THE PROMISE OF STAKEHOLDER ADVISORY COUNCILS

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"Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?"

— Baron Thurlow, Lord Chancellor of England[1]

I. INTRODUCTION

Large public corporations have made tremendous contributions to our society. We benefit from their continuing innovations in the products and services that touch our lives many times each day. And they furnish gainful employment to large numbers of people.[2] When run honestly and in a manner sensitive to the concerns of their customers and the public at large, they have been a huge asset to our common life.[3]

Over the long term, these companies have advanced the standard of living for a huge number of Americans and others around the globe.[4] Yet as American firms have continued to be profitable during the last thirty years, the lion's share of their income has gone to the wealthier strata of our society.[5] As Democratic presidential candidate Michael Bloomberg, a multi-

1. John Coffee, *No Soul to be Damned, No Body to Kicked*, 79 MICH. L. REV. 386, 386 (1981) (quoting the Lord Chancellor of England).

2. In 2018, Walmart, the largest company in the world by revenue had 2.3 million global employees. Michael Klazema, *Top 10 Largest Employers in the USA,* BACKGROUNDCHECKS.COM, Nov. 21, 2018, https://www.backgroundchecks.com/community/Post/5836/Top-10-Largest-Employers-in-the-USA [https://perma.cc/96F6-N4GC]. As of 2013, 1.3 million Walmart employees worked in the U.S. And each of America's 10 largest employers has more than 300,000 workers. Some big retailers and fast-food chains like Target and McDonald's, however, hire a large number of workers with low skills, pay them little and offer them limited career opportunities. Several of those companies have reputations for being unfriendly to unions. Other firms, however, like IBM and Hewlett-Packard that offer a wide range of sophisticated products have high-skilled workers who are decently compensated. *See* Alexander E.M. Hess, *The 10 Largest Employers in America,* USA TODAY (Aug. 22, 2013) https://www.usatoday.com/story/money/business/2013/08/22/ten-largest-employers/2680249/ [https://perma.cc/N7PT-VB7W] (discussing employment statistics and company data of the ten largest companies in the United States).

3. Among the recent books written about the history of American business are ALAN GREENSPAN & ADRIAN WOOLRIDGE, CAPITALISM IN AMERICA (2019); ROBERT J. GORDON, THE RISE AND FALL OF AMERICAN GROWTH (2017); MICHAEL LIND, LAND OF PROMISE: AN ECONOMIC HISTORY OF THE UNITED STATES (2013); and JOHN STEELE GORDON, AN EMPIRE OF WEALTH (2005).

4. During the last 40 years, the income of the bottom half of the world's populations has doubled, and during the last three decades, the number of those living on less than $1.90 per day—the World Bank's threshold for extreme poverty—has dropped by more than half, from nearly 2 billion to around 700 million. *See* Abhijit V. Banerjee and Esther Dublo, *How Poverty Ends: The Many Paths to Progress—and Why They Might Not Continue,* Foreign Aff., Jan.- Feb. 2020, 22 (examining poverty trends and data).

5. *See* EMMANUEL SAEZ & GABRIEL ZUCMAN, THE TRIUMPH OF INJUSTICE: HOW THE

billionaire himself, put it: "The financial system isn't working the way it should for most Americans. The stock market is at an all-time high, but almost all of the gains are going to a small number of people."[6]

RICH DODGE TAXES AND HOW TO MAKE THEM PAY 3–11 (2019) (discussing the causes of income inequality and the role of taxing the wealthy). The author has also written on this topic, Daniel J. Morrissey, *Executive Compensation and Income Inequality,* 4 WM. & MARY BUS. L. REV. 1 (2013) (discussing executive compensation and income inequality) and Daniel J. Morrissey, *Income Equality in Utopia,* 48 U. OF PAC. L. REV. 79 (2016) (examining income inequality).

At the beginning of 1990, 30 years ago, the Dow Jones Industrial Average was 2,753.20 and the NASDAQ was 454.82. *See Rollicking, Rocketing Stock Markets,* WALL ST. J. Dec. 13, 1999 at C1, C23 (providing data on the Dow Jones and NASDAQ 1999 averages). On February 14, 2020, the Dow closed at 29,398.08 and the NASDAQ at 9,731.18. In the last three decades, the Dow increased more than 10 times and the NASDAQ double that. 80% of that stock is owned by just 10% of Americans, and only 55% of our fellow citizens own any at all. *See infra* note 123 and accompanying text.

Most troubling, the standard of living once enjoyed by American workers continues to decline. *See* Amanda Novello & Jeff Madrick, *11 Ways American Workers are Falling Behind the Rest of the World,* 62 CHALLENGE 21, 21–22 (2019) (discussing the myth that the American standard of living is the gold standard); Esther Y. Peng, *Is China Going to be the World's Largest Economy?-Comparing Standard of Living in China and the U.S. in the Next Twenty Years,* CULMINATING PROJECTS IN ECONOMICS, at 7–10 (May 2019) (examining standards of living in the United States and China). *But see Economists are Rethinking the Numbers on Inequality,* THE ECONOMIST, Nov. 28, 2019 https://www.economist.com/briefing/2019/11/28/economists-are-rethinking-the-numbers-on-inequality [https://perma.cc/ZMS6-J5P6] (asserting, among other things, that the income share of America's top 1% taking into account taxes and transfers to those on the lower end of the economic scale has changed little since 1960).

Meanwhile, the wealth of America's superrich continues to climb. Jeff Bezos, the founder of Amazon, is reputed to be worth a $114 billion. *See* Charles Duhiigg, *The Unstoppable Machine,* THE NEW YORKER, Oct. 21, 2019 at 42, 53 (providing an estimate of Jeff Bezos's net worth). A well-written recent piece focusing on Disney heir, Abagail Disney, described her concern that the famous entertainment firm was not providing decent compensation to most of the workers at its parks when the company's CEO Bob Igor received over $ 65 million in pay last year. *See* Sheelah Kolhatkar, *The Ultra-Wealthy Who Argue that they should be paying higher taxes,* THE NEW YORKER (Dec. 30, 2019) (presenting commentary on wealthy Americans who believe that their taxes should be raised).

For a fine new book on how these disturbing economic changes have hit ordinary Americans, see NICHOLAS D. KRISTOF & CHERYL WUDUNN, TIGHTROPE: AMERICANS REACHING FOR HOPE (2020). A heightened public awareness of this came from the Occupy Wall Street movement in 2011 where people gathered in a park outside New York's financial center to protest the concentrations of wealth in our society. Its energy has gone into a number of movements since then to correct inequities in our society. *See* Michael Levitin, *The Triumph of Occupy Wall Street,* THE ATLANTIC (June 10, 2015) (discussing income inequality in the United States).

6. *See* Andrew Ross Sorkin and Michael J. de la Merced, *Michael Bloomberg Leans Left with Plan to Rein in Wall Street,* N. Y. TIMES (Feb.18, 2020) https://www.nytimes.com/2020/02/18/business/dealbook/michael-bloomberg-wall-street.html [https://perma.cc/WJ7N-SCSZ] (quoting Michael Bloomberg).

This economic discontent was also well capsulized by another Democratic Presidential candidate, Pete Buttigieg: "Neo-liberalism is the political-economic consensus that has governed the last 40 years of policy in the U.S. and the U.K. Its failure helped to produce the Trump movement. Now we have to replace it with something better."[7]

These large corporations are the repositories of tremendous riches and power.[8] As such, their many fine contributions to society can be perverted when they act corruptly or fail to share the wealth they create in a just manner. Through the history of our country's industrial development therefore, our political system has attempted to curb some of those harmful tendencies through the development of various principles of corporate law and other regulatory initiatives.[9]

However, when these safeguards become ineffective, the result has often been disastrous for many of the constituencies of these large firms and for our nation at-large. From the robber baron era down to present times, American business history can be seen as a series of scandalous and corrupt practices that in their aftermath have shocked the conscience of society.[10]

This Article begins with a discussion of one massive fraud that recently rocked public confidence: the corrupt sales and lending practices at Wells

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7. Anand Giridharadas, *How the Elites Lost Their Grip,* TIME, Dec. 2, 2019. "Neoliberalism or neo-liberalism is the 20th century resurgence of 19th-century ideas associated with economic liberalism and free-market capitalism . . . [and] was part of a paradigm shift that followed the failure of the Keynesian consensus in economics to address the stagflation of the 1970s." Neoliberalism, WIKIPEDIA, THE FREE ENCYCLOPEDIA, https://en.wikipedia.org/wiki/Neoliberalism [https://perma.cc/78Q6-LMWA].

8. The top 50 U.S. companies have a combined market capitalization of more than $12 trillion. The largest of these is JPMorgan Chase with $2.7 trillion in assets. *See* Sarah Hansen, *America's Largest Public Companies in 2019,* FORBES (May 15, 2019) https://www.forbes.com/sites/sarahhansen/2019/05/15/americas-largest-public-companies-2019/?sh=52f94175551e [https://perma.cc/5Y9A-3XBJ] (presenting market value and data of America's largest public companies in 2019). JPMorgan Chase's CEO is Jamie Dimon, Chair of the Business Roundtable. Giridharadas, *supra* note 7, at 46 and accompanying text.

9. *See infra* notes 56-6060 and accompanying text (discussing reform legislation from the Securities Act of 1933 to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010).

10. *See* M. Thomas Arnold, *"It's Déjà vu All Over Again," Using Bounty Hunters to Leverage Gatekeepers,* 45 U. TULSA L. REV. 419, 420–24 (2010) (providing a partial list of scandals in American business history). And in the first decade of this century, came two major corporate scandals, options-backdating and the sub-prime crisis, that caused the financial meltdown of 2008. The author has written about those in Daniel J. Morrissey, *The Path of Corporate Law: Of Options Backdating, Derivative Suits, and the Business Judgment Rule,* 86 OR. L. REV. 973, 982–90 (2007) (discussing options-backdating, derivative suits, and the Business Judgment Rule) and Daniel J. Morrissey, *Shareholder Litigation after the Meltdown,* 114 W. VA. L. REV. 531, 539–41 (2012) (discussing economic conditions after the 2008 housing crisis).

Fargo, our nation's fourth largest bank.[11] As a financial institution, it was heavily regulated, but that did not prevent the bank's systematic deceptions that cheated thousands of its customers and undermined the integrity of its core business. After laying out that wrongdoing, the Article will then describe one remedial measure adopted by Wells Fargo that may show promise to deter such frauds and hold corporations accountable to the common good, a Stakeholder Advisory Council.[12]

The Article will then put that innovation in context by briefly reviewing the various laws and regulations now in place that are supposed to prevent such large-scale corrupt activity. The legislative response to such recent frauds, like the accounting scandals of the 90s[13] and the sub-prime mortgage frauds of the last decade,[14] has been to enact new laws such as the Sarbanes-Oxley Act of 2003[15] and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.[16] They in turn only reinforced earlier reform legislation such as the landmark federal securities laws of the 1930s.[17] These sought to redress the fraudulent practices that were a contributing cause to the stock market crash of 1929 and the resulting Great Depression.[18]

These relatively new Acts might have tightened up corporate regulation (and provided more work for lawyers and accountants) but as the crimes at Wells Fargo show, the potential for enormous business corruption remains with us. As one wry commentator put it, "[C]orporate Fraud is sort of like grass, it grows, it gets cut down, and it grows again."[19] Stakeholders Advisory Councils, however, like the one adopted by Wells Fargo, might just stop such harmful practices, or at least make their growth more difficult.

