Stakeholder Capitalism's Greatest Challenge: Reshaping a Public Consensus to Govern a Global Economy

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ABSTRACT

The *Berle XIV: Developing a 21st Century Corporate Governance Model Conference* asks whether there is a viable 21st Century Stakeholder Governance model. In our conference keynote article, we argue that to answer that question yes requires restoring—to use Berle's term—a "public consensus" throughout the global economy in favor of the balanced model of New Deal capitalism, within which corporations could operate in a way good for all their stakeholders and society, that Berle himself supported.

The world now faces problems caused in large part by the enormous international power of corporations and the institutional investors who dominate their governance. These include two fundamental problems threatening humanity: inequality and climate change. The traditional response by many corporate law scholars is that these are not corporate law's problems.

Blinkered thinking like that was alien to Berle. He grappled with the need for structures ensuring corporate power would be exercised in a manner consistent with the public interest. Berle was pleased that a public consensus had been forged channeling corporate conduct in a direction beneficial to the many. And Berle recognized that corporate power was outgrowing domestic constraints and the extension of New Deal values into the international economy was necessary.

Since his lifetime, however, the public consensus Berle championed has eroded. We use five core issues to show that corporate law is not a

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bystander but a contributor to that erosion and to some of humanity's deepest problems:

- the powerlessness of workers in comparison to institutional investors and the corrosive effects of this imbalance on inequality, fairness, and social stability;
- the realities of corporate externalities such as climate change and their implications for the residual claimant concept and corporate accountability;
- facilitation of tax avoidance via corporate law, thus undermining the governmental capacity to address issues like climate change, poverty, and consumer harm;
- the mismatch between the capacity and reach of the regulatory structures and social consensus that constrains corporate power and the scope of the markets in which corporations exert power; and
- the tolerance of corporate law for the unconstrained use of corporate power for political purposes, and its negative effect on the ability of government to implement stakeholder-protective policies.

We confront these issues by identifying elements of countervailing policy to reshape a consensus supportive of stakeholder governance and New Deal capitalism. For corporate law to be a force for good, and not facilitate environmental harm and economic unfairness, it must stop pretending that core issues are solely for other bodies of law to address. If we don't channel corporate power in a fair and sustainable direction, our descendants will be the residual claimants of our excesses and inequities.

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INTRODUCTION

By asking whether there is a viable 21st Century Stakeholder Governance model, this fourteenth Berle conference challenges all of us to think more like Adolf Berle himself: to confront the world as it is, to move beyond the trivial, and to address the deeper implications of corporate power for our world. To answer that question yes requires, to use Berle's term,[1] a "public consensus" throughout the global economy within which corporations and institutional investors now exert power. Public consensus requires the global economy to support not just stakeholder governance, but the balanced capitalism system associated with the New Deal in the United States and social democracy in the wider Organization for Economic Cooperation and Development ("OECD") community. The OECD includes many social democracies embracing New Deal capitalism from the EU (e.g., Germany, the Netherlands, France, and more), North America (e.g., Canada) and Asia (e.g., Australia, Japan, Korea). We call that system "New Deal capitalism," because Berle viewed New Deal capitalism as creating a structure within which corporations could operate in a way good for all their stakeholders.

In 2023, the world faces problems directly related to, and often caused by, corporations and the large institutional investors who dominate its governance. The growth of the real economy and huge corporations has diminished the ability of any single nation to create a public consensus safely constraining corporate power. The influence of large institutional investors has grown exponentially and internationally, and has globalized corporate governance policies that make corporations more subject to the immediate demands of the stock market.[2] These developments have

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1. Two of Berle's works worth reading as to this general topic are ADOLF A. BERLE, JR., THE 20TH CENTURY CAPITALIST REVOLUTION (1954) [hereinafter THE 20TH CENTURY CAPITALIST REVOLUTION] and ADOLF A. BERLE, JR., POWER WITHOUT PROPERTY: A NEW DEVELOPMENT IN AMERICAN POLITICAL ECONOMY (1959) [hereinafter POWER WITHOUT PROPERTY]. Both works consider the framework of both hard law and social expectations within which post-World War II American corporations were operating; in the latter, Berle embraced the term "public consensus" from fellow intellectual, Walter Lippmann, and defined that term as "a set of value judgments so widely accepted and deeply held in the United States that public opinion can energize political action when needed to prevent [economic] power from violating these values." POWER WITHOUT PROPERTY, *supra*, at 22. The need for big corporations to operate within this public consensus was the "final arbiter" of the legitimacy of corporate power. *Id.* at 111.

2. Much has been written about the domestic influence of large American investors. *See, e.g.*, Lucian A. Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. REV. 721 (2019); Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563 (2021); John C. Coates, IV, *The Future of Corporate Governance Part I: The Problem of Twelve* 13 (Harv. Pub. L. Working Paper No. 19-07, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3247337 [https://perma.cc/TT7Z-F9C9] ("The 'Big Three,' as they are known—Vanguard, State Street, and BlackRock—controlled approximately 15% of the S&P 500 in 2017—a much greater

helped create two fundamental problems threatening societies across the globe: inequality and climate change.

Within our own nation, inequality has grown enormously as the share of the gains of capitalist success going to the workers most responsible for creating corporate profits has dwindled, with stockholders taking more of the pie.[3] Inequality has also soared internationally, with wealth shifting

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share of U.S. public companies than any three single investors have ever previously done."). But these same investors also have outsized shares in important foreign markets. *See, e.g.*, Barbara Novick, Vice Chairman, BlackRock, Inc., Keynote Address at Harvard Law School (Nov. 6, 2019), *in* BLACKROCK, REVISED AND EXTENDED REMARKS AT HARVARD ROUNDTABLE ON CORPORATE GOVERNANCE KEYNOTE ADDRESS: "THE GOLDILOCKS DILEMMA" (2019), *reprinted in* Barbara Novick, *"The Goldilocks Dilemma": A Response to Lucian Bebchuk and Scott Hirst*, 120 COLUM. L. REV. F. 80, 82 fig.2 (2020), https://columbialawreview.org/content/the-goldilocks-dilemma-a-response-to-lucian-bebchuk-and-scott-hirst/ [https://perma.cc/CJ94-YE89] (demonstrating that Vanguard, BlackRock, and State Street owned 4%, 4%, and 2% of global equity, respectively, totaling 10% of global equity ownership by just three American institutional investors). And even American proxy advisory firms are now international. *See, e.g.*, *Proxy Voting Services*, INSTITUTIONAL S'HOLDER SERVS., https://www.issgovernance.com/solutions/proxy-voting-services/ [https://perma.cc/4U8Q-8LAU]; Jaron Schneider, *Glass Lewis Launches International Proxy Research and Recommendations Glass Lewis Becomes the Only Global, Conflict-Free Proxy Advisory Firm*, GLASS LEWIS (Sept. 27, 2004), https://www.glasslewis.com/glass-lewis-launches-international-proxy-research-and-recommendations-glass-lewis-becomes-the-only-global-conflict-free-proxy-advisory-firm/ [https://perma.cc/CR5A-CJFP]. For a recent example of U.S. proxy advisory firm pressure to impose U.S.-style preferences on other markets, see ISS's campaign against dual-class shares in Sweden. Richard Milne, *Sweden's Jacob Wallenberg Hits Out at ISS Over Dual-Class Share Attack*, FIN. TIMES (Apr. 10, 2023), https://www.ft.com/content/5239d92d-564b-4450-9880-58f5f16b965c.

3. For some of the literature documenting this profound change, see LAWRENCE MISHEL & JULIA WOLFE, ECON. POL'Y INST., CEO COMPENSATION HAS GROWN 940% SINCE 1978 1 (2019), https://www.epi.org/files/pdf/171191.pdf [https://perma.cc/G4SV-K5XG] ("From 1978 to 2018, CEO compensation grew by 1,007.5% (940.3% under the options-realized measure), far outstripping S&P stock market growth (706.7%) and the wage growth of very high earners (339.2%). In contrast, wages for the typical worker grew by just 11.9%."); Anna Stansbury & Lawrence H. Summers, *The Declining Worker Power Hypothesis: An Explanation for the Recent Evolution of the American Economy* 8 (Nat'l Bureau Econ. Res., Working Paper No. 27193, 2020), https://www.nber.org/papers/w27193 [https://perma.cc/6RZ3-SMH8]; Leo E. Strine, Jr., *Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy—A Reply to Professor Rock*, 76 BUS. LAW. 397, 418 (2021) (summarizing much of the literature demonstrating declining worker share and wage stagnation) [hereinafter *Restoration*]; Aneil Kovvali & Leo E. Strine, Jr., *The Win-Win that Wasn't: Managing to the Stock Market's Negative Effects on American Workers and Other Corporate Stakeholders*, 1 U. CHI. BUS. L. REV. 307 (2022) [hereinafter *Win-Win that Wasn't*]; Leo E. Strine, Jr. & Kirby M. Smith, *Toward Fair Gainsharing and a Quality Workplace for Employees: How a Reconceived Compensation Committee Might Help Make Corporations More Responsible Employers and Restore Faith in American Capitalism*, 76 BUS. LAW. 31 (2020).

toward the few and in particular the world's richest 1%,[4] and the many suffering from stagnant real wages.[5]

Meanwhile, human-caused climate change presents an existential threat to the physical safety of many societies and species, while also posing a huge economic problem. Responsible estimates suggest that by 2030, developing nations alone must invest at least $1 trillion into energy infrastructure each year to mitigate the potential harm from climate change to these vulnerable nations, to reduce pressure on rainforests and other at-risk ecosystems, and to build a clean energy production system.[6] These costs, generated by select corporations across select sectors largely to the benefit of people in nations like the United States,[7] have been disproportionately borne by the people in developing nations.[8] In other words,

4. Andrew Stanley, Int'l Monetary Fund, *Global Inequalities*, FIN. & DEV. (Mar. 2022), https://www.imf.org/en/Publications/fandd/issues/2022/03/Global-inequalities-Stanley [https://perma.cc/U6T9-WNCA] (finding that the wealthiest 1% of the world's population own 38% of global wealth); WORLD INEQ. LAB, WORLD INEQUALITY REPORT 2022 ch.2, https://wir2022.wid.world/www-site/uploads/2023/03/D_FINAL_WIL_RIM_RAPPORT_2303.pdf [https://perma.cc/YD3R-JXMC] (finding that global within country inequality broadly declines from 1900 through 1980, but has since risen back to the levels seen at the turn of the 20th century).

5. MARTIN-BREHM CHRISTENSEN, CHRISTIAN HALLUM, ALEX MAITLAND, QUENTIN PARRINELLO, CHIARA PUTATURO, DANA ABED, CARLOS BROWN, ANTHONY KAMANDE, MAX LAWSON & SUSANA RUIZ, OXFAM, SURVIVAL OF THE RICHEST 4, 7 (2023) [hereinafter SURVIVAL OF THE RICHEST] ("Since 2020, the richest 1% have captured almost two-thirds of all new wealth—nearly twice as much money as the bottom 99% of the world's population. . . . Oxfam analysis shows that at least 1.7 billion workers worldwide will have seen inflation outpace their wages in 2022 . . . ."); OECD, ECONOMIC OUTLOOK, DECOUPLING OF WAGES FROM PRODUCTIVITY: WHAT IMPLICATIONS FOR PUBLIC POLICIES? ch.2 56 (2018), https://www.oecd.org/economy/outlook/Decoupling-of-wages-from-productivity-november-2018-OECD-economic-outlook-chapter.pdf [https://perma.cc/G774-KPKA] (finding that the weighted average of real median wage growth in OECD countries was less than 1% per year from 2005 to 2013).

6. Torsten Ehlers, Charlotte Gardes-Landolfini, Fabio Natalucci & Prasad Anathakrishnan, *How to Scale Up Private Climate Financing in Emerging Economies*, INT'L MONETARY FUND (Oct. 7, 2022), https://www.imf.org/en/Blogs/Articles/2022/10/07/how-to-scale-up-private-climate-finance-in-emerging-economies [https://perma.cc/A3ML-LU9V].

7. *See* PHILIPP BOTHE, LUCAS CHANCEL & TANCRÈDE VOITURIEZ, WORLD INEQ. LAB, CLIMATE INEQUALITY REPORT 4 (2023), https://wid.world/document/climate-inequality-report-2023/ [https://perma.cc/R793-YF4T] ("The top 10% of global carbon emitters [are responsible for] almost half of all global carbon emissions.") [hereinafter CLIMATE INEQUALITY REPORT 2023]. In fact, substantial carbon emissions increases are required if low-income countries are to advance up the income scale. *See id.* at 39, 43.

8. *See* PAUL GRIFFIN, CARBON DISCLOSURE PROJECT, THE CARBON MAJORS DATABASE: CDP CARBON MAJORS REPORT 7 (2017), https://cdn.cdp.net/cdp-production/cms/reports/documents/000/002/327/original/Carbon-Majors-Report-2017.pdf?1501833772 (estimating that roughly 70% of all greenhouse gas emissions generating climate change since 1988 can be attributed to the activity of just 100 corporations); CLIMATE INEQUALITY REPORT 2023, *supra* note 7, at 9 (the "income losses from climate hazards of the bottom 40% are estimated to be 70% larger than the average in low- and middle-income countries"); Marshall Burke, Mustafa Zahid, Noah Diffenbaugh & Solomon M. Hsiang, *Quantifying Climate Change Loss and Damage Consistent with a Social Cost of Greenhouse Gases* 15 (Nat'l Bureau of Econ. Rsch., Working Paper No. 31658),

climate change creates substantial socialized global costs in exchange for private benefits in the wealthier nations where these companies' stockholders and consumers are concentrated.

