THE CORPORATION IN AN AGE OF DIVISIVENESS

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ABSTRACT

The debate around the public purpose of the corporation is not a new one. But it has flared up again recently due to widespread critique of deepening socio-economic inequality, corporate inequities regarding gender and race and the seeming inability of governments and businesses alike to adequately address the catastrophic impact of climate change. As the corporation holds a firmly established place in the universe of economic and financial affairs, it – like the markets in which it operates – is typically depicted as a private affair. Any regulation of the corporation, thus, tends to be critiqued as an unjustified intervention into an economic sphere that should better be left to its own devices. This paper interrogates these claims against the historic evidence of corporate law’ and corporate theory’s trajectories throughout the twentieth century into the present. What this account teaches us is that the designation of ‘corporate purpose’ and our relation to it comes down to political choices. The reputational crisis of the corporation, then, is an opportunity for democratic deliberation and engagement.

Keywords: Corporate Governance – Climate Change – Sustainable Finance - Corporate Purpose – Asset Management – Financialization – Race– ESG – Law & Political Economy (LPE).

I. DEBATING THE CORPORATION

“Obviously things are happening in the economic and social order, and these happenings are reflected in the legal order.”\(^1\)

“Agreement on the Shareholder Primacy Norm has evaporated.”\(^2\)

Does the business corporation have a role to play in addressing socio-economic inequality, ethnic, racial and gender-based discrimination as well as climate change? What does it say about contemporary society that some corporate boards and CEOs and Chief Investment Officers (CIOs) lead their organizations in such directions despite the absence of binding law, while others support state regulation which prohibits the implementation of Environmental, Social, and Governance (ESG)-related corporate governance and investment strategies? Taking a historical perspective on debates around

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the public nature of large stock corporations reveals a non-linear pattern. Rather than showing how the understanding of ‘corporate social responsibility’ tracks the evolution from the idea of laissez-faire towards a more involved and steering role of the government in economic affairs, the history of corporate governance suggests a more complex engagement between the state and the corporation.

This paper places the historical account of corporate law’s evolution in the twentieth century in a ‘Law and Political Economy’ (LPE) context to illuminate the regulatory choices which continue to support and reinforce the marginalization of stakeholder and environmental interests despite sobering evidence of deepening political divisiveness and dramatically accelerating environmental degradation. The current discussion around ‘corporate purpose,’ ESG, and ‘anti-woke’ comes after three years of deep-reaching disruption of economic and social life by the Coronavirus pandemic, which so far has failed to initiate meaningful and long-term reform. But it must also be seen against the background of a deeply financialized and globalized financial economy which has emerged out of governmental political shifts since at least the 1970s. By combining an LPE lens with insights from law and economics, legal history and legal sociology, the paper argues that there is today an important opportunity to revisit and reevaluate the normative assumptions that have been driving corporate governance and financial regulation over time.

The shift, in recent years, from addressing these issues under the heading of ‘Corporate Social Responsibility’ (CSR) to today’s focus on ‘ESG’ and ‘corporate purpose’ points to a changing public perception of the corporation’s position in society. Meanwhile, corporate law doctrine is only just beginning to adapt to this evolving context. Scores of conferences, investor-briefs, corporate law firms’ client alerts and a burgeoning debate between practitioners, scholars and policy makers, for example on Harvard Law School’s Corporate Governance Forum, Columbia Law School’s Blue Sky Blog or McGill’s Business Law Meter, underscore the significance of these broadly debated questions. It is this ‘big picture’ dimension of today’s discussions around transparent, sustainable, and inclusive corporate governance and investment that requires an analysis which is both historical and encompassing. Only by placing the corporation in the historically evolving context of economic and political change is it possible to understand the weight of the present skepticism towards business leaders and political actors in relation to how (little?) corporations are governed. This intervention aims at complementing existing and emerging, excellent legal historical work with an analysis on the sociology of the actors, norms, and processes to bring the multifaceted dimensions of corporate law’s political
economy into fuller view. What becomes visible is a much changed institutional and normative landscape in which corporate governance rules are negotiated, contested, and elaborated across a wide range of public and private actors and interest groups, distinctly reaching beyond the confines of court rooms in Delaware or elsewhere.