Just as significant, however, is the potential of these Councils to advance a significant trend in corporate law: the movement to expand the

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11. Wikipedia, Wells Fargo, *infra* note 25 and accompanying text.

12. WELLS FARGO, *infra* note 42.

13. *See* JONATHAN R. MACEY, ET AL., THE LAW OF BUSINESS ORGANIZATIONS 356–61 (13th ed. 2017) (discussing the 2001 Enron scandal).

14. Arnold, *supra* note 10 and accompanying text.

15. Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 19, 28, and 29 U.S.C.).

16. Pub. L. No. 111-203, § 933, 124 Stat. 1376, 1883–84 (2010).

17. The Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a-77aa) and its companion legislation, the Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat.881 (codified as amended at 15 U.S.C. §§ 78a-78mm). *See infra* notes 59-60 and accompanying text.

18. *See infra* note 58 and accompanying text (discussing the variety of causes of the Great Depression, including the misdirection of capital within the U.S.)

19. *See* Kurt Eichenwald, *The Last Two Years: The Momentous Changes in Corporate America,* 45 S. TEX. L. REV. 245, 246 (2003) (discussing and analyzing prominent cases of corporate fraud).

mission of those hugely important organizations to include not just profit-making but also the larger needs of society and the environment.[20] This piece will discuss proposals from social commentators, legislators, and the business community itself to address those concerns and talk about how they might be furthered by these Advisory Councils.[21]

The Article will close by examining some open issues about these panels. That will include a discussion about them with a leading member of Wells Fargo's advisory council where she gave her response to such important questions as these. Are Advisory Councils mere window dressing, or can they be effective in shaping corporate policy to make firms operate more honestly and serve the broader needs of society?

In that regard, important opportunities exist where corporations with their outsized resources can be a force for good and promote a more just society. Among them are ways they can address extreme wealth and income inequality,[22] climate change, and environmental degradation.[23] This Article will close by exploring how Advisory Councils might be able to shape corporate policy to address those pressing needs, and how they might even be an important first step in shaping a new and more democratic form of capitalism.[24]

II. CORPORATIONS AND THEIR DISCONTENT

A. *Shameful Practices at Wells Fargo*

Not long ago, Wells Fargo may have enjoyed the best reputation of America's four largest banks.[25] In 2016, however, it was rocked by

20. Murray, *infra* note 150 and accompanying text.
21. Ingley and Van der Walkt, *infra* note 151 and accompanying text.
22. Banerjee and Dublo, *supra* note 4 and accompanying text.
23. See Thomas Friedman, *The Answers to Our Problems Aren't as Simple as Left or Right*, N.Y. TIMES (July 24, 2019) https://www.nytimes.com/2019/07/23/opinion/republican-democratic-parties.html [https://perma.cc/MF5P-KKES] (quoting remarks by Marina Gorbis, executive director of the Institute for the Future, and discussing the dangers raised by giant monopolies).

For more on the growth in activism that is challenging "unrestrained capitalism" and "corporate greed that has endangered the planet" see Tim Wu, *The Revolution comes to Davos*, N.Y. TIMES (Jan. 23, 2020) https://www.nytimes.com/2020/01/23/opinion/sunday/davos-2020-capitalism-climate.html [https://perma.cc/6BYE-5RD9].

24. For a fine essay on that see Thomas Geoghegan, *Educated Fools, Why Democratic Leaders Still Misunderstand the Politics of Social Class,* THE NEW REPUBLIC, Jan. 20, 2020 (discussing the politics of social class).
25. Wells Fargo, WIKIPEDIA, THE FREE ENCYCLOPEDIA https://en.wikipedia.org/wiki/Wells_Fargo [https://perma.cc/LVB8-QM4H] (last visited Jan. 25, 2020).

disclosures of a number of fraudulent practices that had gone on there for over a decade. Under pressure from the bank's top management, its employees created more than 3.5 million fictitious checking and savings accounts for its customers. They also engaged in other unauthorized activities by applying for credit and debit cards for Wells Fargo's clients without their knowledge and fabricating phony email addresses to enroll them in online-banking services.[26]

These frauds were the result of aggressive practices by Wells Fargo employees to "cross-sell," i.e., to enroll their customers in as many services as possible that the bank offered. All of that came about because of intense pressure put on branch managers and individual Wells Fargo employees to meet unrealistic quotas.[27] At first, the bank's upper echelon denied any connection to those perverse sales practices and fired over 5,000 of their workers who had set up fake accounts. Subsequent investigations, however, revealed that Wells Fargo's CEO John Stumpf and his protégé, Carrie Tolstedt, the head of retail banking, were the ones responsible for all this outrageous wrongdoing.[28]

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26. For a detailed chronology of all this wrongdoing, see Ethan Wolff-Mann, *Wells Fargo Scandals: The Complete Timeline,* YAHOO FIN. (Mar. 12, 2019), https://finance.yahoo.com/news/wells-fargo-scandals-the-complete-timeline-141213414.html [https://perma.cc/7J4W-N9XW]. *See also* Mark Levine, *Fake Accounts Still Haunt Well Fargo,* BLOOMBERG FIN. (Oct. 23, 2018), https://www.bloomberg.com/opinion/articles/2018-10-23/fake-accounts-still-haunt-wells-fargo [https://perma.cc/A7M9-HRFZ] (describing the scandals in additional detail). Another good piece telling this scandalous story is Mark Levine, *Fake Accounts Still Haunt Well Fargo,* BLOOMBERG FIN. (Oct. 23, 2018).

27. Despite disclosure of this egregious behavior and purported reforms made to correct it, bank workers say that wrongful treatment of employees and customers remains a problem. Michael Sainato, *Wells Fargo Employees Say Little Has Changed Since Fake Accounts Scandal*, THE GUARDIAN (Jan. 4, 2019), https://www.theguardian.com/business/2019/jan/04/wells-fargo-fake-accounts-scandal-employees [https://perma.cc/67B6-UGRL]. Another report said Wells Fargo has "a largely demoralized work force that is chafing under the bank's leadership." Emily Flitter & Stacy Cowley, *Worst Job in Banking Opens Up. Who'll Bite?,* N.Y. TIMES (Mar. 30, 2019), at B1. And the bank's principal regulator, the Office of the Controller of the Currency (OCC), has recently said that the bank continues to have a massive backlog of employee complaints. Rachel Louise Ensign, *Wells Fargo's List of Woes Grows,* WALL ST. J. (Dec. 5, 2019), at A1.

Even though the bank's profits rose recently, it has been struggling. As one report described the situation, "What was once an aggressive, rapidly growing lender whose profits towered above those of rivals has become a firm with sluggish revenues that is leaning heavily on cost cuts." Rachel Louise Ensign, *Wells Fargo Posts Higher Profit,* WALL ST. J. (July 16, 2019), https://www.wsj.com/articles/wells-fargo-posts-higher-profit-11563279572 [https://perma.cc/B5LL-88QM].

28. In a settlement with the OCC, Stumpf agreed to a lifetime ban from banking and was hit with a $17.5 million fine. In its findings, the OCC stated that Stumpf "was or should have been aware of the problem and its root cause" and "there was a culture in the Community

Under pressure from regulators, the bank also disclosed that it had been cheating 800,000 of its automobile loan customers by improperly charging them for collision damage insurance that they didn't need. These unwarranted extra costs pushed 275,000 of its borrowers into delinquency and brought about over 25,000 wrongful repossessions of their cars.

On top of that, a whistle blower lawsuit also forced Wells Fargo to admit that it had swindled thousands of its home loan borrowers by improperly charging them fees to lock in extensions of their interest rates because the processing of their applications was delayed. To justify that, Wells Fargo managers sometimes got their employees to lie to their customers, telling them they were to blame because they did not get all their paperwork in on time.[29]

B. Sanctions and Judgments Against the Bank

Wells Fargo ultimately met a day of reckoning for all this reprehensible conduct, suffering potential losses of about $3.1 billion.[30] Regulators like the Consumer Finance Protection Agency, the Comptroller of the Currency, the Securities and Exchange Commission, and the Federal Reserve also came down hard on the bank with fines of $1.7 billion[31] and other sanctions. As of summer, 2019, Fed Chairman Jay Powell said the Central bank would not lift a cap on the bank's assets "until Wells Fargo gets their arms around this, comes forward with plans, implements those plans, and we're satisfied with what they've done. And that's not where we are right now."[32]

After a hostile grilling before a Congressional committee, CEO Stumpf resigned. So did his successor, Timothy Sloan, a Wells Fargo insider, when he too met a tough reception before law makers lead by democratic

Bank that resulted in systemic violations and regulations." Rachel Louise Ensign & Ben Eisen, *Wells Fargo Ex-CEO is Banned for Life,* WALL ST. J. (Jan. 24, 2020), at A2. The OCC is currently also seeking a $25 million fine from Tolstedt and a lifetime ban. *Id*. That matter may have to be settled in an administrative proceeding. *Id*.

29. The details of these shameful sales practices are described in a shareholder complaint. *Wells Fargo Shareholder Derivative Complaint* (May 30, 2018), Lead Case No. CGC-17-561118 (Sup. Ct. of CA) [Wells Fargo Derivative Suit]. The author served as a consultant to the lawyers bringing the case on behalf of Wells Fargo shareholders.

30. Patrick Thomas, *Wells Fargo Raises Estimate of Possible Losses from Legal Action,* WALL ST. J. (May 3, 2019, 4:42 PM), https://www.wsj.com/articles/wells-fargo-raises-possible-losses-from-legal-action-11556916174 [https://perma.cc/DPE4-6L2V].

31. Sainato, *supra* note 27.

32. Rachel Louise Ensign & Andrew Ackerman, *Scandals Tarnished Wells Fargo. Washington Claimed Its CEO,* WALL ST. J. (Mar. 30, 2019, 9:00 AM), https://www.wsj.com/articles/scandals-tarnished-wells-fargo-washington-claimed-its-ceo-11553950800 [https://perma.cc/WCH7-MSAR].

presidential candidate Elizabeth Warren in the Senate and Congressman Brad Sherman in the House.[33] After that, it took some time for Wells Fargo to find a new CEO. Running the nation's fourth largest bank wasn't such an appealing job, noted the Wall Street Journal.[34]

That individual would "have to juggle fixing the bank's problems with Washington, reviving key businesses, and rehabilitating a corporate reputation damaged by many problems[.]"[35] Other commentators said any new Wells Fargo CEO would have "to clean up [a] radioactive mess."[36] Things still had not improved in December 2019, when the Wall Street Journal reported a large backlog of employee complaints at the bank.[37] Charles Scharf, an outsider who had become the bank's CEO in October 2019, finally achieved a settlement with the Justice Department and the SEC in February, 2020 that resulted in Wells Fargo paying a $3 billion fine.[38]

But as regulators and lawmakers sought to hold Wells Fargo accountable for harming so many of its clients, owners of the bank itself, its shareholders were also taking action to make sure such reprehensible conduct would not recur. The shareholders did that by initiating legal actions against the bank's management using the mechanism of derivative suits.