The traditional response by many corporate law scholars is that these are not corporate law's problems.[9] If society wants to reduce inequality, it can simply tax the haves and redistribute.[10] If society wants to address climate change, it can adopt environmental regulations and energy taxes.[11] Corporate law accepts that corporations must follow the law, so if the consequences of corporate activity are not socially optimal, then it is not corporate law itself—which simply allocates power between stockholders and corporate management and allows for the creation of artificial citizens—but other bodies of law that bear responsibility.

Blinkered thinking like that was alien to Berle. He risked addressing how the regulation of corporations mattered to society. He grappled with the distributional effects of corporate power and the need for structures ensuring corporate power would be exercised consistent with the broader public interest. Berle was an architect and strong supporter of the New Deal policies protecting stakeholders and society from corporate overreaching and sharp practices. Berle was pleased that a public consensus comprised of formal laws and societal norms had been forged during his lifetime that channeled corporate conduct in a positive direction beneficial to the many, in stark contrast to the pre-New Deal period of American

https://www.nber.org/papers/w31658 [https://perma.cc/3NSC-UN8L] (calculating that US CO_2 emissions held the largest country source of damages, harming countries like India and Brazil who held the largest total damages to GDP).

9. Professor Rock has described this as the traditional view of corporate law. Edward B. Rock, *For Whom Is the Corporation Managed in 2020? The Debate over Corporate Purpose*, 76 BUS. LAW 363, 368 (2021). Even corporate law scholars who believe that corporations wield too much power tend to disconnect their behavior from the incentives and flexibility that corporate law gives them. *E.g.*, Douglas M. Branson, *The Very Uncertain Prospect of "Global" Convergence in Corporate Governance*, 34 CORNELL INT'L L.J. 321, 361 (2001) (arguing that large multinational corporations and their role in economic imperialism, degradation of the environment, regulatory arbitrage, and plantation production are problems of "external corporate governance").

10. This position is of course associated with the Chicago school. *See, e.g.*, Milton Friedman, *The Social Responsibility of Business Is to Increase its Profits*, N.Y. TIMES, Sept. 13, 1970, at 17 ("The executive is exercising a distinct 'social responsibility,' rather than serving as an agent of the stockholders or the customers or the employees, only if he spends the money in a different way than they would have spent it. But if he does this, he is in effect imposing taxes, on the one hand, and deciding how the tax proceeds shall be spent, on the other. . . . On the level of political principle, the imposition of taxes and the expenditure of tax proceeds are governmental functions."); FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 38 (1991).

11. Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, *Stakeholder Capitalism in the Time of COVID*, 40 YALE J. REGUL. 60, 68 (2023) ("Thus, our evidence suggests that those who are concerned about the protections of stakeholders, as we are, should not rely on corporate leaders' stakeholderist pledges but instead focus on governmental reforms that would provide real protection for stakeholders in a wide range of areas. . . . such as a carbon tax . . . .").

history.[12] But Berle also recognized that even a nation as powerful as the post-World War II United States could not avoid an increasingly global economy, and that corporate power was outgrowing purely domestic constraints.[13] Berle thus supported the extension of New Deal values into the international economy.

Much has changed since Berle's lifetime. The challenge that this conference poses—Is there a viable system of stakeholder corporate governance?—cannot be met without acknowledging that the different corporate law power dynamics of the 21st century contribute to some of humanity's deepest problems.[14] Stakeholder governance is not viable absent the supportive structure of a public consensus Berle wrote about, and that public consensus must now be re-instilled, not just within the United States, but across a global economy.[15] Corporate power has outgrown any single

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12. *See, e.g.*, POWER WITHOUT PROPERTY, *supra* note 1, at 3–11, 109–14, 120–22, 135, 155–58; THE 20TH CENTURY CAPITALIST REVOLUTION, *supra* note 1, at 169, 188.

13. *See, e.g.*, THE 20TH CENTURY CAPITALIST REVOLUTION, *supra* note 1, at ch.4; Adolf A. Berle, Jr., *The Coming Epoch of Rebuilding*, 4 DEP'T STATE BULL. 611, 613 (1941) ("[N]o nation exists by its own strength. If it lives at all, it can do so only because it is part of an international fabric. . . . The foundation of national life is thus international; and every laborer, factory manager, businessman, and statesman knows that this is true."); Adolf A. Berle, Jr., *Cooperative Peace in the Western Hemisphere*, 1 DEP'T STATE BULL. 659, 661 (1939) ("It has long been recognized that economic forces are not strictly national, just as it has long been recognized by all serious students that unless trade relationships are unobstructed, the prosperity of any nation is limited, if not imperiled.").

14. Branson, *supra* note 9, at 362 (calling for two leading corporate law scholars to "turn their not inconsiderable talents to the issues of the new century.")

> The astounding growth of huge multinational corporations, the impotence or lack of will among nation states to regulate them, the role of international organizations in the regulation of multinationals, and the relevance or lack of relevance of traditional corporate governance regimes—not 'global' convergence in corporate governance—are the corporate law issues to which we *must* devote our time and our thoughts in the twenty first century.

Id.

15. At the beginning of this century, there was a controversial article published by two respected scholars arguing that the world was converging around stockholder primacy and that this was a positive development. Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001) ("There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value."). Interestingly, even these two scholars caveated their championing of stockholder primacy with their advocacy for eliminating limited liability for stockholders for tort liability, citing to the massive harm done to customers and communities by certain companies and the difficulty of obtaining full recovery or adequate deterrence under current rules. *Id.* at 466 (citing Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879 (1991)). In a powerful response to *The End of History* claim, Professor Branson cited the failure of Hansmann and Kraakman to acknowledge that a majority of the market economies, and of U.S. states, had systems calling for broader consideration of stakeholders. Branson, *supra* note 9, at 333 n.63. But in some ways, their debate about convergence converged itself, as Hansmann and Kraakman saw stockholders as becoming, as a practical matter, more powerful throughout the market economies and that as driving corporate governance focused on their interests. Hansmann & Kraakman, *The End of History for Corporate Law*, *supra*, at 459. Professor Branson largely accepted that this was in fact a growing phenomenon, but connected

nation's reach, even one as powerful as the United States. International understandings have given primacy to the interests of stockholders, not workers, communities of operation, or the environment.[16] Regulatory arbitrage has put downward pressure on New Deal capitalism and stakeholder protection domestically and internationally. Restoring an effective public consensus requires constraining the huge investors, whose emergence Berle predicted, who have pushed corporations to obsess over stockholder returns and to subordinate other stakeholders. And it also requires confronting the reality that corporations do not passively follow rules of the game. Corporate law itself has helped corporations erode rules of the game protecting workers and the environment, to shift wealth away from workers to investors, and to escape fair taxation, thus undermining the

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that change in government focus to serious harm to workers, consumers, and the environment. Branson, *supra*, at 352–59. In many ways, Professor Branson echoed Berle himself, who believed that corporations in the pre-New Deal era often overreached because they were controlled by large stockholders with strong incentives to maximize their own profits at the expense of others, and that after the New Deal structure emerged and ownership was dispersed, the corporations less likely to violate the public consensus were those less, and not more, subject to stockholder power. *E.g.*, Adolf A. Berle, Jr., *"Control" in Corporate Law*, 58 COLUM. L. REV. 1212, 1215 (1958).

16. Early in the postwar period, what came to be known as the "Havana Charter" was proposed to establish strong protections for workers in the world trading regime being established in the wake of the war. U.N. Conference on Trade and Employment, *Final Act and Related Documents*, U.N. DOC. E/CONF.2/78 (Apr. 1948). But it was not adopted and the generally favorable conditions for American and European workers from the 1940s until the 1980s reduced the pressure for international labor protections. *See* Leo E. Strine, Jr., *Development on a Cracked Foundation: How the Incomplete Nature of New Deal Labor Reform Presaged Its Ultimate Decline*, 57 HARV. J. ON LEGIS. 67, 87 (2020) [hereinafter *Development on a Cracked Foundation*] ("In comparison to the General Agreement on Tariffs and Trade and the World Trade Organization, the International Labor Organization was never given the necessary tools to protect the fair leverage of workers in the post-War trading regime. That was in no small measure because the United States itself did not support a stronger international system of labor protection. . . . During the period of Western hegemony from 1945 to the early 1970s, this did not seem so costly. Never was growing prosperity so widely shared."); Anne Applebaum, *The Lure of Western Europe*, N.Y. REV. BOOKS (2019) (reviewing IAN KERSHAW, THE GLOBAL AGE: EUROPE 1950–2017 (2018)) ("In the early years, this gigantic and unprecedented experiment in democracy and integration brought immediate benefits for all of the members of the West. What the French called *les trentes glorieuses*—the thirty years of steady growth and expansion of social benefits from the 1940s to the 1970s—had its echo elsewhere in the bloc. Germany had its *Wirtschaftswunder*, led by Adenauer's finance minister, Ludwig Erhard; Italy had its *boom economico*, an extraordinary transformation that saw incomes double and triple within a generation. Even in the dictatorships of the Iberian Peninsula, which did not join European institutions until the 1970s, postwar growth was remarkable: in Spain, GDP per capita rose by a factor of ten between 1960 and 1975. Growth and industrialization were accompanied by a parallel growth in social benefits: universal health care, free education, and government safety nets became the norm everywhere in Western Europe."). The labor movement came to rue this when President Reagan took American international economic policy in a Friedmanite direction that privileged capital even more, a direction that shaped U.S. influence on other nations in a laissez-faire direction away from New Deal capitalism, and that came to be referred to as the "Washington consensus." *See* Caleb Crain, *Is Capitalism a Threat to Democracy?*, NEW YORKER (May 7, 2018), https://www.newyorker.com/magazine/2018/05/14/is-capitalism-a-threat-to-democracy [https://perma.cc/BJ2P-7ZJ9].

capacity of governments to address the serious externalities that corporate power has generated.

In this keynote article, we seek to shed light on these issues that demand attention if we are to make progress toward an effective public consensus supportive of stakeholder governance. We proceed toward that end as follows.

First, we do a brisk, high-level tour of changes since Berle's lifetime that have affected the capacity of the United States to hold corporations accountable for treating all corporate stakeholders with respect. We then identify five issues of substantial social importance with a direct connection to corporate governance to exemplify that corporate law is not a policy bystander, but a contributor, to the erosion of the public consensus favoring stakeholder governance and the New Deal capitalism Berle supported. As we discuss each of the five key issues, we identify elements of domestic and international policy critical to reshaping a public consensus supportive of stakeholder governance, one that in Berle's spirit might be deemed part of a 21st century global New Deal. We do so to encourage scholars and policymakers to think more innovatively about how corporate governance incentives might be improved to produce the socially beneficial outcomes stakeholder governance seeks to achieve and, at the least, ameliorate some of the poor incentives our current corporate governance approach creates.

I. The Erosion of the Public Consensus Within Which Corporate Power Operates Since Berle's Lifetime: A Hurried History of a Half Century of Corporate Governance and Economic Change

During the post-World War II era, Berle became more sanguine about corporate power because he grew more confident that corporations had to operate within a societal- and stakeholder-protective public consensus. This consensus, embodied not just in the iconic New Deal laws protecting workers, consumers, and investors, but in an ethos of common purpose and values arising out of the shared experiences of the Great Depression and a World War, encouraged corporate leaders to run their companies in ways good for their workers, communities of operations and consumers.[17] Berle saw the polity as having emerged from these experiences as strong and resilient, and one that would act rapidly to address corporate actions disrespecting that public consensus. That public consensus involved widespread acceptance of New Deal capitalism and, in particular, the idea that capitalism needed to work for the many and that the national

17. *E.g.*, Power Without Property, *supra* note 1, at 3–11, 109–14, 120–22, 135, 155–58; The 20th Century Capitalist Revolution, *supra* note 1, at 169, 188.

government must protect stakeholders like workers and consumers from corporate overreaching.[18]

With New Deal capitalism central to the public consensus, Berle even found the positive in something he had once famously worried about: the separation of ownership and control.[19] Because that public consensus held corporate leaders accountable for running companies in a manner that was fairer to all stakeholders,[20] Berle viewed it as a strength of American corporate governance that stockholders were dispersed and relatively non-influential because corporate managers were less dangerous to that consensus than powerful stockholders.[21] In fact, Berle believed that it was companies with influential stockholders that were more likely to flout that consensus.[22]

Professor Berle died in 1971, some 52 years ago. That was a time of American and European prosperity and hegemony, when the promise of New Deal capitalism, that a system of market dynamism could operate within a fair framework for economic security for the many, seemed to be coming true. In his later writings,[23] however, Berle observed three

18. *E.g.*, POWER WITHOUT PROPERTY, *supra* note 1, at 122, 135 ("full employment" and fair wages were part of the public consensus reflected in New Deal capitalism).

19. Berle's constant concern was that an interest with economic power would lack accountability for its conduct. The lack of a governmental framework before the New Deal helps explain the evolution of his thinking, as scholars have discussed. *See* Dalia Tsuk Mitchell, *From Pluralism to Individualism: Berle and Means and 20th-Century American Legal Thought*, 30 LAW & SOC. INQUIRY 179 (2005); William Bratton & Michael Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation*, 34 J. CORP. L. 99 (2008); Jessica Wang, *Looking Forward in a Failing World: Adolf A. Berle, Jr., the United States, and Global Order in the Interwar Years*, 42 SEATTLE U. L. REV. 385 (2019). The confusion caused by the Berle–Dodd debate continues to this day because, like George Orwell who was a firmly committed socialist but decidedly not communist, Berle is often embraced selectively by people who support stockholder primary primacy, without the recognition that, even in the debate with Dodd, Berle's support for the New Deal-like regulation to require corporations to operate in a manner consistent with the interests of the many was underscored. Leo E. Strine, Jr., *Human Freedom and Two Friedmen: Musings on the Implications of Globalization for the Effective Regulation of Corporate Behavior*, 58 U. TORONTO L.J. 241, 253–55 (2008) [hereinafter *Human Freedom and Two Friedmen*]. This conference, in its now fourteen-year-long history, has done much to highlight the arc of Berle's contribution, and to demonstrate that, like all interesting and important thinkers, he did not operate in a straight line, but that he was committed to a principled set of concerns, ones fairly identified with New Deal capitalism. For an in-depth biography of Berle that discusses the evolution in his thinking about the economy in the period leading up to FDR's election, see JORDAN A. SCHWARTZ, LIBERAL: ADOLF A. BERLE AND THE VISION OF AN AMERICAN ERA chs.3–4, at 37–113 (1987).