This debate is not a new one. For a greater part of the last thirty years, corporate governance has been the subject of a lively, transnational debate. Many of the contentions that drive that debate and their roots, however, can be traced back much further, at least to the early decades of the twentieth century if not before. A majority of the themes at the forefront of today’s scholarly and public discussions around corporate purpose, the delimitation of directors’ managerial roles and duties, the concentration of economic

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4 See Jill E. Fisch, The Overstated Promise of Corporate Governance, 77 U. CHI. L. REV. 923, 924 (2010) (arguing that the importance of firms’ economic performance “has led commentators to debate governance reforms for decades”); see also Fisch, supra, note 2, at 114 (“Repurposing the corporation is the hot issue in corporate governance.”); Ruth V. Aguilera and Gregory Jackson, Comparative and International Governance, 4 ACAD. MGT. ANN. 485 (2010) (mapping competing disciplinary and normative approaches to corporate governance through a comparative law lens); Jennifer G. Hill, Shifting Contours of Directors’ Fiduciary Duties and Norms in Comparative Corporate Governance, 5 U.C. IRVINE J. INT’L, TRANS. & COMP. L. 163, 175 (2020) (highlighting the widespread emergence and continuous amendment of corporate governance codes in parallel to formal corporate law regulation); Simon Deakin, Corporate Governance in Contention 25 (Ciaran Driver and Grahame Thompson eds., 2018) (tracing the rise to dominance of the shareholder value model of corporate governance to the proliferation of law and economics thinking and its reception in corporate law); Lucian A. Bebchuk and Roberto Tallarita, The Illusory Promise of Stakeholder Governance, 106 CORNELL L. REV. 91, 110 (2020) (arguing that even where directors consider stakeholder interests this does not deviate from their commitment to maximizing shareholder value); Paul L. Davies, Shareholder Voice and Corporate Purpose: The Purposelessness of Mandatory Corporate Purpose Statements, 39 (Eur. Corp. Gov. Inst. L. Working Paper, Paper No. 666/2022, 2023) (“[S]hareholders who do not like broad purpose requirements and directors accountable to them will not implement them in a meaningful way and those shareholders who do favour them are not dependent on the presence of a purpose requirement.”).

5 See Reinhard Bendix, Work and Authority in Industry: Ideologies of Management in the Course of Industrialization 305 [1956] (1974) (“This contrast between the ‘real’ worker and the ‘ideal’ manager was readily interpreted in the sense that the gulf dividing the two was unbridgeable.”).
power in a small number of corporations and investors,\(^6\) socio-economic inequality,\(^7\) and the rise of financial activity as a driving force of generating profits,\(^8\) were on the mind of regulators and citizens already a hundred years ago with comparable intensity.\(^9\) What has further developed are both the scope and priorities in today’s discussions. The breathtaking rise of the large stock corporation as the dominating actor not only in economic but also political affairs prompted critical reflections also from those who doubted that the celebrated principals of ‘private autonomy’ and ‘freedom of contract’ during the *Lochner* era adequately depicted the socio-economic struggles of workers and low-income demographics.\(^10\) Berle and Means’

\(^6\) See Adolf A. Berle & Gardiner C. Means, The Modern Corporation and Private Property xxi [1932] (2nd ed. 1991) (arguing that large stock corporations have freed themselves from governmental control by administering significant amounts of capital); see also Harold J. Adam, Anti-Trust (Anti-Monopoly) Policy and Application 1920-1929, 4 AM. ECON. 2, 12 (1960) (describing the active corporate merger period of the 1920s which was facilitated by governmental non-intervention).


\(^8\) See Rosemary L. Batt & Eileen Appelbaum, The Impact of Financialization on Management and Employment Outcomes, 9 (Upjohn Inst., Working Paper 13-191, 2013) (“[A] series of regulatory changes freed up large pools of capital for investment in the stock market and fueled the rise of pools of private capital available to new financial intermediaries. This included pension legislation that for the first time allowed pension funds and insurance companies to hold shares of stock and high risk bonds in their portfolios.”); see also Alicja Bobek, Marek Mikuš and Martin Sokol, Making Sense of the Financialization of Households: State of the Art and Beyond, SOC-ECON. REV. 6 (2023) (“The deregulation of financial services in advanced capitalist countries and elsewhere coincided with the rhetoric of a ‘democratization of finance’ . . . the expanded access of individual (i.e. non-corporate) clients to forms of finance that are more flexible, diverse, complex and prominent in relation to household balance sheets than ever before . . . It is important to note that this process occurred in parallel with wage compression and an increase in lifestyle expectations . . . , which led many individuals to rely more on financial products.”).

\(^9\) Robert L. Heilbroner, The Making of Economic Society 84 (2nd ed., 1968) (citing Woodrow Wilson: “If monopoly persists, monopoly will always sit at the helm of government. I do not expect to see monopoly to restrain itself. If there are men in this country big enough to own the government of the United States, they will own it.”).

