

PROGRESSIVE CORPORATE GOVERNANCE UNDER SOCIAL CAPITALISM: DO THE RIGHT THING OR SHARE THE WEALTH?

Amy Deen Westbrook¹

David A. Westbrook¹

ABSTRACT

This Article expands the idea of progressive corporate governance beyond the limitations entailed in the traditional debate over corporate purpose: should firms be operated for Shareholder Wealth Maximization (SWM) or for broader goods, today called Environmental, Social, and Governance (ESG) goals? In one form or another, “shareholder capitalists,” have debated with “stakeholder capitalists,” for over a century. In general, stakeholder capitalists have presented their conception of the firm’s purpose as “progressive.” This Article complicates that claim by arguing that both SWM and ESG may be understood as progressive, albeit under different understandings of the word “progressive,” different assumptions about the practicalities of corporate governance, and different understandings of today’s economy.

The circumstances of the debate over corporate purpose have changed. The contemporary U.S. economy is extremely financialized: shocks such as the Global Financial Crisis and the COVID-19 pandemic have

¹ Kurt M. Sager Memorial Distinguished Professor of International and Commercial Law, and Co-Director, Business and Transactional Law Center, Washburn University School of Law.

¹ Louis A. del Cotto Professor and Co-Director, UB NYC Program in Finance and Law, University at Buffalo School of Law, State University of New York. We would like to thank Stephen Bainbridge, Ron Colombo, Stephan Diamond, Vitor Gaspar, Lyman Johnson, Knut Myhre, Charles O’Kelley, Richard Ribstein, Bernard Sharfman, Harwell Wells, and the participants in the Central States Law Schools Association Annual Scholarship Conference for their comments and suggestions. We would also like to thank Alyssa Crenshaw and Cameron Edens for their research assistance. Any mistakes or other shortcomings are our responsibility.

Copyright © 2023 Virginia Law & Business Review Association

demonstrated that institutions and individuals depend on the smooth functioning of the capital markets. Neither classical economics, on which shareholder capitalism relies, nor the tradition of social criticism, on which stakeholder capitalism depends, adequately frame this economy. Our situation is better understood in terms of “social capitalism.” Reversing Henry Sumner Maine’s famous dictum that progress is the movement from status to contract, human welfare in the United States is determined largely by station, in short, property.

Under social capitalism, a firm might be progressive in the way urged by stakeholder capitalists, by “doing the right thing.” Governance of such a firm should heed its active, influential shareholders, focusing on how the business operates. Alternatively, a firm might be progressive by “spreading the wealth” and democratizing participation in capital markets, both by individuals and institutions. Governance of such a firm practically requires delegation of control over assets to its board of directors and other fiduciaries, focusing on meeting society’s claims to economic output.

The question of what constitutes progressive corporate governance thus hinges on whether “progressive” is understood primarily in terms of operations and relatively few active shareholders, or in terms of wealth distribution and perforce delegated governance. In the age of social capitalism, the answer is likely both.

TABLE OF CONTENTS

INTRODUCTION	148
I. SOCIAL CAPITALISM.....	153
A. The Financialized Economy	153
B. Government Efforts to Democratize Capitalism	157
C. Social Capitalism Distinguished from Liberal Political Economy and Critical Social Thought.....	159
1. <i>Distinguishing Social Capitalism from Liberal Political Economy: Growth and Care</i>	159
2. <i>Distinguishing Social Capitalism from Critical Social Thought: (in)Equality and Care</i>	160
II. A VERY OLD DEBATE	161
A. Roots of the Debate over Corporate Purpose	161
B. A High-Water Mark: Berle, Means, and Dodd.....	162

17:145 (2023)	<i>Progressive Corporate Governance</i>	147
	C. Berle’s Argument for a “Broader” Vision.....	165
III.	TRADITIONAL VIEWS OF CORPORATE PURPOSE.....	166
	A. Shareholder Capitalism.....	166
	1. <i>Shareholder Wealth Maximization</i>	166
	2. <i>Doctrine and Economics</i>	168
	a. <i>Caselaw: Dodge and eBay</i>	168
	b. <i>Markets and Economics</i>	169
	c. <i>Major Players Weigh In</i>	171
	3. <i>Criticism of Shareholder Capitalism</i>	172
	a. <i>Impractical in the Face of Varied Shareholder Interests</i>	172
	b. <i>SWM Is Not Required by Law</i>	173
	c. <i>Management Discretion and the Business Judgment Rule</i>	175
	B. Stakeholder Capitalism	176
	1. <i>Corporate Social Responsibility</i>	176
	2. <i>Doctrine and Market Composition</i>	177
	a. <i>Caselaw: Barlow, Unocal, and Revlon</i>	177
	b. <i>Other Constituencies Statutes and Benefit Corporations</i>	179
	c. <i>Major Players Weigh In</i>	180
	3. <i>Criticism of Stakeholder Capitalism</i>	181
	a. <i>Businesses Are Not Governments</i>	181
	b. <i>Varied Interests and Who Decides</i>	182
	c. <i>Accountability and Ambiguity</i>	183
IV.	CORPORATE GOVERNANCE UNDER SHAREHOLDER CAPITALISM	
	AND STAKEHOLDER CAPITALISM.....	185
	A. Shareholder Capitalism Presumes Management Control.....	185
	B. Stakeholder Capitalism Presumes Shareholder Power	188
	C. Corporate Purpose and Corporate Governance	192
V.	UNDERSTANDING THE PROGRESSIVE CORPORATION THROUGH	
	THE LENS OF GOVERNANCE	193
	A. Stakeholder Capitalism and Progressive Operational Goals.....	193
	1. <i>Progressive Operational Goals</i>	193
	2. <i>Shareholder Influence</i>	194
	B. Shareholder Capitalism and Progressive Distributive Goals.....	195
	1. <i>Progressive Distributive Goals</i>	195
	2. <i>Management Control</i>	198
	CONCLUSION: DO THE RIGHT THING OR SHARE THE WEALTH?	200

INTRODUCTION

DO corporations contribute to social progress by seeking environmental, social, and governance (ESG) goals, or by earning money for shareholders? How does corporate governance constrain a firm's ability to pursue progressive objectives? A broader understanding of what it means to be "progressive"¹ in today's economy, combined with a reconsideration of the nature of that economy, can help us wrestle with such questions.

This Article begins with the proposition that the U.S. economy is no longer adequately described by the traditional conceptual apparatus. Neither the tradition of political economy stretching back to Adam Smith ("liberal political economy")², nor the leftist tradition of critical social thought stretching back through Karl Marx ("critical social thought"),³ does a very good job articulating current realities. Today, labor is often incidental to the problem of social welfare and the solicitude for others at the heart of "progressive" sentiment. Instead, in the contemporary U.S. economy, we look to benefits, especially those benefits that flow from property ownership, including stock ownership, to secure welfare. This state of affairs can be described as "social capitalism."⁴ Like any economy, social capitalism must provide for most of its members, or it will not last long.

In the context of social capitalism, we make two arguments about the governance of business corporations. Our first argument is that a corporation's contribution to social progress, its solicitude for others, may be understood in either operational or distributive ways. On one hand, we may ask whether a company is "doing the right thing." Does the company pay its employees well? Are its governance structures diverse and otherwise representative? Does the company's business contribute to climate change? Such questions have long

¹ Our understanding of "progressive" as that which contributes to social and economic "progress" is simple and broad. One may trace progressive movements, policies, and laws throughout post-Enlightenment history and, certainly, transcending particular U.S. political parties. Detailed discussions of the works of Adam Smith and Karl Marx, for example, or an historical examination of the U.S. Progressive Era, are relevant but not feasible in this Article. We also recognize that the term is currently associated with a Congressional caucus within the Democratic Party, which provides an extensive list of "progressive issues" such as climate justice, immigrant rights, a fair economy, building worker power, and universal health care. See *What We Stand For*, CONG. PROGRESSIVE CAUCUS, <https://progressives.house.gov/what-we-stand-for> (last visited Oct. 23, 2022).

² See ADAM SMITH, *THE WEALTH OF NATIONS BOOKS IV-V* (Andrew Skinner ed., Penguin Classics 1999) (1776).

³ For a handy and influential compendium, see KARL MARX & FRIEDRICH ENGELS, *THE MARX-ENGELS READER* (Robert C. Tucker ed., 2d ed. 1978).

⁴ See David A. Westbrook, *Social Capitalism: A Descriptive Sketch*, 194 *TELOS* 27, 29 (2021).

been discussed under the rubric of “corporate social responsibility” (CSR), and latterly under the heading of ESG investing.⁵ In short, we may think of “progressive” as a judgment about the operations of a firm.

On the other hand, we might ask if and how a corporation shares the wealth it generates. Helping other people may mean helping them acquire a claim on the productive capacity of society. Such claims may be direct, a form of property, in the corporate context paradigmatically stock. Such claims may be indirect, as beneficiaries of an endowment. More generally, individual claims upon contemporary society are made upon a highly financialized society. That is, we may consider “progressive” as a judgment about the distribution of wealth.

How are we to choose between understanding “progressive” in either operational or distributive terms? The classic lawyer’s answer – “it depends” – is of course true, but also somewhat unsatisfying.

Our second basic argument is that the choice of operational or distributive understandings of “progressive” may be driven by the practical requirements and possibilities of the governance of specific firms. Operational progressivism tends to presume a high degree of shareholder power; distributive progressivism tends to presume shareholder passivity, and in consequence, relies on board management.

These arguments stand aslant very old debates regarding corporate purpose.⁶ Since its inception, the corporation has been framed by two broad visions of its purpose. In one vision, the corporation is seen as a self-interested economic actor, a business. In corporation law doctrine, the focus on corporate and therefore shareholder profit is known as “shareholder wealth maximization” (SWM). This notion that the firm is, as a normative matter, to be governed to maximize the (long-term) reward to equity investors, whether through dividends or stock price appreciation, is often called “shareholder primacy.”⁷

⁵ See discussion *infra* Part III.B.1.

⁶ See, e.g., Charles R.T. O’Kelley, *From Berle to the Present: The Shifting Primacies of Corporation Theory*, in THE OXFORD HANDBOOK OF THE CORPORATION 119 (Thomas Clarke et al. eds., 2019) (delineating the history of these debates); see also C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-first Century*, 51 U. KAN. L. REV. 77 (2002) (arguing for a cyclical understanding of corporate priorities); see generally PROGRESSIVE CORPORATE LAW (Lawrence E. Mitchell ed., 1995) (exploring the phrase “progressive corporate law”).

⁷ One of the earliest uses of the term “shareholder primacy” was by Professor Lyman Johnson in his discussion of the orthodox understanding of management’s duties to the corporation and the shareholders. Lyman Johnson, *The Eventual Clash Between Judicial and Legislative Notions of Target Management Conduct*, 14 J. CORP. L. 35, 50 (1988) (discussing

The idea that the firm is a self-interested economic actor places the business corporation within liberal political economy. In this tradition, competition among rationally self-interested actors leads to innovation, lower prices, and material progress generally. For our purposes, proponents of shareholder primacy, understood in terms of liberal political economy, will be called “shareholder capitalists.” Shareholder capitalists tend to see other perspectives as arguments for inefficiency which could reduce the benefits “wealth maximizing” competition brings.⁸

The second traditional vision of corporate purpose sees the corporation as a social organization with responsibilities to society.⁹ A firm should govern its affairs with due regard to the interests of all its “stakeholders,” including not only shareholders and other providers of capital, but also its employees, neighbors, customers, and others impacted by its operations. Corporations should be responsible, hence CSR and ESG.¹⁰ The usually tacit proposition is that an economy comprised of firms mindful of social concerns, even at the cost of shareholder profits, will lead to a more just and equitable society and to social progress. For our purposes, this vision of corporate purpose will be called “stakeholder capitalism,” and its proponents “stakeholder capitalists.” Stakeholder capitalists tend to portray shareholder capitalists as rapacious, willing to hurt others in the pursuit of profit.¹¹

preservation of the illusion of shareholder primacy by reference to a vague long-term future); see also David Millon, *Radical Shareholder Primacy*, 10 U. ST. THOMAS L.J. 1013, 1013-14 (2013) (distinguishing between radical shareholder primacy, which prioritizes short-term profit, and traditional shareholder primacy, which permits consideration of long-term interests of the corporation).

⁸ See, e.g., Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 449-51 (2001).

⁹ See discussion *infra* Part III.B; see also ALAN R. PALMITER, *SUSTAINABLE CORPORATIONS* (2022) (exploring the purpose of the corporation, and its place in our culture, in an innovative law school coursebook).

¹⁰ For present purposes, distinctions between CSR and ESG are immaterial. The former term is a little older and tends to refer to the firm’s efforts to make a positive environmental or social impact. Jamie Johnson, *What Is Corporate Social Responsibility?*, CO—U.S. CHAMBER OF COM. (Apr. 6, 2021), <https://www.uschamber.com/co/start/strategy/corporate-social-responsibility-guide>. ESG was coined in the investment context and adds corporate governance factors to environmental and social considerations. Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 388 (2020) (ESG investing is an “investment strategy that emphasizes a firm’s governance structure or the environmental or social impacts of the firm’s products or practices.”).

¹¹ Bernie Sanders ran a prominent campaign for the 2020 democratic presidential nomination condemning “massive wealth and income inequality.” *Making The Rich Pay Their Fair Share in Taxes*, BERNIE, <https://bernieanders.com/issues/tax-increases-for-the-rich/> (last visited Oct. 29, 2022) (saying “we need a progressive tax system in this country that is based

The two traditional visions of corporate purpose thus compete.¹² Shareholder capitalism is self-interested, and therefore seen as not progressive.¹³ Stakeholder capitalism emphasizes the good of others and is therefore seen as progressive. Under any plausible understanding of the institution, the tensions between the two visions of the corporation cannot finally be resolved.¹⁴ For over a century, proponents of each vision have sought to “move the needle” of corporate purpose toward their understanding. Shareholder capitalists seemed to have won a near total victory (at least in the halls of the U.S. legal academy) in the last decades of the 20th century.¹⁵ Since then, however, stakeholder capitalists have come roaring back, with the surge in ESG investment concerns.¹⁶ Many ESG initiatives use the language of “progressive” politics.

This Article suggests that we have not been thinking about political economy and social progress clearly. Our welfare may be determined largely by station. Perhaps we have reversed Henry Sumner Maine’s famous dictum that

on the ability to pay”). Warren Buffett was quoted in 2006 acknowledging, “[t]here’s class warfare, all right, but it’s my class, the rich class, that’s making war, and we’re winning.” Ben Stein, *In Class Warfare, Guess Which Class Is Winning*, N.Y. TIMES (Nov. 26, 2006), <https://www.nytimes.com/2006/11/26/business/yourmoney/26every.html>.

¹² Stephen Diamond argues against this schema of corporate purpose, finding that corporate governance is better understood as the fairly coherent expression of capitalist class interest. Stephen F. Diamond, *The Myth of Corporate Governance* (Jan. 12, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3742395 (analyzing decision-making in Apple Inc.).

¹³ Scholarly discussion of “progressive corporate law,” associates the term with a rejection of SWM and shareholder capitalism. See PROGRESSIVE CORPORATE LAW, *supra* note 6, xiii (linking the term “progressive” with the argument that the corporation is a public institution with public – community - obligations); Matthew T. Bodie, *The Next Iteration of Progressive Corporate Law*, 74 WASH. & LEE L. REV. 739, 740 (2017) (explaining that progressive corporate law “seeks to move beyond shareholder primacy to a communitarian vision of the corporation”).

¹⁴ Old debates recapitulate themselves: “Corporate social responsibility is not a novel solution to an unchanging problem; quite the contrary, it is an unchanging solution to an ever-new problem.” Wells, *supra* note 6, at 81. *But see* Ronald J. Colombo, *Ownership, Limited: Reconciling Traditional and Progressive Corporate Law via an Aristotelian Understanding of Ownership*, 34 J. CORP. L. 247, 249 (2008) (reconciling the two approaches using an Aristotelian idea of limitations on ownership rights).

¹⁵ Hansmann & Kraakman, *supra* note 8, at 439 (asserting that there was “no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value”); Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 859 (1997) (reviewing PROGRESSIVE CORPORATE LAW, *supra* note 6).

¹⁶ See discussion *infra* Part III.B.2.

progress is the movement from status to contract.¹⁷ If we have constructed a kind of neo-feudal economy, what might “progressive” corporate governance mean? Not only is the long-standing debate over corporate purpose irresolvable on its own terms, but the terms are inapt and fail to describe our social reality.

Moreover, the common view that CSR is progressive tacitly adopts an operational approach to social progress, i.e., firms should “do the right thing.” As discussed below, CSR also tacitly presumes an activist style of corporate governance with powerful shareholders.

Suppose, however, that social progress is also understood in a distributive fashion to mean “share the wealth,” i.e., democratizing claims upon—and stakes in—the productive capacity of the economy, directly and through institutions. This would suggest that shareholder primacy, with its focus on shareholder wealth, is progressive. As discussed below, under this paradigm boards would manage firms for the financial benefit of passive shareholders. Given people’s limited supply of time and attention, and the practical constraints of corporate governance, shareholder capitalism may be the more pragmatic approach to social progress for reasons quite independent of the invisible hand.

Part I of this Article introduces social capitalism, the current U.S. political economy presumed by our legal argument. Part II walks through the early debate between shareholder and stakeholder capitalists and shows that even then legal scholars recognized ways in which the capital markets played a critical role in social welfare. Part III lays out the traditional legal understandings of shareholder capitalism (shareholder primacy) and stakeholder capitalism (CSR/ESG) and suggests that the contest between the two is irresolvable in principle. Part IV examines the corporate governance systems that correspond to shareholder and stakeholder capitalism. Part V looks at the orthodox claim that stakeholder capitalism is “progressive,” and what an operational progressivism requires of corporate governance, and then goes on to suggest that, under a different and equally plausible understanding of “progressive,” it is shareholder capitalism, distributive progressivism, that is socially responsible. Part V also discusses how the circumstances of corporate governance may inform the adoption of one or the other understandings of “progressive.” The Conclusion summarizes the conflict and acknowledges that neither operational nor distributive approaches to corporate governance are fully satisfactory in a

¹⁷ HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS* 170 (1st ed. 1861).

world that is far sloppier than schematic arguments about the nature of capitalism might suggest.¹⁸

I. SOCIAL CAPITALISM

A. The Financialized Economy

Suppose with the passage of time, the economy has changed, and the concepts used to think about the economy have gradually become less apt. For example, the terms “left” and “right,” used with such confidence today, are almost a quarter of a millennium old, and were coined for very different debates in a very different world.¹⁹

We often think in terms of opposites: the state and the individual; the law, with its power to tax and spend on social welfare, and the market, which produces goods and services and is taxed; the sovereign, which issues currency and debt, and investors, who lend.²⁰ Marxism sought to dissolve many such oppositions. The private would be made public, “socialized,” even governmental (“dictatorship of the proletariat”).²¹ In places like China and Russia, that dream was held for a few generations, and then abandoned even in name.²²

In the United States and elsewhere, the end of the Marxian dream was seen as a triumph for market-based liberalism, and to some extent it was. Liberal triumphalism, however, clouded thinking about political economy. As already suggested, contemporary economies can only misleadingly be understood through the old conceptual dualities. This is most clear in the United States, where non-state actors fill many social roles, from education and research, to religion, to healthcare, to the arts, to care for the poor and the sick. Such actors are directly dependent upon capital contributions and endowment interest. In many other countries, of course, the state takes direct responsibility for such

¹⁸ Emerson noted that “[a] foolish consistency is the hobgoblin of little minds” RALPH WALDO EMERSON, *Self-Reliance*, in *ESSAYS: FIRST SERIES* 35, 47 (1841).

¹⁹ SIMON SCHAMA, *CITIZENS: A CHRONICLE OF THE FRENCH REVOLUTION* 479 (1989).

