Can A Broader Corporate Purpose Redress Inequality? The Stakeholder Approach Chimera

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ABSTRACT

Economic inequality is soaring and the consensus in some circles is that corporations' myopic focus on profits is largely to blame. At first glance a stakeholder approach would seem an appealing solution: surely if the purpose of corporations was not wealth maximization for shareholders, but rather to create value for all constituents—thus including employees, customers, suppliers, and communities—we would make strides towards combatting inequality, the theory goes. Corporations themselves, through their powerful lobbying group, the Business Roundtable, recently disclaimed shareholder primacy and embraced stakeholder theory. However, far from successfully redressing inequality, a stakeholder approach is unlikely to achieve meaningful redistribution of power and resources to weaker constituents and would likely work in the opposite direction. We suggest that a stakeholder approach gives corporate executives both a sword and a shield with which to preserve their advantageous status quo. First, executives can justify stepped up lobbying efforts as part of their mandate to consider the interests of all constituents, capturing the agenda with respect to distributing more power and resources to weaker constituents. Second, because a switch to a stakeholder approach would appear as a significant change—despite not actually accomplishing meaningful redistribution—it would require significant political capital to be adopted, and once adopted would occupy an outsized portion of legislative and regulatory space, depleting energy and resources necessary to pass reform that is more likely to actually impact inequality. In fact, in reviewing the likely drivers of inequality, we find that key factors include higher concentration leading to the shrinking of the labor share and increased monopsony in labor markets, the gradual weakening of worker protections from labor market institutions, and giving up on progressive taxation as a redistributive mechanism. Broadening corporate purpose alone would do next to nothing to impact these fields, so to address rampant economic inequality corporate scholars will need to eschew the academic silo and reach across disciplines to identify more effective policies.

I. INTRODUCTION 2
II. THE STAKEHOLDER APPROACH 12
A. *Background: The Corporate Purpose Debate* 12
B. *Corporatist Advocates for a Stakeholder Approach*. 16
C. *Critiques to the Stakeholder Approach*. 18
D. *A Preliminary Assessment of the Stakeholder Approach and of the Critiques to It* 23

III. IS SHAREHOLDER PRIMACY RESPONSIBLE FOR INEQUALITY AND ECONOMIC STAGNATION? CAN A STAKEHOLDER APPROACH BE THE FIX? 26
A. *Inequality and Economic Stagnation* 26
B. *What Is Behind Inequality and Economic Stagnation?* 30
1. Trade and Globalization. 31
2. Technology 32
3. Education 34
4. Concentration and Market Power 36
5. *Excessive Compensation: CEOs, Super Managers,* **and** *Other Elite Workers*. 43
6. *Weak and Declining Protection from Labor Market Institutions*. 46
7. Deregulation and the Vanishing Safety Net 51
8. Tax.. 53
9. Discrimination. 56
C. *A Stakeholder Approach Would Hardly Address Inequality and Economic Stagnation*. 59
IV. THE RISKS OF A STAKEHOLDER APPROACH AND A PROPOSED ALTERNATIVE 62
A. *A Stakeholder Approach Is Likely Detrimental to Redressing Inequality*.......... 62
1. *The Offensive Feature of a Stakeholder Approach: The Weaker Constituencies Card Increases Lobbying Power*... 63
2. *The Defensive Feature of a Stakeholder Approach: Stakeholderism Would Occupy Significant Legislative and Regulatory Space*..................... 66
B. *Redressing Inequality: An Alternative Approach* 68
V. CONCLUSION 71

We share a fundamental commitment to all of our stakeholders.
Business Roundtable, August 2019.

*Timeo danaos et dona ferentes.****
Virgil, 29–19 B.C.

I. INTRODUCTION

Economic stagnation and increasing income and wealth inequality are staples of our time. Even though the GDP has gone up 23% since the 1990s, median income has only increased by 2.2%.[1] In the last three decades, the so-called labor share, the share of income

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*** [I fear the Greeks, even when they bear gifts.] Virgil, Aeneid, II, 49.
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that accrues to all labor in the aggregate, fell by 10%; as a result, the U.S. appears closer to a developing country than a developed one as far as labor is being remunerated.[2] Wealth inequality, as measured by the Gini index, is the highest it has been since 1967, when the Census Bureau first began studying inequality.[3] Income inequality has returned to levels not seen since the Gilded Age.[4]

Economic anxiety runs very high—seldom has the capitalist credo been as feeble as in current times, even well before the COVID-19 pandemic. To get a sense, in an August 2019 poll by the New York Times, three out of five respondents worried about the economy, regardless of whether they were financially well off or struggling.[5] Eight of fifteen economics books recommended by the Financial Times chief economist commentator, Martin Wolf, for the second half of 2019 were books describing or denouncing various aspects of the unsustainability of present day's economic system,

Fordham Law School on February 27, 2020, and in the Faculty Colloquium at Rutgers Law School on September 30, 2020. Thanks to Erin Gray for her research efforts. All errors and omissions are our own.

1. *United States of America: Staff Concluding Statement of the 2019 Article IV Mission*, INT'L MONETARY FUND (June 6, 2019), https://www.imf.org/en/News/Articles/2019/06/06/mcs060619-united-states-staff-concluding-statement-of-the-2019-article-iv-mission [https://perma.cc/HQ2Y-7S4P] [hereinafter IMF USA].

2. ERIC A. POSNER & E. GLEN WEYL, RADICAL MARKETS: UPROOTING CAPITALISM AND DEMOCRACY FOR A JUST SOCIETY 5–6 (2018).

3. Taylor Telford, *Income Inequality in America Is the Highest It's Been Since Census Bureau Started Tracking It, Data Shows*, WASH. POST. (Sept. 26, 2019, 2:57 PM), https://www.washingtonpost.com/business/2019/09/26/income-inequality-america-highest-its-been-since-census-started-tracking-it-data-show/ [https://perma.cc/D58E-96GU] ("The Gini index measures wealth distribution across a population, with zero representing total equality and 1 representing total inequality, where all wealth is concentrated in a single household. The indicator has been rising steadily for several decades. When the Census Bureau began studying income inequality in 1967, the Gini index was 0.397. In 2018, it climbed to 0.485. By comparison, no European nation had a score greater than 0.38 last year.").

4. The poorest 40% of households have less net wealth today than in 1983, and the share of the population earning less than one-half the median income is increasing. IMF USA, *supra* note 1. In 1979, the average household in the top one percent earned 9.3% of all income and earned ten times as much as the average household in the middle twenty percent. Michael Linden, *The Federal Tax Code and Income Inequality*, CTR. FOR AM. PROGRESS 1, 4 (Apr. 19, 2012), https://cdn.americanprogress.org/wp-content/uploads/issues/2012/04/pdf/tax_code_inequality.pdf [https://perma.cc/DCP7-UEKC]. By 2007, the average household in the top one percent claimed 19.4% of all income and made 30 times the average household in the middle twenty percent. *Id.* at 3–4. Forty-five million Americans are living in poverty. IMF USA, *supra* note 1. Social mobility is also eroding. Today one-half of young adults earn less than their parents did at a similar age, whereas forty years ago only ten percent of young adults were in that position. *Id. See also* Raj Chetty, David Grusky, Maximilian Hell, Nathanial Hendren, Robert Manduca & Jimmy Narang, *The Fading American Dream: Trends in Absolute Income Mobility Since 1940*, 356 SCIENCE 398, 398 (2017), https://science.sciencemag.org/content/356/6336/398/tab-pdf [https://perma.cc/3BL2-YC9N] (finding that rates of absolute mobility have fallen from approximately 90% for children born in 1940 to 50% for children born in the 1980s).

5. Ben Casselman & Jim Tankersley, *Trump Acclaims Economy, but Voters Are Anxious amid Recession Talk*, N.Y. TIMES (Aug. 22, 2019), https://www.nytimes.com/2019/08/22/business/economy/economics-survey-trump.html [https://perma.cc/F8HA-ZDNJ]. Similarly, a Gallup poll in the summer of 2019 showed that 40% of Americans "are either running into debt or barely making ends meet" and that employed households are struggling: "only 25% of this group report they are saving enough for retirement," while 18% "admit they have saved nothing at all." Lance Tarrance, *Despite U.S. Economic Success, Financial Anxiety Remains*, GALLUP NEWS (July 12, 2019), https://news.gallup.com/opinion/polling-matters/260570/despite-economic-success-financial-anxiety-remains.aspx [https://perma.cc/N5YY-UE6P].

inequality first and foremost.[6] Some fear social peace is at risk,[7] and many attribute the rise of populist movements around the globe to this economic malaise.[8] The end of history that was optimistically forecasted when the Cold War folded[9] has never felt so distant. Of course, things worsened dramatically with COVID-19.[10]

Predictably, corporations, the archetypical legal structures for large businesses,[11] are not wildly popular these days: a 2014 poll found that only 36% of Americans consider

6. *See* Martin Wolf, *Best Books of 2019: Economics*, FIN. TIMES (Dec. 3, 2019), https://www.ft.com/content/39d5bd82-0bf5-11ea-bb52-34c8d9dc6d84 [https://perma.cc/4EF3-9Q47] (listing Wolf's "must-read titles").

7. JOSEPH STIGLITZ, THE PRICE OF INEQUALITY 114–15 (2013). For a historical account of the fragile line between inequality and conflict, see generally WALTER SCHEIDEL, THE GREAT LEVELER: VIOLENCE AND THE HISTORY OF INEQUALITY FROM THE STONE AGE TO THE TWENTY-FIRST CENTURY (2018).

8. POSNER & WEYL, *supra* note 2, at 12–16. *See generally* David Autor, David Dorn, Gordon Hanson & Kaveh Majlesi, *A Note on the Effect of Rising Trade Exposure on the 2016 Presidential Election* (MIT Working Paper, 2017), https://economics.mit.edu/files/12418 [https://perma.cc/R399-RXK9] (discussing increased labor market competition with China and its effects on voters' policy preferences in the 2016 election); Sharun Mukand & Dani Rodrik, *The Political Economy of Ideas: On Ideas Versus Interests in Policymaking* (Nat'l Bureau of Econ. Rsch., Working Paper No. 24467, 2018), http://www.nber.org/papers/w24467 [https://perma.cc/79BR-4JCE] (concluding a rise in income inequality may be linked to ideational politics). *But see* Ronald F. Inglehart & Pippa Norris, *Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash* (Harv. Kennedy Sch. Fac. Rsch. Working Paper No. RWP16-026, 2016), https://www.hks.harvard.edu/publications/trump-brexit-and-rise-populism-economic-have-nots-and-cultural-backlash [https://perma.cc/XH24-HG2W] (arguing that the rise of populism in the U.S. and the U.K. has less to do with economic insecurity than cultural backlash, that is, a reaction against cultural changes that threaten the worldview of once-predominant sectors of the population).

9. *See generally* Francis Fukuyama, *The End of History?*, 16 NAT. INT. 3 (1989) (hypothesizing that the end of the Cold War would lead to the end of history—that humanity had reached its final form of government in democracy).

10. *See generally* Patricia Cohen, *Jobless Numbers Are 'Eye-Watering' but Understate the Crisis*, N.Y. TIMES (Apr. 23, 2020), https://www.nytimes.com/2020/04/23/business/economy/unemployment-claims-coronavirus.html?action=click&pgtype=Article&state=default&module=styln-coronavirus-markets&variant=show®ion=TOP_BANNER&context=storyline_menu [https://perma.cc/P7RB-8D9W] (mentioning that in the five-week period ended on April 23, 2020, a staggering 26 million people filed initial unemployment claims); Scott R. Baker, Nicholas Bloom, Steven J. Davis & Stephen J. Terry, *COVID-Induced Economic Uncertainty* 1, 6 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26983, 2020), https://www.nber.org/papers/w26983.pdf [https://perma.cc/F7GB-VHN5] (forecasting a contraction of the U.S. economy of nearly 11% as of the fourth quarter of 2020); Josh Mitchell & Josh Zumbrun, *Coronavirus-Triggered Downturn Could Cost Five Million U.S. Jobs*, WALL ST. J. (Mar. 21, 2020), https://www.wsj.com/articles/coronavirus-triggered-downturn-could-cost-5-million-u-s-jobs-11584783001 [https://perma.cc/7AUV-BL5M]; Patti Domm, *Goldman Sees Unprecedented Stop in Economic Activity, with 2nd Quarter GDP Contracting 24%*, CNBC MKT. INSIDER (Mar. 20, 2020), https://www.cnbc.com/2020/03/20/goldman-sees-an-unprecedented-stop-of-economic-activity-with-2nd-quarter-gdp-contracting-by-24percent.html [https://perma.cc/E9F3-5RFE].

11. *See generally* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH (Reinier Kraakman et al. eds., 3d ed. 2017); KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY 47–48 (2019) (arguing that corporate law is not just a tool to optimize the allocation of risks and returns in the production of goods and services, but can also represent "a capital minting operation by employing the ability to partition assets and shield them behind a chain of corporate veils to access low-cost debt finance, and to engage in tax and regulatory arbitrage"). To be sure, corporations are the very engines of the capitalist system: our economy is essentially the end product of corporations and, to a lesser extent, other forms of private sector enterprises transacting in the marketplace. But corporations do not limit their reach to the marketplace. Albeit, corporations pretend to posture themselves as stand-alone private economic actors,

corporations a source of hope.[12] There are several features of modern-day corporations that are subject to criticism, including the excessive salaries of high-level executives, the lucrative stock buy-backs that tend to systematically favor insiders, and the short-termism that some believe has been killing long-term planning and sustainability.

But there is one criticism that stands out and revolves around the very purpose of the corporation itself: according to this view, corporations have created all sorts of negative externalities by adhering too closely to the so-called shareholder primacy norm, which requires directors to run the corporation in the exclusive interest of shareholders.[13]

Further, some spheres of public opinion,[14] academics, [15] and politicians[16] seem to be in consensus that shareholder primacy is also a key contributor to inequality and that corporations, instead of focusing exclusively on profits, should rather embrace stakeholderism: a more holistic approach aimed at catering to a broader set of interests including those of workers, consumers, and the environment. Interestingly, even leading asset managers such as BlackRock's CEO, Larry Fink,[17] prominent corporate lawyers such as Martin Lipton[18] and conservative politicians such as Senator Marco Rubio[19] have come

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each pursuing their own goals, but they have grown so much in power that they bear significant influence in politics, when they do not altogether bend it to their wills. *See generally* Mara Faccio & Luigi Zingales, *Political Determinants of Competition in the Mobile Telecommunication Industry* (Nat'l Bureau of Econ. Rsch., Working Paper No. 23041, 2017), http://www.nber.org/papers/w23041 [https://perma.cc/N9KR-A8F6] (stating that the mobile telecommunications sector has been able to distort regulations in their favor).

12. Bourree Lam, *Quantifying Americans' Distrust of Corporations*, THE ATLANTIC (Sept. 25, 2014), https://www.theatlantic.com/business/archive/2014/09/quantifying-americans-distrust-of-corporations/380713/ [https://perma.cc/J3ZL-MDML].

13. For a discussion and references, see *infra* Section II.A.

14. *See, e.g.*, Thomas Clarke, *Why Shareholder Value Drives Income Inequality*, THE CONVERSATION (Jul. 25, 2018), https://theconversation.com/why-shareholder-value-drives-income-inequality-100324 [https://perma.cc/67BL-5UB2]; Edward Corcoran, *Corporations and Wealth Inequality*, HUFF. POST (Jun. 6, 2015), https://www.huffpost.com/entry/corporations-and-wealth-inequality_b_5429079 [https://perma.cc/3JZK-5CQ3]; Steve Denning, *How to Solve America's $100 Trillion Problem of Wealth Inequality*, FORBES (Mar. 6, 2019), https://www.forbes.com/sites/stevedenning/2019/05/06/how-to-solve-americas-100-trillion-problem-of-wealth-inequality/#5a54a91e3b9b [https://perma.cc/P9CX-46TG]. *See also infra* note 26.

15. *See, e.g.,* Matthew Bodie, *Income Inequality and Corporate Structure*, 45 STETSON L. REV. 69, 70 (2016) (arguing that, "to a significant extent, the problem of income inequality is not due to our failure to redistribute, but is rather due to our original scheme of income distribution. Specifically, the role of the corporation in wealth distribution is an underappreciated yet significant factor in our increasingly tilted economic picture"). *See also infra* note 56.

16. *See infra* notes 20, 21 and accompanying text.

17. In a now famous letter in early 2018, Larry Fink, CEO of BlackRock, the largest of the big three "passive" asset managers, with more than $6 trillion of assets under management, managed to singlehandedly bring the debate on corporate purpose to the national stage. Larry Fink, *2018 Letter to CEOs: A Sense of Purpose*, BLACKROCK (2018), https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter [https://perma.cc/3YYU-MAEL] ("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, including shareholders, employees, customers, and the communities in which they operate.").

18. *See* Martin Lipton, Steven A. Rosenblum, Sebastian V. Niles, Sara J. Lewis & Kisho Watanabe, *The New Paradigm: A Roadmap for an Implicit Corporate Governance Partnership Between Corporations and Investors to Achieve Sustainable Long-Term Investment and Growth*, INT'L BUS. COUNCIL OF THE WORLD ECON. F. (2016).

19. *Id.*; Marco Rubio, *American Investment in the 21st Century*, RUBIO.SENATE.GOV (May 15, 2019), https://www.rubio.senate.gov/public/_cache/files/9f25139a-6039-465a-9cf1-feb5567aebb7/4526E9620A9A7DB74267ABEA5881022F.5.15.2019.-final-project-report-american-investment.pdf [https://perma.cc/Z34G-BJVN].

to argue that an exclusive focus on short-term shareholder gains is harmful to the broader economy.

In fact, public opinion's irritation with how corporations operate has bubbled up to the sphere of national politics. In the summer of 2018, Senator (and at the time presidential hopeful) Elizabeth Warren presented a bill in Congress titled "Accountable Capitalism Act" aimed at reforming major areas of corporate law, including expanding the fiduciary duties of directors and officers (and more).[20] In late 2019, her main rival on the progressive side of the Democratic Party, Senator Bernie Sanders, followed suit by presenting a plan to overhaul major areas of corporate and business law, which includes a similar approach on fiduciary duties (and more).[21]

Unsurprisingly, corporations themselves turned to voice their views on the issue via their powerful lobbying organization, the Business Roundtable ("BRT"). Indeed, the BRT disclaimed shareholder primacy and embraced a broader stakeholder approach. In August, the BRT—a group including the CEOs of Amazon, Apple, Bank of America, GM, IBM, and JP Morgan Chase—announced that the creation of shareholder value was no longer the principal purpose of their corporations.[22] Instead, in a new "Statement on the Purpose of a Corporation," they said, "[e]ach of our stakeholders is essential," including employees, suppliers, and customers, and they agreed to commit to "deliver value to all of them, for the future success of our companies, our communities and our country."[23] The position of the BRT, which in the days immediately following the Statement was somewhat qualified (if not backtracked from),[24] generated a wave of reactions. Some commentators

20. Accountable Capitalism Act, S. 3348, 115th Cong. § 5 (2018). Additionally, this proposal would, among other things, require corporations that earn more than $1 billion in annual revenue to obtain a federal charter. To qualify for approval, at least 40% of the members on the board of directors would have to be elected by the employees of the corporation. Directors and officers of the corporations would be prohibited from selling stock received as compensation for five years.

21. Corporate Accountability and Democracy Plan, BERNIESANDERS.COM, https://berniesanders.com/issues/corporate-accountability-and-democracy/ [https://perma.cc/EF45-BPGV]. For example, Sanders's proposal seeks to increase employee ownership, by requiring corporations with at least $100 million in assets to share 2% stock per year with employees, until employee ownership reaches 20%. Like Warren, Sanders also proposes a "codetermination" governance model, under which workers will directly elect 45% of the boards of large corporations. His proposal also calls for an outright ban of stock buybacks.

22. *Statement on the Purpose of a Corporation*, BUS. ROUNDTABLE (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans#:~:text=Statement%20on%20the%20Purpose%20of%20a%20Corporation,-Americans%20deserve%20an&text=Businesses%20make%20and%20sell%20consumer,services%20that%20underpin%20economic%20growth [https://perma.cc/9NSR-P859].

23. *Id.* For a description, see *infra* Section II.B and, especially, notes 77–82 and accompanying text.

24. Business Roundtable, *Redefined Purpose of a Corporation: Welcoming the Debate*, MEDIUM (Aug. 25, 2019), https://medium.com/@BizRoundtable/redefined-purpose-of-a-corporation-welcoming-the-debate-8f03176f7ad8 [https://perma.cc/7GDD-34YY] (clarifying that "companies need to generate 'long-term value for shareholders'" and that the Statement "pragmatically reflects . . . the reality that for corporations to be successful, durable and return value to shareholders, they need to consider the interests and meet the fair expectations of a wide range of stakeholders in addition to shareholders, including customers, employees and the communities in which they operate").

welcomed it—some enthusiastically,[25] some with cautious optimism.[26] However, many others raised concerns[27] or denounced the BRT's Statement as empty[28] or old[29] rhetoric.[30]

25. Martin Lipton, *Wachtell Lipton Discusses Stakeholder Corporate Governance: Business Roundtable and CII*, CLS BLUE SKY BLOG (Aug. 26, 2019), https://clsbluesky.law.columbia.edu/2019/08/26/wachtell-lipton-discusses-stakeholder-corporate-governance-business-roundtable-and-cii/ [https://perma.cc/44U4-M56N] (endorsing the BRT's Statement and dubbing as misguided the rejection of the Statement by the Council of Institutional Investors); Michael Spence, *The End of Shareholder Primacy?*, PROJECT SYNDICATE (Aug. 26, 2019), https://www.project-syndicate.org/commentary/shareholder-vs-multi-stakeholder-model-by-michael-spence-2019-08?barrier=accesspaylog [https://perma.cc/3Q3V-G4LC].

26. Andrew Ross Sorkin, *How Shareholder Democracy Failed the People*, N.Y. TIMES: DEALBOOK (Aug. 21, 2019), https://www.nytimes.com/2019/08/20/business/dealbook/business-roundtable-corporate-responsibility.html [https://perma.cc/P34D-384E].

27. *Council of Institutional Investors Responds to Business Roundtable Statement on Corporate Purpose*, COUNCIL OF INST. INVS. (Aug. 19, 2019), https://www.cii.org/aug19_brt_response [https://perma.cc/9Z9E-M8NR]; Luigi Zingales, *Don't Trust CEOs Who Say They Don't Care About Shareholder Value Anymore*, WASH. POST (Aug., 20, 2019), https://www.washingtonpost.com/opinions/2019/08/20/dont-trust-ceos-who-say-they-dont-care-about-shareholder-value-anymore/ [https://perma.cc/UK3V-RZPA] (denouncing the BRT's Statement as a dangerous power grab: "[t]he problem in today's corporate America is not that executives are excessively bound to pleasing shareholders, but that they do not give them enough voice"); Jeffrey N. Gordon, *Addressing Economic Insecurity: Why Social Insurance Is Better than Corporate Governance Reform*, CLS BLUE SKY BLOG (Aug. 21, 2019), https://clsbluesky.law.columbia.edu/2019/08/21/addressing-economic-insecurity-why-social-insurance-is-better-than-corporate-governance-reform [https://perma.cc/6DJM-3MY3]; Lawrence H. Summers, *If Business Roundtable CEOs Are Serious About Reform, Here's What They Should Do*, WASH. POST (Sept. 2, 2019), https://www.washingtonpost.com/opinions/if-business-roundtable-ceos-are-serious-about-reform-heres-what-they-should-do/2019/09/02/53b05014-cdc0-11e9-8c1c-7c8ee785b855_story.html (worrying, among other things, about issues such as executive accountability and enforcement of the principles laid out by the BRT); Mark J. Roe, *Why Are America's CEOs Talking About Stakeholder Capitalism Now?*, OXFORD BUS. L. BLOG (Nov. 7, 2019), https://www.law.ox.ac.uk/business-law-blog/blog/2019/11/why-are-americas-ceos-talking-about-stakeholder-capitalism-now [https://perma.cc/NJN2-TPYT].

28. *See* Jesse Fried, *The Roundtable's Stakeholderism Rhetoric Is Empty, Thankfully*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 22, 2019), https://corpgov.law.harvard.edu/2019/11/22/the-roundtables-stakeholderism-rhetoric-is-empty-thankfully/ [https://perma.cc/N2LD-HUG6] (arguing that the BRT's proposal would not change much from a positive law standpoint, because CEOs and directors are bound by shareholder primacy by virtue of previous contractual arrangements that give shareholders appointment and removal rights).

29. Luca Enriques, *The Business Roundtable CEOs' Statement: Same Old, Same Old*, PROMARKET (Sept. 9, 2019), https://promarket.org/the-business-roundtable-ceos-statement-same-old-same-old/ [https://perma.cc/SK8H-S2X9] (noting that some of the BRT's commitments were already present in 2016 and that there are no ways for stakeholders to enforce the promises the BRT makes); *see also* Katharina Pistor, *Why America's CEOs Have Turned Against Shareholders*, PROJECT SYNDICATE (Aug. 26, 2019), https://www.project-syndicate.org/commentary/american-ceos-turn-against-shareholder-primacy-by-katharina-pistor-2019-08 [https://www.project-syndicate.org/commentary/american-ceos-turn-against-shareholder-primacy-by-katharina-pistor-2019-08] (arguing that CEOs cannot pick and choose the purpose of the corporation as they are not principals but mere agents and denouncing the futility of the Statement because of the lack of remedies for stakeholders); Nell Minow, *Six Reasons We Don't Trust the New "Stakeholder" Promise from the Business Roundtable*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 2, 2019), https://corpgov.law.harvard.edu/2019/09/02/six-reasons-we-dont-trust-the-new-stakeholder-promise-from-the-business-roundtable/ [https://perma.cc/9HYB-PPWH] (stressing several weaknesses of the BRT Statement, including that it has been tried before, it is generic, hypocritical, and not consistent with principles of capitalism).

30. To be sure, this debate on corporate purpose is anything but new, for it has lived for more than a century. In the United States, it goes back to the famous *Dodge v. Ford* case of 1919 (Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919) (*see infra* note 65) and the Berle-Dodd debate in the 1930s (*see infra* notes 47, 48 and accompanying text). In the 1980s, the debate had a resurgence when the hostile takeovers boom prompted companies to adopt defenses with the declared goal of protecting, among others, weaker constituencies and to

Why is a stakeholder approach potentially appealing to the policymaker? We believe that it is because it promotes a seemingly radical change in how high-level decisions should be taken by the board of directors, which happens to be appealing to both progressives *and* incumbent executives. Indeed, both groups appreciate how the approach fosters a shift in the interests the decision maker is supposed to cater to. Progressives, on the one hand, believe that focusing uniquely on value creation for shareholders has generated the unequal outcomes we deal with in the socio-economic reality of today.[31] Therefore, by switching to a more holistic view of the enterprise, the theory confides to secure more just results for the weaker constituencies involved, especially workers who, as wealth and income inequality data show, have received an increasingly shrinking portion of the pie.[32] Incumbent executives, on the other hand, welcome the opportunity of a break from shareholder pressures.[33]

However, there is also a cynical read for the Business Roundtable's endorsement of stakeholder theories.[34] Under this view, the BRT proposal helps management teams and boards of directors go through these uncertain times of socio-economic malaise while retaining the driver seat and not giving in to other quests for changes in policies affecting business firms, such as the far-reaching corporate law reforms advocated by Warren and

lobby state legislatures to pass various antitakeover legislation, including constituency statutes that would expressly allow directors to protect a broader set of stakeholders. One of the principal advocates for this approach was Martin Lipton. See in particular Martin Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. L. 101 (1979); Martin Lipton, *Corporate Governance in the Age of Finance Corporatism*, 136 U. PA. L. REV. 1 (1987). On the impact of weaker constituencies in the takeover debate and Delaware adjudication in the 1980s, see generally Mark J. Roe, *Takeover Politics*, *in* THE DEAL DECADE: WHAT TAKEOVERS AND LEVERAGED BUYOUTS MEAN FOR CORPORATE GOVERNANCE 321, 330–33 (Margaret M. Blair ed., 1993). *See infra* notes 66, 67 and accompanying text. The modern day debate has been heavily influenced by a famous article by Margaret Blair and Lynn Stout, in which the authors propose a view of the corporation as a joint project comprised of varied members who enter into an agreement to work together for mutually beneficial value, and argue that corporate purpose cannot be to maximize wealth just for shareholders, but also for employees, customers, suppliers, and other stakeholders. *See generally* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999) (proposing the view described). Note that this type of debate has occurred, in one form or another, in many other jurisdictions. For an account of the debate on the other side of the pond, see Martin Gelter & Geneviève Helleringer, *Lift Not the Painted Veil! To Whom Are Directors' Duties Really Owed?*, 2015 U. ILL. L. REV. 1069, 1089–92 (2015) (describing the equivalent debates in Germany, France, Italy, and the U.K.) and Martin Gelter, *Taming or Protecting the Modern Corporation—Shareholder-Stakeholder Debates in a Comparative Light*, 7 N.Y.U. J.L. & BUS. 641, 718–29 (2011) (comparing the U.S. with the German and French debates).

31. *See supra* notes 14, 15 and 16 and accompanying text.

32. *See generally infra* Part II.

33. Roe, *supra* note 27.

34. *See, e.g.*, Zingales, *supra* note 27 ("At best, the new statement seems an attempt to present a kinder and gentler image to cover the reputational blow that daily scandals are imposing on corporate America: a marketing ploy with no real bite.").

Sanders,[35] for instance, or changes in labor, antitrust, and tax policies, which are currently being discussed in academic and political circles.[36]

We side with the cynical read. For those concerned about inequality, a shift to stakeholder theory, especially one focused on expanding fiduciary duties, is perilous in part precisely because it does seem to *represent* a sea change. However, allowing or even requiring managers and directors to consider the needs of all stakeholders does not guarantee any meaningful rebalancing of power and resources to weaker constituencies. Without specific mandates to corporations and without enforcement mechanisms, these measures do little more than increase managerial discretion. Indeed, all existing proposals to broaden the scope of fiduciary duties to cover weaker constituencies are absolutely vague on the actual measures or initiatives the board should undertake to benefit such constituencies.

Further, although there may be a role for corporate governance to play—assuming rule changes result in enforceable obligations for businesses—direct regulation in other fields is more critical. We show that increasing inequality is attributable primarily to factors outside corporate governance—including lack of antitrust protections, weakened labor rights, tax cuts, and so focusing time and resources on corporate governance changes is unlikely to be the most effective means of targeting inequality.

But there is more: we are concerned that the stakeholder approach would be at best innocuous, but more likely counter-productive. We believe that to invest in stakeholderism is to hand corporate executives and their advisors both a sword and a shield with which they can maintain their advantageous status quo. First, executives can play offense with stakeholderism by justifying more expansive lobbying efforts as part of their mission to consider all constituents.[37] That is, corporations could use a stakeholder mandate to justify expanding the reach of their lobbying efforts, risking corporate capture of the entire equality agenda—having to cater to a broader set of constituencies (employees first and foremost) would expand significantly their political leverage.[38] There is a big risk that putting the board (and management) in charge to fix a problem they apparently have created is not sensible policy, especially given the lack of input as to what exactly they should do. Consider that even the more well-meant directors will face heavy collective action costs if they decide to take a virtuous path, as other firms might cynically take

35. *See supra* notes 20, 21 (describing Sanders' and Warren's plans). *Cf. also* Roe, *supra* note 27 ("The anti-corporate ideas are in the political air, with political leaders expressing them, but the political leaders are not themselves the ideas' basic origin. The ideas and opinions exist and will persist regardless of how any of the leaders fare. However, any of [Warren, Sanders, or Trump] (or others pursuing that agenda) would need political allies to implement policies targeting large corporations. If their potential allies are more or less satisfied with corporate America's new statement of purpose—especially if CEOs act on it in a media-visible way—then populist anti-business measures will lose traction.").

36. We analyze such policies in a companion paper. Matteo Gatti & Chrystin Ondersma, *Does Stakeholderism Derail Non-Corporate Policies that Would Protect Weaker Constituencies?* (Working Paper, 2020) (on file with authors).

37. Faccio & Zingales, *supra* note 11; Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPS. ON POL. 564 (2014); THOMAS PHILIPPON, THE GREAT REVERSAL: HOW AMERICA GAVE UP ON FREE MARKETS 14 (2019). Indeed, in the days following its Statement, the BRT begun listing certain reform priorities to achieve the goals set forth in the Statement. *See* Business Roundtable, *supra* note 24 (citing, among other initiatives, an increase in the federal minimum wage and changes to the Higher Education Act).

