bebchuk & Cohen, *The Costs of Entrenched Boards*, *supra* note 27 (finding that staggered boards are associated with lower firm value), *and* Lucian Arye Bebchuk, John C. Coates, IV & Guhan Subramanian, *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy*, 54 STAN. L. REV. 887 (2002) (same), *with* Steven M. Bainbridge, *Director Primacy in Corporate Takeovers*, 55 STAN. L. REV. 791, 817–18 (2002) (responding to Bebchuk, Coates, and Subramanian, and arguing that their "shareholder primacy [model] is both normatively and positively inferior to the director primacy model"), Martijn Cremers, Lubomir P. Litov & Simone M. Sepe, *Staggered Boards and Long-Term Value, Revisited*, 126 J. FIN. ECON. 422 (2017) (finding that staggered boards can be positive for firm value), *and* Richard H. Koppes, Lyle G. Ganske & Charles T. Haag, *Corporate Governance Out of Focus: The Debate Over Classified Boards*, 54 BUS. LAW. 1023, 1025–26 (1998) (arguing that staggered boards "best serve the interests of shareholders and management in many situations").

42. I say theoretically for two important reasons. First, because of the influence of corporate and business elites on our political process, the likelihood of this happening has been rendered minuscule. Second, my sense is that the scholars most likely to point to redistribution by government,

corporate governance were optimally designed to increase stock prices. Indeed, even a herd of elite law and economics scholars obsessed with agency costs largely ignored that most Americans were now stockholders of money managers, not companies themselves, and that these money managers had huge agency problems that made it difficult to align their actions with those of their diversified human investors. The predominant strain was just on squeezing corporate management to get more juice to the stockholders,[43] with pushback from a few traditionalist scholars who argued that there was long-term value to stockholders in a more managerialist model that reduces some of the short-term pressures of the market.[44] Scholars who worried about other stakeholders were largely lumped into a general category of corporate social responsibility and not taken very seriously by those predominating at the elite law schools.

Is this overstated? If so, I would say not by much. But equity requires tipping a hat to scholars and commentators who kept an eye on the bigger picture consequences of corporate governance. That people like David Millon, Lyman Johnson, William Lazonick, Harold Meyerson, Thomas Geoghegan, Robert Kuttner, Brett McDonnell, Kent Greenfield, and Marleen O'Connor[45] were not given the prominence of scholars like Lucian Bebchuk and Michael Jensen does not mean there was no debate.[46] Rather, it means that what corporate law and finance elites mistook for the debate was but a narrow slice of it.[47] At best, it

rather than the need to make corporations pay fair wages, are the *least* likely as a class to support the taxing and spending policies that would be necessary to achieve anything like fairness.

43. A primary means of doing so was making companies more susceptible to immediate market whims, through successful efforts to get rid of classified boards, turn decisions to withhold a proxy into a "no" vote that can unseat a director, and to have annual "say on pay" votes even though no rational person believes executive pay should be set on a year-to-year basis.

44. *See, e.g.*, Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 Vand. L. Rev. 83, 86 (2019) (arguing that director discretion best advances stockholder wealth).

45. The list could go on, and include names like Damon Silvers, Stephen Pearlstein, John Coates, Larry Mitchell, Bill Bratton, Stephen Davis, Jon Lukomnik, and David Pitt-Watson—as well as emerging voices interested in the larger subject of corporate governance's effect on society, like David Webber, Matthew Bodie, Elizabeth Pollman, Lynne Paine, Rebecca Henderson, Ewan McGaughey, Lenore Palladino, Zeynep Ton, Dalia Tsuk, David Yosifon, Rick Alexander, Chris Brummer, Lisa Fairfax, and Grant M. Hayden. I am sure I have omitted many. My point is that because these and other folks were interested and shone a light on how unequal the outcomes in our corporate governance system are, they helped bring about the eventual recognition by business elites that things needed to change.

46. Even law and economics titans like Larry Summers questioned, for example, whether corporate takeovers were good for society, rather than just for stockholders. *See* Andrei Shleifer & Lawrence Summers, *Breach of Trust in Hostile Takeovers*, *in* Corporate Takeovers: Causes and Consequences 33 (Alan. J. Auerbauch ed., 1988) (discussing negative effects of takeovers on workers). In fact, after some distancing from that position, Professor Summers has returned strongly to the view that increasing the power of the stock market over companies, and decreasing the voice of workers, has had profoundly negative effects on our society. *See* Anna Stansbury & Lawrence H. Summers, *The Declining Worker Power Hypothesis: An Explanation for the Recent Evolution of the American Economy* (Nat'l Bureau Econ. Res., Working Paper No. 27193, Nov. 2020), https://www.nber.org/papers/w27193.

47. Admittedly, the effects of our corporate governance system on workers has long been a preoccupation of my own. In 2007, a symposium issue of the *Journal of Corporate Law* addressed an article of mine, and had contributions from important thinkers ranging from Steve Bainbridge on the right, to Damon Silvers and Richard Ferlauto on the left, with important centrist corporate governance thinkers like Jack Bogle, Martin Lipton, Larry Hamermesh, Paul Rowe, John Olson, and Ron Gilson, all dilating on larger questions than were characteristic of that decade's debate. *See* Leo E. Strine, Jr., *Toward Common Sense and Common Ground? The Shared Interests of Managers and*

meant grudgingly addressing Margaret Blair and the late Lynn Stout and their defense of director discretion as a better way for corporations to function and the argument that we should encourage not just fair treatment of, but increased firm-specific investments in, workers and communities;[48] and of course it meant aggressively taking on Marty Lipton's long-standing defense of allowing directors room to embrace stakeholder governance. This slice of the debate, however, rarely addressed the larger questions raised by some scholars about the effect corporate governance was having on inequality and the environment.[49] Outside corporate law academia and in the policy realm, the same limited prism dominated for much of the period since the 1980s. Much more time was spent on tearing down defenses to acquisitions and activism, and on tying CEO pay to stock performance, than on whether corporate boards were treating workers fairly, being environmentally responsible, or even prudently managing corporate risk.[50]

But there were some in the vanguard who had their eye on the ball. The Aspen Business and Society program, founded and directed by Judy Samuelson, has consistently focused on the bigger picture question of how corporations affect society, and what can be done to create a corporate governance system that produces more socially productive outcomes.[51] And increasingly those in this camp

Labor in a More Rational Corporate Governance System, 33 J. CORP. L. 1 (2007); *see also* Leo E. Strine, Jr., *Human Freedom and Two Friedmen: Musings on the Implications of Globalization for the Effective Regulation of Corporate Behaviour*, 58 U. TORONTO L.J. 241 (2008); Leo E. Strine, Jr., *Securing Our Nation's Economic Future: A Sensible, Nonpartisan Agenda to Increase Long-Term Investment and Job Creation in the United States*, 71 BUS. LAW. 1081 (2016).

48. *See generally* Margaret M. Blair & Lynn Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999) (arguing that the team production model justifies director discretion, allowing and encouraging firm-specific investments of all members of the corporation, including rank-and-file employees).

49. For an example of high-quality scholarship of this stockholder-focused kind, see, for example, Bebchuk, Coates & Subramanian, *The Powerful Antitakeover Force of Staggered Boards*, *supra* note 41 (arguing that staggered boards are bad for stockholders). Their article generated responses from other scholars trying to show the contrary. *E.g.*, Mark Gordon, *Takeover Defenses Work. Is That Such a Bad Thing?*, 55 STAN. L. REV. 819 (2002) (responding to Bebchuk, Coates, and Subramanian, and arguing that tools such as use of a staggered board are important in balancing the bargaining power of acquirers and targets); Lynn A. Stout, *Do Antitakeover Defenses Decrease Shareholder Wealth? The Ex Post/Ex Ante Valuation Problem*, 55 STAN. L. REV. 845, 856–57 (2002) (responding to Bebchuk, Coates, and Subramanian, and questioning whether the use of staggered boards is bad for stockholders given ex ante benefits); Bainbridge, *Director Primacy in Corporate Takeovers*, *supra* note 40, at 817–18 (arguing that director primacy rather than shareholder primacy is normatively and positively better).

50. Leo E. Strine, Jr., *One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed for the Long Term Unless Their Powerful Electorates Also Act and Think Long Term?*, 66 BUS. LAW. 1 (2010) (showing that even after the manage-to-the-market-driven debacles leading to the passage of Sarbanes-Oxley, institutional investors used their influence to push for more manage-to-the-market policies, such as reducing takeover defenses, votes on executive pay, and so-called "majority voting" to turn withhold votes into votes to unseat directors, and did not push for initiative to improve risk management and compliance).

51. ASPEN INST., TOWARD A NEW CAPITALISM: THE PROMISE OF OPPORTUNITY AND THE FUTURE OF WORK (Jan. 12, 2017), https://www.aspeninstitute.org/publications/the-promise-of-opportunity-and-the-future-of-work/; ASPEN INST., AMERICAN PROSPERITY PROJECT: A NONPARTISAN FRAMEWORK FOR LONG-TERM INVESTMENT (Dec. 19, 2016), https://www.aspeninstitute.org/publications/the-american-prosperity-project-policy-framework/; ASPEN INST., LONG-TERM VALUE CREATION: GUIDING PRINCIPLES FOR CORPORATIONS AND INVESTORS (June 15, 2010), https://www.aspeninstitute.org/publications/long-term-value-

began to recognize that making corporations more socially responsible required making the institutional investors who now controlled them live up to their responsibilities and embrace a more enlightened form of stewardship, one focused on fostering sustainable growth and the fair treatment of the workers whose capital they increasingly held. And the founders of the nonprofit organization B Lab created a new form of corporation, the Benefit Corporation ("B Corps"), specifically designed to encourage corporations to serve a positive social purpose, to avoid externalities that harmed society, and to govern themselves in a manner that was fair to all stakeholders.[52] Not only that, but they fueled a statutory movement to get the model passed in thirty-right states, including the market leader, Delaware.[53] In short, long before the Business Roundtable, BlackRock, or other late-arriving yet well-meaning organizations affiliated with business elites that are cited by Professor Rock arrived on the scene, there were those deeply concerned that our corporate governance system was tilting far too much toward the "haves" at the expense of the many.

In tracing the current dynamic to very recent statements by powerful wealthy interests, Professor Rock also slights a discussion of the important reasons why there has been so much growing societal interest in corporate governance reform. In this reply, I cannot do justice to those causes, but a few are worth underscoring.