\(^10\) See Pound, supra note 1, at 6 (“Where, today, are the economically self-sufficient households and neighborhoods, where is the economically self-sufficient, versatile, restless, self-reliant man, freely making a place for himself by free self-assertion, which that ideal assumes and portrays? Where, indeed, but in our legal thinking in which it is so decisive an element?”); see also Morris R. Cohen, Property and Sovereignty, 13 CORNELL L. REV. 8, 11
'Modern Corporation and Private Property' reflected this explicitly,\textsuperscript{11} echoing the concerns expressed in Upton Sinclair's \textit{Jungle},\textsuperscript{12} those addressed by Justice Holmes's dissent in \textit{Lochner}\textsuperscript{13} or in the critique of economic power as not being recognized as a political problem, as articulated by the lawyer-economist Robert Hale.\textsuperscript{14}  

Today's debates have spilled over from the academy into the wider public and vice versa. The nature of the discussions is varied and the spectrum of issues that are 'on the table' is wide. In hindsight, the rapid succession of 'surprise' election outcomes in 2016 in the UK and the U.S. has become part of a broader, continuing development that is seen to reflect stored-up feelings of anxiety, resignation and anger among voters.\textsuperscript{15} The

\begin{quote}
\textsuperscript{11} BERLE & MEANS, supra note 6, at 116 ("The concentration of economic power separate from ownership has, in fact, created economic empires, and has delivered these empires into the hands of a new form of absolutism, relegating 'owners' to the position of those who supply the means whereby the new princes may exercise their power.").
\textsuperscript{12} See generally UPTON SINCLAIR, THE JUNGLE (1906) (describing the concrete experiences of an immigrant worker family in Chicago’s meat processing plants in the early twentieth century); see also Arvind Dilawar, \textit{America's Most Famous Novel about Bad Meat Was Actually About Immigrant Labor Abuses}, TALK POVERTY (Jan. 10, 2019), https://talkpoverty.org/2019/01/10/sinclair-jungle-immigrant-narrative/index.html [https://perma.cc/37U5-D8RP] ("Buffeted by unemployment, dangerous working conditions, alcoholism, violence and systemic corruption, the family is driven further and further into abject poverty as almost every aspect of society — employers, landlords, politicians, police, merchants — preys upon them.").
\textsuperscript{13} Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("This case is decided upon an economic theory which a large part of the country does not entertain.").
\textsuperscript{14} Robert L. Hale, \textit{Coercion and Distribution in a Supposedly Non-Coercive State}, 38 POL. SC. QUART. 470, 472 (1923) (arguing that governmental protection of property rights results in shielding the owner even from “peaceful infringement of his sole right to enjoy the thing owned”); see also John P. Dawson, \textit{Economic Duress – An Essay in Perspective}, 45 MICH. L. REV. 253, 253 (1947) ("[I]t is through duress and related ideas that private law has dealt most directly with problems raised by inequality in bargaining power. Particularly in the field now known as economic duress, courts have been compelled to take a stand on that central issue of modern politics, the control of economic power.").
\textsuperscript{15} See Stefan A. Schirm, \textit{Globalisation, Divided Societies and Nation-Centred Economic Policies in America and Britain}, 9 EUR. REV. INT’L STUD. 240, 241 (2022) ("Findings demonstrate that workers and industrial regions suffered from economic liberalisation, that incomes partly stagnated, populist discourse grew and that many voters felt a loss of social
varied results of contested elections have been analyzed across different disciplines as phenomena of broader transformation processes with yet uncertain outcomes. The widely noted publication of the French economist Thomas Piketty, “Capital in the Twenty-First Century” (2014) almost a decade ago “prompted discussion[s] of inequality, financial regulation, and political economy across an unusually wide spectrum” and brought together “academic economists, businesspeople, students, central bankers, politicians, policymakers, and social activists into a conversation about the future of capitalism.”

Capital was hardly coming ‘out of nowhere,’ but instead was published in a moment of rising socio-economic anxiety, political alienation and xenophobia. The prevailing economic order, which had for a number of decades become almost automatically associated with “globalization,” has since come under increasing scrutiny, far beyond the confines of scholarly status.”). For a sobering comparative overview of countries electing populist leaders, see Daniel Drache & Marc D. Froese, Has Populism Won? The War on Liberal Democracy (2022) (mapping the widespread coming to power of authoritarian and autocratic leaders in both the Global North and South with broad populist support).

16 See Melissa Morgan, The Legacy of January 6, Stan. Freeman Spogli Inst. for Int’l Stud. (Jan. 5 2022), https://fsi.stanford.edu/news/legacies-january-6 [https://perma.cc/3A3U-63S] (citing Larry Diamond, “Rather than providing a sobering lesson of the dangers of political polarization, the insurrection seems only to have intensified our divisions, and the willingness to contemplate or condone the use of violence.”).


18 Id. at 627-28. See also Marshall Steinbaum, Thomas Piketty Takes On the Ideology of Inequality, Bost. Rev. (Mar. 25, 2020), https://www.bostonreview.net/articles/marshall-steinbaum-another-world-possible/ [https://perma.cc/9SD4-3TCX] (arguing that Piketty shows how the return on capital investments has largely outrun the development of salary income).