38. Note that employers do already mobilize their workers—sometimes in coercive ways—to help run their causes. *See generally* ALEXANDER HERTEL-FERNANDEZ, POLITICS AT WORK: HOW COMPANIES TURN THEIR WORKERS INTO LOBBYISTS (2018).

advantage of the opportunities left on the table by corporations that are trying to help weaker constituencies. In the absence of a playing field leveled by regulation applicable and enforceable across the board, corporations that are good citizens might succumb to the bad ones.

Second, executives can deploy stakeholderism defensively—by accepting a nominal change they preempt direct regulation that could truly shift power and resources to weaker constituents. A stakeholder approach, especially one focused on expanding fiduciary duties, has the appearance of, and thus can persuasively be described by its champions as, meaningful change, without actually constituting meaningful change. The true primary drivers of inequality fall outside the corporate governance realm: increasing market concentration and monopsony in labor market, the weakening of the protections from labor market institutions, the gutting of the social safety net, and tax cuts. As a result, the risk is that disproportionate political capital will be depleted, leaving insufficient time and resources to devote to precisely the regulatory changes most likely to redress inequality.[39]

All in all, in our view the entire debate over corporate purpose has so far revolved around the wrong question: it has centered on whether directors are disproportionately focused on shareholders' interests, neglecting the more important questions of why weaker constituencies are faring so badly in modern-day American capitalism and what can actually be done to elevate their interests. This has relegated us to a Groundhog Day wherein we revisit the same questions without ever discussing what matters most. This article is the first in a series aimed at fixing this problem.

This article is structured as follows. In Part II, we survey the debate on corporate purpose, first, by summarizing how the dispute between supporters of shareholder primacy and stakeholderists has evolved over the years, second, by describing what the recent, corporate-friendly proponents of a stakeholder approach have been pushing for as of lately, and third by dissecting all the different critiques related to such an approach. We close Part II with our preliminary assessment of both the stakeholder approach and the critiques to it by noting that there are two main reasons to be skeptical of a stakeholder approach: one is that it is doubtful that such an approach would adequately protect the economic rights of all the stakeholders, and the other is that it is unproven that shareholder primacy caused the unbalanced economic situation that is afflicting weaker constituencies. In that spirit, in Part III we analyze what are considered the main drivers of inequality in the last 20/30 years: globalization, automation and technology, education, concentration and market power, excessive compensation, fading labor laws, dismantling of the social safety net, deregulation, and the decline of progressive taxation. We note that most of these drivers have nothing or very little to do with corporate law itself and we fail to see how a stakeholder approach would be an effective tool to provide meaningful change. To be sure,

39. At the writing of our article, a parallel paper by Lucian Bebchuk and Roberto Tallarita reaches similar conclusions but from a different perspective, mainly by endorsing the line of criticism embraced by shareholder primacy theorists that managers and directors are unlikely to use their discretion to benefit stakeholders because their incentives are still to advance shareholder interests. *See* Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance* CORNELL L. REV. (forthcoming Dec. 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3544978 [https://perma.cc/GZ8U-M78V]. Our focus here is quite different and revolves around stakeholderism's (in)capacity to redress inequality by showing, via a deep look into the drivers of inequality, what caused stakeholders to lose so much ground in the first place. Based on such analysis, we demonstrate that a stakeholder approach can do nothing to ameliorate these concerns, and in fact will be detrimental to them, while also suggesting a multidisciplinary methodological framework to evaluate policies inside and outside corporate governance.

we reckon that concentration and excessive compensation are (the only) two areas to plausibly implicate corporate law in any meaningful way. Crucially, however, it is managerial power, rather than shareholder primacy, that is implicated in both of these realms; as noted earlier, delegating to boards (and thus management) to solve a problem they have created looks like a recipe for disaster. Rather than via enhanced managerial discretion, antitrust and compensation issues are more effectively dealt with through direct regulation. In Section IV.A, we illustrate that stakeholderism is not only ineffective, but could also be detrimental to attain policies that would be more valuable to corporate constituencies and society at large because there is a risk that a stakeholder approach will deplete political capital without achieving any meaningful reallocation of power and resources from managers and director to weaker constituencies (what we describe as the "defensive" feature of a stakeholder approach), while at the same time it could increase the lobbying power of corporations and attendant risks of their capture of the economic agenda (the "offensive" feature of a stakeholder approach). In addition to showing that stakeholderism does nothing to address the primary drivers of inequality and in fact is inimical to stakeholder interest, in Section IV.B we propose a methodology for evaluating reforms designed to benefit stakeholders: before adopting any corporate governance reform, we should evaluate whether it includes enforcement mechanisms and mandates capable of distributing power from corporate executives to weaker constituents—and we should also consider whether there are direct regulatory measures in other fields more likely to accomplish this goal effectively. Part V concludes.

Before proceeding, a few disclaimers are in good order. First, this article is not particularly interested in establishing whether, under current positive law regimes in Delaware or elsewhere in the United States, directors are already empowered to protect weaker constituencies.[40] We touch the issue from time to time, but only tangentially and for background purposes,[41] as our focus is normative and not doctrinal. Second, this article does not delve into a discussion as to whether other corporate governance reforms aside from an expansion of corporate purpose might lead to a better outcome for weaker constituencies, as that would require a separate work.[42] Third, even though we are skeptical of a legal reform imposing a stakeholder approach, we have no issues with, and in fact favorably look at, market-driven expansions of the corporate horizon. Therefore, the more the bottom-up ESG initiatives, such as best practices, strengthened policies, codes of conduct, disclosures and engagement, impact investing, sustainability practices, and so forth, the merrier.[43] In that spirit, we agree with those who have recently argued that some

40. For a recent effort in this direction, see Edward B. Rock, *For Whom is the Corporation Managed in 2020?: The Debate Over Corporate Purpose* 7–15 (May 1, 2020) (unpublished manuscript) (Eur. Corp. Governance Inst., Law Working Paper No. 515/2020, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3589951 [https://perma.cc/ER5P-37GM].

41. *See supra* note 36; *infra* notes 402–409 and accompanying text.

42. *See supra* note 36.

43. *See infra* note 402 for a broader discussion. For accounts of market or soft-law initiatives that have contributed to sensitize the public of investors in requesting more socially conscious ways of conducting business, see generally Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197 (1999); Lisa M. Fairfax, *The Rhetoric of Corporate Law: The Impact of Stakeholder Rhetoric on Corporate Norms*, 31 J. CORP. L. 675 (2006). For a similar view, skeptical of expanding corporate purpose, but in favor of ESG initiatives, see Marco Ventoruzzo, *On 'Prosperity' by Colin Mayer: Brief Critical Remarks on the (Legal) Relevance of announcing a Multi-Stakeholders 'Corporate Purpose'* 3, (Feb. 28, 2020) (unpublished research paper), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3546139 [https://perma.cc/3RKW-AG2X].

investors' push for corporations to do away with short-termism, and to take into account the implications of their actions for the environment and other similar externalities, should be seen as an effort to curb systemic risk and thus improve welfare for diversified investors.[44] While such quests might appear to overlap with stakeholderism, the latter is quite a different animal, as we explain in Part II.

II. THE STAKEHOLDER APPROACH

A. Background: The Corporate Purpose Debate

In the United States, the scholarly debate over the proper purpose of the corporation—whether to maximize wealth for shareholders or to serve all stakeholders, including employees, creditors, consumers, suppliers, and the general public interest—traces to an exchange in the early 1930s between Adolph Berle and Merrick Dodd,[45] which was likely ignited by the *Dodge v. Ford* case of 1919.[46] While Berle argued that "corporate powers were held in trust for shareholders," Dodd maintained that "these powers were held in trust for the entire community."[47] By the mid-1950s, Berle had come to abandon his view that corporations should be run only to maximize wealth for shareholders, concluding: "[t]he argument has been settled (at least for the time being) squarely in favor of Professor Dodd's contention."[48]

As it turned out, the argument was duly unsettled in time. In 1970, Chicago economist and future Nobel prize winner Milton Friedman published an article in *New York Times Magazine*, in which he dismissed broader stakeholder theories on the argument that the corporate executive is always spending "someone else's money" and should not be permitted to pursue any end other than maximizing the value of the corporation.[49] A few years later, in 1976, Michael Jensen and William Meckling published their influential article *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*,

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44. Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1, 5 (2020) (arguing that climate activism by some in the institutional investor industry is explainable if observed at the portfolio level rather than at the firm level: for certain investors, reducing the systemic risk of pollution, which affects several sectors of the economy, justifies a reduction of corporate profits in particular firms); John C. Coffee, Jr.*, ESG, Common Ownership, and Systematic Risk: How They Intersect* (2020), (Euro. Corp. Governance Inst. Law Working Paper No. 541/2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3678197 [https://perma.cc/DQ9M-7UXP] (arguing that large index funds have been pushing for mandating ESG disclosures to help reduce systemic risk).

45. *See generally* E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932); Adolph A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931).

46. *See supra* note 30; *infra* note 65.

47. ADOLPH A. BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION 169 (1954).

48. *Id. See also* LYNN STOUT, THE SHAREHOLDER VALUE MYTH 17–18 (2012) (discussing the debate between Dodd and Berle). Some authors who revisited the debate do not characterize it as about the merits of shareholder primacy, but rather show that that Berle's main goal was to constrain corporations, while Dodd was fostering a corporatist agenda of managerial planning. William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation*, 34 J. CORP. L. 99, 146–50 (2008).

49. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 32. For a contextualization of Friedman's article at its 50-year anniversary, see Luca Enriques, *Missing in Today's Shareholder Value Maximization Credo: The Shareholders*, PROMARKET (Sept. 22, 2020), https://promarket.org/2020/09/22/milton-friedman-value-maximization-credo-is-missing-the-shareholders/ (arguing that Friedman's main point was less about the maximization of profits than the undesirability of pursuing social goals using shareholders' money).

in which they argued that managers of corporations should be seen as agents of shareholders.[50] In their view, management should be focused exclusively on maximizing wealth for shareholders, and any deviations from this pursuit constitute "agency costs."[51] This economic approach was less focused on managerial fiduciary duties and more focused on reducing regulation, which was viewed as a threat to the corporation's capacity to serve as an efficient nexus of contractual arrangements.[52] Over the next several decades, most mainstream corporate law scholars "accepted without question that shareholder wealth maximization was the only proper goal of corporate governance."[53] In 2001, Reinier Kraakman and Henry Hansmann published *The End of History for Corporate Law*, declaring the triumph of shareholder value thinking over alternative views on corporate purpose, celebrating the consensus amongst scholars, business officials, and policymakers that "ultimate control over the corporation should rest with the shareholder class; the managers of the corporation should be charged with the obligation to manage the

50. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 309–10 (1976).

51. *Id.* at 308–10.

52. *See*, *e.g.*, William W. Bratton, *Berle and Means Reconsidered at the Century's Turn*, 26 J. CORP. L. 737, 740 (2001); FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 68 (1991); Henry N. Butler, *The Contractual Theory of the Corporation*, 11 GEO. MASON U. L. REV. 99, 120–22 (1989). For more examples of the contractarian approach, often linked with shareholder wealth maximization, see RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 100–01 (3d ed. 1986); Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1443 (1993); Henry N. Butler & Larry E. Ribstein, *Opting out of Fiduciary Duties: A Response to the Anti-Contractarians*, 65 WASH. L. REV. 1, 28–32 (1990); Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23, 28 (1991) [hereinafter Macey, *Economic Analysis*]; Jonathan R. Macey & Geoffrey P. Miller, *Corporate Stakeholders: A Contractual Perspective*, 43 U. TORONTO L.J. 401, 407 (1993); Jonathan R. Macey, *Fiduciary Duties as Residual Claims: Obligations to Nonshareholder Constituencies from a Theory of the Firm Perspective*, 84 CORNELL L. REV. 1266, 1274–75 (1999) [hereinafter Macey, *Fiduciary Duties*]; Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911, 1921 (1996) ("The efficiency goal of maximizing the company's value to investors [is] . . . the principal function of corporate law.").

53. STOUT, *supra* note 48, at 21. *See also* ROBERT C. CLARK, CORPORATE LAW 682 (1986) (noting that courts overwhelmingly stand behind the idea that the purpose of the business corporation is to make profits for its shareholders); Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 563 (2003) (noting that "most corporate law scholars embrace some variant of shareholder primacy"); D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 280 (1998) ("The shareholder primacy norm is considered fundamental to corporate law."); Jonathan C. Lipson, *Directors' Duties to Creditors: Power Imbalance and the Financially Distressed Corporation*, 50 UCLA L. REV. 1189, 1214 (2003) ("The shareholder maximization norm is the dominant theoretical approach to directorial duties . . . ."); Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001); Matthew T. Bodie, *The Next Iteration of Progressive Corporate Law,* 74 WASH. & LEE L. REV. 739, 739 (2017) ("Corporate law—in theory, in statute, and in practice—is oriented around the idea of shareholder primacy."); Joan MacLeod Heminway, *Shareholder Wealth Maximization as a Function of Statutes, Decisional Law, and Organic Documents*, 74 WASH. & LEE L. REV. 939, 956 (2017); Ann Lipton, *What We Talk About When We Talk About Shareholder Primacy*, 69 CASE W. L. REV. 863, 866 (2019) ("[M]ost commenters would likely agree that shareholder primacy, whatever its faults, accurately describes the legal regime today, either as a formal matter or in practical effect."). For the view that "the law does not *require* that managers maximize shareholder wealth," see Jonathan R. Macey, *The Central Role of Myth in Corporate Law* 22 (Eur. Corp. Governance Inst., Law Working Paper No. 519/2020, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3435676 [https://perma.cc/AY93-LUPL] ("Officers and directors respond to incentives, and therefore are highly subject to powerful market constraints that lead them to maximize shareholder value even though the law does not.").

corporation in the interests of the shareholders; other corporate constituencies, such as creditors, employees, suppliers, and customers, should have their interests protected by contractual and regulatory means rather than through participation in corporate governance."[54]

Although shareholder maximization became the dominant view, a minority of scholars has continued to advocate for a stakeholder approach. Prominent proponents include Margaret Blair and Lynn Stout, who, in a seminal article at the end of the 1990s set forth a view of the corporation as a joint project comprised of various team members who enter into a complex agreement to work together for a mutual gain.[55] Stakeholder theory, sometimes described as a communitarian approach,[56] holds that managers and directors could and should cater to the interests of and to maximize the value allocated to employees, creditors, customers, suppliers, local communities, the environment, and society as a whole.[57] Stakeholder theorists argue that "the corporation consists of all stakeholders who are responsible for the business of the enterprise,"[58] and therefore directors' fiduciary duties run to the corporation as a whole.[59] They maintain that directors serve as "mediating hierarchs" capable of managing relationships among varied constituents.[60]

Indeed, the battle between supporters of shareholder primacy and its critics intensified significantly during the takeover boom of the 1980s. While the overwhelming majority of legal and financial academics embraced the disruptive force of hostile takeovers on the argument that it benefits shareholders of both actual and potential target companies, and thus condemned the adoption of antitakeover measures by directors,[61] a

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54. Hansmann & Kraakman, *supra* note 53, at 440–41.

55. Blair & Stout, *supra* note 30, at 250–51.

56. *See* David Millon, *Communitarianism in Corporate Law: Foundations and Law Reform Strategies*, *in* PROGRESSIVE CORPORATE LAW 1–3 (Lawrence E. Mitchell ed., 1995) [hereinafter, Millon, *Communitarianism*] (discussing communitarianism in corporate law); David Millon, *Communitarians*, *Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373, 1373 (1993) ("[T]he orthodox assumption [about corporate law's normative foundations] has been that corporate law's objective is to . . . maximize shareholder wealth. . . . [This vision] disregards claims of various nonshareholder constituencies . . . whose interests may be adversely affected by managerial pursuit of shareholder welfare . . . [which] is corporate law's central problem."). British economist Colin Mayer has published two books supporting this view: see COLIN MAYER, PROSPERITY: BETTER BUSINESS MAKES GREATER GOOD (2018) [hereinafter MAYER, PROSPERITY] and COLIN MAYER, FIRM COMMITMENT: WHY THE CORPORATION IS FAILING US AND HOW TO RESTORE TRUST IN IT (2012) [hereinafter MAYER, FIRM COMMITMENT]. For a recent endorsement of a broader corporate purpose, see Martin Petrin & Barnali Choudhury, *Corporate Purpose and Short-Termism*, *in* RESEARCH HANDBOOK ON COMPARATIVE CORPORATE GOVERNANCE 22 (Afra Afsharipour & Martin Gelter eds., forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3538156 [https://perma.cc/ENN9-K2S7] ("The corporate purpose therefore needs to be clarified to the effect that shareholder interests are not supreme but on par with other stakeholder interests. This could be complemented with a mandatory requirement for corporations to balance the positive and negative impacts of their actions, affecting shareholders and stakeholders, against each other.").

57. STEPHEN BAINBRIDGE, THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE, 9–10 (2008) (describing stakeholder theory).

58. Grant Hayden & Matthew T. Bodie, *Shareholder Democracy and the Curious Turn Toward Board Primacy*, 51 WM. & MARY L. REV. 2071, 2091 (2010).

59. *Id.*

60. Blair & Stout, *supra* note 30, at 280.

61. *See generally* Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110

small fraction of scholars and, most notably, Delaware courts sided with the target directors arguing, among other things, that directors' actions should not be second-guessed when such actions were aimed at preserving the corporate enterprise.[62] However, between the end of the hostile takeover frenzy and by the time M&A activity peaked up again with the fifth merger wave of the mid-to-late 1990s, shareholder primacy steadily emerged as the leading theory of corporate purpose. Ironically, but unsurprisingly, once the bulk of M&A deals turned friendly, directors no longer needed to defend from acquisitions but rather to support *more* M&A activity, so they turned their backs to weaker constituencies and embraced supporting shareholders.[63]

Judges and scholars also continued to dispute what the law actually requires: Leo Strine, former Chief Justice of the Delaware Supreme Court, concluded that "[d]espite attempts to muddy the doctrinal waters, a clear-eyed look at the law of corporations in Delaware reveals that, within the limits of their discretion, directors must make stockholder welfare their sole end, and that other interests may be taken into consideration only as a means of promoting stockholder welfare."[64] By contrast, Lynn Stout and others have argued that, far from requiring managers and directors to exclusively pursue shareholder wealth maximization, the business judgment rule and other judicial doctrines in Delaware

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(1965) (describing the benefits of mergers and takeovers on corporate governance); Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981) (proposing the rule of managerial passivity to strengthen the disciplinary function of hostile takeovers); Ronald J. Gilson, Unocal *Fifteen Years Later (and What We Can Do About It)*, 26 DEL. J. CORP. L. 491 (2001) (evaluating the new approach to takeover law established by the Delaware Supreme Court); Lucian Arye Bebchuk, *The Case Against Board Veto in Corporate Takeovers*, 69 U. CHI. L. REV. 973 (2002) (arguing that boards should not have veto power over takeover bids).

62. In particular, see Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (citing Martin Lipton & Andrew R. Brownstein, *Takeover Responses and Directors' Responsibilities: An Update*, 1983 A.B.A. NAT'L INST. ON THE DYNAMICS OF CORP. CONTROL 7, *subsequently published in* Martin Lipton & Andrew R. Brownstein, *Takeover Responses and Directors' Responsibilities—An Update*, 40 BUS. LAW. 1403, 1404 (1985). Another influential piece empowering directors to protect employees and other constituencies, which influenced the thinking of Delaware courts in the 1980s significantly is Lipton, *Takeover Bids*, *supra* note 30. *See also* Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140 (Del. 1989) (holding that the *Unocal* standard was not violated).

63. Leo E. Strine, Jr., *Who Bleeds When the Wolves Bite? A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System*, 126 YALE L.J. 1870, 1918 (2017) ("Labor unions felt burned by their experience when they believed their support of management in fights over constituency statutes and anti-takeover statutes were not rewarded with a commitment by management to address global competition in a way that involved investment in and nurturing of American workers."). After the fourth merger wave characterized by hostile takeovers ended, three more merger waves ensued. Bourree Lam, *2015: A Merger Bonanza*, THE ATLANTIC (Jan. 9, 2016), https://www.theatlantic.com/business/archive/2016/01/2015-mergers-acquisitions/423096/ [https://perma.cc/T8YJ-27YT]. The bulk of deal activity has overwhelmingly revolved around friendly transactions run by management. *See, e.g.*, Edward B. Rock, *Adapting to the New Shareholder-Centric Reality*, 161 U. PA. L. REV. 1907, 1925 (2013) (exploring "how corporate law and practice are adapting to the new shareholder-centric reality"); Matthew D. Cain, Stephen B. McKeon & Steven Davidoff Solomon, *Do Takeover Laws Matter? Evidence from Five Decades of Hostile Takeovers*, 124 J. FIN. ECON. 464, 468 (2017) (evaluating the relationship between hostile takeovers and takeover law). *See also* Bebchuk & Tallarita, *supra* note 39, at 46–48 (explaining that executives, when given the opportunity via constituency statutes, have not, in fact, allocated meaningful resources to stakeholders). For an empirical analysis, see Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, *For Whom Corporate Leaders Bargain* (Aug. 20, 2020) (Working Paper), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3677155 [https://perma.cc/C382-Q97G].

64. 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, 768 (2015).

and elsewhere have allowed boards broad latitude to make decisions for businesses.[65] Besides, in the context of the various responses corporations resorted to when fighting against hostile takeovers in the 1980s, they quite successfully lobbied state legislatures to pass anti-takeover statutes,[66] which prompted legislative changes that explicitly condone the consideration of all stakeholders. As a result, so-called "constituency statutes" were adopted in most states.[67] These statutes explicitly afford directors discretion to consider the interests of all stakeholders in decision-making.[68] However, these statutes neither require directors to consider all stakeholders nor afford any remedy for jilted stakeholders.[69]

B. Corporatist Advocates for a Stakeholder Approach.

Recently, the stakeholder approach has found some powerful new proponents. In August 2016, Martin Lipton, founding partner of the law firm Wachtell, Lipton, issued a memorandum for the International Business Council of the World Economic Forum calling for a paradigm shift in corporate governance. "The New Paradigm," Lipton explains, "is premised on the idea that corporations and institutional investors can forge a meaningful and successful private sector solution, which may preempt a new wave of legislation and regulation."[70] As self-described, this new paradigm for governance will, among other

65. Delaware courts have required the board to focus on shareholder wealth maximization only when the company plans or has no alternative but to go private—when there will no longer be a public corporation with control contestable on the market. Paramount Commc'ns Inc. v. QVC Network, Inc., 637 A.2d 34, 38–39, 48 (Del. 1994); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986). Otherwise, public corporations enjoy the benefits of the business judgment rule, thus facing no legal mandate to focus exclusively on shareholder wealth maximization. STOUT, *supra* note 48, at 31. *Dodge v. Ford*, often held up as a shareholder primacy case, did not involve the role of managers in a public corporation; rather, it dealt with the duty of a controlling majority shareholder to minority shareholders. Dodge v. Ford, 170 N.W. 668, 684 (Mich. 1919). Another case often offered as evidence of a shareholder wealth-maximization mandate is, eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 11 (Del. Ch. 2010). *See* Bodie, *supra* note 53, at 762 ("The eBay decision was disheartening for stakeholder theorists because of its express ratification of shareholder primacy."). But at closer look, the case is consistent with Delaware past jurisprudence. In dicta, the court took issue with Newmark and Buckmaster's express disavowal of shareholder wealth maximization, stating that the corporate form "is not an appropriate vehicle for purely philanthropic ends, at least not when there are other stockholders interested in realizing a return on their investment." *eBay Domestic*, 16 A.3d at 34. Even this dicta, however, does not suggest that philanthropic goals are impermissible, but rather merely that they should not be the exclusive goal of for-profit corporations. Further, the opinion suggests that *had* Newmark and Buckmaster established the existence of a specific culture and established that their takeover defense was designed to protect it, their pill would have been protected. *Id.* at 34–35. Indeed, the Delaware courts have made clear that takeover defenses *are* permissible when deployed as a "good faith effort to protect a specific corporate culture." *Id.* at 32.

66. *See* Roberta Romano, *The Future of Hostile Takeovers: Legislation and Public Opinion*, 57 U. CIN. L. REV. 457, 458–65 (1988) (describing how public opinion influenced state legislation on takeovers). *See generally* Roe, *supra* note 30 (describing the lobbying efforts behind antitakeover statutes).

67. Roberta Romano, *The States as a Laboratory: Legal Innovation and State Competition for Corporate Charters*, 23 YALE J. ON REGUL. 209, 215 tbl. 1 (2006) (reporting that thirty-one states have constituency statutes). Delaware is notably not one of these states, because case law already establishes that weaker constituencies may be taken into account. *See supra* note 62 and accompanying text.

68. *See* Millon, *Communitarianism*, *supra* note 56, at 11–12 (explaining that some constituency statutes apply only to takeover and merger decisions, whereas others apply to all decisions).

69. For a critique to constituency statutes, see Bebchuk & Tallarita, *supra* note 39, at 46–48.

70. Martin Lipton, *Corporate Governance: The New Paradigm*, HARV. L. SCH. F. ON CORP. GOVERNANCE

things: (i) "encourage corporations to pursue thoughtful strategies for maximizing profit and equity share value in the long term;"[71] (ii) "encourage corporations to incorporate relevant sustainability, ESG (environmental, social and governance) and CSR (corporate social responsibility) considerations in developing their long-term strategies and operations planning;"[72] (iii) "encourage corporations to be transparent in their financial reporting; and [(iv)] encourage a corporation to periodically review governance . . . ."[73] The report highlights the perils of short-term growth and suggests a need to combat "activists attacks."[74] The idea seems to be that corporations can be trusted to be transparent and to focus on long-term growth and sustainability (as well as social and environmental concerns), and that communication, rather than litigation or proxy voting, will be sufficient to protect their interests.[75] Tellingly, the paradigm explicitly rejects regulation, and instead suggests that "private ordering through corporations and investors who best know their respective concerns and needs is more likely to result in effective and balanced solutions than government intervention."[76]

In August 2019, the Business Roundtable, a powerful lobbying organization whose members are the CEOs of America's largest corporations, embraced the stakeholder approach advocated by Martin Lipton in a one-pager signed by its CEO members titled "Statement on the Purpose of a Corporation." In the document, each stakeholder—including employees, suppliers, and customers—is considered "essential."[77] In particular, for customers, the business leaders promised to "deliver value," in a way that includes "meeting or exceeding" customer expectations."[78] For employees, the leaders committed to providing "fair" compensation, "important benefits," education and training, and "diversity and inclusion, dignity and respect."[79] For suppliers, the leaders committed to

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(Jan. 11, 2017), https://corpgov.law.harvard.edu/2017/01/11/corporate-governance-the-new-paradigm/#1 [https://perma.cc/D686-D7GK]. Importantly, The New Paradigm views investors and corporations as partners in combatting regulation and legislation: "[C]orporations and investors should band together to resist legislation and regulation that may discourage long-term investment or that presumes that the long-term health of society is not aligned with the long-term interests of business."

71. *Id.*

72. *Id.*

73. *Id.* Notably, the New Paradigm does not suggest requiring or prohibiting any specific action on the part of managers and directors. For instance, it is left to directors to ascertain the relevance of various environmental and social concerns and to address them as they see fit.

74 *Id.*

75. The New Paradigm sees a potential partnership between corporations and institutional investors, and "contemplates that, in exchange for corporations' commitment to corporate governance principles, investors will consistently provide the support and patience needed to permit the realization of long-term value and engage in constructive dialogue as the primary means for addressing subpar strategies or operations." Lipton, *supra* note 70. "Working hand-in-hand with corporations, institutional investors are uniquely positioned to use their influence to recalibrate the system and act as a counterweight to the disproportionate influence of activists." Lipton et al., *The New Paradigm: A Roadmap*, *supra* note 18, at 8.

76. The New Paradigm also cites Ed Garden's quote in the Wall Street Journal: "[T]he way to build strong companies and create jobs is not through government mandate or protecting weak management teams . . . it will happen because market forces will reward the companies in which management teams and highly engaged shareowners work together to achieve sustained, lasting, growth." Lipton et al., *The New Paradigm: A Roadmap*, *supra* note 18, at 7.

77. Business Roundtable, *supra* note 24.

78. *Id.*

79. *Id.*

dealing in a way that is both ethical and fair.[80] For communities, the leaders committed to respect, environmental protection, and sustainable practices.[81] For shareholders, the leaders committed to the generation of long-term value, as well as "transparency and effective engagement."[82] Unsurprisingly, all these statements are formulated in a pretty generic fashion and none of the commitments are accompanied with any suggestion for enforcement mechanisms, or any realignment of the incentive structures within a corporation.[83]

C. Critiques to the Stakeholder Approach.

The stakeholder approach has received several critiques, mainly—but not necessarily—from shareholder primacy proponents. This subsection surveys the most recurring arguments levied against stakeholderism.

i. Negative Impact to Incentives and Shrinking of the Pie. The first line of criticism is that abandoning the maximization of shareholder value would result in shrinking the corporate pie, as fostering shareholders' residual claims provides the best incentives to increase the value created by the enterprise,[84] at least when the corporation is not in the

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80. *Id.*

81. *Id.*

82. *Id.*

83. These views by corporations and their advisors hold much of their intellectual roots in the work of British economist Colin Mayer. MAYER, PROSPERITY, *supra* note 56; MAYER, FIRM COMMITMENT, *supra* note 56. Note that this new embrace of stakeholder theory from the business community has received a mixed reception from the two progressive politicians that ran for president, among other things, on a business law reform agenda. On the one hand, Senator Sanders favorably cited the Business Roundtable report in advocating for his proposal for a federal corporate charter, which would require a stakeholder approach to governance. Corporate Accountability and Democracy Plan, *supra* note 21. On the other hand, Senator Warren responded to the Business Roundtable statement by requesting "information about the tangible actions [they] intend to take to implement the principles" outlined therein. Press Release, Sen. Elizabeth Warren, Senator Warren Asks CEOs to Honor Their Commitments to 'Promote an Economy that Serves All Americans' (Oct. 4, 2019), https://www.warren.senate.gov/oversight/letters/senator-warren-asks-ceos-to-honor-their-commitments-to-promote-an-economy-that-serves-all-americans [https://perma.cc/EA9F-6YED] (inquiring via separate letters with CEOs of Amazon, Walmart, United Airlines, General Motors Company, JPMorgan Chase, BP, AT&T, Comcast, Cigna, and Union Pacific).

84. *Cf.* Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 403–06 (1983) (arguing that equity holders have an overall interest in a firm's profitability as residual claimants). Under this approach, fiduciary duties are adaptive gap fillers for unspecified terms in the corporate contract that supplement voting rights. *See, e.g.*, Butler & Ribstein, *supra* note 52; Macey, *Fiduciary Duties*, *supra* note 52; Simone M. Sepe, *Directors' Duty to Creditors and the Debt Contract*, 1 J. BUS. & TECH. L. 553, 562–63 (2007) (noting that a fiduciary approach protecting also creditors might generate underinvestment). The Delaware judiciary is sensitive to this concern: consider Vice-Chancellor Laster's analysis in *In re* Trados, Inc. S'holder Litig., 73 A.3d 17, 36–37 (Del. Ch. 2013):

> [B]y increasing the value of the corporation, the *directors increase the share of value available for the residual claimants*. Judicial opinions therefore often refer to directors owing fiduciary duties "to the corporation and its shareholders." This formulation captures the foundational relationship in which directors owe duties to the corporation for the ultimate benefit of the entity's residual claimants. Nevertheless, ""stockholders' best interest must always, within legal limits, be the end. Other constituencies may be considered only instrumentally to advance that end.

(emphasis added) (citations omitted).

proximity of bankruptcy,[85] and exerts pressure directors to return excess cash to investors who in turn can channel it back to new investments for newer businesses.[86] Taking this view a step further is the old Friedman idea, recently channeled by SEC Commissioner Hester Peirce, that increasing a corporation's stock price is beneficial for society as a whole.[87]

ii. "Too Many Masters:" Confusion and Excessive Discretion. Another recurring critique is that a stakeholder approach creates confusion as to which principal directors should prioritize when in a given decision the interests of a class of stakeholders conflict with those of another class.[88] Having too many principals would at best confuse directors,[89] at worst give them a blank check to cherry pick which class to support, depending on the

85. *See generally* WILLIAM T. ALLEN & REINIER KRAAKMAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATIONS 112–14 (5th ed. 2016) (discussing the hypothetical presented in dicta by then-Chancellor Allen in Credit Lyonnais Bank Nederland, N.V. v. Pathe Commc'ns Corp., Civ. A. No. 12150, 1991 WL 277613, at *34 (Del. Ch. 1991), which highlights that the incentives to take on excessive risk faced by directors of a corporation that is in the proximity of insolvency and suggests that in such cases directors' duties also run to the corporation's creditors). But for a critique of Allen's approach in *Credit Lyonnais*, see generally Stephen M. Bainbridge, *Much Ado About Little? Directors' Fiduciary Duties in the Vicinity of Insolvency*, 1 J. BUS. & TECH. L. 335 (2007).