A. Bailing Out Those Who Caused the Need for the Bailout

The evidence is undisputed that the financial sector of our economy has been a huge winner in recent generations. But it is also hard to dispute that its wins have not been associated with corresponding gains for society as a whole, but rather with an increasing concentration of wealth at the top, and greater wage stagnation and inequality for the rest. Just as importantly, this financialization of the economy has been a cause of greater instability, leverage, and risk.[54]

creation-guiding-principles-for-corporations-and-investors/; Aspen Inst., Overcoming Short-Termism: A Call for a More Responsible Approach to Investment and Business Management (Sept. 16, 2009), https://www.aspeninstitute.org/publications/overcoming-short-termism-call-more-responsible-approach-investment-business-management/; *see generally* Judy Samuelson, The Six New Rules of Business: Creating Real Value in a Changing World (2021) (highlighting and examining six new norms for businesses that would usefully disrupt the old shareholder primacy model).

52. *About B Lab*, B Corp., https://bcorporation.net/ (last visited Dec. 26, 2020). The founders of B Lab were Jay Coen Gilbert, Bart Houlahan, and Andrew Kassoy. *Jay Coen Gilbert, Bart Houlahan, and Andrew Kassoy—B-Lab Founders*, Conscious Capitalism, https://www.consciouscapitalism.org/heroes/b-lab-founders (last visited Dec. 26, 2020).

53. *Why Pass Benefit Corporation Legislation*, B Corp., https://benefitcorp.net/policymakers/why-pass-benefit-corporation-legislation (last visited Dec. 26, 2020) ("38 states including the District of Columbia have passed benefit corporation legislation"); Del. Code Ann. tit. 8, § 361 (2020); *see also* Frederick Alexander et al., *From Shareholder Primacy to Stakeholder Capitalism*, B Lab & The S'holder Commons (Sept. 7, 2020) ("As B Corps have been successful in both public and private markets, over 10,000 businesses have followed suit by becoming benefit corporations. Over the last decade, these pioneers were enabled by our nonpartisan initiative that passed benefit corporation statutes in 38 states, always with bipartisan support.").

54. *See* Anat R. Admati, *A Skeptical View of Financialized Corporate Governance*, 31 J. Econ. Persp. 131, 132 (2017) ("[F]inancialized governance provides incentives for slanted presentations of accounting data and even in some cases outright accounting fraud. Misconduct, law evasion, or

Sound businesses were acquired and levered up unsustainably, resulting in firm failures and layoffs. Risky financial gamesmanship and fraud caused the demise of others. Imprudent lending practices fueled by the securitization casino proliferated. This has repeatedly resulted in the American taxpayer coming to the rescue, with a recovery plan that has to date always put the financial sector, that which could fairly be said to have caused the crisis, at the front of the line in the response. This series of bailouts—in 1987 after the Wall Street crash;[55] in the 1990s to address the savings and loans crisis;[56] in 2001 and 2002 during the recession identified with Enron and WorldCom;[57] and of course in 2008 and 2009 after the financial crisis that caused the Great Recession[58]—has involved huge infusions of cash to the financial sector, who get to factor it for profit in doling out indirectly the stimulus and relief needed by the many harmed by the irresponsibility. The grossly inequitable outcomes following these debacles, in which the larger public experienced economic insecurity, losses of employment, and a growing gap between themselves and the financiers and corporate managers at the top, increased public cynicism, caused understandable discontent, and led many to question the idea that markets were fair and well designed to price and therefore address excessive risk.

fraud directed at other stakeholders such as customers and governments may benefit shareholders, but they may ultimately have to bear legal expenses, large fines, and loss of reputation. Financialized incentives can also lead to misallocation through 'short-termism' or mismanagement of risk, with the upside benefiting those controlling corporations and the downside harming others, including shareholders and the broader economy.").

55. *Stock Market Crash of 1987*, Fed. Res. Hist., https://www.federalreservehistory.org/essays/stock-market-crash-of-1987 (last visited Dec. 26, 2020) (documenting how the Federal Reserve served as a source of liquidity to support the financial system after the 1987 stock market crash); Robert T. Parry, *The October '87 Crash Ten Years Later*, Fed. Res. Bank San Francisco (Oct. 31, 1997) (documenting how the Federal Reserve responded to the 1987 crash, including by performing lender-of-last-resort activity and adding substantially to reserves through open market operations); Ken Phillips, *The Bailout Bubble*, L.A. Times (Dec. 28, 1997), https://www.latimes.com/archives/la-xpm-1997-dec-28-op-2830-story.html ("Bailouts for U.S. investors took other forms as well. After the stock market crashed in 1987, the Federal Reserve pumped out money—liquidity, in red-suspender parlance—to get the indexes back up. Some traders contend that the Fed also bought futures contracts.").

56. Richard W. Stevenson, *G.A.O. Puts Cost of S. & L. Bailout at Half a Trillion Dollars*, N.Y. Times (July 13, 1996), https://www.nytimes.com/1996/07/13/business/gao-puts-cost-of-s-l-bailout-at-half-a-trillion-dollars.html (reporting that the General Accounting Office estimated the final cost of the savings and loan bailout at $480.9 billion).

57. Luka Nikolic, *A Tale of Two Bubbles: How the Fed Crashed the Tech and the Housing Markets*, F. Econ. Educ. (Aug. 10, 2019), https://fee.org/articles/a-tale-of-two-bubbles-how-the-fed-crashed-the-tech-and-the-housing-markets/ ("As a response to these two economic shocks, Federal Reserve Chairman Alan Greenspan decided to cut rates to one percent starting in 2001 in order to stimulate the economy. This expansionary policy was Greenspan's weapon of choice, as he had been praised in the past for saving the United States from several crises by using the same policy. After 11 federal funds rate cuts, the federal funds rate was one percent from June 2003 to June 2004.").

58. *See Bailout Tracker*, ProPublica, https://projects.propublica.org/bailout/ (last updated Nov. 9, 2020) (tracking the $700 billion-plus bailout to rescue the financial system during the Great Recession); Deborah Lucas, *Measuring the Costs of Bailouts*, 11 Ann. Rev. Fin. Econ. 85 (2019) (estimating the direct cost of the bailouts associated with the 2008 financial crisis as being around $500 billion, with the largest direct beneficiaries being the unsecured creditors of financial institutions); Louise Story & Eric Dash, *Bankers Reaped Lavish Bonuses During Bailouts*, N.Y. Times (July 31, 2009), https://www.nytimes.com/2009/07/31/business/31pay.html (reporting on the billions recipients of the government bailout spent on bonuses for high-level executives).

The continued focus of institutional investors on making public companies more and more subject to immediate market whims, inflating the pay of CEOs to compensate them for managing ruthlessly to increase total stock return, and facilitating hedge fund activism, inversions to tax havens, and going private, rather than on risk management and prudence, compounded these concerns. We shall see whether the imbalanced pandemic recovery efforts that have taken a markedly Wall Street and stockholder-first approach further turns up the heat on policy makers for change.

B. Perhaps Crime Does Pay, If It Is Done by Corporations

The huge costs to society and danger to the future of humanity caused by other forms of corporate overreaching has also increased the demand for changes to corporate governance itself. The most high profile of the issues, and the one that has played the biggest role in fueling demands for investors and companies to change their behavior, has been around climate change. The fact that many segments of corporate America, particularly in the energy space, used corporate resources to obscure the realities of the harm being caused by human-driven carbon emissions, to deter action at a time when it would have been easier to address the harm, and to put immediate profits over the future of humanity angered many.[59] It eventually rung bells among the "haves" who realized that an economic system that was so focused on the short term that it could harm our planet, endanger our species, and destroy many others was unsustainable and dangerous. But, climate change is just one example. The opioid addiction crisis that has harmed millions was caused in large part by corporations putting profit over morals in the most basic sense.[60] Other scandals in the banking industry centered on the exploitation of vulnerable clients, particularly those with limited means, by selling them products and services they did not need, and in some cases did not even know they were paying for.[61] Yet, while American prisons are filled with poor and especially black people who have committed economic crimes,[62] the incarceration of corporate leaders who cause such

59. For a timeline of these energy industry efforts at concealment and confusion, see *Tweet the Story of the Fossil Fuel Industry's Climate Deception*, Union Concerned Scientists (Mar. 11, 2017), https://www.ucsusa.org/resources/tweet-story-fossil-fuel-industry's-climate-deception.

60. *See, e.g.*, Geoff Mulvihill, *OxyContin Maker Purdue Pharma Pleads Guilty in Criminal Case*, Associated Press (Nov. 24, 2020), https://apnews.com/article/purdue-pharma-opioid-crisis-guilty-plea-5704ad896e964222a011f053949e0cc0 ("Purdue Pharma pleaded guilty [] to three criminal charges, formally taking responsibility for its part in an opioid epidemic that has contributed to hundreds of thousands of deaths.").

61. An iconic American financial institution, Wells Fargo, has come to exemplify this issue. Brian Tayan, *The Wells Fargo Cross-Selling Scandal*, Harv. L. Sch. F. on Corp. Governance (Feb. 6, 2019), https://corpgov.law.harvard.edu/2019/02/06/the-wells-fargo-cross-selling-scandal-2/.

62. Karen Dolan, *The Poor Get Prison: The Alarming Spread of the Criminalization of Poverty*, Inst. Pol'y Stud. (Mar. 18, 2015), https://ips-dc.org/wp-content/uploads/2015/03/IPS-The-Poor-Get-Prison-Final.pdf ("Poor people, especially people of color, face a far greater risk of being fined, arrested, and even incarcerated for minor offenses than other Americans. A broken taillight, an unpaid parking ticket, a minor drug offense, sitting on a sidewalk, or sleeping in a park can all result in jail time.").

widespread harm by intentional acts of deceit and overreaching were rare.[63] And when human beings who are not corporate leaders commit crimes, no one worries whether their business continues apace while they are in prison, or what that economic impact might be. But when corporations commit crimes, they (and hence their investors) do not suffer the kind of devastating economic harm that individuals often do.[64] Rather, corporations just proceed under new, or sometimes even the same, management, after paying fines that many of them regard as just the price of doing business.