19 Sindre Bangstad et al., The Politics of Affect. Perspectives on the Rise of the Far-Right and Right-Wing Populism in the West, 83 Focaal. J. Glob. & Hist. Anth. 98, 98 (2019) (“[W]e live in an age in which political anger seem to have returned with a vengeance. Across several nation-states in Europe and the United States, right-wing populism has recently thrived in the context of rising socioeconomic inequalities within Western nation-states, the likes of which the world has not seen since the Gilded Age of the early twentieth century.”). See also Jacqueline O’Reilly et al., Brexit: Understanding the Socio-Economic Origins and Consequences, 14 Soc-Econ. Rev. 807, 807 (2016) (“Brexit brought to the surface and gave a public voice to socio-economic divisions that were deeply embedded, sometimes illogical, but until now had either been ignored or hushed out of ‘respectable’ public debate.”).

The term not only became synonymous with decades’ of international economic, political and cultural integration, but also raises far-reaching and challenging questions regarding the role that states have played in furthering and deepening globalization processes themselves. The economist Dani Rodrik offered a sobering analysis of what he identified as the three competing paradigms which could never simultaneously be achieved: deep economic integration, national sovereignty and democratic politics. Domestically, the frustration with stagnant wages, declining upward mobility and deepening economic hardship, in short, the absence of the proverbial “tide that lifts all boats” which the protagonists of economic globalization had promised right up to the global financial crisis, had begun to manifest itself in political resignation and apathy and, eventually, radicalization.

21 Jeffry Frieden, Harvard University, The Politics of the Globalization Backlash: Sources and Implications, Presentation at the Annual Meetings of the Am. Econ. Assoc., Panel on “Making Globalization Inclusive” (Jan. 6, 2018), https://scholar.harvard.edu/files/jfrieden/files/the_politics_of_the_globalization_backlash.pdf (https://perma.cc/25A7-GSTD) (“Political discontent has been central to the globalization backlash. Dissatisfaction has taken the form of large increases in voting for extremist political parties, the emergence of new parties and movements, and challenges from within existing parties. Large numbers of voters have rejected existing political institutions, parties, and politicians, often in favor of ‘populists’ of the Right or Left whose common themes include skepticism about economic integration and resentment of ruling elites.”).

22 Philip G. Cerny, Paradoxes of the Competition State: The Dynamics of Political Globalization, 32 GOV’T. & OPPOSITION 251, 251 (1997) (describing how states adopted policies to promote globalization while losing the ability “to embody the kind of communal solidarity or Gemeinschaft which gave the modern nation-state its deeper legitimacy, institutionalized power and social embeddedness.”). See also James Fulcher, Globalisation, the nation-state and global society, 38 SOC. REV. 522, 527 (2000) (arguing that historically, “[t]he development of the nation-state was inseparable from the growth of international structures. Its autonomy was based on the principles of national sovereignty and the formal equality of all states, which were established by the 1648 Peace Treaties of Westphalia”).


25 Arlie Russell Hochschild, Strangers in Their Own Land: Anger and Mourning on the Political Right (2016) (tracking the lives of several families in Louisiana over a five-
While the growing democratic crisis has ushered in a crucial surge in domestically and comparatively focused political and sociological analysis of rising authoritarianism and populism, the interdisciplinary cohort of “globalization scholars” of economists, business and management consultants, lawyers, geographers, sociologists and political scientists turned their attention to the drivers and prospects of “post-globalization.”

Today, at the end of the third year of the global Coronavirus pandemic, the general outlook seems mixed, at best. While anxieties around employment and social security which began to gain wider ground during year ethnographic research period and finding that, despite corporations being among the obvious culprits in the environmental degradation that causes illness and death in the studied communities, their members argue against the state’s intervention). See also William Davies, A Review of Arlie Russell Hochschild’s Strangers in their Own Land: Anger and Mourning on the American Right, 30 INT. J. POL. CULT. SOC. 413 (2017) (drawing parallels to the socio-economic and cultural, political conditions that caused a majority of UK citizens to vote to leave the European Union).

26 See STEVEN LEVITSKY AND DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2019); See also DANIEL DRACHE AND MARC FROESE, HAS POPULISM WON? (2022).

27 See, e.g., Dani Rodrik, How to Save Globalization from its Cheerleaders (Centre for Econ. Pol’y Rsch. Discussion Paper No. 6494, 2007), https://repec.cepr.org/repec/cpr/ceprdp/DP6494.pdf [https://perma.cc/X2RP-W3F2] (arguing for a renewed effort on the part of national governments to open up policy spaces rather than creating market access); Tim Stobierski, 6 Pros and Cons of Globalization in Business to Consider, HARV. BUS. SCH. ONL. (Apr. 1, 2021), https://online.hbs.edu/blog/post/pros-and-cons-of-globalization [https://perma.cc/XA6K-3LEP]; see also Michael A. Witt, De-Globalization: Theories, Predictions, and Opportunities for International Business Research, 50 J. INT’L BUS. STUD. 1053 (2019) (noting competing explanations for the continuing decline of globalization: domestic political resistance and external competitive pressure—for example from China); Benjamin L. McKean et al., The Political Theory of Global Supply Chains, 22 CONT. POL. TRI. 375, 378 (2023) (“Neoliberalism provides ordinary people with a comprehensible and often attractive way of looking at the world; when our power as workers is weak and the wealthy dominate political institutions, it can be more pleasurable to find freedom as a consumer and to identify as an entrepreneur than to reckon with the structures that confine and disempower us.”).