²⁰ See generally THOMAS HOBBS, *LEVIATHAN* (Christopher Brooke ed., Penguin Classics 2017) (1651) (generally representing the beginning of this tradition of approach).

²¹ MARX & ENGELS, *Manifesto of the Communist Party*, in *THE MARX-ENGELS READER*, *supra* note 3, at 469, 473-500.

²² Richard D. Cudahy, *From Socialism to Capitalism: A Winding Road*, 11 *CHI. J. INT’L L.* 39, 40 (2010) (examining the transitions in the former beacons of socialism).

social roles. The state, however, still requires access to credit markets to make good on its promises, as abundantly illustrated by the European Debt Crisis.²³

More deeply, the “state” and the “market” in a contemporary economy cannot be understood independently of one another.²⁴ The welfare state requires a tax base, which in turn presumes a relatively stable economy, generally guarded by central banks.²⁵ Given the tendency of financial markets toward instability, regulation (including the lender of last resort function) is required to provide institutional stability, which in turn fosters a reliable tax base for, and the credit worthiness of, the state. Working the other way, the market not only provides goods and services, it allocates assets, makes a variety of distributional decisions, and informs any number of social decisions, through employment, housing, and otherwise. Contra Marx, the people did not become the government; the proletariat never seized the reins of power. Instead, the market is slowly coming to be recognized as a set of governance mechanisms.²⁶

Banks have long (at least since the turn of the last century) been recognized as filling critical social roles – hence the history of bank regulation, and the creation and elaboration of central banks in advanced economies worldwide.²⁷ But in the Global Financial Crisis and the COVID-19 pandemic, government efforts to stabilize the economy went far beyond banks.²⁸ Governments provided capital to institutions and individuals, either via loan or outright gift; increased budgets to undertake stimulating projects; took ownership stakes in

²³ See Luc Eyraud et al., *Fiscal Politics in the Euro Area* 7-8 (Int’l Monetary Fund, Working Paper No. 2017/018, 2017) (looking at the impact of the crisis).

²⁴ See DAVID A. WESTBROOK, *CITY OF GOLD: AN APOLOGY FOR GLOBAL CAPITALISM IN A TIME OF DISCONTENT* 5 (2003).

²⁵ See Nicholas Barr, *Shifting Tides*, INT’L MONETARY FUND FIN. & DEV., Dec. 2018, at 16 (discussing the taxation required to fund social welfare programs); see generally, CHARLES GOODHART, *THE EVOLUTION OF CENTRAL BANKS* (1988) (explaining the role of central banks).

²⁶ See DOUGLAS R. HOLMES, *ECONOMY OF WORDS: COMMUNICATIVE IMPERATIVES IN CENTRAL BANKS* (2013) (understanding central banking, especially inflation targeting, as the management of public expectation).

²⁷ ROSA M. LASTRA, *INTERNATIONAL FINANCIAL AND MONETARY LAW* 31-64 (2d ed. 2015) (discussing the rationale for central banks, and their policies to promote stability).

²⁸ See U.S. DEP’T TREASURY, *THE FINANCIAL CRISIS FIVE YEARS LATER: RESPONSE, REFORM, AND PROGRESS* 7 (2013), <https://ypfsresourcelibrary.blob.core.windows.net/fcic/YPFS/Treasury%20Crisis%20Response-PowerPoint%20Presentation.pdf> (providing a chart illustrating the breadth of the government’s financial response); *Policy Responses to COVID-19: United States*, INT’L MONETARY FUND, <https://www.imf.org/en/Topics/imf-and-covid19/Policy-Responses-to-COVID-19#U> (last visited Oct. 29, 2022) (detailing U.S. fiscal, monetary, and macro-financial responses to the COVID-19 pandemic).

struggling entities; suspended laws related to tenancy and eviction; made payrolls; delayed or cancelled debts; and so forth.²⁹ In short, governments worldwide worked to preserve functioning markets because markets provide the lion's share of social welfare, even in "socialist" societies. By this point, it is clear that markets are also political mechanisms, hardly private.

Even in happier times, however, ordinary economic activity requires well-functioning capital markets.³⁰ The economy has been profoundly financialized,³¹ in ways akin to and connected with the transformation of everyday life by digital technology. Consider commercial paper, or payment systems, including household credit cards. Everyday life requires smooth flows of capital.

Understanding the depth to which capital penetrates, indeed defines, contemporary economic life has profound consequences for progressive economic thought. The social cannot be understood in opposition to capital, despite great and increasing inequality.³² Those who labor, and those who own, are both dependent on capital markets. Indeed, those who labor mostly also own, at least to the extent they are in a position to save for retirement.³³ People who work are also generally *rentiers*, through their retirement plans if nothing else, but also indirectly, through things like the possession of insurance. The distinction between labor and capital has not been erased completely – a wage is still distinguishable from a rent – but the distinction cannot be used, as it has been for generations, to structure critical social thought. Solicitude for "the people," once thought to be laborers and their dependents, cannot seriously be understood in simple opposition to capital.

And what about those whose labor is marginal, providing no surplus for investment? What about those who do not work? At present in the United States, most peoples' living is not funded by, or at least not entirely by, their

²⁹ See U.S. DEPT' TREASURY, *supra* note 28, at 7; *Policy Responses to COVID-19: United States*, *supra* note 28.

³⁰ See DAVID A. WESTBROOK, *OUT OF CRISIS: RETHINKING OUR FINANCIAL MARKETS* (2009).

³¹ Note that this sense of "financialized" differs from the sense in which Cynthia A. Williams uses the word. See Cynthia A. Williams, *Corporate Responsibility and the Embedded Firm: A Critical Reappraisal*, in *THE OXFORD HANDBOOK OF THE CORPORATION* 563, 569 (Thomas Clarke et al. eds., 2019) (defining the financialized economy as one in which much market activity is within finance itself).

³² See David A. Westbrook, *Climbing to 10¹¹: Globalization, Digitization, Shareholder Capitalism and the Summits of Contemporary Wealth*, in *THE INEQUALITY CRISIS* 312 (Edward Fullbrook & Jamie Morgan eds., 2020).

³³ See *What We Do*, U.S. SEC. & EXCH. COMM'N, <https://www.sec.gov/about/what-we-do> (Nov. 22, 2021) (emphasizing that they "continue to focus on the interests of long-term Main Street investors who are entrusting their hard-earned savings to our securities markets to fund home purchases, college educations, and other important life events").

wages. In 2019, before the pandemic, 136,229,000 people worked full time for the entire year, according to the Department of Labor's Bureau of Labor Statistics.³⁴ According to the U.S. Census Bureau, the U.S. population at the end of 2019 was 328,239,523.³⁵ In short, just under forty-two percent of the U.S. population worked full time in 2019. Young people, old people, the indigent, the rich, prisoners, sick people, students – all do not work. On what do all these people who do not work for a wage, or who only occasionally work, depend?

Such people are cared for in what we might call neo-feudal fashion, in accordance with their status.³⁶ Some are wards of the state, others are beneficiaries of charity, or of investment contracts, and still others are familial dependents. In all such cases, people receive goods because of who they are (their place, station, status, etc.) and not because of what they do.³⁷ The ability to support such people – more than half the population – depends on capital in the sense of some claim on the wealth of an economy. Markets exist and produce goods and services, but the welfare of most humans is not provided through the sorts of *quid pro quo* exchanges that have dominated liberal political economy.³⁸

As discussed in section C below, neither the tradition of liberal political economy nor the tradition of critical social thought suffice for thinking about

³⁴ News Release, Bureau of Labor Stats., U.S. Dep't of Labor, Work Experience of the Population — 2019 (Dec. 9, 2020, 10:00 AM), https://www.bls.gov/news.release/archives/work_12092020.pdf. The agency uses particular qualifiers, e.g., “worked at some point during [the year],” or “civilian noninstitutional population,” that tend to make labor participation look higher. *Id.*

³⁵ Press Release, U.S. Census Bureau, 2019 U.S. Population Estimates Continue to Show the Nation's Growth Is Slowing (Dec. 30, 2019), <https://www.census.gov/newsroom/press-releases/2019/popest-nation.html>.

³⁶ The use of “neo-feudalism” to describe contemporary economic organization has arisen in various quarters, with different meanings. *See, e.g.*, JOEL KOTKIN, THE COMING OF NEO-FEUDALISM: A WARNING TO THE GLOBAL MIDDLE CLASS 7 (2020); Jodi Dean, *Neofeudalism: The End of Capitalism?*, L.A. REV. BOOKS (May 12, 2020), <https://lareviewofbooks.org/article/neofeudalism-the-end-of-capitalism/> (discussing a range of books); Westbrook, *supra* note 4, at 40; David A. Westbrook, *The Culture of Financial Institutions: The Institution of Political Economy*, in REGULATING CULTURE: INTEGRITY, RISK AND ACCOUNTABILITY IN CAPITAL MARKETS 3 (Justin O'Brien & George Gilligan eds., 2013).

³⁷ Tellingly, the word “economics” comes from the Greek word for household.

³⁸ Lack of space precludes discussion of the relationships of the state to credit markets or the role of not-for-profit endowed institutions in providing social goods. Consider education, healthcare, retirement, the arts, and spiritual life: all are largely provided by not-for-profit institutions. The federal government encourages donations by making them tax deductible; the resulting endowments are invested, often in equity markets and the capital gains further the institutions' missions.

corporate governance today. Social capitalism materially constitutes society through claims upon the productive capacity of the economy (for present purposes, shares of stock). Since so much economic activity is situated within corporations, the governance of firms has constitutive significance.³⁹

B. Government Efforts to Democratize Capitalism

The U.S. government has sought to democratize capitalism since at least the New Deal, with considerable success. Since the 1930s, federal programs have proliferated to encourage individual investment in equity markets.⁴⁰ The Securities and Exchange Commission (SEC) defines its mission largely in terms of the retail investor⁴¹ and is interested in “broad participation” in U.S. securities markets.⁴² More generally, both the securities and banking laws, to say nothing of insurance, may be understood as inducements for the financialization of the economy (in the macro view) or for the democratization of finance (in the micro view).⁴³

Beginning in the 1970s, the tax code was amended to encourage individuals to save – often by investing in equities – through tax-deferred plans like IRAs and 401(k)s.⁴⁴ The Federal Reserve estimated that, in 2021, 27% of adults in

³⁹ Lydialyle Gibson, *What Does It Mean to Be a Corporate Citizen?*, HARV. MAG. (Sept. 19, 2022), <https://www.harvardmagazine.com/2022/09/a-harvard-conference-on-the-battle-over-esg-investing>.

⁴⁰ Consider, for example, the federal securities laws. “Our focus on Main Street investors reflects the fact that American households own \$38 trillion worth of equities — more than fifty-nine percent of the U.S. equity market — either directly or indirectly through mutual funds, retirement accounts and other investments.” *What We Do*, *supra* note 33.

⁴¹ “Our mission requires tireless commitment and unique expertise from our staff of dedicated professionals who care deeply about protecting Main Street investors and others who rely on our markets to secure their financial futures.” *Id.*

⁴² See U.S. SEC. & EXCH. COMM’N, STAFF REPORT ON EQUITY AND OPTIONS MARKET STRUCTURE CONDITIONS IN EARLY 2021, at 43 (2021), <https://www.sec.gov/files/staff-report-equity-options-market-struction-conditions-early-2021.pdf> (noting that the trading of meme stocks in 2021 highlighted broad participation in the U.S. securities markets in the 21st century).

⁴³ Of course, some significant efforts to democratize capital accumulation in the United States have little to do with corporate stock. For example, the government encourages individuals to build equity in their residences through tax and other measures.

⁴⁴ In 1974, Congress passed the Employee Retirement Income Security Act (ERISA). 29 U.S.C. § 1001. Congress went on to pass, for example, the Economic Recovery Tax Act in 1981, which lowered rates on investment income. Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172 (codified as amended in scattered sections of 26 U.S.C.); see Raj Chetty et al., *Subsidies vs. Nudges: Which Policies Increase Savings the Most?*, 13 CTR. FOR RET. RSCH. B.C. 1, 1 (2013), https://crr.bc.edu/wp-content/uploads/2013/03/IB_13-3-508.pdf (“The federal government provides generous tax subsidies for retirement saving in

the United States considered themselves retired, and although retirees' most common source of income was Social Security, 79% had private income.⁴⁵ That private income included pensions (57% of retirees) and interest, dividends, or rental income (43%).⁴⁶ Non-retirees are also encouraged to save, and of the 75% of non-retirees who had some retirement savings, 55% had a defined contribution plan such as a 401(k) or a 403(b) plan, 36% had savings in an IRA, and 22% had a traditional defined benefit plan like a pension.⁴⁷

As with savings, investment, and retirement, so with education: individuals are encouraged to save for their children's or grandchildren's education through plans like Coverdell education savings accounts⁴⁸ and 529 plans,⁴⁹ also tax deferred. More significantly though, educational institutions, especially the most prestigious, tend to be endowed. Interest supplies a significant portion of operating costs.

Healthcare is just as dependent on financial markets. Drug research and development relies largely on high-risk equity investment in start-up firms, often in partnership with the government (dependent on debt markets) and academia (with its invested endowments).⁵⁰ The insurance companies through which healthcare is paid for are essentially funds, with beneficiaries playing much the same role that depositors do for banks. Hospitals may be for-profit or not-for-profit. In the first case, the hospital is an investment. In the second, the hospital's endowment is invested. In either case, hospitals, like the healthcare system as a whole, have been thoroughly financialized.

401(k)s and IRAs. The subsidies are designed to increase household saving and retirement income security, important national goals.”)

⁴⁵ BD. GOVERNORS FED. RESRV. SYS., ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2021, at 77-78 (2022), <https://www.federalreserve.gov/publications/files/2021-report-economic-well-being-us-households-202205.pdf>.

⁴⁶ *Id.* at 78.

⁴⁷ *Id.* at 79.

⁴⁸ See Farran Powell, *4 Ways Coverdell ESAs Differ from 529 Plans*, U.S. NEWS & WORLD REP. (Oct. 15, 2018, 9:55 AM), <https://www.usnews.com/education/best-colleges/paying-for-college/articles/2018-10-15/4-ways-coverdell-educational-savings-accounts-differ-from-529-plans> (explaining some advantages of Coverdell accounts).

⁴⁹ *An Introduction to 529 Plans*, U.S. SEC. & EXCH. COMM'N, <https://www.sec.gov/reportspubs/investor-publications/investorpubsintro529htm.html> (stating that the plan is “designed to encourage saving for future education costs”) (May 29, 2018).

⁵⁰ See THERESA WIZEMANN, ET AL., INST. OF MED. (U.S.) F. DRUG DISCOVERY, DEV., AND TRANSLATION, BREAKTHROUGH BUSINESS MODELS: DRUG DEVELOPMENT FOR RARE AND NEGLECTED DISEASES AND INDIVIDUALIZED THERAPIES: WORKSHOP SUMMARY 7, 7-11 (2009), <https://www.ncbi.nlm.nih.gov/books/NBK50972/> (explaining investment in drug development at different stages).

C. Social Capitalism Distinguished from Liberal Political Economy and Critical Social Thought

It may be helpful to address two sorts of objections to this Article's claims that traditional accounts of the U.S. economy are inapt, and that our economy should be understood in terms of "social capitalism."

1. Distinguishing Social Capitalism from Liberal Political Economy: Growth and Care

As a political economy, social capitalism assumes the centrality of markets both descriptively and normatively, as engines of human welfare. As already suggested, however, the idea of social capitalism is very different from classical Smithian liberalism.⁵¹

Importantly for present purposes, liberal economy and social capitalism express different social and political norms. From the perspective of classical liberal economics, marketplace actors are expected to be rationally self-interested in conditions of free competition:

[E]very individual . . . neither intends to promote the public interest, nor knows how much he is promoting it. . . . [H]e intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention.⁵²

Within the bounds of the law, the members of *homo economicus* are expected to compete, to take advantage of one another. Society as a whole supposedly benefits from such competition – the invisible hand ensures growth. These assumptions have led to, for example, the mistaken idea that the wealth generated and retained by those at the top of markets automatically "trickles down" to those below, that economic growth would somehow ensure human welfare.⁵³

⁵¹ For a more in-depth account, see WESTBROOK, *supra* note 30, at 248.

⁵² SMITH, *supra* note 2, at 22.

⁵³ See David Hope & Julian Limberg, *The Economic Consequences of Major Tax Cuts for the Rich* (LSE INT'L INEQS. INST., Working Paper No. 55, 2020), http://eprints.lse.ac.uk/107919/1/Hope_economic_consequences_of_major_tax_cuts_published.pdf (demonstrating that tax cuts for the rich increase income inequality without major impacts on economic growth or employment); LUCAS CHANCEL ET AL., *WORLD INEQUALITY REPORT 2022* 3, 168, 170 (2022), https://wir2022.wid.world/www-site/uploads/2022/03/0098-21_WIL_RIM_RAPPORT_A4.pdf (chronicling increasing global inequality).

The idea of social capitalism, in contrast, recognizes that even if we assume negligible growth, or unpredictable growth,⁵⁴ we would still need to care for the elderly, the poor, and other dependents.⁵⁵ We would still need to fund education, health care, and retirement. Participation in markets thus exceeds market rationality. Institutionally, we would still need to ensure government through the preservation of the tax base, which requires institutional order and hence government intervention, e.g., the occasional stimulus checks and regulation generally. Social capitalism, then, claims normative authority based upon an ethos of care for institutions and individuals.⁵⁶ None of this has anything to do with trickle down.

2. Distinguishing Social Capitalism from Critical Social Thought: (In)Equality and Care

Social capitalism is a way to describe contemporary U.S. society. That society, however, is profoundly unequal. In particular, stockholding is highly concentrated. The ultrarich are so rich because they hold so much stock.⁵⁷ Social capitalism, and the arguments drawn from it, are all too easily interpreted to legitimate further exacerbation of the inequality that plagues the nation.⁵⁸

Social capitalism, however, in no way presumes that the material inequalities in the United States today are natural or desirable. A society's capital may be more or less concentrated, a problem recognized for corporation law by Adolf Berle and discussed below. As also discussed below, one might imagine higher levels of corporate taxation, or broader distributions of shares, or any number of other mechanisms that would give more people larger claims upon the economy, even if they do not contribute in any particular way to GDP.

That said, a society based on relative social status, including differentiated holdings of property, is not founded on the normative supremacy of equality. Bluntly, choosing markets as a mode of social ordering means that equality is at most limited and formal.

⁵⁴ JOHN HENRY SCHLEGEL, *WHILE WAITING FOR RAIN* 244 (2022).

⁵⁵ See Westbrook, *supra* note 4.

⁵⁶ See Amy Deen Westbrook & David A. Westbrook, *Unicorns, Guardians, and the Concentration of the U.S. Equity Markets*, 96 NEB. L. REV. 688, 728-38 (2018) (describing the import of and concentration in the public equity markets).

⁵⁷ Westbrook, *supra* note 32, at 314.

⁵⁸ Of course, it may be that a society informed by differentiated claims upon the productive energies of its economy (that is, vastly different levels of property) simply is not serious about material equality.

In the United States today, capital market mechanisms are used to care for people. Moving from individuals to institutions, capital market mechanisms suffuse modern life, from the most banal to the most arcane businesses. And, as the COVID-19 pandemic illustrated, capital market mechanisms are also used to preserve such mechanisms, enabling everything from payment systems to payrolls. That is, capital market mechanisms are key ways in which we govern, and in which we care for civil society.

Claims on society's wealth support, or fail to support, human welfare in the contemporary U.S. economy; social capitalism is the context in which the debate between shareholder and stakeholder capitalists takes place. The next two Parts provide a schematic introduction to the traditional debate over corporate purpose. Each "side" comprises talking points, a collection of received ideas, as articulated by scholars and judges for public consumption. There are truths, of course, but as those on each side of the debate have made clear, neither position is entirely convincing, neither descriptively nor normatively.