86. Fried, *supra* note 28; Gatti & Ondersma, *supra* note 36; Sean J. Griffith, *Saving Capitalism*, Book Review of Colin Mayer's Prosperity (2020) (manuscript on file with author).

87. Hester M. Peirce, Comm'r, Sec. & Exch. Comm'n, My Beef with Stakeholders: Remarks at the 17th Annual SEC Conference, Center for Corporate Reporting and Governance (Sept. 21, 2018):

> Focusing on the company's long-term value also serves the public. The company's price, which reflects the market's view about the company's long-term value, serves a critical role in ensuring that the company is actually meeting the public's needs. . . . A company increases its stock price by selling better products and services or producing them more efficiently and lowering its prices to attract customers. The better the company meets the needs and wants of its buyers, the more income it earns and the more value it returns to its shareholders. The stock price also helps to nudge companies to return resources to shareholders that the company cannot use productively. If a company cannot put resources to work, it returns them to shareholders, who can then put them to work in another enterprise that does have a good use for them. A company that serves the interests of its collective shareholders serves the interests of the public.

(Of course, this entire passage assumes the existence of perfectly competitive product and capital markets and does not even address labor markets. *See infra* Part IV for a more sobering analysis of broader society's welfare after years of bull markets).

88. *See* Bainbridge, *supra* note 53, at 550. *See also* Sepe, *supra* note 84, at 563; Griffith, *supra* note 86, at 6.

89. A variation of this critique is that a stakeholder approach seeks to protect a realm of interests that is just too broad since it purports interests of constituencies *outside* the corporation (creditors, consumers and local communities), whilst the proper policy focus should just be on the weak constituency *within* the corporation, that is, workers. *See* Bodie, *supra* note 53, at 748–52.

very interests of directors.[90] Under both scenarios, the approach would be unworkable and efficient decision-making would suffer.[91]

iii. Lack of Clear Metrics and Problematic Enforcement. A similar line of criticism stresses that not only would the approach afford too much discretion to directors and officers, but also give unclear, if not absent, metrics to adjudicators to establish whether directors are in fact pursuing stakeholders' interests.[92] In contrast, the pursuit of shareholder wealth maximization has a readily available, albeit imperfect, proxy in the stock price.[93] As a result, from a practical standpoint, directors' and officers' accountability would become rather problematic. Moreover, broadening the beneficiaries of fiduciary duties, without making the new beneficiaries also potential plaintiffs for breach of such duties, would give us a system with toothless enforcement.[94]

iv. The Business Judgment Rule Makes the Change Irrelevant—Abandoning It Would Be Overkill. Some authors believe that under existing corporate law regimes,

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90. Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organizations*, 149 U. PA. L. REV. 2063, 2065 (2001) (arguing that a stakeholder approach may "leave managers so much discretion that managers could easily pursue their own agenda, one that might maximize neither shareholder, employee, consumer, nor national wealth, but only their own."). *See also* EASTERBROOK & FISCHEL, *supra* note 52, at 38 ("a manager told to serve two masters (a little for the equity holders, a little for the community) has been freed of both and is answerable to neither."). *See* Summers, *supra* note 27 ("It's legendary that whenever you serve multiple masters, you serve none. With shareholders disempowered and no other form of vigilance empowered, how will the risk that stakeholder capitalism becomes an agenda of CEO empowerment be avoided?"); Ventoruzzo, *supra* note 43, at 10 ("in many ways, a broad corporate purpose is a further empowerment of executives and CEOs, not a constraint on their actions"); Sanjay Bhagat & Glenn Hubbard, *Should the Modern Corporation Maximize Shareholder Value?* 6 (Working Paper, Mar. 3, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3548293 [https://perma.cc/W8Z5-7VNX].

91. *See* Bainbridge, *supra* note 53, at 547 (arguing that shareholder would require a higher rate of return and thus increase corporations' cost of capital if they anticipate directors would have to respond to "two masters"); Macey, *Fiduciary Duties*, *supra* note 52, at 1267; Sepe, *supra* note 84, at 563; Macey & Miller, *supra* note 52, at 414; William J. Carney, *Does Defining Constituencies Matter?*, 59 U. CIN. L. REV. 385, 423–24 (1990).

92. *See* Bainbridge, *supra* note 53, at 547; Bhagat & Hubbard, *supra* note 90, at 6; Rock, *supra* note 40, at 28.

93. *See, e.g.*, Hansmann & Kraakman, *supra* note 53, at 441; Griffith, *supra* note 86, at 5.

94. Stephen M. Bainbridge, *A Critique of Senator Elizabeth Warren's "Accountable Capitalism Act" (Part 3): She Hasn't Thought Through the Enforcement Mechanism*, PROFESSORBAINBRIDGE.COM (Aug. 15, 2018), https://www.professorbainbridge.com/professorbainbridgecom/2018/08/a-critique-of-senator-elizabeth-warrens-accountable-capitalism-act-part-3-she-hasnt-thought-through-.html [https://perma.cc/E3BL-7PYP]; Lipton, *supra* note 53, at 865. Consider that the BRT's Statement on the Purpose of the Corporation does not include any specific promises, nor does it include any enforcement mechanisms by which employees or other constituents could seek any remedy for corporations' failures to meet the standards advocated the BRT. So, whether executives will adequately address the weaker constituencies' needs or concerns will entirely depend on managerial discretion. *See* Enriques, *supra* note 29; Pistor, *supra* note 29; Summers, *supra* note 27. Similarly, The New Paradigm does not place any mandates upon corporations, but instead *encourages* corporations to engage in improved disclosures and to consider sustainability concerns and social responsibility. The New Paradigm explicitly eschews any direct regulation or mandate with respect to employee benefits, compensation, or influence, and does not offer any promise to any other constituency either. The proposal offers no enforcement mechanism to allow employees or other constituencies to pursue any redress in the event of the corporations' failure to consider their interests. Note incidentally that, famously, the New York Business Corporation Law makes it clear that it creates no duty to any party, so non-shareholder groups have no standing to enforce it. N.Y. BUS. CORP. LAW §717(b) (LexisNexis 2020). *See also* Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?* 131-32 (Euro. Corp. Governance Inst., L. Working Paper No. 510/2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561164 (mentioning lack of enforcement).

directors are already capable of pursuing pro-stakeholder policies.[95] This group also includes supporters of the stakeholder approach who believe no reform is actually necessary because directors and managers can *already* pursue other interests than shareholders', as in their stakeholderist view, nowhere does the law require directors to maximize shareholder wealth.[96] Some add that, at least in day-to-day decisions,[97] directors can practically pursue a stakeholder agenda, because, under the business judgment rule, such a decision would not be second-guessed.[98] Paradoxically, the presence of the business judgment rule would make an express stakeholder reform meaningless if directors intended to keep catering to the interests of shareholders only, as such a decision could be reconciled with the business judgment rule. Following this logic, the only way to make a stakeholder reform truly effective would be to abandon the business judgment rule. The question is then whether this would ever be a realistic scenario, given that historically the judiciary does not want to step into the shoes of directors and managers in deciding how to run the business.[99]

v. Fiduciary Duties and the Deterrent Effect of Liability Are Overblown: Other Incentives Drive Directors and Managers. Other authors criticize stakeholderism on the grounds that it represents symbolic, "feel good" governance:[100] it is not fiduciary duty law, but other governance institutions that craft incentives, most importantly director appointment rights, embedded in voting stock.[101] According to this view, shareholder

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95. *See* Lipton, *supra* note 53, at 882.

96. *See, e.g.*, Blair & Stout, *supra* note 30, at 252; STOUT, *supra* note 48, at 31. *But see* Strine, *The Dangers of Denial*, *supra* note 64, at 763 ("advocates for corporate social responsibility pretend that directors do not have to make stockholder welfare the sole end of corporate governance, within the limits of their legal discretion, under the law of the most important American jurisdiction-Delaware."); Stephen M. Bainbridge, *"The Modern Corporation Statement on Company Law" Pretends It Knows What It Is Talking About*, PROFESSORBAINBRIDGE.COM (Nov. 1, 2016), https://www.professorbainbridge.com/professorbainbridgecom/2016/11/the-modern-corporation-statement-on-company-law-pretends-it-knows-what-it-is-talking-about.html [https://perma.cc/C3RK-RUJ3] (supporting Strine's view); *In re* Trados, Inc. S'holder Litig., 73 A.3d 17, at 36–37 (2013).

97. STEPHEN M. BAINBRIDGE, CORPORATE LAW 223, n.5 (2d ed. 2009) (recognizing that a board too sensitive or insensitive to the quests by weaker constituencies will be protected by the business judgment rule for non-*Revlon* decisions).

98. Macey, *supra* note 53, at 27–28, 27 n.95 (citing Bernard S. Sharfman, *Shareholder Wealth Maximization and Its Implementation Under Corporate Law*, 66 FLA. L. REV. 389, 393–99 (2014)). *See also supra* note 65 and accompanying text.

99. Bainbridge, *supra* note 94 (wondering whether Senator Warren's proposal in the Accountable Capitalism Act to expand fiduciary duties to stakeholders would imply a demise of the business judgment rule). *See also* Allison Frankel, *If Corporations Don't Put Shareholders First, What Happens to Business Judgment Rule?*, REUTERS (Aug. 22, 2019, 2:56 PM), https://www.reuters.com/article/us-otc-bizroundtable/if-corporations-dont-put-shareholders-first-what-happens-to-business-judgment-rule-idUSKCN1VC2FS (describing different points of view about the limits and future of the business judgment rule from current and former Delaware judges, as well as Wachtell Lipton).

100. Enriques, *supra* note 29.

101. MARK. J. ROE, POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE 45–46 (2003) (mentioning, among other things, compensation, takeovers, securities markets); Fried, *supra* note 28; Bebchuk & Tallarita, *supra* note 39, at 30–35, 40–41 (arguing that corporate compensation structures, as well as labor and control markets, provide managers and directors with significant incentives to look out for shareholders' interests, but no incentives to look out for stakeholder interests); Rock, *supra* note 40, at 12, 28 (noting that shareholders elect boards and set limits to their discretion). Interestingly, this point is conceded by some supporters of a stakeholder approach. Petrin & Choudhury, *supra* note 56, at 19 (arguing that although "managers are already allowed to

primacy is less a by-product of the law than of market pressure: whenever directors prefer employees to shareholders, irrespective of whether they breach the law, they just put their re-election in danger, including risking activism or a takeover. After all, the constituency statutes passed in the 1980s were premised on the very similar concerns that hostile takeovers were a big threat to employees, creditors, and local communities, yet their impact was minimal.[102] But after 30 years, we are still discussing whether directors should do something more for those constituencies, notwithstanding their protection under the said statutes.[103] Indeed, directors were adamant about using the "weaker constituencies card" when they needed protection against a hostile offer, yet were oblivious to their needs in time of peace or, worse, when they were crafting friendly deals that would ultimately have the same nefarious effects on weaker constituencies as the hostile ones.[104]

vi. Ineffectiveness: If Regime Perceived as Too Taxing, Corporations Would Engage in Regulatory Arbitrage (Migrate; Unincorporate; etc.). Some authors warn that if the shift to a stakeholder approach were perceived as a threat, shareholders would pressure businesses to find ways to avoid the new legal framework.[105] For example, they

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consider broader societal interests and avoid short-term thinking and decision-making[,] . . . they often choose not to use this freedom for various reasons, such as market and reputational pressures or simply to promote their own financial interests."). But instead of dismissing stakeholderism, the authors advocate for "a reformulated corporate purpose that stipulates corporate actions beyond shareholder wealth maximization . . . ." *Id.* However, their proposal does not provide details on how exactly an expanded corporate purpose would in practice counter short-termism.

102. For a critical account, see Romano, *supra* note 66, at 458–65. *See also* Bebchuk & Tallarita, *supra* note 39, at 46–48 (explaining that executives, when given the opportunity via constituency statutes, have not, in fact, allocated meaningful resources to stakeholders). *See also* Bebchuk et al., *supra* note 63 (providing further empirical evidence to prove the point).

103. True, some of those statutes apply only in a takeover. *See e.g.* David K. Millon, *Redefining Corporate Law,* 24 IND. L. REV. 233, 246 n.99 (1991) (citing Connecticut, Iowa, Louisiana, Missouri, Oregon, and Tennessee). But such a counter would leave no explanation as to why executives, if they truly cared about employees, did not lobby local politicians to extend protections to employees in day-to-day operations as well, other than the fact those statutes were really passed to protect management in a takeover, not employees. *Cf.* Lucian Arye Bebchuk & Allen Ferrell, *Federalism and Corporate Law: The Race to Protect Managers from Takeovers*, 99 COLUM. L. REV. 1168, 1177 (1999). *See also* Adam Winkler, *Corporate Law or the Law of Business?: Stakeholders and Corporate Governance at the End of History*, 67 L. & CONTEMP. PROBS. 109, 110 (2004) ("Constituency statutes have also expanded managerial discretion, making stakeholder protection a matter of choice, not legal obligation."). For the dynamics of the lobbying efforts to obtain antitakeover statutes, see generally Roe, *supra* note 30, at 330–33 ("Managers who seek political protection are not climbing uphill; legislators who do managers' bidding do not have to fear reprisal from voters. It is the opposite. Politicians who bash Wall Street and thwart takeovers are rewarded by the average voter." *Id.* at 331). John W. Cioffi, *Fiduciaries, Federalization, and Finance Capitalism: Berle's Ambiguous Legacy and the Collapse of Countervailing Power*, 34 SEATTLE U.L. REV. 1081, 1112 (2011) (noting that "the legal recognition of nonshareholder interests served only to entrench and empower management . . . Labor . . . served as a legitimating fig leaf for managerial power."). *See also infra* note 104 and accompanying text.

104. ROE, *supra* note 101, at 45:

> . . . [C]onstituency laws, which allow boards to consider players other than shareholders, have hardly affected the firm on labor's behalf. One might cynically see these laws as made by and for managers, who wanted freedom to oppose hostile takeovers and, once they had it, offered employees little more. America's underlying political reality did not give managers any further reason to tie themselves to employees on a day-to-day basis.

105. *See, e.g.*, Rock, *supra* note 40, at 28; Bhagat & Hubbard, *supra* note 90, at 16. *See also* Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 NW. U.L. REV. 542 (1990); Stephen M.

could reincorporate in jurisdictions that still follow the shareholder primacy norm—whether another state in the Union or outside the U.S. will depend on whether a stakeholder reform were passed by state legislatures or Congress, respectively. Alternatively, they could change their choice of organizational form into a structure, say a limited liability company, without the same requirements to protect broader stakeholders.[106]

vii. Corporate Law in General, and Fiduciary Duties in Particular, Are Not the Answer. Some authors contend that, even if the protection of weaker constituencies impacted by a corporation's operations were warranted, that should be the job of other areas of law (e.g., employment and labor, antitrust, environmental laws), not corporate law, let alone fiduciary duties.[107] This view reverberates Milton Friedman's intuition that a typical corporate executive would either lack the knowledge or the power (at a minimum to coordinate with other corporations for a collective response) to provide effective changes that could fix the problems affecting society.[108]

D. A Preliminary Assessment of the Stakeholder Approach and of the Critiques to It

Embracing stakeholder theories is based on laudable premises that are supported by existing evidence showing lack of real growth and inequality.[109] Also, one of the mainstays of shareholder primacy, the idea that constituencies other than shareholders can be protected contractually, while only shareholders need help from the law,[110] is true only with respect to financial creditors. Non-adjusting creditors such as tort victims are, by

Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 860–61 (1997) (noting that "mandatory rules are often subject to evasion by choice of form and jurisdiction").

106. Griffith, *supra* note 86, at 10.

107. *See, e.g.*, CLARK, *supra* note 53, at 30–32 ("[T]raditionally, the subjects of corporation law and securities regulation are simply defined to deal only with . . . the most capitalistic of relationships affecting capitalist enterprise. . . . [These] laws do not preclude laws regulating other corporate relationships.") *Id.* at 30; STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 428–29 (2002); Winkler, *supra* note 103, at 111 (advocating for a change of direction of progressive scholars: "Rather than try to change corporate law—which, in the past, has often meant expanded managerial discretion and mixed results for stakeholders—progressives might be better off attempting to protect stakeholders through the broader law of business."); Sepe, *supra* note 84, at 563–64 (explaining the issues that may arise when directors have fiduciary duties to people other than the shareholders); Gordon, *supra* note 27 (arguing that "rather than focusing on the firm as the unit of greatest concern, and assuming that companies themselves are responsible for, say, retraining workers whose skills have become obsolete, whose human capital has depreciated . . . the real issue is one of social insurance, of ensuring that we have the right form of government match to ensure the preservation and, where possible, the reinvigoration, of human potential over the lifetime of employees."). In a scholarly article of a few years ago, then-Chief Justice Strine seemed to side with this view. Strine, Jr., *The Dangers of Denial*, *supra* note 64, at 763 ("In current corporate law scholarship, there is a tendency among those who believe that corporations should be more socially responsible to avoid the more difficult and important task of advocating for externality regulation of corporations in a globalizing economy and encouraging institutional investors to exercise their power as stockholders responsibly.").

108. Friedman, *supra* note 49. For a similar concern, see Gordon, *supra* note 27 (stating that government is better equipped than corporate officers to fix societal problems); Bebchuk & Tallarita, *supra* note 39, at 50–54 (arguing that the stakeholder approach will do little to redress the concerns of non-shareholding stakeholders).

109. *Cf. infra* Section III.A (discussing economic stagnation and inequality).

110. *See, e.g.*, Macey, *Economic Analysis*, *supra* note 52, at 36–37 (explaining that shareholders have greater difficulty protecting themselves contractually than other types of stakeholders).

definition, incapable of protecting themselves contractually.[111] Consumers often times contract with intermediaries and not the corporation itself. But even the constituencies who contract with the corporation, for example workers and consumers transacting directly with the corporation, are parties to a contract only nominally, because they lack meaningful negotiating power to extract contractual terms on an arm's length basis.[112] That these categories are capable of protecting themselves is an empty argument from a substantive point of view.

However, none of the above reasons necessarily implies that the protection of such categories should come from broadening (or interpreting extensively) fiduciary duties under corporate law.[113] There are several reasons to be skeptical, most of which are already captured quite well by existing criticism. For instance, the critiques that stakeholder theories contemplate too many masters,[114] too many stakeholders,[115] and too much

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111. Non-adjusting creditors are those that do not adjust the terms of their claims to anticipate or take into account the effects of new developments. *See generally* Lucian Ayre Bebchuk & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy*, 105 YALE L.J. 857, 864 (1996) (providing examples of non-adjusting creditors).

112. Simon Deakin, Jonas Malmberg & Prabirjit Sarkar, *How Do Labour Laws Affect Unemployment and the Labour Share of National Income? The Experience of Six OECD Countries, 1970–2010*, 153 INT'L. LAB. REV. 1, 3–4 (2014) (citing adverse selection and collective action problems as constraints on the spontaneous emergence of worker-protective rules); Grant H. Hayden & Matthew T. Bodie, *Codetermination in Theory and Practice*, (forthcoming 73 FLA. L. REV. 2021) 26–27, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3684690 [https://perma.cc/QRC6-2J44] (noting that "[t]he contractarian argument for the exclusive shareholder franchise fails to account for . . . these issues: employees have never had equal bargaining power; U.S. labor unions have never represented more than one-third of private-sector employees, and currently represent less than 7 percent; and both legal and logistical roadblocks make it difficult for American unions to participate in corporate governance."). For a critique to the contractual view held by mainstream economists according to which it does not matter whether labor hires capital or vice versa, see Suresh Naidu, *Worker Collective Action in the 21th Century Labor Market* 4–5 presented at the conference "A New Deal for this New Century: Making Our Economy Work for All", (Working Paper, Oct. 3–4, 2019), https://www.law.nyu.edu/sites/default/files/Naidu%20Suresh%20-%20Worker%20Collective%20Action%20in%20the%2021th%20Century%20Labor%20Market.pdf [https://perma.cc/J73S-3LM6] (noting "that frictions [are] pervasive in the labor market. One form of friction is imperfect mobility, which means that, from the perspective of workers, jobs are imperfect substitutes. This lack of mobility could be either due to few employers in a given skill-location segment, costly job search, or non-wage differentiation. Employers set wages to take advantage of this, losing a few workers in order to depress wages for the ones that remain."). Note that those who think otherwise (*see*, *e.g.*, Bhagat & Hubbard, *supra* note 90, at 6) have to assume the existence of a very competitive labor market or the effectiveness of legal remedies: "In a competitive labor market, the employee can resign and seek alternative employment. If the labor market for the particular employee is not very competitive, or if the search and moving costs are very high, the employee can seek redress via litigation or regulatory relief. Managers, aware of the employees' redress options, are less likely or unlikely to treat the employees unfairly. Hence, managers with a focus on shareholder wealth maximization have a strong incentive to treat their employees fairly." However, as *infra* Sections III.A.4 and III.A.6 show, neither assumption is realistic.

113. For a poignant critique, *see* Macey, *Economic Analysis, supra* note 52, at 37 ("If workers lack bargaining power in their employment relationship, changing the law to add a fiduciary duty to this relationship will *harm* workers, not help them. This is because extending the reach of fiduciary duties to rank-and-file employees will not change any fundamental imbalance in the allocation of bargaining power between workers and their employers that already exists.").

114. *See supra* note 88 and accompanying text.

115. *See supra* note 89 and accompanying text.

discretion[116] are all well put: confusion and potential inefficiencies can easily become the new normal in a world with too many interests to protect.

Other critiques, such as the shrinking of the pie and the risk of regulatory arbitrage, which at first glance might also seem appealing, might prove too much at closer look, even if assessed on mere efficiency grounds. The shrinking of the pie argument heavily relies on defining what type of pie matters: arguably, before dismissing the reform altogether on efficiency grounds, a decrease in the corporate pie that results in an aggregate increase of the micro pies of workers would at the very least require some measuring to ensure the change is inefficient in Kaldor-Hicks terms.[117] The mere fact that the change would result in an immediate loss for shareholders is irrelevant, because such an argument could be used to counter any type of regulatory effort that has a short-term effect on the bottom line; think of measures to fight terrorism or white collar crime, to protect privacy, and so forth. Similarly, the specter of regulatory arbitrage is an issue of policy implementation that always looms in the aftermath of a reform effort; policymakers should address it with viable anti-avoidance regimes rather than abandoning the effort altogether simply because the risk exists.

Finally, the idea that other areas of law, including labor/employment, antitrust, and tax, should address the issues that the stakeholder approach purports to solve is certainly promising especially in the U.S. As discussed in more detail in Section III.B, the U.S. can be singled out as a legal system with pretty lax laws and regulations in those areas.

But most of all, there are two main reasons why we are skeptical of the stakeholder approach: one is that it is doubtful that such an approach would be able to adequately protect the economic rights of weaker constituencies, the other is that it is unproven that shareholder primacy caused the unbalanced economic situation that is afflicting them.

As to the first point, it is disconcerting that those championing weaker constituencies rarely discuss the type of measures and initiatives that would need to be implemented by the board for purposes of protecting such constituencies.[118] For instance: How should a corporation address unionization efforts? Should it change its attitude towards lay-offs? Should it be open to a broader use of collective bargaining? What pay policy should it adopt for its lowest and highest earners? Should it refrain from engaging

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116. *See supra* note 90 and accompanying text.

117. For this observation, we draw on the debate on codetermination. *See* Paul Davies, *Efficiency Arguments for the Collective Representation of Workers: A Sketch in* THE AUTONOMY OF LABOUR LAW 367, 391 (Alan Boggs et al. eds., 2015) (discussing workers representation on corporate boards). Davies refuses to infer that corporations' ignoring such a form is evidence of inefficiency, given that the decision to adopt it is currently vested on shareholders alone and never workers; while the former class would likely suffer losses from codetermination, workers might benefit from it and at times their aggregate gain might outsize aggregate losses from shareholders. *But see e.g.* Stephen M. Bainbridge, *Privately Ordered Participatory Management: An Organizational Failures Analysis*, 23 DEL. J. CORP. L. 979, 1054-55 (1998) (arguing that codetermination is inefficient because it is not voluntarily adopted by firms); Luca Enriques, Henry Hansmann, Renier Kraakman & Mariana Pargendler, *The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies*, *in* THE ANATOMY OF CORPORATE LAW 79, 106 (Reinier Kraakman et al. eds., 3ed. 2017) (same). For a critical take on the mainstream view on codetermination in the U.S., see Hayden & Bodie, *supra* note 112, at 22–30 (arguing that lack of voluntary adoption in corporate America has less to do with the alleged inefficiency of a codetermination system, than with the unequal bargaining power between employers and workers and the limited role of labor unions in private firms in the U.S.).

118. To be sure, even those who suggest that other areas of the law should be the main focus of a reform effort to protect weaker constituencies never really discuss what policies should be pursued in those other areas. But this is not entirely surprising: after all, letting other fields deal is a critique that for the most part comes from proponents of shareholder primacy. *See, e.g.*, BAINBRIDGE, *supra* note 107 (arguing that other fields are best suited for protecting other vulnerable shareholders).

in an acquisition that would significantly increase concentration? Should it refrain from lobbying activities that could potentially harm some of their constituencies? These are just a few of many possible questions for which there are neither answers nor any discussion, at least in corporate law circles. The bulk of the discussion is instead on whether the board should be in charge to generically set the agenda to protect employees (or other stakeholders), but not on the contents of such agenda, for which stakeholder champions seem happy to give the board a blank check. This is worrisome because it fails to demonstrate that switching to a broader corporate purpose would in fact be beneficial for the various constituencies it purports to help. Indeed, one of the main goals of this article is opening to the various policy debates on how to protect weaker constituencies that exist outside corporate law and governance.

With respect to the second point, as Part III illustrates, looking closely at what are considered the most accredited explanations for why weaker constituencies have been faring so badly in the U.S. (to that end, we look into lack of real economic growth and rampant economic inequality), it appears that corporate law itself has had a very limited role in conducting our economy to the current levels of distributional discontent.[119] Accordingly, giving corporate law a big role in fixing problems it did not create makes little sense and, as we explain further in Part IV, is problematic if we really care to protect weaker constituencies.

III. IS SHAREHOLDER PRIMACY RESPONSIBLE FOR INEQUALITY AND ECONOMIC STAGNATION? CAN A STAKEHOLDER APPROACH BE THE FIX?

To ascertain the degree to which changes in corporate law can mitigate the problems faced by weaker constituencies, in terms of inequality and economic stagnation, it is necessary to first understand the factors behind such phenomena. With the help of a growing body of literature, we review the nature and potential causes behind today's economic malaise. Only then can we effectively understand the extent to which broadening corporate purpose may be useful in redressing these concerns.

A. Inequality and Economic Stagnation

Growth had been sluggish even before COVID-19. Per capita GDP in the U.S. has steeply declined over the past two decades: with an average growth of about 2% per annum during the 1970s, 1980s, and 1990s, in the 2000s growth shrunk to an average of 0.8% per annum and decreased even further in 2010–17 to 0.6%.[120] The real median family income in the U.S. was $78,646 in 2018 from $65,878 in 1988—increasing less than $13,000 in 30 years, compared to the $27,000 bump in the preceding 30-year period.[121] Productivity in both the U.S. and Europe has fluctuated, slowing in the 1970s before rebounding modestly in the mid-1990s, and then slowing again in the mid-2000s.[122] In particular, manufacturing has declined precipitously in recent years, falling by 9.7%

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119. Gordon, *supra* note 27.

120. PHILIPPON, *supra* note 37, at 14.

121. U.S. Census Bureau, *Real Median Family Income in the United States*, FED. RSRV. BANK OF ST. LOUIS (Sept. 10, 2019), https://fred.stlouisfed.org/series/MEFAINUSA672N [https://perma.cc/S9V2-6FRS].

122. Chad Syverson, *Challenges to Mismeasurement Explanations for the U.S. Productivity Slowdown*, 31 J. ECON. PERSP. 165, 165 (2017).

between 1991 and 2001 and by an additional 16.1% between 2001 and 2007.[123] This is reflected in employment levels. The employment rate in the U.S. peaked at 67.3% in early 2000, and kept declining until reaching a near 40-year low of 62.4% in September 2015; for prime-age workers (25-54 years), it fell from 85% in the late 1990s to 81% in 2015.[124] Both the college/high school and graduate/no degree education premiums increased significantly and then flattened: they were respectively 40% and 92% in the 1980s, reached 68% and 179% in the 2000s, and then flattened until now.[125] Meanwhile, high school and college completion rates slowed down and flattened since the 1970s and the U.S. education system started to deteriorate and failed to maintain its role as the great equalizer.[126] Over the last years, the labor share has receded as a result of higher concentration and profits, leaving us with a less competitive and more unequal economy.[127] Upward mobility plummeted: rates of absolute mobility have fallen from approximately 90% for children born in 1940 to 50% for children born in the 1980s and economists attribute this phenomenon less to lack of growth than to unequal income distribution,[128] which takes us to the next topic.

Inequality indicators are numerous and quite striking. Focusing on the most salient traits, we note that the biggest crux of the distributional puzzle in America is how bad the lower tail is doing. We mentioned that a whopping 45 million Americans live below the poverty threshold,[129] which essentially means that, within its borders, the U.S. hosts a country roughly the size of Italy with the economy of a poor developing nation. Indeed, as Piketty, Saez, and Zucman report, although average pretax real national income per adult has increased 60% from 1980 to 2014, it has stagnated for the bottom 50% of the distribution at about $16,000 a year (in 2014 dollars).[130] Even more troubling, the bottom 20 percentile experienced a decrease in their inflation-adjusted pre-tax annual income of more than 25%. Workers at the 40th percentile of income distribution have seen their incomes grow at an abysmal 0.3% per year in inflation-adjusted dollars (from $26,400 in 1980 to $29,800 in 2016) while it almost quadrupled for individuals at the top 1 percent.[131] In the economists' words,

> the bottom 50% income share has collapsed from about 20% in 1980 to 12% in 2014. In the meantime, the average pretax income of top 1% adults rose from

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123. David Autor, David Dorn, Gordon H. Hanson & Jae Song, *Trade Adjustment Worker-Level Evidence*, 129 Q.J. ECON. 1799, 1800 (2014).

124. Alan B. Krueger, *Where Have All the Workers Gone? An Inquiry into the Decline of the U.S. Labor Force Participation Rate*, 48 BROOKINGS PAPERS ON ECON. ACTIVITY 1 (Fall 2017), https://www.brookings.edu/wp-content/uploads/2018/02/kruegertextfa17bpea.pdf [https://perma.cc/S8K8-288L].

125. Robert G. Valletta, *Recent Flattening in the Higher Education Wage Premium: Polarization, Skill Downgrading, or Both?*, (Nat'l Bureau of Econ. Rsch., Working Paper No. 22935, 2016), https://www.nber.org/papers/w22935.pdf [https://perma.cc/N8G8-G9AR].

126. The decline in U.S. education institutions is chronicled in CLAUDIA GOLDIN & LAWRENCE F. KATZ, THE RACE BETWEEN EDUCATION & TECHNOLOGY (2008). *See also infra* note 171 and accompanying text.

127. *See infra* notes 192, 193 and accompanying text.

128. Chetty et al., *supra* note 4, at 405.

129. IMF USA, *supra* note 1.

130. Thomas Piketty, Emanuel Saez & Gabriel Zucman, *Distributional National Accounts: Methods and Estimates for the United States*, 133 Q.J. ECON. 553, 557 (2018).