29 Jonathan Heathcote et al., More Unequal We Stand? Inequality Dynamics in the United States 1967-2021 (Nat’l Bureau of Econ. Rsch., Working Paper No.31486, 2023), https://www.nber.org/papers/w31486 [https://perma.cc/5RZ6-LWA5] (“wage dispersion at the bottom of the wage distribution (i.e., below the median) has remained relatively stable over the past 20 years, while inequality has kept growing at the top.”); See also Genevieve LeBaron & Adrienne Roberts, Confining Social Insecurity: Neoliberalism and the Rise of the 21st Century Debtors’ Prison, 8 POL. & GENDER 25, 26 (2012) ("[A]s social welfare programs have been scaled back and rendered more punitive over the past several decades, and as levels of inequality and poverty have risen, collective means of governing social marginality have
the great recession after the global financial crisis seem to echo sentiments from earlier times, other issues such as the digital invasion into personal privacy, and the overwhelming specter of climate change, among others, test our imagination of alternatives and sustainable transformation.

Due to the interaction of longevity and the pressing urgency of these problems, many today would attest to a sense of crisis—the felt experience of living through a period which faces overwhelming challenges while offering few clear markers of what might come next. Notably, today’s discontents bring into sharp relief the connections between a long-lasting progress of economic growth and financial expansion that has deepened the largely been replaced by individualized, privatized, and severe ones.”); Rebecca Vallas et al., The Effect of Rising Inequality on Social Security, CTR. FOR AM. PROGRESS (2015), https://www.americanprogress.org/article/the-effect-of-rising-inequality-on-social-security/.

30 Beth Redbird & David B. Grusky, Distributional Effects of the Great Recession: Where Has All the Sociology Gone?, 42 ANN. REV. SOCIO. 185, 186 (2016) (describing the Great Recession “as one of these defining events that has become deeply ingrained in our collective conscience,” and tying this to the effects of the financial collapse of 2007, which “initially erased more than half of the capitalization of the stock market, . . . housing prices fell dramatically and left many Americans underwater, . . . banks stopped lending and many construction and construction-related workers lost their jobs . . .”). The authors note further “that the crisis quickly became economy-wide with unemployment climbing to as high as ten percent, that tax revenues in turn fell as employment and income declined, and that there were real and legitimate worries during the early years of the crisis that the downward spiral would continue unchecked.”).

31 Julie E. Cohen, Law for the Platform Economy, 51 U. CAL. DAVIS L. REV. 133, 178 (2017); Valerio de Stefano & Simon Taes, Algorithmic Management and Collective Bargaining, 29 TRANSFER 21, 22 (2023) (“[A] panoply of technological devices and IT-powered tracking and monitoring methods is being introduced in workplaces, affecting the conditions under which workers do their jobs and invading their privacy. The data collected are processed to manage the workforce in an automated fashion; decisions concerning hiring and promoting workers and retaining or dismissing them are increasingly shaped or nudged by automatic tools.”).

32 Gesa Mackenthun, Sustainable Stories: Managing Climate Change with Literature, 13 SUSTAINABILITY 1, 3 (2021) (lamenting the lack of transformative visions in present-day popular culture); see also Ailise Buffin, Popular Culture and the ‘New Human Condition’: Catastrophe Narratives and Climate Change, 156 GLOB. & PLANETARY CHANGE 140, 142 (2017) (observing a deep-seated popular concern with the pending climate catastrophe).

33 Eva Gifford & Robert Gifford, The Largely Unacknowledged Impact of Climate Change on Mental Health, 72 BULL. ATOMIC SCIENC. 292, 292 (2016) (noting how “‘exo-anxiety,’ . . . the ‘severe and debilitating worry about risks that may be insignificant’ . . . can elicit dramatic reactions, such as loss of appetite, sleeplessness, and panic attacks, among those affected.”). See also David Wallace-Wells, Beyond Catastrophe: A New Climate Reality is Coming Into View, N.Y. Times Mag., Oct. 26, 2022, https://www.nytimes.com/interactive/2022/10/26/magazine/climate-change-warming-world.html [https://perma.cc/EKG3-WN7F] (“The window of possible climate futures is narrowing, and as a result, we are getting a clearer sense of what’s to come: a new world, full of disruption but also billions of people, well past climate normal and yet mercifully short of true climate apocalypse.”).
asymmetries between winners and losers and the significant environmental impact on the planetary conditions of human existence.\textsuperscript{34}