II. A VERY OLD DEBATE

A. Roots of the Debate over Corporate Purpose

In our mythical imagination of the early corporations, but not far from fact, a sovereign power grants a company a royal charter to carry out some enterprise, perhaps to build a road or engage in some new manufacture.⁵⁹ The company then enjoys legal privileges, maybe the right to charge tolls or a trade monopoly of some sort. Thus, incorporation has a purpose, indeed two sorts of purposes at some odds with one another. For its part, the sovereign seeks to accomplish some end, by definition "public" since it was willed by the state.⁶⁰ From its inception, the corporation has been understood to be "social." It represents an opportunity for state interests to be promoted through private enterprise.⁶¹ At the same time, the company's founders, adventurers in much the sense "venture" capitalists are today, have always been understood to be

⁵⁹ See Alfred S. Konefsky, *Law and Culture in Antebellum Boston*, 40 STAN. L. REV. 1119, 1140 (1988) (book review).

⁶⁰ Early corporations were created when the Crown granted a charter to a group of investors who wanted to carry out some enterprise that furthered national interests. Lyman Johnson, *Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, 35 SEATTLE U. L. REV. 1135, 1144-48 (2012).

⁶¹ Larry Catá Backer, *The Drama of Corporate Law: Narrator Between Citizen, State, and Corporation*, 2009 MICH. ST. L. REV. 1111, 1130 (2009) ("state interests could be maximized through private enterprise").

self-interested. They seek profits for the entity that passes through to them, “wealth maximization” in modern parlance.⁶²

As the process of incorporation was simplified in the 19th century, businesses increasingly were not required to state a specific purpose in order to use the corporate form.⁶³ State statutes began to allow incorporation for any lawful purpose.⁶⁴ Lawful business was and is assumed to be in the public interest because business contributes to the welfare of its consumers, employees, and owners, to say nothing of the tax rolls.⁶⁵ The corporation, located “between citizen and state,” has thus always been both public and private.⁶⁶ Much of the history of U.S. corporation law scholarship may be told as a debate held over generations between those who have stressed the responsibility of the corporation to its shareholders, and those who have stressed the responsibility of the corporation to stakeholders other than shareholders.⁶⁷

B. A High-Water Mark: Berle, Means, and Dodd

The debate reached a high-water mark in the 1930s. Former Columbia Law School Professor Adolf Berle argued in a series of articles that the defining characteristic of the modern large business corporation was the separation of ownership, held by shareholders, from control, exercised by the board of directors and top executives.⁶⁸ Because this arrangement provided managers

⁶² Consider, for example, the Hudson Bay Company or the Dutch East India Company. See Paul Frentrop, *The Dutch East India Company: The First Corporate Governance Debate*, in THE OXFORD HANDBOOK OF THE CORPORATION 51, 54 (Thomas Clarke et al. eds., 2019) (discussing early market ordering by the government). The States-General maintained that formation of the Dutch East India Company would allow merchants sailing from the Netherlands to the East Indies to “greatly benefit and profit from this and with God’s help will enjoy the full results of that voyage and trade, which will similarly further the honor and reputation of the United Netherlands and harm the king of Spain.” *Id.*

⁶³ See Johnson, *supra* note 60, at 1144-45 (noting that the public purpose charge was common though not a requirement).

⁶⁴ *Id.* at 1146.

⁶⁵ See David A. Westbrook, *Corporate Law After Enron: The Possibility of a Capitalist Reimagination*, 92 GEO. L.J. 61, 63 (2003) (“With similar shifts of attention, corporation law could be understood as a branch of public law rather than a branch of private law . . .”).

⁶⁶ DAVID A. WESTBROOK, BETWEEN CITIZEN AND STATE: AN INTRODUCTION TO THE CORPORATION 158-59 (2007); Backer, *supra* note 61, at 1130.

⁶⁷ See Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, 102 MINN. L. REV. 1951, 1952 (2018) (noting that this is a very old debate); William W. Bratton & Michael L. Wachter, *Shareholder Primacy’s Corporatist Origins: Adolf Berle and the Modern Corporation*, 34 J. CORP. L. 99, 100 (2008) (noting that the battle lines of the debate “wax and wane”).

⁶⁸ Wells, *supra* note 6, at 87-88.

with the opportunity to exploit shareholders, the function of corporation law was to protect shareholders from managers. This insight was fully expressed in *The Modern Corporation and Private Property*, which Berle published in 1932 with Harvard economist Gardiner Means.⁶⁹

Since then, the separation of ownership from control, the fiduciary duties imposed on managers for the protection of shareholders, and the efforts by shareholders to enforce such duties through litigation, have structured the traditional understanding of the corporation. At first blush, it is easy to understand Berle and Means simply as proponents of SWM, opposed to “progressive” stakeholder views of the corporation.

That view, however, would be too simple.⁷⁰ *The Modern Corporation* was fundamentally concerned with the concentration of power in the hands of very few people, the managers of giant industrial corporations (now often called “Berle-Means corporations”).⁷¹ The stock market had crashed in 1929. Business leadership had failed and the Hoover administration was unable to cope. In 1932, Roosevelt was elected on a platform of, among other things, somehow taming the corporations. Berle was part of his “Brain Trust,”⁷² and helped usher in unprecedented federal regulation of the U.S. economy. The problem was that then, as now, many Americans were suspicious of government, placing more trust in rugged individualism and private property, including property in corporations’ stock. Regulation was a tough sell.

In 1931, Berle also published “Corporate Powers as Powers in Trust” in the *Harvard Law Review*. In “Powers in Trust,” Berle recharacterized the nature of shareholders’ property in corporations. Although directors of corporations have control over the corporation, Berle argued that a close reading of cases showed that power was subject to equitable constraints, to be used for the benefit of the shareholders, akin to trusts at law.⁷³

⁶⁹ ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 122-23 (1932). For a full analysis of the book, see William W. Bratton & Michael L. Wachter, *Tracking Berle’s Footsteps: The Trail of the Modern Corporation’s Law Chapter*, 33 SEATTLE U. L. REV. 849, 850-52 (2010) (looking at the book in the context of the changing economic conditions and attitudes toward regulation at the time).

⁷⁰ See O’Kelley, *supra* note 6, at 123-28 (providing a nuanced reading of Berle’s work).

⁷¹ See Mark J. Roe, *A Political Theory of American Corporate Finance*, 91 COLUM. L. REV. 10, 10-13 (1991) (coining the term “Berle-Means corporations” to describe large publicly traded corporations owned by a dispersed group of shareholders).

⁷² See JORDAN A. SCHWARZ, *LIBERAL: ADOLF A. BERLE AND THE VISION OF AN AMERICAN ERA* (1987) (providing a detailed biography of Berle).

⁷³ Adolf A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931) (arguing corporate action must be tested “by equitable rules somewhat analogous to those which apply in favor of a *cestui que trust* to the trustee’s exercise of wide powers granted to him in the instrument making him a fiduciary”); see also William W. Bratton, *Game Theory and*

Charles O’Kelley explains⁷⁴ that Berle’s point that “private property” was not inherently at odds with government involvement, indeed a share of stock was defined by government enforcement of equitable considerations against the superficially absolute prerogatives of centralized management required by an industrialized society.⁷⁵

In 1932, Harvard Law School Professor Merrick Dodd published a response to Berle, “For Whom Are Corporate Managers Trustees?”⁷⁶ Dodd sympathized with Berle’s concerns and analysis, but Dodd wrote that, as the law progressed, the business corporation would be understood to be an institution different from the sole proprietorship or even the trust, and more broadly socially responsible.⁷⁷

Dodd suggested two ways the law might understand the business corporation, and so its governance and the obligations of managers, in social terms. First, if the corporation were to be regarded as an entity, then managers should be obliged to direct business in the interest of the firm as a whole, including its non-shareholder constituencies.⁷⁸ Second, if the corporation were to be regarded as the private property of its owners, i.e., the shareholders, then such ownership was a qualified right in an industrial society.⁷⁹ Dodd pointed out that the regulation of railroads and utilities, the emergence of labor standards, and the like qualified the rights of the owners of such enterprises.⁸⁰

Berle responded that same year with “For Whom Are Corporate Managers Trustees: A Note” (A Note), agreeing with Dodd that the modern economy required concentrations of capital under centralized management.⁸¹ In a mass society so organized, a few people would wield enormous power. “[T]he great

the Restoration of Honor to Corporate Law’s Duty of Loyalty, in PROGRESSIVE CORPORATE LAW, *supra* note 6, at 139, 140-43 (noting that generally shareholders can sell, but beneficiaries of a trust cannot).

⁷⁴ See O’Kelley, *supra* note 6, at 125.

⁷⁵ See Berle, *supra* note 73, at 1073 (“[N]o power, however absolute in terms, is absolute in fact; . . . every power is subject to the essential equitable limitations.”).

⁷⁶ E. Merrick Dodd, *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932).

⁷⁷ *Id.* at 1148 (“[P]ublic opinion, which ultimately makes law, has made and is today making substantial strides in the direction of a view of the business corporation as an economic institution which has a social service as well as a profit-making function, that this view has already had some effect upon legal theory, and that it is likely to have a greatly increased effect upon the latter in the near future.”).

⁷⁸ *Id.* at 1160.

⁷⁹ *Id.* at 1162 (“Business — which is the economic organization of society — is private property only in a qualified sense, and society may properly demand that it be carried on in such a way as to safeguard the interests of those who deal with it.”).

⁸⁰ *Id.* at 1148-51.

⁸¹ Adolf A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932).

industrial managers, their bankers and still more the men composing their silent ‘control,’ function today more as princes and ministers than as promoters or merchants.”⁸² If managers were princes, then they had political obligations, much as Dodd argued.

Unlike Dodd, however, Berle was unwilling to trust the *noblesse oblige* of managers. Insisting on social responsibility, Berle argued, would make matters worse. If managers are only accountable to some vague notion of “social responsibility,” then in practice, meaning litigation, they would be hardly accountable at all.⁸³ As Berle put it: “[Y]ou [cannot] abandon emphasis on ‘the view that business corporations exist for the sole purpose of making profits for their stockholders’ until such time as you are prepared to offer a clear and reasonably enforceable scheme of responsibilities to someone else.”⁸⁴ Then, as now, the debate has not been resolved.⁸⁵

C. Berle’s Argument for a “Broader” Vision

In his response to Dodd, however, Berle also articulated a highly prescient argument for a broad view of progressive corporate governance. In A Note, Berle explained:

This group [of shareholders], expanded to include their families and dependents, must directly affect not less than half of the population of the country When the fund and income stream upon which this group rely are irresponsibly dealt with, a large portion of the group merely devolves on the community; and there is presented a staggering bill for relief, old age pensions, sickness-aid, and the like. Nothing is accomplished, either as a matter of law or of economics, merely by saying that the claim of this group ought not to be “emphasized.”⁸⁶

It can be difficult to recall that in the 1930s, the institution of private property itself was in question. A polity’s choice to run its economy through a

⁸² *Id.* at 1366-67.

⁸³ *Id.* at 1367 (discussing the New York corporate bar).

⁸⁴ *Id.*

⁸⁵ Some years after their famous exchange, Berle conceded that corporations had to be considered to have social responsibilities. ADOLF A. BERLE, JR., THE 20TH CENTURY CAPITALIST REVOLUTION 169 (1954). Dodd conceded, too, acknowledging that accountability was a real problem. E. Merrick Dodd, Jr., *Is Effective Enforcement of the Fiduciary Duties of Corporate Managers Practicable?*, 2 U. CHI. L. REV. 194, 205-06 (1935).

⁸⁶ Berle, *supra* note 81, at 1368.

system of private property, however, immediately raises social questions. Berle was forceful:

Either you have a system based on individual ownership of property or you do not. If not — and there are at the moment plenty of reasons why capitalism does not seem ideal — it becomes necessary to present a system (none has been presented) of law or government, or both, by which responsibility for control of *national wealth and income is so apportioned and enforced that the community as a whole, or at least the great bulk of it, is properly taken care of.*⁸⁷

In short, the welfare of the people depended upon capital, not least stock, even in the early 1930s. Under conditions of social capitalism, what was true then has become even more so.

III. TRADITIONAL VIEWS OF CORPORATE PURPOSE

A. Shareholder Capitalism

1. Shareholder Wealth Maximization

The term SWM is often used as if it were self-evident.⁸⁸ In a tradition running back hundreds of years,⁸⁹ the value of an asset is commonly understood as the net present value of the stream of monetary income generated by the asset, discounted for risk and the time value of money.⁹⁰ So,

⁸⁷ *Id.* (emphasis added).

⁸⁸ Stefan Padfield explains SWM based on what it is not: “The only thing a for-profit corporation cannot do in a shareholder wealth maximization regime is knowingly sacrifice shareholder value, whether calculated in the short- or long-term, in pursuit of some social end.” Stefan J. Padfield, *The Role of Corporate Personality Theory in Opting Out of Shareholder Wealth Maximization*, 19 TENN. J. BUS. L. 415, 443 (2017) (working through the corporate purpose scholarship of Joan Heminway and Eric Chaffee). The obligation to put shareholders first — “the social responsibility of business is to increase its profits” — at least seems straightforward. See Peter Coy, Opinion, *C.E.O.s Are Going Out of Their Way to Punish Russia*, N.Y. TIMES (Mar. 9, 2022), <https://www.nytimes.com/2022/03/09/opinion/russia-sanctions-corporations.html> (quoting Milton Friedman).

⁸⁹ See Susie Brackenborough et al., *The Emergence of Discounted Cash Flow Analysis in the Tyneside Coal Industry c. 1700-1820*, 33 BRIT. ACCT. REV. 137, 137-38 (2001) (tracing the concept of “ready money” back to 1649).

⁹⁰ See THOMAS E. COPELAND & J. FRED WESTON, FINANCIAL THEORY AND CORPORATE POLICY 38 (3d. ed. 1988) (“Shareholders’ wealth . . . is the present value of their stream of residual cash flows, discounted at the cost of equity capital.”); see generally ALFRED RAPPAPORT, CREATING SHAREHOLDER VALUE: THE NEW STANDARD FOR BUSINESS

if the company as a whole is understood as an annuity, and the share is a fraction of the company, then we can value the share accordingly. Logically, then, management focuses on earnings per share (EPS).⁹¹

In this view, profits, often expressed as EPS, drive share prices,⁹² and management is often judged on the basis of share price changes.⁹³ Assuming informationally efficient equity markets, relative increases in stock price must mean that management is increasing shareholder wealth. If that is true, then one can use the stock market to evaluate corporate governance measures like poison pills or staggered boards. If it is good for shareholders, the price of shares will increase, and if not, not. The stock market will tell us what is good, like the Oracle at Delphi, but in a less cryptic manner.

Of course, in an age of tech stocks, to say nothing of meme stocks,⁹⁴ EPS looks like something of a shibboleth. Moreover, SWM may have less explanatory and legal power than is often implied. Within its bounds, however, SWM makes a great deal of sense. Of course, shareholders want a return on investment; that is why they invest.⁹⁵ And surely directors and managers should do what is best for the company? If they act with skill and fortune smiles, the company will make money. Wouldn't shares in such a company gain in value, as measured by price in money?

PERFORMANCE 19-49 (1986) (discussing earnings per share, return on investment, and return on equity as performance measures). Discussion of discounted cash flow is often found in introductory finance or business courses. See CFI Team, *Discounted Cash Flow (DCF)*, CORP. FIN. INST., <https://corporatefinanceinstitute.com/resources/valuation/discounted-cash-flow-dcf/> (Dec. 10, 2022).

⁹¹ See ENRON CORP., ENRON ANNUAL REPORT 2000, at 2 (2001).

⁹² In the accounting scandals that led to the passage of the Sarbanes-Oxley Act, much of the deceptive accounting served to make the companies' EPS numbers look better than they actually were. Enron's last letter to shareholders in 2000 famously asserted, "Enron is laser-focused on earnings per share . . ." *Id.* For a fuller discussion of Enron's collapse, see David A. Westbrook, *Corporation Law After Enron: The Possibility of a Capitalist Reimagination*, 92 GEO. L.J. 61, 97-100 (2003).

⁹³ Management engages in "earnings management" in order to meet market expectations and avoid adverse consequences to their firms and themselves. Lynne L. Dallas, *Is There Hope for Change? The Evolution of Conceptions of "Good" Corporate Governance*, 54 SAN DIEGO L. REV. 491, 531-32 (2017) (discussing ways in which SWM contributes to unintended negative consequences).

⁹⁴ See discussion *infra* Part III.A.3.

⁹⁵ See Dalia T. Mitchell, *From Dodge to eBay: The Elusive Corporate Purpose*, 13 VA. L. & BUS. REV. 155, 199-200 (2019).

2. Doctrine and Economics

a. Caselaw: Dodge and eBay

In the law school classroom, SWM is usually taught using the classic case of *Dodge v. Ford Motor Co.*⁹⁶ The Michigan court, convinced by Ford Motor Company shareholders John and Horace Dodge, rejected Henry Ford's plans for several socially beneficial initiatives and compelled the corporation to issue its special dividend. In doing so, the court pointed out: "A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed to that end."⁹⁷

In its 2010 *eBay Domestic Holdings, Inc. v. Newmark* holding, the Delaware Chancery Court endorsed SWM.⁹⁸ The court rejected defensive measures adopted by online classified ad business "craigslist" to prevent its shareholder, online auction site eBay, from threatening its community-oriented corporate culture. Chancellor Chandler wrote:

Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders. The "Inc." after the company name has to mean at least that.⁹⁹

⁹⁶ *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919). *Dodge* is also prominent in legal scholarship. Rhee, *supra* note 67, at 1958 n.28.

⁹⁷ *Id.* at 684.

⁹⁸ *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010).

⁹⁹ *Id.* at 34 (rejecting a plan that sought *not* to maximize the company's value for the stockholders). *See* Padfield, *supra* note 88, at 423 (discussing the *eBay* opinion).

SWM is widely considered the norm,¹⁰⁰ a “foundational principle” of corporate law and governance¹⁰¹ even attributed to Congress¹⁰² and often accepted as law.¹⁰³ With the exception of non-profit corporations and benefit corporations (B Corps), “[c]orporations are almost universally conceived as economic entities that strive to maximize value for shareholders.”¹⁰⁴

b. Markets and Economics

At least in the paradigmatic case of a publicly traded company of moderate size, the norm is said to be self-enforcing. Henry G. Manne argued in a series

¹⁰⁰ Bernard S. Sharfman, *Shareholder Wealth Maximization and Its Implementation Under Corporate Law*, 66 FLA. L. REV. 389, 391 (2014) (calling SWM “a norm of corporate governance that encourages a firm’s board of directors to implement all major decisions . . . with only the interests of shareholders in mind”). Other scholars agree: “Profit maximization sometimes is expressed as a societal norm, but it sometimes also is expressed as a legal requirement, at least in the United States.” JONATHAN R. MACEY, CORPORATE GOVERNANCE: PROMISES KEPT, PROMISES BROKEN 1 (2008).

¹⁰¹ See Stephen Bainbridge, *A Duty to Shareholder Value*, N.Y. TIMES (Apr. 16, 2015, 6:46 AM), <https://www.nytimes.com/roomfordebate/2015/04/16/what-are-corporations-obligations-to-shareholders/a-duty-to-shareholder-value> (asserting that the law requires corporate directors and managers to pursue SWM). See also Rhee, *supra* note 67, at 1951; David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L.J. 181, 184 (2013) (describing shareholder primacy as the law).