131. HEATHER BOUSHEY, UNBOUND: HOW INEQUALITY CONSTRICTS OUR ECONOMY & WHAT WE CAN DO ABOUT IT 5 (2019).

> $420,000 to about $1.3 million, and their income share increased from about 12% in the early 1980s to 20% in 2014. The two groups have essentially switched their income shares, with eight points of national income transferred from the bottom 50% to the top 1%. The top 1% income share is now almost twice as large as the bottom 50% share, a group that is by definition 50 times more numerous. In 1980, [the] top 1% [of] adults earned on average 27 times more than [the] bottom 50% adults before tax, while they earn 81 times more today.[132]

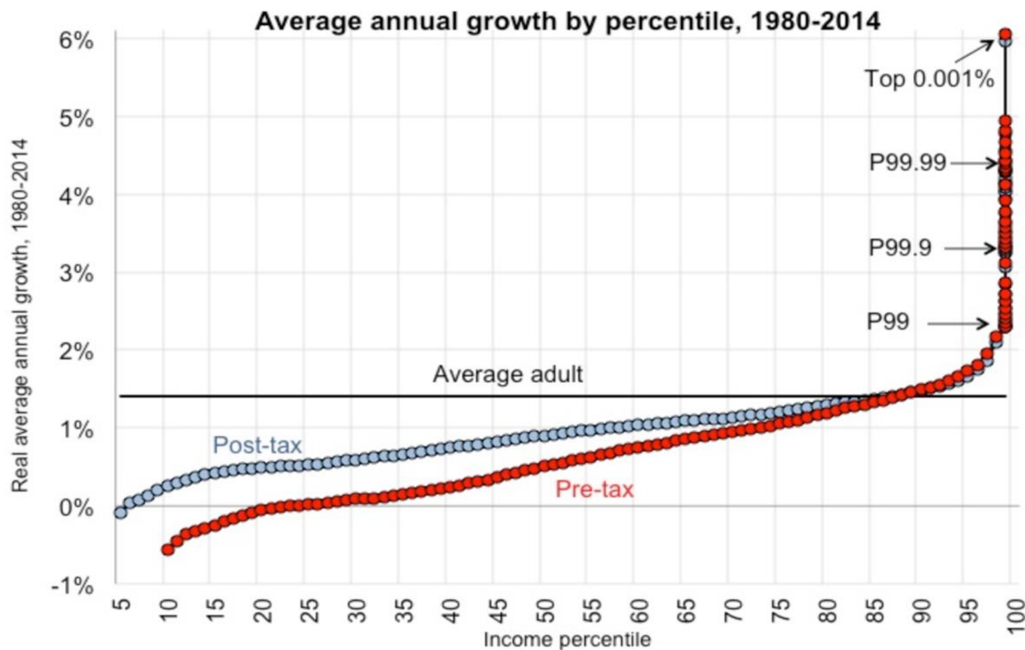
Folks in the top 10 percentile did pretty well, mostly because those at the very top did extremely well, as Table I can show. Fig. I plots inflation-adjusted average annual growth by percentile for the period. Note the stellar performance of those above the top 1% and the stagnation of everyone below the 90th percentile.

Table I (source: Piketty, Saez & Zucman, 2018)[133]

	Pre-Tax Growth		After Tax Growth	
Income Group	1946-1980	1980-2014	1946-1980	1980-2014
Top 10%	79%	121%	69%	113%
Top 1%	47%	204%	58%	194%
Top 0.1%	54%	320%	104%	298%
Top 0.01%	76%	453%	201%	423%
Top 0.001%	57%	636%	163%	616%

Fig. I (source: Piketty, Saez & Zucman, 2018)[134]

132. Piketty et al., *supra* note 130, at 557.
133. *Id.* at 578 tbl.2.
134. *Id.* at 579 fig.2.



To make things worse, racial minorities are disproportionately represented in the lowest income bracket.[135] Whites tend to have a disproportionately large share of income in top quantiles, while all other races accrue a disproportionately large share of income at the bottom 10% and 1% of the overall income distribution.[136] Also, most race groups (with the exception of Asians) range between 50% and 80% of the corresponding white income level consistently across various percentiles in the income distribution.[137] According to Census Bureau data, in 2016, the real median income for white individuals was $65,041, compared to $39,490 for Black individuals and $47,675 for Latinx individuals.[138] Far more

135. Raj Chetty, Nathaniel Hendren, Maggie R. Jones & Sonya R. Porter, *Race and Economic Opportunity in the United States: An Intergenerational Perspective* (Nat'l Bureau of Econ. Rsch., Working Paper No. 24441, 2018), https://www.nber.org/papers/w24441 [https://perma.cc/U75G-AJBX] (finding that African American men earn less than white men in 99% of US Census tracts—even controlling for socioeconomic factors). *See also* JESSICA SEMEGA, MELISSA KOLLAR, JOHN. CREAMER & ABINASH MOHANTY, U.S. DEP'T OF COM., U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2018, tbls. A-1, A-6, U.S. CENSUS BUREAU (2019), https://www.census.gov/data/tables/2019/demo/income-poverty/p60-266.html [https://perma.cc/W888-N9QM].

136. Randall Akee, Maggie R. Jones & Sonya R. Porter, *Race Matters: Income Shares, Income Inequality, and Income Mobility for All U.S. Races*, (Nat'l Bureau of Econ. Rsch., Working Paper No. 23733, 2017), https://www.nber.org/papers/w23733 [https://perma.cc/G45Y-LMPD].

137. *Id.* Whilst racial economic disparity has long plagued the United States, matters have not improved even after the passage of Civil Rights legislation. *See* Heather Long & Andrew Van Dam, *The Black-White Economic Divide Is as Wide as It Was in 1968*, WASH. POST (June 4, 2020), https://www.washingtonpost.com/business/2020/06/04/economic-divide-black-households/ [https://perma.cc/3QLM-NNLT] (documenting that in 1968, a typical middle-class black household had slightly less than 9.5% of the wealth of the typical middle-class white household ($6,674 compared to $70,786), a percentage that actually decreased in 2016 to 8.7% ($13,024 versus $149,703)).

138. JESSICA SEMEGA, KAYLA R. FONTENOT & MELISSA A. KOLLA, U.S. DEP'T OF COM., U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2016 7 (2017), https://www.census.gov/content/dam/Census/library/publications/2017/ demo/P60-259.pdf.

Black and Latinx individuals than white individuals live in poverty: only 8.8% of white individuals live below the poverty line, while 22% of Black individuals and 19.4% of Latinx individuals live in poverty.[139] White households also continue to have higher median incomes than Black and Latinx households.[140] Gender economic disparity is also relevant as men continue to earn more than women (real median incomes of $51,640 and $41,554 respectively),[141] with Black and Latina women having less wealth and earning less than white women.[142]

The COVID-19 pandemic has hit marginalized constituents particularly hard. By gender, women suffered a higher unemployment rate than men (15.5% and 13%, respectively).[143] By race, white individuals have had the lowest unemployment rate at 14.2%, compared with Asian, Black, and Latinx individuals who have suffered the greatest harm (unemployment rates of 14.5%, 16.7%, and 18.9%, respectively).[144] Less than one-half of Black adults are employed as a result of COVID-19, matching a number unseen since early 1980.[145]

B. What Is Behind Inequality and Economic Stagnation?

In this Section III.B, we survey some of the most accredited explanations for why we have reached these levels of inequality and why growth is stagnant. Each of the ensuing subsections assesses whether current corporate governance has been a contributing factor in any of the causes we identify. In addition, it preliminarily evaluates if the broadening of the beneficiaries of fiduciary duties of directors and officers could represent a viable policy in reversing course and restoring the corporate world and society in a more sustainable path.

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139. *Id.* at 13.

140. *Id.* For example, from 1975 to 2014, Latinx households' median income increased from $28,350 to $42,491, and Black households' median income increased from $23,691 to $35,398. *See Distribution of Household Income by Race*, INFOPLEASE, https://www.infoplease.com/business-finance/poverty-and-income/distribution-household-income-race [https://perma.cc/L2YM-6R8F]. Still, the median income for white households increased from $39,463 to $56,866, earning more than both other racial households. Wealth disparities are just as substantial. According to 2014 data from the Federal Reserve, the median white household possessed $142,000 in wealth in 2013—thirteen times greater than the median Black household ($11,000) and ten times greater than the median Latinx household ($13,700). Jesse Bricker, Lisa J. Dettling, Alice Henriques, Joanne W. Hsu, Kevin B. Moore, John Sabelhaus, Jeffrey Thompson & Richard A. Windle, *Changes in U.S. Family Finances from 2010 to 2013: Evidence from the Survey of Consumer Finances*, 100 FED. RES. BULL. 1, 11–12 (2014).

141. SEMEGA ET AL., *supra* note 135, at 10. More women live in poverty than men; the poverty rate for women aged 18 to 64 was 13.4 percent in 2016, compared to 9.7 percent for men. *Id.* at 15.

142. Katherine Richard, *The Wealth Gap for Women of Color*, CTR. FOR GLOB. POL'Y SOLS. (Oct. 2014), http://www.globalpolicysolutions.org/wp-content/uploads/2014/10/Wealth-Gap-for-Women-of-Color.pdf [https://perma.cc/URM9-BH28].

143. Tracy Jan, *This Is How Economic Pain Is Distributed in America*, WASH. POST (May 9, 2020, 5:00 AM), https://www.washingtonpost.com/business/2020/05/09/jobs-report-demographics/ [https://perma.cc/KB8T-NPPP].

144. *Id.* This data includes undocumented immigrants.

145. Long & Van Dam, *supra* note 137. Small businesses owned by Black individuals have also suffered a greater collective loss than those owned by white individuals. *Id.* Economic harm has accrued on an already-disadvantageous economic position for Black individuals, whose median income has fallen by more than $2,000 since the year 2000, while median income for Latinx individuals has risen a little over $2,500 and whites' median income has risen by about $4,000 from the same time. Even before the pandemic struck the United States, data from 2016 shows that Black households had less than one-fifth ($8,762) of the amount of cash or liquid assets that white households had ($49,529).

1. Trade and Globalization.

The growth and impact of global trade over the last decades have been some of the defining dynamics of our current economic times. Thanks to lower tariffs, on the one hand, and better ease in transportation and communication, on the other hand, global trade has allowed significant progress on many fronts, from improving the economies in many developing countries to reducing the costs of goods for our households. However, globalization also meant casualties—many of them. As U.S. households and businesses could import products more cheaply from overseas, domestic firms suffered and many ran out of business.[146] Moreover, as firms found ways to produce goods in countries where wages workers are lower, jobs were offshored and lost.[147]

There is little doubt that globalization has significantly contributed to the loss of businesses and jobs in the United States—no wonder it has become a staple in national politics. Leading labor economists have quantified that greater Chinese import penetration amounted to approximately 10% of the decline in manufacturing jobs from 17.2 million workers in 1999 to 11.4 million in 2011.[148] The overall effect on U.S. employment is even larger after estimating input-output effects for suppliers and buyers and their respective suppliers and buyers: with this broader lens, the number of lost jobs increases to 985,000 workers in manufacturing alone and to almost 2 million in the entire economy.[149] Because the lost jobs were mainly in areas with fewer employment alternatives, due to the low labor movability across regions,[150] not only is the overall impact of trade hard to reverse, but it also propagates beyond production jobs.[151] Exposure to trade affects the local businesses that were once catering to the bygone manufacturing firm and its workforce,[152] as well as all major occupation groups, including managerial, professional, and technical jobs.[153]

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146. Andrew B. Bernard, J. Bradford Jensen & Peter K. Schott, *Survival of the Best Fit: Exposure to Low-Wage Countries and the (Uneven) Growth of U.S. Manufacturing Plants*, 68 J. INT'L. ECON. 219, 219–20 (2006).

147. DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 168–77 (2014) (describing offshoring practices in the last decades). On offshorability, see generally Alan S. Blinder, *How Many U.S. Jobs Might Be Offshorable?*, 2 WORLD ECON. 41 (2009).

148. Daron Acemoglu, David H. Autor, David Dorn, Gordon H. Hanson & Brendan Price, *Import Competition and the Great US Employment Sag of the 2000s*, 34 J. LAB. ECON. S141, S144 (2016).

149. *Id.* at S145.

150. Autor et al., *supra* note 123, at 1828–30 (finding that workers initially employed in more trade-exposed industries are not more likely to change their place of residence in the 1994-2007 period and suggesting that that geographic mobility is not a primary mechanism for adjusting to trade shocks). *See also* Alan Manning & Barbara Petrongolo, *How Local Are Labor Markets? Evidence from a Spatial Job Search Model*, 107 AM. ECON. REV. 2877 (2017) (finding that labor markets are generally local in nature and the lucrativeness of job offers dissipates with distance); Ioana Marinescu & Roland Rathelot, *Mismatch Unemployment and the Geography of Job Search*, 10 AM. ECON. J. MACROECONOMICS 42 (2018) (asserting that less-educated workers are less mobile when searching for work).

151. *See generally* David H. Autor, David Dorn & Gordon H. Hanson, *The China Syndrome: Local Labor Market Effects of Import Competition in the United States*, 103 AM. ECON. REV. 2121 (2013) (mentioning that regions with higher exposure to import competition from China experienced larger reductions in overall employment and earnings).

152. *Cf.* RAGHURAM RAJAN, THE THIRD PILLAR: HOW MARKETS AND THE STATE LEAVE THE COMMUNITY BEHIND 185–86 (2019).

153. David H. Autor, David Dorn & Gordon H. Hanson, *Untangling Trade and Technology: Evidence from Local Labour Markets*, 125 ECON. J. 621, 644 (2015) (noting that, overall, non-college educated workers are disproportionally negatively affected).

Worryingly, the loss of jobs for trade competition is a persistent and, in fact, increasing trend.[154]

The impact of trade competition was not limited to employment, unemployment, and workers' nonparticipation rates, but extended to wages: a study analyzing the effect of exposure to international trade on workers' earnings from 1992 to 2007 found that the "difference between a manufacturing worker at the 75th percentile of industry trade exposure and one at the 25th percentile of exposure amounts to cumulative earnings reductions of 46% of initial yearly income and to one half of an additional month where payments from [Social Security Disability Insurance] are the main source of income."[155] Importantly, the same study also found that weaker categories of workers (i.e., those with lower labor force attachment, shorter tenure, and lower earnings) incur larger losses in subsequent earnings and employment, as compared with workers with high initial earnings, whose losses are modest.[156]

Certainly, alleged deficiencies in corporate governance, including shareholder primacy, played no role whatsoever in the rise and worsening of trade as a driver of inequality. Therefore, reforms aimed at extending the spectrum of beneficiaries of fiduciary duties of directors and managers can do nothing to reform this worrying trend.

2. Technology

As we keep being warned that, in ten/twenty years, job "xyz" will no longer exist, technological innovation plays a central role amongst the many economic anxieties characterizing our times. Technology eliminates jobs involving specific routines or predictable tasks.[157] For instance, automation turned car assemblage into a job where humans became mere supervisors of building machines. Computers made redundant professional figures the likes of typists, bookkeepers, cashiers, and phone operators. Software eliminated the need for accountants in straightforward tax filings and hardware reduced the need for supermarket clerks. The Internet sunk the record industry, print media, brick and mortar book and video stores, travel agencies, and much more. These are just a few examples of what happened in the last fifty years or so. Town car and big truck drivers are expected to become the next endangered professions for the near future. And only time will tell the job-destructing potential of artificial intelligence. To be sure, this is nothing new—innovation has radically altered business practices throughout history, especially after the industrial revolution, and with that it shed hordes of jobs.

Technology is as disruptive as trade and is perceived as a threat by a possibly wider spectrum of the population.[158] However, the impact of technology on employment

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154. *Id.*

155. Autor et al., *supra* note 123, at 1804 (finding that "[m]ore exposed workers spend less time working for their initial employer, less time working in their initial two-digit manufacturing industry, and more time working elsewhere in manufacturing and outside manufacturing altogether").

156. *Id.* (mentioning that "[d]istinct from their high-wage counterparts, low-wage workers churn primarily among manufacturing industries, where they remain exposed to trade shocks").

157. *See generally* David H. Autor, Frank Levy & Richard J. Murnane, *The Skill Content of Recent Technological Change: An Empirical Exploration*, 118 Q.J. ECON. 1279 (2003) (discussing how technology excels at efficiently performing repetitive, programmable tasks).

158. The pool of American jobs at risk is potentially wider as technology affects both blue-collar production requiring capital-intensive manufacturing (mostly located in the Great Lakes and the Southeast) and white-collar office, clerical, and administrative-support occupations in banking, insurance, finance, and other information-

has some important differences with what economists have observed with respect to trade: it does not affect overall employment levels, but it reduces wages. Indeed, studies analyzing the adoption of workplace computing and the ensuing reduction of employment in routine task-intensive occupations found that exposure to routine task specialization has largely neutral overall employment effects.[159] In particular, these studies show that local labor markets more specialized in routine occupations do experience employment losses in such occupations, but such losses are largely offset by local employment growth in other occupations, namely abstract and manual-task-intensive ones.[160] This change in occupations, in turn, leads to a pattern of so-called occupational polarization in both the manufacturing and non-manufacturing jobs.[161] Occupational polarization is the phenomenon whereby the demand for middle-skill, routine task-intensive jobs significantly decreases, but the drop is balanced by employment increases in relatively high-education, abstract task-intensive occupations, and especially in relatively low-education, manual-task-intensive occupations.[162] The net result is that both employment and wages in the middle decline and employees who used to be at that level need to take on the lowest paying jobs in the economy.[163] In fact, it has been observed that the expansion of the lower tail of the employment and earnings distributions substantially derives from rising employment and wages in service occupations, that is, assisting or caring for others (e.g., food service workers, security guards, janitors and gardeners, cleaners, home health aides, child care workers, hairdressers and beauticians, and recreation occupations).[164] All in all, occupational polarization is a key contributor to income inequality. A study has looked into the displacement of old labor tasks and reinstatement of new ones as a result of automation, and found that the slower growth of employment over the last three decades is due to acceleration in the displacement effect, especially in manufacturing, a weaker reinstatement effect, and slower growth of productivity than in previous decades.[165]

Here too though, neither shareholder primacy nor corporate law and governance

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intensive sectors (mostly located in large cities, such as New York, Chicago, Dallas, and Los Angeles). Autor et al., *supra* note 153, at 630.

159. *Id.* at 624, 632.

160. *Id.* at 624.

161. *Id.*

162. *Id.* at 636. *See also generally* Daron Acemoglu & David H. Autor, *What Does Human Capital Do? A Review of Goldin and Katz's* The Race Between Education and Technology, 50 J. ECON. LITERATURE 426, 440–42 (2012) (noting that "new technologies, by increasing the productivity of high-skill workers, encourage some of the tasks previously performed by middle-skill workers be shifted to high-skill workers, but a corresponding shift of low-skill tasks to middle-skill workers is not profitable" *Id.* at 447.).

163. *Cf.* David H. Autor & David Dorn, *The Growth of Low-Skill Service Jobs and the Polarization of the U.S. Labor Market*, 103 AM. ECON. REV. 1553, 1555 (2013) (finding that "wage growth is strikingly U-shaped in skill percentiles, with the greatest gains in the upper tail, modest gains in the lower tail, and substantially smaller gains toward the median"). This makes intuitive sense; "eroding the initial comparative advantage of the middle skill group in a given set of tasks, the technological shift in effect shunts the displaced skill group into a set of tasks in which it was initially less productive." Acemoglu & Autor, *supra* note 162, at 448.

164. Autor & Dorn, *supra* note 163 (finding that the share of U.S. labor hours in service occupations grew by 30% between 1980 and 2005, and that real wage growth in service occupations substantially outpaced that in other low-skill occupations, averaging 6.4% per decade between 1980 and 2005).

165. Capital replaces labor in tasks it was previously engaged in and thus always reduces the labor share in value added and may reduce labor demand even as it raises productivity. However, such effects are counterbalanced by the creation of new tasks in which labor has a comparative advantage—this is due to the reinstatement effect, which always raises the labor share and labor demand. Daron Acemoglu & Pascual Restrepo, *Automation and New Tasks: How Technology Displaces and Reinstates Labor*, 33 J. ECON. PERSPS. 3, 4 (2019).

have had any significant role in how technology revolutionized certain sectors and played against workers' interests. And expanding fiduciary duties would offer no cure for the social issues technology raises.

3. Education

Education and technology have historically been considered intertwined factors in determining occupational levels and wages and, therefore, in leading to more or less inequality. As Jan Tinbergen described in an influential piece in the mid-1970s, technology and education are in a "race."[166] As technological development increases the demand for workers with more skills, citizens invest in their education to supply labor that matches that demand; otherwise, if trained skills do not keep the same pace as the needs generated by new technology demand, the group of workers with insufficient training will fall behind.[167] To avoid this, the theory goes, the education system will need to rapidly increase the supply of workers trained with new skills.[168] This race, in essence, describes the reasons behind the well-known college-high school premium. According to the Bureau of Labor Statistics, in 2016 college-educated workers earned 168% of the wages of high-school graduates, and workers with graduate degrees earned 213% of the earnings of high-school graduates.[169] Note that the presence of such a premium is said to offer a natural correction to the inequality it generates, since it provides a strong incentive for prospective workers to invest in further education, thus increasing the supply of educated workers and ensuring the wage premium does not spike at the expense of less educated workers. In fact, leading economists have found that mass education has operated as a great equalizer in the U.S. for the most part of the last century.[170]

However, Professors Goldin and Katz report that starting in the mid-to-late 1970s, American prominence in the education system faltered and since then inequality ballooned.[171] To be sure, the view that education alone (or for the most part) is the main driver in leading to an unequal share of economic growth ignores that the biggest predictor

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166. *See generally* Jan Tinbergen, *Substitution of Graduate by Other Labour*, 27 KYKLOS 217 (1974) (describing how the steady increase in the skill supply as a result of greater public investments in the education system and eagerness of individuals and their families towards schooling, created a race between education and technology that resulted in reduced inequality from the second half of the nineteenth century). This view has been subsequently dubbed as the "canonical model." Acemoglu & Autor, *supra* note 162, at 427.

167. *See generally* GOLDIN & KATZ, *supra* note 126 (analyzing the increasing wage gap due to discrepancies in education).

168. *Id.*

169. *The Education Wage Premium Contributes to Wage Inequality*, HAMILTON PROJECT (Sept. 26, 2017), https://www.hamiltonproject.org/charts/the_education_wage_premium_contributes_to_wage_inequality [https://perma.cc/2UU4-8YZ8]. According to a Pew Report, median annual wage for college-educated workers was $45,500 in 2012, compared to $28,000 for high school graduates (a $17,500 gap). In 1965, the gap between high-school-educated and college-educated workers was only $7,400. Shaila Dewan, *Wage Premium From College Is Said to Be Up*, N.Y. TIMES ECONOMIX, (Feb. 11, 2014, 8:23 PM), https://economix.blogs.nytimes.com/2014/02/11/wage-premium-from-college-is-said-to-be-up/ [https://perma.cc/7UTW-RFUF].

170. GOLDIN & KATZ, *supra* note 126, at 3–4.

171. *Id.* at 7 (noting that both high school and college graduation rates abruptly plateaued and quality levels worsened, thus contributing to wider inequality). *See also* Claudia Goldin & Lawrence F. Katz, *The Race Between Education and Technology: The Evolution of U.S. Educational Wage Differentials, 1890 to 2005* (Nat'l. Bureau of Econ. Rsch. Working Paper No. 12984 2007), https://www.nber.org/papers/w12984 [https://perma.cc/3ENJ-2NQM] (reporting on the increasing wage gap and a history of higher education in the United States).

of educational achievement is household income itself.[172] Besides, hourly wages for college graduates have scarcely increased since the year 2000; in fact, wages for the bottom 60% of college graduates have fallen.[173] Finally, while 34% of individuals over age 25 have a college degree, only 26% of jobs require a college degree.[174] In fact, most of the gains are observable in the post-graduate category.[175]

All in all, the U.S. educational system fails to adequately train and support human capital for the challenges of the modern-day economy; definitely, it fails the less privileged spheres of society, such as racial minorities, immigrants, and low-income families in general.[176] So even if other factors[177] are contributing to inequality (whether to a larger or smaller extent than education is up for debate),[178] addressing the current education system

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172. *See, e.g.*, Raj Chetty, John N. Friedman, Emmanuel Saez, Nicholas Turner & Danny Yagan, *Mobility Report Cards: The Role of Colleges in Intergenerational Mobility*, (Nat'l Bureau of Econ. Rsch., Working Paper No. 23618, 2017), https://www.nber.org/papers/w23618 [https://perma.cc/5S2Y-784C] (finding that children whose parents are in the top 1% of the income distribution are 77 times more likely to attend an Ivy League college than those whose parents are in the bottom income quintile). *See also* DANIEL MARKOVITS, THE MERITOCRACY TRAP: HOW AMERICA'S FOUNDATIONAL MYTH FEEDS INEQUALITY, DISMANTLES THE MIDDLE CLASS, *AND* DEVOURS THE ELITE 6–8, 111–56 (2019) (explaining that, while around the mid-1960s elite schools changed their admissions criteria from "breed" to meritocracy, current admission practices systematically reward investments in education that only the upper class can afford thus creating a meritocratic inheritance enabling rich children to dominate competitions for admission to elite colleges and then for elite jobs thus thwarting upper mobility).

173. Nick Hanauer, *Better Schools Won't Fix America*, THE ATLANTIC (July 2019), https://www.theatlantic.com/magazine/archive/2019/07/education-isnt-enough/590611/ [https://perma.cc/4PFL-9PNC].

174. *Id.*

175. Acemoglu & Autor, *supra* note 162, at 440 (observing "steeply declining wages among less educated workers . . . rather than rising wages among college workers").

176. GOLDIN & KATZ, *supra* note 126, at 7 ("The slowdown in the growth of educational attainment has been most extreme and disturbing for those at the bottom of the income distribution, particularly for racial and ethnic minorities."). For example, there continues to be a 10-point gap between graduation rates between African American and white students. *See* NAT'L INST. FOR EDUC. STAT., *Public High School Graduation Rates* (May 2020), https://nces.ed.gov/programs/coe/indicator_coi.asp [https://perma.cc/LEJ4-HZFB]. Also, African American college graduates are equally likely to file for bankruptcy as African Americans without a college degree. Abbye Atkinson, *Race, Educational Loans & Bankruptcy*, 16 MICH. J. RACE & L. 1, 11 (2010) (showing that a college education may not confer the same protective benefit against financial hardship for African Americans that it does for their white counterparts). Consider further that marginalized groups, particularly marginalized women, also have greater student loan debt burdens and are less likely to see as many gains from education as white men. AM. ASS'N OF UNIV. WOMEN, *Deeper in Debt: Women and Student Loans* 18–19 (May 2017), https://files.eric.ed.gov/fulltext/ED580345.pdf [https://perma.cc/939L-RGE7] [*hereinafter* AAUW Report].

177. Consider first and foremost the phenomenon of occupational polarization described *supra* in Section III.B.2. *See* Acemoglu & Autor, *supra* note 162, at 440–44 (detailing the polarization of earnings growth starting over the past two decades and occupational polarization).

178. "What the canonical model does not deny, though largely leaves out, is that human capital is multidimensional. Workers produce work by performing job tasks, and different tasks require different types of skills. Workers with different types of skills have varying comparative advantages for these tasks. Changes in technology and in the supply of skills affect what types of tasks are in demand and how the available set of skills are assigned to these different tasks. This, we will argue, creates a rather different and more nuanced picture of what human capital does. By implication, it also leads to a somewhat different perspective on many of the developments in labor markets in the United States and other advanced nations." Acemoglu & Autor, *supra* note 162, at 428.

would most likely result in less inequality (but it still would not cure the excessive share captured by those on top).

But again, neither shareholder primacy nor corporate law and governance have had a prominent role in how the above described dynamics panned out. Nor can they provide meaningful ways to solve structural issues affecting the U.S. education system.

4. Concentration and Market Power

Firm concentration can have varied negative effects on economic distribution, so much so that national politics has recently shown a renewed attention to competition policy.[179] The effects of concentration on consumer welfare are of course well known, so we will not indulge in them, but just mention that in the United States, since the early 1980s, consumer welfare has been the *sole* concern of official antitrust policy.[180]

However, there are several other areas in which concentration and increased market power can contribute to inequality. First, competition at large is endangered: concentration makes it much harder for other firms, especially small ones, to stay in the market thus creating hardship on other business owners;[181] similarly, small suppliers of a larger firm would suffer from harsher pricing terms. Note, incidentally, that prior to the Chicago School-inspired antitrust revolution by the Reagan administration in the early 1980s,[182] U.S. antitrust policy was attentive to these issues[183] and the European Union still is.[184]

Moreover, a crucial dimension of firm concentration consists in creating hardship for weaker market participants such as workers. Two patterns are well known. One is that

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179. Interestingly, both the Trump administration and progressive Democrats are engaged. *Compare* Cecilia Kang, David McCabe & Daisuke Wakabayashi, *U.S. Accuses Google of Illegally Protecting Monopoly*, N.Y. TIMES (Oct. 20, 2020), https://www.nytimes.com/2020/10/20/technology/google-antitrust.html (describing the legal challenge by the Department of Justice to Google for illegally protecting its monopoly over search and search advertising) *with* Sen. Elizabeth Warren, Keynote Remarks at New America's Open Market Program Event: Reigniting Competition in the American Economy, (June 29, 2016) (transcript available at https://washingtonmonthly.com/2016/06/30/elizabeth-warrens-consolidation-speech-could-change-the-election/ [https://perma.cc/TAW8-F2PQ]) ("Concentration is not the only reason for rising economic insecurity, but it is one of them.").

180. *See, e.g.*, Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257, 266–68 (2001) (describing how market power and not consumer welfare was the main concern of antitrust authorities); Jonathan B. Baker, *Economics and Politics: Perspectives on the Goals and Future of Antitrust*, 81 FORDHAM L. REV. 2175, 2180 (2013) (likewise pointing out that economic analysis has framed the antitrust community's pursuit); Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 236–37 (2017) (detailing how antitrust officials used "open-ended standards favorable to businesses with market power" to govern business conduct).

181. Because of concentration, the number of start-ups has been constantly falling since the 1970s and has negatively impacted aggregate productivity. *See generally* Titan Alon, David Berger, Robert Dent & Benjamin Pugsley, *Older and Slower: The Startup Deficit's Lasting Effects on Aggregate Productivity Growth*, 93 J. MONETARY ECON. 68 (2018).

182. For a chronicle, see generally Daniel A. Crane, *Chicago, Post-Chicago, and Neo-Chicago*, 76 U. CHI. L. REV. 1911 (2009).

183. *See* Khan & Vanheesan, *supra* note 180, at 266 (describing how the Reagan administration changed antitrust enforcement to focus on neoclassical economic efficiency).

184. *See* Anu Bradford, Adam Chilton, Katerina Linos & Alex Weaver, *The Global Dominance of European Competition Law Over American Antitrust Law* 1, 4 (July 2, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3339626 [https://perma.cc/WB6K-L8WW] (showing EU competition law's focus on more than just consumer welfare).

concentration facilitates anti-market behavior, such as the widespread practice of imposing non-competes on employees,[185] or explicit or implicit non-hires with other large firms.[186] The other is that some mergers are said to occur for redistributive reasons, by shifting wealth from current employees to target shareholders: the former, who bear firm-specific risk and are undiversified, are laid-off to create merger gains for the latter.[187]

But there is a third aspect in the nexus between concentration and worker welfare that is even more relevant for our current purposes: concentration means less competition in hiring workers. Increasing degrees of firm market power (from oligopsony to monopsony)[188] lead to (more) imperfect labor markets[189] resulting in wage suppression for workers[190] and sometimes in labor cartels.[191] The increased and unprecedented corporate

185. Evan Starr, J.J. Prescott & Norman Bishara, *Noncompete Agreements in the U.S. Labor Force*, J.L & ECON. 6 (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625714 [https://perma.cc/3KLW-8FJ2] (finding that 13.3% of non-college educated workers earning less than $40,000 per year were bound by noncompetes).

186. Many Silicon Valley firms were sued by the U.S. government for violation of antitrust laws in connection with their entering into non-poaching agreements whereby they agreed to not hire from each other. *See, e.g.*, Garrison v. Oracle Corp., 159 F. Supp.3d 1044, 1053–55 (N.D. Cal. 2016); United States v. eBay, Inc., 968 F. Supp.2d 1030, 1033 (N.D. Cal. 2013); *In re* High-Tech Emp. Antitrust Litig., 985 F. Supp. 2d 1167, 1172–73 (N.D. Cal. 2013). The various cases ultimately settled but cast a light on an ongoing practice that alarmed authorities. Since then, the U.S. government issued guidelines clarifying that non-poach agreements are illegal, even if implicit. U.S. DEP'T OF JUS. ANTITRUST DIV. & FED. TRADE COMM'N, *Antitrust Guidance for Human Resource Professionals* 2 (Oct. 2016), https://www.justice.gov/atr/file/903511/download [https://perma.cc/5FX9-TSQK].

187. Andrei Shleifer & Lawrence H. Summers, *Breach of Trust in Hostile Takeovers*, *in* CORPORATE TAKEOVERS: CAUSES AND CONSEQUENCES 33, 34–37, 41–42 (Alan J. Auerbach ed., 1988), https://www.nber.org/chapters/c2052.pdf [https://perma.cc/SB3C-LMBF]. *See*, more recently, BOUSHEY, *supra* note 131, at 115.