As far as academic discussions of corporate governance and, as of recent, corporate purpose,\textsuperscript{35} are concerned, it is the interconnectedness of this constellation\textsuperscript{36} that manifests itself in a bifurcated discourse. Part of this discourse remains deeply engaged within the conceptual and even doctrinal borders that have for what seems a long time now pitted against one another stark (op-)positions between shareholder primacy and stakeholder governance.\textsuperscript{37} Much of that is owed to the fact that, as Christopher Bruner

\textsuperscript{34} Christopher M. Bruner, \textit{The Corporation as Technology. Re-Calibrating Corporate Governance for a Sustainable Future} 3-9 (2022) (mapping a host of \lq interconnected crises\rq with regard to \lq extraordinary environmental, social and economic upheaval, and arguing for corporations to assume the leadership role in addressing these). \textit{See also} Karl Aiginger & Dani Rodrik, \textit{Rebirth of Industrial Policy and an Agenda for the Twenty-First Century}, 20 \textit{J. Ind., Comp. & Trade} 189, 191 (2020) (arguing that the pursuit of societal and environmental goals is bound to clash with prevailing industrial policy in \lq dirty\rq industry sectors).


\textsuperscript{36} Naomi Klein, \textit{This Changes Everything: Capitalism vs. the Climate} (2014) (arguing for a wholesome analysis of economic growth theory and environmental degradation).

\textsuperscript{37} The literature around these positions spans many decades. For an in-depth exploration of the competing views, \textit{see} David Millon, \textit{Theories of the Corporation}, \textit{Duke L. J.}, 201 (1990) (discussing the arguments in support of the view that \lq corporate activity has broad social and political ramifications that justify a body of corporate law that is deliberately responsive to public interest concerns\rq and the \lq alternative viewpoint \lq which\rq portrays corporate law as governing little more than the private relations between the shareholders of the corporation and management, which acts as their agents or trustees\rq); Benedict Sheehy, \textit{Scrooge—The Reluctant Stakeholder: Theoretical Problems in the Shareholder-Stakeholder Debate}, 14 \textit{Miami Bus. L. Rev.} 193, 195 (2005) (highlighting that the corporate governance debates around shareholder primacy and stakeholder governance increases as globalization (i.e., economic and financial integration,) increases); \textit{see also} David Ronnegard & N. Craig Smith, \textit{Shareholders vs. Stakeholders: How Liberal and Libertarian Political Philosophy Frames the Basic Debate in Business Ethics}, 32 \textit{Bus. & Prof. Eth. J.} 183,185 (2013) (discussing the
recently remarked, “many of the most consequential features of the corporate form are treated as if they were etched in stone.” However, what is actually at stake is how to constructively open up a doctrinal discussion around corporate law and societal concerns which place the corporation in a broader, social and ecological context. The somewhat circular nature of these discussions results in exhaustion—particularly for those who are trying to break the shareholder/stakeholder contentions out of the limiting mold of standing corporate governance theory and corporate law doctrine in order to point out the need to think beyond these confines, while finding that again and again even ambitious efforts become ‘stuck in neutral.’ And as Lisa Fairfax recently noted:

[T]he strength of the shareholder primacy norm may undermine the feasibility of norm internalization related to stakeholderism. Scholars have emphasized the considerable difficulty of altering pre-existing norms. Once a norm is in place, people will adhere to it and defend it even if it is costly or inefficient. The considerable legal and extralegal factors supporting the shareholder primacy norm may make altering the normative environment appear to be a heavy lift.

And here emerges the other side of the discourse, in which participants engage in historical and conceptual, interdisciplinary and critical retro- and intro-spection to trace the long-term trajectories and determinants of the combination of economic, political and legal paradigmatic thinking that they

38 Christopher M. Bruner, Corporate Governance Reform and the Sustainability Imperative, 131 YALE L. J. 1217 (2022), 1276.
39 Elizabeth Pollman, Corporate Social Responsibility, ESG, and Compliance, in THE CAMBRIDGE HANDBOOK OF COMPLIANCE (Benjamin van Rooij & D. Daniel Sokol eds., 2021) (arguing that ESG requires the introduction and amendment of concrete corporate law instruments).
suggest should today be placed under the microscope.42

Part II of this paper will go back to a number of landmark moments and transitions in the life of the business corporation. These, in turn, prompt two observations that Parts III and IV will explore in more detail. One is that it is impossible to study the corporation and competing assertions regarding its responsibilities towards different constituencies purely on the level of theoretical, abstract arguments. What the research reviewed in this paper shows, instead, is that the corporation and its continuing organizational transformation have always been embedded in processes of societal change. In other words, an analysis and assessment of the arguments made around shareholder primacy, stakeholderism, corporate purpose or sustainability risks becoming circular as it navigates a set of contentions in an increasingly self-referential manner. In abstracting the actual corporation from its socio-economic, political, and ecological environment, the participants of such debates find themselves speaking to themselves, repeating the same, well-rehearsed arguments while, worse still, further delaying an earnest and inclusive conversation about what we might reasonably expect to happen with corporations in the next five, ten, twenty years as we keep tossing balls around.