There the law allows shareholders who believe the management of their companies have harmed them to champion causes of action on their corporations' behalf against their faithless officials.[39] The relief from those

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33. *Id.* As discussed above, Stumpf has now accepted a lifetime ban from banking and is paying a $17.5 million fine. Although some banks have paid stiff penalties for wrongdoing in recent years, the sanctions against Stumpf are noteworthy because few such fines have been assessed against individual bankers. *See* Ensign & Eisen, *supra* note 28 and accompanying text.

When Sloan, however, took over as Wells Fargo's CEO in June, 2018, he began receiving annual total compensation of $17.6 million, 564 times the average wage of the bank's employees which was $15 per hour. Sainato, *supra* note 27.

34. Ensign and Ackerman, *supra* note 32.

35. Rachel Louise Ensign & David Benott, *CEO Candidates Spurn Wells Fargo,* WALL ST. J. (June 12, 2019), at A1.

36. Flitter & Cowley, *supra* note 27.

37. Ensign, *Wells Fargo's List of Woes Grows, supra* note 27 and accompanying text.

38. Ben Eisen, *Wells Fargo Settles U.S. Probes,* WALL ST. J. (Feb. 22-23, 2020), at A1. In announcing the settlement, Nick Hanna, U.S. Attorney for the Central District of California, said: "This case illustrates a complete failure of leadership at multiple levels within the bank. Wells Fargo traded its hard-earned reputation for short-term profits, and harmed untold numbers of customers along the way." Emily Flitter, *To Settle Fraud Actions, Wells Fargo to Pay $3 Billion*, N.Y. TIMES, (Feb. 22, 2020), at B1.

39. The author has written extensively on the importance of this legal remedy to curtail wrongdoing by corporate officers and directors. *See generally* Daniel J. Morrissey, *Shareholder Litigation after the Meltdown,* 114 W. VA. L. REV. 531 (2012); Daniel J. Morrissey, *The Path of Corporate Law in the 21st Century,* 86 OR. L. REV. 975 (2008).

civil suits can be twofold. It can be in damages from the wrongdoing officers and directors, which go to the injured companies. It can also come in changes to the firms' governance structures to make sure that such harmful conduct will not happen again.

In the settlement of these derivative suits brought to remedy Wells Fargo's reprehensible conduct, the plaintiff shareholders achieved both those goals. They got Stumpf and Tolstedt to forfeit $60 million of equity compensation, and they also got Wells Fargo to agree to a number of reforms that should serve as an effective safeguard against such wrongful practices in the future.[40]

C. Wells Fargo's New Advisory Council

One of these reforms may be the most far-reaching of all—the creation of an external Stakeholders Advisory Council. It represents groups who focus on issues such as consumer rights, fair lending, and proper corporate governance. The Council is also charged with providing direct feedback to Wells Fargo's board and senior executives on how the bank's programs are impacting underserved or vulnerable communities, many of which were harmed by the bank's fraudulent practices.[41]

When Wells Fargo announced the launch of this Council, it elaborated on that mission, saying that it would "provide insight and feedback to the Company's Board of Directors and Senior Management from a stakeholders' perspective."[42] In addition to championing the needs of underserved communities, the Council would bring issues of "diversity, social inclusion and environmental sustainability" to the attention of the bank's leadership groups.[43] The Advisory Council was thus designed as a creative way to improve board oversight by giving outsiders connected to the bank access and input in its operations.

When constituted, the Council did appear to be a group suited to that task. Included among its members were Sister Nora Nash, the director of

40. *Wells Fargo Settlement and Release* (Mar. 4, 2019), Lead Case No. CGC-17-561118 (Sup. Ct. of CA) (from Wells Fargo Derivative Suit, *supra* note 29).

41. *Id.*

For the author's opinion on why on those reforms confer meaningful benefits on Wells Fargo and its shareholders, see Declaration of Professor Daniel J. Morrissey in Support of Plaintiffs' Renewed Motion for Preliminary Approval of Settlement filed in the Wells Fargo Derivative Action (June 26, 2019), Lead Case No. CGC-17-561118 (Sup. Ct. of CA).

42. *Wells Fargo Launches Stakeholder Advisory Council,* WELLS FARGO (Dec. 21, 2017), https://stories.wf.com/wells-fargo-launches-stakeholder-advisory-council/ [https://perma.cc/GF27-NTUV] (last visited Nov. 16, 2020).

43. *Id.*

Corporate Social Responsibility for the Sisters of St. Francis of Philadelphia[44] and representatives from such groups as The National Urban League, The Centre for Responsible Lending, and the Director of Corporate Governance of the California State Teacher's Retirement System.[45]

In establishing the Council, Wells Fargo professed its commitment to the broad goals that it would be advocating, stating, "It is important that the top leadership of our company hears directly from our stakeholders, and we look forward to benefiting from the Council's diverse perspectives and experiences, particularly with respect to our commitment to our customers and communities."[46] Perhaps the best advice the Council could give in that regard was put succinctly by Shemeeka Beckham, an overcharged auto-loan customer now suing Wells Fargo, who stated, "I would advise the new C.E.O.—he or she—basically to just be more considerate of people."[47]

D. *The Impact of Advisory Councils on Traditional Corporate Governance*

Stakeholders' Advisory Councils like Wells Fargo's have the potential to beneficially modify the traditional structure of corporate governance—to put a conscience in a soulless institution. From their origins, corporations have professed no such moral sensitivity.[48] Rather pragmatic considerations led to their dominance of our country's economy.

In their modern form, corporations came to the forefront of American business during the second half of the 19th century because they were the best legal vehicle in which to organize a large company. Gigantic enterprises like oil, steel, railroads, large-scale manufacturing, and food processing were then becoming the driving force in our economy, and they needed large amounts of capital.[49]

The corporation provided an ideal form to raise those funds from far-

44. Sister Nash, i*nfra* note 174 and accompanying text.
45. WELLS FARGO*, supra* note 42.
46. WELLS FARGO*, supra* note 42.
47. Flitter & Cowley, *supra* note 27, at B5.
48. COFFEE, *supra* note 1 and accompanying text. For an interesting twist on that, see KENT GREENFIELD, CORPORATIONS ARE PEOPLE TOO (AND THEY SHOULD ACT LIKE IT) (2018). The author takes off from the notorious *Citizens United* case, which held that the Constitution gives free speech protections to corporations. *See generally* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010). If these institutions are afforded such rights, Greenfield says, they should also assume certain responsibilities of citizenship such as acting conscientiously.
49. For a discussion of the historic and economic rise of the corporation in modern America, see generally ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS (1977).

flung individuals who could invest even small amounts of their savings in them. It offered these stockholders the opportunity to share in the profits of those "big businesses" by purchasing the basic entrepreneurial interests in those firms: their common shares. In addition, such investments gave stockholders the protection of limited liability. They would not be responsible for the debts of their firms beyond the amounts they contributed.[50]

In return, it was only logical that such numerous and widely diffused owners would cede the power to run their enterprises to a centralized management—a board of directors that they would elect. After that, however, a company's stockholders would be passive, confidently hoping to receive dividends and see the value of their shares increase.[51]

States that chartered corporate entities were at first fearful of the concentrations of wealth and power that might arise from their activity and sought to limit the size and the scope of their undertakings.[52] But as these jurisdictions began competing with one another for the revenue that incorporation would bring, those restrictions fell away.[53]

Correspondingly, the raison d'etre of these business organizations was said to simply be to make money for their shareholders. The Michigan Supreme Court famously affirmed that in a case where Henry Ford seemed to be taking his auto manufacturing firm in another direction—diminishing its returns, at least in the short-term, by raising his employees' wages and decreasing the price that the buyers of his cars would pay.[54] The Court sustained a shareholder challenge to those policies by stating, "A business corporation is organized and carried on primarily for the profit of the

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50. As two authors put it, "The corporation allowed for the pooling of vast sums of capital, an essential requirement for industries with large fixed-cost components: track, locomotives, railway cars, buildings, factories, furnaces, and machines." STEPHEN B. PRESSER & JAMIL S. ZAINLALDIN, LAW AND JURISPRUDENCE IN AMERICAN HISTORY: CASES AND MATERIALS 359 (6th ed. 2006).

51. *See* Lucien Arye Bebchuck, *The Case for Increasing Shareholder Power,* 118 HARV. L. REV. 833, 844–45 (2005) (discussing this arrangement between shareholders and directors in detail).

52. *See* Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1933), 548–49 (Brandeis, J. dissenting) (arguing that this "race to laxity" stemmed from states' revenue motives).

53. *Id.* at 559–60.

54. Ford stated this as the larger purposes he was seeking to achieve:

> My ambition . . . is to employ still more men; to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes. To do this, we are putting the greatest share of our profits back into the business.

Dodge v. Ford, 170 N.W. 668, 671. (Mich. 1919).

stockholders."[55]

E. Earlier Approaches to Curb Corporate Wrongdoing

As the country moved into the twentieth century, however, it became apparent that the actions of these large enterprises often had a harmful impact on the common good. President Theodore Roosevelt famously called those who ran the worse of such companies, "The Malefactors of Great Wealth."[56] Progressive era reformers like him therefore advocated that those firms be regulated in the public interest. Through forceful political leadership, they were successful in enacting anti-trust and various health and safety legislation to stifle monopolies and protect workers and consumers from harm.[57]

A decade later, the stock market crash of 1929, and the Great Depression which followed, provided New Dealers the impetus for perhaps the most constructive financial legislation that the country would ever see.[58] Those were the Securities Act of 1933[59] and its companion, the Securities Exchange Act of 1934.[60] Those laws were designed to protect investors by requiring that companies seeking investments disclose all material facts about their operations and continually update them so long as they remained publicly-held.[61] To make sure the new federal securities laws would be

55. *Id.* at 684.

56. Michael E. McGerr, A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870–1920 (2003) (quoting Theodore Roosevelt at the dedication of a memorial to the Pilgrims at Provincetown, Massachusetts, in August 1907).

57. For a fine book about the legislative initiatives from that era that originated in New York, see generally Terry Golway, FRANK AND AL: FDR, AL SMITH AND THE UNLIKELY ALLIANCE THAT CREATED THE MODERN DEMOCRATIC PARTY (2018).

58. A Congressional committee made this statement about that in 1933: "Whatever may be the full catalogue of the forces that brought to pass the present depression, not least among these has been this wanton misdirection of the capital resources of the Nation." H.R. Rep. No. 73-85, at 2–3 (1933).

59. 15 U.S.C. §§77a-77bbbb.