20. *See* POWER WITHOUT PROPERTY, *supra* note 1, at 3–11 (discussing progress made in improving corporate behavior in wake of the New Deal and World War II).

21. *E.g.*, *id.* at 36–37, 66; THE 20TH CENTURY CAPITALIST REVOLUTION, *supra* note 1, at 45–48, 54–60.

22. POWER WITHOUT PROPERTY, *supra* note 1, at 106–10.

23. *See* JORDAN A. SCHWARTZ, LIBERAL: ADOLF A. BERLE AND THE VISION OF AN AMERICAN ERA, chs. 3–4, at 37–113 (The Free Press 1987) (tracing Berle's evolution toward concluding that a

emerging realities that threatened to destabilize the public consensus he supported. The first was that no nation, even one as powerful as our own, could function in the world economy in isolation, and that engagement and competitiveness in international markets were necessary.[24] The second was that huge corporations had emerged whose influence had outgrown the control of any one nation.[25] The third was that the proportion of shares controlled by institutional investors was growing, and that these investors had the potential to exercise far more power over companies than disaggregated human stockholders and thus to put far more pressure on companies to prefer their interests to that of other stakeholders.[26]

Given that Berle died in 1971, a time when U.S. economic hegemony remained strong, Berle understandably underestimated a fourth factor that eventually helped destabilize the public consensus he embraced: America backpedaling on its domestic and international commitment to New Deal capitalism. By the time of Berle's death, there was a movement on the far right, exemplified by economists like Milton Friedman and politicians like Barry Goldwater and Ronald Reagan,[27] to undo the New Deal and to return to 19th century laissez-faire policies. But, the mainstream economic policies of both parties (as exemplified by the two-term Eisenhower and Nixon Administrations) were largely accepting of New Deal capitalism. This acceptance of the New Deal capitalist consensus changed profoundly with the election of President Reagan in 1980 and the embrace by the United States of policies that elevated the pursuit of corporate profit for stockholders over regulating corporations in the interests of workers, other stakeholders, or the environment. This same movement encouraged corporations to stymie policies protective of stakeholders and the environment, and to shift responsibility for paying taxes away from business.[28]

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governmental framework was required to channel corporate power in the public interest, and situating the debate with Dodd within that evolution).

24. *E.g.*, POWER WITHOUT PROPERTY, *supra* note 1, at 121 (noting competitive pressures from other nations on the United States to produce high growth); THE 20TH CENTURY CAPITALIST REVOLUTION, *supra* note 1, at 159 ("The present political framework of foreign affairs is nationalist. The present economic base is not. The classic nation-state is no longer capable, by itself alone, either to feed and clothe its people, or to defend its borders.").

25. See, for example, THE 20TH CENTURY CAPITALIST REVOLUTION, *supra* note 1, at ch. 4 on the influence of corporations in foreign affairs, and also discussing example of power exercised by certain large European corporations, POWER WITHOUT PROPERTY, *supra* note 1, at 127.

26. In his work, POWER WITHOUT PROPERTY, Berle discussed the growing and potential power of institutional investors, and the reality that they were no less disconnected from real owners than corporate managers. *E.g.*, POWER WITHOUT PROPERTY, *supra* note 1, at 43, 50–59, 76.

27. *See, e.g.*, MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962).

28. *See, e.g.*, Memorandum from Lewis F. Powell, Jr., on Attack of American Free Enterprise System to Eugene B. Sydnor, Jr., Chairman, U.S. Chamber of Com., Educ. Comm. (Aug. 23, 1971) (on file with authors).

These changes in policy direction contributed to and interacted with the three trends Berle had flagged to undermine the public consensus he embraced. Many of the concerns that inspired Berle's strong support for the New Deal and his desire to constrain corporate power in the pre-World War II era have arisen in new, but familiar forms, and with common and vexing attributes. Each of them must be addressed internationally, not just domestically, in an environment where domestic and international policy-making must overcome the pervasive influence of corporate and investor power and money, and take into account the constant threat of regulatory arbitrage.

Since the Reagan Administration, Republican leaders have acted to undercut the ability of workers to unionize, erode the real value of minimum wage laws, trim other sources of economic security, denude environmental regulators of authority, and otherwise undermine the New Deal regulatory state.[29] Internationally, U.S. policymakers, even during some Democratic administrations, used their influence with institutions like the International Monetary Fund (IMF), the World Bank, and the World Trade

29. *See, e.g.*, Jordan Weissmann, *60 Years of American Economic History, Told in 1 Graph*, ATLANTIC (Aug. 23, 2012), https://www.theatlantic.com/business/archive/2012/08/60-years-of-americaneconomic-history-told-in-1-graph/261503/ [https://perma.cc/CH6J-M7JX] ("In the immediate postwar period, America's rapid growth favored the middle and lower classes. The poorest fifth of all households, in fact, fared best. Then, in the 1970s, amid two oil crises and awful inflation, things ground to a halt. The country backed off the postwar, center-left consensus—captured by Richard Nixon's comment that 'we're all Keynesians now'—and tried Reaganism instead. We cut taxes. Technology and competition from abroad started whittling away at blue collar jobs and pay. The financial markets took off. And so when growth returned, it favored the investment class—the top 20 percent, and especially the top 5 percent (and, though it's not on this chart, the top 1 percent more than anybody).") (citing PEW RSCH. CTR., FEWER, POORER, GLOOMIER: THE LOST DECADE OF THE MIDDLE CLASS 9 (2012), https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2012/08/pew-social-trends-lost-decade-of-the-middle-class.pdf [https://perma.cc/JRN6-8Y97]); David Cooper, Elise Gould & Ben Zipperer, *Low-Wage Workers Are Suffering from a Decline in the Real Value of the Federal Minimum Wage*, ECON. POL'Y INST. (Aug. 27, 2019), https://www.epi.org/publication/labor-day-2019-minimum-wage/ [https://perma.cc/F923-XLJG] ("The real value of the federal minimum wage has dropped . . . 31% since 1968."); David M. Uhlmann, *Back to the Future: Creating a Bipartisan Environmental Movement for the 21st Century*, 50 ENV'T. L. REP. 10800, 10802 (2020) ("President Reagan nominated Anne Gorsuch to head EPA and James Watt to lead the U.S. Department of the Interior, each of whom sought to roll back a decade of environmental progress in curbing pollution, protecting against environmental degradation, and promoting conversation."); Sandra Evans Teeley, *OSHA Under Siege*, WASH. POST (Apr. 12, 1981), https://www.washingtonpost.com/archive/business/1981/04/12/osha-under-siege/52eedeee-34d9-4723-86a6-26c9f5e41e7f/ [https://perma.cc/3U4R-RL9K] ("The Reagan administration is moving to curb one of the most hated government agencies in the eyes of American business—the Occupational Safety and Health Administration. Under consideration are fundamental changes in OSHA policy that ultimately could affect the health of millions of workers. . . . Labor unions have opposed [the policies], arguing that [they are] inhumane.").

Organizations (WTO) to push other nations to adopt laissez-faire economic policies and reduce stakeholder protections.[30]

Businesses and nations seeking market participation internationally were given guaranteed access, without corresponding obligations to treat workers, communities of operation, or the environment with respect.[31] In the global economy, the influence of mobilized capital thus grew substantially, and the ability of individual nations to set their own rules of the game protecting stakeholders diminished.[32] Indeed, the power of international institutions that give rights to capital grew, without any corresponding increase in the potency of international protections for workers, consumers, or the environment.[33]

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30. *See* Steven A. Ramirez, *Market Fundamentalism's New Fiasco: Globalization as Exhibit B in the Case for a New Law and Economics*, 24 MICH. J. INT'L L. 831, 846–48 (2003) (observing that developing nations "have little choice but to follow the free market dictates of the IMF," and that "international economic institutions" like the IMF and the World Bank "were never intended to be the high priests of the failed laissez-faire ideology"); Crain, *supra* note 16 ("Starting in the eighties, developing nations found free-market doctrine written into their loan agreements: bankers refused to extend credit unless the nations promised to lift capital controls, balance their budgets, limit taxes and social spending, and aim to sell more goods abroad—an uncanny replica of the austerity terms enforced under the gold standard. The set of policies became known as the Washington Consensus.").

31. To be fair, some Democratic administrations made efforts to embody stronger labor standards in international trade understandings. *See, e.g.*, Drusilla K. Brown, Alan V. Deardorff & Robert M. Stern, *International Labor Standards and Trade: A Theoretical Analysis* 5 (Rsch. Seminar in Int'l Econ. Post-Print Paper No. 3, 1996), *post-printed in* FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? (Jagdish N. Bhagwati & Robert E. Hudec eds., MIT Press 1996) ("The United States continued to push for negotiation of a GATT article on labor standards in both the Tokyo and Uruguay rounds of multilateral trade negotiations. While receiving some support from other GATT member countries, the U.S. efforts continued to be unsuccessful."). But when these non-strenuous efforts were rebuffed, the same administrations signed on to initiatives, such as admitting China to the World Trade Organization without guarantees that it would act in accord with standards of stakeholder protection common in the OECD, see, e.g., *What Happened When China Joined the WTO?*, COUNCIL ON FOREIGN RELS. (June 17, 2021), https://world101.cfr.org/global-era-issues/trade/what-happened-when-china-joined-wto [https://perma.cc/KKW9-AJDP], and trade agreements like NAFTA and the TPP, which privileged capital over labor and other stakeholders, see, e.g., *NAFTA's 20-Year Legacy and the Fate of the Trans-Pacific Partnership*, PUB. CITIZEN (Feb. 1, 2014), https://www.citizen.org/article/naftas-20-year-legacy-and-the-fate-of-the-trans-pacific-partnership/ [https://perma.cc/EEV4-656B].

32. *See generally* Strine, *Development on a Cracked Foundation*, *supra* note 16, at 87. *See* Ramirez, *supra* note 30, at 846–48 (observing that developing nations "have little choice but to follow the free market dictates of the IMF").

33. Kyle Bagwell & Robert W. Staiger, *The Simple Economics of Labor Standards and the GATT*, *in* SOCIAL DIMENSIONS OF U.S. TRADE POLICIES 195, 195–96 (Alan V. Deardorff & Roberty M. Stern eds., 2000) ("GATT's approach to labor standards might be most aptly characterized as one of 'benign neglect'. . . . While there is an explicit provision within GATT articles that allows governments to restrict importation of the products of prison labor, the determination of domestic labor standards is for the most part considered the legitimate domain of each national government, and weak labor standards *do not* constitute a violation of GATT obligations. . . . Hence, for the most part, current GATT rules respect the sovereignty of domestic decisions over labor standards, as they allow each member government to determine its own labor policies without worrying about the ramifications of

The Reagan–Friedman economic movement did not operate in isolation from, but rather accelerated and acted in concert with changes, within the corporate governance system. The strength of stockholders compared to other corporate stakeholders has changed in a way aligned with the moves to erode New Deal capitalism. The growth of institutional investors in the United States was itself facilitated by Reagan–Friedman economic policies that turned workers from pensioners into forced capitalists, and made them give over money each paycheck to mutual funds that controlled their savings.[34] This steroidal injection of power into institutional investors was then used by them to demand manage-to-the-market corporate governance policies,[35] making corporate managers more accountable for

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these choices for either its GATT obligations or those of its trading partners. It is the wisdom of preserving this national sovereignty over domestic labor policies while at the same time negotiating successive multilateral agreements to liberalize world trade which is now being challenged from various quarters in the United States and elsewhere in the industrialized world. The primary concern voiced by labor interests and social activists is that working conditions and wages in industrialized countries will suffer from trade liberalization as a result of increased import competition from countries where labor standards are weak or not enforced. It is feared that such pressures could fuel a 'race to the bottom,' in which the labor standards of the industrialized world are compromised in the name of international 'competitiveness.'"); Keith E. Maskus, *Should Core Labor Standards Be Imposed Through International Trade Policy?* 59 (World Bank Dev. Rsch. Grp., Working Paper No. 1817, 1997), http://ctrc.sice.oas.org/geograph/labor/maskus.pdf ("Several times during the evolution of the GATT, American trade authorities attempted to have language on fair labor standards introduced into the agreement, each time without success.").

34. *See* Leo E. Strine, Jr., *Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance*, 33 J. CORP. L. 1, 4–5 (2007) [hereinafter *Toward Common Sense and Common Ground?*] (workers are forced capitalists in the sense that they must turn over a substantial fraction of their earnings to mutual funds participating in 401(k) and 529 accounts if they wish to save for college for their children and retirement for themselves); *see also* Peter Brady, Kimberly Burham & Sarah Holden, INV. CO. INST., THE SUCCESS OF THE U.S. RETIREMENT SYSTEM 30 (2012), http://www.ici.org/pdf/ppr_12_success_retirement.pdf [http://perma.cc/2BG6-82LP] (describing an increase in the number of active participants in 401(k) plans from 17 million in 1989 to 51 million in 2010); John Broadbent, Michael Palumbo & Elizabeth Woodman, BANK FOR INT'L SETTLEMENTS, THE SHIFT FROM DEFINED BENEFIT TO DEFINED CONTRIBUTION PENSION PLANS—IMPLICATIONS FOR ASSET ALLOCATION AND RISK MANAGEMENT 13–17 (2006), http://www.bis.org/publ/wgpapers/cgfs27broadbent3.pdf.