C. More Pie for the Few, Crumbs for the Many

Perhaps no factor has driven demand for change more than the profound shift in gainsharing that has characterized American corporate governance during the last forty years.[65] Sure, we all wish that the overall pie would have grown more, but we aren't inventing new products as transformational as the automobile and refrigerator now.[66] But plenty of new pie was baked. What changed the most was not growth, but how the spoils of improved productivity and profitability were distributed. Consistent with the power dynamics of a corporate governance

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63. The reader interested in the subject of whether corporate law has been enforced as vigorously as it should have been in recent decades should see Jennifer Traub, Big Dirty Money: The Shocking Injustice and Unseen Costs of White Collar Crime (2017); John C. Coffee, Jr., Corporate Crime & Punishment: The Crisis of Underenforcement (2020).

64. Terry-Ann Craigie et al., *Conviction, Imprisonment, and Lost Earnings: How Involvement with the Criminal Justice System Deepens Inequality*, Brennan Ctr. Pub. Pol'y Advoc. (Sept. 15, 2020), https://www.brennancenter.org/our-work/research-reports/conviction-imprisonment-and-lost-earnings-how-involvement-criminal ("[T]hose who spend time in prison miss out on more than half the future income they might otherwise have earned. . . . As a perpetual drag on the earning potential of tens of millions of Americans, these costs are not only borne by individuals, their families, and their communities. They are also system-wide drivers of inequality and are so large as to have macroeconomic consequences."); Matthew Menendez & Lauren-Brooke Eisen, *The Steep Costs of Criminal Justice Fees and Fines*, Brennan Ctr. Pub. Pol'y Advoc. (Nov. 21, 2019), https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines ("[C]riminal justice debt represents a significant barrier to a person's chances of successfully reentering society following a conviction. It also hurts the families of those who are incarcerated, depriving them of a wage earner while adding new court costs to the defendant's criminal debts.").

65. For excellent literature on this and showing that inequality and wage stagnation has grown enormously in the period since the Reagan Administration, see Emanuel Saez & Gabriel Zachman, *Wealth Inequality in the U.S. Since 1913: Evidence from the Capitalized Income Tax Data* (Nat'l Bureau Econ. Res., Working Paper No. 20625, Oct. 2014), https://perma.cc/E77Y-B54u (last visited Dec. 26, 2020); Lawrence Mishel, Elise Gould & Josh Bivens, Econ. Pol'y Inst., Wage Stagnation in Nine Charts (Jan. 6, 2015); Chad Stone et al., *A Guide to Statistics on Historical Trends in Income Equality*, Ctr. Budget & Pol'y Priorities (Jan. 13, 2020), https://www.cbpp.org/sites/default/files/atoms/files/11-28011pov._0.pdf.; Katherine Schaefer, *6 Facts About Economic Inequality in the U.S.*, Pew Res. Ctr. (Feb. 7, 2020), https://www.pew research.org/fact-tank/2020/02/07/6-facts-about-economic-inequality-in-the-us/; Drew DeSilver, *For Most U.S. Workers, Real Wages Have Barely Budged in Decades*, Pew Res. Ctr. (Aug. 7, 2018), https://WS.pewresearch.org/fact-tank/2018/08/07/for-most-us-workers-real-wages-have-barelybudged-for-decades/. For example, real median household income has only grown by 22 percent since 1984, while the top 1 percent's income has grown by 180 percent. Saez & Zachman, *supra*, at app. tbls. A, 2.

66. *See* Robert J. Gordon, The Rise and Fall of American Growth: The U.S. Standard of Living Since the Civil War (2017) (describing how the rate of growth since 1970 has declined because the life-altering scale of innovations between 1870 and 1970 cannot be repeated).

and political system skewed toward the powerful and against other stakeholders, the share for top management, stockholders, and money managers went way up, while the share for workers below top management went way down.[67] The distributional impact of this shift was profound because the stockholder class, even today, remains unrepresentative of the general American public and is comparatively much better off.[68] Shifting a large portion of what had formerly gone into worker's pay caused much greater economic insecurity and inequality, and it particularly hurt Black Americans—in their first half-century of anything remotely resembling free participation in the labor market—who are much more likely to be in the working and lower middle class.[69] Many elites sloughed off

67. The data shows that largely up until the Reagan Administration reversed our nation's commitment to the New Deal, equality in the United States was rising, including for Black Americans, and wage increases for workers were more closely correlated with increases in corporate profits, CEO pay, and stock prices. Since that period, there has been a huge decline in the share of capitalist gains in worker pay, while there have been seismic increases in the return to stockholders and top managers. *See generally The Productivity—Pay Gap*, ECON. POL'Y INST. (July 2019), https://www.epi.org/productivity-pay-gap/ ("From 1979 to 2018, net productivity rose 69.6 percent, while the hourly pay of typical workers essentially stagnated—increasing only 11.6 percent over 39 years (after adjusting for inflation).").

To cite only one of many stark examples, American productivity grew 69.6 percent from 1979 to 2018, while CEO compensation grew by 940 percent, and the S&P 500 grew by 2400 percent. For U.S. workers? A total increase of 11.6 percent. *Id.*; *see also* William Lazonick, *The Financialization of the US Corporation: What Has Been Lost, and How It Can Be Regained*, 36 SEATTLE L. REV. 857, 857–60 (2013) (describing how inequality declined during the post-World War II era, and then increased markedly since the 1980s).

68. Robin Wigglesworth, *How America's 1% Came to Dominate Stock Ownership: Market's Tenfold Gain Since 1990 Has Mostly Gone to the Richest Part of the Population*, FIN. TIMES (Feb. 11, 2020), https://financialpost.com/investing/how-americas-1-came-to-dominate-stock-ownership (citing statistics that the top 1 percent own 56 percent of stocks, that the remainder of the top 10 percent own most of the rest, and that the 90 percent of Americans below the top 10 percent only own 12 percent of the stock, and noting that the trends toward the top have accelerated in recent decades); *see also* B. Ravikumar, *How Has Stock Ownership Trended in the Past Few Decades*, ST. LOUIS FED (Apr. 9, 2018), https://www.stlouisfed.org/on-the-economy/2018/april/stock-ownership-trended-past-few-decades (demonstrating the trend toward greater inequality, with the top decile owning the overwhelming bulk of stock).

For an excellent overall summary of just how unequal income and wealth is distributed in the United States, see G. William Domhoff, *Wealth, Income, and Power*, WHO RULES AMERICA?, https://whorulesamerica.ucsc.edu/power/ wealth.html (last visited Dec. 26, 2020).

69. *See* Domhoff, *supra* note 68, at 7 (showing that the income gap disfavoring Black people is growing, that they are far behind white people, and that the wealth gap in favor of white people in 2013 was over 200 to 1 when home equity was excluded); Kim Parker & Richard Fry, *More Than Half of U.S. Households Have Some Investments in the Stock Market*, PEW RES. CTR. (Mar. 25, 2020), https://www.pewresearch.org/fact-tank/2020/03/25/more-than-half-of-u-s-households-have-some-investment-in-the-stock-market/ (showing median stockholdings of black Americans at one-fifth that of white Americans); Kristin McIntosh et al., *Examining the Black-White Wealth Gap*, BROOKINGS INST. (Feb. 27, 2020), https://www.brookings.edu/up-front/2020/02/27/examining-the-black-white-wealth-gap/ (showing the huge wealth and income gap disfavoring black Americans and demonstrating that it is growing); David Leonhardt, *The Black-White Wage Gap Is as Big as It Was in the 1950s*, N.Y. TIMES (June 25, 2020), https://www.nytimes.com/2020/ 06/25/opinion/sunday/race-wage-gap.html (documenting that racial wealth and income gap shrunk in the post-war era, citing scholars attributing this to rising wages due to strong unions, the inclusion of formerly excluded jobs that many black workers held in the minimum wage by Great Society legislation in 1966, and other policies that benefited all working people, but that these gains then reversed from the 1980s forward). *See generally Facts: Racial Economic Inequality*, INEQUALITY.ORG, https://inequality.org/facts/racial-inequality/ (last visited Dec. 26, 2020) (comprehensively documenting

the growing inequality as solely the result of globalization, or as only involving uneducated workers. But that ignored the reality that the decline in gainshifting was much greater in the United States;[70] involved how gains were distributed rather than whether American companies were competitive; that the American workforce was more educated and capable of adaptation than ever before;[71] and that many highly educated and skilled workers suffered from wage stagnation. This declining share for workers not only hurt Black workers, it also hit many white workers and opened the door for divisive appeals (in varying degrees of subtlety) blaming the fate of struggling white workers on people of color and immigrants, and pitting workers against each other.

For more constructive observers, the declining share represented a failure to remember the lessons of history and a return to economic policies that had led to the Great Depression and the rise of Communism and Fascism.[72] These

racial inequality, including that the median Black family had net wealth of only $3,500 compared to white median family wealth of $147,000, and that this trend has grown considerably since the early 1980s; showing that of the Fortune 500 CEOs just fourteen were Black or Latino, whereas Black and Latinos would comprise 44.1 percent of the workers who would benefit from increasing the federal minimum wage; and that the top 10 percent of black families earn only around $60,000 compared to $117,986 for white families; and that white workers made 28 percent more than the typical Black worker). For an excellent article discussing profound racial inequality and situating it within the current pandemic, see Elise Gould & Valerie Wilson, *Black Workers Face Two of the Most Lethal Preexisting Conditions for Coronavirus—Racism and Inequality*, Econ. Pol'y Inst. (June 1, 2020), https://www.epi.org/publication/black-workers-covid/. For an article connecting corporate governance with racial inequality, see Eleanor Bloxham & Bruce F. Freed, *It's Time for Boards and Institutional Investors to Act on Racial Justice*, Barron's (June 19, 2020), https://www.barrons.com/articles/its-time-for-boards-and-institutional-investors-to-act-on-racial-justice-51592527239 (describing the role of large institutional investors in enabling racial justice by opposing corporate political disclosure resolutions, which enabled companies to quietly donate to Republicans and help flip state legislatures and elect governors who opposed legislation or programs that would address inequality and racial justice issues).

70. Domhoff, *supra* note 68, at 11, 17 (showing that U.S. income inequality now far exceeds that of its major market economy allies—including Germany, Japan, and the United Kingdom—and that there is a similar trend in wealth concentration); Anna Stansbury & Lawrence H. Summers, *The Declining Worker Power Hypothesis: An Explanation for the Recent Evolution of the American Economy* (Nat'l Bureau Econ. Res., Working Paper No. 27193, May 2020), https://www.nber.org/papers/w27193 (demonstrating how much of greater inequality in the United States can be attributed to the change in power dynamics within corporate governance, with worker power going down and stock market and institutional investor power increasing).