60. 15 U.S.C. §§ 78aa-78nn. Those federal statutes were not the first legislative forays into that field. A few decades earlier, some states had enacted so-called "blue sky laws" to give residents of their jurisdictions' similar protection, but they were largely ineffective because they failed to cover the national market for securities that had developed in the 20th century. *See* Joseph C. Long, Blue Sky Law (Securities Law Vol. 12) (chart listing all the "blue sky laws" that were passed by each state).

61. *See* Joel Seligman, *The Historic Need for a Mandatory Corporate Disclosure System,* 9 J. CORP. L. 1, 2 (1983) (explaining the responses to the SEC's newly enacted mandatory corporate disclosure system).

For the author's opinion that this regimen of required disclosure is not enough to protect investors, and rather that public officials should pass on the quality of these offerings, see Daniel J. Morrissey, *The Road not Taken: Rethinking Securities Regulation and the Case* properly administered and enforced, the 1934 Act created an independent regulatory agency, the Securities and Exchange Commission (SEC).[62] To this day, it has generally maintained a good reputation for promoting investor confidence and keeping America's securities markets honest.[63]

However, the regime of disclosure mandated by the federal acts had ramifications beyond mere investor protection, bringing about an indirect form of corporate regulation. Businesses required by law to tell the public about all significant aspects of their operations might understandably be reluctant to engage in various types of harmful or fraudulent conduct that their shareholders or political leaders might seek to redress.[64]

About the time this landmark legislation was passed, an influential study revealed that ownership of large public companies had become quite diffuse.[65] No longer did their founders control a large amount of their shares, but rather it was rare that any of their stockholders owned as much as one percent of their companies. With shareholder voting power to elect directors so fragmented, management groups through solicitation of proxies could maintain their power as self-perpetuating oligarchies.[66]

Yet as the country entered the second half of the 20th century, few seemed to believe that these large concentrations of wealth and power were acting in ways that were inimical to society. Advocates of laissez-faire economics asserted that the competitive pressures of the market would guarantee that their activities would produce the goods and services that people wanted.[67] In addition, a good share price was a sign that the company

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for Federal Merit Review, 44 U. OF RICH. L. REV. 647, 648 (2010) (detailing disclosure system's failure to protect investors).

62. For an interesting description of the SEC's early years by one of its first chairmen who later became a Supreme Court Justice, see WILLIAM O. DOUGLAS, GO EAST YOUNG MAN 239–281 (1974). The SEC's current self-description of its mission and operations can be found at *The Work of the SEC*, https://www.sec.gov/about/what-we-do [https://perma.cc/K3JK-2EXX].

63. *See* David L. Ratner, *The SEC at Sixty: A Reply to Professor Macey,* 16 CARDOZO L. REV. 1765, 1779 (1995) (evaluating SEC's reputation). The Commission, however, was sorely embarrassed by the Madoff matter when it did not catch a decades-long Ponzi scheme that bilked investors out of billions of dollars. Press Release, SEC, Office of Investigations, Investigation of the Failure of the SEC to Uncover Bernard Madoff's Ponzi Scheme (Aug. 31, 2009) (on files with the SEC).

64. *See* M. STEINBERG, CORPORATE INTERNAL AFFAIRS: A CORPORATE AND SECURITIES LAW PERSPECTIVE 29 (1983) (discussing the Commission's influence on corporate internal affairs).

65. ADOLF BERLE AND GARDINER MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

66. *Id.* at 6.

67. The classic statement of this outlook is found in Milton Friedman, *The Social Responsibility of Business is to Increase its Profits,* N.Y. TIMES, (Sept. 13, 1970) § 6

was using its resources well and serving the general economy.[68] Any harmful conduct that they might engage in could be corrected by actions of the regulatory state.[69] In the general prosperity during the decades following World War II, few therefore questioned America's corporate system.[70]

F. A New Era Brings Increased Concerns

As the country moved into 1960s and 70s, however, civil and women's rights and environmental concerns came to the forefront, and corporations became suspect for acting in ways that frustrated those goals.[71] A renewed global economy and a sluggish stock market also contributed to a general unrest about the legitimacy of American corporations.[72]

Classical economics had answers for some of those problems. If corporations were not acting efficiently to maximize profits, market forces would cause the price of their stock to drop.[73] Managers of such underperforming corporations could be disciplined by tender offers for their shares that would result in their replacement by more efficient stewards of the company's assets.[74]

(Magazine), at 32.

68. *Id.*

69. HENRY M. HART AND ALBERT M. SACKS, THE LEGAL PROCESS (1958).

70. For a lengthy discussion of this thirty-year phenomenon of economic well-being that the West enjoyed up to the 1970s, see Thomas Piketty, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer trans., 2014) (explaining corporate impact after World War II).

71. *See* Blumberg, *The Politicization of the Corporation,* 51 B.U. L. REV. 425, 433 (1971) (showing how communities began to hold corporations accountable for their social impact on society). *See* Schwartz, *Defining the Corporate Objective,* 52 GEO. WASH. L. REV. 511, 521–22 (1984) (suggesting a corporation's purpose is not only economic).

72. For a distinguished jurist's remarks about how the argument over a corporation's duty to maximize profits and its obligations to act in a socially responsible manner had been "papered over" when American companies were free from global competition and impervious to hostile take-overs, see William T. Allen, *Our Schizophrenic Concept of the Business Corporation,* 14 CARDOZO L. REV. 262, 263 (1992) (explaining how global competition has altered corporate responsibility). Then, corporate philanthropy was easily justified as being in the long-term best interest of the firm and its shareholders.

73. The rise of the efficient market hypothesis supported that outlook. *See* Eugene Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work,* 25 J. FIN. 383, 413–16 (1970) (explaining corporate efficiency through the market). A market might undervalue a company when its resources were managed inefficiently. *See* Henry Manne, *Mergers and the Market for Corporate Control,* 73 J. POL. ECON. 110, 112–13 (1965) (showing that an active market for corporate control exists).

74. A well-regarded federal judge called a hostile take-over, "the sharpest blade for the improvement of corporate management." *See* H. Friendly, *Make Haste Slowly,* in COMMENTARIES ON CORPORATE STRUCTURE AND GOVERNANCE 525, 532 (D. Schwartz ed.

Along those lines, some argued that the current system of corporate law was sufficient to safeguard the interests of stockholders/owners and other interested parties. Shareholders could rely on hostile take-overs or sue directors for breaches of their fiduciary duties to make sure their investments were protected.[75] And under a theory which saw the corporation as a "nexus of contracts," its other constituents like employees and creditors could regulate their relationships to it by legally enforceable agreements and sue for breach if promised performances were not forthcoming.[76]

Other commentators, however, saw that the problem of management's accountability to its shareholders was a stickier one because of agency costs in the system. Corporate officials, particularly CEOs who were supposed to be working for their shareholders, had self-interested conflicts that were easily abetted by pliant directors. Instead of maximizing profits for their stockholders, corporate officials could shirk that responsibility or find ways to channel corporate wealth to themselves and their friends.[77]

This problem was compounded, said those critics, by the inability of widely-scattered shareholders to monitor such misfeasance.[78] On top of that, the business judgment rule prevented them from challenging corporate policy, so long as the firm's officers and directors were not personally enriched by it.[79] True, management underperformance could depress a stock's price, inviting a hostile take-over, but that was often a very blunt instrument for making officers and directors more accountable to their shareholders. In fact, case law from the dominant corporate jurisdiction, Delaware, allowed incumbent boards to adopt tactics like poison pills that might ward them off.[80]

1979) (arguing takeovers serve as a tool for improving corporate management).

75. As the Delaware Supreme Court put it, corporate officers and directors owe a loyalty and allegiance to the corporation—a loyalty that is undivided, influenced by no consideration other than the welfare of the corporation. Aronson v. Lewis, 473 A.2d 805, 811–15 (Del. 1984).

76. For a good discussion of the development of this theory see Anselm Schneider and Andreas Georg Scherer, *Corporate Governance in a Risk Society,* 26 J. OF BUS. ETHICS 309, 310 (2015) (arguing contracts limit risk toward stakeholders). *See also* Jenson and Meckling, *infra* note 87 and accompanying text.

77. Robert C. Bird and Stephen Kim Park, *Organic Corporate Governance,* 59 B. C. L. REV. 21, 32–33 (2018) (showing how agency cost in the systems make management accountability more difficult).

78. BERLE AND MEANS, *supra* note 65.

79. The Delaware Supreme Court described the business judgment rule with these comments: "A board of directors enjoys a presumption of sound business judgment, and its decisions will not be disturbed if they can be attributed to any rational business purpose." Sinclair Oil Corp. v. Levien, 280 A.2d. 717, 720 (Del. 1971).

80. *See, e.g.,* Moran v. Household Int'l, Inc. 490 A.2d 1059 (Del. 1985) (ruling incumbents can use poison pill as a defense to hostile takeovers).

In the face of such management entrenchment, administrative and legislative additions to the federal securities laws gave substantive rights to shareholders facing tender offers and further empowered them by placing new disclosure obligations on public companies.[81] And laws passed in the wake of the accounting frauds of the dot.com era and the sub-prime mortgage crash, respectively the Sarbanes-Oxley[82] and Dodd-Frank Acts,[83] put more disclosure duties on public companies.[84]

Along with that, a movement arose to strengthen internal corporate governance by requiring that boards have more independent directors who would not be beholden to their officers. They would thus be freer to monitor management.[85] This would include the unfettered ability to remove a poorly performing CEO and to exercise meaningful oversight to prevent unlawful,

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81. For a good discussion of the federal laws governing tender offers, see *Thomas Lee Hazen,* The Law of Securities Regulation, 393–444 (7th ed. 2017) (discussing legal process governing tender offers).

82. The Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204 (2002).

83. The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (2010).

84. Bird and Park, *supra* note 77 at 26.

85. *See, e.g.*, Jeffrey Gordon, *The Rise of Independent Directors in the United States.*, 1950-2005, 59 STAN. L. REV. 1465, 1469 (2005) (explaining independent directors' role in monitoring management). It has long been the case that the wide-spread shareholding in public companies gives stockholders little incentive to be active in the election of their directors. Accordingly, those firms have become self-perpetuating oligarchies, where the top management selects their directors through their control of the proxy solicitation mechanism. *See* BERLE AND MEANS, *supra* note 65 and accompanying text.

Recently, however, there has been a strong push for more diversity on boards. As a California state senator put it, "The corporate boardroom has been a white-male bastion for far too long, limiting the opportunity for women and others to participate." Jessica Guynn, *California Boardrooms are put on notice,* USA TODAY, Jan. 3, 2020, at 2A. Accordingly, California now requires that public companies headquartered in that state have at least one female director. *Id*. And companies that are rated highly for their socially responsible activity have higher percentages of female directors than other firms. Erynne E. Landry, Richard A. Bernardi and Susan M. Bosco, *Recognition for Sustained Corporate Social Responsibility: Female Directors Make a Difference,* 23 CORP. SOC. RESP. ENVIRON. MGMT. 27, 31–36 (2016).