35. The overwhelming success of institutional investors in making corporations more subject to the immediate whims of the stock market is reflected in the substantial diminution in takeover defenses such as classified boards and poison pills, the emergence of so-called majority voting that turns a withhold vote into a removal tool even when a director is not opposed by an actual rival candidate, the use of precatory proposals as a leverage tool by activists, and tying executive compensation to stock returns. *See Poison Pills in Force Year over Year Profile Report*, FACTSET RSCH. SYS. (retrieved Sept. 28, 2022) (only six S&P 500 companies had a shareholder rights plan (inclusive of a net operating loss protective plan) in place at the end of 2021, compared to 301 S&P 500 companies having a plan at the end of 2001); *Takeover Defense Trend Analysis*, FACTSET RSCH. SYS. (retrieved Sept. 28, 2022) (at the end of 2021, 89.77% of the S&P 500 companies and 45.97% of the Russell 3000 companies had adopted the majority voting standard, which are significant increases from 73.5% of the S&P 500 companies and 26.5% of the Russell 3000 companies at the end of 2010); Tod Perry & Marc Zenner, *CEO Compensation in the 1990s: Shareholder Alignment or Shareholder Expropriation?*, 35 WAKE

delivering returns to equity holders,[36] even if that hurt other stakeholders.[37]

These trends moved with less rapidity outside the United States, but they did move.[38] Institutional investors are stronger everywhere and growing in influence. Large U.S. institutional investors are among the largest stockholders in many foreign markets and are using their influence to spread American manage-to-the-market corporate governance policies, such as annual say-on-pay votes.[39] Union and worker influence is down everywhere.

The natural result of giving stockholders way more power and cutting the power of workers ensued: the share of corporate profits that went to the American workers most responsible for their creation went sharply

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FOREST L. REV. 123, 127 (2000) (highlighting the role institutional investors, including CalPERS, played in tying executive compensation to stock price performance); Vijay Govindarajan & Anup Srivastava, *We Are Nowhere Near Stakeholder Capitalism*, HARV. BUS. REV. (Jan. 30, 2019), https://hbr.org/2020/01/we-are-nowhere-near-stakeholder-capitalism ("CEOs continue to be hired, fired, and compensated based on metrics such as revenues, profits, and share prices. Fund managers, who make investment decisions on behalf of dispersed investors, continue to be rewarded based on how their investments performed relative to the market. The board of directors continue to be selected by shareholders to protect their interests. So, how likely is it that a CEO would get up one day and suddenly change his or her focus from revenues, profits, and stock prices toward wider Environmental, Social, and Governance (ESG) goals? Some CEOs might, but for most, the predominant objective would continue to be to maximize shareholder value while keeping ESG objectives in mind, instead of the other way around."); *see also* Roberta Romano, *Less Is More: Making Shareholder Activism a Valuable Mechanism of Corporate Governance*, 18 YALE J. ON REG. 174 (2001) (explaining how 14a-8 proposals encouraging corporations to drop defenses have made it easier for hedge fund pressure campaigns to succeed).

36. *See* STEPHEN M. BAINBRIDGE, THE PROFIT MOTIVE: DEFENDING SHAREHOLDER VALUE MAXIMIZATION 118–21 (2023) (documenting evidence that CEOs are compensated primarily in forms of equity that give them a strong incentive to put stockholders first).

37. *See* John C. Coffee, Jr., Robert J. Jackson, Jr., Joshua R. Mitts & Robert E. Bishop, *Activist Directors and Agency Costs: What Happens When An Activist Director Goes on the Board?*, 104 CORNELL L. REV. J. 381, 394 (2019) (marshaling studies and evidence that hedge fund activism "cost creditors significantly and systematically" and may pressure corporations "to act in a more risk-accepting manner and contrary to broadly accepted public policies.").

38. For example, the number of companies based in Europe and subject to public activist demands rose from 89 in 2014 to 135 in 2019; for companies based in Asia, the analogous figure rose from 49 in 2014 to 107 in 2019; for companies based in Australia, the analogous figure rose from 60 in 2014 to 72 in 2019. *See* ACTIVIST INSIGHT, SHAREHOLDER ACTIVISM IN 2019 10, 12, 14 (2020), https://www.activistinsight.com/research/Shareholder_Activism_In_2019.pdf [https://perma.cc/DS6E-U34E]. Further, across Europe, Asia, and Australia, activists gained more board seats in 2019 than in 2014 (rising from 39 to 64 in Europe, from 30 to 67 in Asia, and 23 to 42 in Australia). *See id.*

39. *See*, *e.g.*, *SRD II—Say on Pay Requirements: An Overview of Key Changes and the Glass Lewis Approach*, GLASS LEWIS, https://www.glasslewis.com/wp-content/uploads/2020/02/SRDII_SoP.pdf [https://perma.cc/2VHE-H6E7]; *SRD II—Shareholder 'Say on Pay' Now Mandatory in Ireland*, MCCANN FITZGERALD (Apr. 17, 2020), https://www.mccannfitzgerald.com/knowledge/equity-capital-markets/srd-ii-shareholder-say-on-pay-now-mandatory-in-ireland [https://perma.cc/H8ZU-B27C]; Christoph Van der Elst & Anne Lafarre, *Shareholder Voice on Executive Pay: A Decade of Dutch Say on Pay*, 18 EUR. BUS. ORG. L. REV. 51 (2017).

down, while returns to stockholders and management went sharply up.[40] This erosion in gain sharing is at odds with Berle's understanding of the core purpose of our corporate governance system: "The first requirement of the American industrial system is that it shall assure continued growth of American product, accompanied by a distribution of its benefits to substantially all the American population."[41] Rather than wages tracking productivity gains and workers gaining when stockholders did, the share of the corporate pie—and yes, there was plenty of new pie—was taken by the stockholders.[42] There has been a profound growth in inequality in the United States, most acutely and durably along racial lines,[43] and that relationship corresponds in material part to changes in corporate governance.[44] The same trends have operated beyond our shores. Worker share is down

40. POWER WITHOUT PROPERTY, *supra* note 1, at 120.

41. *Id.*

42. The excellent work of Larry Mishel and other scholars at the Economic Policy Institute have documented this profoundly negative trend in gain sharing with workers. *See* LAWRENCE MISHEL & JULIA WOLFE, ECON. POL'Y INST., CEO COMPENSATION HAS GROWN 940% SINCE 1978 (2019), https://www.epi.org/files/pdf/171191.pdf [https://perma.cc/GV52-H4HF]; *see also* JAMES MANYIKA, JAN MISCHKE, JACQUES BUGHIN, JONATHAN WOETZEL, MEKALA KRISHNAN & SAMUAL CUDRE, MCKINSEY GLOB. INST., A NEW LOOK AT THE DECLINING LABOR SHARE OF INCOME IN THE UNITED STATES (May 2019), https://www.mckinsey.com/~/media/mckinsey/featured%20insights/employment%20and%20growth/a%20new%20look%20at%20the%20declining%20labor%20share%20of%20income%20in%20the%20united%20states/mgi-a-new-look-at-the-declining-labor-share-of-income-in-the-united-states.pdf [https://perma.cc/FKV3-4G2F].

43. *See* Catarina Saraiva, *Black-White Wealth Gap Getting Worse, 160 Years of U.S. Data Show*, BLOOMBERG L. (June 7, 2022), https://www.bloomberg.com/news/articles/2022-06-07/black-white-wealth-gap-getting-worse-160-years-of-us-data-show.

44. In an important paper, distinguished economists attribute much of the stagnation in wages to this change in power balance. *See* Anna Stansbury & Lawrence H. Summers, *The Declining Worker Power Hypothesis: An Explanation for the Recent Evolution of the American Economy* 7 (Nat'l Bureau Econ. Res., Working Paper No. 27193, 2020), https://www.nber.org/papers/w27193 [https://perma.cc/XV77-VK6U] ("[T]he declines in unionization and the real value of the minimum wage, and the fissuring of the workplace, affected middle- and low-income workers more than high-income workers, and some of the lost labor rents for the majority of workers may have been redistributed to high-earning executives (as well as capital owners)."). Another recent article draws a similar connection in an incisive way. *See* Zohar Goshen & Doron Levit, *Agents of Inequality: Common Ownership and the Decline of the American Worker*, 72 DUKE L.J. 1 (2022). One of us has written about this connection for many years. *See, e.g.*, 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*, 106 MINN. L. REV. 1325, 1338, 1354 (2022); Strine & Smith, *supra* note 3; Strine, *Development on a Cracked Foundation*, *supra* note 16; 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 (2017) [hereinafter *Who Bleeds When the Wolves Bite?*]; Strine, *Human Freedom and Two Friedmen*, *supra* note 19; Strine, *Toward Common Sense and Common Ground?*, *supra* note 34.

internationally.[45] Inequality is up, with the gap between the haves and the many growing everywhere.[46]

The trends of the last half century have also undermined the idea that stockholders are residual risk-bearers who cannot win unless the fair expectations of others are met first.[47] Climate change has been fueled by a discrete set of corporations from the wealthy nations of the world, whose stockholders have benefited tremendously from their activities.[48] Stockholders investing in these corporations during this period have been paid multiples of their original investment and have no responsibility to give it back to ameliorate the harm the corporations have caused.[49] Corporate activity in other areas, such as plastics pollution[50] and drug and tobacco addiction,[51] reveals the emptiness of the residual claimant model in the real

45. *See generally* OECD, ECONOMIC OUTLOOK, *supra* note 5; INT'L MONETARY FUND, WORLD ECONOMIC OUTLOOK, GAINING MOMENTUM? 122 (2017), https://www.imf.org/en/Publications/WEO/Issues/2017/04/04/world-economic-outlook-april-2017 [https://perma.cc/BZR2-Z88V].

46. *See, e.g.*, SURVIVAL OF THE RICHEST, *supra* note 5, at 15 ("In the last 10 years, billionaires have doubled their wealth, making nearly six times more than the increase in wealth seen by the bottom 50%. . . . The top 1% have gained 74 times more wealth than the bottom 50% in the last 10 years."). Since 2020 alone, the wealthiest 1% of the global population has captured almost two-thirds of new wealth created. *Id.*; *see also* WORLD INEQ. LAB, WORLD INEQUALITY REPORT 2022, *supra* note 4, at 3 ("[B]etween 1995 and 2021, the top 1% captured 38% of the global increment in wealth, while the bottom 50% captured a frightening 2%. The share of wealth owned by the global top 0.1% rose from 7% to 11% over that period . . . .").

47. For one of our takes on this, see Kovvali & Strine, *Win-Win that Wasn't*, *supra* note 3.

48. *See, e.g.*, discussion *supra* note 8.

49. For example, between 1980 and 2017, shares of ExxonMobil returned an average of 15.5% per year, compared to only 11.1% per year for the S&P 500; put differently, one dollar invested in the S&P 500 over that period would be worth $29.40, while one dollar invested in ExxonMobil over the period would be worth $99.90. *Stocks for the Long Run: ExxonMobil vs. the S&P 500*, MOTLEY FOOL (Apr. 7, 2017), https://www.fool.com/investing/general/2012/05/29/stocks-for-the-long-run-exxonmobil-vs-the-sp-500.aspx#:~:text=Since%201980%2C%20shares%20have%20returned,it'd%20be%20worth%20%2499%2C900. [https://perma.cc/Y25D-33W6]. And more recently, in the aftermath of the COVID-19 pandemic and the expanded Russian invasion of Ukraine, stockholders of energy companies have reaped even greater rewards. *See, e.g.*, Evan Halper, *Shell Adds to Oil Industry's Record Profits, with $41.6 Billion*, WASH. POST (Jan. 31, 2023), https://www.washingtonpost.com/business/2023/01/31/oil-profits-chevron-exxonmobil-earnings/ [https://perma.cc/7MAG-6LUH]; Tim Mullaney, *ExxonMobil, Chevron's Big Cash Shows Cheap Gas Isn't Coming Back*, CNBC (Feb. 1, 2023), https://www.cnbc.com/2023/02/01/exxon-chevron-earnings-buybacks-show-cheap-gas-isnt-coming-back.html [https://perma.cc/HS73-52WF].

50. *See, e.g.*, DOMINIC CHARLES & LAURENT KIMMAN, MINDEROO FOUND., PLASTIC WASTE MAKERS INDEX 2023 18, 27 fig.5 (2023), https://cdn.minderoo.org/content/uploads/2023/02/04205527/Plastic-Waste-Makers-Index-2023.pdf?campaign_id=54&emc=edit_clim_20230207&instance_id=84759&nl=climate-forward®i_id=54001568&segment_id=124672&te=1&user_id=62a8634dd0a6ff8d128ee4e8e8e0b542 ("More than half of the world's single-use plastic waste could be traced directly to just 20 petrochemical companies. . . . The top 20 list of petrochemical companies producing polymers bound for single-use plastic in 2021 remains effectively unchanged since 2019.").

51. *See, e.g.*, Rebecca Haffajee & Michelle M. Mello, *Drug Companies' Liability for the Opioid Epidemic*, 377 NEW. ENG. J. MED. 2301, 2305 (2017) ("For opioids, though, government payment for

world, where stockholders can take all the time and the residual costs are often borne by others affected by corporate conduct.[52]

Corporations have also flexed their domestic and international power to extract rents and to escape accountability to stakeholders. The corresponding emergence of tax havens and of corporate willingness to short or even abandon their home nations to escape domestic taxation or other forms of regulation has undermined public fiscs and stakeholder protections.[53] This has compromised the ability of nations to maintain their social safety nets and address challenges like climate change.[54] Corporations will even abandon the nation that gave rise to their prosperity to avoid paying fair taxes;[55] that is what an inversion is.[56]

Corporate law itself is at the heart of tax avoidance through asset partitioning. By way of example, when corporation intellectual reports

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excessive prescriptions under public insurance programs directly contributed to companies' profits. . . . Notwithstanding the $600 million federal settlement with Purdue in 2007—one of the largest in history with a drug company—opioid litigation has yet to financially dent the $13-billion-a-year opioid industry.").