To show how the corporation has always been implicated in and a key part of continuously changing societal circumstances throughout history, Part II will outline, in broad strokes at least, the evolution of the political economy of corporate regulation. It begins with the era of rapid industrialization and asymmetric wealth creation at the turn of the twentieth century on to the expansion and contraction of national economies after World War II up to the 1970s, and then on through the late twentieth-century transformation of governmental policies to shrink public services through contractualization and privatization at the same time that global financial

42 Bruner, supra note 38. See Carol Liao et al., INNOVATIVE BUSINESS FOR SUSTAINABILITY: REGULATORY APPROACHES IN THE ANTHROPOCENE 1 (Carol Liao et al. eds., 2022) (“Amid the global COVID-19 pandemic, the corporate disregard of the connection between economics and ecology has come to an uncomfortable reckoning.”); see also Andrew Johnston et al., Corporate Governance for Sustainability, (Columbia L. Sch. Working Paper 2019), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3611&context=faculty_scholarship [https://perma.cc/Z3SS-Y7DA]; Dirk Schoenmaker et al., Corporate Governance beyond the Shareholder and Stakeholder Model, 2023 ERASMUS L. REV. 27; Martin Gelter, Taming or Protecting the Modern Corporation? Shareholder-Stakeholder Debates in a Comparative Light, 7 N.Y.U. J. L. & BUS. 641 (2011) (drawing attention to the fact that historically there already existed compelling arguments in favor of seeing corporate directors making decisions with view to their impact on the social, cultural and ecological environment).
transfers and domestic access to mobile, foreign capital were being facilitated. Finally, Part II will review the consolidation of large financial and non-financial sectors in a context of ongoing significant geopolitical change, caused both by China’s rise as a leading global economic and political power and by the domestic rise of populist discontent with shrinking prospects of upward socio-economic mobility and the uncertainty of forward-looking economic and ecological security prospects.

Following on this historical sketch, Part III will trace the role played by both public and private actors in generating the regulatory framework in relation and in response to the changing economic and political conditions. It will focus on the corporation as a key site for the study of how law regulates—or struggles to regulate—43 not only economic transactions through corporate, contract or tort law, but also how the corporation becomes an opportunity to analyze how law both addresses and creates the actual institutional infrastructure of market-based interactions, of which the corporate law analysis is only a small part. Taken together, these Parts will render visible the corporation as a mirror in which we find reflections not only of continuing societal change but of normative and regulatory competition. An important observation in this context is that the corporation emerges not only in the traditional, doctrinal sense as a legal creation and artifact 44 but also as an organizational structure which is significantly implicated in the creation of legal norms itself.

At its core, such an approach to studying the corporation is grounded in traditions of legal history, legal sociology and, more specifically, economic sociology of law. These strands of scholarly analysis have more recently again received renewed attention under the auspices of “law and political economy,” 45 (LPE) while notably continuing strands of such scholarly

45 See, e.g., David Singh Grewal & Jedediah Purdy, Law and Neoliberalism, 77 L. & CONT. PROB. 1 (2014); Jedediah Britton-Purdy et al., Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis, 129 YALE L. J. 1780, 1784 (2020) (“Together, these developments pose a deep challenge to prevailing models of legal thought and scholarship, which have been profoundly shaped by a misconception of the relationship between politics and the economy. That misconception inhibits our ability to address urgent
inquiry into the sociology and political economy of the firm spanning across a long time period.\textsuperscript{46} Of relevance here is not only the academic and analytical interdisciplinary scholarship with its promise—or, aspiration—to break down and unpack field boundaries that tend to artificially separate co-existing and overlapping institutions and processes of power according to legal doctrine, but, more importantly, to aim for a contextualization of law’s operation in a historically changing, socio-economic and political context.

Part V puts forward the argument that a study of corporate law \textit{in context} from an LPE perspective can reveal a richer and more complete picture of the corporation’s evolving place in society than corporate law-internal legal and economic scholarship might be able to render visible on its own. By contextualizing the corporation and the laws and norms which apply to it,\textsuperscript{47} it becomes possible to see more clearly the interdependence of the corporation, the law and the political economy in which they evolve and shape one another.