Adding to this movement is the recent statement by the leading investment banker at Goldman Sachs that it will not underwrite public stock offerings for companies that do not have diverse boards. Jeff Green, *Goldman to Refuse IPOs if All Directors are White Straight Men,* (Jan. 24, 2020), https://www.fa-mag.com/news/goldman-to-refuse-ipos-if-all-directors-are-white--straight-men-53760.html [https://perma.cc/C3RE-CRLJ]. The author has recently written about the need for corporations to furnish more opportunity for African Americans. Daniel J. Morrissey, *George Floyd Protests Show Corporations Must Support Racial and Economic Equality*, THE HILL (June 4, 2020) https://thehill.com/opinion/civil-rights/501259-protests-show-corporations-must-support-racial-and-economic-equality [https://perma.cc/PQ5U-EUYY].

or otherwise harmful, corporate activity. Stock exchanges included such provisions for director independence in their listing requirements and developed qualifications for that status.[86]

In line with increasing concern for the broader social responsibilities of business, two leading corporate scholars advocated a different way to define the duties of directors. Taking a more communal approach than the individualistic "nexus of contract" theory,[87] they asserted that a corporation is a "team" organized to engage in productive activity.[88] With that outlook, directors should no longer be seen as a group obliged to just maximize profits for shareholders, but as a "mediating hierarchy"[89] for the interests of all those touched by the activity of a corporation.

As such, a board would have duties to a myriad of individuals and groups connected to a corporation, not just stockholders, but also employees, creditors, consumers, and the communities where it did business. Each of those groups are essential to the success of the enterprise and the directors must be attentive to the needs and concerns of all of them.[90]

III. ENVIRONMENTAL, SUSTAINABLE CORPORATE GOVERNANCE

A. The Rise of Corporate Social Responsibility

This "team" approach was a close cousin to a newer way to view the purpose of a corporation that arose during the last several decades, one that would have it assume a larger role in promoting the common good. It has become a real rival to the traditional shareholder primacy theory that

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86. New York Stock Exchange Listed Company Manual, 303A.02, *Independence Tests. See also American Law Institute, Principles of Corporate Governance §3A.01* (1994) (recommending that boards of public companies have a majority of independent directors). Along those lines, Sarbanes Oxley added a provision to the federal securities laws requiring that directors of public companies who serve on audit committees be independent. 15 U.S.C. §78j-1(m)(3) (as amended by Section 301 of Sarbanes-Oxley Act of 2002).

87. *See* Michael C. Jensen and William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure,* 3 J. FIN. ECON. 305, 310–11 (1976) (arguing that the nexus of contracts helps regulate relationships among individuals in a corporation).

88. Margaret M. Blair and Lynn A. Stout, *A Team Production Theory of Corporate Law,* 85 VA. L. REV. 247, 265–76 (1999).

89. Margaret M. Blair, *Boards of Directors as Mediating Hierarchs,* 38 SEATTLE U. L. REV. 297, 334–35 (2015).

90. In a famous address, Delaware Chancellor William T. Allen stated that the law was not eager to grapple with the conflicting arguments between those who see corporations as economic and financial entities as opposed to those who view them as institutions with political and social significance. It was the duty of directors, he said, to strike that balance. Allen, *supra* note 72, at 264–65.

prevailed for most of the last century, where profit-making was a corporation's top priority.[91]

Internationally, the United Nations has been a strong supporter of this broader mandate for business, placing it within its mission to advance human rights. In 2011, the UN published *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework,*[92] which has been very influential in shaping discussion on the world scene. It justifies the beneficent values it advocates as being grounded in recognition of: "[t]he role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights."[93]

The development of those principles involved multiple discussions with stakeholder groups with a practical goal to bring about "on-the-ground change in people's daily lives."[94] To accomplish that, the UN emphasized that it is important to have accountability and a grievance procedure that individuals and groups can use to redress abusive business behavior.[95] As a result of that consultative process, it promulgated a document called *Ten Principles of the UN Global Compact*.[96]

Its preamble forthrightly stated: "Corporate sustainability starts with a company's value system and a principles-based approach to doing business. This means operating in ways that, at a minimum, meet fundamental responsibilities in the areas of human rights, labour, environment and anti-corruption."[97] While the compact is not legally binding, it is "designed to stimulate change and to promote corporate sustainability and encourage innovative solutions and partnerships."[98]

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91. *See* Dodge v. Ford, 170 N.W. 668, 671. (Mich. 1919) (holding that corporations are organized and carried on primarily for the benefit of the stockholders).

92. John Ruggie (Special Representative of the Secretary-General), *Rep. on Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010), https://www2.ohchr.org/english/issues/trans_corporations/docs/A-HRC-14-27.pdf [https://perma.cc/N7H9-7N4A].

93. *Id.* at 6.

94. Rep. of the Special Representative of the Secretary-General to United Nations General Assembly, Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development,* Summary of Five Multi-Stakeholder Consultations, U.N. Doc. A/HCR/8/5/Add.1, at 5 (Apr. 23, 2008).

95. *Id.* at 5.

96. *The Ten Principles of the UN Global Compact*, United Nations Global Compact, https://www.unglobalcompact.org/what-is-gc/mission/principles [https://perma.cc/H42M-ZKSS] (last visited Nov. 12, 2020).

97. *Id.*

98. Frequently Asked Questions, UNITED NATIONS GLOBAL COMPACT, https://www.unglobalcompact.org/about/ [https://perma.cc/4F69-74FM] (last visited Nov. 12, 2020).

In the United States, this more expansive and high-minded mission for business has had many names, but it has come most often to be called "corporate social responsibility (CSR)" and "Environmental, Sustainable Governance (ESG)."[99] It asserts that corporations must go beyond mere token philanthropy, which was justified as being in the corporation's "enlightened self-interest."[100] Instead, they should make being a force for good one of their principal goals.

B. The Triple Bottom Line

CSR's strongest proponents espouse a "triple bottom line"[101] approach to corporate activity—it should make profit, but also engage in socially beneficial activity and work for a sustainable environment. All three of those objectives should be parallel priorities. Business leaders like Bill Gates and John Mackey, the president of Whole Foods, have been champions of this outlook. As Gates said in a famous speech advocating "creative capitalism"[102]

> It is mainly corporations that have the skills to make technological innovations work for the poor. To make the most of those skills, we need a more creative capitalism: an attempt to stretch the reach of market forces so that more companies can benefit from doing work that makes more people better off.[103]

Mackey, advocating a similar position, buttressed it by pointing out that most

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99. Most recently, the author has written about this in Daniel J. Morrissey, *The Riddle of Shareholder Rights and Corporate Social Responsibility*, 80 BROOK. L. REV. 353, 353–54 (2015).

100. Allen, *supra* note 72 and accompanying text.
For a contemporary defense of this more traditional outlook by two leading corporate lawyers, see BARRY M. KAPLAN & GREGORY L. WATTS, DIRECTORS' AND OFFICERS' LIABILITY: CURRENT LAW, RECENT DEVELOPMENTS, EMERGING ISSUES (Practicing Law Inst. 3rd ed. 2019).

101. The term was popularized in the early 1990s by a well-known environmentalist, John Elkington. He argued for a sustainable form of capitalism where a company's profit-making would be both eco-friendly and committed to a fair distribution of its wealth. MICHAEL KERR ET AL., CORPORATE SOCIAL RESPONSIBILITY: A LEGAL ANALYSIS 24 (2009).

102. Gates first introduced the idea at the World Economic Forum in Davos, Switzerland in 2008. Bill Gates, Chairman, Microsoft Corp., A New Approach to Capitalism in the 21st Century, Address at the World Economic Forum (Jan. 24, 2008) (available at https://www.youtube.com/watch?v=Ql-Mtlx31e8 [https://perma.cc/K8TZ-N5N7]). But for a critical comment on how the Davos gathering now just features just empty rhetoric, see Wu, *supra* note 23.

103. Barbara Kiviat & Bill Gates, *Making Capitalism More Creative,* TIME (July 31, 2008), http://content.time.com/time/magazine/article/0,9171,1828417,00.html [https://perma.cc/WLT9-6RRR].

business people are motivated not just to make profit, but also at least in part to do good for others.[104] One commentator called the remarks of Gates and Mackey prime examples of "philanthrocapitalism . . . a more self-consciously innovative and entrepreneurial effort to tackle the world's most urgent social problems."[105] Not surprisingly, religious leaders like Pope Francis have supported such sentiments,[106] but public opinion has shifted in that direction too. Seventy-seven percent of consumers now say that it is important for businesses to be socially responsible,[107] and 50% of them take that into consideration when they buy things.[108]

C. Difficulties with this Approach

Balancing such different corporate priorities may not be easy, however, particularly when less than maximally profitable activity may put firms at a competitive disadvantage. As renowned venture capitalist Peter Thiel has observed, only firms that have some insulation from market forces may have room to vary their practices in that regard. Most have to fight hard just to survive.[109]

A fine new book corroborates that.[110] It tells the stories of forward-thinking entrepreneurs who have tried to have their companies serve the needs of their employees and communities while at the same time making

104. JOHN MACKEY & RAJ SISODIA, CONSCIOUS CAPITALISM: LIBERATING THE HEROIC SPIRIT OF BUSINESS (2013).

105. Chrystia Freeland, *Plutocrats vs. Populists*, N.Y. TIMES (Nov. 3, 2013), at SR1.

106. *See* VATICAN PRESS, APOSTOLIC EXHORTATION EVANGLII GAUDIUM OF THE HOLY FATHER FRANCIS TO THE BISHOPS, CLERGY, CONSECRATED PERSONS AND THE LAY FAITHFUL OF THE PROCLAMATION OF THE GOSPEL IN TODAY'S WORLD 45 (2013) ("Just as the commandment 'Thou shalt not kill' sets a clear limit in order to safeguard the value of human life, today we also have to say 'thou shalt not' to an economy of exclusion and inequality."). The Pope will soon be hosting a conference of young economists in Assisi, Italy that will promote "a different kind of economy: one that brings life not death, one that is inclusive and not exclusive." Marcelo J. Garcia, *Can the Pope Deliver a Debt Miracle for Argentina?*, N.Y. TIMES (Jan. 30, 2020), https://www.nytimes.com/2020/01/30/opinion/pope-francis-argentina.html [https://perma.cc/Q5W9-LJJL].

107. Knowlege@Wharton, *Why Companies Can No Longer Afford to Ignore Their Social Responsibilities*, TIME (May 28, 2012), https://business.time.com/2012/05/28/why-companies-can-no-longer-afford-to-ignore-their-social-responsibilities/ [https://perma.cc/FXB6-VE6A].

108. Craig Kielburger & Marc Kielburger, *The Rise of Corporate Social Responsibility*, HUFFINGTON POST (May 25, 2011), https://www.huffpost.com/entry/the-rise-of-corporate-soc_b_85395 [https://perma.cc/SU22-LTHP].