52. *See, e.g.*, Oliver D. Hart & Luigi Zingales, *The New Corporate Governance* 197 (U. Chi., Becker Friedman Inst. for Econ., Working Paper No. 2022-55, 2022), https://ssrn.com/abstract=4094175 [https://perma.cc/XK8S-ZU7W] ("When externalities are important and at least some investors are prosocial, we argue that shareholders will want companies to pursue *shareholder welfare maximization* . . . not [shareholder value maximization].").

53. Some of the best writing on corporate tax evasion has been done by Professors James Hines and Reuven Avi-Yonah. *See, e.g.*, Reuven S. Avi-Yonah & Omri Maria, *Inversions and Competitiveness: Reflections in the Wake of Pfizer/Allergan*, INT'L TAX J. 39 (2015); Reuven S. Avi-Yonah, *A World Turned Upside Down: Reflections on the 'New Wave' Inversions and Notice 2014-52*, 145 TAX NOTES 95 (2014); James R. Hines, Jr. & Eric M. Rice, *Fiscal Paradise: Foreign Tax Havens and American Business*, 109 Q.J. ECON. 149 (1994); James R. Hines, Jr., Mihir A. Desai & C. Fritz Foley, *The Demand for Tax Haven Operations*, 90 J. PUB. ECON. 513 (2006); James R. Hines, Jr., Anna Gumpert & Monika Schnitzer, *Multinational Firms and Tax Havens*, 98 REV. ECON. & STAT. 713 (2016).

54. Nations have made pledges to tackle climate change that have been dishonored. *See* Ivana Kottasova, *Not a Single G20 Country Is in Line with the Paris Agreement on Climate, Analysis Shows*, CNN (Sept. 16, 2021), https://www.cnn.com/2021/09/15/world/climate-pledges-insufficient-cat-intl/index.html [https://perma.cc/QBT6-KWL2]. The fact that their treasuries are stressed by corporate tax escape does not help.

55. Berle noted that, in the run up to World War II, some American businesses continued to engage in trade with Nazi Germany, by arguing that they were not involved in politics. But, he found that in the main American corporations had operated internationally in a way that was loyal to national priorities, and that American corporations and foreign policymakers had largely cooperated to advance American economic goals. THE 20TH CENTURY CAPITALIST REVOLUTION, *supra* note 1, at 132–45. As he later summarized: "The modern corporation thus has become an international as well as national instrument. It is a mighty institution which thus far has not become, and has manifested no great desire to become, an independent political force." *Id.* at 163. There is more than a small amount of examples that seem to display a different corporate attitude toward loyalty to home nation and the exercise of political muscle.

56. The Congressional Budget Office identified 60 American companies that discarded their citizenship between 1983 and 2015 in order to avoid taxes. CONG. BUDGET OFF., AN ANALYSIS OF CORPORATE INVERSIONS 5 (2017), https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/53093-inversions.pdf [https://perma.cc/2TU4-7XE4].

develop in their home nation but they parked it in a subsidiary in a tax haven nation to which the corporation requires its other subsidiaries to pay a royalty[57]—a tactic used by large corporations to insulate themselves from taxation.[58] Corporate law facilitates tax avoidance and other forms of regulatory arbitrage like threats of redomiciling and relocation, now on a global and not just domestic basis.[59] As a result, the share of national, state, and local taxes paid by corporations has diminished, and the ability of all nations to fairly tax corporations for profits generated within their borders has been denuded.[60]

Importantly, the need for corporations to operate in global markets has also reduced the ability of any chartering nation to hold its corporations accountable to a public consensus of ethical behavior. Corporations now find themselves subject to the exercise of governmental power by nations that do not share a common set of values, and where there is the opposite of a shared public consensus. Because American and OECD-domiciled corporations are under pressure to deliver profits, they operate in nations where governments do not adhere to commonly accepted standards of human and civil rights, leaving them vulnerable to pressure to be complicit in oppression and to take stakeholder-unfriendly actions they would never risk at home. Examples include corporations helping governments engage in surveillance on their populations and treating workers, communities, and consumers in less wealthy "foreign" nations in ways that

57. *See, e.g.*, Andrew Blair-Stanek, *Intellectual Property Law Solutions to Tax Avoidance*, 62 UCLA L. REV. 2 (2015).

58. *See* Rachel Brewster, *Enabling ESG Accountability: Focusing on the Corporate Enterprise*, 2022 WIS. L. REV. 1367, 1385 ("MNCs' profit shifting to lower tax jurisdictions can occur through several mechanisms. Most famously, MNCs can move their intangible assets, including trademarks, patents, copyrights, or other intellectual property, to subsidiaries in low-tax jurisdictions. . . . MNCs can [also] route profits through holding companies in other low-tax jurisdictions to further reduce the company's tax bill.").

59. *See, e.g.*, *id.* at 1389 ("None of the global tax avoidance systems would be possible without enterprise law's robust recognition of subsidiaries as separate legal entities. The ability to transfer assets between subsidiaries is the central dilemma of modern corporate tax policy.").

60. The statutory corporate tax rate in the United States has declined from its all-time high of over 50% in the 1960s to just 21% today. *Six Charts that Show How Low Corporate Tax Revenues Are in the United States Right Now*, PETER G. PETERSON FOUND. (Apr. 28, 2021), https://www.pgpf.org/blog/2021/04/six-charts-that-show-how-low-corporate-tax-revenues-are-in-the-united-states-right-now [https://perma.cc/U94V-PHFP]. As a result, corporate income tax revenue as a share of GDP has declined from almost 6% in 1952 to roughly 1% today. *Id.* Current corporate tax revenues in the United States are also a geographic outlier. Corporate income taxes accounted for roughly 6% of U.S. tax revenue in 2021, compared to an average of 24% in other OECD countries. Daniel Bunn & Cecilia Perez Weigel, *Sources of U.S. Tax Revenue by Tax Type*, TAX FOUND. (Feb. 27, 2023), https://taxfoundation.org/publications/sources-government-revenue-united-states/#:~:text=Corporate%20income%20taxes%20accounted,U.S.%20tax%20revenue%20in%202021.&text=Source%3A%20OECD%2C%20%E2%80%9CRevenue%20Statistics,taxes%20and%20property%20taxes [https://perma.cc/786Q-57BQ].

are clearly unacceptable at home.[61] This at best might be thought to move the corporate governance system toward a form of NIMBY ESG, if you will,[62] explained in part by the reality that corporations have incentives to do worse by stakeholders outside their headquarters' nation.[63] Corporations can and do use the threat of moving operations toward markets where there are fewer stakeholder protections to stymie efforts to increase domestic stakeholder protection.[64] To this point, many corporations that practice under codetermination codes at home and have strong domestic union workforces, locate operations abroad in jurisdictions with low union and labor rights.[65] Companies also have an incentive to claim that their direct domestic workforce, direct consumer, and environmental practices are high quality, while not reporting on their treatment of contracted workers or the impact of their outsourced operations.[66]

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61. *See, e.g.*, Jack Nicas, Raymond Zhong & Daisuke Wakabayashi, *Censorship, Surveillance and Profits: A Hard Bargain for Apple in China*, N.Y. TIMES (May 17, 2021), https://www.nytimes.com/2021/05/17/technology/apple-china-censorship-data.html [https://perma.cc/W38W-EZL4]; *China: Apple Accused of Violating Labour Laws as Employees at iPhone Factory Found Working 100 Hours of Overtime & Being 'Punished' for not Meeting Targets*, *Incl. Co. Comments*, BUS. & HUM. RTS. RES. CTR. (Sept. 9, 2019), https://www.business-humanrights.org/en/latest-news/china-apple-accused-of-violating-labour-laws-as-employees-at-iphone-factory-found-working-100-hours-of-overtime-being-punished-for-not-meeting-targets-incl-co-comments/ [https://perma.cc/N5TM-TRDR].

62. ESG for people like me, but not the developing thee.

63. Professor Pargendler has discussed this in an incisive recent article. *See generally* Mariana Pargendler, *The Grip on Nationalization of Corporate Law*, 95 IND. L.J. 533, 534–39 (2020).

64. In fact, some of the most vocal corporate leaders espousing a supposed commitment to ESG have felt free to aggressively use corporate resources to thwart efforts by workers to unionize and have treated violations of labor law rights as akin to traffic tickets. Matthew T. Bodie, *Labor Relations at the Woke Corporation*, 79 NYU ANN. SURV. L. (forthcoming 2023) (manuscript at 11–16) (on file with authors).

65. The global race by corporations to save on labor costs as a way to seek profit for their stockholders has even led some European companies to locate operations in the southern United States in an effort to evade the more stringent worker protections in the European Union and the more labor-protective, higher pay states within the U.S. itself. *See* Lance Compa, *The Double Standard at Work: European Corporate Investment and Workers' Rights in the American South*, REVUE DE DROIT COMPARÉ DU TRAVAIL ET DE LA SÉCURITÉ SOCIALE (Apr. 2021).

66. Branson, *supra* note 9, at 361 (arguing that, in the international realm, corporate managers have incentives to do anything that will generate profits, thus not to underperform for stockholders but to engage in conduct that involves "over performing, relentlessly pursing profit through economic imperialism, excessive regulatory arbitration, degradation of the environment and plantation production").

> The United States style corporate governance model, which convergence advocates say should or already does dominate on global fronts, contemplates an underperforming or self dealing manager, not an over performing one. Put another way, in the international sphere, the senior managers and dispersed owners share an interest in financial returns that is less hampered, or not hampered at all, by an agency cost problem.

Id.

And with more powerful mergers and acquisitions markets, the number of public companies has fallen substantially in both the United States and the EU,[67] reducing corporate ties to particular communities even more. Corporate law has also facilitated the growth of large private markets, presenting yet another opportunity for regulatory arbitrage, enabling U.S. companies to leave the public equity markets and escape the only real system of corporate disclosure that exists—the United States has made its primary system of public corporate reporting one that only exists to serve equity investors, and not other corporate stakeholders.[68]

These problems are compounded by the reality that corporate law facilitates the ability of corporations to act on the political process and to undercut protections for other stakeholders.[69] The conception that a stockholder-focused corporate law poses little danger because external laws will

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67. The number of public companies in the United States has fallen from an all-time high of almost 6,000 in the mid-1990s to roughly 4,000 in 2020. Varkita Gupta, Tim Koller & Peter Stumpner, *Reports of Corporates' Demise Have Been Greatly Exaggerated*, MCKINSEY & CO. (Oct. 21, 2021), https://www.mckinsey.com/capabilities/strategy-and-corporate-finance/our-insights/reports-of-corporates-demise-have-been-greatly-exaggerated [https://perma.cc/P5AJ-2QZM]. The number of public companies in the European Union, meanwhile, has decreased from an all-time high of almost 8,000 in 2001 to under 6,000 in 2018. LISTED DOMESTIC COMPANIES, TOTAL–EUROPEAN UNION, WORLD BANK, https://data.worldbank.org/indicator/CM.MKT.LDOM.NO?locations=EU [https://perma.cc/DW5Q-BFZZ] (data retrieved Sept. 15, 2023).

68. For a learned dilation on the problems with relying upon the listing of equity shares as the exclusive trigger for public reporting and other regulatory obligations for large companies, see George S. Georgiev, *Is 'Public Company' Still a Viable Regulatory Category?*, 13 HARV. BUS. L. REV. 1 (2023).

69. The Center for Political Accountability has published carefully documented studies demonstrating the huge amounts of political spending done by American public corporations, the lack of alignment of that spending with the distribution of views in political affiliations by the American public, and that much of the spending goes to elected officials who regulate companies. *See generally* JACOB HACKER & PAUL PIERSON, CTR. FOR POL. ACCOUNTABILITY, CONFLICTED CONSEQUENCES (2021), https://www.politicalaccountability.net/wp-content/uploads/2021/08/Conflicted-Consequences.pdf [https://perma.cc/9QCN-7BDK]; BRUCE FREED, DAN CARROLL, CARLOS HOLGUIN, KARL SANDSTROM & PETER HARDIN, CTR. FOR POL. ACCOUNTABILITY, PRACTICAL STAKE: CORPORATIONS, POLITICAL SPENDING AND DEMOCRACY (2022), https://www.politicalaccountability.net/wp-content/uploads/2022/04/Practical-Stake.pdf [https://perma.cc/87EU-XMLV]. For prior writings by one of us that pull together these and other studies and that demonstrate how corporate money for political spending and lobbying swamps become available to groups representing workers, consumers, and the environment, see 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, 1020, 1033–39 (2020) [hereinafter *Fiduciary Blind Spot*]. Corporate political influence is not just an issue in the United States. A recent report on corporate political spending in Australia found a marked gap between the stated policies of energy-producing companies, for example, on climate change, and their corporate political spending and lobbying practices, with companies voicing support for action to arrest climate change while simultaneously using their funds to exert political influence to oppose that action. *See generally* AUSTRALASIAN CTR. FOR CORP. RESP., BENCHMARKING FOR CHANGE: CORPORATE POLITICAL EXPENDITURE AND CLIMATE LOBBYING IN AUSTRALIA (2023), https://www.accr.org.au/research/benchmarking-for-change-corporate-political-expenditure-and-climate-lobbying-in-australia/ [https://perma.cc/YZ2B-F34B].

protect society against overreaching by corporations—pressed to squeeze the lemon for more juice for equity holders—confronts the additional reality that corporate power acts on the polity and its political process to undercut the ability of society to protect workers, consumers, and the environment. Corporate law enables corporate managers to act on the political process without approval from stockholders, much less any other stakeholder group, and institutional investors who are themselves conflicted have abdicated any duty to check corporate political rent-seeking.[70] Even in nations where corporations cannot contribute directly, they exercise outsized political influence and use the leverage of relocation to cut their taxes and reduce their obligations to stakeholders.