¹⁰² The SEC argued in 1975 that it had not been led “to question the basic decision of the Congress that, insofar as investing is concerned, the primary interest of investors is economic. After all, the principal, if not the only, reason why people invest their money in securities is to obtain a return.” Comment Letter on Proposal on Climate-Related Disclosures for Investors from Lawrence A. Cunningham et al., to Sec. & Exch. Comm’n (Apr. 25, 2022) (File No. S7-10-22) (quoting Notice of Commission Conclusions and Rulemaking Proposals in the Public Proceeding Announced in Securities Act Release No. 5569 (Feb. 11, 1975), Release No. 33-5627, 8 S.E.C. Docket 73 (Oct. 14, 1975)), <https://www.sec.gov/comments/s7-10-22/s71022-20126528-287180.pdf> [hereinafter Cunningham et al. Comment Letter] (arguing against proposed climate-related disclosure requirements for reporting companies).

¹⁰³ See Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 763-67 (2015) (asserting that directors must make shareholder welfare the sole end of corporate governance, within legal limits, under Delaware law).

¹⁰⁴ MACEY, *supra* note 100, at 2 (pointing out that SWM is a choice, and shareholders can invest in ventures supporting other goals). Stephen Bainbridge has analyzed Delaware law and found that Delaware courts have on occasion “embraced an even stronger version of shareholder value maximization than did *Dodge*.” Stephen M. Bainbridge, *Why We Should Keep Teaching Dodge v. Ford Motor Co.*, 48 J. CORP. L. 77, 100 (2022) (arguing that Lynn Stout’s interpretation is incorrect). Bainbridge analyzes the Delaware Chancery Court’s 1986 decision in *Katz v. Oak Industries, Inc.*, 508 A.2d 873, 879 (Del. Ch. 1986), stating that directors have an obligation to maximize long-term shareholder interests. *Id.* at 102 (calling the decision “an unqualified statement of shareholder value maximization”).

of articles in the mid-1960s that failure to maximize shareholder return can jeopardize not only the existence of the firm, but worse (!), the jobs of its managers.¹⁰⁵ When “an existing company is poorly managed—in the sense of not making as great a return for the shareholders as could be accomplished under other feasible management—the market price of the shares declines relative to the shares of other companies in the same industry or relative to the market as a whole.”¹⁰⁶ Manne explained, “The lower the stock price, relative to what it could be with more efficient management, the more attractive the take-over becomes to those who believe that they can manage the company more efficiently.”¹⁰⁷ In this conception, the market for corporate control, i.e., takeovers or the threat of takeovers, effectively requires managers to adopt shareholder capitalism.¹⁰⁸

In a 1970 *New York Times* piece, economist Milton Friedman argued for shareholder capitalism over stakeholder capitalism.¹⁰⁹ In “The Social Responsibility Of Business Is to Increase Its Profits,” Friedman asserted that shareholders own corporations and corporate managers are bound by agency law to serve the interests of those owners.¹¹⁰ Anything else is misappropriation, taxation without representation, and subverts the market mechanism. Friedman called such subversion “socialism.”¹¹¹ “The Social Responsibility Of Business Is to Increase Its Profits,” published at the height of the Vietnam era, became shorthand for the view that corporations are vehicles for the

¹⁰⁵ Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 112-14 (1965).

¹⁰⁶ *Id.* at 112.

¹⁰⁷ *Id.* at 113. For a recent example, consider Elon Musk’s offer for Twitter. Jennifer Korn, *Elon Musk’s Bumpy Road to Owning Twitter: A Timeline*, CNN (Oct. 28, 2022, 8:12 AM), <https://www.cnn.com/2022/05/17/tech/twitter-elon-musk-timeline/index.html> (outlining the progression of Musk’s takeover offer).

¹⁰⁸ As Manne recognized, many companies do not have effective shareholder voting, and hence no market for corporate control, and his argument does not apply to such companies. This is the norm in today’s technology sector. See Amy Deen Westbrook & David A. Westbrook, *Snapchat’s Gift: Equity Culture in High-Tech Firms*, 46 FLA. ST. U.L. REV. 862, 896-98 (2019) (explaining that the market for corporate control cannot function in the absence of shareholder franchise); see also Jack Davis, *Twitter Turns the Tables on Elon Musk, Intends to ‘Close the Transaction and Enforce the Merger Agreement’*, THE W.J. (May 18, 2022, 8:22 AM), <https://www.westernjournal.com/twitter-turns-tables-elon-musk-intends-close-transaction-enforce-merger-agreement/> (emphasizing that Twitter’s board believed that the agreement was “in the best interest of all shareholders”).

¹⁰⁹ Milton Friedman, *A Friedman Doctrine - The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970), <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html>.

¹¹⁰ *Id.*

¹¹¹ *Id.*

accumulation of individual wealth and that political economy should be discussed in the language of libertarian microeconomics. The business of business is business.¹¹²

c. Major Players Weigh In

By the 1990s, shareholder capitalism had become the dominant conceptualization of corporate purpose.¹¹³ In 1994, the American Law Institute published its Principles of Corporate Governance, exhorting “a corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain.”¹¹⁴ In 1997, the Business Roundtable¹¹⁵ released its Statement on Corporate Governance, explaining:

[T]he paramount duty of management and of boards of directors is to the corporation’s stockholders; the interests of other stakeholders are relevant as a derivative of the duty to stockholders. The notion that the board must somehow balance the interests of stockholders against the interests of other stakeholders fundamentally misconstrues the role of directors.¹¹⁶

¹¹² See Jeff Civins & Mary Mendoza, *Corporate Sustainability and Social Responsibility: A Legal Perspective*, 71 TEX. B. J. 368, 370 (2008) (reviewing Friedman’s argument).

¹¹³ See, e.g., Ira M. Millstein & Paul W. MacAvoy, *The Active Board of Directors and Performance of the Large Publicly Traded Corporation*, 98 COLUM. L. REV. 1283, 1302 (1998) (assessing board impact on corporate performance, which is itself measured in terms of economic indicators such as economic value added to capital invested).

¹¹⁴ 2 Principles of Corporate Governance: Analysis and Recommendations § 2.01 (AM. L. INST. 1994).

¹¹⁵ The Business Roundtable comprises a group of leaders of the largest U.S. companies. THE BUS. ROUNDTABLE, <https://www.businessroundtable.org/> (last visited Nov. 2, 2022).

¹¹⁶ THE BUS. ROUNDTABLE, STATEMENT ON CORPORATE GOVERNANCE 3 (1997), <http://www.ralphgomory.com/wp-content/uploads/2018/05/Business-Roundtable-1997.pdf>. Scholars affirmed that “[s]hareholders want managers to work in their best interests, that is, to maximize their wealth.” April Klein, *Firm Performance and Board Committee Structure*, 41 J.L. & ECON. 275, 279 (1998) (continuing on to note that managers “may maximize their own utility through the consumption of perquisites or the selection of suboptimal investments”).

3. Criticism of Shareholder Capitalism

a. Impractical in the Face of Varied Shareholder Interests

“Maximize shareholder wealth” looks like a clear directive to managers and directors, but “in a public firm with many shareholders with different investment time frames, tax concerns, outside investments, levels of diversification, and attitudes toward corporate social responsibility,”¹¹⁷ the injunction may become “incoherent.”¹¹⁸ A business is not a clock; choices are required. Returns are not guaranteed in either amount or timing.¹¹⁹

Even if managers achieve shareholder wealth, accounted for in traditional terms such as EPS or discounted cash flow, shareholders seem to want many things besides pure wealth maximization. In recent years, shares in companies with few prospects (famously, GameStop¹²⁰ and more recently, Revlon¹²¹) or even in bankruptcy proceedings (such as Hertz¹²²) have skyrocketed in price.¹²³ One might dismiss the “meme stock” phenomenon as a function of stock

¹¹⁷ Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163, 175 (2008). Even with regard to SWM, different shareholders may have substantially different preferences and interests. See Padfield, *supra* note 88, at 430 (pointing out that shareholder heterogeneity contributes to arguments in favor of SWM because everyone can use the money as they see fit); see also Sean J. Griffith, *Opt-In Stewardship: Toward an Optimal Delegation of Mutual Fund Voting Authority*, 98 TEX. L. REV. 983, 1009-10 (2020) (noting that the interest of shareholders as a class can be assumed to be SWM, as a “lowest common denominator solution to their inability to coalesce around other objectives”).

¹¹⁸ Stout, *supra* note 117, at 174.

¹¹⁹ See Rhee, *supra* note 67, at 1962 (noting that it may not be clear how to maximize profit).

¹²⁰ Katie Canales, *Here’s How GameStop Went from Dying Retail Relic to a ‘Meme Stock’ That Has Rattled the American Stock Market*, BUS. INSIDER (Jan. 31, 2021, 7:00 AM), <https://www.businessinsider.com/gamestop-struggling-pandemic-stock-market-video-games-2021-1> (chronicling the rise of the share price after it attracted attention of a subreddit forum).

¹²¹ See Claire Ballentine & Jeremy Hill, *Retail Army Defies Bond Logic to Drive Revlon Stock 600% Higher (1)*, BLOOMBERG L., (June 23, 2022, 9:54 AM), <https://news.bloomberglaw.com/securities-law/retail-army-defies-bond-logic-to-drive-revlon-stock-600-higher-1> (noting the echo of meme-stock mania driving Revlon, Inc. share prices higher after its bankruptcy filing).

¹²² Jeff Sommer, *Hertz: And Now for Something Completely Worthless*, N.Y. TIMES (Oct. 25, 2021), <https://www.nytimes.com/2020/06/17/business/hertz-bankruptcy-stock-sale.html> (describing the company’s IPO from bankruptcy).

¹²³ Matt Levine, Opinion, *Maybe the Memes Are Over*, BLOOMBERG (Jan. 24, 2022, 1:55 PM), <https://www.bloomberg.com/opinion/articles/2022-01-24/maybe-the-memes-are-over>. Levine jokes: “One important but not necessarily permanent lesson of the Year of Meme Stocks is that if you run a public company you should try to meme it up as much as possible, because your job is to create shareholder value and doing meme stuff creates shareholder value. . . . All of this stuff is pretty much unrelated to actual business results.” *Id.*

trading for entertainment during a time of quarantine,¹²⁴ but valuations of many companies, especially start-ups and tech companies, bear no relationship to current earnings.¹²⁵ Equity investment is often driven by something other than a realistic assessment of a shareholder's claim to a company's discounted cash flow. This does not mean that shareholder interest does not drive stock prices – presumably investors buy stock in companies in which they are interested. But the interest may not be reducible to SWM. To say that shareholders may care about things other than discounted cash flow, however, is not to say very much.

b. SWM Is Not Required by Law

Corporation law scholars have struggled with the legal status of SWM.¹²⁶ Critics of the doctrine have pointed out that state corporation laws do not limit

¹²⁴ See *id.* “When the world shut down in the spring of 2020, people turned to day-trading stocks because, even though the market had just crashed, trading stocks was still more fun than their other entertainment options. And then trading stocks became, improbably, really fun, a source of social connection and populist excitement, and also those stocks went up a lot which was fun.” *Id.* For a thorough analysis of the market in early 2021, see U.S. SEC. & EXCH. COMM’N, *supra* note 42 (analyzing causes of the GameStop market activity). But see JOSHUA MITTS ET AL., A REPORT BY THE AD HOC ACADEMIC COMMITTEE ON EQUITY AND OPTIONS MARKET STRUCTURE CONDITIONS IN EARLY 2021 (2022) (arguing that a short squeeze and a gamma squeeze impacted GameStop share value).

¹²⁵ See, e.g., Steven Fiorillo, *Tesla: Overvalued By 85.26% And Not a Technology Company*, SEEKING ALPHA (May 6, 2022, 8:30 AM), <https://seekingalpha.com/article/4507535-tesla-overvalued-by-85-26-percent-and-not-a-technology-company> (calling Tesla’s valuation “egregious”); see also Amy Deen Westbrook, *We(re) Working on Corporate Governance: Stakeholder Vulnerability in Unicorn Companies*, 23 U. PA. J. BUS. L. 505, 571 (2021) (noting that at one point Morgan Stanley suggested a WeWork valuation of \$104 billion).

¹²⁶ Joan Heminway, for example, finds that SWM is a norm, though SWM is not required by state statutes or decisional law. Joan MacLeod Heminway, *Shareholder Wealth Maximization as a Function of Statutes, Decisional Law, and Organic Documents*, 74 WASH & LEE L. REV. 939, 968-72 (2017) (concluding that it is unclear whether shareholders can limit SWM through their organic documents given the strength of the norm). Einer Elhauge concludes that “[c]orporate managers have never had an enforceable legal duty to maximize corporate profits.” Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 738 (2005) (stating that managers have always had discretion to sacrifice corporate profits in the public interest). Robert Rhee finds that it is a legal obligation in the Hartian tradition: one not backed by a sanction. Rhee, *supra* note 67, at 2005-07 (distinguishing it from legal obligations in the Austinian tradition). Jonathan Macey identifies SWM as a “myth,” but central to corporate law. Jonathan R. Macey, *The Central Role of Myth in Corporate Law* 5, 22 (Eur. Corp. Governance Inst., Working Paper No. 519/2020, 2020) (describing SWM as a “well-documented and intensely debated myth” that obscures managers’ unfettered discretion to manage the business). And, as Stefan Padfield argues, it is possible “that the perception [of SWM] is so persistent and common that it is law.” Padfield, *supra* note 88, at 438. Even if it is law, however, many scholars agree that shareholders may “opt out” of its

corporate purpose to SWM.¹²⁷ They normally allow corporations to be formed to conduct or promote “any lawful business or purposes,”¹²⁸ and do not mention a duty to maximize shareholder profits.¹²⁹

It is not clear that the most widely accepted understanding of *Dodge* is right.¹³⁰ Scholars have argued that the decision is founded on the fact that Ford, a controlling shareholder, breached a duty to minority shareholders (the Dodge brothers), and that the oft-quoted sentence about SWM is simply dicta.¹³¹ In addition, the Michigan court only described shareholder profit as the “primary” purpose of the corporation, not the only one, and noted that corporate managers have implied powers to pursue charitable works that can be characterized as incidental to the corporation’s business.¹³² Lynn Stout described *Dodge* as “largely irrelevant to corporate law and corporate practice”¹³³ and even now it is seldom cited outside of law journals.¹³⁴

As in *Dodge*, the court in *eBay*¹³⁵ enjoined the ability of dominant shareholders to ignore a minority shareholder in favor of “semi-

requirements. David G. Yosifon, *Opting Out of Shareholder Primacy: Is the Public Benefit Corporation Trivial?*, 41 DEL. J. CORP. L. 461, 479 (2017) (noting that Delaware corporation law does not prohibit alteration of the shareholder primacy “rule”).

¹²⁷ Stout, *supra* note 117, at 169; Lyman Johnson, *Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose*, 38 DEL. J. CORP. L. 405, 432 (2013) (explaining that “[n]o corporate statute in the United States, for example, requires a corporation to advance a particular purpose, such as profit or share price maximization”).

¹²⁸ DEL. CODE ANN. tit. 8, § 101 (2022). *But see* Yosifon, *supra* note 126, at 473-74 (pointing out that no Delaware court has ever suggested that the phrase authorizes corporations to “deviate from shareholder primacy and sacrifice shareholder value for other stakeholders”).

¹²⁹ Anne Choike, *A New Urban Front for Shareholder Primacy*, 9 MICH. BUS. & ENTREPRENEURIAL L. REV. 79, 91 (2019).

¹³⁰ *See generally* Heminway, *supra* note 126, at 945-68 (walking through each element); Mitchell, *supra* note 95, at 173.

¹³¹ Stout, *supra* note 117, at 167-68. *But see* Bainbridge, *supra* note 105, at 93 (pointing out that “the decision was a logical extension of legal trends of the time” and “was accepted almost immediately . . . as a correct statement of the law of corporate purpose.”).

¹³² *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919); *see* Elhauge, *supra* note 126, at 773 (emphasizing that the court said profits should be the “primary but not exclusive goal”).

¹³³ Stout, *supra* note 117, at 166 (also calling it “bad law,” “a mistake,” “a judicial ‘sport,’” and “a doctrinal oddity”).

¹³⁴ Rhee, *supra* note 67, at 2002. Rhee noted that “[i]n Delaware, [*Dodge*] has only been cited three times for other propositions. In almost one hundred years, only the West Virginia Supreme Court has restated *Dodge’s* iconic proposition, but it did so in the context of justifying broad authority to engage in corporate philanthropy, a concept that is at least in tension with maximizing shareholder profit.” *Id.* at 1959. A quick Lexis search reveals 76 citations total, including the three in Delaware.

¹³⁵ *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010). *eBay* has been cited in more than 60 cases since being handed down, including more than 40 cases in Delaware.

eleemosynary”¹³⁶ goals of dominant shareholders.¹³⁷ In both cases the dominant parties explicitly said they did not care about financial returns to shareholders and used the corporate machinery accordingly until ordered otherwise by the court,¹³⁸ but neither court actually interfered with the management of the company or sought to define, much less require, action to maximize shareholder wealth.

c. Management Discretion and the Business Judgment Rule

Other criticisms have focused on the leeway enjoyed by managers. The reluctance of courts to impose a general duty on boards to maximize shareholder wealth makes sense in the business context. Consider, for example, a handsome executive compensation package¹³⁹ or a corporate donation to a university.¹⁴⁰ Obviously, every dollar so paid is not paid out in dividends or, if retained as cash, valued as an asset on the balance sheet and reflected in the market price for the stock. But would such payments be bad for the long-term success of the company? Courts are not in a position to say, and they have regularly refused opportunities to do so.¹⁴¹ In refusing to grant relief to shareholders angered by management decisions that, the shareholders plausibly argue, cost them money, courts routinely employ the business judgment rule.¹⁴²

¹³⁶ *Dodge*, 170 N.W. at 683 (wording used in *Dodge*).

¹³⁷ Johnson, *supra* note 127, at 443 (claiming the *eBay* court’s decision conflated corporate purpose with stockholder value and ran counter to many Delaware cases); *see also* Yosifon, *supra* note 101, at 193-94 (comparing *Dodge* and *eBay*).

¹³⁸ The two cases have been termed “confession cases” because of their yes-or-no approach to SWM. *See* Jeffrey M. Lipshaw, *The False Dichotomy of Corporate Governance Platitudes*, 46 J. CORP. L. 345, 368 (2021) (arguing against zero-sum shareholder v. stakeholder debates).

¹³⁹ For example, Disney shareholders filed a derivative suit to challenge the substantial severance payment provided in the employment contract the company signed with Michael Ovitz, but the Delaware court upheld the package. *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 776 (Del. Ch. 2005), *aff’d*, 906 A.2d 27 (Del. 2006).

¹⁴⁰ *See* A. P. Smith Mfg. Co. v. Barlow, 13 A.2d 145, 160-61 (N.J. 1953) (upholding a \$1,500 charitable donation to Princeton University).

¹⁴¹ *See* Westbrook & Westbrook, *supra* note 56, at 704 (noting that the judiciary has been “consistently deferential to managers, notably through the elaboration of the business judgment rule”).

¹⁴² The business judgment rule is a judicial standard of review based on a rebuttable presumption that directors’ business decisions are informed, in good faith, and in the honest belief that the decision is in the best interests of the corporation. *Aronson v. Lewis*, 473 A.2d 805, 811-12 (Del. 1984); *Parnes v. Bally Ent. Corp.*, 722 A.2d 1243, 1246 (Del. 1999).