There is of course more to say about the influence that globalizing the power of mobilized capital, but not protections for workers and the environment, has had on corporate behavior, and indeed on the very notion of a corporation having a national identity, and the influence of these factors on calls for an increased corporate attention to social responsibility. Sufficient unto this paper are the reasons above.

71. For a comprehensive examination of why wage stagnation occurred and a refutation of the idea that it was due to a decline in the education and skills of the U.S. workforce, especially given stagnation in wages among college-educated middle managers, see generally William Lazonick, *Labor in the 21st Century: The Top 0.1% and the Disappearing Middle-Class* (Inst. for New Econ. Thinking, Working Paper No. 4, 2015), https://papers.ssrn.com/abstract=2586239.

72. The economic programs proposed by both President Biden and his leading primary opponent, Senator Bernie Sanders, were both grounded on this viewpoint, with the President hewing more strictly to the American example set by the New Deal and Great Society, while Senator Sanders more openly embraced lessons from our EU social democratic allies. *See Economic Recovery*, Biden-Harris Transition, https://buildbackbetter.gov/priorities/economic-recovery/ (last visited Dec. 26, 2020) (seeking to create millions of new good-paying union jobs and to mobilize the economy with an infrastructure plan); *Bernie Sanders on the Issues*, BernieSanders.com, https://berniesanders.com/issues/

observers wanted a restoration of the New Deal/European Social Democratic model in which market economies function more equitably, and to adapt that model to meet the challenges of the concentrated financial power existing in the twenty-first century.[73]

D. The Corporate Power Ratchet: How Corporate Influence Has Made Externality Regulation Less Effective and Less Realistic

Now, the final causal factor is one that Professor Rock eludes to, but largely by asking the question: why not just pass laws and adopt regulations to protect workers, consumers, the environment, and society generally from excessive corporate greed? He adverts briefly to the frustration that has been felt by the inability of our society to sustain the New Deal/Great Society consensus and to ensure that our economy works in a balanced way that helps the many.[74] But he ends his article on a conservative note, fearing that the demands for change within corporate governance itself threaten more harm than they promise good.[75] In describing the factors leading to where we now are, Professor Rock highlights Milton Friedman and his belief that corporations should focus exclusively on making profits within the rules of the game.[76]

But what Professor Rock does not discuss is that Milton Friedman and his acolytes have also engaged in a relentless campaign to eviscerate the rules of the game that protect workers and other corporate stakeholders. Their inculcation of their belief system into generations of corporate leaders has led to corporations using their vast resources to distort our political process.[77] The name Lewis Powell is not cited by Professor Rock, but Powell, more famous as a justice of the Supreme Court, inspired "praxis" by corporate America to fill out Friedman's vision.[78] In his capacity as an advisor to the U.S. Chamber of Commerce, Powell called on the American business community to rise up against the regulatory state and to use all their resources to impede it, by lobbying aggressively

(last visited Dec. 26, 2020) (proposing, for example, doubling union membership, eliminating "Right to Work for Less" laws, enacting a federal jobs guarantee, and creating millions of healthcare and New Green Deal jobs).

73. For a variety of views aligned with this perspective, see *A New Deal for This New Century: Making Our Economy Work for All*, N.Y.U. L. Inst. Corp. Governance & Fin. (Oct. 3–4, 2019), https://www.law.nyu.edu/centers/icgf/ events/new-deal-new-century; *Economic Policy Conference*, N.Y.U. L. Inst. Corp. Governance & Fin. (Oct. 1, 2020), https://its.law.nyu.edu/eventcalendar/index.cfm?fuseaction=main.detail&id=78618. Neither of these conferences would have occurred but for the leadership of the N.Y.U. Law Institute for Corporate Governance and Finance that Professor Rock heads.

74. Rock, *supra* note 1, at 391–92.

75. *Id.* at 394–95.

76. *Id.* at 390–91.

77. *See* Liz Kennedy, *Corporate Capture Threatens Democratic Government*, Ctr. Am. Progress (Mar. 29, 2017), https://www.americanprogress.org/issues/democracy/news/2017/03/29/429442/corporate-capture-threatens-democratic-government/; Strine, *Corporate Power Ratchet*, *supra* note 13.

78. My use of the Marxist term for converting theory into action is a hat tip to Professor Rock's citation to Vladimir Lenin and the importance of ideology in affecting behavior. Rock, *supra* note 1, at 22.

against legislation, electing candidates who favored corporate interests, and using the judiciary as an instrument to get its way.[79]

During the period when the business community has embraced Powell's call to arms, some important laws did get through the legislation gantlet that business lobbyists and contributors erected to stop important legislation protecting society. But many of those laws were struck down by an increasingly activist judiciary, which departed from past precedent to reach out and strike down legislation, such as McCain–Feingold,[80] Medicaid expansion in the Affordable Care Act,[81] and the Voting Rights Act.[82] The business community also weaponized the litigation process to get activist judges to strike down important environmental regulations;[83] use the First Amendment to elevate the interests of corporations over protections for their workers, consumers, and even public safety against firearms;[84] and render hollow the protections of laws like the National Labor Relations Act.[85]

By exercising their political muscle and expenditures, corporate America tilted the whole political system to the right, seating federal and state officials who often sought to undermine the implementation of laws on the books and made it much more difficult to pass new legislation.[86] The effects of these integrated actions

79. Memorandum from Lewis Powell to the Chairman of the Educ. Comm. of the U.S. Chamber of Commerce, Attack on American Free Enterprise System (Aug. 23, 1971), https://research.greenpeaceusa.org/?a=view&d=5971&_ga=2.180401764.2131756745.1607699824-1906142670.1607699824. Powell could never feel his advice was not taken. The U.S. Chamber of Commerce and other corporate interests dominate lobbying expenditures. Strine, *Corporate Power Ratchet*, *supra* note 13, at 431–32 n.31 (collecting sources demonstrating this point); Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course: The Tension Between Conservative Corporate Law Theory and* Citizens United, 100 CORNELL L. REV. 335, 359–62, 387 (2015) (collecting sources demonstrating how much corporate political spending surged after *Citizens United* allowed the use of treasury funds for that purpose); *see also* Megan R. Wilson, *Lobbying's Top 50: Who's Spending Big*, THE HILL (Feb. 7, 2017), https://perma.cc/R4Y7-TQSA (showing that forty-nine of the top fifty spending lobbying interests were business or business-related).

80. Citizens United v. FEC, 558 U.S. 310 (2010).

81. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

82. Shelby Cnty. v. Holder, 570 U.S. 529 (2013).

83. *E.g.*, Michigan v. EPA, 576 U.S. 743 (2015); Util. Air Regulatory Grp. v. EPA, 573 U.S. 302 (2014); Rapanos v. United States, 547 U.S. 715 (2006).

84. The scholarship of John Coates, Robert Post, and Amanda Shandor documents this well. *See* John C. Coates, IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223 (2015); Robert Post & Amanda Shandor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165 (2015). And, of course, compare the treatment of corporations in *Citizens United* with the treatment of labor unions in cases like *Janus* v. *American Federation of State, County & Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); *see also* Leo E. Strine, Jr. & Jonathan R. Macey, Citizens United *as Bad Corporate Law*, 2019 WIS. L. REV. 451 (discussing this issue); Strine & Walter, *Conservative Collision Course*, *supra* note 79, at 359–62, 387 (same).

85. For my own comprehensive take on this phenomenon, see Strine, *Corporate Power Ratchet*, *supra* note 13. For discussion of the negative effect of this on the ability of workers to exercise their rights under the NLRA, see Leo E. Strine, Jr., *Development on a Cracked Foundation: How the Incomplete Nature of New Deal Labor Reform Presaged Its Ultimate Decline: A Response to Cuéllar, Levi, and Weingast*, 57 HARV. J. ON LEGIS. 67, 83–84 (2020).

86. As an important new study by the Center for Political Accountability shows, the amount of spending by public companies to influence political elections is huge, goes overwhelmingly to Republican candidates and committees, and has been used to seat candidates who have gerrymandered

were reinforcing, because passing legislation not only got harder, but if the legislation did go through, the likelihood that it or key implementing regulations would get struck down by the courts also grew.[87]

With these corporate power dynamics making external regulation to protect society and corporate stakeholders much less effective and realistic, it seems to me natural and not at all surprising that advocates for workers, consumers, and the environment would begin to demand reforms to corporate law itself. That seems even more natural when so many Americans were becoming "forced capitalists," effectively required by federal mandate to turn over part of their pay every month to money managers, if they were lucky enough to be paid sufficiently to be able to save for retirement.[88] Perhaps, these advocates thought, if corporate law itself, and particularly the power dynamics within it, would change, we can get corporations themselves to behave more responsibly. Not only would this involve them treating their stakeholders and society better, it would also specifically involve trying to limit the extent to which corporations use their influence to prevent the political process from putting in place effective external regulations. That is, in order to revitalize external regulation, advocates of a fairer society rationally became convinced that internal corporate governance reform was required.

V. Time for 21st Century Corporate Governance for a 21st Century Economy: A More Optimistic, and Less Fearful, Perspective

Professor Rock ends on a pessimistic note. He fears that instead of focusing on external laws protecting stockholders, populist pressures will be exerted on corporate law itself and result in changes that undermine, rather than improve, social welfare.[89]

legislative districts and put in place ballot restrictions harming black people; opposed action to address climate change; opposed LGBTQ rights; attacked the Affordable Care Act, including during the pandemic; and sought to restrain women's reproductive rights. *Conflicted Consequences*, Ctr. Pol. Accountability (July 21, 2020), https://politicalaccountability.net/hifi/ files/Conflicted-Consequences.pdf. As the report shows, in many cases the companies donating large amounts to candidates and committees taking these policy positions were, at the same time, publicly claiming that their corporate policy was to the contrary. That is, these corporations were saying one thing on issues like racial justice and climate change, while using their funds to tilt government policy in the opposite direction.

87. In other work, I have explained how the ideology of stockholder primacy encourages corporations to focus their political spending on supporting candidates and committees that will minimize regulation of corporate externalities. Strine & Walter, *Conservative Collision Course*, *supra* note 79, at 349–50; Strine, *Corporate Power Ratchet*, *supra* note 13, at 442. There is evidence that companies that engage more of such rent-seeking behavior tend to perform less well than companies that instead focus on making money by developing and selling high-quality products and services. Leo E. Strine, Jr., *Fiduciary Blind Spot: The Failure of Institutional Investors to Prevent the Illegitimate Use of Working Americans' Savings for Corporate Political Spending*, 97 Wash. U. L. Rev. 1007, 1034–35 (2020).