188. A monopsony is the mirror image of a monopoly: a market where there is only one buyer, in this case a single employer. "There are more and less extreme examples of monopsony. It used to be that if you were trained as an astronaut, your only real employer option was NASA (now, of course, you might be able to get a job with SpaceX). If you're a nurse, you might have a variety of hospitals to choose from in your community, but it is increasingly likely that they are all owned by the same firm, reducing your bargaining power." BOUSHEY, *supra* note 131, at 131.

189. "[M]ost labor markets are not highly competitive. Most labor markets are rural or semi-rural. Only a handful of employers cater to a thin population spread out over a large area. Even in densely populated areas, various frictions, including noncompetition agreements, prevent workers from easily finding new jobs." Ioana Marinescu & Eric A. Posner, *Why Has Antitrust Failed Workers?* 2 (Mar. 10, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3335174 [https://perma.cc/4J66-Q4LU].

190. *Id.* ("A labor monopsony exists when lack of competition in the labor market enables employers to suppress the wages of their workers."); Suresh Naidu, Eric Posner & E. Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 537 (2018) (noting that, despite the fact that antitrust law prohibits firms from restricting competition in labor markets just as it does with respect to products markets, antitrust enforcement has focused almost exclusively on product markets and too little on labor markets). *See also* José Azar, Ioana Marinescu & Marshall I. Stainbaum, *Labor Market Concentration* 10 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24147, 2017), http://www.nber.org/papers/w24147.pdf [https://perma.cc/YYD4-CPZ3] (indicating that a ten percent increase in labor market concentration depresses wages between 0.3% and 1.3%). Data do indicate that high concentration is "robustly associated with lower wages." *See* Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L. REV. 1031, 1047 (2019) (citing several empirical studies). Studies indicate that a ten percent increase in labor market concentration depresses wages between .3 and 1.3%. *Id.*

191. Khan & Vaheesan, *supra* note 180, at 236–37; Jason Furman & Peter Orszag, *A Firm-Level Perspective on the Role of Rents in the Rise in Inequality* (Oct. 16, 2015), https://obamawhitehouse.archives.gov/sites/

profits and mark-up of the last few years, which are in part considered a by-product of merger activity, go hand-in-hand with decreasing levels of labor share.[192] Further, thanks to concentration we have experienced what has been described as the rise of superstar firms (in tech, finance, retail, and media) whose employees manage to capture higher wages than peers working for other firms: as observed by many, the income inequality of today occurs less within firms than between firms.[193]

Finally, market concentration increases the political clout of firms, leading to regulatory capture and making reforms, especially progressive ones, much harder.[194]

Following years of somewhat dormant debate,[195] economic and legal commentators have recently reengaged in a lively discussion over the role of antitrust policy and enforcement in dealing with, among other things, inequality. Two questions are central to the current analysis: First, has concentration significantly increased as of lately? Second, is concentration causing more inequality? The questions are instrumental in determining whether changes are necessary on the policy and enforcement front (namely, abandoning the Chicago School laissez-faire approach on enforcement and/or introducing new guidelines, if not legislation).

Has concentration increased lately? The short answer leans to the affirmative, but the extent of concentration and its negative impact are subject to discussion among experts. A 2016 study by President Obama's Council of Economic Advisers found that most industries have seen increases in the revenue share enjoyed by the 50 largest firms between 1997 and 2012.[196] Another study shows that in the last two decades, over 75% of U.S. industries have experienced an increase in concentration levels, which has led to higher profit margins, more profitable M&A deals, but no sign of increased operational efficiency, thus suggesting that value is derived from greater market power.[197] Other research finds

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default/files/page/files/20151016_firm_level_perspective_on_role_of_rents_in_inequality.pdf [https://perma.cc/YS9U-BFZS].

192. *See* Simcha Barkai, *Declining Labor and Capital Shares* 1 (2017), http://facultyresearch.london.edu/docs/BarkaiDecliningLaborCapital.pdf [https://perma.cc/2CM4-3J8F] (showing that "[i]ncreases in industry concentration are associated with declines in the labor share"); Gauti Eggertsson, Jacob A. Robbins & Ella Getz Wold, *Kaldor and Piketty's Facts: The Rise of Monopoly Power in the United States* 6 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24287, 2018), https://www.nber.org/papers/w24287 [https://perma.cc/JN83-BE96] (pointing to one of the firm's main purposes to gain "sustainable competitive advantage").

193. Erling Barth, Alex Bryson, James C. Davis & Richard B. Freeman, *It's Where You Work: Increases in Earnings Dispersion Across Establishments and Individuals in the United States*, 34 J. LAB. ECON. S67, S68 (2016) (finding that "most of the increased variance in earnings among individuals is associated with the increased variance of average earnings among the establishments where they work."); Jae Song, David J. Price, Faith Guvenen, Nicholas Bloom & Till von Watcher, *Firming Up Inequality* 4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 21199, 2015), http://www.nber.org/papers/w21199 [https://perma.cc/7YGL-F4X3] (noting that any explanation for a rise in inequality must take into account the firm's nature and economic motivations). On the rise of superstar firms, see generally David Autor, David Dorn, Lawrence F. Katz, Christina Patterson & John Van Reenen, *The Fall of the Labor Share and the Rise of Superstar Firms*, 135 Q.J. ECON. 645 (2020).

194. Faccio & Zingales, *supra* note 11; Gilens & Page, *supra* note 37, at 575–77.

195. Khan & Vaheesan, *supra* note 180, at 236–37.

196. COUNCIL OF ECON. ADVISERS ISSUE BRIEF, BENEFITS OF COMPETITION AND INDICATORS OF MARKET POWER (Apr. 2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf [https://perma.cc/DF4Y-N3YR].

197. Gustavo Grullon, Yelena Larkin & Roni Michaely, *Are U.S. Industries Becoming More Concentrated?* 2 (Swiss Fin. Inst. Res. Paper Series, Working Paper No. 19-41, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2612047 [https://perma.cc/W4YE-J9C5] (finding that the

that since the 1980s, firm markups have steadily risen from 21% to nearly 61% in 2016, an increase attributable almost exclusively to firms that already had the highest markups.[198] Moreover, a paper by Azar, Marinescu, and Steinbaum analyzes concentration in labor markets and finds that concentration in the average U.S. labor market is high and that markets with higher concentration are associated with lower posted wages.[199] According to these studies, the increase in value of U.S. firms has occurred at the expense of consumers and the workforce, with negative ripple effects on investments, dynamism, and entrepreneurship.[200] Studies focused on specific sectors found similar patterns of increased concentration in, among others, the airline,[201] banking,[202] beer,[203] healthcare,[204] health insurance,[205] hospitals,[206] manufacturing,[207] online platforms,[208] and wireless

"Herfindahl-Hirschman index (HHI) has systematically increased in more than 75% of U.S. industries . . . the average increase in concentration levels has reached 90%[, and] the market share of the four largest public and private firms has grown significantly for most industries, and the average and median size of public firms, i.e., the largest players in the economy, has tripled in real terms."). The study also finds that, contrary to earlier periods, in the period 2001–2014, "a zero-investment strategy of buying firms in industries with the largest increase in concentration levels, and shorting firms in industries with the largest decrease in concentration levels, generates excess returns of approximately 8.2% per year, . . . suggest[ing] that the higher profit margins firms have realized during the recent increase in industry concentration are reflected in higher returns to shareholders." *Id.* at 4–5. Similarly, *see* Autor et al., *supra* note 193, at 663 (noting that "according to all measures of sales concentration, industries have become more concentrated on average").

198. Jan De Loecker, Jan Eeckhout & Gabriel Unger, *The Rise of Market Power and the Macroeconomic Implications,* Q.J. ECON. (forthcoming 2020) (arguing that the increase explains the declining labor share, lower wages for low-skilled workers, and diminishing output growth).

199. *See* Azar et al., *supra* note 190, at 1 (noting that the U.S. labor market is associated with lower posted wages). *See also* Marinescu & Hovenkamp, *supra* note 190, at 1047 (discussing empirical evidence showing that market concentration depresses wages).

200. Marinescu & Hovenkamp, *supra* note 190, at 1047; Grullon et al., *supra* note 197, at 5. *See also* Germán Gutiérrez & Thomas Philippon, *Declining Competition and Investment in the U.S.* 1–3 (2017), (Nat'l Bureau of Econ. Rsch., Working Paper No. 23583, 2017), https://www.nber.org/papers/w23583.pdf [https://perma.cc/LK6R-EEFS] (showing that rather than trickling down to benefit the overall system, higher profits tend to be internalized by stockholders and top managers with stock options, by virtue of share buy-backs and dividend distributions).

201. *See generally* José Azar, Martin C. Schmalz & Isabel Tecu, *Anticompetitive Effects of Common Ownership*, 73 J. FIN. 1513 (2018) (describing how common ownership leads to reduced product market competition, hurting consumers).

202. José Azar, Sahil Raina & Martin C. Schmalz, *Ultimate Ownership and Bank Competition* (May 4, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2710252 [https://perma.cc/QMB6-5B5R].

203. BOUSHEY, *supra* note 131, at 114–15.

204. *Id.* at 117–19.

205. *See generally* Leemore Dafny, Mark Duggan & Subramaniam Ramanarayanan, *Paying a Premium on Your Premium? Consolidation in the US Health Insurance Industry*, 102 AM. ECON. REV. 1161 (2012) (describing how healthcare markets are increasingly exercising market power).

206. Zack Cooper, Stuart V. Craig, Martin Gaynor & John Van Reenen, *The Price Ain't Right? Hospital Prices and Health Spending on the Privately Insured* (Nat'l Bureau of Econ. Rsch., Working Paper No. 21815, 2015), https://www.nber.org/papers/w21815 [https://perma.cc/T8SA-ZA7L].

207. *See generally* Sam Peltzman, *Industrial Concentration Under the Rule of Reason*, 57 J.L. & ECON. 101 (2014) (describing how concentration in the manufacturing center has continued to grow).

208. Jonathan B. Baker & Fiona Scott Morton, *Antitrust Enforcement Against Platform MFNs,* 127 YALE L.J. 2176, 2177–78 (2018) (finding that online platforms have been increasingly demanding that any supplier using a platform not offer lower prices at other competitive platforms thus reducing overall competition).

industries.[209] Further, there is an important line of studies that has focused on the anticompetitive effects of common ownership by passive and other funds: few large asset managers own very large stakes throughout the main indexes, thus ending up being major players in several industries, with ascertained instances of uncompetitive behavior.[210] However, full consensus on whether concentration and firm market power has increased as of lately is yet to be reached, as there are other authors who warn to be cautious, if not skeptical.[211]

Moving to the second question, there is even a bigger controversy surrounding the issue of regressive monopoly, that is, whether concentration has led to more inequality. Of course, those who doubt there has been a significant increase in concentration disagree even more strongly on the ensuing regressivity claim.[212] However, on the other hand of the spectrum, there is a growing body of literature pointing to lack of competition as one of the main factors leading to inequality.

The opening salvo came from a study by Jason Furman, then Chairman of President Obama's Council of Economic Advisers, co-authored with Peter Orszag,[213] in which they hypothesize that "(a) a rising share of firms are earning super-normal returns on capital; (b) workers at those firms are both producing and sharing in those super-normal returns, driving up wage inequality; and (c) the high returns to labor and capital at those firms reduces labor mobility by discouraging workers from leaving firms that earn higher

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209. Faccio & Zingales, *supra* note 11.

210. *See also* Azar et al., *supra* note 201; Azar et al., *supra* note 202 (analyzing how common ownership may lead to uncompetitive markets). *See generally* Einer Elhauge, *Horizontal Shareholding*, 129 HARV. L. REV. 1267 (2016) (focusing on airline and banking industries and raising concerns for when large shareholders own shares of competing companies); Einer Elhauge, *How Horizontal Shareholding Harms Our Economy—And Why Antitrust Law Can Fix It*, 10 HARV. BUS. L. REV. 207 (2020) (responding to critiques to his earlier study on horizontal shareholding with empirical data encompassing several industries and offering legal strategies on how to tackle horizontal shareholding); John C. Coates IV, *The Future of Corporate Governance Part I: The Problem of Twelve* 10 (Harv. Pub. L. Working Paper No. 19-07, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3247337 [https://perma.cc/SX35-PCV8] (describing the growing share of ownership of index funds and analyzing the "Problem of Twelve"—the likelihood that in the future roughly twelve individuals, senior money managers in the investment fund industry, will have practical power over the majority of U.S. public corporations).

211. Some acknowledge an increase in concentration but are not worried about its overall materiality level. *See* Carl Shapiro, Univ. of Cal. at Berkeley, Remarks at the University of Chicago Booth School of Business' Conference, "Is There a Concentration Problem in America?," 6–7 (Guy Rolnik ed., 2018), https://promarket.org/wp-content/uploads/2018/04/Is-There-a-Concentration-Problem-in-America.pdf [https://perma.cc/5BFK-U4XW] (arguing empirical evidence shows there is greater concentration in the U.S. economy but that rise could be attributed to non-problematic developments, like efficiency). Others are more skeptical and not persuaded by the data itself: according to Chicago Booth professor and former chairman of President Obama's CEA, Austan Goolsbee, the evidence that points to a rise in concentration "comes from court cases or non-representative samples and is filled with ambiguity and myth." *Id.* at 2. Scholars disputing the conclusion that concentration has been detrimental to the economy as a whole warn that more studies and data are necessary before undertaking any major policy shift. For instance, Sam Peltzman and Dennis Carlton argue that while the evidence points to a rise in concentration, there is not enough evidence that rising concentration leads to adverse economic effects, and that concentration does not necessarily mean a lack of competition or decline in quality. *Id.*

212. *See, e.g.*, Daniel A. Crane, *Is More Antitrust the Answer to Wealth Inequality?*, REGULATION, Winter 2015–16, at 18 (claiming the regressivity claim is "vastly overstated").

213. Furman & Orszag, *supra* note 191, at 2.

rents."[214] Their study drew on the literature showing that much of the growth of earnings inequality among workers is between firms and not within them.[215]

The above insights have been developed by more recent scholarship, which sheds light on a particular, and not fully explored, dimension of concentration: its nexus with labor market power and wage suppression. A study by Autor, Dorn, Katz, Patterson, and Van Reenen highlights a negative relationship at the industry level between concentration and the labor share: technological and competitive forces have been driving the trend towards greater concentration and a reallocation of output towards high-productivity and low labor share firms.[216] This line of work confirms that more concentration leads to increased labor market power,[217] which results in lower levels of employment and wage suppression by monopsonistic (or oligopsonistic) employers.[218] Wage suppression in turn creates a cascade of negative consequences, which include: (a) less income for people employed in concentrated labor markets; (b) the redistributive effect of an income reduction for those who rely on labor for the benefit of those who rely on capital and profit from a firm's market power; (c) underemployment of labor[219] and less investment on skills and education, thus stifling growth; and (d) a burden on the government for lost taxes and greater expenditures on social programs (disability, unemployment, and so forth).[220] Indeed, several industries that have experienced a recent wave of consolidation have also experienced a reduction of workers' wages.[221] The problem is exacerbated by the

214. *Id.* While conceding that their hypothesis is more a question worth exploring than a definitive conclusion, Furman and Orszag admonish that "the increase in inequality has been so substantial that there is room for a number of partial explanations and . . . a more complete exploration of these explanations can help guide us towards the right policy solutions for addressing rising inequality." *Id.*

215. Barth et al., *supra* note 193, at S89–90; Song et al., *supra* note 193.

216. Autor et al., *supra* note 193, at 683 (finding that "there has been a fall in the labor share and a rise in sales concentration, that the fall in the labor share is greatest in the four-digit industries where concentration rose the most, and that the fall in labor share is primarily accounted for by between-firm reallocation of value-added and sales rather than within-firm declines in labor share.").

217. David Berger, Kyle Herkenhoff & Simon Mongey, *Labor Market Power* 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 25719, 2019), http://www.simonmongey.com/uploads/6/5/6/6/65665741/bhm_draft_10_4_19.pdf [https://perma.cc/Y2Z4-BFTG]. One intuitive source of market power is that there may be few firms in a local labor market and these firms understand that their hiring and wage setting decisions affect the local labor market's overall wage and employment levels. Firms that have a significant impact on local labor market conditions and internalize this fact, maximize profits by hiring fewer workers in order to pay lower wages.

218. *Id. See also* Azar et al., *supra* note 190 (quantifying the level of labor market concentration across a wide range of occupations and for almost every commuting zone in the U.S., and finding that labor market concentration in the average market is high, and higher concentration is associated with significantly lower posted wages); Naidu et al., *supra* note 190, at 537 (finding antitrust law prohibits firms from restricting competition in labor markets like it does in product markets).

219. At lower wages, some workers decide to exit the labor force or refuse to take available jobs—this is the waste or deadweight loss of monopsony. Naidu et al., *supra* note 190, at 558.

220. *Id.* at 537–38 (estimating that "monopsony power in the U.S. economy reduces overall output and employment by 13%, and labor's share of national output by 22%").

221. *Id.* at 546–47 (mentioning that mergers in the airline industry suppressed wages for pilots, flight attendants, and airline mechanics, that consolidation in the hospital sector created monopsonistic markets for nurses in rural areas, and that the meatpacking industry almost entirely operates in rural areas and it is subject to monopsonistic dynamics). For a simple description of the mechanics of wage suppression, see Marinescu & Posner, *supra* note 189, at 6 ("Employers with monopsony power, whatever its source, can suppress wages (and

"fissured" nature of employment in recent years.[222] As firms tend to focus on their core competencies and outsource everything else to outside firms, certain workers offering specific services (think janitorial ones) can sometimes rely only on one or two employers even if they operate at firms in competitive markets: this makes intra-firm mobility almost impossible, depressing wages.[223]

In a 2018 article, Naidu, Posner, and Weyl make a strong case for looking at workers' protection from an antitrust lens.[224] In their view, albeit fully consistent with antitrust law, this approach has long been neglected for several reasons, including tougher cases to litigate by a plaintiff[225] and a long-held view by economists that labor markets were competitive.[226] In fact, the idea that labor markets are competitive is no longer tenable because of the decline of unions and the inexorable retreat of labor and employment law in the U.S.[227] They note that labor markets are actually more problematic than product ones, for they are geographically more contained and present further complexities for workers, such as matching.[228]

It is therefore no surprise that over the last few years the labor economics literature has devoted renewed attention to monopsony and oligopsony,[229] while industrial

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degrade working conditions) in order to save labor costs. While some workers will quit as a result, an employer with monopsony power gains more in reduced labor costs than it loses from lower production. Both types of workers—those who continue working and those who quit—suffer from this state of affairs, and there is also harm to the economy as a result of the lower level of production.").

222. *See* WEIL, *supra* note 147 (describing how outsourcing practices have led to fissured workplaces).

223. *See* BOUSHEY, *supra* note 131, at 133 (describing inequality's pervasive role in our economy).

224. Naidu et al., *supra* note 190, at 539–41.

225. *Id.* at 543 (noting that, unlike for class actions in consumer cases, "virtually no worker can hope to obtain damages in an antitrust action . . . that would compensate her for the cost of litigation[] . . . [a]nd class actions brought by workers hardly ever succeed because workers—unlike consumers—are frequently in diverse positions, defeating the common interest requirement").

226. *Id.* at 541–42.

227. *Id.* at 542–43. We analyze the decline in labor and employment laws and their institutions. *Infra* Section III.B.6.

228. For a description of matching, see *id.* at 554–55:

> [U]nlike in product markets, the preferences of both sides of the [labor] market affect whether a transaction is desirable. . . . In employment, the employer cares about the identity and characteristics of the employee and the employee cares about the identity and characteristics of the employer. Complexity runs in both directions rather than in one. Employers search for employees who are not just qualified, but also who possess skills and personality that are a good match to the culture and needs of that employer. At the same time, employees are looking for an employer with a workplace and working conditions that are a good match for their needs, preferences, and family situation. Only when these two sets of preferences and requirements "match" will a hire be made. This two-sided differentiation is why low-skill workers may be as or even more vulnerable to monopsony than high-skill workers, despite possibly being less differentiated for employers. Low-skill workers may have less access to transportation, well-situated housing markets, child care options, and job information, and be more dependent on local, informal networks, all of which make jobs less substitutable and employers more differentiated.

229. *See* Alan B. Krueger, Luncheon Address at the Jackson Hole Economic Symposium: Reflections on Dwindling Worker Bargaining Power and Monetary Policy, (Aug. 24, 2018) (transcript available at https://www.kansascityfed.org/~/media/files/publicat/sympos/2018/kcfedlunchremarks-aspreparedfordeliveryv2.pdf?la=en [https://perma.cc/SAQ8-GAAJ]) (arguing that "[m]onopsony power has probably always existed in labor markets, but the forces that traditionally counterbalanced monopsony power and

organization economists have intensified their efforts in investigating the extent of concentration in labor markets.[230]

Back to our main questions: Has the leading view on corporate purpose contributed to the current levels of concentration? Has shareholder primacy itself played a role? Unlike other contributors to inequality observed thus far, here the answer to both questions is likely affirmative. In a system based on a shareholder-elected board of directors, in which directors are structurally poised to cater to the interests of those who put them in office, and in which they are compensated based on stock performance, it is natural for corporations to strive to maximize profits, and few strategies are more effective than capturing greater market shares. Therefore, broadening fiduciary duties to embrace a stakeholderist approach sensitive to competition issues could represent, at least in theory, a policy tool seeking to slow down the concentration process and make product and labor markets more competitive. However, the relevant question is whether this route, which in practice requires directors and officers to refrain from expanding a corporation's market share, would be the appropriate policy strategy.[231]

5. Excessive Compensation: CEOs, Super Managers, and Other Elite Workers

Another oft-cited cause of inequality is the rise in managerial compensation. Inequality scholars such as Atkinson and Piketty impute raising income inequality across the world, and especially in the U.S., to excessive compensation for supermanagers and the collapse of pay norms that were once taming excessive salaries.[232]

Excesses in compensation have occurred on two levels: executive pay and superordinate pay at large. The first one is a core corporate governance issue that creates a typical "managers v. owners" conflict[233] and, over the last twenty years or so has kept

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boosted worker bargaining power have eroded in recent decades."); Ihsaan Bassier, Arindrajit Dube & Suresh Naidu, *Monopsony in Movers: The Elasticity of Labor Supply to Firm Wage Policy* 36–37 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27755, 2020), https://www.nber.org/papers/w27755 [https://perma.cc/6MZT-ZEHB] (showing that there is moderate labor monopsony in U.S. labor markets, and that "the degree of monopsony power is greater in the low-wage, high-turnover sectors and for low-wage workers."); Arindrajit Dube, Jeff Jacobs, Suresh Naidu & Siddharth Suri, *Monopsony in Online Labor Markets* 15 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24416, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3143341 [https://perma.cc/MZK6-8R5J] (finding substantial monopsony power, as measured by the elasticity of labor supply facing the requester (employer) in online labor markets resulting in a considerable "markdown of productivity in the wage . . . with workers paid less than 20% of their productivity."). Note that online job markets should naturally be more competitive for workers because of lower search frictions. Indeed, a typical issue of the labor market, which is exacerbated in a monopsony situation, is represented by search frictions. Existing employers are aware of the high search costs of employees for switching jobs and can opportunistically reduce compensation because they know the employee will have trouble finding another job. For an analysis of search costs, see generally ALAN MANNING, MONOPSONY IN MOTION (2003).

230. Azar et al., *supra* note 190, at 7–11 (calculating concentration in labor markets using the HHI based on vacancies and applications in a labor market in a given commuting zone as resulting from ads on the job search website careerbuilder.com); Efraim Benmelech, Nittai Bergman & Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?* (Nat'l Bureau of Econ. Rsch., Working Paper No. 24307, 2018), https://www.nber.org/papers/w24307.pdf [https://perma.cc/VK3B-77E4].

231. We address this question *infra* in Section III.C and Part IV.

232. *See* ANTHONY ATKINSON, INEQUALITY 107–08 (2016); THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 397–405 (2014) (tying income inequality to overcompensation of managers).

233. To be sure, the mainstream view of financial economists is that, under an agency theory perspective, a performance-based pay system, linking the pay to increases in shareholder wealth through performance indicators,

minting extreme wealth for few households at the very top—along with a proportionate amount of outrage in public opinion[234] and political discourse.[235] CEO compensation at the top 350 firms increased 940% between 1978 and 2018.[236] In 1965, the average CEO earned only twenty times the average worker. [237] By 1995, the CEO-to-worker pay ratio was 123:1. [238] In 2018, the average CEO earned 221 times the pay of the average worker.[239]

Of course, corporate governance scholars are well aware of this phenomenon at least for CEOs and other top executives. Lucian Bebchuk and Jesse Fried wrote an influential book denouncing the U.S. legal regime behind CEO remuneration as structurally biased towards higher pay for top executives and that the system, rather than mimicking an arm's length bargain, has essentially tolerated decoupling pay from performance.[240] There are multiple reasons for the explosion of CEO pay—some deriving from market forces, others from flaws in pay design and in corporate governance mechanisms. Consider, for instance, the problematic nature of stock price as a proxy for performance; rewarding success but not penalizing failure with the existing options structures; short term focus; management capture of boards; peer capture of directors; collective action problems suffered by shareholders; and insufficiency of a pure disclosure system.[241] One of the most criticized features of executive pay revolves around the market practice of "competitive

is an effective way to attract top talent and align executives' and shareholders' interests. For this view, see generally Michael C. Jensen & Kevin J. Murphy, *Performance Pay and Top-Management Incentives*, 98 J. POL. ECON. 225 (1990). For an endorsement of this view in corporate law circles, see generally Marcel Kahan & Edward B. Rock, *How I Learned to Stop Worrying and Love the Pill: Adaptive Responses to Takeover Law*, 69 U. CHI. L. REV. 871 (2002). However, critics note that while this alignment theory is correct in the abstract, setting the pay in practice triggers a bargaining conflict between the recipient-agent with the payer-principal and that structural flaws in corporate governance design tip the balance in favor of the recipient. In other words, "executive pay can also be regarded as an agency cost in itself." Guido Ferrarini & Maria Cristina Ungureanu, *Executive Remuneration*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 334, 335 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018) (noting that in practice pay is not set by shareholders but by the board whose interests executive compensation itself is supposed to align with shareholders'). For the critical approach to executive compensation, *see infra* notes 240–42 and accompanying text.

234. DAVID F. LARCKER, NICHOLAS E. DONATIELLO & BRIAN TAYAN, AMERICANS AND CEO PAY: 2016 PUBLIC PERCEPTION SURVEY ON CEO COMPENSATION 4 (2016), https://www.gsb.stanford.edu/sites/gsb/files/publication-pdf/cgri-survey-2016-americans-ceo-pay.pdf [https://perma.cc/FV3P-EDNU] (mentioning that "[n]early two-thirds (62 percent) of Americans believe that there is a maximum amount CEOs should be paid relative to the average worker, regardless of the company and its performance [and that] . . . a majority of all political groups believe CEO pay should be capped in some manner, though Republicans are somewhat less likely to hold this opinion (52 percent) than Democrats (66 percent) or Independents (64 percent)").

235. *Id.* at 3 (mentioning that both candidates in the 2016 presidential election took issue with CEO pay).

236. Lawrence Mishel & Julia Wolfe, *CEO Compensation Has Grown 940% Since 1978: Typical Worker Compensation Has Risen Only 12% During That Time*, ECON. POL'Y INST. (2019), https://www.epi.org/publication/ceo-compensation-2018/ [https://perma.cc/6WBK-AGLH].

237. *Id.*

238. *Id.*

239. *Id.*

240. *See generally* LUCIAN BEBCHUK & JESSE M. FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION 4–6, 25–26 (2004) (citing factors such as management capture by directors, the virtual assurance of directors placed on the company's slate of being reelected, and the influence of CEO over the nomination process of those who will subsequently determine their pay). *See also* William W. Bratton, *The Academic Tournament over Executive Compensation*, 93 CAL. L. REV. 1557 (2005); Stephen M. Bainbridge, *Executive Compensation: Who Decides?*, 83 TEX. L. REV. 1615 (2005).

241. For a discussion of these flaws, see Ferrarini & Ungureanu, *supra* note 233, at 339–45.

benchmarking," under which compensation levels are typically targeted to either the 50th, 75th, or 90th percentile of peers. This system, which purports to provide information on market packages, naturally creates a self-perpetuating upward bias and movement in total compensation amounts paid to CEOs.[242]

However, focusing only on CEOs and other high-level executives pay would miss the broader phenomenon of increasing income experienced by elite workers in various fields. This phenomenon covers many more individuals. First, the pay of superordinate managers in successful corporations has been on the rise: remuneration has increased for high pay employees such as investment bankers and traders in financial firms and other managers in high growth industries.[243] Second, other elite workers, such as doctors, lawyers, athletes, and other entertainers, have done exceptionally well.[244] The bulk of new wealth created by this new breed of elite workers has been associated with the sheer increase of compensation (and hours worked) in certain sectors, most notably in finance and in businesses catering to finance (think lawyers), or operating near workers in finance (think doctors or real estate).[245] But finance is just one of many examples: tech, media, and luxury follow similar patterns (especially at the very top of their respective fields).[246]

Similar to concentration, corporate law and governance did have a role in the rise of CEO pay—but less so for the growth in pay for other elite workers. For the former, the structural flaws of the legal regime and governance institutions behind the design and setting of compensation packages for CEOs, have contributed to skyrocketing compensation packages.[247] However, it is doubtful that shareholder primacy itself was a contributing element, let alone that a stakeholder approach would be a fix. In fact, what is striking is that excesses in CEO pay have occurred *notwithstanding* shareholder primacy. Maybe shareholder primacy is not as effective a constraint, as some suggest.[248] In any event, to expect that by simply switching to a stakeholder approach we would tame excessive compensation better would be quite naïve—especially if all other incentives stay the same. In fact, the very interest-aligning nature of performance-based pay would make it hard for executives to curb the temptation to keep pushing for higher shareholder value at the expense of other constituencies. Unsurprisingly, neither the Business Roundtable nor Martin Lipton mentions excessive pay in their pro-stakeholder manifestos.

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242. Charles M. Elson & Craig K. Ferrere, *Executive Superstars, Peer Groups and Overcompensation: Cause, Effect and Solution*, 38 J. CORP. L. 487, 503 (2013).

243. Thomas Philippon & Ariell Reshef, *Wages and Capital in the U.S. Finance Industry: 1909–2006*, 127 Q.J. ECON. 1551, 1605 (2012) (mentioning that in 2006 the average worker in finance earned 70% more than the average worker in the remainder of the private sector, the top 10% of finance earners grew 80% more than the top 10% of workers in other sectors, and that executives in finance earned more than 250% than executives in other fields). Josh Bivens & Lawrence Mishel, *The Pay of Corporate Executives and Financial Professionals as Evidence of Rents in Top 1 Percent Incomes*, 27 J. ECON. PERSPS. 57, 58–62 (2013). For non-financial firms in general, see the discussion on higher pay at superfirms *supra* note 193 and accompanying text.

244. *See* MARKOVITS, *supra* note 172, at 89–92.

245. *Id.* at 90.

246. *Id.* at 11.

247. *See supra* notes 240–42 and accompanying text.

248. *See* Macey, *supra* note 53, at 22–26 (contending that corporate law does not require directors and managers to maximize shareholder value).