Two widely taught cases illustrate the leeway afforded corporate managers by the business judgment rule.¹⁴³ In *Shlensky v. Wrigley*, the Illinois appeals court rejected a challenge against an arguably costly board decision not to install lights at Wrigley Field.¹⁴⁴ The court reasoned that it should not interfere unless the board's conduct bordered on fraud, illegality, or conflict of interest.¹⁴⁵ In *Kamin v. American Express*, the New York State Supreme Court rejected shareholders' challenge to the American Express directors' decision to issue a dividend in a form that cost both the corporation and the shareholders money.¹⁴⁶

In light of the "judicial eagerness to protect directors from claims that they failed to maximize shareholder wealth,"¹⁴⁷ the shareholder primacy "mandate" is at best soft law, and not enforceable in statutes or judicial decisions.¹⁴⁸

B. Stakeholder Capitalism

1. Corporate Social Responsibility

Stakeholder capitalists maintain that firms should be responsible to a range of constituents. CSR generally refers to a corporation's consideration of the impact of its business on society,¹⁴⁹ and includes concerns such as "business ethics, community development, labor, environment, and human rights."¹⁵⁰

¹⁴³ Rhee, *supra* note 67, at 1976-77 (analyzing the business judgment rule's powerful "best interests" incantation).

¹⁴⁴ *Shlensky v. Wrigley*, 237 N.E.2d 776, 780-81 (Ill. App. Ct. 1968).

¹⁴⁵ See Padfield, *supra* note 88, at 424-28 (discussing situations in which boards can ignore any duty to maximize shareholder value by attributing a colorable pro-shareholder motivation to their actions).

¹⁴⁶ *Kamin v. Am. Express Co.*, 383 N.Y.S.2d 807, 812 (N.Y. Sup. Ct. 1976), *aff'd*, 54 A.D.2d 654 (N.Y. App. Div. 1976) (rejecting the shareholders' objections to the board's dividend decision). Of course, in *Smith v. Van Gorkom*, the court denied the directors the protection of that relaxed standard of review but, as many scholars have noted, the case is anomalous. *Smith v. Van Gorkom*, 488 A.2d 858, 887-88 (Del. 1985); see Daniel R. Fischel, *The Business Judgment Rule and the Trans Union Case*, 40 BUS. LAW. 1437, 1455 (1985) (calling the decision "one of the worst decisions in the history of corporate law").

¹⁴⁷ Stout, *supra* note 117, at 171 (discussing the *Shlensky* decision).

¹⁴⁸ Elhauge, *supra* note 126, at 738-39 (2005) (noting that there is not an enforceable duty).

¹⁴⁹ Thomas Lee Hazen, *Corporate and Securities Law Impact on Social Responsibility and Corporate Purpose*, 62 B.C. L. REV. 851, 853 (2021). The U.S. Chamber of Commerce defines it as "a business's efforts to make a positive environmental or social impact." Johnson, *supra* note 10 (identifying the main types of CSR as environmental, ethical, and philanthropic).

¹⁵⁰ U.S. GOV'T ACCOUNTABILITY OFF., GLOBALIZATION: NUMEROUS FEDERAL ACTIVITIES COMPLEMENT U.S. BUSINESS'S GLOBAL CORPORATE SOCIAL RESPONSIBILITY EFFORTS 5 (2005), <https://www.gao.gov/assets/gao-05-744.pdf> (pointing out that "most definitions [of CSR] suggest that, in addition to addressing the interests of its shareholders, business

Today, CSR is often expressed in terms of the environmental, social, and governance (ESG) impact of the corporation's operations. Just what kinds of impact are being measured, and how, is the subject of debate.¹⁵¹ The SEC took a stab at defining ESG, mentioning climate change, community investment, and executive compensation.¹⁵² In the legal academy, and in this Article, CSR and ESG, along with related terms such as "charity" and "sustainability," tend to be understood in contradistinction to SWM and terms like "self-interest" and "the bottom line."

2. Doctrine and Market Composition

a. *Caselaw*: Barlow, Unocal, and Revlon

Sometimes people wish to benefit others, as Adam Smith also wrote in *Theory of Moral Sentiments*.¹⁵³ Suppose a company is self-consciously managed to benefit people apart from its owners. Courts have long allowed corporations to make charitable contributions. In its 1896 decision in *Steinway v. Steinway & Sons*, for example, the New York Supreme Court held that a corporation could make moderate contributions to a charitable purpose such as a church, school, or library for its employees, describing such expenditures as "directly related to the legitimate objects of the corporation."¹⁵⁴

In law schools, the board's discretion to make charitable donations, and by extension, stray from the straight and narrow path of SWM, is often taught using *A.P. Smith Mfg. Co. v. Barlow*.¹⁵⁵ In that case, a New Jersey court upheld the directors' discretion to direct a charitable contribution to Princeton

should address the interests of its other stakeholders, including customers, employees, suppliers, and the local community.").

¹⁵¹ Saijel Kishan, *ESG Insiders Demand Course Correction to Fix Industry Woes*, BLOOMBERG L. (June 7, 2022, 8:25 AM), <https://news.bloomberglaw.com/esg/esg-insiders-demand-course-correction-to-fix-industry-woes-2> (noting calls for a dedicated watchdog to police claims, and problems with nomenclature).

¹⁵² U.S. Sec. & Exch. Comm'n, *Environmental, Social, and Governance (ESG) Investing*, INVESTOR.GOV, <https://www.investor.gov/introduction-investing/investing-basics/glossary/environmental-social-and-governance-esg-investing> (providing a basic introduction and definition). Conceptually and schematically, then, CSR focuses on intention, while ESG emphasizes impact – flip sides of the same coin.

¹⁵³ "How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortune of others, and render their happiness necessary to him, though he derives nothing from it, except the pleasure of seeing it." ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS*, pt. 1, §1, ch. 1, para. 1 (1759). The tension between Smith's books is sometimes referred to as the "Adam Smith problem."

¹⁵⁴ *Steinway v. Steinway & Sons*, 40 N.Y.S. 718, 721 (N.Y. Sup. Ct. 1896).

¹⁵⁵ *A. P. Smith Mfg. Co. v. Barlow*, 13 N.J. 145, 161 (N.J. 1953).

University, citing the corporation's "high obligations as a constituent of our modern social structure."¹⁵⁶ Writing at the height of the Cold War, the court observed "just as the conditions prevailing when corporations were originally created required that they serve public as well as private interests, modern conditions require that corporations acknowledge and discharge social as well as private responsibilities as members of the communities within which they operate."¹⁵⁷

During the takeover boom of the 1980s,¹⁵⁸ the question of corporate purpose became acute.¹⁵⁹ The conglomerates that dominated the U.S. economy during the post-World War Two era were vulnerable to the hostile takeovers that had been described by Henry Manne two decades earlier.¹⁶⁰ Such deals were typically financed with high-yield ("junk") debt.¹⁶¹ Servicing such debt often required the sale of substantial assets, including the sale of divisions and subsidiaries to distant competitors resulting in lost jobs and community hardships.

In the midst of those years, the Delaware Supreme Court decided *Unocal Corp. v. Mesa Petroleum Co.*, ruling that a board's decision to adopt defensive measures against a hostile takeover bid might properly be based upon consideration of a range of concerns about the bid's likely impact upon the corporate enterprise.¹⁶² Such concerns might include "the impact on 'constituencies' other than shareholders (i.e., creditors, customers, employees,

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 154. Not all courts shared New Jersey's conceptions of the obligations of good citizenship. See, e.g., *State ex rel. Pillsbury v. Honeywell, Inc.*, 291 N.W.2d 322 (Minn. 1971) (focusing on shareholders' economic interests).

¹⁵⁸ Leonard Silk, *The Peril Behind the Takeover Boom*, N.Y. TIMES, Dec. 29, 1985 (¶ 3), at 1, <https://www.nytimes.com/1985/12/29/business/the-peril-behind-the-takeover-boom.html> (dating the beginning of the boom to 1981).

¹⁵⁹ See Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385, 1393-94 (2008) ("[C]oncerns [about 'soulless' pursuit of SWM] have taken on far greater urgency since the advent of leveraged hostile tender offers in the 1980s, tempting shareholders with all-cash premium deals, while arguably leaving other stakeholders (including employees, creditors, and communities) to bear the costs as the acquired companies labored under high debt loads or were simply broken up to pay off the buyer's debts.").

¹⁶⁰ For an account of the transition from the economy erected after World War Two to the contemporary economy, see SCHLEGEL, *supra* note 54, at 76.

¹⁶¹ John Armour et al., *The Evolution of Hostile Takeover Regimes in Developed and Emerging Markets: An Analytical Framework*, 52 HARV. INT'L L.J. 219, 240-41 (2011). "During the 1970s and 1980s, [investment] capital took the form of subordinated, high interest unsecured debt (so-called 'junk bonds') issued by the hostile acquirer. The result was that the currency used for many hostile acquisitions was typically unsecured credit." *Id.*

¹⁶² *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

and perhaps even the community generally).”¹⁶³ The next year, however, the Court seemed to step back from endorsing stakeholder capitalism. In *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*,¹⁶⁴ the court found that, once “dissolution of the company becomes inevitable, the directors cannot fulfill their enhanced *Unocal* duties by playing favorites with the contending factions. Market forces must be allowed to operate freely to bring the target’s shareholders the best price available for their equity.”¹⁶⁵

b. Other Constituencies Statutes and Benefit Corporations

In response to the takeover boom, a substantial majority of states tilted the playing field towards stakeholders by adopting “other constituencies” statutes.¹⁶⁶ Such statutes explicitly allow boards to consider employees and others affected by corporate action.¹⁶⁷ Many corporations have amended their charters accordingly.¹⁶⁸

In addition, since the 2010s, a majority of states¹⁶⁹ have amended their laws to enable incorporation of for-profit benefit corporations, known as B-Corps, which explicitly balance a social purpose with profit seeking.¹⁷⁰ Generated at the urging of the Philadelphia-based non-profit B Lab,¹⁷¹ B-Corps remain somewhat controversial. Some scholars argue that, since SWM is not required by law, B-Corps are unnecessary and potentially counterproductive to the extent their availability implies that conventional corporations may not engage

¹⁶³ *Id.* at 955.

¹⁶⁴ *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 184 (Del. 1986); see Bainbridge, *supra* note 104, at 104-08.

¹⁶⁵ *Revlon*, 506 A.2d at 184.

¹⁶⁶ Lucian A. Bebchuk et al., *For Whom Corporate Leaders Bargain*, 94 S. CAL. L. REV. 1467, 1489 (2021). Thirty-three states had constituency statutes from 2000-2019. 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, 426 (2021).

¹⁶⁷ *Id.*

¹⁶⁸ “Moreover, corporations have, in the past (during the takeover heyday of the mid-1980s), ‘adopted charter provisions specifying management’s right to consider the interests of nonshareholder constituencies.’” Heminway, *supra* note 126, at 958 (quoting Martin Lipton, *Corporate Governance in the Age of Finance Corporatism*, 136 U. PA. L. REV. 1, 41 (1987)).

¹⁶⁹ B-Corps are now available in 40 states. *B Corp States: Everything You Need to Know*, UPCOUNSEL, <https://www.upcounsel.com/b-corp-states> (last visited June 27, 2022) (providing a list of states).

¹⁷⁰ Mohsen Manesh, *Introducing the Totally Unnecessary Benefit LLC*, 97 N.C. L. REV. 603, 610 (2019).

¹⁷¹ *About B Lab*, B LAB GLOBAL, <https://www.bcorporation.net/en-us/movement/about-b-lab> (last visited June 27, 2022).

in such a balance.¹⁷² The business judgment rule already affords corporate boards with significant discretion in management of the business, and boards can benefit other constituencies if they so choose.¹⁷³ Other scholars maintain that the adoption of B-Corp statutes demonstrates that SWM is in fact the default rule.¹⁷⁴ Still other scholars argue that B-Corps serve shareholder primacy by giving shareholders ultimate control over the corporation's purpose.¹⁷⁵

c. Major Players Weigh In

Renewed attention to stakeholders has roughly coincided with the rise of the institutional investor.¹⁷⁶ Currently, approximately eighty percent of U.S. equities are estimated to be held by institutional investors,¹⁷⁷ many of which are committed to ESG issues. “Recently, under the rubric of investment due diligence and stewardship, [institutional investors] have expanded their analyses to prioritize non-financial matters—namely environmental risks, social issues, and governance reform . . . increasingly regarded as integral to investment decision-making.”¹⁷⁸

In 2018 Larry Fink, founder, chairman and CEO of BlackRock (the world's largest asset manager with over \$6 trillion in assets under management) called

¹⁷² Manesh, *supra* note 170, at 621-38 (noting that B-Corps produce state-sponsored branding without accountability); *see also* Yosifon, *supra* note 126, at 461 (arguing that corporate law has long allowed deviation from shareholder primacy in chartering documents).

¹⁷³ Manesh, *supra* note 170, at 624-28 (discussing the power of the business judgment rule).

¹⁷⁴ *See, e.g.*, STEPHEN M. BAINBRIDGE, *THE PROFIT MOTIVE* (forthcoming 2023) (on file with authors).

¹⁷⁵ Jill E. Fisch & Steven Davidoff Solomon, *The “Value” of a Public Benefit Corporation*, in *RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD* 68 (Elizabeth Pollman & Robert B. Thompson eds., 2021).

¹⁷⁶ *See* Lawrence Cunningham, *Ask the Smart Money: Shareholder Votes by a “Majority of the Quality Shareholders,”* 55 U.C. DAVIS L. REV. 1019, 1034 (2021) (analyzing the impact of institutional investors and suggesting that they have altered but not resolved many of corporate governance challenges); *see also* Ittai Paldor, *Empirical Findings in Need of a Theory – In Defense of Institutional Investors*, 54 LOY. L.A. L. REV. 785, 787 (2021) (calling institutional investors the “dominant capital market players of our time”).

¹⁷⁷ Jacob Greenspan, *How Big a Problem Is It That a Few Shareholders Own Stock in So Many Competing Companies?*, HARV. BUS. REV. (Feb. 22, 2019), <https://hbr.org/2019/02/how-big-a-problem-is-it-that-a-few-shareholders-own-stock-in-so-many-competing-companies> (“Overall, institutional investors (which may offer both active and passive funds) own 80% of all stock in the S&P 500.”); Paldor, *supra* note 176, at 787 (“According to some estimates, nearly 80% of the total value of the U.S. stock market is held by institutional investors.”).

¹⁷⁸ Alexander T. Kraik, *Environmental, Social, and Governance Issues: An Altered Shareholder Activist Paradigm*, 44 VT. L. REV. 493 (2020); *see* John C. Coffee, Jr., *The Future of Disclosure: ESG, Common Ownership, and Systematic Risk*, 2021 COLUM. BUS. L. REV. 602 (2021).

on corporate CEOs to focus on sustainability and impacts on non-shareholder stakeholders. “To prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society. Companies must benefit all of their stakeholders . . .”¹⁷⁹ According to Morningstar, “[a]ssets in sustainable funds landed at a record \$357 billion at the end of 2021, more than 4 times the total [at the end of 2018].”¹⁸⁰ In addition, the number of otherwise conventional funds claiming to consider ESG has increased dramatically.¹⁸¹

Some of the largest operating corporations seem to have followed suit. In 2019, the Business Roundtable shifted its tone and released a new Statement on the Purpose of the Corporation that did not even mention shareholders until almost eighty percent of the way through, after affirming a commitment to customers, employees, suppliers, and communities.¹⁸² The idea that corporate managers should be given increased discretion to serve a wider pool of stakeholders has gained influence.¹⁸³

3. Criticism of Stakeholder Capitalism

a. Businesses Are Not Governments

Suppose that a board of directors takes a series of decisions designed to address non-business-related, humanitarian concerns said to be important to shareholders. Warren Buffet has argued that such decisions take the “stockholder’s money,”¹⁸⁴ and that directors should not make company

¹⁷⁹ Larry Fink, *Larry Fink’s 2018 Letter to CEOs: A Sense of Purpose*, BLACKROCK <https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter> (last visited June 27, 2022).

¹⁸⁰ See Alyssa Stankiewicz, *Sustainable Funds U.S. Landscape Report: 2021: Another Year of Broken Records*, MORNINGSTAR (Jan. 31, 2022), https://assets.contentstack.io/v3/assets/blt4eb669caa7dc65b2/blta7ff93f78c5a4bbb/61f46e30b647832808dee6ff/U.S._Sustainable_Funds_Landscape_2022.pdf.

¹⁸¹ Jon Hale, *The Number of Funds Considering ESG Explodes in 2019*, MORNINGSTAR (Mar. 30, 2020), www.morningstar.com/articles/973432/the-number-of-funds-considering-esg-explodes-in-2019.

¹⁸² *Statement on the Purpose of a Corporation*, THE BUS. ROUNDTABLE (Aug. 19, 2019), <https://s3.amazonaws.com/brt.org/May-2022BRTStatementonthePurposeofaCorporationwithSignatures.pdf>.

¹⁸³ Bebchuk et al., *supra* note 166, at 1470.

¹⁸⁴ WARREN E. BUFFET, *THE ESSAYS OF WARREN BUFFET: LESSONS FOR CORPORATE AMERICA* 48 (Lawrence A. Cunningham ed., 5th ed. 2019).

decisions based on their social beliefs.¹⁸⁵ Now suppose that all boards of directors generally act in this fashion. As noted, Friedman argued that this would be an undemocratic system of expropriation (from shareholders) and redistribution to somebody else.¹⁸⁶ Criticism of stakeholder capitalism often emphasizes that businesses are not governments, and lack the legitimacy, scope, and tools to address social issues in any comprehensive sense. However well-intentioned, corporate managers are not positioned to address broad-based social issues.¹⁸⁷

b. Varied Interests and Who Decides

As Spike Lee's 1989 movie suggested, "do the right thing" is hardly simple advice.¹⁸⁸ One shareholder supports this; another shareholder supports that. Activist shareholder Carl Icahn, for example, has worried about the humane treatment of pigs.¹⁸⁹ Presumably other shareholders have other concerns.

Even if there is consensus that a particular course of action would be good, how should a large corporation address competing ideas for what CSR would entail? For examples: higher wages; lower costs to consumers who might not otherwise afford its product; charity and other forms of community support; long-term partnerships with businesses owned or operated by under-represented groups; reduction of pollution (which form of pollution?); and educational outreach may all be socially responsible. There are any number of

¹⁸⁵ Robert Armstrong, *Warren Buffett on Why Companies Cannot Be Moral Arbiters*, FIN. TIMES (Dec. 29, 2019), www.ft.com/content/ebbc9b46-1754-11ea-9ee4-11f260415385 (reporting Buffett's opinion that the government should promote select projects, not companies).

¹⁸⁶ Friedman, *supra* note 109.

¹⁸⁷ This is why agency capture is such an issue. *Protecting the Public Interest: Understanding the Threat of Agency Capture: Hearing Before the S. Subcomm. on Admin. Oversight and the Courts*, 111th Cong. 2 (2010) (testimony of Sidney A. Shapiro, Professor of Law, Wake Forest Law), <https://www.judiciary.senate.gov/imo/media/doc/08-03-10%20Shapiro%20Testimony.pdf> (explaining the democratic accountability of agencies).

¹⁸⁸ DO THE RIGHT THING (40 Acres and a Mule Productions 1989).