88. Strine, *Fiduciary Blind Spot*, *supra* note 87, at 1011, 1020–22 (describing how "the mutual fund industry is federally subsidized because powerful tax incentives require American workers to become 'forced capitalists'").

89. In this skepticism that corporate law itself has much to offer stakeholders like workers, Professor Rock echoes well-reasoned arguments from scholars like Steve Bainbridge and Ron Gilson. *See*

I am more optimistic.[90] For starters, one of the most central proposals for reforming corporate law, the public benefit corporation model, builds on and strengthens traditional corporate law, rather than turning it upside down.[91] In particular, the model rests on two important and related factors that other commentators also tend to slight in addressing the corporate purpose debate. The first is that part of the genius of American corporate law, if it has any, has been in determining the conditions under which it is best for the judiciary to keep its hands off corporate decision-making.[92] This is fundamental to the business judgment rule itself, which provides, as Professor Rock emphasizes,

Stephen M. Bainbridge, *The Shared Interests of Managers and Labor in Corporate Governance: A Comment on Strine*, 33 J. CORP. L. 21, 24–26 (2007) (explaining reasons he believes corporate law has little potential to help workers in particular); Ronald J. Gilson, *Leo Strine's Third Way: Responding to Agency Capitalism*, 33 J. CORP. L. 47, 54–55 (2007) (arguing that law external to corporate law, not within corporate law, is what should and can protect workers).

90. This does not mean I am correct, of course. In the period running up to the 2016 election, I believed that the obvious economic insecurity in the nation would lead to pressures for bipartisan action to make our economy fairer, and so did others. *See generally* Leo E. Strine, Jr., *Securing Our Nation's Economic Future: A Sensible, Nonpartisan Agenda to Increase Long-Term Investment and Job Creation in the United States*, 71 BUS. LAW. 1081 (2016) (discussing a specific agenda to address calls for economic reform); ASPEN INST., AMERICAN PROSPERITY PROJECT: A NONPARTISAN FRAMEWORK FOR LONG-TERM INVESTMENT 5–6 (Dec. 19, 2016), https://assets.aspeninstitute.org/content/uploads/2017/01/American-Prosperity-Project_Policy-Framework_FINAL-1.3.17.pdf. But only one candidate talked about economic insecurity during that election (albeit in a divisive and counterproductive way), and what has resulted is four years of inaction, at best, even as there has been an intensification of the trend toward inequality and unfairness. We shall see what the new election results portend, but I believe that FDR's view of fear, expressed in his 1933 inaugural address, is as relevant today. *First Inaugural Address of Franklin D. Roosevelt*, YALE L. SCH. LILLIAN GOLDMAN L. LIBR., https://avalon.law.yale.edu/20th_century/froos1.asp (last visited Dec. 26, 2020) ("This is preeminently the time to speak the truth, the whole truth, frankly and boldly. Nor need we shrink from honestly facing conditions in our country today. This great Nation will endure as it has endured, will revive and will prosper. So, first of all, let me assert my firm belief that the only thing we have to fear is fear itself—nameless, unreasoning, unjustified terror which paralyzes needed efforts to convert retreat into advance. In every dark hour of our national life a leadership of frankness and vigor has met with that understanding and support of the people themselves which is essential to victory.").

91. To be sure, there is now debate around how effective the PBC model is in promoting a stakeholder governance approach, and some are more skeptical than others. *Compare* Jill E. Fisch & Steven Davidoff Solomon, *The "Value" of a Public Benefit Corporation*, RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD (forthcoming 2021) (examining the value of the PBC model, finding it ineffective and overstated as a means of promoting stakeholder governance, and arguing the model should be reformed to require a more definable purpose statement and allow for accountability mechanisms) *with* Frederick Alexander, *Putting Benefit Corporation Statutes into Context by Putting Context into the Statutes*, 76 BUS. LAW. (forthcoming 2021) (a strong supporter of the B Corp model but one who recognizes that fully-realizing the benefits of the PBC model will require not just a shift in principals but also the building of "parallel concepts that allow for monitoring, incentivizing and influencing managers to reject the type of profits that sap the strength of our social and environmental systems, but to continue to pursue those profits that result from the creation of authentic value"). With the growing number of larger B corporations, including those that are now public, we will have more evidence in coming years.

92. *See* Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, *supra* note 44, at 109–29 (arguing that "the business judgement rule is justified precisely because judicial review threatens the board's authority," that judges are not business experts, and that the business judgment rule encourages risk taking and has positive effects on internal board dynamics); Blair & Stout, *A Team Production Theory of Corporate Law*, *supra* note 47, at 315–16 (arguing that providing directors wide discretion to act, so long as they are not using their positions to benefit themselves, allows them the latitude to promote the joint welfare of the corporation).

wide discretion for corporate directors, even in Delaware, to govern the firm in a manner that is respectful of all stakeholders, so long as in doing so the directors seek to advance the interests of the stockholders as well.[93] The second is that corporate law often seeks to promote certain conduct by corporate managers by means of encouragement and the articulation of a normative duty, not by threat of monetary liability. A good example of this is the duty articulated by the *Caremark* case in Delaware.[94] As a normative matter, Chancellor Allen's decision encouraged directors to step up and be active monitors to ensure that their companies put in place and attended to systems of reporting and monitoring designed to ensure compliance with law. For that reason, *Caremark* is rightly seen as having inspired greater compliance efforts by corporate America.[95] But Chancellor Allen did not expose directors to negligence-based liability; rather, he immunized them from that and held that they could only be liable if they acted in bad faith, by failing to even try to exercise their monitoring duties.[96] This discordance between what is expected of directors normatively and what they can be held liable for in damages is now, because of the ubiquity of exculpatory charter clauses, standard in American corporate law.[97]

In the period during which Milton Friedman wrote his famous essay, both of these factors could be seen to have had prominence in the purpose debate. At that time, stockholders were still seen as dispersed and relatively weak, and managers comparatively powerful. Thus, many on the political right feared that

93. Rock, *supra* note 1, at 375; *see also* Jonathan Macey, *Sublime Myths: An Essay in Honor of the Shareholder Value Maximization Myth and the Tooth Fairy*, 91 TEX. L. REV. 911, 920 (2013) (arguing that the business judgment rule acts to "eviscerate large swaths of the notion of shareholder value maximization"); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 770–72 (2005) (arguing to the same effect); LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 32 (2012) (same).

94. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996).

95. The extent of this influence is naturally contested but most scholars agree that *Caremark* had an important influence on encouraging corporate attention to law compliance. *See* Donald C. Langevoort, Caremark *and Compliance: A Twenty-Year Lookback*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 29, 2018), https://corpgov.law.harvard.edu/2018/03/29/caremark-and-compliance-a-twenty-year-lookback/ (noting that "[i]n nearly all narratives of how compliance has grown as a legal subject and field of practice in the last two decades, the Delaware Chancery Court's decision in *In re Caremark* plays a featured role" although "join[ing] the lively academic debate over whether *Caremark*'s causal impact on the unmistakable growth curve of compliance has been overstated"); Jennifer Arlen, *The Story of* Allis-Chalmers, Caremark, *and* Stone*: Directors' Evolving Duty to Monitor* 4–5, 23–24 (NYU L. Ctr. L., Econ. & Org., Working Paper No. 08-57, 2008) (arguing that *Caremark* was successful in expanding directors' oversight duties and incentivizing them to assume active oversight over legal compliance, but that its success is limited and heavily dependent on the clarity of the law, since bad-faith liability is narrow); Claire A. Hill, Caremark *as Soft Law*, 90 TEMP. L. REV. 681, 697 (2018) (arguing "that *Caremark*'s considerable, albeit soft, force is on balance a good thing" and has "push[ed] companies toward expansive 'compliance' programs that also include concern for reputation"); Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013, 2016 & n.12 (2019) (noting that some scholars have referred to *Caremark* responsibility as being of "practical irrelevance" and discussing "what it means to have the potential for corporate accountability lodged within the duty of good faith but almost never brought to fruition in terms of trial liability").

96. 698 A.2d at 972.

97. *See* Edward B. Rock & Michael L. Wachter, *Islands of Conscious Power: Law, Norms and the Self-Governing Corporation*, 149 U. PA. L. REV. 1619 (2001).

corporate managers would use their power to advance liberal political values using corporate funds.[98] They worried that the slack that the business judgment rule gave managers insulated them from accountability to stockholders, that stockholders would see their invested capital used for political and social purposes that they did not share, and thus they argued that, within the bounds of the law, corporate managers should focus on creating profits for stockholders. In other words, they sought to articulate and inculcate a normative duty of managers that would cause them to put profit first, and to be reticent to impose their social norms on society through the exercise of corporate power. The advocates of this world view pressed their position in not just the political process, but in academia, the business press, and particularly in forums for management education.

As Professor Rock shows, the first factor—the room provided by the business judgment rule—also played a role in reaction to the takeover wave of the 1980s. The so-called constituency statutes were adopted to give corporate managers additional room under the business judgment rule to resist takeovers and to govern in a manner that treated all stakeholders as equal.[99] But those statutes are notable for the extent to which they did not take into account the second factor: the statutes enabled corporate management to consider stakeholder interests but did not mandate it. Not only did the statutes generally provide no enforcement mechanism at all, there was nothing to enforce because the statutes just gave corporate directors—elected solely by stockholders and subject to removal solely by them—an option to give consideration to the interests of stakeholders like employees, communities of operations, and consumers. For those related reasons, there is little evidence that these statutes helped stakeholders; at most, they seem to have given corporate managers leverage in takeover disputes to take care of their own interests.[100]

The lessons from these experiences have been both over- and under-emphasized, in the debate between what might fairly be called "managerialist stakeholder advocates" and those favoring stockholder-focused corporate governance.

The managerialists who advocate stakeholder governance have fetishized the importance of normative purpose.[101] They argue rightly that normative purpose matters, but act as if a rearticulation of normative purpose alone will rebalance the American corporate governance system in a way that is fairer to stakeholders. But, interestingly, those who take this position typically wish to just act as

98. Strine & Walter, *Conservative Collision Course*, *supra* note 79, at 352–53.

99. Rock, *supra* note 1, at 371–72.

100. Bebchuk, Kastiel & Tallarita, *For Whom Corporate Leaders Bargain*, *supra* note 19; Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. DAVIS L. REV. 407, 463–64 (2006) (explaining that these statutes have been "rather insignificant" because they are permissive and do not provide any enforcement rights to other stakeholders); Gilson, *Leo Strine's Third Way*, *supra* note 89, at 52 (briefly explaining why he never believed constituency and antitakeover statutes would protect workers).