The implications of these and other changes to corporate governance since Berle's death are profound and make more challenging the larger question key to any viable form of stakeholder corporate governance: globalizing New Deal capitalism and a public consensus for holding businesses accountable for making money the right way.

Without purporting to be exhaustive, we distill down from these developments five areas of corporate law policy that must be addressed to move in this direction:

- the powerlessness of workers in comparison to institutional investors and the corrosive effects of this imbalance on inequality, fairness, and social stability;
- the realities of corporate externalities such as climate change and their implications for the residual claimant concept and corporate accountability;
- the facilitation of tax avoidance via corporate law, and thus undermining the governmental capacity to address issues like climate change, poverty, and consumer harm;

70. Corporate law scholars have documented the reasons why conflicts of interest exist between corporate managers and investors on this dimension, and the reasons why requiring stockholder approval would be consistent with traditional corporate law principles. *See* Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923, 942 (2013); Coates, *supra* note 2, at 13; Strine, *Fiduciary Blind Spot*, *supra* note 69; Leo E. Strine, Jr. & Jonathan R. Macey, Citizens United *as Bad Corporate Law*, 2019 WIS. L. REV. 451 (2019); Dorothy S. Lund & Leo E. Strine, Jr., *Corporate Political Spending is Bad Business*, HARV. BUS. REV. (Jan.–Feb. 2022), https://hbr.org/2022/01/corporate-political-spending-is-bad-business [https://perma.cc/KS52-KPJG]. A more eminent authority agreed: Vanguard's founder John ("Jack") Bogle, who suggested that corporations be prohibited from engaging in corporate political spending unless 75% of their stockholders supported the plan under which donations would be made. His rationale was simple and compelling: human beings do not invest for political reasons, human investors are not likely to be more homogenous in political views than the public at large, and thus corporations have no legitimacy in using their entrusted capital to influence our political system without consensus support. John C. Bogle, *The Supreme Court Had Its Say. Now Let Shareholders Decide.*, N.Y. TIMES (May 14, 2011), https://www.nytimes.com/2011/05/15/opinion/15bogle.html [https://perma.cc/K6YC-K45X].

• the mismatch between the capacity and reach of the regulatory structures and social consensus that constrains corporate power and the scope of the markets in which corporations exert power; and
• the tolerance of corporate law for the unconstrained use of corporate power for political purposes, and the negative effect this has on the ability of government to implement stakeholder-protective policies.

II. HOW CORPORATE LAW SCHOLARSHIP AND POLICY MIGHT HELP RESTORE A 21ST CENTURY PUBLIC CONSENSUS SUPPORTIVE OF STAKEHOLDER GOVERNANCE

To create an effective public consensus supportive of stakeholder governance and the exercise of corporate power consistent with the broader interests of humanity, these five key issues must be at the forefront of corporate law scholarly research and policy development.[71]

First, corporate law must address the decline in voice and power of the constituency most responsible for capitalism's success—workers. It is hollow for corporate law scholars to crow that American boards of directors do not take into account workers in merger transactions,[72] for example, if you have systematically argued for corporate governance rules that make boards responsive to the immediate whims of the stock market and for having them manage corporations solely for the benefit of stockholders.[73]

71. To our minds, these realities facilitated by corporate power—and others that we do not cover in this Article, such as the increasingly global spread of disease without a commensurate growth in international public health infrastructure, the development of artificial intelligence products at a faster rate than policymakers can grasp and address, and the concentration of ownership of social and news media in the hands of the wealthy few—present a formidable challenge to corporate law thinkers and policymakers. These stubborn facts about the connection between the exercise of corporate power and adverse social outcomes, at both the domestic and global level, are what is most important to any current consideration of corporate law policy, and what must be confronted in any serious effort to make stakeholder governance effective. In prior work, one of us has recommended multipronged policy measures to better align corporate and investor incentives with the interest of human beings. *See, e.g.*, Strine, *Restoration*, *supra* note 3; Leo E. Strine, Jr., *Toward Fair and Sustainable Capitalism* (Roosevelt Inst., Working Paper No. 202088, 2020), https://rooseveltinstitute.org/wp-content/uploads/2020/08/RI_TowardFairandSustainableCapitalism_WorkingPaper_202008.pdf [https://perma.cc/A4YK-2Q6J]; Strine & Smith, *supra* note 3; Strine, *Fiduciary Blind Spot*, *supra* note 69; Strine, *Who Bleeds When the Wolves Bite?*, *supra* note 44; Strine, *Human Freedom and Two Friedmen*, *supra* note 19; Strine, *Toward Common Sense and Common Ground?*, *supra* note 34.

72. *See generally* Bebchuk, Kastiel & Tallarita, *supra* note 11.

73. Lucian A. Bebchuk, *The Case Against Board Veto in Corporate Takeovers*, 69 U. CHI. L. REV. 973, 975 (2002) (arguing that boards should not have power to "veto" takeover bids and prevent stockholders from accepting tender offers); Lucian A. Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 865 (2005) (advocating for a regime in which "shareholders would be able to initiate and adopt any rules-of-the-game decisions," including changes to corporate charters

What should instead happen is the consideration of ways to ensure that the interests of workers are better considered and that fair gainsharing is restored.[74] Within domestic corporate law, that could mean requiring boards of all large companies—public or private—to have workforce committees charged with considering the company's policies for worker compensation and benefits, training, safety, and respect; its policies toward living wages, unions, and outsourcing; and its policies that address the treatment of its contracted workforce.[75] To move toward more worker voice in the unique American context,[76] these workforce committees could be empowered to experiment with EU-style works councils and other forms of worker voice.[77] Public disclosure by large companies about the compensation of their workforce—direct and contracted—and other important metrics relevant to worker welfare should be required. This would put upward pressure on worker treatment and hold boards accountable for how they treat their workforce.[78]

These moves would also move the United States into closer conformity with its OECD allies, which commonly require companies not only to take into account a broader set of stakeholders than just shareholders[79] but

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and the state of incorporation); Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 696–98 (2007) (arguing for a corporate electoral system in which shareholders would be able to directly place candidates on the ballot and in which challengers would be entitled to reimbursement for their reasonable expenses); Lucian A. Bebchuk, *How to Fix Bankers' Pay*, 139 DAEDALUS 52, 57–58 (2010) (arguing "advisory votes [on pay packages] by themselves cannot ensure that directors are sufficiently attentive to and focused on shareholder interests" and shareholders should have power to directly change corporation's charter or state of incorporation); Lucian Arye Bebchuk, *Streamlining Access to the Corporate Ballot*, 12 CORP. GOVERNANCE ADVISOR 28, 30 (Mar.–Apr. 2004) (arguing a threshold ownership level of only one percent before stockholders are allowed to submit proxy access proposals is too high).

74. Bodie, *supra* note 64 (manuscript at 16–20) (detailing several constructive steps companies could do to give more weight to worker voice and welfare).

75. For more discussion of how this could be achieved, see, for example, Strine & Smith, *supra* note 3; Strine, Kovvali & Williams, *supra* note 44, at 1338, 1354; Strine, *Toward Fair and Sustainable Capitalism*, *supra* note 71.

76. For an incisive look at recent experiments in greater worker influence over wages and working conditions by state and local governments and their promise and limits within an American system that have more limited mechanisms for worker voice than most OECD nations, see generally César F. Rosado Marzán, *Quasi Tripartism: Limits of Co-Regulation and Sectoral Bargaining in the United States*, 90 U. CHI. L. REV. 703 (2022).

77. Strine & Smith, *supra* note 3, at 42–43.

78. *Id.* at 57; Strine, Kovvali & Williams, *supra* note 44, at 1380–92.

79. *See, e.g.*, Michael Bradley, Cindy A. Schipani, Anant K. Sundaram & James P. Walsh, *The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads*, 62 LAW & CONTEMP. PROBS. 9, 52 (1999) ("[C]orporate law in Germany makes it abundantly clear that shareholders are only one of the many stakeholders on whose behalf the managers must operate the firm."); Lawrence A. Cunningham, *Commonalities and Prescriptions in the Vertical Dimension of Global Corporate Governance*, 84 CORNELL L. REV. 1133, 1157 (1999) ("German law takes more seriously the idea that beneficiaries of directors' duties include corporate constituents

also sometimes even require worker-representatives on boards,[80] and better shape a public consensus toward the fair treatment of workers in the global economy.[81] If this system of disclosure also covered all aspects of corporate workforces, domestic and international, it would also encourage rising standards for fair treatment of workers in all global markets.

Critical to this effort is joint action by the United States and OECD to include protection for workers in all trade agreements, so that regionally appropriate minimum wages, the protection of workers' safety, and right to organize are the price of inclusion.[82] The public consensus Berle strongly supported, and that was envisioned as part of FDR's global New Deal, was a world trading system where the lessons of history were taken into account so the world did not repeat the sins of the past.[83] The

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other than shareholders . . ."); Timothy L. Fort & Cindy A. Schipani, *Corporate Governance in a Global Environment: The Search for the Best of All Worlds*, 33 VAND. J. TRANSNAT'L L. 829, 846 (2000) ("German corporate law clearly shows that managers must operate the firm for the benefit of multiple stakeholders, not just shareholders."); MARK J. ROE, POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE: POLITICAL CONTEXT, CORPORATE IMPACT 68 (2003) ("Nor has the French corporate law demanded shareholder-wealth maximization; indeed, it is said to encourage managers to run the firm in the general social interest, for all the players in the firm."); Geert Raaijmakers & Jos Beckers, *Netherlands*, *in* THE CORPORATE GOVERNANCE REVIEW 280, 293 (Willem J. L. Calkoen ed., 5th ed. 2015) ("[T]he Netherlands has traditionally followed the stakeholder model, under which management and supervisory board members are required to take into account the interests of all stakeholders when making decisions and performing their duties. According to Paragraph 7 of its preamble, the Corporate Governance Code is based on the principle that a company is a long-term alliance between the various parties involved in the company, such as employees, shareholders and other investors, suppliers, customers, the public sector and public interest groups. Paragraph 8 of the preamble indicates that corporate social responsibility issues must also be taken into account by the management and supervisory boards.").

80. *E.g.*, Strine, Kovvali & Williams, *supra* note 44, at 1338, 1354; Strine, *Toward Fair and Sustainable Capitalism*, *supra* note 71, at 9; Klaus J. Hopt, *Labor Representation on Corporate Boards: Impacts and Problems for Corporate Governance and Economic Integration in Europe*, 14 INT'L REV. L. & ECON. 203, 208 (1994) ("Maximization of shareholders' wealth has hardly ever been the objective of German stock corporations . . .").

81. *See, e.g.*, Stephen F. Befort, *A New Voice for the Workplace: A Proposal from an American Works Councils Act*, 69 MO. L. REV. 607, 609 (2004) ("'Works councils are elected bodies of employees who meet regularly with management to discuss establishment level problems.' Most countries in Western Europe legislatively mandate the formation of works councils for enterprises or plants in excess of a certain minimum size." (footnote omitted)); Cunningham, *supra* note 79, at 1142 ("Many continental European countries have gone further than the EC mandates and require that virtually all corporations establish and maintain worker councils."); Strine, Kovvali & Williams, *supra* note 44, at 1353–56 (summarizing the EU's approach to worker involvement in corporate governance).

82. *See generally* John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT'L L. 819 (2007).

83. *See, e.g.*, Adolf A. Berle, Jr., *Basic Elements in the New World Crisis*, 27 AM. SCHOLAR 423, 434–35 (1958) ("The capacity to produce a stable system of international economics is likely to determine also how solid a force the Free World really is. . . . The time has come when, I think, both the West and the East are likely to consider seriously reasonable global plans. This is not because of sudden conversion to internationalist faith. It is, quite simply, because the forces with which we all work, whether in economics or in international ballistic missiles, are themselves worldwide—and no other solutions make sense.").

inequality in outcomes represents what happens when corporate power is able to operate without the constraints put in place by the New Deal's example. Rather than follow the vision of FDR and Berle during much of the time since the 1980s, the United States used international institutions to undermine New Deal-like protections. Instead, the United States promoted the adoption of nineteenth century Reagan–Friedman style economic policies that regarded those protections for workers and other stakeholders as mistaken.[84]

Continuous pressure must be exerted on all economic fronts to ensure that fair worker protection—and other constraints on the ability of business to exploit other stakeholders, communities of operation, and the environment—exist in every sphere in which corporate power is exercised and that international convergence is on the enlightened New Deal model, not the antediluvian nineteenth century one. It is legitimate and proper that the minimum wage in Africa or South America should not be identical to that in Canada, Japan, Norway, or the United States; it is another thing to argue that there should be no minimum wage in those regions nor upward convergence toward better wages and working conditions in every global region.[85]

Second, to support effective stakeholder governance more generally, the United States could take important steps to encourage more consideration of all stakeholders in corporate governance and thus promote international convergence toward a stakeholder governance model. Examples of feasible action would be leveraging federal and state procurement systems to give a leg up to state-chartered public benefit corporations ("PBCs") that were certified as meeting responsible stakeholder protection standards set by the Department of Commerce. PBCs must commit to respecting their stakeholders and are subject to enforcement action if they do not.[86] Forty-four states and the District of Columbia now authorize

84. *See, e.g.*, Ramirez, *supra* note 30, at 846–48; Crain, *supra* note 16 at 93, ("Starting in the eighties, developing nations found free-market doctrine written into their loan agreements: bankers refused to extend credit unless the nations promised to lift capital controls, balance their budgets, limit taxes and social spending, and aim to sell more goods abroad—an uncanny replica of the austerity terms enforced under the gold standard. The set of policies became known as the Washington Consensus."); Brown, Deardorff & Stern, *supra* note 31, at 5.

85. One of the least attractive moves made by those who oppose worker rights is to argue that those who believe there should be greater protections for American and European workers want to impoverish the developing world. The reality of course is that paying fairer wages to the many in the United States and Europe would not be an obstacle to greater worldwide equality. What is an obstacle is the continuing growth in the concentration of wealth in the few, both within the United States and Europe (but also in the developing world), even though the wealth created results from the sweat and ingenuity of the many and from the support of states funded by the many.