¹⁸⁹ See Tristan Bove, *Carl Icahn Challenges BlackRock and Other Big Firms to Join His Pig Fight Against McDonald's*, FORTUNE (Apr. 21, 2022), <https://fortune.com/2022/04/21/carl-icahn-blackrock-other-big-firms-should-support-pig-fight-with-mcdonalds/> (explaining Icahn's years-long fight for animal welfare); see also Susanne Barton, *Icahn Drops Proxy Fight Over Pig Treatment at Kroger (1)*, BLOOMBERG L. (June 6, 2022, 9:27 AM), https://news.bloomberglaw.com/in-house-counsel/icahn-to-drop-proxy-fight-over-pig-treatment-at-kroger-wsj-says?usertype=External&bwid=00000181-3627-d80d-a7b9-f7af75980003&qid=7303584&cti=&cuc=&et=NEWSLETTER&emc=cenw_n1%3A11&source=newsletter&item=read-text (noting that Icahn lost a similar fight against McDonald's).

ways to do the right thing, but they often are in tension with one another.¹⁹⁰ And most investors still want to make some money. “Different shareholders have . . . different views about the extent to which they are willing to sacrifice corporate profits to promote broader social interests, such as a clean environment or good wages for workers.”¹⁹¹

Criticism of stakeholder capitalism may emphasize that, as a practical matter, such questions are left to the processes of corporate governance. A company’s CSR is largely what the company says it is.¹⁹² As with SWM, dissatisfied shareholders may sell their shares, at least in a publicly traded company. As an academic and intellectual matter, however, a particular investor’s decision to stay invested or exit a corporation hardly defines CSR in general. So, CSR remains an abstract, somewhat vaporous, injunction.

c. Accountability and Ambiguity

How do shareholders evaluate the methods directors employ to promote a particular CSR goal?¹⁹³ This is not a new concern, but it takes on a new urgency in a world with hundreds of commercial ESG indices with ratings. Berle was worried about just this: if directors are trustees for shareholders, understood as the beneficial owners of the corporation, then directors are accountable for the wise use of that property.¹⁹⁴ If such fiduciary duties are replaced by a nebulous injunction to do the right thing, accountability evaporates into the fog.¹⁹⁵ As Stephen Bainbridge wrote in a *New York Times* editorial in 2015, “managers who are responsible for everyone are responsible to no one.”¹⁹⁶ The same day that the Business Roundtable released its 2019

¹⁹⁰ See Grant M. Hayden & Matthew T. Bodie, *The Corporation Reborn: From Shareholder Primacy to Shared Governance*, 61 B.C. L. REV. 2419, 2433 (2020) (pointing out that shareholders may have different and competing interests).

¹⁹¹ Stout, *supra* note 117, at 174.

¹⁹² The SEC is currently considering making more stringent rules about public company disclosure of certain ESG measures relating to climate change. The Enhancement and Standardization of Climate-Related Disclosures for Investors, Proposed Rule, Securities Act Release No. 33-11042, 17 CFR 210 (proposed Mar. 21, 2022).

¹⁹³ See Schanzenbach & Sitkoff, *supra* note 10, at 387.

¹⁹⁴ BERLE & MEANS, *supra* note 69.

¹⁹⁵ “[A]cceptance of stakeholderism would make corporate leaders less accountable and more insulated from investor oversight . . . [which] would increase managerial slack and agency costs, thus undermining economic performance and thereby damaging both shareholders and stakeholders.” Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 100-01 (2021).

¹⁹⁶ Bainbridge, *supra* note 101 (arguing for shareholder wealth maximization); see also BERLE & MEANS, *supra* note 69, at 122.

Statement on the Purpose of the Corporation, the Council of Institutional Investors issued a response, objecting that the stakeholder focus “undercuts notions of managerial accountability to shareholders.”¹⁹⁷

Critics have pointed out that many corporate ESG pledges are ambiguous.¹⁹⁸ It is hardly clear that the corporations responsible for the Business Roundtable 2019 Statement have in fact changed their focus.¹⁹⁹ Perhaps businesses just hope to do good by doing well.

More cynically, one might argue that management may be incentivized to claim that its business is virtuous or that its fund invests in “green” companies, whatever the facts may be. So, for example, a business might claim that its operations are carbon neutral. Investors may invest on that basis, at least in part. But suppose the business is not carbon neutral in fact, but merely “greenwashing?”²⁰⁰ Is a 2050 target for an environmental goal merely an excuse to continue business as normal for now?²⁰¹ Social causes present similar problems.

¹⁹⁷ *Council of Institutional Investors Responds to Business Roundtable Statement on Corporate Purpose*, COUNCIL OF INSTITUTIONAL INV. (Aug. 19, 2019), https://www.cii.org/aug19_brt_response; see also Dallas, *supra* note 93, at 559 (“The main criticism of the sustainability approach is that it is believed to give managers too much flexibility in making business decisions.”).

¹⁹⁸ Larry Fink’s language was ambiguous. See also Mariana Mazzucato, *Larry Fink’s Capitalist Shell Game*, PROJECT SYNDICATE (Feb. 11, 2022), <https://www.project-syndicate.org/commentary/stakeholder-capitalism-lip-service-fink-2022-letter-by-mariana-mazzucato-2022-02> (claiming that Fink’s version of stakeholder capitalism is based on “sleight of hand”).

¹⁹⁹ See Lucian A. Bebchuk & Roberto Tallarita, *Will Corporations Deliver Value to All Stakeholders?*, 75 VAND. L. REV. 1031, 1035 (2022) (presenting empirical evidence that the Business Roundtable 2019 Statement “was largely for show and did not reflect a meaningful commitment to bring about material improvement in the treatment of stakeholders”); Westbrook, *supra* note 125, at 554-55 (discussing lack of change in activities of companies whose CEOs signed the statement).

²⁰⁰ Kyle Peterdy, *Greenwashing*, CORP. FIN. INST., <https://corporatefinanceinstitute.com/resources/esg/greenwashing/> (Dec. 12, 2022) (defining Greenwashing as “[m]aking false, misleading, unsubstantiated, or otherwise incomplete claims about the sustainability of a product, service, or business operation.”). Currently investors and regulators are attempting to cut down on greenwashing; see Tim Quinson, *Money Funds May Be Next Target in Fight Against Greenwashing*, BLOOMBERG (June 22, 2022), <https://www.bloomberg.com/news/articles/2022-06-22/money-funds-could-be-next-target-in-greenwashing-war>. As the crackdown on ESG funds demonstrates, it is hard to assess a corporation’s performance towards its non-financial goals.

²⁰¹ Megan Rowling, *Meaningless or Sensible? Net Zero by 2050 Divides Climate Community*, REUTERS (Mar. 6, 2020), www.reuters.com/article/us-climate-change-europe-politics-trfn/meaningless-or-sensible-net-zero-by-2050-divides-climate-community-idUSKBN20T2AA (noting some climate activists worry about maintaining current emissions levels even for a few years).

To make things more complicated, it is difficult to show that CSR initiatives significantly ameliorate the problems they seek to address. For example, in 2021, a group of scholars published an analysis of empirical data which found that, despite “other constituencies” statutes in the “vast majority” of states, out of over 120 mergers/sales, only 3% offered protection from firing to employees.²⁰² The overall result of the study seemed to be that “other constituencies” statutes have not served to protect stakeholders in any significant way.²⁰³ Measuring the effectiveness of CSR initiatives seems to be an inexact science at best.²⁰⁴

IV. CORPORATE GOVERNANCE UNDER SHAREHOLDER CAPITALISM AND STAKEHOLDER CAPITALISM

A. Shareholder Capitalism Presumes Management Control

A firm’s approach to corporate purpose is directly related to its corporate governance. Recall that Berle and Means’ discussion of shareholder primacy emerged from Depression-era concerns about the dominance of large publicly traded corporations over the U.S. economy, and the dominance of managers over shareholders in such firms.²⁰⁵ Contemporary conceptualization of the economy, expressed by the national focus on equity indices and founders of tech companies, is still centered on the largest corporations.²⁰⁶

²⁰² Bebchuk, et al., *supra* note 166, at 1516.

²⁰³ *Id.* at 1475-76; see also Julian Velasco, *Shareholder Ownership and Primacy*, 2010 U. ILL. L. REV. 897, 945 (2010) (arguing that other constituencies statutes are misguided and ineffective).

²⁰⁴ Jeff Cockrell, *How Do Companies Measure Their CSR Impact?*, CHI. BOOTH REV. (June 16, 2021), www.chicagobooth.edu/review/how-do-companies-measure-their-csr-impact (discussing possible ways to measure impact, and variations).

²⁰⁵ Margaret M. Blair, *Are Publicly Traded Corporations Disappearing?*, 105 CORNELL L. REV. 641, 673 (2020) (discussing the enduring importance of large publicly traded corporations); see also Brian R. Cheffins, *Rumours of the Death of the American Public Company Are Greatly Exaggerated* 1 (Eur. Corp. Governance Inst., Working Paper No. 444/2019, 2019), https://ecgi.global/sites/default/files/working_papers/documents/finalcheffins.pdf (“The public company has dominated the corporate economy of the United States for decades.”). “While publicly traded companies comprise only 4300 of America’s 28 million businesses, they are responsible for half of all business capital spending.” *Id.* at 2. Roe, *supra* note 71, at 10 (calling the public company “the dominant form of enterprise in the United States”).

²⁰⁶ Of course, this is hardly a full picture of the U.S. economy. Most companies are small and privately held. There were over 32.5 million U.S. business entities in 2019. Todd Kehoe, *What Counts as a ‘Business’? It Might Not Be What You Think It Is*, ALB. BUS. REV. (Apr. 11, 2019), <https://www.bizjournals.com/albany/news/2019/04/11/number-of-businesses-in-the-united-states.html>. Only 4,266 of them were publicly traded corporations. *Listed*

Such companies are said to be governed by a board of directors in the interests of the corporation and its shareholders.²⁰⁷ Again, this is the basic course in business associations.²⁰⁸ In this view, shareholders tend to be spread out, rationally passive,²⁰⁹ even vulnerable,²¹⁰ individuals. Given the moral frailty of managers and the vulnerability of shareholders, Berle and Means were concerned that managers would use their concentrated power to take advantage of dispersed investors.²¹¹ The central purpose of corporation law strictly construed, then, is to protect shareholders from managers.²¹²

Under the proposition that shareholders, as residual claimants, own the company,²¹³ managers may be seen as agents. Under basic principles of agency

-
- domestic companies, total - United States*, WORLD BANK, <https://data.worldbank.org/indicator/CM.MKT.LDOM.NO?locations=US> (last visited June 27, 2022). Some of our largest companies may be privately held in fact or in effect. Consider, for example, Koch or Cargill. See *America's Largest Private Companies*, FORBES (Dec. 1, 2022, 10:00 AM), <https://www.forbes.com/largest-private-companies/list/#tab:rank> (listing the largest U.S. privately held companies). Also consider, mechanisms like dual class share structures may ensure concentrated ownership and founder control of even large publicly traded companies. See Westbrook & Westbrook, *supra* note 108, at 868-78 (discussing dual-class share structures).
- ²⁰⁷ Heminway, *supra* note 126, at 953 (discussing the relationship between the interest of the corporation and the interest of its shareholders); Stephen M. Bainbridge, *In Defense of Shareholder Wealth Maximization*, 50 WASH. & LEE L. REV. 1423 (1993) (discussing board dominance).
- ²⁰⁸ Johnson, *supra* note 127, at 438 (2013) (noting that the shareholder primacy position permeates teaching of corporate law).
- ²⁰⁹ See Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520, 522 (1990) (advocating against rational passivity, but accepting it to be the most commonly held belief among legal scholars); Jeffrey N. Gordon, *Ties that Bind: Dual Class Common Stock and the Problem of Shareholder Choice*, 76 CAL. L. REV. 1, 43-44 (1988) (questioning the reliability of shareholder voting given shareholder rational apathy combined with collective action problems).
- ²¹⁰ See Roe, *supra* note 71, at 10. “[The] combination of a huge enterprise, concentrated management, and dispersed, diversified stockholders shifts corporate control from shareholders to managers.” *Id.*
- ²¹¹ BERLE & MEANS, *supra* note 69, at 122 (“If we are to assume that the desire for *personal profit* is the prime force motivating control, we must conclude that the interests of control are different from and often radically opposed to those of ownership[.]”). Other scholars agree. See Michael C. Jensen & William Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 312 (1976).
- ²¹² BERLE & MEANS, *supra* note 69, at 122 (“the controlling group. . . can serve their own pockets better by profiting at the expense of the company.”); see also William W. Bratton, *Berle and Means Reconsidered at the Century's Turn*, 26 J. CORP. L. 737, 740 (“[A]s Berle and Means asserted, the separation [of ownership and control] implies shortfalls of competence and responsibility.”).
- ²¹³ This view is by no means settled. See Melvin A. Eisenberg, *The Conception that the Corporation Is a Nexus of Contracts, and the Dual Nature of the Firm*, 24 J. CORP. L. 819, 825 (1999) (suggesting that shareholders own the corporation). But see Stephen M. Bainbridge, *The*

law, managers may be expected to act in the best interests of the corporation and its owners, exercising fiduciary duties of loyalty and performance articulated in a variety of doctrinal ways.²¹⁴ Delaware courts have explained that directors owe duties to the corporation and its shareholders in SWM terms, because “by increasing the value of the corporation, the directors increase the share of value available to the residual claimants.”²¹⁵

Thus, perhaps ironically, *shareholder* capitalism presumes *management* control. Berle-Means corporations are impossible to run as if they were partnerships. Instead, the managers manage. From this perspective, the idea that shareholders are owners and that managers are their agents is reduced to mere formality.²¹⁶ Procedurally, shareholder efforts to exercise their “power” by enforcing general fiduciary duties owed by agents to their principals are routinely dismissed under the business judgment rule and otherwise. “Managerialists” think this is a good thing:²¹⁷ concentration of capital under the professional direction of managers is the strength of the modern corporation. At least in publicly traded companies, shareholders may be protected by things like performance-based executive compensation schemes,²¹⁸ the market for

Board of Directors as Nexus of Contracts, 88 IOWA L. REV. 1, 13 n.51 (2002) (arguing that shareholders merely have a contract that gives them certain ownership-like rights).

²¹⁴ See RESTATEMENT (THIRD) OF AGENCY § 8.01 (AM. L. INST. 2006). See also eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 26 (Del. Ch. 2010) (“All directors of Delaware corporations are fiduciaries of the corporations’ stockholders.”); *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 52 (Del. 2006) (upholding the board’s payment of a large severance package to Michael Ovitz after he was fired).

²¹⁵ *In re Trados Inc. S’holder Litig.*, 73 A.3d 17, 36-37 (Del. Ch. 2013) (finding that directors owe duties to the corporation for the ultimate benefit of the shareholders).

²¹⁶ Bayless Manning, *The Shareholder’s Appraisal Remedy: An Essay for Frank Coker*, 72 YALE L.J. 223, 245 n.37 (1962) (calling corporation law empty, “towering skyscrapers of rusted girders, internally welded together and containing nothing but wind”). Many annual meetings have become formalities. Walmart, *2019 Annual Shareholders’ Meeting*, YOUTUBE (June 5, 2019), <https://www.youtube.com/watch?v=IOI1M2Vk8Lk> (lasting just over 26 minutes); Citi, *Citi: 2019 Annual Stockholders’ Meeting*, YOUTUBE (Apr. 16, 2019) <https://www.youtube.com/watch?v=bG6DCY4FIBs> (lasting just over 19 minutes).

²¹⁷ Donald C. Langevoort, *The Effects of Shareholder Primacy, Publicness, and “Privateness” on Corporate Cultures*, 43 SEATTLE U. L. REV. 377, 383 (2020) (describing managerialists’ commitment to the autonomy of managers to make decisions on behalf of the corporation).

²¹⁸ Charles M. Yablon, *Bonus Questions – Executive Compensation in the Era of Pay for Performance*, 75 NOTRE DAME L. REV. 271, 272 (1999) (discussing the reasons for adoption of performance-based compensation in many public companies). *But see* Meredith R. Conway, *Money for Nothing and the Stocks for Free: Taxing Executive Compensation*, 17 CORNELL J.L. & PUB. POL’Y 383, 406 (2008) (criticizing certain performance-based mechanisms such as stock options).

corporate control,²¹⁹ or exit (sale of shares), but rationally shareholders should not waste their time with corporate governance.

For present purposes, however, the law of corporate governance addresses boards, not shareholders. In a world in which shareholders are relatively powerless, corporation law instructs those who do have power—management—to look out for the economic interest of shareholders.

B. Stakeholder Capitalism Presumes Shareholder Power

In 1991, John Coffee argued that the rise of the institutional investor made meaningful shareholder participation in corporate governance a real possibility, even in Berle-Means corporations.²²⁰ For quite a few years, however, the possibility seemed theoretical. Management and its allies generally controlled substantial blocks of shares.²²¹ Institutional investors had neither the time nor the interest in becoming very involved.²²² Consulting firms, notably Institutional Shareholders Services, emerged to advise institutional investors on how to vote²²³ on questions such as whether to adopt a staggered board.²²⁴ The

²¹⁹ See discussion *supra* Part III.A.2.

²²⁰ John C. Coffee, Jr., *Liquidity Versus Control: The Institutional Investor as Corporate Monitor*, 91 COLUM. L. REV. 1277 (1991).

²²¹ Niccolo Calvi, *Towards Shareholder Vote on Equity Issuances*, 10 AM. U. BUS. L. REV. 1, 23, 42 (2021) (noting managers tend to entrench themselves by issuing blocks of shares to sympathetic investors).

²²² Brian R. Cheffins, *The Rise and Fall (?) of the Berle-Means Corporation*, 42 SEATTLE U. L. REV. 445, 478 (2019) (discussing the tendency of institutional fund managers to sell, instead of interfering, when corporate management produces unsatisfactory earnings). Bernard Sharfman argues that when index funds vote against board voting recommendations it is a wealth-reducing activity, a kind of opportunism, on the part of the investment advisers running the funds. See Bernard S. Sharfman, *Opportunism in the Shareholder Voting and Engagement of the 'Big Three' Investment Advisers to Index Funds*, 48 J. CORP. L. (forthcoming 2023) (manuscript at 10) (available on SSRN), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3995714; Bernard S. Sharfman, *Looking at the 'Big Three' Investment Advisers Through the Lens of Agency*, OXFORD BUS. L. BLOG (Feb. 18, 2022), <https://www.law.ox.ac.uk/business-law-blog/blog/2022/02/looking-big-three-investment-advisers-through-lens-agency>.

²²³ *About ISS*, INSTITUTIONAL S'HOLDER SERVS., <https://www.issgovernance.com/about/about-iss/> (last visited June 27, 2022) (ISS “empowers investors and companies to build for long-term and sustainable growth by providing high-quality data, analytics and insight.”); see also Cassidy Alexander, *The Role of Proxy Advisory Firms*, GLASS LEWIS: BLOG (Jan. 14, 2022), <https://www.glasslewis.com/the-role-of-proxy-advisory-firms/> (explaining how proxy advisors assist voters).

²²⁴ INSTITUTIONAL S'HOLDER SERVS., UNITED STATES PROXY VOTING GUIDELINES BENCHMARK POLICY RECOMMENDATIONS 17 (2018), <https://www.issgovernance.com/file/policy/2018-US-Voting-Guidelines.pdf> (advising “[v]ote against proposals to classify (stagger) the board.”).

consultants generally advised institutional investors to vote with management, and so the institutional investors did.²²⁵

Institutional investors still usually side with management,²²⁶ and most shareholder proposals fail.²²⁷ That said, some things have changed. A number of large public institutional investors, such as CalPERS, began pressing companies on ESG issues in the early 2010s.²²⁸ The Norwegian Government Pension Fund Global,²²⁹ the largest sovereign wealth fund in the world,²³⁰ is concerned about the policies of the companies in which it invests.²³¹ In the last

²²⁵ See Ronald J. Gilson & Reinier Kraakman, *Reinventing the Outside Director: An Agenda for Institutional Investors*, 43 STAN. L. REV. 863, 893 (1991); Yaron Nili & Kobi Kastiel, *Competing for Votes*, 10 HARV. BUS. L. REV. 287, 318-19 (2020) (analyzing how ISS recommendations affect voting).

²²⁶ Nili & Kastiel, *supra* note 225, at 315 (noting that the Big Three institutional investors, BlackRock, Vanguard, and State Street, “follow corporate management’s recommendations at a much higher rate than other investors, and generally oppose shareholder proposals at far higher rates than other investors”); see also Alan R. Palmiter, *Mutual Fund Voting of Portfolio Shares: Why Not Disclose?*, 23 CARDOZO L. REV. 1419, 1430-31 (2002) (noting that historically, mutual funds almost exclusively followed the “Wall Street rule” of voting with management).