6. Weak and Declining Protection from Labor Market Institutions

Income inequality has been linked with the scarce protections afforded to workers by a country's legal system and labor market institutions.[249]

There are two observable macro phenomena here. First, traditionally the U.S. legal and industrial system has provided minimal rights and protections to workers if compared to other economically advanced nations.[250] The other phenomenon is the global decline in workers' rights and protections starting with the 1980s, which was the result of the neoliberal revolutions by conservative governments led by Margaret Thatcher in the U.K. and President Reagan here at home: their economic policies involved scaling back unions' prerogatives and protections such as working hours, working conditions, and pensions, all in the name of enhancing flexibility and efficiency in labor markets.[251]

To get a sense of the limited scope of workers' rights in the U.S., the centerpiece of labor legislation, the National Labor Relations Act (NLRA),[252] leaves weak categories such as domestic and agricultural workers excluded from its reach,[253] does not fit with

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249. David Card, Thomas Lamieux & W. Craig Riddell, *Unions and Wage Inequality*, 25 J. LAB. RES. 519, 555 (2004) (finding that the decline in union density "explains a significant fraction of the growth in wage inequality in the United States and United Kingdom"); PIKETTY, *supra* note 232, at 388–90 (mentioning the decreasing purchasing power since the 1970s of the federal minimum wage in the U.S.); ATKINSON, *supra* note 232, at 135–36 (mentioning the explosion of "involuntary employment" such as part-time, fixed-term, temp-agency, seasonal, casual, family work, as well as self-employment); FLORENCE JAUMOTTE & CAROLINA OSORIO BUITRON, INEQUALITY AND LABOR MARKET INSTITUTIONS 4 (2015), https://www.imf.org/external/pubs/ft/sdn/2015/sdn1514.pdf [https://perma.cc/2AF3-ALZK] (finding that "lower union density is associated with a rise of top income shares"); David H. Autor, Alan Manning & Christopher L. Smith, *The Contribution of the Minimum Wage to US Wage Inequality over Three Decades: A Reassessment*, 8 AM. ECON. J. APPLIED ECON 58, 88–89 (2016) (stating that albeit not the primary contributor to inequality in the lower tail, the minimum wage was certainly a contributing factor to widening lower tail inequality, particularly for females); Henry S. Farber, Daniel Herbst, Ilyana Kuziemko & Suresh Naidu, *Unions and Inequality over the Twentieth Century: New Evidence from Survey Data*, NAT'L BUREAU OF ECON. RSCH. (2018, revised October 2020), https://www.nber.org/papers/w24587.pdf [https://perma.cc/6TV5-WDMG] (looking at union density starting from 1936 and finding that unions have a causal effect in reducing inequality—including consistently contributing to a wage premium throughout the whole period—after controlling for factors such as education, race, and household income); Josh Bivens & Heidi Shierholz, *What Labor Market Changes Have Generated Inequality and Wage Suppression?*, ECON. POLY. INST. (Dec. 18, 2018), https://www.epi.org/publication/what-labor-market-changes-have-generated-inequality-and-wage-suppression-employer-power-is-significant-but-largely-constant-whereas-workers-power-has-been-eroded-by-policy-actions/ [https://perma.cc/HTJ2-3PKG] (arguing that the biggest change in labor market dynamics has been the "collapse of worker power," which "has been overwhelmingly driven by conscious policy decisions"); JOSEPH E. STIGLITZ, PEOPLE, POWER AND PROFITS: PROGRESSIVE CAPITALISM FOR AN AGE OF DISCONTENT 86–87, 292 n.60 (2019) (arguing that legislation affecting unions and workers' rights weakened workers' bargaining power).

250. *See, e.g.*, Alan Hyde, *The Idea of the Idea of Labour Law: A Parable*, *in* THE IDEA OF LABOUR LAW 88 (Guy Davidov & Brian Langille eds., 2011); COLIN CROUCH, MAKING CAPITALISM FIT FOR SOCIETY 99, 107–12 (2013); Deakin et al., *supra* note 112, at 12; JAKE ROSENFELD, WHAT UNIONS NO LONGER DO (2014); Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 16 (2016).

251. *See* COLIN CROUCH, THE STRANGE NON-DEATH OF NEOLIBERALISM 18 (2011) (noting that the neoliberal platform on labor issues had become mainstream by the mid-1990s with both the OECD and the EU endorsing the dismantling of workers' and other social rights); Deakin et al., *supra* note 112, at 1 (noting that starting in 1994 the OECD argued for "liberalizing labour laws as part of a strategy for enhancing labour market flexibility and thereby boosting job creation," and that "[d]uring the 2000s similar arguments were made by the World Bank through its *Doing Business* initiatives").

252. National Labor Relations Act of 1935 ("Wagner Act"), 29 U.S.C. §§ 151–169 (2012).

253. Andrias, *supra* note 250, at 16.

modern-day labor demand which is oftentimes outsourced,[254] offers weak enforcement mechanisms and mild penalties,[255] and puts unions at a disadvantage vis-à-vis employers in unionization campaigning efforts,[256] including giving opportunity for employers to delay[257] and de facto retaliate.[258] Moreover, the U.S. labor system is anchored to a firm-level, dual bargaining system, union vs. particular employer, whereas in most jurisdictions abroad unions operate at the sectoral level and interact not just with the employer but also with the government, which actively participates in the bargaining process.[259] As a result, U.S. unions have very limited political clout.

Furthermore, if labor law is weak, workers can hardly find any solace under employment law, which comprises a wide range of federal laws and doctrines that work independently of any collective effort in the workplace and bestow a series of individual rights and protections for the employee: anti-discrimination on the basis of race, sex, sexual orientation, national origin, and other protected characteristics; guaranteed minimum standards and fair treatment, such as minimum wages, maximum hours, safe working conditions, and family leave.[260] While employment law should in theory function as a floor from which employees and/or unions can extract better terms, in practice it has conflicted with the very philosophy of labor law, as its individual-centered structured atrophied solidarity.[261] Moreover, its individual protections, originally meant to make up the decreased union power, ultimately proved to be thin. Generally, enforcement is lax even with rampant violations, especially for outsourced workers.[262] Taking employers to court is extremely hard given that mandatory arbitration clauses are ubiquitous nowadays following the Supreme Court's blessing in *Epic Systems Corp. v. Lewis*.[263] And employment law rights are limited if compared to what is normally obtained through

254. *See generally* WEIL, *supra* note 147 (describing the implications of large U.S. corporations outsourcing their work to small companies).

255. Andrias, *supra* note 250, at 6; Alan Hyde, *The Crisis in the US Litigation Model of Labour Rights Enforcement*, *in* "ONE LAW FOR ALL?": *WEBER V. ONTARIO HYDRO* AND CANADIAN LABOUR LAW 301 (Elizabeth Shilton & Karen Schucher eds., 2017); Janice Fine, *Solving the Problem from Hell: Tripartism as a Strategy for Addressing Labour Standards Non-Compliance in the United States*, 50 OSGOODE HALL L.J. 813, 842 (2013).

256. Andrias, *supra* note 250, at 25 (mentioning that "[u]nions are denied physical access to the workplace during an organizing campaign, but employers are permitted to compel employee presence for antiunion communication.").

257. Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1777 (1983).

258. Josh Eidelson, *How the American Worker Got Fleeced. Over the Years, Bosses Have Held Down Wages, Cut Benefits, and Stomped on Employees' Rights. Covid-19 May Change That*, BLOOMBERG (July 2, 2020), https://www.bloomberg.com/graphics/2020-the-fleecing-of-the-american-worker/ [https://perma.cc/CN3E-SFAB] (mentioning several tactics to intimidate workers who intent to unionize: "Given the NLRB's wrist-slap approach to enforcement, firing employees who try to organize a union is one of the most effective short-term investments a company can make.").

259. Andrias, *supra* note 250, at 6, 15.

260. *Id.* at 37–38.

261. *Id.* at 38–39.

262. *Id.* at 39; WEIL, *supra* note 147, at 214–21.

263. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018). *See also* Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679 (2018) (explaining how so few employment disputes subject to mandatory arbitration are ever filed).

collective bargaining:[264] notably, they fail to keep people out of poverty.[265] All in all, employment law rights appear to be more a compliance nuisance than an effective protection for the workforce.

Troublingly, a low starting point has not deterred the U.S. system from curtailing over the years several protections available to workers in the aftermath of the New Deal. Responding to pressures from employers, courts began pruning important pieces of the NLRA. As Kate Andrias noted, the Supreme Court itself "undercut the Act's protection of the right to strike, made it easier for employers to oppose union campaigns, and generally shored up managerial rights of control over the workplace."[266] In parallel, deregulation in certain sectors like transportations and telecommunications allowed entry by nonunionized firms, contributing to a steeper decrease of unions' power in such markets as unionized workers had to make concessions to make their firms competitive in the new environment.[267]

The end result of a system of weak protections is unsurprising: to mention just a few notable features, the federal minimum wage is below sustainability levels,[268] union density has been constantly declining,[269] employers have a right to fire at will,[270] lay-offs can take place more freely than in other countries for the lack of employment protection legislation,[271] the overall system of labor standards enforcement is designed to fail,[272] and collective bargaining plays a very small role in the overall U.S. economy (and it never takes place at a centralized level).[273]

Empirical studies show that this system of low protections has significant impact on inequality.[274] For instance, Farber, Herbst, Kuziemko, and Naidu find that the decrease

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264. Andrias, *supra* note 250, at 40.

265. David Cooper, *The Minimum Wage Used to Be Enough to Keep Workers out of Poverty—It's Not Anymore*, ECON. POL'Y INST. (Dec. 4, 2013), https://www.epi.org/publication/minimum-wage-workers-poverty-anymore-raising/ [https://perma.cc/ZK2M-SBCK].

266. Andrias, *supra* note 250, at 17.

267. *Id.* at 23.

268. Eidelson, *supra* note 258 (noting that "[t]he federal minimum wage, stuck at $7.25 since 2009, is worth 70% of what it was in 1968, and about a third of what it would be had it kept pace with productivity").

269. Press Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Union Members—2019 (Jan. 22, 2020), https://www.bls.gov/news.release/pdf/union2.pdf [https://perma.cc/ZUT6-RL43].

270. *See generally* Cynthia L. Estlund, *How Wrong Are Employees About Their Rights, & Why Does It Matter?*, 77 N.Y.U. L. REV. 6 (2002) (noting that in the U.S. at will employment is the default everywhere but Montana); Andrias, *supra* note 250, at 40.

271. Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment at Will*, 58 UCLA L. REV. 1, 4–6 (2010) (mentioning that American employment law scholars are keen to reform at will employment only for "arbitrary or socially condemnable terminations," not for business-driven mass layoffs).

272. *See supra* note 255 and accompanying text.

273. ROSENFELD, *supra* note 250, at 19–20.

274. *See, e.g.*, Farber et al., *supra* note 249 (examining union density starting from 1936 and finding that unions have a causal effect in reducing inequality, including consistently contributing to a wage premium throughout the whole period); Heidi Shierholz, *Working People Have Been Thwarted In Their Efforts to Bargain For Better Wages by Attacks on Unions*, ECON. POLY. INST. (Aug. 27, 2019), https://www.epi.org/publication/labor-day-2019-collective-bargaining/ (mentioning that "a worker covered by a union contract earns 13.2% more than a peer with similar education, occupation, and experience in a nonunionized workplace in the same sector" and that " the *decline* of unionization has played a significant role in the *expansion* of the black–white wage gap") (emphasis in original).

of union density has increased inequality.[275] Studies also show that these low protections affect more severely racial minorities and members of the LGBTQ community.[276] Further, workers whom the NLRA leaves unprotected, such as domestic workers, have become more important to the U.S. economy in recent years and are poised to increase in number, thus making more inequality somewhat inevitable in the near future: between 2008 and 2018, in-home-care workers more than doubled to about 2.3 million and are expected to expand by an additional 1.3 million by 2028.[277]

To be sure, a system lacking basic protections for workers does not bother conservative and libertarian scholars who oppose a fairer and more equal workplace. In fact, these scholars do not contend that policy tools aimed at reinvigorating unions or increasing the minimum wage have a beneficial effect on inequality. Rather, they take issue with the efficiency costs of such policies and argue that by raising labor costs they chill investments and raise unemployment.[278]

However, contrary to conventional wisdom, empirical studies have found that changes in union density and the minimum wage do not carry adverse effects of significant magnitude on unemployment.[279] Indeed, studies suggest that the response by labor markets to an increase in minimum wage is quite mellow: they show either an insignificant impact

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275. Farber et al., *supra* note 249, at 3–4 (estimating the effect of union on household income over eighty years and finding "consistent negative effect of reweighting the full income distribution toward the union income distribution on both the Gini coefficient and the 90/10 ratio," and also finding "union density has a negative effect on standard measures of inequality such as the skill premium, the 90/10 ratio, the Gini coefficient, and the top-ten-percent income share").

276. *See generally* Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2014) (describing racial discrimination); Shanna K. Kattari, Darren L. Whitfield, N. Eugene Walls, Lisa Langenderfer-Magruder & Daniel Ramos, *Policing Gender Through Housing & Employment Discrimination: Comparison of Discrimination Experiences of Transgender and Cisgender LGBQ Individuals*, 7 J. SOC'Y FOR SOC. WORK & RSCH. 427 (2016) (mentioning that a majority of states in the United States do not offer legal protection from discrimination for members of the lesbian, gay, bisexual, transgender, and queer communities). *See also* Lincoln Quillian, Devah Pager, Ole Hexel & Arnfinn H. Midtbøen, *Meta-Analysis of Field Experiments Shows No Change in Racial Discrimination in Hiring over Time*, 114 PROC. NAT'L ACAD. SCI. 10870 (2017) (showing that race-based employment discrimination has persisted, particularly against African Americans, with discrimination against Latinx still evident but decreasing slightly); NAT'L RSCH. COUNCIL, MEASURING RACIAL DISCRIMINATION (Rebecca M. Blank, Marilyn Dabady & Constance F. Citro eds., 2004).

277. Eidelson, *supra* note 258 (ascribing the growth to baby boomers' increased demand).

278. *See, e.g.*, Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357 (1983); Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984); Andrew P. Morriss, *Bad Data, Bad Economics, and Bad Policy: Time to Fire Wrongful Discharge Law*, 74 TEX. L. Rev. 1901 (1996).

279. JAUMOTTE & BUITRON, *supra* note 249, at 8; Gordon Betcherman, *Labor Market Institutions: A Review of the Literature* (World Bank Pol'y Rsch., Working Paper No. 6276, 2012) (reviewing the empirical literature on various topics including minimum wage, unions, and collective bargaining and noting that, while consensus is far from being reached, it is no longer the case that all labor economists subscribe to the idea that worker protections result in higher unemployment or carry other efficiency costs); ORG. FOR ECON. COOP. & DEV. (OECD), OECD EMPLOYMENT OUTLOOK 2006 175 (2006), http://www.oecd.org/employment/emp/oecdemploymentoutlook2006.htm [https://perma.cc/Y65K-W8TB] (finding no link between changes in minimum wage and employment levels). *See generally* David R. Howell, Dean Baker, Andrew Glyn & John Schmitte, *Are Protective Labor Market Institutions at the Root of Unemployment? A Critical Review of the Evidence*, 2 CAPITALISM & SOC'Y 1 (2007).

or a modest negative impact, with some studies showing a positive employment effect.[280] In particular, the data suggests that, among states that have recently raised the minimum wage, there have not been employment reductions or other economic harms.[281] Moreover, one recent study found that minimum wage effects on employment become less negative as concentration increases and even become positive in the most concentrated labor markets.[282] Similarly, a growing body of empirical work suggests that worker protections in labor and employment law are positively correlated with productivity and innovation at the firm level.[283] Other studies point out that union contracts can be efficiency maximizing since "there are many workplace decisions where workers have superior information about their cost of doing things."[284]

Did shareholder primacy impact workers' welfare? While we tend to agree with the consensus that corporations might try to extract value from their employees for the benefits of their shareholders,[285] we do not believe corporations would cease to do so should a stakeholder approach be embraced. In fact, corporations currently tamper with employee rights because they find no obstacles in the legal and institutional framework

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280. *See generally* David Card & Alan B. Krueger, *Time-Series Minimum-Wage Studies: A Meta-Analysis*, 85 AM. ECON. REV. 238, 238 (1995) (reporting data showing that the minimum wage has an insignificant effect on employment and suggesting that "specification searching and publication biases" led to data errors in earlier studies that showed a correlation between unemployment and a minimum wage). Note that a 1998 study of labor economists showed respondents evenly split on the question of whether the minimum wage should be increased. Victor R. Fuchs, Alan B. Krueger & James M. Poterba, *Economists' Views About Parameters, Values, & Policies: Survey Results in Labor and Public Economics*, 36 J. ECON. LIT. 1387 (1998). *See also* Jonathan Meer & Jeremy West, *Effects of the Minimum Wage on Employment Dynamics*, 51 J. HUM. RES. 500 (2016); Doruk Cengiz, Arindrajit Dube, Attila Linder & Ben Zipperer, *The Effect of Minimum Wages on Low-Wage Jobs*, 134 Q.J. ECON. 1405 (2019).

281. For example, a study by researchers at the New York Fed found "no discernible effect on employment." Jason Bram, Faith Karahan & Brendan Moore, *Minimum Wage Impacts Along the New York-Pennsylvania Border*, FED. RSRV. BANK OF N.Y., LIBERTY ST. ECON. (Sept. 25, 2019), https://libertystreeteconomics.newyorkfed.org/2019/09/minimum-wage-impacts-along-the-new-york-pennsylvania-border.html [https://perma.cc/H6TD-ARLU]. One study found no evidence of job reduction or any adverse impact on employment and also found some spillover effect raising wages beyond the minimum wage. *See* Cengiz et al., *supra* note 280.

282. *See* Jose Azar, Emiliano Huet-Vaughn, Ioana Marinescu, Bledi Taska & Till von Wachter, *Minimum Wage Employment Effects and Labor Market Concentration* (2019) (unpublished manuscript), https://ssrn.com/abstract=3416016 [https://perma.cc/6HKN-VHBZ] ("From a policy perspective, our findings suggest that the potential employment costs of a minimum wage policy are reduced when monopsony power is pervasive, while the benefits are especially great (because monopsony already depresses wages below the competitive level)."). For a discussion on monopsony and the decrease of the labor share, see *supra* Section IV.B.4.

283. For a description, see Zoe Adams & Simon Deakin, *Corporate Governance and Employment Relations*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 1037, 1038, 1057, 1060–61 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018) (reporting, among other things, that stricter controls over unfair dismissals are found to be correlated with higher innovation, with causation running from former to the latter, with reduced risk of hold-up by innovative employees; for instance, after the tightening of wrongful discharge laws in California and Massachusetts there was an increase in patenting activity, in the number of startups, and in the number of employees in innovative firms).

284. Naidu, *supra* note 112, at 4–5 ("A union contract can reallocate these decision rights toward the efficient division, and evidence . . . suggests that this reduces labor conflict (measured by strikes)." (citing Elliott Ash, W. Bentley MacLeod & Suresh Naidu, *The Language of Contract: Promises and Power in Union Collective Bargaining Agreements* (Working Paper, Mar. 30, 2019), https://extranet.sioe.org/uploads/sioe2019/ash_macleod_naidu.pdf [https://perma.cc/7KJH-H6EW])).

285. *See infra* note 347 and accompanying text.

that is meant to protect workers.[286] Switching to stakeholderism while keeping labor market institutions intact would not alter the landscape in any significant way.

7. Deregulation and the Vanishing Safety Net

Deregulation has also contributed to income inequality.[287] Take financial regulation as an example: beginning in the 1980s, the groundwork for the demise and repeal of Glass-Steagall legislation—which established deposit insurance and walled off commercial banking from investment banking—began.[288] In 1999, the Gramm-Leach-Bliley Act (GLBA) repealed critical sections of Glass-Steagall[289] and effectively allowed the consolidation of commercial banks and securities firms.[290] Under the GLBA, financial firms could own investment banks, commercial banks, and insurance firms. Meanwhile, seeking higher yields, investors abandoned conventional interest-bearing (and FDIC insured) accounts in favor of other financial products, which were largely exempt from regulation thanks to the Commodities Futures Modernization Act of 2000.[291] A substantial portion of financial activity moved from traditional banking to the so-called "shadow banking" sector, focused on derivatives and securities.[292] Thus, funds from corporations, municipalities, and pensions were shifted to the shadow banking sector, providing opportunities for high returns for the finance sector, while externalizing risks, as evidenced in the 2008 financial crisis.[293]

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286. For a discussion, see *infra* notes 373–84 and accompanying text.

287. *See* Philippon & Reshef, *supra* note 243, at 1605 ("Over time, across subsectors, and across regions, we find that deregulation is followed by increases in relative education, relative job complexity, and relative wages. Our main argument is that changes in financial regulation are an important determinant of all these patterns."); Eric Keller & Nathan J. Kelly, *Partisan Politics, Financial Deregulation, and the New Gilded Age*, 68 POL. RES. Q. 1, 12 (2015), https://nathanjkelly.utk.edu/wp-content/uploads/2017/10/Keller-kelly-2015.pdf [https://perma.cc/6453-SAS8] ("As the movement toward deregulation of the financial sector gained speed in the late 1970s through the 1990s, the income shares of those in the upper echelons of the U.S. economy increased dramatically, and this association is present while controlling for several other potential explanations of rising inequality. Contrary to the predictions of a pure rent-seeking theory of regulation, we find that the finance industry has been more able to enrich itself relative to the rest of society when exposed to less regulation.").

288. William M. Isaac & Melanie L. Fein, *Facing the Future—Life Without Glass-Steagall*, 37 CATH. U.L. REV. 281, 283–84 (1988). The Banking Act of 1933 contained four sections that are known as Glass-Steagall provisions. Sections 16 and 21 of the Banking Act of 1933 barred commercial banks from performing the acts of an investment bank and vice versa. Section 20 prohibited commercial banks from affiliating with organizations principally involved in securities. Section 32 prevented directors and officers of commercial banks from being a director or officer in an organization that engages primarily in securities. Don More, *The Virtues of Glass-Steagall: An Argument Against Legislative Repeal*, 1991 COLUM. BUS. L. REV. 433, 434–36 (1991) (referencing Banking Act of 1933 §§ 16, 20, 21, 32 (1933)).

289. Arthur E. Wilmarth, Jr., *The Road to Repeal of the Glass-Steagall Act*, 17 WAKE FOREST J. BUS. & INTELL. PROP. L. 441, 518 (2017) (Phil Gramm, one of the bill's authors, described the bill as "a deregulatory bill," asserting "when Glass-Steagall became law, it was believed that government was the answer . . . We are here to repeal Glass-Steagall because we have learned that government is not the answer.").

290. Gramm-Leach-Bliley Act § 101. Both §§ 20 and 32 of the Banking Act of 1933 were repealed in the GLBA.

291. Colin Gordon, *Growing Apart: A Political History of American Inequality*, INEQUALITY.ORG, http://scalar.usc.edu/works/growing-apart-a-political-history-of-american-inequality/wall-street-and-main-street-the-rise-of-finance [https://perma.cc/25LW-62EH].

292. *Id.*

293. Morgan Ricks, *Regulating Money Creation After the Crisis*, 1 HARV. BUS. L. REV. 76, 81 (2011).

Deregulation also fueled the rise of high-risk, and often predatory, consumer financial products.[294] With the de facto extinction of usury laws,[295] lenders were able to charge astronomical rates to more than adjust for the increased risk of lending to low-income families.[296] As a result, many families found themselves mired in debt and unable to meet their basic needs.[297] Indeed, the middle class and poor have faced increasing precarity as a result of neoliberal policies dismantling the social safety net since the 1980s.[298] Fewer employers provided health benefits and pensions,[299] the government drastically reduced its contribution to struggling families,[300] and the cost of both health care and education rose astronomically.[301] As Jacob Hacker writes in *The Great Risk Shift*, "Over the last generation, we have witnessed a massive transfer of economic risk from broad structures of insurance, including those sponsored by the corporate sector as well as by government, onto the fragile balance sheets of American families."[302]

All of these changes contributed to an increase in speculation and risk, a substantial increase in the profits of financial institutions, increasing financialization of other sectors of the economy, and externalization of the risks involved in financial speculation.[303] Some have noted that the increase in the financial sector's share of income can account for half of the decline in labor's share of national income since 1970.[304] By 2004, the combined income of the top twenty-five hedge fund managers was greater than the combined income of the top 500 CEOs as listed by Standard & Poor's.[305] More than

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294. *See*, *e.g.*, FIN. CRISIS INQUIRY COMM'N, FINANCIAL CRISIS INQUIRY REPORT (Feb. 25, 2011), https://www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf [https://perma.cc/UXD8-8FXX]; Özgür Orhangazi, *Financial Deregulation and the 2007–08 US Financial Crisis* (FESSUD, Working Paper Series No. 49, 2014), http://fessud.eu/wp-content/uploads/2013/04/Financial-deregulation-and-the-2007-08-US-financial-crisis-Working-Paper-49.pdf [https://perma.cc/7CHW-V5PT] (describing the link).

295. KATHERINE PORTER, *Driven by Debt: Bankruptcy and Financial Failure in American Families*, *in* BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS 1, 4 (Katherine Porter ed., 2012).

296. Sarah Sternberg Greene, *The Bootstrap Trap*, 67 DUKE L.J. 233, 238 (2017).

297. *Id.* at 268. *See generally* Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 STAN. L. REV. 1093 (2019); Chrystin Ondersma, *Small Debts, Big Burdens*, 103 MINN. L. REV. 2211 (2019).

298. CROUCH, *supra* note 251, at 16–21.

299. Barbara A. Butrica Howard M. Iams, Karen E. Smith & Eric J. Toder, *The Disappearing Defined Benefit Pension and Its Potential Impact on the Retirement Incomes of Baby Boomers*, 69 SOC. SEC. BULL. 1 (2001), https://www.ssa.gov/policy/docs/ssb/v69n3/v69n3p1.html [https://perma.cc/B2F6-H7YV] (explaining that defined benefit plans have decreased from 38% of the workforce to 20% from 1980 to 2008); Tyler Bond, *What Happened to Private Sector Pensions?*, NAT''L PUB. PENSION COAL., (Aug. 4, 2016), https://protectpensions.org/2016/08/04/happened-private-sector-pensions/ [https://perma.cc/G487-LFRS] (explaining that only 33% of workers now have any workplace retirement plan, down from 88%).

300. ROBERT REICH, SAVING CAPITALISM: FOR THE MANY, NOT THE FEW 138 (2016) (noting that in 2014 only 26% of jobless Americans were receiving any kind of jobless benefit).

301. David I. Auerbach & Arthur L. Kellermann, *How Does Growth in Healthcare Costs Affect the American Family?*, RAND (2011), https://www.rand.org/pubs/research_briefs/RB9605.html [https://perma.cc/6L4B-U77Q]; Camilo Maldonado, *Price of College Increasing Almost 8 Times Faster Than Wages*, FORBES (July 24, 2018, 8:23 AM), https://www.forbes.com/sites/camilomaldonado/2018/07/24/price-of-college-increasing-almost-8-times-faster-than-wages/#fd90a4966c1d [https://perma.cc/9B25-PNPY].

302. JACOB HACKER, THE GREAT RISK SHIFT 5–6 (2006).

303. Damian Paletta & Kara Scannell, *Ten Questions for Those Fixing the Financial Mess*, WALL ST. J., (Mar. 10, 2009, 12:01 AM), https://www.wsj.com/articles/SB123665023774979341 [https://perma.cc/3VMK-KD7M].

304. Gordon, *supra* note 291.

305. *Id.*

nine times as many finance investors earned more than $100 million a year than did executives of public companies.[306] Additionally, the share of the top one percent employed in finance doubled between 1979 and 2004, to about 14%.[307] By 2006, the average worker in finance earned 70% more than the average worker in the remainder of the private sector.[308] Also during that period, the top 10% of finance earners grew 80% more than the top 10% of workers in other sectors.[309] By 2005, executives in finance earned 250% more than executives in other fields.[310]

But deregulation was not a result of corporate governance changes, but instead came about due to legislative changes removing direct regulation of certain companies. While executives surely had a lobbying role,[311] merely relying on a stakeholder approach would be ineffective to tame the added risks brought by deregulation.

8. Tax.

While taxation is supposedly one of the available leveling tools for reducing income and wealth inequality,[312] over the past several decades, a series of tax cuts in the United States have reduced the share of income that the highest earners contribute, limiting the redistributive impact of taxation.[313]

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306. *Id.*

307. *Id.*

308. Philippon & Reshef, *supra* note 243, at 1605.

309. *Id.*

310. *Id.*

311. *See* PHILIPPON, *supra* note 37, at 162 (describing the role of a prominent lobbying firm to repeal the Glass-Steagall Act).

312. *See*, *e.g*., Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient Than the Income Tax in Redistributing Income*, 23 J. LEG. STUD. 667 (1994) (explaining the benefits of using taxation to redistribute income).

313. These tax cuts began in earnest under President Reagan in 1981, when he signed the Economics Recovery Tax Act, which lowered the top marginal tax rate from 70% to 50% and the bottom bracket from 14% to 11%. The Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 101, 95 Stat. 172 (1981). In 1986, the Tax Reform Act lowered the top rate for ordinary income from 50% to 28% and increased the bottom rate from 11% to 15%. Tax Reform Act of 1986, Pub. L. No. 99-514, § 101, 100 Stat. 2085 (1986). It also mandated that long-term capital gains be taxed at the same rate as ordinary income; therefore, the top rate for capital gains was raised from 20% to 28%. *Id.* § 302. George W. Bush signed the Economic Growth and Tax Relief Reconciliation Act of 2001 and the Jobs and Growth Tax Relief Reconciliation Act of 2003, which reduced the marginal tax rate from 39.6% to 35%. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 101, 115 Stat. 38 (2001); Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, §105, 117 Stat. 752 (2003). As a result, between 2004 and 2012, the top 1% of households received an average tax cut of over $570,000. In addition, the tax cuts lowered the marriage penalty, lowered the tax rate on capital gain and dividend income, increased the child tax credit, and implemented the phase out of the estate tax to be eliminated by 2010. *See* Economic Growth and Tax Relief Reconciliation Act of 2001 § 301 (lowering the marriage penalty); *see also id.* § 201 (increasing child tax credit); *see also id.* § 501 (repealing estate tax). The tax rate cuts were due to expire after ten years; however, because of the financial crisis, President Obama extended the tax cuts by two years. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, §§101-103, 124 Stat. 3296 (2010). Subsequently, Obama enacted the American Taxpayer Relief Act of 2012, which made most of the Bush tax cuts permanent, except for the top marginal rate, which returned to the Clinton era tax rate of 39.6%. American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, §§ 101, 102, 126 Stat. 2313 (2013). Finally, in 2017 President Trump signed the Tax Cuts and Jobs Act, which cuts corporate tax rates permanently, but cuts individual tax rates temporarily. Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11001, 131 Stat. 2054

Although income inequality has increased, the tax rate for the highest earners has decreased, in both nominal and effective terms. The nominal top marginal income tax rate has averaged 57% historically, but today is 37%.[314] By some calculations, the 400 wealthiest individuals in the country now are taxed at an effective total tax rate (including federal, state, and local taxes) that is lower than the rate at which any other group is taxed.[315] This group was taxed at an overall effective rate of 23% in 2017, compared to a rate of 47% in 1980 and 70% in 1950.[316] Taxes for low and middle-income families, by contrast, have remained more or less flat.[317] Additionally, many corporate profits are not taxed—wealth held in shares of domestic companies is not taxed unless dividends are paid (or shares are sold), and taxes on dividends have also been reduced to a maximum of 20%.[318] The corporate tax was reduced from 35% to 21%, and corporate tax revenue fell by one third between 2016 and 2018.[319] The Congressional Research Service estimated that in 2019 only 6% of the federal government's revenue will have come from corporate taxes.[320] Finally, as a result of a 20% deduction for business income under the Trump tax

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(2017). The Trump tax cuts lowered five of the seven individual tax brackets, including the top marginal rate from 39.6% to 37%, and also lowered the income bands that the new rates apply to. The lowest bracket and the second highest bracket remain the same at 10% and 35%. The Trump tax cuts also lowered the corporate tax rate to 21% and repealed the alternative minimum tax for corporations. Tax Cuts and Jobs Act § 13001 (lowering the corporate tax rate on taxable income to 21%). *See also id.* § 12001 (repealing the alternative minimum tax for corporations). *See* Emily Horton, *The Legacy of the 2001 and 2003 "Bush" Tax Cuts*, CTR. ON BUDGET & POL'Y PRIORITIES (Oct. 23, 2017), https://www.cbpp.org/research/federal-tax/the-legacy-of-the-2001-and-2003-bush-tax-cuts [https://perma.cc/HB4M-77PG] (describing tax cuts under President George W. Bush); Chye-Ching Huang, *Budget Deal Makes Permanent 82 Percent of President Bush's Tax Cuts*, CTR. ON BUDGET & POL'Y PRIORITIES (Jan. 3, 2013), https://www.cbpp.org/research/budget-deal-makes-permanent-82-percent-of-president-bushs-tax-cuts [https://perma.cc/2WA6-6CC5] (describing the same); Tax Cuts and Jobs Act, 131 Stat. 2054. Of course, this overview of tax law changes is far from exhaustive.

314. CONG. RSCH. SERV., OVERVIEW OF THE FEDERAL TAX SYSTEM IN 2019 5 (2019). *See also* GARY GUENTHER, CONG. RSCH. SERV., INDIVIDUAL INCOME TAX RATES AND OTHER KEY ELEMENTS OF THE FEDERAL INDIVIDUAL INCOME TAX: 1988 TO 2019 TAX YEARS (describing current tax trends).