86. *See* 8 Del. C. § 362.

PBCs,[87] demonstrating the bipartisan appeal of having corporations focusing on making money the right way. With encouragement from the contracting system and a credible, efficient one-stop certification process by the Department of Commerce, a useful incentive would be created.

Another corporate law obstacle to stakeholder governance must be overcome. For generations, the United States has relied on disclosure from companies with publicly traded stock to give Americans information about how corporations behave. But federal securities law has facilitated the emergence of large private companies,[88] many of which are larger than the typical public company, and the number of companies publicly listed in the United States is down considerably.[89] The failure to require large private companies to disclose meaningful information to the public is discordant with policy in much of the OECD, where disclosure relevant to stakeholders is triggered by the size of business operation,[90] and creates an incentive for corporations wishing to engage in profit-seeking through behavior injurious to workers and society to "go dark" by going private.[91]

87. *Stakeholder Governance*, *Making Business Accountable to People and Planet*, B LAB GLOB., https://www.bcorporation.net/en-us/movement/stakeholder-governance [https://perma.cc/3X6J-7N57].

88. *See* Asaf Eckstein & Gideon Parchomovsky, *Where the Wild Things Are? The Governance of Private Companies* 51 (U. Penn. Inst. for L. & Econ. Rsch. Paper No. 23-15, 2023), https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID4409858_code711466.pdf?abstractid=4393111&mirid=1 [https://perma.cc/MB82-BP67].

89. *See, e.g.*, MICHAEL J. MAUBOUSSIN & DAN CALLAHAN, MORGAN STANLEY, PUBLIC TO PRIVATE EQUITY IN THE UNITED STATES: A LONG-TERM LOOK 3 (2020), https://www.morganstanley.com/im/publication/insights/articles/articles_publictoprivateequityintheusalongtermlook_us.pdf [https://perma.cc/EB6U-F4N4] (finding that the number of companies listed on the U.S. stock market has declined from 4,796 in 1976 to 3,643 in 2019 even as GDP has more than tripled during the same period); ROGER ALIAGA-DIAZ, GIULIO RENZI-RICCI, HARSHDEEP AHLUWALIA, DOUGLAS M. GRIM & CHRIS TIDMORE, VANGUARD, THE ROLE OF PRIVATE EQUITY IN STRATEGIC PORTFOLIOS 2 (2020), https://static.vgcontent.info/crp/intl/avw/mexico/documents/role-of-private-equity.pdf [https://perma.cc/5799-QA76] ("[T]he asset size of the private equity market has been gradually growing on an absolute basis and relative to the public equity market over the last 20 years. Private equity has risen from 2% to 7% of total investable global equity assets.").

90. *See, e.g.*, Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 Amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as Regards Corporate Sustainability Reporting, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022L2464 [https://perma.cc/77VM-BMUS] (mandating enhanced ESG disclosure among medium and large companies, both publicly traded and privately held, with at least 500 workers).

91. We would also note that the ability to go private contributes to the regulatory arbitrage, making it difficult to address issues like climate change. In the energy sector, by way of example, there has been a growing tendency for energy producing businesses to transfer their most carbon- and methane-intensive assets to privately held companies, see GABRIEL MALEK, ANDREW BAXTER, DOMINIC WATSON, ANDREW HOWELL, MARK DAVIS, GANI SAGINGALIYEV GRANT SWARTZWELDER & CLARE STAIB-KAUFMAN, ENV'T DEF. FUND, TRANSFERRED EMISSIONS: HOW RISKS IN OIL AND GAS M&A COULD HAMPER THE ENERGY TRANSITION (2022), https://business.edf.org/wp-

This regulatory arbitrage creates a biased playing field and diminishes corporate accountability to stakeholders.

To restore a public consensus holding all powerful corporations accountable for behaving in a socially responsible manner, comparable information about stakeholder treatment must be expected from all large corporations. And U.S. policymakers should work with the other OECD nations—where disclosure of this kind is more common—to converge toward common standards of core disclosure about corporate treatment of key stakeholders and the environment.[92] U.S. policymakers establishing such disclosure standards would create pressure for competition to occur on the right lines—innovation and quality—rather than through the poor treatment of workers, communities, and the environment. Enhanced disclosure about how corporations make money in all regions of their operations, and about their treatment of the workers and communities responsible for profit creation in those regions, can promote the emergence of a global public consensus holding corporations more accountable and help close a widening equality gap.

Relevant to this issue is another long-avoided challenge for scholars wanting to help policymakers forge more sensible directions: confronting the reality that there is no good measure of the actual wealth-creating value of a corporation. The equity value of a corporation is not equal to the wealth a corporation actually creates for society; rather, it is a measure of the value of the company's equity,[93] and a company's market capitalization just measures the additional value debt adds to that equity value. A corporation that pays its workers well and has a lower return to equity can be just "as efficient" and in fact more wealth creating than a corporation that pays its workers unfairly and has a higher return to equity. A

content/blogs.dir/90/files/Transferred-Emissions-How-Oil-Gas-MA-Hamper-Energy-Transition.pdf [https://perma.cc/92ZN-GB63], thus escaping the investor- and public-driven expectation that public energy companies disclose their emissions and their plans to move to net zero. *See* Jeffrey Cavanaugh, *Public E&Ps Weigh Pros, Cons of Privatization*, ENERGY INTEL. (July 18, 2022), https://www.energyintel.com/00000182-02bf-d5e3-a58a-63bfdc100000 [https://perma.cc/99MF-45NV].

92. *E.g.*, *EU's New ESG Reporting Rules Will Apply to Many U.S. Issuers*, COOLEY (Oct. 28, 2022), https://www.cooley.com/news/insight/2022/2022-10-28-eus-new-esg-reporting-rules-will-apply-to-many-us-issuers [https://perma.cc/KP8F-Q4W2]; *#DeloitteESGNow—Global Reach of the E.U. Corporate Sustainability Reporting Directive and the Impact on U.S. Companies*, DELOITTE (Jan. 9, 2023), https://dart.deloitte.com/USDART/pdf/968fd654-35c8-4ca8-97bd-528e8ee08efc [https://perma.cc/7RGS-T5J8] ("Many U.S.-based companies, including certain nonlisted ones, will be subject to these European sustainability reporting requirements, whose implementation period could be more accelerated, and whose reporting and assurance provisions could be more expansive, than what the SEC's proposed rule on climate-related disclosures would require.").

93. *See* Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637, 673 (2006) ("Shareholder value is neither the equivalent of firm value nor a reasonable proxy for firm value, particularly when applied to the agency context upon which corporate law is focused.").

corporation is not less "efficient" or less of a competitor because it spreads its profits equitably between the workers most responsible for it and the stockholders. Rather, that corporation has chosen to answer a distributional question in a manner that is arguably more socially productive and creates much more wealth because of its higher positive multiplier effect. Likewise, corporate shirking in the form of externalities does not increase societal wealth, it simply enriches stockholders in a windfall way by shifting costs to others who must bear them. Too much thinking about corporate law policy still turns solely on a singular metric—stock price—that is notoriously erratic and subordinates other important elements of genuine value.

Third, governments must have the ability to address key social problems and redress corporate externalities (e.g., climate change, plastics pollution, and consumer harm) for stakeholder governance to be effective. Corporate law has facilitated the systematic erosion of government tax bases and left governments without the capacity to, for example, educate their citizens[94] and address the huge challenge not just of preventing further climate change, but of protecting vulnerable populations from the enormous harm posed by human-caused warming. Why doesn't corporate law itself have a responsibility to consider appropriate limits on the use of wholly owned subsidiaries set up solely to erode fair taxation by the nations in which the parent corporation's substantive business operations have transpired—such as the creation and actual use of its proprietary intellectual property?[95] Likewise, the world's wealthiest people exploit the ability to split themselves into exponential numbers of corporate entities to place their wealth as far beyond the reach of taxing authorities as possible.[96] As corporations and billionaires erode the tax bases of governments using corporate structures, they shift the support of government to

94. *E.g.*, *How Corporations Drain School Funding*, GOOD JOBS FIRST (Oct. 5, 2022), https://goodjobsfirst.org/how-corporations-drain-school-funding/ [https://perma.cc/H7NB-U4UU]; CHRISTINE WEN, KATIE FURTADO & GREG LEROY, GOODJOBSFIRST.ORG ABATING OUR FUTURE: HOW STUDENTS PAY FOR CORPORATE TAX BREAKS 2 (2021), https://goodjobsfirst.org/wp-content/uploads/docs/pdfs/Abating%20Our%20Future.pdf [https://perma.cc/CV9W-6Z6D] [hereinafter ABATING OUR FUTURE] ("[E]conomic development tax abatements given to corporations cost public school districts $2.37 billion in foregone revenue in [fiscal year] 2019."). Property taxes are the largest source of funding for K-12 education in the United States and are the largest corporate tax that most companies pay. ABATING OUR FUTURE, *supra*, at 5. Many states, however, grant cities or counties within their borders to grant property tax abatements to corporations in an effort to attract investment. *See id.* These abatements leave less revenue to be distributed across school districts, limiting per-student spending. *Id.* at 7.

95. For further suggestions on how corporate law can better combat, rather than facilitate, global tax avoidance, see, for example, Brewster, *supra* note 58, at 1401–04.

96. Even very rich people on the left shelter income this way. Google the world's most famous Dutch rock band and you will be surprised to find out who they are.

the less wealthy and reduce state capacity to regulate in the public interest. Corporate law has made this possible.[97]

Here again, disclosure could be part of the answer. The public should know when corporations are absolved for paying taxes otherwise required of human citizens. Through threats to relocate, corporations have continually undermined the tax bases of states and local governments and, especially, the public education system.[98] Requiring corporations to file a public annual tax subsidy report identifying the extent of subsidies received, whether the corporation has honored promises it made in connection with those subsidies,[99] and whether the corporation has sought subsidies by threatening to relocate or close its operations might dampen the enthusiasm corporations have for playing states and communities against each other in auctions that shift value to stockholders at the expense of American taxpayers.[100] Such disclosure would also make explicit when corporate success has been facilitated—as it often has been—by subsidies from ordinary taxpayers rather than being entirely the result of private investment.[101]

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97. *See, e.g.*, Blair-Stanek, *supra* note 57, at 18–48.

98. *See generally* John D. McKinnon & Scott Thurm, *U.S. Firms Move Abroad to Cut Taxes*, WALL ST. J. (Aug. 28, 2012), https://www.wsj.com/articles/SB10000872396390444230504577615232602107536; ABATING OUR FUTURE, *supra* note 94.

99. For example, after huge public backlash, Amazon cancelled its plans to locate its second headquarters in New York City, which it said would create tens of thousands of jobs, see Amy Plitt, *Amazon HQ2 and NYC: A Timeline of the Botched Deal*, CURBED (Feb. 18, 2019), https://ny.curbed.com/2019/2/18/18226681/amazon-hq2-new-york-city-timeline [https://perma.cc/855N-THBH], even though empirical analysis of prior subsidies to Amazon found that "the evidence suggests that there are scant benefits a community can hope to gain from publicly subsidizing [Amazon]'s operations, and those benefits come at an extremely high cost. There is little evidence of a big spillover effect that leads to the creation of additional jobs beyond Amazon's direct employees." Ike Brannon & Matthew Winden, *The Employment Effects of Tax Subsidies for the Construction of Amazon Facilities* 9 (Working Paper, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4394550 [https://perma.cc/D98Z-BM9U].

100. There are government accounting standards that can work in concert with a requirement of this kind. GOV'T ACCT. STANDARDS BD., STATEMENT NO. 77: TAX ABATEMENT DISCLOSURES (2015), https://gasb.org/page/ShowDocument?path=gasbs77_final-%2520Cropped.pdf&acceptedDisclaimer=true&title=GASB+STATEMENT+NO.+77%2C+TAX+ABATEMENT+DISCLOSURES&Submit= [https://perma.cc/32QA-ZPDA]. Already, this requirement is being used to shine a light on corporate undermining of school taxes. *See, e.g.*, ABATING OUR FUTURE, *supra* note 94 (which presented case studies on the impact of corporate tax abatements on school funding in Louisiana, Missouri, New York, South Carolina, and Texas).

101. Such disclosure could also help better facilitate the achievement of one of the most central aims of corporate tax: to regulate corporate activities. Subsidies can be more effective than taxation at creating incentives for certain corporate behaviors, but auditing the use—thereby policing the abuse—of subsidies is costly. *See* Reuven Avi-Yonah, *Why 15%? Justifying the Global Corporate Minimum Tax* (forthcoming 2023) (manuscript at 2), https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID4392468_code208790.pdf?abstractid=4392468&mirid=1 [https://perma.cc/AV63-GMYT].

Internationally, the corrosive effect of using the corporate form and domicile arbitrage to escape fair taxation undermine stakeholder protection and social safety nets and fuel inequality must be a priority of our nation's foreign policy. Corporations must be subject to taxation in a manner that tracks where it conducts its substantive operations. The parking of IP in nations having nothing to do with its creation should not be a legitimate use of the corporate form. Developing nations must also benefit from fairer corporate taxation regimes[102] and not just the chartering nations of big multinationals, especially given the greater threats they face from climate change and the further they are from prosperity. Only by these means will inequality and corporate externalities be reduced.