109. PETER THIEL, ZERO TO ONE: NOTES ON STARTUPS OR HOW TO BUILD THE FUTURE 44–82 (2014).

110. JAMES O'TOOLE, THE ENLIGHTENED CAPITALISTS 2–26 (2019).

competitive earnings. Starting with the nineteenth century Scottish reformer Robert Owen, down to the present day, conscientious business leaders have attempted to do well by doing good, but many have found that hard to do.[111]

Responsibility for adopting such broader policies, like all corporate decision making, rests ultimately with a firm's board, and the law gives it some latitude there. Most significantly, the business judgment rule makes it difficult to challenge actions determined by directors to be best for their companies, particularly if they can be justified as promoting their firms' long-term interests.[112]

So-called constituency statutes enacted by states to protect the independence of firms in their jurisdictions give further leeway to directors in meeting that challenge. They provide that boards may take the interests of stakeholders other than their shareholders into consideration when resisting hostile take-overs.[113] The American Law Institute in its Principles of Corporate Governance furnishes similar support for such broader corporate objectives by encouraging directors in their decision-making to take environmental and social factors into account, even when they could diminish their firms' profitability.[114]

As encouragement for corporations to directly profess such broad goals, some new legislation allows a company to state in its charter that it may engage in activity geared to further the common good that may be less than optimally remunerative.[115] And some reformers point to other countries like Germany, where companies have two boards, one supervisory where diverse

111. O'Toole discusses a number of other companies who have taken that broad approach, some like Johnson & Johnson and Levy Strauss that are household names. *Id.* at 145–205.

112. Sinclair Oil Corp. v. Levien, 280 A.2d. 717, 720 (Del. 1971). *See also* A.P. Smith Mfg. Co. v. Barlow*,* 98 A.2d 581, 586–90 (N.J. 1953) (discussing when the Court upheld a company's contribution to a university).

113. For a good discussion of these, see Anthony Bisconti, *The Double Bottom Line: Can Constituency Statutes Protect Socially Responsible Corporations Stuck in Revlon Land*, 42 LOY. OF L.A. L. REV. 765, 767–69 (2009). *See also* Lawrence E. Mitchell, *Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes,* 70 TEX. L. REV. 579, 579–86 (1992) (discussing constituency statutes generally).

114. AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE § 201 (1994). The ALI has initiated a new project to restate the law of corporate governance. The Institute first tackled the subject of corporate governance more than 25 years ago. Although it provided valuable guidance in a new and unfamiliar area of law at the time, this area has evolved quite a bit in the intervening decades.

115. At least twenty-six states have passed legislation authorizing these "B" corporations. Jennifer Ball, *The B Corporation: Economic Thought on 'Doing Good' and the Profit Motive*, 1–2 (Washburn Univ. School of Bus., Working Paper No. 165, 2014).
For a piece pointing out that such an approach appeals to consumers see Richard Stammer, *It Pays to Become a B Corporation*, HARV. BUS. REV. (Dec. 6, 2016).

interests like those of the firms' workers are directly represented.[116]

Yet even with such guidelines and proposed innovations, a board still has to determine how much socially responsible conduct its corporation should undertake—particularly if it may result in the sacrifice of profit. As Delaware Chancellor William T. Allen stated in a famous address, the business judgment rule gives it the authority for that. And as he put it, "[r]esolving the often conflicting claims of these various corporate constituencies calls for judgment, indeed calls for wisdom, by the board of directors of the corporation."[117]

Along those lines, this author and many others have advocated that corporations be run, in ways that go beyond mere profitability, to promote the common good.[118] That admirable result may best come about, as one commentator stated, "through a broad framework of economic, social, environmental and ethical values and shared objectives that involve constant interaction between the company and its various stakeholders."[119]

D. Senator Warren's Accountable Capitalism

Such an approach gained a major political advocate when Senator and presidential candidate Elizabeth Warren introduced a bill in Congress in August 2018, called The Accountable Capitalism Act.[120] With a twist on

116. *See* Justin Fox, Opinion, *Why U.S. Corporate Boards Don't Include Workers*, BLOOMBERG OPINION (Aug. 27, 2018), https://www.bloomberg.com/opinion/articles/2018-08-27/why-u-s-corporate-boards-don-t-include-workers [https://perma.cc/9E8Y-XQ2F] ("In Germany, it's considered perfected normal that half the members of corporate boards are representatives of the corporation's employees. In the U.S., where Senator Elizabeth Warren recently proposed 40-percent worker representation, it seems like a radical idea.").

Also, on the other side of the Atlantic, former British Prime Minister Theresa May promised in 2016 when she was campaigning that she would allow workers to be represented on boards (although that never happened), and French President Emmanuel Macron is considering changes that would permit greater worker participation on boards in his country. Andrea Garnero, *What We Do and Don't Know About Worker Representations on Boards*, HARV. BUS. REV. (Sept. 6, 2018), https://hbr.org/2018/09/what-we-do-and-dont-know-about-worker-representation-on-boards [https://perma.cc/4F9N-YKW6].

117. Allen*, supra* note 72 and accompanying text.

118. Morrissey, *supra* note 99.

119. JAMES ROSELLE, *THE TRIPLE BOTTOM LINE: BUILDING SHAREHOLDER VALUE,* IN CORPORATE SOCIAL RESPONSIBILITY, THE CORPORATE GOVERNANCE OF THE 21ST CENTURY 130 (Ramon Mullerate, ed. 2d ed. 2011).

120. S. 3348, Accountable Capitalism Act, 115th Cong. (2018).

Supreme Court cases like Citizens United[121] and Hobby Lobby,[122] which gave corporations free speech and religious rights enjoyed by natural persons, Senator Warren's bill would place the moral obligations of humans on them as well.[123]

As the Senator wrote introducing her proposal to readers of the Wall Street Journal:

> American corporations exist only because the American people grant them charters. Those charters confer valuable privileges—such as limited liability for their owners—that enable businesses to turn a profit. What do Americans get in return? What are the obligations of corporate citizenship in the U.S.? For much of U.S. history, the answers were clear. Corporations sought to succeed in the marketplace, but they also recognized their obligations to employees, customers, and the community.[124]

To restore that socially minded approach, the essence of Warren's bill would require companies with gross receipts over $1 billion to enroll as federal corporations. They would then have duties to not only make money for their shareholders but also to serve the interests of stakeholders like their workforce, their communities, their customers, and the local and global environment. In addition, these corporations would be required to have their workers elect 40% of their directors.[125]

This plan would most likely redirect some of the profit generated by these firms to a broader segment of the public. Those returns have largely gone to their shareholders as reflected in a booming stock market.[126] Yet

121. Citizens United v. Fed. Election Comm'n, 558 U.S. 10 (2010). *See* the comment of Republican presidential candidate Mitt Romney, "Corporations are people." Philip Rucker, *Mitt Romney says 'Corporations are People',* WASH. POST (Aug. 11, 2011).

122. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (1994).

123. Matthew Yglesias, *Elizabeth Warren has a plan to save capitalism*, VOX (Dec. 8, 2019), http://www.vox.com/2018/8/15/17683022/elizabeth-warrent-accountable-capitalism-corporations [https://perma.cc/Q7PC-3F3Q].

124. Elizabeth Warren, *Companies Shouldn't Be Accountable Only to Shareholders*, WALL ST. J. (Aug. 14, 2018), https://www.wsj.com/articles/companies-shouldnt-be-accountable-only-to-shareholders-1534287687 [https://perma.cc/SZ9L-V7RX].

125. *See* Fox, *supra* note 116 (discussing the role of workers on corporate boards in Germany). For a fine book about how this model of corporate governance, which exists in Germany, promotes a better life for its citizens in that country, see THOMAS GEOGHEGAN, WERE YOU BORN ON THE WRONG CONTINENT: HOW THE EUROPEAN MODEL CAN HELP YOU GET A LIFE? (2010).

126. *See* Rollicking, Rocketing Stock Markets, *supra* note 5 (stating that in the last 30 years, the Dow Jones industrial average has increased more than 10-fold and the NASDAQ has jumped even more astoundingly by 20 times).

80% of those shares are owned by just 10% of the American public.[127] A large amount of that gain has also found its way into the pockets of many corporate executives whose compensation has reached stratospheric levels.[128] Warren's proposal would force companies to share more of that with their workers and promote the common good.[129]

Defenders of the current economic system, of course, were not pleased with Senator Warren's proposal. For example, two conservatives attacked it as undercutting retirement security. Citing statistics showing that older Americans have a large percentage of their wealth in stocks, they argued that Warren's plan was a threat to those savings: "among all the Democratic taxers and takers" they wrote, "no one would hit retirees harder than Sen Elizabeth Warren. Her 'Accountable Capitalism Act' would wipe out the single greatest legal protection retirees currently enjoy — the requirement that corporate executives and fund managers act as fiduciaries on investors' behalf."[130]

E. The Business Roundtable Pushes the CSR Movement Forward

The drive to promote socially responsible conduct by corporations also got a big boost in the summer of 2019 from a startling statement by the leaders of our country's 200 largest firms. In what the Wall Street Journal called "a major philosophical shift,"[131] the Business Roundtable broke from the traditional shareholder primacy approach it had long advocated, which held that a corporation's principal duty is to make a profit for its shareholders.[132]

Rather, the leaders of those firms now said that their decisions should take into account more than just the interests of their investors and be

127. Rollicking, Rocketing Stock Markets, *supra* note 5.

128. Morrissey, s*upra* note 5 and accompanying text.
See also Kolhatkar *supra* note 5 (disclosing the $65 million annual compensation of Disney CEO Bob Igor).

129. Yglesias, *supra* note 123.

130. Phil Gramm and Mike Solon, *Warren's Assault on Retiree Wealth,* WALL ST. J. (Sept. 10, 2019), https://www.wsj.com/articles/warrens-assault-on-retiree-wealth-11568155283 [https://perma.cc/7ECZ-SHYY]. *See also* Lydia Saad, *What Percentage of Americans Own Stock*, GALLUP (Sept. 13, 2019), https://news.gallup.com/poll/266807/percentage-americans-owns-stock.aspx [https://perma.cc/B54X-75UT] (announcing results of a poll showing only 55% of Americans own any stock, however, down from 62% a decade ago). And 80% of that is owned by the wealthiest 10%. *Rollicking, Rocketing Stock Markets*, *supra* note 5 and accompanying text.