315. EMMANUEL SAEZ & GABRIEL ZUCMAN, THE TRIUMPH OF INJUSTICE, HOW THE RICH DODGE TAXES AND HOW TO MAKE THEM PAY 14 (2019). In calculating taxation rates, Saez and Zucman include all federal, state, and local taxes, and express taxes as a fraction of pre-tax income, and they focus on effective tax rates. *See also* Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data*, 131 Q.J. ECON. 519, 546, online app. tbl. B32 (2016) (explaining that prior to the passage of the Tax Reform Act of 1986, the top income tax rate was 50%, but today is 37%; further showing that the top 0.01% of individuals in the United States paid a federal tax rate of 28% in 2012, compared to a rate of 46% in 1980 and 55% in 1970).

316. SAEZ & ZUCMAN, *supra* note 315, at 14, 19–20. Saez and Zucman also explain that the reason many billionaires pay so little is that most of their income is not subject to taxation. For example, although Mark Zuckerberg owns 20% of Facebook and Facebook made $20 billion in profits in 2018, it did not pay any dividends, so the $4 billion Zuckerberg made was not subject to any taxation. Additionally, business income now enjoys a 20% deduction, meaning that the top marginal rate for business income is 29.6%, as opposed to 37% for wages. *Id.* at 20.

317. *Id.* at 19–20. Saez and Zucman explain that consumption and payroll taxes are actually regressive, as most of the income of the super-rich is not actually subject to taxation; additionally, the poor consume all of their income, the very rich save much more of theirs. *Id.* at 16–18.

318. *Id.* at 19–20.

319. U.S. BUREAU OF ECONOMIC ANALYSIS, FEDERAL GOVERNMENT: TAX RECEIPTS ON CORPORATE INCOME [FCTAX], FRED, Federal Reserve Bank of St. Louis, https://fred.stlouisfed.org/series/FCTAX [https://perma.cc/QL4Z-D7VR], (October 13, 2020).

320. OVERVIEW OF THE FEDERAL TAX SYSTEM IN 2019, *supra* note 314, at 5.

cuts, the nominal top marginal tax rate for business income went from 37% to 29.6%. This deduction is a limited deduction for the self-employed, but is unlimited for businesses. Wages, however, do not benefit from any exemption, deduction, or reduced rate.[321] Studies show that lower levels of taxation have in fact resulted in more inequality.[322]

Stakeholderism would not fix the situation. Corporations justify their non-payment or minimal payment of taxes by asserting that they are simply following the law.[323] Given that even non-profit organizations do all they can to minimize their tax bill, the shareholder primacy norm cannot be the primary culprit of the current failure of our tax system to effectively mitigate inequality.

Rather, taxation itself is arguably one of the fields most equipped to directly redress inequality concerns. In fact, there is little disagreement that, to contain inequality, tax reform is needed, although it is debated how our tax system should be modified in order to better allocate wealth. Indeed, academics and policymakers[324] have put forward a number of tax proposals aimed at reducing inequality.[325] Some proposals include surtaxes on capital income,[326] on corporate income,[327] and on high income.[328] Other proposals contemplate eliminating "loopholes" in certain sectors, such as treating returns to hedge fund managers as income rather than capital gains.[329] Some experts suggest larger scale

321. SAEZ & ZUCMAN, *supra* note 315, at 20.

322. *See generally* Thomas Piketty, Emmanuel Saez & Stefanie Stantcheva, *Optimal Taxation of Top Labor Incomes: A Tale of Three Elasticities*, 6 AM. ECON. J.: ECON. POL'Y 230 (2014).

323. *See* Press Release, Tim Cook, A Message to the Apple Community in Europe (Aug. 30, 2016), https://www.apple.com/uk/customer-letter/ [https://perma.cc/PF6M-4C7H] ("In Ireland and in every country where we operate, Apple follows the law and we pay all the taxes we owe."); Graeme Wearden & Larry Elliott, *Google CEO: We're Happy to Pay More Tax*, GUARDIAN (Jan. 24, 2018, 2:02 PM), https://www.theguardian.com/technology/2018/jan/24/google-ceo-were-happy-to-pay-more-tax [https://perma.cc/U9VR-Y33K] ("We encourage the OECD to actually solve these issues. . . .") (quoting Google CEO, Sundar Pichai).

324. All democratic presidential candidates had tax proposals as part of their 2020 platform, with the centrist candidates focusing on expanding the Earned Income Tax Credit (under which workers receive a fixed percentage of their earnings up to a maximum credit), and the progressive ones focusing primarily on increasing wealth taxes. *See* Candice Norwood, *What 2020 Democratic Presidential Candidates Believe: Taxes*, PBS NEWS HOUR (Dec. 16, 2019, 7:15 PM), https://www.pbs.org/newshour/politics/what-2020-democratic-presidential-candidates-believe-taxes [https://perma.cc/WCU2-EMA2] (describing tax proposals).

325. Former Delaware Chief Justice Leo Strine advocates for progressive taxation in the furtherance of the goal to address inequality. *See* Leo Strine, Jr., *Toward Fair and Sustainable Capitalism*, 2–5 (U. of Pa., Inst. for L. & Econ., Research Paper No. 19-39, 2019) (explaining why progressive taxation is the best way to address inequality).

326. Joseph Bankman & Daniel Shaviro, *Piketty in America: A Tale of Two Literatures*, 68 TAX L. REV. 453, 505–06 (2015). They explain that a surtax on capital income might reduce wealth concentration, whether by raising current rates or eliminating preferential rates for dividends and capital gains. However, taxpayers may succeed in offsetting this tax by increasing pretax risk of their investment portfolio. Additionally, this would not affect the wealth of business sector individuals who do not sell shares or receive dividends, and financial sector individuals also may characterize returns as to labor instead of to capital.

327. *Id.* at 506 (explaining, however, that corporate income taxation may not be effective because companies are able to "exploit corporate residence mobility and the source rules for corporate income").

328. *Id.* (explaining that a higher income tax would not affect those individuals whose wealth is not primarily derived from income but rather from wealth, such as Warren Buffet).

329. *Id.* at 506–607 (suggesting that requiring hedge fund managers to treat certain returns as ordinary income rather than capital gain could reduce wealth in the financial sector, and also suggesting that prohibiting aggressive tax planning techniques could help).

income tax reforms, such as implementing a business enterprise tax, [330] a mark-to-market system,[331] a progressive consumption tax,[332] a wealth tax,[333] and estate or inheritance taxes.[334]

Because progressive taxation is arguably the tool most likely to mitigate inequality—indeed, redistribution is precisely the purpose of a progressive taxation system—the political difficulty in achieving meaningful tax reform should not be a barrier to its pursuit. Indeed, knowing that passage of tax increases is politically difficult is reason to allocate ample time and resources to identifying which tax reforms are most likely to be effective at countering inequality, and further suggest that it may be more important to devote political capital to achieving taxation reform than to pursue corporate governance changes which would not directly change the resources allocated to workers. It is also worth noting that stakeholderism itself will do little on the taxation front—even corporations eager to treat employees and other stakeholders well are unlikely to volunteer more taxes for the sake of equality.

9. Discrimination

As we mentioned at the end of Section III.A, economic inequality is not race or gender neutral. Black, Latinx, and other marginalized groups, including women of all races, as well as LGBTQ individuals, earn less and have less wealth than white men.[335]

Racial disparities did not occur by happenstance, but derive directly or indirectly from the legacy of slavery, discrimination, exclusion, and dispossession. Instead of fostering policies giving fair access to affordable credit and government grants when needed, the U.S. government was an active participant in the deprivation and exclusion of Black individuals and communities from the opportunity to build wealth, particularly housing wealth: the federal government demolished integrated neighborhoods to create highway systems and segregated public housing, denied Black individuals access to FHA loans, and subsidized the development of suburbs on the condition that no homes be sold

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330. EDWARD D. KLEINBARD, WE ARE BETTER THAN THIS: HOW GOVERNMENT SHOULD SPEND OUR MONEY 398–402 (2014).

331. Joseph Bankman, *A Market-Value Based Corporate Income Tax*, 68 TAX NOTES 1347 (1995) (arguing that corporate income tax should be replaced with a market value tax by measuring the annual changes in value of outstanding equity); Michael S. Knoll, *An Accretion Corporate Income Tax*, 43 STAN. L. REV 1 (1996) (arguing for replacing corporate income tax with an accretion corporate tax to tax the change in the total market value of the corporation's outstanding securities.

332. Bankman & Shaviro, *supra* note 326, at 505–06.

333. *Id.* at 487–89. While the idea of a wealth tax has gained considerable traction, it has been questioned on a variety of grounds; including the possible unconstitutionality of such a tax. *See id.* at 489–91 (explaining that a wealth tax may be a "direct" and "unapportioned" tax, and thus unconstitutional under Article 1, but considering Deborah Schenk's suggestion to translate a wealth tax into an equivalent income tax on riskless return, but concluding that this method would also face constitutional challenges). *But see* Deborah H. Schenk, *Saving the Income Tax with a Wealth Tax*, 53 TAX L. REV. 423, 424–25 (2000) (arguing that a consumption tax plus a low-rate wealth tax could replicate (and replace) the income tax on capital income).

334. *See*, *e.g.*, Bankman & Shaviro, *supra* note 326, at 510 (suggesting extending the reach and tightening enforcement of estate and gift laws as an option to mitigate dynastic wealth transmission); Lily Batchelder, *Estate Tax Reform: Issues and Options*, 122 TAX NOTES 633, 644–46 (2009) (suggesting that the estate tax be converted into an inheritance tax, whereby the tax is based on the amount one inherits rather than the overall amount of the estate, thus improving the political optics of the tax).

335. *See supra* notes 129–39, 276 and accompanying text.

to Black individuals and loans included racially restricted covenants.[336] State and local authorities often rezoned Black neighborhoods into industrial zones, permitting toxic and undesirable use that often turned these neighborhoods into slums.[337]

Women of all races were also historically excluded from access to property ownership and access to credit.[338] Despite the passage of the Equal Credit Opportunity Act in 1974, which was designed to prohibit such exclusion,[339] women continue to face higher borrowing costs and higher rates of predatory lending, thus interfering with their ability to accumulate wealth and achieve financial stability.[340] Black, Latinx, and other marginalized individuals also continue to face higher borrowing costs and higher rates of predatory

336. RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 64–68 (2017); *see also* Mehrsa Baradaran, *Jim Crow Credit*, 9 U.C. IRVINE L. REV. 887, 937 (2019) (showing the relationship between residential segregation and the propensity of borrowers within those areas to receive subprime loans); MEHRSA BARADARAN, THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP 105 (2017) (showing the role financial institutions played in creating and maintaining racial inequality in the United States).

337. ROTHSTEIN, *supra* note 336, at 64.

338. LIZBETH COHEN, A CONSUMER'S REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA 147 (2004) (discussing the exclusion of both women and Black communities from access to credit); *see also* Abbye Atkinson, *Borrowing Equality*, COLUM. L. REV. (forthcoming 2020) (manuscript on file with authors) (discussing the historical exclusion of women from property ownership and credit).

339. Equal Credit Opportunity Act, Pub. L. 93-495, 88 Stat. 1521 (1974).

340. *See*, *e.g.*, Amy Baker Castro, *Eroding the Wealth of Women: Gender and the Subprime Foreclosure Crisis*, 88 SOC. SERV. REV. 59, 62 (2014) (showing a policy gap between the protective legislation and mortgage markets resulting in new forms of gender inequity in housing and lending); AAUW Report, *supra* note 176 (showing how the gender wage gap disproportionately affects women thus making it harder for women to pay back their student loans); Deborah Thorne, *Women's Work, Women's Worry?: Debt Management in Financially Distressed Families* (2012), *in* BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS 141–46 (Katherine Porter ed., 2012) (analyzing data from 2007 Consumer Bankruptcy Project to show that women shoulder the financial strain in marriages); Kristin Brandser Kalsem, *Bankruptcy Reform and the Financial Well-Being of Women: How Intersectionality Matters in Money Matters*, 71 BROOK. L. REV. 1181, 1202 (2006) (utilizing an intersectional approach to the 2005 Bankruptcy Act to foreground how women's historical, economic, and social experiences are different, specifically as to how women are conceived as creditors or debtors in bankruptcy proceedings); Elizabeth Warren, *What Is a Women's Issue? Bankruptcy, Commercial Law, and Other Gender-Neutral Topics*, 25 HARV. WOMEN'S L.J. 19, 52 (2002) (describing bankruptcy as a "women's issue" in light of "[t]he sheer number of middle-class women who are in such economically desperate circumstances that they must file for bankruptcy . . . ").

lending, resulting in dispossession of accumulated wealth and interference with the ability to build wealth.[341] LGBTQ individuals also face costly discrimination.[342]

Neither shareholder primacy nor stakeholder theory are key causes of, nor key solutions to, systemic racism and other forms of discrimination. Of course, corporate law is by no means extraneous—systemic racism and bias are insidious in all aspects of law and society.[343] But we doubt that a stakeholder approach would be a key tool in redressing systemic discrimination and bias. Indeed, stakeholderism alone clearly seems insufficient to address systemic inequality; in addition, we foresee a risk that corporations will profess commitments to diversity and anti-discrimination in an effort to preempt the very regulatory changes capable of altering resource and power allocation. Companies may be eager to suggest that they oppose sexism and racism,[344] but less willing to take measures that would cost them something.[345] The widespread adoption of mandatory arbitration clauses that prevent employees from bringing discrimination claims is a case in point.[346]

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341. *See* Justin P. Steil, Len Albright, Jacob S. Rugh & Douglas S. Massey, *The Social Structure of Mortgage Discrimination*, 33 HOUS. STUD. 759 (2018); *see generally* Jacob S. Rugh, Len Albright & Douglas Massey, *Race, Space, and Cumulative Disadvantage: A Case Study of the Subprime Lending Collapse* 62 SOC. PROBS. 186 (2015) (finding Black borrowers in Baltimore were charged five percentage points more than white borrowers, controlling for income and other demographics); Patrick Bayer, Fernando Ferreira & Stephen L. Ross, *"Race, Ethnicity, and High-Cost Mortgage Lending* (Nat'l Bureau of Econ. Rsch., Working Paper No. 20762, 2014), https://www.nber.org/papers/w20762.pdf [https://perma.cc/EQM3-BT3F] (finding that after controlling for credit scores, loan to value ratios, the existence of subordinate liens, and housing and debt expenses relative to individual income, Black and Latino borrowers were significantly more likely to receive a high-cost loan than whites, in all seven metropolitan areas studied); Vicki Been, Ingrid Ellen & Josiah Madar, *The High Cost of Segregation: Exploring Racial Disparities in High-Cost Lending*, 36 FORDHAM URB. L.J. 361 (2009) (arguing that to address the racial disparities in the subprime mortgages must take into account for the relationship between existing levels of racial segregation and the racial disparities in the types of mortgages homeowners received); STEPHEN L. ROSS & JOHN YINGER, THE COLOR OF CREDIT: MORTGAGE DISCRIMINATION, RESEARCH METHODOLOGY AND FAIR LENDING ENFORCEMENT (2002) (analyzing racial discrimination and mortgage lending procedures); Kerwin Kofi Charles, Erik Hurst & Melvin Stephens, Jr., *Rates for Vehicle Loans: Race and Loan Source*, 98 AM. ECON. REV. 315 (2008) (finding racial disparities for individuals who do not qualify for low interest rates when financing a car purchase).

342. *See supra* note 276 and accompanying text.

343. *See generally* Cheryl L. Wade, *Transforming Discriminatory Corporate Cultures: This Is Not Just Women's Work*, 65 MD. L. REV. 346 (2006) (arguing that companies will only enjoy healthy relationships with women employees when the male employees change); Cheryl L. Wade, *Effective Compliance with Antidiscrimination Law: Corporate Personhood, Purpose and Social Responsibility*, 74 WASH. & LEE L. REV. 1187 (2017) (arguing that corporate officers' overt and implicit decision making to follow the spirit or the letter of the law is an important factor in the social responsibility equation especially when it comes to antidiscrimination).

344. Additionally, shareholders may also put pressure on corporations to combat racism (whether because it is the right thing to do or because it is good for business), so anti-racist corporate efforts cannot credibly be construed as an exclusive prerogative of stakeholderism.

345. Absent enforcement mechanisms or actual redistribution, statements condemning racism and sexism are hollow. For example, in the wake of George Floyd's murder, corporations rushed to condemn racism, but these condemnations were met with skepticism, as they were not accompanied by institutional changes, much less any changes capable of altering the distribution of power and resources. Tracy Jan, Jena McGregor, Renae Merle & Nitasha Tiku, *As Big Corporations Say "Black Lives Matter," Their Track Records Raise Skepticism*, WASH. POST (June 13, 2020, 5:21 PM), https://www.washingtonpost.com/business/2020/06/13/after-years-marginalizing-black-employees-customers-corporate-america-says-black-lives-matter/ [https://perma.cc/8RXQ-2B7W]. Note also that, given the historical dispossession and exclusion of Black Americans from wealth accumulation, it is difficult to conceive of a meaningful effort to redress inequality that lacks reparations.

346. *See supra* note 263 and accompanying text.

So while we support measures to speak out against racism, we fear the lack of concrete measures would not only leave things as they are, but would represent a missed opportunity.

Below, we explore in more detail the limitations and risks of a stakeholder approach in redressing inequality. Although we focus on economic inequality, we are mindful that systemic injustices and discrimination along lines of race, gender, sexual orientation, and gender identity are inextricably linked, and indeed determine the contours of economic inequality.

C. A Stakeholder Approach Would Hardly Address Inequality and Economic Stagnation.

In Section III.B, we surveyed the most accredited contributors for the unexciting economic reality and prospects U.S. households are facing: trade, automation, access to education, market power and concentration, excessive compensation, weak and declining protection from labor market institutions, the deregulation and the vanishing social safety net, and loosening of the tax code in favor of the wealthy.

As the analysis above illustrates, only few causes of inequality and stagnation can be somehow tied to shareholder primacy: concentration, (to some extent) excessive compensation, and (at least from a political pressure and lobbying angle) decline in workers' prerogatives[347] and tax cuts.[348] But even when there is some link, it is doubtful that these contributors to inequality would not have emerged under a different approach. For example, shareholders surely appreciate when their company captures bigger market shares; put another way, they benefit from concentration. But the empire building phenomenon in the midst of the managerialist peak of the 1960s and early 1970s shows that concentration can in fact arise in an era of weak shareholder pressure.[349] Similarly, equity holders expect short-term gains when the labor share shrinks and affects less the bottom line, but employer-employee relations can be just as tense when shareholders are not in the picture. Activist campaigns by workers lamenting unfair pay or practices do occur at non-profit institutions as well;[350] recently, even a high-profile public benefit corporation such as Kickstarter made the waves for resisting a unionization campaign by their workforce.[351] To be sure, workers are not the sole casualties of non-profits: powerful

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347. Andrias, *supra* note 250, at 17 (chronicling that at the urge of employers and the business community, several features of the NLRA were trimmed down by courts and legislators).

348. PHILIPPON, *supra* note 37, at 163 (describing the role of lobbying to obtain fiscal privilege).

349. *See generally* CLAIRE A. HILL, BRIAN J. QUINN & STEVEN DAVIDOFF SOLOMON, MERGERS AND ACQUISITIONS: LAW, THEORY, AND PRACTICE 8–9 (2d ed. 2019) (chronicling the conglomerate era during and thanks to the third merger wave).

350. In the early 2000s, Harvard found itself facing a tense minimum wage campaign, which involved a three-week sit in in front of the President's office. Martin Van Der Werf, *How Much Should Colleges Pay Their Janitors?*, CHRON. HIGHER EDUC. (Aug. 3, 2001), http://www.hcs.harvard.edu/~pslm/livingwage/08_03_che.html (noting that, not just Harvard, but also "[o]ther colleges are paying wages that are below the poverty level, or contracting the work out to companies that pay only the prevailing wage."). Almost twenty years later, the situation is virtually the opposite: "service workers on the payroll of an outside contractor earn the same pay and benefits they would get as direct university employees—including health insurance and pension benefits, paid vacation and child care assistance." Eduardo Porter, *Harvard Is Vaulting Workers into the Middle Class with High Pay. Can Anyone Else Follow Its Lead?*, N.Y. TIMES (Sept. 8, 2018), https://www.nytimes.com/2018/09/08/business/economy/harvard-living-wage.html [https://perma.cc/3BQT-8Y8M] (noting this is the result of a policy passed in 2002 by then President Larry Summers in the aftermath of the living wage campaign).

351. *See* Michael Gold, *Kickstarter Calls Itself Progressive. But About That Union*, N.Y. TIMES (Oct. 15,

non-profit institutions have oftentimes negatively impacted local communities by gentrifying areas and imposing economic duress in the real estate markets where they operate.[352] All this is to say that businesses can and will make winners and losers among their constituencies, irrespective of whether they face shareholder pressure.

Moreover, among the various hypotheses, we noted that corporate law seems to have had an impact mostly on concentration; but even there, other factors more powerful than shareholder primacy have been at work. In fact, managerial power, which conceptually sits opposite to shareholder primacy, seems the stronger contributor to buy-side excess.[353] Besides, lax antitrust enforcement has been a more significant contributor than shareholder primacy.[354]

To show how inadequate stakeholderism's interest in delegating change to corporate boards can be, we run a simple litmus test to establish what a stakeholder-oriented board could do with respect to the challenges brought by each of the causes of stakeholder discontent. Corporate governance in general and stakeholderism in particular can do very little on trade, the dynamics of which are dominated by global market forces and even governmental responses—if unilateral—are for the most part ill-equipped to address the issue, as the U.S.-China trade war can attest.[355] Nor can corporate governance fix the social costs of technology: short of committing not to embrace a new technology (which would raise significant collective action costs as other firms might take advantage of it), very little can be done at the company level. Similarly, responses by single firms to improve access to education are isolated and insufficient answers; at best, corporations can create scholarship programs, but those would change the lives of only the lucky ones who obtain them. Undoubtedly, to structurally reform the educational system broader political action outside the corporate realm is necessary.

As to concentration and the rise of superstar firms, the question is whether, under a stakeholderist approach, corporations would realistically refrain from reaching greater size and scope, in order to protect their customers from future exploitation and their employees from being sucked into a monopsony labor market. That would be wishful thinking. Considering that directors' monetary incentives and appointment mechanics would not change, it would be a stretch, if not outright naïve, to believe that boards would

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2019), https://www.nytimes.com/2019/10/15/nyregion/kickstarter-union-employees-fired.html [https://perma.cc/N598-YUT7] ("Kickstarter pushed back against the [attempt to form a] union, and as the effort dragged on, two of the organizers were dismissed last month in what they say was retaliation.").

352. Mariah Stewart, *Private Universities Bring New Growth, but Gentrification Can Sideline Existing Residents*, INSIGHT INTO DIVERSITY (Aug. 7, 2019), https://www.insightintodiversity.com/private-universities-bring-new-growth-but-gentrification-can-sideline-existing-residents/ [https://perma.cc/G6VH-ZPNF].

353. *See* Randall Morck, Andrei Shleifer & Robert W. Vishny, *Do Managerial Objectives Drive Bad Acquisitions?*, 45 J. FIN. 31, 47 (1990) (showing that bidder shareholders lose when their firm diversifies); Richard Roll, *The Hubris Hypothesis of Corporate Takeovers*, 59 J. BUS. 197, 212–14 (1986) (noting that decision-makers at bidder level tend to overestimate the value of targets at the expense of bidder shareholders); Bernard. S. Black, *Bidder Overpayment in Takeovers*, 41 STAN. L. REV. 597, 623–29 (1989) (explaining that managerial optimism, error, winner's curse and agency costs often push a bidder to overpay at its stockholders' expense); James A. Fanto, *Braking the Merger Momentum: Reforming Corporate Law Governing Mega-Mergers*, 49 BUFF. L. REV. 249, 287 (2001) (noting that peer pressure motivates CEOs to engage in acquisitions).

354. *See generally supra* Section III.B.4 (analyzing concentration and market power in relation to the reason behind inequality and economic stagnation).

355. *See* David Fickling, *Trump's Dud of a Deal Shows the Futility of Trade War*, BLOOMBERG (Dec. 12, 2019, 9:34 PM), https://www.bloomberg.com/opinion/articles/2019-12-13/trump-s-u-s-china-deal-wasn-t-worth-a-trade-war [https://perma.cc/3MFJ-NDNC] (covering the U.S.-China trade war and critiquing the U.S. position throughout).

refrain from capturing larger market power. Again, even those who would otherwise commit to the stakeholderist view would come to realize they face a collective action problem, for other firms might hold-out and continue to chase larger market shares.[356]

Notice incidentally that a corporation could easily make the case that its empire-building would benefit existing employees if, for instance, a larger firm could create more growth opportunities for the workforce (think of Facebook before purchasing Instagram). And it would not be a stretch to hypothesize that both buy-side and sell-side boards could take the view that pursuing greater market power is in line with fostering the interests of the best and the brightest in their own workforce. They can claim, for example, that if they do not combine, they would succumb to the consolidation process that is taking place in their industry. Therefore, fiduciary duties would not help. This is a typical problem raised by the issue of multiple masters,[357] along with the lack of specific mandates of stakeholder theories:[358] which constituency to give priority to when their interests collide, and what are directors precisely supposed to do to protect a weaker constituency?

A similar dynamic can be observed with respect to excessive compensation. Modern-day boards awarded exorbitant compensation packages notwithstanding the fact that they theoretically had to cater to an antagonistic class of stakeholders—that is, shareholders.[359] How could a stakeholder-minded board give us a different outcome, if all we were to change are simply fiduciary duties? This shows one of the main weaknesses of a stakeholder approach: we deem corporations to be culprits of the unfair results of today's economy, yet we ask corporations themselves to solve the issues they created. For instance, if society at large is not benefiting from excessive pay at, say, financial firms, why should we expect these firms to bother addressing interests of people in the community that are not their employees?

As to workers' rights and protections, there is literature suggesting that a narrow focus on shareholder wealth would result in layoffs, harsher working conditions, and so forth.[360] The typical story is that around the end of the 1970s and beginning of the 1980s, under pressure from corporate raiders, corporations moved to a new normal in which they could distance themselves from previously agreed upon union deals, as well as not honor the long-term investments made by their workforce. However, the crucial factor to consider here is that all the actions corporations took that harmed workers were made possible by the constant decline of protections for the labor force, both legal and institutional.[361] Once

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356. *See* Summers, *supra* note 27 (arguing that "companies that practice stakeholder capitalism must be protected by law from excessively ruthless competition from companies run only in shareholders' interests").

357. *See supra* Section III.C.ii (detailing a critique of the stakeholder approach that it creates confusion as to whom principal should prioritize).

358. *See supra* Section III.C (outlining the multiple critiques of the stakeholder approach).

359. According to a view in the executive compensation literature, it is perfectly rational for shareholders to handsomely remunerate talented executives. *See supra* note 233. This does not change the practical observation that we have experienced a harsh fight on compensation between investors and managers over the last two decades. *See* HARVARD L. SCH. F. ON CORP. GOVERNANCE, https://corpgov.law.harvard.edu/tag/compensation/ [https://perma.cc/MD2F-9GTF] (detailing an abundant back and forth between management and shareholders supporters on executive pay).

360. Shleifer & Summers, *supra* note 187, at 50–51. *But see* Mark J. Roe, *Stock Market Short-Termism's Impact* (European Corporate Governance Institute (ECGI), L. Working Paper No. 426/2018, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3171090 [https://perma.cc/X3CM-YLUB] (critiquing this view).

361. *See supra* Section III.B.6 (detailing the stakeholder approach's potential relation to weak and declining protection from labor market institutions).

those got dismantled over the years, it was only a matter of time before the "breach of implicit contracts"[362] was to happen: if it were not for the pressure of hostile takeovers, it would have been for the need to restructure later on. Broadening fiduciary duties would not significantly improve the situation, as the legacy of constituency statutes can attest.[363]

Finally, although shareholders benefit from deregulation and lower taxes, none of these changes are directly attributable to the investor world. They are a product of economic neo-liberalism in politics and can only be reversed by politics: corporations alone, no matter how woke, lack power to expand the social safety net and are unlikely to prefer a more regulated environment and/or higher taxes. In the absence of top-down legislation or regulation, these are spheres in which corporate actions are not even symbolic: at best, they are a big nothing, and at worst, they go in the opposite direction.

IV. THE RISKS OF A STAKEHOLDER APPROACH AND A PROPOSED ALTERNATIVE

This article has thus far shown that a stakeholder approach would likely be ineffective in protecting weaker constituencies. In this Part IV, we illustrate that stakeholderism is not only ineffective but could also be detrimental to attain policies that would be more valuable to corporate constituencies and society at large. We then propose an alternative approach: academics and policymakers should eschew proposals that delegate the task of protecting weaker constituents to managers and directors and instead should focus on reforms likely to meaningfully shift power and resources to weaker constituents.

A. A Stakeholder Approach Is Likely Detrimental to Redressing Inequality.

To our perplexities on the effectiveness of a stakeholder approach, one might counter that even if broadening fiduciary duties cannot be of help with the economic difficulties hampering weaker constituencies, it might still be a discrete contribution in the solution of an admittedly wide set of issues. Why should such an approach be dismissed altogether? In other words, can't a stakeholder approach be simply innocuous but not dangerous?[364]

Of course, one of the main risks of a stakeholder approach, as pointed out by many scholars, is that we would abandon a well-tested way for value creation at firms for a hazier environment governing director liability. In particular, the risk is that the switch might take us back to managerialism and empire building, where shareholder primacy helped spur growth and efficiency at corporations.[365] But in any event, we do not believe that this

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362. Shleifer & Summers, *supra* note 187, at 34.

363. Note that corporations, including signatories to the BRT Statement of Purpose, regularly engage in anti-worker activities. *See infra* notes 373–388 and accompanying text (detailing examples of these employers using tactics to weaken unions). Similarly, profitable tech companies like Google and Facebook are notoriously disrespectful of their customers' privacy. *See generally* SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER (2019) (detailing the social, political, business, personal, and technological meaning of "surveillance capitalism").

364. To be sure, some could just take issue with the fact that stakeholderism is innocuous—why attempt policy changes in the absence of expected benefits from the new course? But because some commentators might still contend that a structural shake in a corporation's decision-making process would still be worth a try to improve a deteriorating capitalist system (whether as a first-step policy or just as a symbolic one), we lay out why we believe a stakeholder reform would in fact be detrimental.

365. Rock, *supra* note 40, at 30 ("The private lawyer's worry, of course, is that using private law to solve

concern, which is what worries proponents of shareholder primacy the most,[366] is the biggest problem with the stakeholder approach.

In our view, stakeholderism is troubling for two main reasons, one overt and the other more subtle. First, lobbying by corporations and the ensuing regulatory capture—two highly troubling features of modern-day capitalism[367]—would likely increase and pose a greater threat to economic prosperity than under the current scenario. This can be considered the "offensive" feature of stakeholderism that the BRT is pursuing. Second, a subtler and possibly bigger problem of the stakeholder approach derives from the vast expenditure of political capital necessary to pass it, potentially preempting direct regulation that would be more likely to shift power and resources to weaker constituents. This can be considered the "defensive" feature that the BRT is seeking by endorsing this approach.

1. The Offensive Feature of a Stakeholder Approach: The Weaker Constituencies Card Increases Lobbying Power.

With respect to the first concern, our projection is that corporations would gain formidable political capital if they could credibly claim that their lobbying efforts were made to foster interests of a wider sphere of stakeholders and not just shareholders.

Several indicators suggest this concern is well-founded. To begin, one can simply look at the previous season of stakeholder-oriented policy making: the experience with antitakeover legislation in the 1980s. The playbook of public corporations was to lobby state legislatures to pass antitakeover statutes, arguing that weaker constituencies located in the state (workers, first and foremost, but also suppliers and the communities around a corporation's headquarters) were the typical casualties of hostile takeovers and needed protection.[368] To cement this concern, consider the work of political scientist Alexander Hertel-Fernandez, who has detected a recurring pattern of employers actively mobilizing their workers to lobby for causes (business, political, or otherwise) the former care about: workers support employers not only with logistical help but also by providing a crucial input in persuading public opinion.[369] Indeed, Hertel-Fernandez shows how employer mobilization can actually shape congressional work, as legislative staffers find it helpful

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social problems will destroy the value generating potential of private law while failing to solve the social problems, leaving all of us worse off."). *See also* Roe, *supra* note 90; Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 879 (2013). To be clear, we do not overrate fiduciary duties, nor do we consider the risk of legal liability from shareholders' suits a crucial driver of directors' conduct in corporations. In fact, directors' incentives would not dramatically change with a stakeholder approach that would still leave directors' appointment rights intact, thus making shareholders "more equal" than other stakeholders. *See* Fried, *supra* note 28. So, even if this policy change were to become effective, we would likely not observe anything seismic. Still, we cannot help but fear that in some situations subpar directors and managers would try to justify actions of dubious value by adopting some generic, omnibus resolution as a catch-all to safeguard the process and to exculpate themselves from criticism and liability.