101. Until late in her all too brief career, Professor Lynn Stout tended to ignore the power dynamics within American corporate governance that made normative purpose an inadequate answer to her desire for stakeholder-respecting governance. But her last major work acknowledged this problem and advanced a bold and novel idea to address this. *See* LYNN STOUT, TAMARA BELINFANTI & SERGIO GRAMITTO, CITIZEN CAPITALISM: HOW A UNIVERSAL FUND CAN PROVIDE INCOME AND INFLUENCE TO ALL (2019).

if Delaware law is something other than it is, and ignore the evidence that constituency statutes have done nothing substantively to protect workers or communities. Put simply, those in this camp are, in essence, managerialists who will not go beyond giving directors the discretion to act with respect toward other stakeholders, within overall corporate law structures that give power only to stockholders. In fact, these managerialists will not even use the word "shall" to describe a director's duty to other stakeholders, much less indulge the notion of giving stakeholders enforcement or other rights.

But stockholder advocates also share this fetish with purpose in itself. In a twenty-first century in which powerful money managers can and do act quickly to impose change on public companies, some still fear that corporate managers will have too much slack to impose their own values on society, at the cost of stockholders, if corporate law allows boards to treat the best interests of all stakeholders as a proper end of corporate governance.[102] They ignore factors that Professor Rock does not, which render this fear of untethered management running wild highly improbable. These include: i) the enormous power and ease of action for institutional investors; ii) vigorous global and domestic competition; iii) provisions of corporate law that make it impossible for founders who own large blocks to pay out dividends to themselves without comparable treatment of other investors; and iv) the provisions of corporate law that strongly discourage self-dealing.[103] In fact, experience under constituency statutes shows that stockholders have little to fear from a "may" regime, but stakeholders have nothing to gain from it.[104]

102. My esteemed friend Lucian Bebchuk continues to harbor this concern, and so do other scholars like Jesse Fried, Glenn Hubbard, and Mark Roe. *See* Lucian A. Bebchuk & Robert Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 Cornell L. Rev. (forthcoming 2020), https://ssrn.com/abstract=3544978 (arguing that stakeholder capitalism could impose substantial costs on shareholders and reduce accountability of corporate leaders); Andrew Ross Sorkin, *A Free Market Manifesto that Changed the World*, N.Y. Times (Sept. 14, 2020), https://www.nytimes.com/2020/09/11/ business/dealbook/milton-friedman-doctrine-social-responsibility-of-business.html; Sanjai Bhagat & R. Glenn Hubbard, *For Whom Should Corporations Be Run?*, AEIdeas (Sept. 4, 2020), https://www.aei.org/economics/for-whom-should-corporations-be-run/ ("Who monitors the stakeholder monitor? It is this concern that animated Friedman's 1970 contribution."). For a standard and succinct expression of this concern, see Frank Easterbrook & Daniel Fischel, The Economic Structure of Corporate Law 38 (1991) ("[A] manager who has been told to serve two masters . . . has been freed of both and answerable to none."). For other and similar criticisms about stakeholder capitalism, see Steve Kaplan, *The Enduring Wisdom of Milton Friedman*, ProMarket (Sept. 14, 2020), https://promarket.org/2020/09/14/the-enduring-wisdom-of-milton-friedman/ ("Friedman brings up a vital concern about dividing loyalties in this way. 'If businessmen are civil servants rather than the employees of their stockholders, then in a democracy they will sooner or later be chosen by the public techniques of election and appointment. And long before this occurs, their decision-making power will have been taken away from them.'"); Eugene F. Fama, *Market Forces Already Address ESG Issues and the Issues Raised by Stakeholder Capitalism*, ProMarket (Sept. 25, 2020), https://promarket.org/2020/09/25/market-forces-esg-issues-stakeholder-capitalism-contracts/ (arguing that contract structures already address ESG concerns).

103. As to the last point, commentators often ignore that workers, creditors, and communities stand to lose more than diversified investors if corporate management self-deal or fail to pursue a profitable business strategy. On most issues of checking managerial conflicts of interest, stakeholders are more, not less, interested than diversified stockholders in ensuring managerial fidelity to corporate success, rather than personal enrichment, be it financial or on some other dimension.

104. *E.g.*, Bebchuk, Kastiel & Tallarita, *For Whom Corporate Leaders Bargain*, *supra* note 19 (showing that top corporate managers did not use constituency statutes to protect employees or communities of

Professor Rock takes Senator Elizabeth Warren to task a bit for a reason relevant to this discussion: he properly points out that nothing in the substantive corporate law of Delaware changed during the period in which she rightly argues that our corporate governance system has swung strongly toward stockholders and against workers and other stakeholders.[105] But, in doing so, he slights something his own scholarship takes seriously, which is that directors' normative views of what their duty is matters. Senator Warren's quoted statement does fairly address a profound change in attitude by many CEOs over those of prior generations. And that attitude had a self-justifying effect, as Chicago-school academics argued that if CEOs managed to drive so-called "shareholder value" they were best serving society.

Even more importantly, Senator Warren's solutions to the problems she identifies reflect her deeper recognition that the legal architecture of corporate law has not kept up with market developments that have made institutional investors and corporate interests much more powerful, and weakened workers and other corporate stakeholders. Whether one agrees with Senator Warren or not, it is undeniable that she has identified policy solutions that take into account the way corporate law actually works.

For the moment, just focus on her support of the public benefit corporation ("PBC") model. The PBC model builds on the business judgment rule model by protecting the board from a challenge to a decision that it makes that requires it to balance the interests of various stakeholders, including in a sale of the corporation. By this means, the PBC model puts a brake on the ability of stockholders to use litigation to put pressure on boards to take actions that harm stakeholders to generate greater returns for stockholders.

But the PBC model Senator Warren supports also builds on traditional corporate law techniques by imposing a mandatory, normative duty on directors to respect all stakeholders. The duty is not optional or discretionary, it is mandatory. But similar to *Caremark*, the duty is primarily one that is influential because most people take duties seriously and try to fulfill them, even if there is no likelihood of being punished for failing to do so. And like *Caremark*, most PBC statutes, including Delaware's, create the potential for a suit to enforce the board's duty to stakeholders, even if not by means of monetary liability.[106] PBC statutes also require the articulation of a corporate purpose and goals and the publication of reports tracking the company's compliance with its purpose and progress toward its goals.

Interestingly, the benefit corporation model has critics from both managerialist stakeholder advocates and from those committed to stockholder-first governance. For stakeholder advocates of the managerialist camp, they advance two

operation, but did use the leverage to benefit stockholders and themselves); Jonathan M. Karpoff & Michael D. Wittry, *Institution and Legal Context in Natural Experiments: The Case of State Antitakeover Laws*, 73 J. Fin. 657 (2018) (finding no measurable difference in outcomes for companies under constituency statutes than companies that were not).

105. Rock, *supra* note 1, at 389.

106. Del. Code Ann. tit. 8, § 367 (2020) (providing for suits for injunctive and declaratory relief only to enforce directors' duties to stakeholders); *id.* § 102(b)(7) (allowing corporations to limit the personal liability of directors in certain suits).

primary arguments. First, they argue that realists like Professor Rock just don't recognize that Delaware law is just like laws in the thirty-three states that took express statutory action to be different than Delaware.[107] That is, they engage in wish fulfillment and denial of objective legal reality. Second, and more quietly but undeniably, these stakeholder advocates are in fact managerialists who do not support requiring corporate directors to govern in a manner that respects stakeholders, even if that requirement does not expose the directors to any threat of monetary liability. These managerialists are stuck at "may," and wish to give boards and CEOs (subject solely to stockholder power) the discretion to protect stakeholders to the extent they choose and are able to do so.

Opponents from a stockholder perspective have a more principled basis for opposition. They believe that boards have no legitimacy to focus on issues other than making profits within the bounds of law, and they tend to think that, even in the current era, there is too much slack from the discipline of the stock market.

For someone in the American tradition of evolutionary progress and realism, both sets of critics may be thought misguided. The managerialists fail to address the reality that corporate directors are elected by only one constituency, and that therefore many statutes unaccompanied by more have not worked. The stockholder advocates ignore that undeniable potency of capital and product markets and the way they have tilted corporate governance.[108] Perhaps most importantly, the stockholder advocates also ignore that most stockholders are not long one company, but rather long the entire economy, and thus suffer economically if externalities are rewarded instead of sustainable wealth creation.

The PBC model evolves American corporate law in a way consistent with its traditions. Stockholders retain potent protections and the ultimate ability to elect new directors and to reject transactions they do not like. But the model addresses the profound change in market power developments by building on the business judgment rule to give directors more space to govern in a way that is fair to other stakeholders. And it goes further by requiring the directors to in fact do so if they wish to live up to their legal duties. By both means, it builds on successful intuitions and approaches taken historically by American corporate law.

The model thus works no fundamental revolution, but is instead a responsible evolution, insufficient in itself, but useful nonetheless. And its balanced and incremental nature reduces the fear that Professor Rock expresses in his pessimistic close that positive change risks more harm than it promises good.

Not only that, most PBC advocates also support action that would greatly minimize any fear that corporate managers could use their duty toward stakeholders to impose their own political views on society using corporate resources. First, within

107. Bebchuk, Kastiel & Tallarita, *For Whom Corporate Leaders Bargain*, *supra* note 19 (finding thirty-three states with constituency statutes in force during the period from 2000 to 2019).