²²⁷ *Early 2022 US AGM Season Data: Highest Ever Volume of ESG Shareholder Proposal Submissions, but Muted Support for E&S Proposals, Says Georgeson*, GEORGESON, <https://www.georgeson.com/us/insights/early-2022-us-agm-season-data> (last visited June 27, 2022) (offering a specific breakdown of the voting and passage of 2022 shareholder proposals based on their ESG categories, though showing that most fail).

²²⁸ *CalPERS Mission & Vision*, CAL. PUB. EMPS.’ RET. SYS., <https://www.calpers.ca.gov/page/about/organization/calpers-story/our-mission-vision#investment-beliefs> (Feb. 24, 2022) (noting CalPERS adopted its “Investment Beliefs” in 2013). For a fuller study of the fund’s ESG activism, see Karen Nikos-Rose, *CalPERS, UC Davis Launch Research Initiative to Study Impact of Sustainability Factors on Investments*, U.C. DAVIS (Jan. 28, 2013), www.ucdavis.edu/news/calpers-uc-davis-launch-research-initiative-study-impact-sustainability-factors-investments (explaining that CalPERS began incorporating ESG issues across its portfolio in 2011).

²²⁹ *About the Fund*, NORGES BANK INV. MGMT., www.nbim.no/en/the-fund/about-the-fund/ (Feb. 27, 2019); see also Knut Christian Myhre, *Sovereign Wealth and Custodial Finance in Norway*, ANTHROPOLOGY NEWS (June 3, 2020), https://www.researchgate.net/publication/341901556_Sovereign_Wealth_and_Custodial_Finance_in_Norway (explaining the Fund’s central position in the financial markets).

²³⁰ Knut Christian Myhre, *Financialization and the Norwegian State: Constraints, Contestations, and Custodial Finance in the World’s Largest Sovereign Wealth Fund*, in 6 FINANCIALIZATION: RELATIONAL APPROACHES 157, 157 (Chris Hann & Don Kalb eds., 2020) (estimating the fund’s value at just over a trillion dollars).

²³¹ *Responsible investment*, NORGES BANK INV. MGMT., <https://www.nbim.no/en/the-fund/responsible-investment/> (last visited June 27, 2022) (providing an overview of their expectations for companies that they invest in). The Norwegian fund owns a substantial share of the world’s publicly traded equities. See *All investments*, NORGES BANK INV. MGMT., <https://www.nbim.no/en/the-fund/investments/#/2021/investments/equities> (last visited June 27, 2022) (listing the equities the Fund has invested in).

few years, activist investors,²³² often hedge funds, increasingly have pressed management to adopt new business strategies, many of which express ESG concerns.²³³ Given the scope of their investment and expertise, hedge funds are often in a position to critique a corporation's financial performance as well as its ESG record.²³⁴

Not only did major shareholders find their voice, but ESG concerns also became more pressing.²³⁵ Concerns about race, gender, climate change, and armed conflicts are not new, but when Black Lives Matter,²³⁶ #MeToo angers,²³⁷ California burns,²³⁸ and war rages in Ukraine,²³⁹ it is difficult if not impossible for management to dismiss ESG arguments as irrelevant to the corporation's business.²⁴⁰ Many institutional and activist shareholders are invested in the substance of the corporation's operational policies, not just the

²³² Bernard S. Sharfman, *A Theory of Shareholder Activism and Its Place in Corporate Law*, 82 TENN. L. REV. 791, 804 (2015) ("Shareholder activism refers to 'any action(s) of any shareholder or shareholder group with the purpose of bringing about change within a public company without trying to gain control.'").

²³³ Anna Christie, *The Agency Costs of Sustainable Capitalism*, 55 U.C. DAVIS L. REV. 875, 912-13 (2021).

²³⁴ Kraik, *supra* note 178, at 496.

²³⁵ Leonard W. Wang, *INSIGHT: ESG Disclosures—Prospects for the Future*, BLOOMBERG TAX (Aug. 30, 2019, 2:00 AM), <https://news.bloomberglaw.com/financial-accounting/insight-esg-disclosures-prospects-for-the-future> (pointing out that ESG investing and ESG disclosures are growing in importance).

²³⁶ Veronica Root Martinez & Gina-Gail S. Fletcher, *Equality Metrics*, 130 YALE L.J. F. 869, 892-93 (2021) (discussing institutional investor statements supporting Black Lives Matter).

²³⁷ See, e.g., *Business Response to Sexual Harassment and the #MeToo Movement*, WEBER SHANDWICK, https://www.webershandwick.com/uploads/news/files/Business_Response_to_Sexual_Harassment_in_the_Workplace_and_the_MeToo_Movement.pdf (Mar. 21, 2018) (tracking business reactions in the wake of sexual harassment allegations against Harvey Weinstein in 2017).

²³⁸ Didi Martinez, *Tech Companies Offer Donations and Digital Tools to Aid California Wildfire Response*, NBC NEWS (Nov. 13, 2018, 5:01 PM), www.nbcnews.com/tech/tech-news/tech-companies-offer-donations-digital-tools-aid-california-wildfire-response-n935791 (discussing company responses).

²³⁹ See Clara Hudson, *Reputational Concerns Mount as US Companies Reconsider Russia*, BLOOMBERG L. (June 15, 2022, 10:52 AM), <https://news.bloombergtax.com/esg/reputational-concerns-mount-as-us-companies-reconsider-russia> (noting that McDonalds cited corporate values and the humanitarian crisis in Ukraine as reasons for its withdrawal from Russia).

²⁴⁰ See Matt Levine, *Opinion, ESG Goes to War*, BLOOMBERG (Mar. 9, 2022, 2:05 PM), <https://www.bloomberg.com/opinion/articles/2022-03-09/esg-goes-to-war#xj4y7vzkg> ("In the olden days – 10 years ago? – big public companies were essentially in the business of maximizing cash flows for shareholders; they might pull out of a war zone to avoid risk, but you would not expect every public company to take a moral stand on every important issue. In the new world of environmental, social and governance investing, companies are expected to be moral actors.").

returns on their investment.²⁴¹ For example, in a well-publicized 2021 proxy fight, Engine No. 1 LLC, a relatively small hedge fund, won three seats on the board of Exxon Mobil “with the goal of pushing the energy giant to reduce its carbon footprint.”²⁴² The victory was made possible by the fact that the Engine No. 1 insurgent candidates were supported by fellow shareholders BlackRock,²⁴³ Vanguard, and State Street, some of the largest institutional investors in U.S. markets.²⁴⁴

The SEC has thrown its shoulder behind shareholder initiatives in pursuit of CSR in publicly traded companies. In November 2021, the SEC released Staff Legal Bulletin No. 14L, which makes it easier for shareholder proposals dealing with ESG topics to be considered at annual shareholder meetings.²⁴⁵ Possibly as a result, the 2022 proxy season featured more than 500 ESG proposals, up twenty percent from 2021.²⁴⁶

²⁴¹ Christie, *supra* note 233, at 924-26 (concluding that new activism strategies can be effective with respect to ESG matters).

²⁴² Matt Phillips, *Exxon’s Board Defeat Signals the Rise of Social-Good Activists*, N.Y. TIMES (June 9, 2021), <https://www.nytimes.com/2021/06/09/business/exxon-mobil-engine-no1-activist.html>.

²⁴³ BLACKROCK, VOTE BULLETIN: EXXONMOBIL CORPORATION 1, 3 (2021), <https://www.blackrock.com/corporate/literature/press-release/blk-vote-bulletin-exxon-may-2021.pdf> (explaining Engine No. 1 “has advocated for, among other things, improved capital allocation discipline, greater investment in technologies that will enable Exxon to meet more ambitious long-term total emissions reduction targets, and fresh perspectives in the boardroom to guide these, and other strategic changes”).

²⁴⁴ Phillips, *supra* note 242 (highlighting the powerful support of the Big Three).

²⁴⁵ SEC Staff Legal Bulletin No. 14L (CF) (Nov. 3, 2021), <https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals> (rescinding Staff Legal Bulletin Nos. 14I, 14J, and 14K, and making it harder for companies to exclude proposals). For example, the new guidance “makes it clear that the ordinary business exclusion [in Rule 14a-8] does not apply to matters of significant social policy.” Sanford Lewis, *SEC Resets Shareholder Proposal Process*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 23, 2021), <https://corpgov.law.harvard.edu/2021/12/23/sec-resets-the-shareholder-proposal-process/> (discussing Bulletin No. 14L and claiming the SEC bulletin brings the 14a-8 process in line with the growing importance of ESG to the capital markets). *But see* Cunningham et al. Comment Letter, *supra* note 102, at 2-5 (arguing that ESG is irrelevant to individual investors and that certain institutional investors, especially index funds, are pushing so-called investor demand for climate disclosures as well as responding to other comment letters).

²⁴⁶ Garnet Roach, *Record-Breaking Proxy Season for ESG Proposals, Report Says*, CORP. SEC’Y (Mar. 17, 2022) <https://www.corporatesecretary.com/articles/esg/32946/record-breaking-proxy-season-esg-proposals-report-says> (reporting that 529 ESG proposals were filed). *But see* Cunningham et al. Comment Letter, *supra* note 102, at 7 (arguing that there are actually few ESG proposals filed, especially relating to climate change).

Thus, perhaps also ironically, *stakeholder* capitalism presumes *shareholder* power.²⁴⁷ ESG initiatives are driven by shareholders, not stakeholders, who play no role in governance and are relatively powerless in the corporation, except as symbols or objects of concern.²⁴⁸ In a world in which at least some shareholders, institutional investors, are in fact influential, they may use their influence to realize their moral sentiments.²⁴⁹

C. Corporate Purpose and Corporate Governance

The substance and procedure of corporate governance are intertwined. Shareholder capitalism presumes that control of the company is centralized in management, meaning the board of directors and senior executives. Managers manage and governance is top down. Managers, however, must manage in accordance with theoretically enforceable fiduciary duties to the corporation and its shareholders. In the classic Berle-Means corporation, solicitude for powerless shareholders seems to require doctrines, if not exactly legally enforceable rules, addressed to boards of directors.

In contrast, solicitude for other stakeholders seems to require shareholders with sufficient power to challenge management.²⁵⁰ Using corporate governance to determine what action a firm should take, if it wishes to be responsible, presumes shareholders who have political agency. One might imagine a company in which the Norwegian Pension Fund Global holds a substantial stake moving, at the suggestion of the Fund, toward carbon neutrality. In that case, ownership is *not* effectively separated from control, as in the Berle-Means conception of the corporation. Shareholders influence the governance of the enterprise. Governance is, in important respects, bottom up.

²⁴⁷ Christopher Bruner has wondered: “Why does no prevailing theory of corporate governance pair shareholder power with stakeholder purpose? Presumably, shareholders are not generally expected to use the governance powers at their disposal to advance anyone’s interests but their own.” Christopher M. Bruner, *Corporate Governance Reform and the Sustainability Imperative*, 131 YALE L. J. 1217, 1237 (2022). *But see* Lyman P. Q. Johnson, *New Approaches to Corporate Law*, 50 WASH. & LEE L. REV. 1713, 1720 (1993) (observing that a multi-constituency fiduciary approach accepts a management-centered conception of corporate governance).

²⁴⁸ *See* Justin Blount, *Creating a Stakeholder Democracy Under Existing Corporate Law*, 18 U. PA. J. BUS. L. 365, 366-67 (2016) (exploring whether it is possible to give stakeholders a formal role in corporate governance under current laws).

²⁴⁹ SMITH, *supra* note 153, at pt. 1, §1, ch. 1, para. 1.

²⁵⁰ Cynthia A. Williams & Donna M. Nagy, *ESG and Climate Change Blind Spots: Turning the Corner on SEC Disclosure*, 99 TEX. L. REV. 1453, 1466 (2021) (noting that while mutual funds and institutional investors often support ESG, they are rarely the ones to suggest it; it usually comes from small shareholders).

Different corporate purposes, roughly shareholder capitalism and stakeholder capitalism, are achieved through different styles of corporate governance. We are left with a schema:

Governance Norm	Shareholder Capitalism	Stakeholder Capitalism
Seeks to Benefit	Shareholders	Stakeholders
Type of Governance	Top-Down	Bottom-Up
Shareholder Stance	Passive	Active
Board Power	In Control	Can Be Influenced

V. UNDERSTANDING THE PROGRESSIVE CORPORATION THROUGH THE LENS OF GOVERNANCE

A. Stakeholder Capitalism²⁵¹ and Progressive Operational Goals

1. Progressive Operational Goals

As discussed, CSR defines itself in service to progressive goals. Stakeholder capitalists often care about issues like climate change and diversity, and about people like company employees, neighbors, and consumers, and they seek to establish their values as the firm's values. Most ESG proposals are progressive, in the sense of "charitable" or "un-self-interested."²⁵² In 2022, environmental shareholder resolutions related to issues such as environmentally sensitive packaging, terminating support of fossil fuel initiatives, and ending deforestation.²⁵³ Social resolutions dealt with topics such as human rights

²⁵¹ Stakeholder capitalism, CSR, and ESG are often explained in contradistinction to shareholder capitalism and SWM. Therefore, shareholder capitalism has been presented first up to this point in this article. Traditionally, however, it is stakeholder capitalism that is perceived to be progressive. Therefore, in what follows, stakeholder capitalism is presented first. The possibility that shareholder capitalism is in fact progressive is presented second, as a critique of, or at least addition to, the conventional view.

²⁵² See Eric Martel, *ESG: Good for Business, Better for the World*, MILKEN INST. (Oct. 6, 2021), <https://milkeninstitute.org/article/esg-good-business-better-world> (asserting that ESG helps a company "fulfill its altruistic and intrinsic impetus . . . solid corporate ESG practices can help build meaningful lives").

²⁵³ Michael W. Peregrine & Eric Orsic, *A Mid-Season Look at 2022 Shareholder Proposals*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 17, 2022),

violations in countries where companies do business, forced labor in supply chains, and the institution of civil rights and DEI audits.²⁵⁴ Corporate governance was addressed by resolutions proposing employee representation on corporate boards, continued use of dual-class shares, and pay equity gaps along gender and racial lines.²⁵⁵ Many such concerns are mainstays of the progressive agenda.²⁵⁶

In general, CSR and specific shareholder ESG initiatives seek to help by affecting business operations.²⁵⁷ The firm should take actions that express certain values, and refrain from taking actions that contravene those values. Firms should “do the right thing.”

2. Shareholder Influence

Although the rhetorical focus tends to be on commitment to values, stakeholder capitalism is a governance norm, and as such enacts a model of corporate government. Stakeholder capitalists presume a vision of the corporation in which shareholders have the capacity to raise progressive concerns or suggestions for the operation of the company.²⁵⁸ Put the other way around, it is difficult to imagine a firm calling itself “progressive” if the firm does not allow important shareholders to raise their concerns. CSR/ESG shareholder activism assumes shareholders who have a voice, who are active, and who are powerful enough to be heard. Institutionally speaking, stakeholder capitalism imagines the corporation to be somewhat like a partnership (or perhaps a faculty). In such institutions, members pay attention, exercise their say, and influence how the collective does what it does.

<https://corpgov.law.harvard.edu/2022/05/17/a-mid-season-look-at-2022-shareholder-proposals/> (assessing the proposals considered at that time).

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ This stance is often associated with the progressive wing of the Democratic Party. *See The Progressive Promise*, CONG. PROGRESSIVE CAUCUS, <https://progressives.house.gov/the-progressive-promise> (last visited July 3, 2022) (listing goals like amelioration of climate change and racial justice and equity).

²⁵⁷ *See* Quinn Curtis et al., *Do ESG Mutual Funds Deliver on Their Promises?*, 120 MICH. L. REV. 393, 401 (2021) (stating that the ESG movement encourages corporations to address concerns like climate change, racial and gender discrimination, and wealth and wage inequality in their business practices).

²⁵⁸ *See* Lisa M. Fairfax, *Making the Corporation Safe for Shareholder Democracy*, 69 OHIO ST. L.J. 53, 53 (2008) (examining whether improving shareholder democracy will improve the fortunes of non-shareholder stakeholders).

To summarize: corporate governance is progressive because shareholders shape corporate operations to advance progressive ends.²⁵⁹ Stakeholder capitalism is about *how* the corporation does business.

B. Shareholder Capitalism and Progressive Distributive Goals

1. Progressive Distributive Goals

Shareholder capitalism may also serve progressive goals, albeit under a different understanding of the word progressive from that used by stakeholder capitalists and employed in the context of CSR.²⁶⁰ In the financialized world of social capitalism, "progressive" may be understood as the effort to ensure that people participate in society in a dignified fashion, regardless of their employment status.²⁶¹ This sense of progressive might be understood as inclusive or democratic. This notion of progressive is familiar from redistributive income tax, solidarity, unions, social democratic parties in Europe and elsewhere, and the social/communitarian tradition stretching back through Marx to Rousseau and a (perhaps romanticized) understanding of the European Middle Ages.

Generally, participation may be fostered in two complementary ways: by strengthening individuals and by establishing capable institutions to serve and support society writ large. As discussed above, most people in the United States do not receive a paycheck all year round: they are cared for through their status, as owners, beneficiaries, or dependents.²⁶² In such circumstances, the distributive significance of shareholding is that it gives both individuals and institutions a stake in and a claim upon the productive capacity of the economy. Diversified pools of financial assets tend to grow over time, and thus the

²⁵⁹ See Harwell Wells, *A Long View of Shareholder Power: From the Antebellum Corporation to the Twenty-First Century*, 67 FLA. L. REV. 1033, 1083 (2016) (discussing early social issue activist shareholders).

²⁶⁰ See Millon, *supra* note 7, at 1039 ("So-called corporate law progressives or communitarians reject shareholder wealth maximization as a legal requirement and also on normative grounds."); see also PROGRESSIVE CORPORATE LAW, *supra* note 6, at xiii-xiv (featuring essays exploring the public obligations of the modern corporation).

²⁶¹ *The Progressive Promise*, *supra* note 256 (listing goals like advancing the right to retire with security and dignity and ending income inequality); see also Kent Greenfield & D. Gordon Smith, *Proposition: Saving the World with Corporate Law?*, 57 EMORY L. J. 947, 949 (2008) ("Corporate law could also channel the power of corporations to make them a progressive force in society, using them not only to create wealth but to spread it more equitably – addressing public policy problems . . . [that] have been remarkably impervious to other public policy tools.").

²⁶² See discussion *supra* Section I.A.

owner's wealth grows.²⁶³ Individuals may become materially comfortable; institutions may accomplish their missions. Put negatively, without access to capital, interruptions to cash flow (consider a pandemic) may prove disastrous. Individuals, institutions, and entire nations depend on access to equity and other financial markets.²⁶⁴

In this view of “progressive,” corporate actions are progressive insofar as they act to democratize claims on the economy. Corporations should seek to help people and institutions by, bluntly, making money for them. Corporations should “share the wealth.”

Although much of U.S. law and policy seeks to encourage the democratization of capital, much more could be done. Individual shareholding in the United States is deeply unequal. The Federal Reserve estimated that in 2019 about 53% of U.S. families owned stocks.²⁶⁵ In the third quarter of 2022, the top 1% of Americans owned 43.1% of corporate equities and mutual fund shares; the top 20% owned 86.5%.²⁶⁶ Special attention should be devoted to groups with little tradition of investment and its attendant long-term

²⁶³ OFF. OF INV. EDUC. & ADVOC., U.S. SEC. & EXCH. COMM'N, SAVING AND INVESTING 1 (2011), <https://www.sec.gov/investor/pubs/sec-guide-to-savings-and-investing.pdf> (“No one can guarantee that you’ll make money from investments you make. But if you get the facts about saving and investing and follow through with an intelligent plan, you should be able to gain financial security over the years and enjoy the benefits of managing your money.”).