131. David Benoit, *Top CEOs See a Duty Beyond Shareholders,* WALL STREET J. (Aug. 20, 2019), at A1.

132. *Id.*

broadened to include those of "all stakeholders." That larger mandate would charge executives to be attentive to the concerns of their employees and customers. In addition, it would impose a duty on them to protect the environment and deal fairly and ethically with their suppliers. In their pronouncement, the leaders made this high-minded pledge to all those constituents of their firms: "We commit to deliver value to all of them, for the future success of our companies, our communities and our country."[133]

A good comment on that came from Indra Nooyi, a longtime leader at PepsiCo, Inc. She noted that CEOs were now willing to step into a leadership vacuum, and that they have a "bully pulpit" at a time when political leaders have lost credibility because they are seen as "overly partisan and willing to take divisive stands."[134] "Top executives" now can fill that void "to help unite people behind social issues."[135]

The Roundtable's statement was also said to reflect "a moment of increasing distress in corporate America, as big companies face mounting global discontent over income inequality, harmful products and poor working conditions."[136] Another commentator stated that the call for corporations to become "more stakeholder-inclusive and socially responsive is timely and significant."[137]

Yet the same commentator cited the statement's lack of specifics on how corporate goals would be prioritized saying, "[C]orporate boards, senior executives, investors, and government regulators can only speculate about the statement's true significance."[138] A progressive writer showed much the same skepticism when confronting Jamie Dimon, the Roundtable's chairman, about his group's failure to put many teeth into their promises. In response, Dimon told her that the roundtable wasn't a "police force" and allegedly made a dismissive comment that "a lot of people don't like to work."[139]

Another observer also downplayed the impact of the Roundtable's statement, calling it merely a truism. He pointed to a more conventional part of the declaration asserting that a free-market economy is the best means for assuring a prosperous society with a "healthy environment and economic

133. David Gelles and David Yaffe-Bellany, *Shareholder Value is No Longer Everything, Top C.E.O.s Say,* N.Y. TIMES (Aug. 19, 2020).

134. John D. Stoll, *For CEOs, It's a Whole New Job,* WALL ST. J. (Dec. 18, 2019).

135. *Id.* For an earlier book advocating such a role for business leaders by a renowned corporate executive, see Lee Iacocca, Where Have All the Leaders Gone? (2007).

136. Gelles and Yaffe-Bellany, *supra* note 133.

137. Alfred Rappaport, *How CEOs Can Forge a New Kind of Shareholder Value,* BLOOMBERG BUSINESS (Sept. 4, 2019).

138. *Id.*

139. Giridharadas, *supra* note 7, at 46.

opportunity for all."[140] For that to be correct, he said, "No business can long survive without meeting such stakeholders' needs."[141]

Yet those remarks were facile. Another more realistic commentator saw the statement as reflecting pressure that business leaders were feeling for the harms their firms have caused such as "climate change, growing inequality (and awareness that these CEOs make hundreds of times more than their employees)."[142] Citing environmental challenges in particular, he went on to assert, "[t]he current shareholder obsessed system is not fit . . . to tackle shared global challenges."[143]

A recent survey of Chief Financial Officers of large corporations corroborates that, making the point that maximizing short term returns is still the driving force in our capitalist economy. It revealed that "U.S. executives feel five times the investor pressure of counterparts in Europe to deliver quarterly performance, and double the pressure felt by many CFOs in Asia."[144]

Others were even more even dubious that the Roundtable's pronouncement would herald any real change in corporate behavior. Kev Bertsch, the head of the Council of Institutional Investors, said the statement just gives corporate leaders more room to dodge their duties to shareholders, and there is no mechanism of accountability to anyone else.[145] His group also criticized the statement because "it is government, not companies that should shoulder the responsibility of defining and addressing societal

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140. James R. Copland, *The Business Roundtable's Statement Isn't Revolutionary. It's a Truism,* WASH. POST (Aug. 22, 2019).

141. *Id.* Another commentator made much the same point, saying, "How can shareholder wealth ever be created except by satisfying stakeholders, who include customers, workers, suppliers and the communities that create the legal environment in which firms operate?" Holman W. Jenkins, Jr. *CEOs for President Warren,* WALL ST. J. (Aug. 20, 2019), https://www.wsj.com/articles/ceos-for-president-warren-11566341440 [https://perma.cc/ND9R-E3MY].

142. Andrew Winston, *Is the Business Roundtable Statement Just Empty Rhetoric?*, HARVARD BUS. REV.: ECON. AND SOC'Y (Aug. 30, 2019), https://hbr.org/2019/08/is-the-business-roundtable-statement-just-empty-rhetoric [https://perma.cc/NJH2-Y27J].

143. *Id.*

144. Eric Rosenbaum, *Steve Mnuchin dissed 181 major CEOs in a new battle over the future of profits*, CNBC, (Sep. 20, 2019), https://www.cnbc.com/2019/09/20/steve-mnuchin-disses-181-ceos-in-new-battle-over-future-of-profits.html [https://perma.cc/A473-ZVSU]. As another business leader, the founder and president of the CFO Leadership Council made much the same point, saying, "How do you make decisions that are in the long-term best interests of the company when most of the pressure comes from the current quarter?" *Id.*

145. Marc Benioff, *We Need a New Capitalism,* N.Y. TIMES (Oct. 14, 2019), https://www.nytimes.com/2019/10/14/opinion/benioff-salesforce-capitalism.html [https://perma.cc/GP46-8CHJ].

objectives."[146]

Conservative leaders and commentators were also quite forceful with their attacks the Roundtable's Statement. When asked if companies should serve all stakeholders, Vice President Mike Pence cautioned against "leftist policies,"[147] and Secretary of the Treasury Steven Mnuchin declined to endorse the Statement.[148] Wall Street Journal columnist Holman W. Jenkins, Jr. called it "nonsense." It was "throw[ing] shareholders under the bus," he said, and "a mighty fig leaf our corporate leaders have afforded themselves if they must powwow with President Warren 17 months from now.[149]

IV. STAKEHOLDER ADVISORY COUNCILS

A. The Benefits of these Panels

Despite those criticisms, the Roundtable's Statement does afford corporate leaders discretion to make the larger concerns of their stakeholders part of their mandate. Yet the blunt fact remains that those non-shareholder constituents of corporations have no actual power in the governance of their firms and may not even be able to get their voices heard in corporate boardrooms.[150] Not only do they lack the influence to get their companies to adopt socially beneficial policies, but such agendas still cut across the conventional grain of American business.

For at least two decades, commentators have been calling on boards to develop "a broader mindset and new skills"[151] to deal with the exigencies of global business. Two of them noted that corporate constituents other than shareholders and directors could provide that guidance asserting, "[t]hese stakeholders demand higher standards of governance from boards and require greater accountability and professionalism . . . ."[152]

The commentators gave another important objective that those groups

146. *Id.*
147. *Id*.
148. Rosenbaum, *supra* note 144.
149. Jenkins, *supra* note 141.
150. *See* J. Haskell Murray, *Adopting Stakeholder Advisory Boards,* 54 AM. BUS. L. J. 61, 80 (2017) (quoting Leo Strine, the former Chief Justice of the Delaware Supreme Court: "[a]bsent an effective voice by socially responsible investors, boards of directors will naturally gravitate toward focusing solely on the only interest group wielding real power: stockholders acting singularly based on a profit motive.").
151. C. B. Ingley and N.T. Van der Walt, *The Strategic Board: the changing role of directors in developing and maintaining corporate capability,* 9 CORP. GOVERNANCE 174, 174 (2001).
152. *Id.*

could help achieve. They could address the need for a functioning society to have an equitable distribution of its riches. As one put it: "Traditionalists see the need to build long-term shareholder value while the socially conscious see the need to share wealth in order to prevent individuals from strangling the 'golden goose.'"[153]

Still old habits die hard. As a repentant lawyer at a top firm wrote recently about his life-time representing big companies: "The corporate entity is obligated to care only about itself and to define what is good as what makes it more money . . . . [That is] pretty close to a textbook case of antisocial personality disorder. And corporate persons are the most powerful people in our world."[154]

Stakeholder advisory councils have the potential to broaden that narrow outlook and are an important first step to give representatives of the more diverse groups in our society some real authority to impact corporate policy. They are not a new phenomenon. Ten years ago, they had already achieved some success, and in the words of one observer, were "reaching a critical mass."[155] Pointing to a number of companies that had adopted them, he noted how they were helping to identify problems, develop strategies, and provide management with feedback on its performance. These panels, he said, were independent, credible representatives of major stakeholders.

They were not rubber stamps for dominant CEOs and their pliable boards, but rather their critical friends, providing valuable insight to management for dealing with market uncertainties. The piece cited a number of well-known companies that had established these stakeholder panels, including BP, Shell, Burger King, Coca-Cola, Dow Chemical, Unilever and Nestle. Properly constituted, the author said, these outside groups foster a meaningful exchange with management, reflecting the concerns of their members.[156]

Another report focusing on these panels in the U.K. said that they were helping companies make better decisions on social and environmental issues through open and honest dialogue with their top officials. It pointed out that some of those firms had learned the hard way that ignoring stakeholder

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153. *Id.* at 176.

154. Andrew Ross Sorkin, *Ex-Corporate Lawyer's Idea: Rein in 'Sociopaths' in the Boardroom,* N.Y. TIMES (July 29, 2019), https://www.nytimes.com/2019/07/29/business/dealbook/corporate-governance-reform-ethics.html [https://perma.cc/J7NE-NBZV] (quoting Jamie Gamble, a corporate lawyer whose firm counted many of America's largest corporations among its clients).

155. Rajesh Chabara, *Stakeholder panels – Reaching a Critical Mass,* ETHICAL CORPORATION (June 7, 2009), www.ethicalcorp.com/business-strategy/stakeholder-panels-reaching-critical-mass [https://perma.cc/NH4E-EDK4].

156. *Id.*

concerns about issues like child labor and environmental issues "can have devastating effects on share price and corporate reputation."[157] It advocated these joint management-stakeholder committees as vehicles to continue addressing such issues. There, corporate leaders would engage with individuals selected from among their firm's various constituencies and would make decisions in collaboration with them.[158]

The authors warned, however, that their proposal might not be a panacea. It could be difficult for certain groups to develop a good relationship with management due to a lack of trust or the complexities of the issues. In such cases, disillusioned stakeholders might pull out of the process if they saw it as a waste of time.[159] To avoid that, they advocated particular mechanisms for meaningful stakeholder involvement, such as their participation in a firm's environmental forum or its corporate social responsibility committee.[160]

Along those lines, another study found that a company's ecological issues were particularly well-suited for such collaboration.[161] As an example of stakeholder involvement in product development, it described Greenpeace's role as a "strategic bridge" to an appliance manufacturer, helping it make a more environmentally friendly refrigerator.[162] It also discussed other examples of employee participation with management that can result in innovative solutions to problems by bringing diverse viewpoints to reconsider them or by "combining competencies in new ways."[163]

To that end, the study reported how some firms had benefited by having stakeholder panels or advisory boards do period evaluation of their progress on sustainability goals. Along the same line, it found similar good results where management held direct and open communications at regular interactions with stakeholders.[164]

Such meetings opened up the possibility for differing viewpoints to be explored that often involved "triple bottom line" objectives. Sustainable innovations could come about from those exchanges. Calling for more research on this process, those commentators cited the potential for more

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157. Heiko Spitzeck, David Grayson and Erik G. Hansen, *Joint management-stakeholder Committees, 11* CORP. GOVERNANCE INT'L J. OF BUS. IN SOC'Y 560, 562 (Oct. 2011).

158. *Id.*

159. *Id.* at 561.

160. *Id.* at 565.

161. Rosina Watson, Hugh N. Wilson, Palie Smart, and Emma K. Macdonald, *Harnessing Difference: A Capability-Raised Framework for Stakeholder Engagement in Sustainability Innovations,* 35 J. OF PROD. INNOVATION MGMT. 254, 271–74 (2017).