108. For a balanced view of the potent interaction of activists and institutional investors and their combined power to hold companies' feet to the fire, see John C. Coffee, Jr. & Darius Palia, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance*, 41 J. Corp. L. 545 (2016).

the PBC model itself, the focus is not on politics, it is on a corporation making profits in a manner that is fair to all stakeholders and that does no harm to society. Most PBCs have positive purposes connected to their business model, few if any of which involve hotly contested ideological issues. Second, and more important, advocates of the PBC model like Senator Warren also support what a supermajority of Americans do—restricting corporate political spending.[109]

If corporations were restricted to only making political expenditures under plans approved by a supermajority of stockholders, as proposed initially by conservative John Bogle in the wake of *Citizens United* and included in progressive Senator Warren's Accountable Capitalism Act,[110] the current use of corporate funds for political purposes would plummet to previous levels, and the practical ability of managers of public companies to misuse a duty to stakeholders to pursue their own political hobbyhorses would greatly diminish over what happens now in corporations operating under Delaware law and "may" constituency statutes. That is, there would be less danger that stockholders with diverse views would see their entrusted capital used to fund candidates and causes they do not agree upon,[111] and that are contrary to the interests of diversified investors.[112]

If corporations were less able to pollute our politics, the ability of corporate managers to act in illegitimate ways goes way down.[113] For example, laws restrict charities from participating in politics, and most charities as a result address issues on which there is little societal divide. Even more important, corporate stakeholders like employees and creditors have even less interest than diversified investors in letting management pursue hobbyhorses that hurt corporate performance. Employees need the company to be profitable to have the chance to keep a job and get raises and promotions. Creditors want to be repaid. Thus, governance focused on stakeholders is not an authorization for management to do what it wants, it is a mandate for management to run a profitable company in a way that respects all stakeholders and benefits, not harms, society. Lastly,

109. *See* Strine, *Fiduciary Blind Spot*, *supra* note 87, at 1023–24 (collecting poll data showing strong and durable bipartisan support for overturning *Citizens United* and restricting corporate political spending).

110. John C. Bogle, *The Supreme Court Had Its Say: Now Let Shareholders Decide*, N.Y. TIMES (May 14, 2011), https://perma.cc/K6YC-K45X; Accountable Capitalism Act, S. 3348, 115th Cong. § 8(b) (2018).

111. Many corporate law scholars, including strong stockholder primacists, have long believed that corporations have no legitimacy to spend corporate funds on politics without express stockholder approval. Strine, *Corporate Power Ratchet*, *supra* note 13, at 444 n.81 (gathering writings to this effect by Victor Brudney, John Coates, Lucian Bebchuk, Robert Jackson, Benjamin Sachs, and Adam Winkler); *see also* Leo E. Strine, Jr. & Jonathan R. Macey, Citizens United *as Bad Corporate Law*, 2019 WIS. L. REV. 451 (conservative and liberal writing together and embracing this view).

112. For important scholarship suggesting that corporate political spending unauthorized by stockholders is likely to disadvantage diversified investors, see John C. Coates, IV, *Corporate Politics, Governance, and Value Before and After* Citizens United, 9 J. EMPIRICAL LEGAL STUD. 657 (2012); Jay Kesten, *Shareholder Political Primacy*, 10 VA. L. & BUS. REV. 161 (2006).

113. As is known, what is known about corporate political spending is outweighed by what is not known, and what is known is troubling enough. Strine, *Fiduciary Blind Spot*, *supra* note 87, at 1027–29 (documenting the concerns about leading organizations devoted to tracking such spending that it is impossible to do so and that much spending is funneled through dark committees with no money trail for investors or the public to follow).

the continued entrustment of the only voting rights to stockholders, and their ability to throw out management, plus the disciplining effect of product markets, acts as a powerful check on frolics and detours by managers of public companies.

Interestingly, and relevant to the point of who is being blinkered, is the too-narrow focus of Professor Rock's last question, which in my view gets the closest to the heart of the debate. That question asks "what are the social roles and obligations of large publicly traded firms?"[114] But those pushing for genuine stakeholder-focused corporate governance reform think the question is a broader one and understand that with developments in the markets, such as the rise of private equity and the ability to finance huge private companies, addressing the obligations of public companies is not enough. From just an investor perspective, many Americans are exposed to the risks of private companies as pensioners, and as constituents of organizations like universities and charities, because pension funds and the nonprofit sector invest hundreds of billions of dollars indirectly in private companies through investment-fund intermediaries. As importantly, Americans are workers at these companies, live in communities where they operate and often seek tax subsidies, consume products and services they deliver, and thus suffer in these capacities if these companies do not fairly treat their workers, their communities of operation, the environment, their consumers, and their creditors. In fact, it is these companies that are the least constrained in how they use corporate resources to act on our political system and in their ability to externalize costs. The concentrated ownership of their shares largely gets to do what it wants, and as private companies, they are exempt from reporting to the public even on their EESG impact.

To address these concerns, Senator Warren calls for all companies with over one billion dollars in revenues[115] to become PBCs and to have a duty to all stakeholders and to avoid causing harm to society.[116] I favor a uniform move toward the PBC model and a federal baseline mandate for PBC governance for large, socially influential companies, be they public or private.[117] But,

114. Rock, *supra* note 1, at 1, 369.

115. Accountable Capitalism Act, S. 3348, 115th Cong. § 2(2)(A)(iii) (2018) (providing scope of act). As Professor Rock notes, there is a diversity of entity types. Rock, *supra* note 1, at 28. The Accountable Capitalism Act is designed to address not just corporations, but all societally important companies regardless of whether they embrace an alternative entity model. *See* Accountable Capitalism Act, S. 3348, 115th Cong. § 2(2) (2018) (providing scope of act).

116. Accountable Capitalism Act, S. 3348, 115th Cong. § 5 (2018).

117. Robert G. Eccles, Leo E. Strine, Jr. & Timothy Youmans, *Purpose with Meaning: A Practical Way Forward*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 16, 2020), https://corpgov.law.harvard.edu/2020/05/16/purpose-with-meaning-a-practical-way-forward/ ("Under Delaware's leading statute allowing corporations to adopt that model, benefit corporations must have a statement of purpose, and act with due regard to society, the environment, and all corporate stakeholders. . . . The model is conservative in that it does not give other stakeholders enforcement rights but depends on the existence of stockholders who give real weight to social responsibility and respect for other stakeholders. And the model preserves the strong protections against managerial self-dealing essential to all stakeholders."); Leo E. Strine, Jr. & Joey Zwillinger, *What Milton Friedman Missed About Social Inequality*, N.Y. TIMES (Sept. 10, 2020), https://www.nytimes.com/2020/09/10/business/dealbook/milton-friedman-inequality.html ("To reverse the Friedman paradigm, companies should embrace

I believe companies should remain chartered under complying state PBC statutes, rather than through an inefficient federal system. This approach is not only much more likely to become law, it is far more likely to be efficient and effective. Demonstrating the feasibility of this more traditional approach is the reality that Senator Warren's bill embraces the leading state law version of the PBC model, that of Delaware.[118]

Others, including me, also believe it is time that societally important private companies be subject to mandatory employee, environmental, social, and governance or EESG reporting that would be focused on how these companies treat their workers, the environments, consumers, and society, so that they are more accountable on these dimensions and there is not a perverse incentive to go private to escape increased EESG reporting obligations if they are imposed solely on public companies.[119]

Likewise, there is an increasing recognition that more responsibility needs to be imposed on institutional investors themselves to set high standards of stewardship around EESG, and to expect sustainable and ethical business practices from the companies, private or public, in which they invest.[120] Many of these investors

an affirmative duty to stakeholders and society. This requires tangible, publicly articulated goals, such as paying living wages to their workers, respecting workers' right to join a union, promoting racial and gender inclusion and pay equity, enhancing safety protocols, and reducing carbon emissions."); Colin Mayer, Leo E. Strine, Jr. & Jaap Winter, *50 Years Later, Milton Friedman's Shareholder Doctrine Is Dead*, FORTUNE (Sept. 13, 2020), https://fortune.com/2020/09/13/milton-friedman-anniversary-business-purpose/ (proposing this approach).

118. *Compare* Accountable Capitalism Act, S. 3348, 115th Cong. § 5 (2018) (providing that "[a] United States corporation shall have the purpose of creating a general public benefit, which shall be—[] identified in the charter of the United States corporation" and that directors and officers "shall manage or direct the business and affairs of the United States corporation in a manner that—[]seeks to create a general public benefit; and [] balances the pecuniary interests of the shareholders of the United States corporation with the best interests of persons that are materially affected by the conduct of the United States corporation"; and defining "general public benefit" as "material positive impact on society resulting from the business and operations of a United States corporation, when taken as a whole"), *with* DEL. CODE ANN. tit. 8, § 362(a)–(b) (2020) (defining a "public benefit corporation" as a "for-profit corporation . . . that is intended to produce a public benefit or public benefits" and that "shall be managed in a manner that balances the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefit or public benefits identified in its certificate of incorporation"; and providing that "public benefit" means "positive effect (or reduction of negative effects) on 1 or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders)."

119. Other scholarship has focused on EESG and its connection with legal or internal governance compliance, arguing that greater sustainability disclosure would help us better understand existing corporate practices addressing how corporations affect their workers, consumers, the environment, and society. *See, e.g.*, Elizabeth Pollman, *Corporate Social Responsibility, ESG, and Compliance*, CAMBRIDGE HANDBOOK OF COMPLIANCE (D. Daniel Sokol & Benjamin van Rooij eds., forthcoming) ("As corporate leaders and investors increasingly appreciate the importance of social responsibility and sustainability, . . . the need for standardized, accurate, and audited information that provides transparency and allows for comparability becomes more pressing. Better information would in turn aid efforts to understand the relationship between CSR, ESG, and financial performance, as well as related topics such as compliance. New insights could further inform evolving norms and laws on issues of particular significance for workers, customers, communities, and the environment.").

120. A great citizen of our republic and incisive commentator on corporate governance, Vanguard's founder, Jack Bogle, was quicker than many to realize the need for institutional investor responsibility to be at the forefront of any agenda to make our system of corporate governance function

want more track record and EESG information from hedge and private equity funds and private companies, and public officials are taking an increasing interest in addressing the outdated public-private divide.[121] And there is corresponding interest in addressing the pressures activists and private equity exert on our corporate governance system, as a result of "going private" and activist campaigns that have resulted in harm to workers, creditors, and communities.

Nor are these stakeholder advocates blind to the reality that revitalized external regulation is essential to restoring a fair American economy. These advocates are also leading proponents of measures to breathe life back into the NLRA;[122] to pass living wage legislation;[123] increase consumer protection;[124] address climate change; and create jobs and sustainable prosperity by investing in clean infrastructure and new technologies.[125] But they are open-eyed to the related reality that without addressing corporate power and how it is used, the prospects for this external regulation being adopted and being allowed to operate are less robust.[126]

more effectively. *E.g.*, John C. Bogle, *Reflections on "Toward Common Sense and Common Ground,"* 33 J. CORP. L. 31 (2007); JOHN C. BOGLE, THE BATTLE FOR THE SOUL OF CAPITALISM (2005); *see also* JOHN C. BOGLE, BOGLE ON MUTUAL FUNDS: NEW PERSPECTIVES FOR THE INTELLIGENT INVESTOR (1993) (criticizing and calling out misleading advertising, excessive fees, and mediocre performance of mutual funds).