²⁶⁴ See Ben Lobel, *How Does the Stock Market Affect the Economy? A Trader’s Guide*, DAILYFX (June 1, 2020, 1:30 PM), www.dailyfx.com/education/understanding-the-stock-market/how-the-stock-market-affects-the-economy.html (discussing ways the stock market is connected to the economy including pensions, the ability of businesses to grow, and consumer spending); Kimberly Amadeo, *Will the Next Stock Market Crash Cause a Recession?*, THE BALANCE (Apr. 26, 2022), www.thebalance.com/could-a-stock-market-crash-cause-a-recession-3306175 (discussing how a crash leads to loss of confidence in the economy and recession).

²⁶⁵ Neil Bhutta et al., *Changes in U.S. Family Finances from 2016 to 2019: Evidence from the Survey of Consumer Finances*, 106 FED. RSRV. BULL. 1, 16-18 (Sept. 2020) (noting an increase from 52% in 2016). Based on a Gallup poll, in 2022 the number may have been closer to 58%. See Lydia Saad & Jeffrey M. Jones, *What Percentage of Americans Owns Stock?*, GALLUP, <https://news.gallup.com/poll/266807/percentage-americans-owns-stock.aspx#:~:text=Stock%20ownership%20is%20strongly%20correlated%20with%20household%20income%20of%20those%20in%20households%20earning%20less%20than%20%2440%2C000> (May 12, 2022) (“Gallup finds 58% of Americans reporting that they own stock, based on its April Economy and Personal Finance survey. This is slightly higher than the 56% measured in 2021 and 55% measured in 2020 but is not a statistically meaningful increase.”).

²⁶⁶ *Distribution of Household Wealth in the U.S. since 1989*, BD. GOVERNORS FED. RSRV. SYS., <https://www.federalreserve.gov/releases/z1/dataviz/dfa/distribute/chart/#quarter:127;series:Corporate%20equities%20and%20mutual%20fund%20shares;demographic:income;population:1;units:shares;range:2007.1,2022.1> (Dec. 16, 2022).

benefits.²⁶⁷ The FINRA Foundation identifies a persistent racial and ethnic divide among investor households, with people of color under-represented in the investor ranks.²⁶⁸ In 2021, non-retirees in some underrepresented groups such as Blacks and Hispanics were less likely to have retirement savings than their white and Asian counterparts.²⁶⁹ In response, a number of efforts to encourage investment by traditionally underserved communities have emerged.²⁷⁰

Emphasis on individuals and even on inequality hides much of the social significance of financial markets generally and equity markets in particular. As suggested above with regard to healthcare,²⁷¹ the institutions that serve and to a large extent comprise civil society are dependent on financial markets.²⁷² By extension, individuals who depend on such institutions, whether for hospitals or schools or charities or simply as employees, are dependent on the functioning of such markets whether or not they directly or beneficially own any stock or other financial assets.

It can be difficult not to think of shares as private property, and therefore a matter of individual, as opposed to social, concern. Such thinking has been reinforced by the libertarian strain in liberal political economy dominant in the last half century or so. In a financialized economy, however, the social is

²⁶⁷ “Only 34% of Black American households owned equity investments, as compared with 61% of white families, according to Federal Reserve Board’s most recent survey in 2019.” Yun Li, *Black Americans’ Lack of Participation in the Stock Market Likely to Widen Post-Pandemic Wealth Gap*, CNBC (Feb. 2, 2022, 11:22 AM), www.cnbc.com/2022/02/02/black-americans-lack-of-participation-in-the-stock-market-likely-to-widen-post-pandemic-wealth-gap.html; see also Leslie Quander Wooldridge, *Black Americans Are Less Likely to Invest than White Americans, but Experts Say 5 Steps Can Change That*, BUS. INSIDER (Sept. 21, 2020, 10:45 AM), www.businessinsider.com/personal-finance/how-to-close-racial-investing-gap-2020-9 (noting that in 2015 some Black households under-invested in stocks when compared to white households, though there was an upward trend).

²⁶⁸ OLIVIA VALDES & GARY MOTTOLA, FINRA INV. EDUC. FOUND., BRIDGING THE DIVIDE: A CLOSER LOOK AT CHANGES IN THE RACIAL AND ETHNIC COMPOSITION OF INVESTOR HOUSEHOLDS 1-2 (2021), https://www.finrafoundation.org/sites/finrafoundation/files/bridging-the-divide_0.pdf (finding that “African American and Hispanic/Latino respondents were largely underrepresented as taxable investors and overrepresented in households without any investment accounts”).

²⁶⁹ BD. GOVERNORS FED. RSRV. SYS., *supra* note 45, at 78 (noting this may be to some extent due to the fact that Black and Hispanic non-retirees are on average younger than the non-retired population overall).

²⁷⁰ *About*, BROWN GIRLS DO INVEST, <http://www.browngirlsdoinvest.com/about.html> (last visited June 23, 2022) (seeking to educate African-American women to invest in stocks, real estate, and acquire multiple lines of income).

²⁷¹ See discussion *supra* Part I.B.

²⁷² See WESTBROOK, *supra* note 65.

founded upon claims to the fruits of that economy, represented by financial instruments including stock, much as feudal claims to land were represented by livery of seisin. And, as in medieval Europe, many such claims are held by institutions and people with obligations and duties, rather than the atomistic individual who populates liberal political economy.

2. Management Control

Shareholder primacy is, like CSR, a governance norm, and as such enacts its own model of the corporation. As theorized by Berle and Means, modern industrial society requires large corporations that collect the capital of dispersed investors and put it under the control of a small number of managers.²⁷³ Shareholder capitalism therefore envisions the corporation as an institution in which managers have great discretion to operate the business to generate wealth for shareholders.²⁷⁴

Distributive notions of “progressive” shareholding reinforce this vision of directors acting in the interest of passive shareholders, not that different from Berle’s conception in “Powers in Trust.”²⁷⁵ Democratizing beneficial claims upon the economy of the nation means that many claimants do not, and often cannot and should not, participate in economic governance. For example, investors are commonly taught to diversify to avoid being vulnerable to a reversal in a particular company or sector.²⁷⁶ Diversified investors are unlikely to be able to monitor all their investments carefully.²⁷⁷ In a similar vein, many investors invest in funds, which are themselves managed by professional

²⁷³ BERLE AND MEANS, *supra* note 69.

²⁷⁴ Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 155 (2012) (“[C]orporate law requires directors, as a matter of their duty of loyalty, to pursue a good faith strategy to maximize profits for the stockholders. The directors, of course, retain substantial discretion, outside the context of a change of control, to decide how best to achieve that goal and the appropriate time frame for delivering those returns.”).

²⁷⁵ Berle, *supra* note 73, at 1049.

²⁷⁶ See OFF. OF INV. EDUC. & ADVOC., U.S. SEC. & EXCH. COMM’N, *supra* note 263, at 12-13 (“Diversification can’t *guarantee* that your investments won’t suffer if the market drops. But it can improve the chances that you won’t lose money, or that if you do, it won’t be as much as if you weren’t diversified.”).

²⁷⁷ See Kat Tretina & Benjamin Curry, *Should You Buy Individual Stocks?*, FORBES ADVISOR (Feb. 15, 2022, 9:09 AM), www.forbes.com/advisor/investing/buy-stocks/ (explaining the difficulties of monitoring the 30 to 100 stocks needed to build a diversified portfolio).

managers.²⁷⁸ Funds may set out specific strategies but are characterized by large, diffuse holdings and report results considerably after the fact. Add to that the fact that most funds are passive,²⁷⁹ balancing their investments to replicate an index of the market, i.e., to deliver a market return.²⁸⁰ Finally, and perhaps most fundamentally, people have other commitments or do not otherwise have the capacity to spend their days reading proxy statements.²⁸¹ Most potential investors either do not or cannot care about the minutiae of corporate governance and operations.²⁸² The democratization of shareholding means that more investors will be passive, and consequently reinforces the role of the director as a trustee acting in the interest of shareholders.

In other words, in social capitalism, beneficial interest in the economy is not exclusively compensation for labor, much less skill in financial risk-taking and the management of assets. People are paid because of their status, at the most basic level, because they are people. Many beneficiaries, most obviously the very young and the very old, but also diversified investors and investors in managed funds, to say nothing of recipients of various forms of charity, are not involved in corporate governance. Conversely, the corporate managers who govern economic activity on behalf of others are constrained to support their beneficiaries, that is, to make money.

²⁷⁸ Aaron Levitt, *What Does a Mutual Fund Manager Do?*, (Sept. 10, 2014) <https://mutualfunds.com/education/what-does-mutual-fund-manager-do/> (explaining the duties of fund managers in actively managed funds).

²⁷⁹ Since 2019, passive assets under management have exceeded actively managed assets. Estimates were that, in 2021, 20-30% of the U.S. equity market was controlled by passive funds. Annie Lowrey, *Could Index Funds Be Worse Than Marxism?*, THE ATLANTIC (Apr. 5, 2021), <https://www.theatlantic.com/ideas/archive/2021/04/the-autopilot-economy/618497/> (reporting on concerns that U.S. equity markets have become “inert” because of index funds).

²⁸⁰ Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 COLUM. L. REV. 2029, 2033 (2019) (“Index funds—investment funds that mechanically track the performance of an index—hold an increasingly large proportion of the equity of U.S. public companies.”).

²⁸¹ See DAVID F. LARCKER ET AL., STAN. U., RR DONELLEY, & EQUILAR, 2015 INVESTOR SURVEY: DECONSTRUCTING PROXY STATEMENTS – WHAT MATTERS TO INVESTORS 1 (2015), <https://www.sec.gov/comments/4-681/4681-3.pdf#:~:text=Fifty-five%20percent%20of%20investors%20believe%20that%20a%20typical,32%20percent%20of%20a%20typical%20proxy%2C%20on%20average> (finding that on average investors claim to read only 32 percent of a typical proxy statement); see also Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1745 (2006) (discussing the opportunity cost for shareholders of reading corporate disclosure documents).

²⁸² See Harry G. Hutchison & R. Sean Alley, *The High Costs of Shareholder Participation*, 11 U. PA. J. BUS. L. 941, 948 (2009) (noting that most shareholders do not seek participation in corporate governance).

Notably, the rise of the defined contribution plan in the last thirty years has rendered corporate profits more important to a larger swathe of the U.S. population. As Bernard Sharfman has pointed out,

[s]ince defined-contribution plans strongly depend on capital markets and not the ability of employer contributions to maintain benefit levels, shareholder wealth and its growth have become more important for larger segments of society. This trend has created public pressure on corporate boards to keep their share prices growing while, at the same time, reducing their ability to take into account the interests of other stakeholders.²⁸³

Democratization of shareholding and, more broadly, social capitalism, tends to reinforce the idea that “the interest” of shareholders should be assumed to be SWM. Some shareholders, often hedge funds, can afford to be active and may voice preferences at odds with SWM.²⁸⁴ But to be active is an elite position.²⁸⁵ Most shareholders, people with lives and diversified investments, often through funds, are passive. In social capitalism, most beneficiaries – the ultimate claimants on the economic activities of the nation – have no way to participate in corporate governance.²⁸⁶ It would be odd for trustees even to guess at the political preferences of beneficiaries, or to assume that an activist investor fairly represents other shareholders.²⁸⁷ Directors are thus thrown back on the imperfect but relatively neutral objective of SWM.

To summarize: corporate governance is progressive insofar as directors maximize shareholder wealth to advance distributionally progressive ends. Progressive shareholder capitalism is about *who benefits* from the corporation’s business.

CONCLUSION: DO THE RIGHT THING OR SHARE THE WEALTH?

The tension between SWM, on the one hand, and CSR/ESG on the other, roughly mirrors the tension between capital and labor that has structured

²⁸³ Sharfman, *supra* note 100, at 394 (discussing factors that have enforced the norm of SWM).

²⁸⁴ Note that investors in hedge funds are generally subject to a lock-up and cannot withdraw their funds at will. This gives managers a great deal of discretion.

²⁸⁵ See Cunningham et al. Comment Letter, *supra* note 102, at 2 (referring to an “elite global subset” of investors).

²⁸⁶ See Adi Libson & Gideon Parchomovsky, *Reversing the Fortunes of Active Funds*, 99 TEX. L. REV. 581, 588-90 (2021) (discussing barriers to activism by dispersed individual shareholders).

²⁸⁷ Cunningham et al. Comment Letter, *supra* note 102, at 5.

critical thought for at least two centuries. Shareholders, clearly, are investors, capital providers. SWM is, then, a capitalist argument. But is it progressive?

In the past, the answer has been “no.” As discussed, stakeholder capitalism has defined itself against capital, and SWM in particular.²⁸⁸ Among the stakeholders with which CSR has always been concerned, none is more important than employees, “labor.”²⁸⁹ More generally, stakeholder capitalism has understood itself to be progressive, “helpful,” because it is concerned with not only employees but also communities, customers, and more generally, with people rather than money.

Of course, the contrast is not as simple as “good” vs. “bad,” although it has sometimes been portrayed in such Manichean terms. As noted above, all corporations fulfill some lawful, and in that sense public, purpose. Corporations contribute to social welfare through taxes and employment, as well as the provision of goods or services. The public purpose is clearer when the state itself establishes a firm, as was the old norm, and as is still seen in the case of “government sponsored enterprises”²⁹⁰ like Freddie Mac,²⁹¹ Fannie Mae,²⁹² and Ginnie Mae.²⁹³ Such corporations explicitly serve public or social ends; the social aspect of an ordinary for-profit operating company is less obvious.

Moreover, liberal political economy considers that the enlightened pursuit of self-interest, competition in free markets, leads to growth and therefore serves the public interest. Adam Smith wrote:

²⁸⁸ See discussion *supra* Section III.B.

²⁸⁹ The concern with labor is longstanding. See Cynthia Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705, 710 (2002) (exploring corporations’ duties to ensure their social relationships, including their labor relationships, “either do not impede the development of human capabilities or actually promote those capabilities”).

²⁹⁰ Government sponsored enterprises (GSEs) were chartered by Congress for a public purpose, for example the stimulation of home ownership. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, *Appendix, in* BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2020, at 1273 (2019), <https://www.govinfo.gov/content/pkg/BUDGET-2020-APP/pdf/BUDGET-2020-APP-2-4.pdf>.

²⁹¹ *Federal Home Loan Mortgage Corporation (Freddie Mac)*, USA.GOV, <https://www.usa.gov/federal-agencies/federal-home-loan-mortgage-corporation-freddie-mac> (last visited June 27, 2022).

²⁹² *Who We Are*, FANNIE MAE, <https://www.fanniemae.com/about-us/who-we-are> (last visited June 27, 2022).

²⁹³ *Funding Government Lending*, GINNIE MAE, https://www.ginniemae.gov/about_us/who_we_are/Pages/funding_government_lending.aspx (last visited June 27, 2022).

It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our necessities but of their advantages.²⁹⁴

Not everyone believes that an invisible hand may be trusted to organize markets for the common good,²⁹⁵ but for present purposes it suffices to note that both arguments for CSR in the public interest and arguments for the public benefit of self-interested economic activity are normative.

Insofar as this economy is understood in terms of social capitalism, however, then the opposition between capital (money) and labor (including everyone else) no longer tells us what “progressive” means. As the Global Financial Crisis and the COVID-19 pandemic made clear, employees are dependent on businesses that are themselves dependent on smoothly functioning financial markets. Most people are not employees, at least to the extent that their wages support their welfare. Instead, they are dependent on what they own, or their relationships with other people or institutions which have wealth, claims upon the economy. Even the homeless man in an emergency room of a hospital, himself destitute, is dependent upon the financial markets that underwrite the hospital’s endowment, the insurance and drug companies, and the tax base of local, state, and federal governments.

As is often the case in law, substantive questions are resolved or at least clarified by process. The choice between “do the right thing” and “share the wealth” implicates how corporations are run. Complex organizations generally rely on a considerable degree of centralization. In Berle-Means corporations, the vast majority of decisions are taken by management. Shareholders vote on few things, almost all of which are relatively formal.²⁹⁶ Voting itself is often a formality. There are good practical reasons for this arrangement – a large corporation cannot be run like a partnership. At issue, therefore, are the guiding principles for management’s decisions that will determine how the business is actually conducted.

The emergence of contemporary ESG demonstrates the potential for expanded shareholder input via proposals about how the company should be run and about what the company’s business should be. Understandably, many

²⁹⁴ SMITH *supra* note 2, at 119; *see also* BERNARD MANDEVILLE, THE FABLE OF THE BEES: OR PRIVATE VICES, PUBLIC BENEFITS (1714).

²⁹⁵ Notably, Marx disagreed. *See* MARX & ENGLES, *supra* note 3.

²⁹⁶ *See* Robert B. Thompson, *Defining the Shareholder’s Role, Defining a Role for State Law: Folk at 40*, 33 DEL. J. CORP. L. 771, 778 (2008) (noting shareholders vote on fundamental decisions).

shareholders want the operations of the enterprise in which they are invested to comport with their moral sentiments.

On the other hand, we live in a world in which much of the economy is dominated by large enterprises. Shareholding permits an array of institutions and ordinary citizens to have a stake in the relatively few businesses that generate real wealth and, not incidentally, to grow wealthier themselves. Insofar as we care about democratizing wealth, we should hope even more people participate in the economy through shareholding.

As a practical matter, such people can rarely participate in corporate governance. This is not a new problem: much of securities law endeavors to protect ordinary investors, thereby encouraging even the vulnerable, especially the vulnerable, to participate.²⁹⁷ To the same end, we have relied on the stewardship of fiduciaries to manage operating companies and the funds that invest in such companies, in the interest of their shareholders, beneficial owners. And “interest” has been understood, basically, if somewhat vaguely, as SWM.

To oversimplify: suppose a board wants to steer the company in a progressive direction. Is it more progressive to improve the company’s operations, or to make more money for its passive shareholders, including institutions? On easy days, the answer will be “both.” Some measures may both further an ESG objective and make good financial sense. As noted above, ESG-driven decisions can almost always be justified in SWM terms, especially over the longer term, and the board can shelter behind the business judgment rule.

Other times, however, harder decisions must be made. “Doing the right thing” may cost money and reduce value to shareholders. One might, in the collegial corporation, simply discuss and then vote on the matter. Is adopting ESG policy X, with probable benefits Y, worth cost Z to the income statement, and ultimately to shareholders?

In the Berle-Means corporation, however, individual shareholders (as individuals, beneficial owners of funds, or as participants in social capitalism more generally) have little ability to weigh in on such tradeoffs. Directors must

²⁹⁷ Donald C. Langevoort, *The SEC, Retail Investors, and the Institutionalization of the Securities Markets*, 95 VA. L. REV. 1025, 1025-26 (2009) (“The Securities and Exchange Commission thinks of itself as the investors’ advocate, by which it means retail investors - individuals and households . . . throughout the SEC’s history and culture, the rhetorical stress has been on the plight of average investors, ones who lack investing experience and sophistication so as to need the protection of the securities laws . . . with references to both the need to promote retail-level investor confidence to give depth and liquidity to the nation’s financial markets and the desire to level the playing field between the meek and the privileged.”).

guess what such shareholders would want. In some cases, directors may be tempted by the optics (“See, we are doing good things”) or influenced by a small number of active shareholders.

But even when efforts are sincere and effective, “doing the right thing” may not always be the best way to understand the concept of progressive. In contemporary social capitalism, progressive goals may sometimes be better served by “sharing the wealth” with the broader society. The question of what constitutes progressive corporate governance thus hinges on whether we understand “progressive” primarily in terms of operations and active shareholders, or in terms of wealth distribution and perforce delegated governance. Despite the contradictions, the answer is now both.