162. *Id.*

163. *Id.*

164. *Id.*

"value-framing" and "systematized learning" that might take place if these sessions involving management and stakeholders were better understood.[165]

B. The Place of Stakeholder Councils in Corporate Governance

With all their promise, a fundamental question remains. What power will these panels have in corporate decision-making? Will they be merely window dressing, with their members amenable to management influence and advocating only token reform proposals? Or will they be constituted with true representatives of company stakeholders and have a meaningful say to advance beneficial social policy?

To that end, how will the members of these panels be chosen? Will they be individuals who are likely to advocate forcefully for the broader goals of the stakeholders? If they are appointed by management, will they be indebted to those corporate leaders and therefore compromised in discharging their far-reaching responsibility? Even if their selection is set up to guarantee their independence, they could be captured by persuasive executives unless they remain committed to their mission.

These panels should not only review proposals by management, but also feel free to criticize all the activities of their corporations. They must be given complete information about any matters involving their duties and have resources and staffs to investigate any of those issues. Their existence and mandate should be well publicized, and all interested individuals and groups should be told they may freely communicate with them about their concerns.

Top officials of their companies should be required to meet regularly with them and informed that they must take their comments seriously. Corporate leaders should be encouraged to seek out suggestions from the members of these panels and give them their full consideration. As a further step to assure some accountability here, these panels should move to publish their recommendations and compel management to respond to them in documents that are available to the public, such as their filings with the SEC.[166]

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165. *Id.*

166. As one commentator said about how a company should make good on the Business Roundtable's recent statement about its commitment to its stakeholders, "As a next step the government could formalize this commitment, perhaps with the Securities and Exchange Commission, requiring public companies to publicly disclose their key stakeholders and show how they are impacting those stakeholders." Benioff, *supra* note 145.

An analogy to the federal sentencing guidelines may be instructive. While those are an attempt to bring consistency and eliminate bias in those proceedings, they are not mandatory. A provision in them states, however, that if judges go outside of them in a

C. *An SEC Proposal Threatens to Insulate Corporations from Social Concerns*

Such a commitment to openness is needed now more than ever in light of a proposed rule change by the SEC that would reduce an avenue of accountability that public companies have to their shareholders and members of the public. As it now stands, Exchange Act Rule 14a-8[167] allows shareholders whose stock has a market value over $2,000 to submit proposals for a vote at shareholder meetings, so long as they have held their stock for at least one year. If adopted, those resolutions become corporate policy.[168]

These exercises in shareholder democracy though, are typically opposed by management and never secure approval by a majority of the shares voting. Yet many of them bring important corporate policies like working conditions and environmental protection to public awareness.[169]

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sentence, they must give their reasons for doing so. Similar explanations could be required of corporations who believe they cannot follow the recommendations of their Advisory Panels. Here is the specific language from the guidelines:

> (e) REQUIREMENT OF SPECIFIC WRITTEN REASONS FOR DEPARTURE.—If the court departs from the applicable guideline range, it shall state, pursuant to 18 U.S.C. § 3553(c), its specific reasons for departure in open court at the time of sentencing and, with limited exception in the case of statements received in camera, shall state those reasons with specificity in the statement of reasons form.

167. Securities Exchange Act Rule 14a-8, 17 CFR §240.14a-8. For a good general discussion of how this process works, see Lewis A. Black, Jr. and A. Gilchrist Sparks, III, *SEC Rule 14a-8: Some Changes in the way the SEC Staff Interprets the Rule,* 11 TOL L. REV. 957, 960–62 (1980).

168. One commentator gave this description of shareholder proposals: "After more than four decades of experience and modification, the consensus understanding of the typical rule 14a-8 proposal is that it is advisory or precatory in nature, frequently is made during a national campaign by shareholders holding only a few shares in each of several targeted companies and is convincingly rejected at the annual meeting." Patrick J. Ryan, *Rule 14a-8, Institutional Shareholder Proposals, and Corporate Democracy,* 28 GA. L. REV. 97, 101 (1988).

169. Although Rule 14a-8(i)-(7) allows management to exclude proposals relating to its ordinary business operations, one commentator, reviewing case law, has noted that corporate decisions involving "matters which have significant policy, economic or other implications inherent in them" may not be excluded on those grounds. Stephen M. Bainbridge, *Revitalizing SEC Rule 14a-8's Ordinary Business Exclusion: Preventing Shareholder Micromanagement by Proposal,* 85 FORD. L. REV. 705, 705 (2016). He is critical of that approach because, he says, it is contrary to state corporate law principles. *Id.*

Others however have praised this process. "The shareholder proposal rules permit investors to express their voices collectively on issues of concern to them, without the cost and disruption of waging proxy contests. The rule works particularly well in granting retail investors — who lack other avenues to meaningfully engage with management — a voice in the companies they own." INVESTOR RIGHTS FORUM https://www.investorrightsforum.co m [https://perma.cc/QF6H-5JU3] (last visited Jan. 24, 2021) (quoting Council of Institutional

The SEC, however, has now proposed changes to the rule that would limit this important mechanism that investors can use to express those concerns.[170] In the words of one advocacy group, that

> would make it more difficult for shareholders to vote independently of management . . . by rigging the rules to make it more difficult to file shareholder proposals or issue proxy advice on a wide array of issues from excessive executive pay to climate risk or board and staff diversity.[171]

Among other changes, the SEC would step up the ownership amount required to submit a proposal to $25,000 if the stock has only been held for one year and only retain the $2,000 amount if the shares have been owned for three years.[172] This would make it more difficult for groups with limited resources to meet the threshold required to submit proposals. One such prominent organization that would be adversely affected by the SEC's action is the Interfaith Center on Corporate Responsibility (ICCR).

During the half-century of its existence, the ICCR, a coalition of over 300 religious and other socially minded investors, has sought dialogue with corporate leaders on a wide range of concerns involving social and environmental issues. When those are unproductive, ICCR members have used the proxy proposal system to make their voices heard. They submitted over 300 of those resolutions in 2017.[173]

D. *Comments of a Member of Wells Fargo's Panel*

Sister Nora Nash of the Franciscan Sisters of Philadelphia is part of the ICCR leadership and also sits on Wells Fargo's new Stakeholders' Advisory Council. In a conversation, she described her fellow members of the bank's panel as "seven folks from different backgrounds urging the company to

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Investors CEO, Ken Bertsch).

170. This is in line with an approach that one commentator has described with these remarks: "Today the Republican Party has become so radicalized that it opposes almost any government action to solve problems. Its domestic agenda consists largely of cutting taxes for the rich and freeing companies from oversight." David Leonhardt, *The Questions all Democrats Need to Ask Themselves,* N.Y. TIMES (Feb. 9, 2020), https://www.nytimes.com/2020/02/09/opinion/democrats-2020-election.html [https://perma.cc/7MVC-9UCK].

171. Investor Rights Forum, *Securities and Exchange Commission Rulemaking Threatens to Disrupt ESG Investment Ecosystem and Undermine Shareholder Rights* https://www.investorrightsforum.com/rights-at-risk [https://perma.cc/8AL6-9W7M] (last visited Feb. 15, 2020).

172. Securities and Exchange Commission, *SEC Proposes Amendments to Modernize Shareholder Proposal Rule,* Exchange Act Release 2019-232 (Nov. 5, 2019).

173. Interfaith Center on Corporate Responsibility, *Catalyzing Corporate Change,* https://www.iccr.org/about-iccr [https://perma.cc/FED4-MGG6] (last visited Feb. 14, 2020).

move in the right direction."[174] She saw the purpose of the Council as bringing an outside view to the company's problems.

Chief among them, she said, are how it has treated its workforce, particularly those who were fired for the "horrible things" which went on at the company during the long-standing and massive frauds that the bank was perpetrating on its customers. Were those discharged employees the real culprits, she questioned, or just workers pressured into dishonest practices by top level officers of the company? Despite the company's professions of reform, she indicated that the panel was still looking for answers and exercising oversight to see if the bank's new management would show a real commitment to change as reflected in its corporate culture.

Sister Nash went on to further describe the role of the Council as examining the important and salient issues facing the bank. Among those were its human rights policies as evidenced in its lending practices. She said that Wells Fargo had appropriately stopped funding the private prison industry but noted that it was still providing lines of credit to the National Rifle Association and to various fossil fuel companies—some that were involved in the environmentally harmful practice of fracking and extracting minerals from tar sands.

The panel saw its role, she said, not only to admonish Wells Fargo's management about such unethical activity, but also to apprise them pragmatically of the harmful and expensive consequences that might arise from it. Those could include reputational loss as well as financial and litigation risks.

On the broader issues of societally responsive corporate governance, she pointed to progress on the human rights front by retailers. Facing public pressure about exploitive and unsafe working conditions in their supply chains, they have taken some corrective action. She spoke of the need to still target unethical recruitment practices that are tantamount to human trafficking.

Overall, Sister Nash was hopeful that the panel would be effective in moving Wells Fargo toward more ethical and environmentally sustainable conduct. She said the bank's management appeared to be listening to the panel's comments and appreciating its feedback on the company's policies.

V. CONCLUSION

Given the historical character of American businesses as profit-seeking

174. Phone interview of Sister Nora Nash of the Franciscan Sisters of Philadelphia (February 14, 2020).

organizations, it may be a bit much to expect large scale altruistic behavior from our corporations.[175] In the past, various reform movements have attempted to curb their excessively anti-social behavior through regulation,[176] and the Business Roundtable's recent statement may be a laudable attempt to instill some higher-minded aspirations into internal corporate decision making.[177] Yet one could rightly assume that it, like the regulatory approach, will meet with limited success.

Corporate leaders nevertheless are powerful individuals with much of our country's resources at their disposal. True, they must satisfy the demands that their investors and the market put on them, but as the Roundtable's Statement shows, executives are increasingly recognizing the larger inequities in our society and would like to do something about them. If corporations are now "soulless"[178] creatures, Stakeholder Advisory Councils may be a way to implant souls in them. If nothing more, those panels can serve as a bridge from corporations to society at large, sensitizing those firms to their impact on our common life and prodding them to serve the larger purposes of our nation.

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175. As this article was being prepared for printing, another article was scheduled to appear in the Cornell Law Review, taking a more critical viewpoint of stakeholder participation in corporate governance than this piece. Lucian A. Bebchuk & Robert Tallarita, *The Illusory Promise of Stakeholder Governance*, CORN. L. REV. (2020) (forthcoming).

The authors there assert that stakeholders are not benefited by these reforms. Rather, they insulate corporate leaders from accountability to shareholders and impede more meaningful measures that would better protect stakeholders.

This article expresses some of the same reservations about reforms such as those proposed by the Business Roundtable's revised statement on corporate purpose. However, the author of this piece continues in the belief that Stakeholder Advisory Councils are a good first step in promoting more responsible corporate governance.

176. *See supra* notes 56-70 and accompanying text (discussing the early era of progressive reforms to corporate law).

177. *See supra* notes 131-137 and accompanying text (discussing the shift from the shareholder primacy approach to an approach that included stakeholder interests).

178. Coffee, *supra* note 1 and accompanying text.