Another problem exists that even scholars who favor stockholder primacy acknowledge: corporations have been able to escape full responsibility for vast consumer harm because they use the shield of limited liability to frustrate fair compensation. Corporate law provides some modest safeguards against this problem when corporations actually seek to liquidate,[103] but the use of the corporate form to escape accountability is now a tool wielded by enormously profitable companies.[104] Rather than bear the costs of potential accountability to tort claimants who might prove they have been harmed by corporate conduct, enormously profitable

> The most important goal of the corporate tax is to regulate corporate activities. Large publicly traded corporations cannot be taxed on a pass-through basis and they are very important players in the economy. Having a corporate tax enables Congress to incentivize them by granting deductions (e.g., the Foreign Derived Intangible Income regime (FDII)) or credits (e.g., the tax credits in the Inflation Reduction Act (IRA)). Congress could achieve the same goals through cash subsidies, but it is sometime more efficient to use the tax code, and cash subsidies require more intense audits.

Id. Required public disclosure would help citizens and the press supplement regulation in creating better accountability and provide an impetus for elected officials to take further action.

102. Policies that seek to curb the abuse of tax havens must also, therefore, recognize legitimate efforts by developing nations to attract international investment. Martin W. Sybblis, *Equality Offshore*, 63 B.C. L. REV. 2667, 2740 (2022) (arguing that efforts to address tax havens should take account of the differences among nations and the interests in developing nations to build financial institutions and judicial systems that can foster their economic development, and to recognize that tax sheltering occurs within many developed nations in the OECD).

103. *E.g.*, Jonathan Randles, *Judge Throws Out Purdue Pharma's Deal to Shield Sacklers from Opioid Lawsuits*, WALL ST. J. (Dec. 16, 2021) (describing a district judge in New York's rejection of a bankruptcy-court sanctioned settlement that would have shielded Sackler family); WILLIAM ORGANEK, HARV. L. SCH. BANKR. ROUNDTABLE, THE DISMISSAL OF LTL AND WHAT LIES AHEAD FOR MASS TORT BANKRUPTCY (2023), https://hlsbankruptcyr.wpengine.com/wp-content/uploads/2023/02/The-Dismissal-of-LTL-and-What-Lies-Ahead-for-Mass-Tort-Bankruptcy.pdf [https://perma.cc/6LGU-BGJR].

104. *See, e.g.*, Joshua Macey & Jackson Salovaara, *Bankruptcy as Bailout: Coal Company Insolvency and the Erosion of Federal Law*, 71 STAN. L. REV. 879, 879 (2019) (documenting coal companies' use of bankruptcy process to evade environmental and worker protections); Steven Church, *J&J's Controversial Bankruptcy Strategy Upheld by Judge*, BLOOMBERG L. (Feb. 25, 2022), https://news.bloomberglaw.com/bankruptcy-law/j-js-controversial-bankruptcy-strategy-upheld-by-federal-judge [https://perma.cc/2GJ7-TYL4].

corporations form insolvent subsidiaries for the sole purpose of shirking future liabilities and seek to leave the healthy parent and its "residual claimant" stockholders free from any responsibility to future claimants.[105] If we are starting to sound familiar, it is for a reason**.** Corporate citizenship is a privilege that exposes society and stakeholders to dangers. The self-segmentation of a parent corporation into a proliferating number of wholly owned "subcitizens" challenges the idea that stockholders are residual claimants and, in a world of global competition, allows for rent-seeking and the avoidance of fair responsibility along many dimensions. Corporate law facilitates these dysfunctions; corporate law thus has a responsibility to address them.

Turning to a greyer area of a public consensus around corporate behavior that may not violate the law of the nation in which the corporation is operating—and may be encouraged by that nation—but that violates commonly accepted norms in the United States and long-standing internationally recognized human and civil rights. Think of American companies that have been pressured by oppressive regimes to turn over data about its customers that might be used to imprison or harass it, and to stifle its executives' free speech. This is an area where norms and other forms of softer law that Berle saw as essential come to the fore.[106] One promising avenue to reduce these pressures is to expand trade within the OECD bloc and to increasingly require nations that wish to benefit from participation in an international market system to respect the basic norms—the public consensus—expected in terms of the rights of workers and human beings in general.[107] The enlistment of private for-profit businesses as an arm of a police state is inconsistent with the premises on which organizations like

105. *See, e.g.*, Samir D. Parikh, *Mass Exploitation*, 170 U. PA. L. REV. ONLINE 53, 58–59 (2022); Adam Levitin, *The Texas Two-Step: The New Fad in Fraudulent Transfers*, CREDIT SLIPS (July 19, 2021), https://www.creditslips.org/creditslips/2021/07/the-texas-two-step.html#more [https://perma.cc/W78S-9ACC]; Michael A. Francus, *Texas Two-Stepping Out of Bankruptcy*, 120 MICH. L. REV. 38, 38 (2022). Even respected scholars who argue that a Chapter 11 proceeding might be the "least-bad" option for tort claimants propose reforms to ensure that corporations do not misuse asset partitioning, and concede that corporate conduct can often leave future tort claimants with no easy route to fair recompense. *See* Anthony J. Casey & Joshua C. Macey, *In Defense of Chapter 11 for Mass Torts*, 90 U. CHI. L. REV. 973, 1016 (2023).

106. The potential utility of soft law in the form of standards- and norms-setting organizations is suggested by a new paper that shows that companies that adhere to standards set by organizations like GRI are more likely to obtain assurance of their ESG reporting, and that industries where more participants adhere to such standards are more likely to obtain assurance. *See generally* Brandon Gipper, Samantha Ross & Shawn Shi, *ESG Assurance in the United States* (Soc. Sci. Rsch. Network, Working Paper No. 4263085, 2023), https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID4540827_code2909054.pdf?abstractid=4263085&mirid=1 [https://perma.cc/ZJT6-E7BW].

107. *See, e.g.*, Hung Tran, *Our Guide to Friend-Shoring: Sectors to Watch*, ATLANTIC COUNCIL (Oct. 27, 2022), https://www.atlanticcouncil.org/in-depth-research-reports/issue-brief/our-guide-to-friend-shoring-sectors-to-watch/ [https://perma.cc/UJE5-GQQF].

the WTO are based. The opportunity to share in the benefits of reciprocal commerce must come with the obligation to respect internationally recognized rights of the human stakeholders affected by that commerce. "Soft law" in the form of governance codes, like the U.N. Principles for Responsible Investing and the G20/OECD Principles of Corporate Governance,[108] and support by institutional investors for corporate resistance to complicity in human and civil rights violations are critical to making progress.[109]

108. There are now an array of potentially useful sources of such soft law standards. *See, e.g.*, *What Are the Principles for Responsible Investment?*, UNITED NATIONS PRINCIPLES FOR RESPONSIBLE INV., https://www.unpri.org/about-us/what-are-the-principles-for-responsible-investment [https://perma.cc/JVK7-9359] (which many of the world's leading institutional investors supposedly adhere to, and corporate governance advocated by the OECD); G20/OECD PRINCIPLES OF CORPORATE GOVERNANCE, OECD (2015), http://dx.doi.org/10.1787/9789264236882-en [https://perma.cc/T8Z3-PCL6]; *Supporting Materials for IFRS Accounting Standards*, INST. FOR FIN. REPORTING, https://www.ifrs.org/supporting-implementation/supporting-materials-by-ifrs-standards/ [https://perma.cc/8K8W-8M4T]. The World Economic Forum's New Paradigm also provides a model for companies and institutional investors to work together to channel profit-making activity in a more sustainable and socially responsible direction. MARTIN LIPTON, STEVEN A. ROSENBLUM, SABASTIAN V. NILES, SARA J. LEWIS & KISHO WATANABE, WORLD ECON. F., THE NEW PARADIGM: A ROADMAP FOR AN IMPLICIT CORPORATE GOVERNANCE PARTNERSHIP BETWEEN CORPORATIONS AND INVESTORS TO ACHIEVE SUSTAINABLE LONG-TERM INVESTMENT AND GROWTH (2016), https://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.25960.16.pdf [https://perma.cc/VW5C-F76D]; *see also* Mathieu Blanc & Jean-Luc Chenaux, *Sustainability Through Corporate Purpose: A New Framework for the Board of Directors*, CTR. FOR BUS. L. U. LAUSANNE (forthcoming) (manuscript at 3), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4518467 [https://perma.cc/K22Q-YJ3A] (discussing how a deeper conception of corporate purpose can be put into practice to help corporations make money through sound, sustainable business practices). And of course, institutions like the IMF and the World Bank have influence in channeling not just governmental but corporate power in certain directions.

109. Berle himself viewed emerging norms that had not yet become formal, hard law as useful parts of the public consensus. POWER WITHOUT PROPERTY, *supra* note 1, at 114 ("These standards some of us have christened 'inchoate' law—rules of conduct whose disregard entails consequences almost as foreseeable as does violation of specific statutes . . . . One result is likely to be that the standards set up by consensus will suddenly be made into explicit law in case of abuse of power."). One need not be as sanguine as Berle could be during the post-World War II era to see some hope in how international standards to which corporations and institutional investors are increasingly being asked to adhere, might have promise in contributing to better corporate behavior and ultimately the adoption of harder forms of international understandings protective of global corporate stakeholders. An incisive paper by Professor Pargendler articles well the potential utilities of soft law. *See* Mariana Pargendler, *The Rise of International Corporate Law*, 98 WASH. U. L. REV. 1765 (2021) (arguing that because nations are reluctant to impose regulations that could cut the international competitiveness of their home-chartered corporations, international soft corporate law could help fill the gap and encourage convergence around more productive incentives for corporate conduct). Just recently, plaintiffs have cited to such standards in seeking to enforce, through the U.S. State Department, guidelines for responsible business conduct developed by the OECD. *E.g.*, Simon Mundy, *Asia Factory Workers Press Nike Over Missing Pay*, FIN. TIMES (Mar. 1, 2023), https://www.ft.com/content/b2fb7264-aea0-4941-845b-40289b0f0238.

They can help encourage upward convergence toward more responsible corporate behavior.[110]

Finally, the notion that corporations passively exist within a public consensus and rules of positive law—and thus those external protections should be relied upon to protect the stakeholders—ignores the fact that corporate money, and thus power, dominates our political system. Corporate law polices conflicts of interest using tools like required participation by independent directors in decision making, stockholder approval, and disclosure.[111] The plain facts demonstrate the need to require the use of these tools to constrain corporate political influence, as the overwhelming weight of corporate political spending opposes protection for workers, consumers, the environment, and fair taxation.[112] Internationally, model governance codes promulgated by organizations including the IMF, the World Bank, and the OECD should converge to make corporate lobbying and political donations part of required public disclosure, and pressure independent directors and institutional investors to police these expenditures for consistency with stakeholder interests and established human and civil rights principles. More generally, these codes should hold corporate boards and institutional investors accountable for curbing abuses of corporate power harming stakeholders and the environment.

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110. By way of example, Apple has stated that its commitment to human rights is based on aspects of soft law such as the United Nations International Bill of Human Rights and the International Labour Organization's Declaration on Fundamental Principles on Business and Human Rights, and that where "national and international human rights differ," Apple follows the "higher standard." APPLE, OUR COMMITMENT TO HUMAN RIGHTS 3 (2020), https://s2.q4cdn.com/470004039/files/doc_downloads/gov_docs/2021/03/Our-Commitment-to-Human-Rights_Final-copy-(updated-links-Feb-2021).pdf [https://perma.cc/9RCU-MR67]; *see also* Thilo Kuntz, *ESG and the Weakening Business Judgment Rule*, RESEARCH HANDBOOK ON ENVIRONMENTAL, SOCIAL, AND CORPORATE GOVERNANCE (forthcoming Mar. 2023) (manuscript at 9), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4395003 [https://perma.cc/78DT-HERT].

111. Notably, the law governing corporate political contributions adopted during a period of conservative rule in the U.K. prohibits corporations from making political donations, except under a plan approved by the stockholders. Companies Act 2006, Part 14 (UK). As a respected British corporate law scholar has observed: "The impact of requiring shareholder approval has been largely to shut off corporate political contributions (though not, of course, . . . corporate lobbying)." Paul L. Davies, *Shareholder Voice and Corporate Purpose: The Purposeless of Mandatory Corporate Purpose Statements*, *in* BOARD-SHAREHOLDER DIALOGUE: POLICY DEBATE, LEGAL CONSTRAINTS AND BEST PRACTICES 33 n.100 (forthcoming 2023) (Eur. Corp. Governance Inst., Working Paper No. 666, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4285770 [https://perma.cc/7DSH-F6NH].

112. *See generally* BRUCE FREED, KARL SANDSTROM, PETER HARDIN, NANYA SPRINGER, CAITLIN MONIZ & ANDREW FELDMAN, CTR. FOR POL. ACCOUNTABILITY, COLLISION COURSE: THE RISKS COMPANIES FACE WHEN THEIR POLITICAL SPENDING AND CORE VALUES CONFLICT AND HOW TO ADDRESS THEM 10 (2018), https://politicalaccountability.net/hifi/files/Collision-Course-Report.pdf [https://perma.cc/3WMN-RXTK]; Strine & Macey, *supra* note 70; Strine, *Fiduciary Blind Spot*, *supra* note 69, at 1040–43.

We do not use this keynote article to set forth all the answers, nor do we expect even those who generally share our values and view of the problems to agree with all our suggestions. What we do hope is that our examination of the things that matter most about the effects of our corporate governance system will encourage thinking of the kind that Adolf Berle did. It is easier to obsess about minutia than to tackle what really matters. But if corporate law is to be a force for good and not fuel irreversible harm, then it must address the big issues and stop pretending that those issues are for others to grapple with. If our answers are not the right ones, then don't just naysay, say what you think will work. The momentous impact of corporate conduct from generations ago is affecting our planet in dangerous ways, and so is the unfairness and divisiveness that comes with growing inequality. The impact of more and more of us now, acting on each other and the planet through corporate power, will be even more substantial. If we don't take commensurate action to address the use of that power and to channel it in a fair and sustainable direction, all of our descendants will be the residual claimants of our excesses and inequities.

And if you think we believe that what it takes to reshape a public consensus supportive of stakeholder governance is a U.S. commitment to forging a global New Deal, well you understand us . . . and Berle himself.