For an incisive take from others who have also long been focused on this issue, see STEPHEN DAVIS, JON LUKOMNIK, & DAVID PITT-WATSON, WHAT THEY DO WITH YOUR MONEY: HOW THE FINANCIAL SYSTEM FAILS US AND HOW TO FIX IT (2016) (laying out an agenda for curtailing the misalignments that allow the financial industry to profit at the expense of workers); STEPHEN DAVIS, JON LUKOMNIK, & DAVID PITT-WATSON, THE NEW CAPITALISTS: HOW CITIZEN INVESTORS ARE RESHAPING THE CORPORATE AGENDA (2006) (analyzing the "circle of accountability" in which citizen investors, executives, and company directors keep each other in check and the "ecosystem" that enables the circle to operate efficiently through various monitoring and information-gathering activities). These authors suggest various reforms, including by updating ERISA and ensuring worker representation on employee savings oversight boards.

121. The Accountable Capitalism Act, for example, targets all companies with more than one billion dollars in revenues, and the Brokaw and Stop Wall Street Looting Acts address activism and private equity. Brokaw Act, S. 1744, 115th Cong. (2017) (proposing to enhance Rule 13d to require more disclosure by activist investors); Stop Wall Street Looting Act, S. 3848, 116th Cong. (2019) (proposing regulation of private equity to limit ability to take funds out of portfolio, to impose more exposure to liability to injured stakeholders, and to require more disclosure).

122. Protecting the Right to Organize Act, H.R. 2474, 116th Cong. (2019); Employer Free Choice Act of 2016, H.R. 5000, 114th Cong. (2016).

123. *E.g.*, Raise the Wage Act, H.R. 582, 116th Cong. (2019) (proposing phased in increase of minimum wage to $15 per hour).

124. Senator Warren famously urged the creation of the Consumer Financial Protection Bureau. *See also* Forced Arbitration Injustice Repeal Act, S. 610, 116th Cong. (2019) (limiting ability to force workers, consumers, and others to arbitrate their claims); Comprehensive CREDIT Act of 2019, H.R. 3621, 116th Cong. (2019) (proposing thorough reform to protect financial consumers).

125. For example, the stakeholder-advocate Business and Society Program at the Aspen Institute has repeatedly called for action along these lines, including in its most recent comprehensive proposal. *See* ASPEN INST., AMERICAN PROSPERITY PROJECT: A NONPARTISAN FRAMEWORK FOR LONG-TERM INVESTMENT 5–6 (Dec. 19, 2016), https://assets.aspeninstitute.org/content/uploads/2017/01/American-Prosperity-Project_Policy-Framework_FINAL-1.3.17.pdf?_ga=2.8079153.2023942180.1607570649-161828295.1607570649.

126. *E.g.*, Brokaw Act, S. 1744, 115th Cong. (2017) (proposing to enhance Rule 13d to require more disclosure by activist investors); Stop Wall Street Looting Act, S. 3848, 116th Cong. (2019) (proposing regulation of private equity to limit ability to take funds out of portfolio, to impose more exposure to liability to injured stakeholders, and require more disclosure); Do No Harm Act of 2019, S. 593, 116th Cong. (2019) (proposing to amend RFRA to address the negative effect of the Supreme Court's *Hobby Lobby* decision on employee rights); Inclusive Prosperity Act of 2019,

Of course, some might say, Strine, aren't you ignoring the call to have worker-elected directors on large company boards?[127] Isn't that a move toward, well, "socialism." Well, yes, I do not view the call for that small slice of co-determination as yet central to the debate.[128] Without political conditions allowing for the passage of labor law reform, living wage, the creation of a mandatory board committee addressing worker fair pay and safety, and racial and gender equity, and other legislation that would support a system of board-level co-determination, not only is that sort of system not likely to pass, it will not function as it should.[129] More likely in the immediate term are more realistic moves, as have been discussed, that have substantial bipartisan appeal and that are more evolutionary. But, I won't blanch at addressing the socialist issue. No serious person would equate European Social Democratic nations like Germany and Sweden that have co-determination with communism, or a system where the government owns the means of production. These are the nations with the companies from whom rich Americans buy high-precision cars, watches, and other products. They have high functioning "market economies," but ones that in the fully realized spirit of the New Deal include workers more fully in the governance of the capitalist companies for which they work.[130] And Americans

S. 1587, 116th Cong. (2019) (financial transactions tax proposal); Wall Street Tax Act of 2019, S. 647, 116th Cong. (2019) (another FTT proposal); Shareholders United Act of 2019, H.R. 936, 116th Cong. (2019) (requiring corporations to survey stockholders annually before engaging in political spending, in reaction to *Citizens United*); Carried Interest. Fairness Act of 2019, H.R. 1735, 116th Cong. (2019) (proposing to eliminate the carried interest preference).

127. Rock, *supra* note 1, at 363 (noting that the Accountable Capitalism Act would require that employees elect at least 40 percent of the board); Accountable Capitalism Act, S. 3348, 115th Cong. § 6(b)(1) (2018). More recently, U.S. Senator Tammy Baldwin announced legislation to reverse a Trump Administration rule that would discourage ERISA plans from voting their proxies unless the plans set a default voting policy to always vote with management, saying it would help give workers "their rightful voice in board rooms." *U.S. Senator Tammy Baldwin Announces New Legislation to Reverse Trump Administration Move to Silence Workers in Corporate America*, Tammy Baldwin (Dec. 11, 2020), https://www.baldwin.senate.gov/press-releases/baldwin-announces-empowers-act.

128. For a discussion of the potential benefits of co-determination, see Grant M. Hayden & Matthew T. Bodie, *Codetermination in Theory and Practice*, 73 Florida L. Rev. (forthcoming 2021) (marshaling evidence that firms with stronger labor involvement in corporate governance are better for creditors, other stakeholders, and have more enlightened corporate social responsibility policies).

129. In a forthcoming article, my co-authors and I consider in detail the need for greater worker voice, and the distance between where we are now and a system of effective ground-up, and not just top-down, codetermination that would work in the American context. *See* Leo E. Strine, Jr., Aneil Kovvali & Oluwatomi O. Williams, *Lifting Labor's Voice: A Principled Path Toward Greater Worker Voice and Power Within American Corporate Governance* (Columbia L. Sch. Ctr. L. Econ. Stud. Working Paper, Paper No. 643, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3792492.

130. The tendency of American-based scholars, even those with origins outside our borders, to become U.S.–centric is illustrated in the current debate about whether stakeholder-focused corporate governance can work effectively. *E.g.*, Bebchuk & Tallarita, *The Illusory Promise of Stakeholder Governance*, *supra* note 102 (analyzing the expected consequences of stakeholder capitalism and concluding that it would not benefit stakeholders). To be candid, there should be no debate. A majority of EU nations, for example, have a form of stakeholder-focused corporate governance, and many of them embrace co-determination, including in the high-functioning Scandinavian and German economies. Ewan McGaughey, *Votes at Work in Britain: Shareholder Monopolisation and the "Single Channel,"* 47 Indus. L.J. 76, 79 n.17 (2018) (noting that sixteen out of twenty-eight EU member states have codetermination laws); Patricia Crifo & Antoine Rebérioux, *Corporate Governance and Corporate Social Responsibility: A Typology of OECD Countries*, 5 J. Gov. & Reg. 14, 16–17 (2016) (showing that the

might remember that the United States advocated for the strengthening of European co-determination in the wake of World War II, as a bulwark against both fascism and communism. It was the New Deal and European Social Democracy that ultimately defeated both fascism and communism.[131]

Indeed, it is in the spirit of FDR that twenty-first century New Dealers are acting on many fronts to press for realistic change to make our economy work better for the many. To echo Roosevelt himself, I believe we have less to fear from moving in a direction that will make our economy more like that which exists in high functioning societies like those in Scandinavia, the Netherlands, and Germany, than risking a return to the benighted, unequal world of the pre-New Deal—a world that created inequality and instability that fueled the rise of fascism and communism. The risks of more economic, racial, and ethnic division, and of also becoming a more corrupt society like Russia,[132] are the ones we face if we hew to a model of corporate governance built for a different time with substantially different power dynamics. I'll take the much less troubling risks that flow from having corporate governance reform do its fair share in the larger effort to becoming a nation that again makes a market economy spread prosperity broadly, and one that does so durably for Black Americans this time.[133]

stakeholder governance model dominates in Europe). And many other Organization for Economic Cooperation and Development ("OECD") nations with well-performing economies have corporate laws that embrace a stakeholder model. *Id.* at 17 tbl. 3 (showing that most OECD countries adopt a stakeholder model).

131. Chad Stone et al., *A Guide to Statistics on Historical Trends in Income Inequality*, Ctr. Budget Pol'y Priorities (Jan. 13, 2020) ("The years from the end of World War II into the 1970s were ones of substantial economic growth and broadly shared prosperity."); *The Productivity-Pay Gap*, *supra* note 65 ("[F]rom the late 1940s to the early 1970s, incomes across the distribution scale grew at nearly the same pace."); Anne Appelbaum, *The Lure of Western Europe*, 66 N.Y. Rev. Books (2019), https://www.nybooks.com/articles/2019/06/06/ian-kershaw-lure-western-europe/ (discussing the widespread prosperity that flowed in the European social democratic nations during the "trente glorieuses").

132. *See* Coates, *Corporate Speech & the First Amendment*, *supra* note 38, at 224 (discussing the risks of becoming Russia if corporate rent seeking rather than fundamental economic innovation in products and services quality grows).

133. Black Americans were locked out of the full benefits of the New Deal on many levels, but economic racial inequality still shrunk considerably, particularly after the Civil Rights Revolution and Great Society legislation opened the doors of opportunity for black people wider and built on the New Deal's leveling effect. Since the so-called "Reagan Revolution" against the New Deal and Great Society, racial inequality in income and wealth has grown considerably, instead of shrinking. *See supra* notes 65–69. The reader interested in the mixed legacy of the New Deal for black people and the progress made during the Great Society era should not miss Ira K. Katznelson, When Affirmative Action Was White (2005); Ira K. Katznelson, Fear Itself: The New Deal and the Origins of Our Time (2013); Joshua Zeitz, Building the Great Society; Inside LBJ's White House (2018).