366. *See e.g.*, Gilson & Gordon, *supra* note 365.

367. *See generally* Faccio & Zingales, *supra* note 11; Gilens & Page, *supra* note 37; PHILIPPON, *supra* note 37, at 153–75 (reporting data showing that "large firms play an even more outsized role in the political system than they do in the economy itself." *Id.* at 168); HERTEL-FERNANDEZ, *supra* note 38, at 157–87. *See also* John C. Coates IV, *Corporate Speech and the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223 (2015).

368. *See supra* note 103 and accompanying text.

369. *See generally* HERTEL-FERNANDEZ, *supra* note 38 (noting that employers are increasingly recruiting their workers—sometimes in coercive ways—to help them run their causes).

"especially when it involves having employees express their support for or opposition to particular policy proposals."[370] The trouble the SEC got itself into with the ghost letter fiasco in connection with the proposed reform of proxy advisors confirms that concerted lobbying work does rely on average Joes and Janes to score political points (except that in this case they did not even exist).[371]

Second, and even more troublingly, corporations have not been championing the causes of their weaker constituencies—quite the contrary.[372] In 41.5% of all union election campaigns, U.S. employers are charged with deploying illegal tactics.[373] Moreover, U.S. corporations spend massive amounts to prevent their employees from unionizing; according to Department of Labor reports, employers spend almost $340 million per year on anti-union consulting.[374] Notably, Amazon has fought workers' efforts to unionize.[375] Google has sought to prevent workers from discussing their labor rights with outsiders, hired a consulting firm that specializes in blocking unions, and has allegedly retaliated against four worker activists.[376] Both Uber and Lyft have taken pains to avoid worker unionization[377] (and spent $200 million to pass Proposition 22 in California to deny

370. *Id.* at 164 (describing survey work showing that 49% of congressional staffers find "extremely or very useful" when employees "offer assistance with legislation"). *See generally id.* at 163–72.

371. *See* Jonathan Macey, *Behind the SEC's War on Freedom of Speech*, BLOOMBERG (Mar. 2, 2020, 6:00 AM), https://www.bloomberg.com/amp/opinion/articles/2020-03-02/sec-s-new-rules-undermine-shareholder-rights [https://perma.cc/379R-6RQQ] ("[T]he SEC received ghost-written letters in support of the proposed regulations that were fraudulently represented as letters from ordinary investors. The SEC apparently relied on these fake letters in measuring public support for its proposed regulations and is now said to be investigating this scheme to subvert the agency's rulemaking process.").

372. *See* Eidelson, *supra* note 258 ("One thing that frequently unites U.S. employers of all kinds is fierce opposition toward collective organizing."); Sandeep Vaheesan, *How Antitrust Perpetuates Structural Racism*, THE APPEAL (Sept. 16, 2020), https://theappeal.org/how-antitrust-perpetuates-structural-racism/ (describing how businesses and the federal government itself have used antitrust laws to thwart unionization efforts); Shierholz, *supra* note 274 (mentioning that the decline of collective bargaining is the direct result of employers' anti-union activities).

373. Celine McNicholas, Margaret Poydock, Julia Wolfe, Ben Zipperer, Gordon Lafer & Lola Loustaunau, *Unlawful: U.S. Employers Are Charged with Violating Federal Law in 41.5% of All Union Election Campaigns*, ECON. POL'Y INST. (Dec. 11, 2019), https://www.epi.org/publication/unlawful-employer-opposition-to-union-election-campaigns/ [https://perma.cc/U6GD-WMF5].

374. *Id.* at n.14 ("Estimate based on . . . analysis of LM-20 and LM-21 reports filed with the U.S. Department of Labor Office of Labor-Management Standards between 2014 and 2018 and the findings of a 2011 DOL report on underreporting by consultants.").

375. Katie Schoolov, *How Amazon Is Fighting Back Against Workers' Increasing Efforts to Unionize*, CNBC (Aug. 22, 2019, 1:34 PM), https://www.cnbc.com/2019/08/22/how-amazon-is-fighting-back-against-workers-efforts-to-unionize.html [https://perma.cc/7VSJ-M63S].

376. Noam Scheiber & Kate Conger, *The Great Google Revolt*, N.Y. TIMES MAG. (Feb. 18, 2020), https://www.nytimes.com/interactive/2020/02/18/magazine/google-revolt.html [https://perma.cc/P2FP-2W5Z] (reporting that Google "gradually scaled back opportunities for employees to grill their bosses and imposed a set of workplace guidelines that forbid 'a raging debate over politics or the latest news story'"). *See also* Noam Scheiber & Daisuke Wakabayashi, *Google Hires Firm Known for Anti-Union Efforts*, N.Y. TIMES (Nov. 20, 2019), https://www.nytimes.com/2019/11/20/technology/Google-union-consultant.html [https://perma.cc/R8GM-WL2H].

377. Matthew Debord, *Uber and Lyft Are Trying to Make an End-Run Around Unionization*, BUS. INSIDER (June 14, 2019, 5:35 PM), https://www.businessinsider.com/uber-and-lyft-opposing-driver-unionization-california-2019-6 [https://perma.cc/2BNV-LT8K].

employee status to their drivers).[378] This phenomenon has been particularly worrisome during the Trump era, with the NLRB systematically siding with employers (and employers taking advantage of the situation).[379] One study shows that businesses fight harder against unions when Republicans are in charge of the NLRB, as evidenced by "a suspiciously high number of close union losses, suggesting employers can fight harder without being sanctioned[,]" which explains a higher firing rate of pro-union workers.[380] The aftermath of the COVID-19 pandemic offers yet more proof that, despite the pro-stakeholder posturing, many signatories of the BRT's Statement have continued to put profit over the needs of employees and others[381]—including refusal to address the safety needs of employees,[382] or even firing employees who publicly criticized the treatment of co-workers at risk of contagion.[383] In fact, according to reports on the press, several American

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378. Kate Conger, *Uber and Lyft Drivers in California Will Remain Contractors*, N.Y. TIMES (Nov. 4, 2020), https://www.nytimes.com/2020/11/04/technology/california-uber-lyft-prop-22.html (describing the efforts and unprecedented expenditure, north of $200 million, by the likes of Uber, Lyft, and DoorDash to get Proposition 22 approved in California, a ballot measure that, contrary to prior state law, will allow gig economy companies to continue treating drivers as independent contractors and not employees).

379. Emily Bazelon, *Why Are Workers Struggling? Because Labor Law Is Broken*, N.Y. TIMES MAG. (Feb. 19, 2020), https://www.nytimes.com/interactive/2020/02/19/magazine/labor-law-unions.html [https://perma.cc/V7V9-9CFW] (describing the many ways in which Trump's NLRB has hamstrung union activism).

380. Naidu, *supra* note 112, at 6 (citing Brigham Frandsen, *The Surprising Impacts of Unionization on Establishments: Accounting for Selection in Close Union Representation Elections* (Working Paper, 2013), https://pdfs.semanticscholar.org/c6fc/3a97c48c87827ca87e4512051d4be07e64bb.pdf [https://perma.cc/NZX9-N55B]).

381. Peter Whoriskey, *U.S. Companies Cut Thousands of Workers While Continuing to Reward Shareholders During Pandemic*, WASH. POST (May 5, 2020, 9:51 AM), https://www.washingtonpost.com/business/2020/05/05/dividends-layoffs-coronavirus/ [https://perma.cc/Q2WG-UXZG] (mentioning that five companies paid a combined $700 million to shareholders while cutting jobs and closing plants); Jaewon Kang & Sharon Terlep, *Retailers Phase out Coronavirus Hazard Pay for Essential Workers*, WALL ST. J. (May 19, 2020, 3:14 PM), https://www.wsj.com/articles/retailers-phase-out-coronavirus-hazard-pay-for-essential-workers-11589915679 [https://perma.cc/9NMU-9GM3].

382. Josh Eidelson, *McDonald's Workers Sue Claiming Virus Measures Falling Short*, BLOOMBERG (May 19, 2020, 11:40 AM), https://www.bloomberg.com/news/articles/2020-05-19/mcdonald-s-workers-sue-claiming-virus-measures-falling-short?sref=DIvsyJQr [https://perma.cc/JB7S-277T].

383. For example, the *New York Times* interviewed FedEx delivery drivers who worried about losing their jobs if they called in sick. One package handler in Nashville requested a day off after experiencing a sore throat, stomach pains and a fever, and his supervisor requested his presence at work. When he took the day off anyway, his absence was recorded as "unexcused" and he received a demerit. Rachel Abrams & Jessica Silver-Greenberg, *'Terrified' Package Delivery Employees Are Going to Work Sick*, N.Y. TIMES (Mar. 21, 2020), https://www.nytimes.com/2020/03/21/business/coronavirus-ups-fedex-xpo-workers.html [https://perma.cc/BPS6-57VY]. *See also* Anna Nicolaou & Alex Barker, *Disney Stops Paying 100,000 Workers to Save $500m a Month*, FIN. TIMES (Apr. 21, 2020), https://www.ft.com/content/db574838-0f40-41ce-9bcd-75039f8cb288 [https://perma.cc/JE35-4SUB] (describing how Disney suspended additional payments to its employees during COVID-19). Amazon fired two employees who publicly criticized its treatment of warehouse workers. Jay Greene, *Amazon Fires Two Tech Workers Who Criticized the Company's Warehouse Workplace Conditions*, WASH. POST (Apr. 14, 2020, 5:59 PM), https://www.washingtonpost.com/technology/2020/04/13/amazon-workers-fired/ [https://perma.cc/9KN8-8R5S]. Whole Foods (owned by Amazon) asked employees to donate unused sick leave to co-workers infected with COVID-19. Gillian Tett, Billy Nauman, Patrick Temple-West, Anna Gross, Tamami Shimizuishi & Andrew Edgecliffe-Johnson, *Coronavirus Poses 'Acid Test' for Conscious Capitalism; Climate Pressure Continues,* FIN. TIMES (Mar. 18, 2020), https://www.ft.com/content/b0620412-846b-4dcb-9451-d0887c3d8aba [https://perma.cc/8XRX-RFBA].

employers in various industries "have told workers not to share information about COVID-19 cases or even raise concerns about the virus, or have retaliated against workers for doing those things."[384]

One does not need to be too cynical to anticipate that, in a broader stakeholder environment, efforts to tamper with workers' labor rights would not disappear simply because, by law, directors would have to cater to the interests of employees. More likely, corporations would use the pretext of their broader purpose to claim they know better what is in the best interests of workers and to thus thwart bottom-up initiatives such as unionizing, which would be labeled as too radical and overkill.[385]

Another example that shows how stakeholderism could put other efforts in jeopardy is antitrust. How realistic, especially in light of the ongoing DOJ/Google fight,[386] is it that corporations alone can achieve more effective results in fighting off concentration and anti-competitive behavior than an external independent authority? Can we really expect corporations to cease seeking larger shares of market power because fiduciary duties have been broadened? Deregulation and taxation are even stronger cases in point: firms will resist them, no matter to whom fiduciary duties run. Indeed, the Business Roundtable record on these and many more issues affecting weaker constituencies speaks for itself.[387]

2. The Defensive Feature of a Stakeholder Approach: Stakeholderism Would Occupy Significant Legislative and Regulatory Space.

Concerning the second issue, the defensive feature of a stakeholder approach, the problem is that the approach would *represent* a sharp shift from the past in what is considered a core field of corporate law—yet without actually *being* a real change. It cannot be, because it is not designed to allocate any real power or resources to workers and other weaker constituencies. This is precisely why it is so appealing to corporations and their directors, some of whom openly say as much.[388]

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384. Josh Eidelson, *Covid Gag Rules at U.S. Companies Are Putting Everyone at Risk,* BLOOMBERG (Aug. 27, 2020, 3:00 AM), https://www.bloomberg.com/news/features/2020-08-27/covid-pandemic-u-s-businesses-issue-gag-rules-to-stop-workers-from-talking?sref=DIvsyJQr [https://perma.cc/ZX2X-FZP2] (citing workplace complaints at companies such as Amazon, Cargill, McDonald's, Target, Smithfield Foods, Urban Outfitters, General Electric, and Delta Air Lines, in some cases filed with the NLRB or the Occupational Safety and Health Administration).

385. As noted, constituency statutes are a typical example of how employers can use weaker constituents' interests opportunistically to lobby for legislation that advances a managerial agenda. *See supra* text accompanying note 368.

386. *See supra* note 179.

387. Barry Ritholtz, *Stakeholder Capitalism Will Fail If It's Just Talk*, BLOOMBERG (Aug. 21, 2019, 4:34 PM), https://www.bloomberg.com/opinion/articles/2019-08-21/business-roundtable-shareholder-primacy-shift-judged-by-actions [https://perma.cc/N8R6-CDSD] (noting that "[T]he Roundtable has spent most of the past four decades advocating against the interests of those exact stakeholders[,]" for example: "[i]t fought the rise of labor unions and pro-union legislation; [h]elped to defeat antitrust bills; [p]revented the formation of the Consumer Protection Agency; [o]pposed corporate governance changes to make boards of directors and CEOs more accountable to stockholders; [f[ought proper accounting of stock options given as compensation to executives and insiders; [o]pposed increases in the national minimum wage (it now favors increases); [l]obbied to prevent restrictions on executive compensation; [f]ought legislation that would create cleaner energy and address climate change; [p]ushed for corporate income-tax cuts; [s]upported anti-consumer Supreme Court decisions, including the fiction that corporations are legal people, and that campaign donations equal speech.").

388. *See* Lipton, *supra* note 70 and accompanying text (explaining that The New Paradigm views investors

And yet a stakeholder approach would, to embrace an expression one of us used in previous work, occupy an outsized portion of legislative and regulatory space, which can thwart real reform. [389] Indeed, such an approach would be perceived by policymakers as a new, sweeping regime and thus would not leave much room for other major, and more critical, policy changes.[390] In other words, there is a strong and concrete risk that, after a stakeholder approach becomes law, other initiatives to bolster the protection of weaker constituencies (say, strengthening unions, introducing collective bargaining at the sectoral level, minimum wage, tougher antitrust enforcement with particular focus on labor markets, more balanced system of progressive taxation, and so forth) might be tabled because they would no longer be as pressing, given that directors would be already in charge of looking after all stakeholders' interests. This would mean that more urgent and meaningful reforms for the constituencies that directors are supposed to look after would not see daylight. After all, one of the reasons why it is so hard to quantify the power of lobbying is that lobbyists specialize in killing proposed policy that might hurt their clients.[391]

Therefore, trading more useful reforms for symbolic, yet ineffective stakeholderism would be a mistake. Indeed, the peril of a corporation-centric approach to solving the social issues that corporations raise is that we would end up wasting too much time and effort discussing a corporate governance reform[392] while losing sight of those who need to be protected in the first place. A stakeholder approach could just end up being another experiment in supply-side economics: whilst some of its proponents blame corporations for the very issues affecting our economy, they ultimately delegate to corporations themselves the burden to solve those issues corporations created.

For these reasons, initiatives such as the Business Roundtable's Statement on the Purpose of a Corporation[393] and The New Paradigm advocated by Wachtell Lipton[394] are all telling. Those in whose interest the entire shift is supposed to occur are given no new or stronger powers, let alone ways to enforce the paradigm. Indeed, all "voice" rights would

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and corporations as partners in combatting regulation and legislation: "[C]orporations and investors should band together and resist legislation and regulation that may discourage long-term investment or that presumes that the long term health of society is not aligned with the long-term interests of business."). *See also* Lipton, *supra* note 76 (referencing Ed Garden's quote in the Wall Street Journal).

389. For an analysis and critique of certain regimes for their inherent costliness in terms of regulatory space, see Matteo Gatti, *Upsetting Deals and Reform Loop: Can Companies and M&A Law in Europe Adapt to the Market for Corporate Control?*, 25 COLUM. J. EUR. L. 1, 50 (2019) (discussing the mandatory bid regime in Europe).

390. We are comforted that a parallel paper by Bebchuk and Tallarita has now taken a similar view. *See* Bebchuk & Tallarita, *supra* note 39, at 50–54 (arguing that stakeholderism can be detrimental because (i) it may lead to inaction on important regulatory issues such as environmental regulations and antitrust policy given the expectation that managers and directors will make progress on these issues on their own, (ii) time and resources will be allocated to stakeholderism rather than other policy proposals, and (iii) policymakers may come to share "inaccurate expectations" about stakeholderism and may prefer corporate self-regulation).

391. PHILIPPON, *supra* note 37, at 156–57, 159, 170 (noting that the "firms that have an incentive to lobby are the ones that are most likely to be targeted" and that "[t]he big tech companies beefed up their lobbying efforts precisely when they started to hear complaints about their size and behavior . . . ").

392. On the limits of corporate law scholars primarily looking at reform in the corporate governance field, see *infra* Section IV.B.

393. *See* Business Roundtable, *supra* note 24 (committing to delivering to stakeholders in a non-binding statement of purpose).

394. *See* Lipton et al., *supra* note 18 (arguing that an exclusive focus on short-term shareholder gains is harmful to the broader economy).

be syndicated by and among boards and significant investors. The employees are unsurprisingly absent—the benevolent capitalists get to decide what is good for them. The approach is well in line with charity philosophy: it is for the wealthy and powerful to set the rules, not politics, let alone the community.[395] This recipe is a déjà vu of what happened in the takeover era, whereby boards lobbied state legislatures to pass antitakeover statutes that on paper were enacted to protect weaker constituencies when in fact they were instrumental in isolating the board from the threat of hostile bidders.[396] Unsurprisingly, one of the main tenets of proposals such as The New Paradigm is to avoid a legislative solution and encourage private ordering.[397] To be sure, private ordering might well be the right approach when we deal with the typical directors vs. shareholders governance battles (because it allows companies to each select their level of openness to capital and takeover markets).[398] But when we deal with broader issues involving other constituencies, leaving only boards and shareholders to set the rules will inevitably produce an output skewed towards their interests—not the other constituencies'—especially when it comes to distributive issues.

The COVID-19 pandemic exacerbates this concern. As many businesses cannot survive without government aid, some of them had to accept conditions to bailout money, primarily concerning stock buy-backs and dividend payouts.[399] We speculate that, at some point, businesses might find it convenient to simply offer, in exchange for further government relief, formal adoption of a stakeholder approach in their charter. Conceivably, corporations could even do the posturing of lobbying legislatures to have it passed on a statutory basis. This would enable them to preempt more onerous restrictions while proclaiming their care for workers and other weaker constituencies while in fact merely preserving the status quo—especially if corporations somehow manage to keep enforcement mechanisms at bay.

B. Redressing Inequality: An Alternative Approach

Although we doubt that a stakeholder approach will be effective in redressing inequality, and we fear it is inimical to the interests of stakeholders, particularly weaker constituents, we are concerned about protecting the same constituents that stakeholderists wish to protect. We have shown, however, that the reasons that employees, consumers, and other weaker constituents have lost power and resources do not likely stem from any corporate governance changes, but rather from problems such as increased market concentration, weakening of labor market institutions, and regressive taxation.[400] We have also shown that there are risks inherent in any proposal that delegates decision-making to corporate executives. We believe that a better approach is to evaluate and develop

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395. *See generally* ROB REICH, JUST GIVING: WHY PHILANTHROPY IS FAILING DEMOCRACY AND HOW IT CAN DO BETTER 7 (2018) ("[B]ig philanthropy is often an unaccountable, non-transparent, donor-directed, and perpetual exercise of power.").

396. *See supra* note 103 and accompanying text; *see also supra* note 368.

397. *See supra* notes 70, 76 and accompanying text.

398. The issue is hotly debated and there is no point of addressing it here. *See generally* Michael Klausner, *The "Corporate Contract" Today*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 84 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018).

399. Victor Reklaitis, *Coronavirus Stimulus Package Set to Ban Stock Buybacks for Companies That Get Aid*, MARKETWATCH (Mar. 25, 2020, 2:34 PM), https://www.marketwatch.com/story/coronavirus-stimulus-package-set-to-ban-stock-buybacks-for-companies-that-get-aid-2020-03-25 [https://perma.cc/4N2N-JMMT].

400. *See generally supra* Section III.B.

proposals according to the following methodology: First, is the proposal capable of shifting power and resources to weaker constituents? Second, are there proposals for direct regulatory reform that are likely to be more effective in accomplishing this goal?

With respect to the first point of analysis, it is crucial to note that any proposal that does not include mandates or enforcement mechanisms is unlikely to shift power and resources to weaker constituents. As some authors have recently shown, managers and directors subject to a constituency statute who have had the express opportunity to make decisions in the interests of stakeholders have declined to do so; for example, declining to insist on stakeholder protections as a condition for sale or merger.[401] For this reason, we do not think all corporate governance proposals must be dismissed out of hand—this just confirms that broadening the notion of corporate purpose alone does nothing. It may be that corporate governance in general has the potential to be a viable arena to intervene for protecting weaker constituencies. Other corporate governance reform[402] proposals are currently on the table, in parallel to corporate purpose and stakeholderism.[403] Such reforms, which to be sure the BRT opposes,[404] include areas as varied as: (i) reconsidering the regulatory framework for stock buybacks;[405] (ii) enhancing employee stock ownership (via various types of incentives and structures)[406] and its clout (by allowing pension funds to support labor causes);[407] and (iii) codetermination, that is, workers' participation on the

401. Bebchuk & Tallarita, *supra* note 39, at 46–48; Bebchuk et al., *supra* note 63. To be sure, a stakeholderist might concede that constituency statutes fell short. A stakeholderist might counter that it is precisely because of such statutes' inability to protect constituencies that there are now calls for a bolstered stakeholder approach. Also, more generally, if compared to Delaware, the jurisdictions in which the authors have tested director behavior are not traditionally prone to judicial second-guessing of director actions in M&A transactions. Hence, lack of loyalty to weaker constituencies might have less to do with the poor bite of the constituency statute in and of itself than with a generally lax legal and judicial environment in which a sale process is normally analyzed.

402. Note that some corporate governance initiatives are taking place without necessitating a reform at all. For instance, ESG-minded market pressures and related soft-law type initiatives can represent a positive influx in the corporate governance discourse while avoiding the perils attendant to stakeholderism. Indeed, the influence of these initiatives is not the product of any new legislation or regulation, so no political capital is being spent to achieve its underlying goals. Rather the adoption of ESG proposals depends on how market dynamics pan out. A growing demand for certain corporate actions relating to environmental, social, and governance issues has arisen in the market, and boards have decided to respond to such demand by embracing some of the underlying campaigns—sometimes because they represent sound ideas that benefit both brand reputation and thus potentially long-term value, some other times to simply avoid a PR backlash. Either way, whether an action is undertaken or not will be the result of the attrition of market forces, which depend on the relative strength of corporations and its vocal constituents over certain topics that at any given point in time society deems sensitive. *See also supra* note 44 and accompanying text.

403. *See* Accountable Capitalism Act, *supra* note 20 (proposing changes to corporate statutory structure). *See also* Corporate Accountability and Democracy Plan, *supra* note 21 (describing Sanders' proposal to increase employee ownership in corporations).

404. Business Roundtable, *supra* note 24 ("We have not called for, and do not support, radical changes to corporate governance structures, which could have serious unintended consequences.").

405. For a critical account, see Jesse Fried & Charles C.Y. Yang, *Buyback Critics Are Not Letting the COVID-19 Crisis Go to Waste*, Harv. L. Sch. F. on Corp. Governance (Apr. 2, 2020), https://corpgov.law.harvard.edu/2020/04/02/buyback-critics-are-not-letting-the-covid-19-crisis-go-to-waste/ [https://perma.cc/6B68-9TMU].

406. *See* Hayden & Bodie, *supra* note 112, at 7–12 (surveying the employee ownership and governance models historically or currently present in the U.S.).

407. *See generally* DAVID WEBBER, THE RISE OF THE WORKING-CLASS SHAREHOLDER (2018). To be sure, the Trump administration took a position that is in frontal opposition to pension funds' support of labor causes.

board.[408] While such proposals warrant a separate discussion and we do not intend at the moment to either endorse or reject any of them, we just care to mention that codetermination appears to be the most far reaching, yet the one with more potential for workers, as it allows this constituency to have a say within the structure.[409]

Still, even if we identify a corporate governance proposal that may be capable of protecting weaker constituents, this alone is not sufficient to warrant the devotion of time and resources to such proposal. We should also first ensure that embracing such a proposal is in fact the most effective means of accomplishing the goal of protecting weaker constituencies; that is, we should consider whether to instead promote proposals in other fields that may more directly and effectively address economic inequality. We have shown here that the primary drivers of inequality fall outside the corporate governance realm. Therefore, we should question whether corporate governance solutions are the most pressing if our concern is protecting weaker constituencies.

We believe that a sounder approach for those engaging in the task of finding a better, more sustainable set of corporate governance arrangements should be to actually embrace debates in other fields, such as labor, antitrust, and tax laws.[410] Indeed, the whole

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U.S. DEP'T OF LAB., U.S. DEPARTMENT OF LABOR PROPOSES RULE ON EMPLOYEE BENEFIT PLAN PROXY VOTING AND EXERCISES OF OTHER SHAREHOLDER RIGHTS (Aug. 31, 2020), https://www.dol.gov/newsroom/releases/ebsa/ebsa20200831 [https://perma.cc/8SLR-DLRF] (proposing a rule amending the Department's longstanding "investment duties" regulation and providing, among other things, that before casting votes fiduciaries must first determine the economic impact of their votes, with the aim of "giving fiduciaries clear directions to refrain from spending workers' retirement savings to research and vote on matters that are not expected to have an economic impact on the plan").

408. Clearly, the list of initiatives to protect weak constituencies in the corporate governance front is much longer and could include restrictions on takeovers and on short-termism generated by activists. But these are older, quite saturated, and ultimately uneventful policy diatribes. Indeed, neither have they brought meaningful change (employees experienced no improvements after actual policies to thwart takeovers were passed in the 1980s: *see supra* note 63 and accompanying text), nor does conclusive evidence emerge showing that in the aggregate activism is bad for workers; Roe, *supra* note 360, at 109–13.

409. Indeed, at a minimum, codetermination takes care, or reduces the impact of, important flaws of the stakeholder approach, such as the incentive problem and awarding too much discretion to directors. As to the former, while under a pure stakeholderist approach, directors would still be appointed exclusively by shareholders, codetermination would require that workers appoint a portion of directors. As to the excessive discretion awarded by stakeholder theory, it is one thing to have "too many masters" and thus none, another thing to have a board composed of members who can actually mediate because they are appointed by the labor force. Of course, the effectiveness of this mediation would depend on the actual split between equity and labor appointees. *See* Katharina Pistor, *Codetermination: A Sociopolitical Model with Governance Externalities*, *in* EMPLOYEES AND CORPORATE GOVERNANCE 163, 175 (Margaret M. Blair & Mark J. Roe eds., 1999) (describing the German model and showing how, in case of an impasse, the chairperson of the supervisory board is elected by the shareholder bench and that effectively gives shareholders greater power because the chair can break a tie vote). We note that there is no reliable domestic data to either back or dismiss such an approach, because this governance form is virtually untested in the U.S. It bears acknowledging that arrangement has worked quite well in other capitalist systems, Germany first and foremost, although those systems have different industrial relations and societal bonds—importantly, they have a class of workers' representatives who have been doing this for quite a while. Both Senators Sanders and Warren set forth codetermination proposals during their presidential runs. *See supra* note 22 (explaining that one of the primary purposes of a corporation is to serve the stakeholders). For a recent study endorsing the codetermination model for the U.S., see generally Hayden & Bodie, *supra* note 112 (mentioning that "[e]ven supporters of stakeholder governance—whose vision of the corporation involves paying attention to the fortunes of all corporate constituents—have not paid it too much attention." *Id.* at 4.).

410. Bhagat & Hubbard, *supra* note 90, at 15 ("There are . . . instances in which direct policy action is required to alter shareholder value maximization. Examples include antitrust laws to limit exploitation of product

discussion on stakeholderism suffers from compartmentalization a great deal. With very few exceptions, experts have looked for solutions just in their field: therefore, the policies they propose and criticize are inherently constrained by the scope of the underlying analysis. Frankly, we cannot help but think the reason corporate law scholars primarily look at reform in the corporate governance field is because this is their line of expertise. While that is understandable after all, it also represents a major limit of the approach, because we are implicitly admitting we have less of a definite view on the wider picture affecting the weaker constituencies, yet we seek to use the very tools of our trade to fix problems afflicting society. This is shown in the stakeholder approach itself, in which its proponents seek to protect weaker constituencies in a vacuum: that is, without any actual guidance as to how a stakeholder-minded board should address hot topics such as unionization efforts, lay-off policy, collective bargaining, the right to strike, pay policy for lowest and highest earners, concentration in product and labor markets, lobbying activities, and so forth. This is extremely risky because corporations surely have views on such topics that, when put into action, do penalize weaker constituencies. Again, these are some of many policy discussions that do not take place in corporate law circles, but somehow stakeholderists consider it an improvement of the system if we just give carte blanche to executives, without realizing the risk of losing control of these issues to their corporatist agenda.

Instead, in consideration of the drivers of inequality analyzed in Part III, we believe there is little choice but to depart from simply looking at traditional corporate governance solutions and identifying more effective tools to address inequality. As many of the drivers of inequality have occurred outside of corporate governance, cross-fertilization and interdisciplinary work are necessary to develop better strategies for addressing inequality, especially with reforms that best allocate resources and political capital.[411]

V. CONCLUSION

With corporate profits soaring and workers and others left out of the gains, it is tempting to pin the blame on shareholder primacy for the treatment of weaker constituencies—and thus to turn to a stakeholder approach for solutions. But we have seen that the drivers of inequality, a key proxy for the welfare of such constituencies, are myriad, and few are directly related to corporate purpose and fiduciary duties. Those that do seem to be related—such as concentration and executive compensation—are more closely linked to different incentives affecting managerial conduct. Achieving regulatory and legislative change requires tremendous work and political capital, and if we are serious about redressing inequality, we cannot afford to direct these resources to measures unlikely to reallocate power to weaker constituencies.

This is not to say that corporate law and governance have no role to play,[412] but that any proposal with an eye toward protecting weaker constituencies must, at a minimum,

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market power, anti-monopsony rules to enhance competition for employees, and corporate tax policy to affect levels of corporate profitability, location decisions, wages paid to workers or incentives to invest. These explicit policies address social objectives that would not, in some cases, be achievable by individual firms and would not otherwise receive the same level of attention in an unconstrained long-term shareholder value maximization by the board of directors.").

411. This is a project that we undertake in our companion paper. *See* Gatti & Ondersma, *supra* note 36.

412. *See supra* notes 402–409 and accompanying text (describing the purposes of corporation law and governance).

include meaningful rights and enforcement mechanisms for them. Simply encouraging, or even requiring, managers and directors to look out for the interests of all stakeholders may do little more than give cover for whatever managers wish to pursue. Further, even when we identify a corporate governance proposal that does have potential to boost weaker constituencies, we think direct regulation in other fields may be a more effective means of reaching the goal.

These considerations are particularly important in light of the tough choices policymakers will be making to mitigate the devastating effects of COVID-19 on the economy. Some businesses have accepted conditions for receiving bailout money, primarily with respect to stock buy-backs and dividend payouts. It is plausible that, to obtain further relief, businesses might find it convenient to adopt a stakeholder approach in their charter. This would preempt more onerous restrictions while preserving the status quo.

As many of the drivers of inequality affecting weaker constituencies have occurred outside of corporate governance, we believe there is little choice but to depart from simply looking at traditional corporate governance solutions and identifying more effective tools to protect weaker constituencies—something which will require greater collaboration across fields and disciplines,[413] as well as a recognition of the role systemic racism plays in entrenching inequality.[414]

That corporations should better care for the needs of workers, consumers, and communities is an understandable and even laudable aspiration. But relying on managers and directors to effectively carry this out is a perilous bet. Tackling inequality will require careful research, innovative ideas, and courage. Corporate law scholars will be part of this work, but it is preferable if we do not do it alone.

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413. Gatti & Ondersma, *supra* note 36.

414. As discussed above, while we welcome corporations' recognition of systemic racism, this recognition is insufficient, and could be counterproductive, absent a meaningful redistribution of power and resources. *See* note 344 and accompanying text.