Part VI ties the foregoing analysis into an engagement with today’s broader societal and academic debate around corporate purpose. It argues that, regardless of whether the term itself will prove effective and compelling in the long run, the concerns it helps to crystallize deserve our full attention. The current moment prompts an analysis of the corporation in its socio-economic, political, ecological as well as doctrinal-conceptual context. Today’s questions regarding the corporation, its managers, its investors and its wider sets of stakeholders are not all new but build on a long line of public

\textsuperscript{46} See, e.g., \textsc{Theodor Veblen}, \textsc{The Theory of Business Enterprise} (1904); James V. Cornehel, \textsc{Veblen’s Theory of Finance Capitalism and Contemporary Corporate America}, 38 J. Econ. Iss. 29 (2004); Berle \& Means, \textit{ supra} note 6; \textsc{Peter A. Hall}, \textsc{Varieties of Capitalism: The Institutional Foundations of Comparative Advantage} (Peter A. Hall et al. eds., 2001); Peer Zumbansen, \textsc{Rethinking the Nature of the Firm: The Corporation as a Governance Object}, 35 \textsc{Seattle U. L. Rev.} 1469, 1470 (2012)(arguing that comparative corporate governance debates in the 2000s picked up on preceding comparative political economy analysis of the role of economic regulation and corporations).

and scholarly discourse—a discourse that is today being carried out under the particularly pressing conditions of widely noted social inequality, political division and an undeniable, dramatic climate crisis.

II. LESSONS FROM HISTORY

For any corporate law and teacher, there exists a constant tension between the evolution of case law and doctrine as well as related scholarship and broader debates about the politics, functions and contestations around corporations and how they are regulated. At times, these debates can feel almost breathless with academics seemingly constantly writing on a “hot” topic, eventually filling substantial space in law reviews, blogs and discussion fora. Taking a step back, we can put this tension into perspective and see that not all is actually that new.

In fact, for a long time, similar arguments have been exchanged in relation to the duties and obligations of corporate directors and the scope of the corporation’s responsibility to society at large. Often enough, these were related to or corresponded with widely noted court disputes. Among the prominent examples, the case of the Supreme Court of Michigan’s 1919 landmark judgment in *Dodge v. Ford* still stands out.

*Dodge* spurred a string of legal commentary that is now over a century old and ongoing. As the corporate law and legal history scholar Dalia Tsuk

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48 Fisch, *supra* note 4, at 114.

49 William W. Bratton and Michael L. Wachter, *Shareholder Primacy’s Corporatist Origins: Adolf Berle and The Modern Corporation*, 43 J. CORP. L. 99, 100 (2008) (“A continuing and longstanding debate has been waged in corporate law scholarship among those who favor shareholder primacy, those who favor management discretion, and those who believe that corporations have a social responsibility to other constituencies, such as the corporation’s employees, and the wider public interest.”).


Mitchell notes, these debates shed important light on the tensions that arise out of a changing experience and understanding of the relationship between the state and the market and how the rise in corporate power inevitably shifts the balance between public and private power. Unsurprisingly, these debates tend to flare up during significant socio-economic and political transitions, when public attention scrutinizes the powerful position the business corporation holds in people’s lives, whether that affects them as consumers, employees, as workers or as forced and slave laborers, as business corporation merits a continuing engagement with the judgment; Robert J. Rhee, The Neoliberal Corporate Purpose of Dodge v. Ford and Shareholder Primacy: A Historical Context 1919-2019, 28 STAN. J. L. BUS. & FIN. 202, 204-05 (2022) (“Despite its celebrity status as the oldest canonical case in modern corporate law, Dodge has never been influential in American courts.”); David Millon, Shareholder Primacy in the Classroom after the Financial Crisis, 8. J. BUS. & TECH. L. 191, 192 (2013) (“In fact, shareholder primacy is not a legal doctrine. Beyond the anomalous case of Dodge v. Ford, it is virtually impossible to find authority for it.”).

54 Jiwook Jung & Yin Lee, Financialization and Corporate Downsizing as a Shareholder Value Strategy, 20 SOC-ECON. REV. 1795 (2022) (tracing how, beginning in the 1970s, corporations began relying increasingly on external, foreign workers while shrinking their internal workforce). For a historical account of how employees became increasingly implicated in the successes and failures of the firms and funds in which their old-age savings were hosted, see SANFORD M. JACOBY, LABOR IN THE AGE OF FINANCE: PENSIONS, POLITICS, AND CORPORATIONS FROM DEINDUSTRIALIZATION TO DODD-FRANK (2021); see also Giorgos Gouzoulis et al., Financialization and the Rise of Atypical Work, 61 BR. J. IND. REL. 24, 25 (2023) (“In highly financialized non-financial firms that are largely owned by shareholders, the main goal of management is to maximize dividend payments to them, hence, the process of achieving this entails rising financial costs, which, in turn, result in squeezing labour costs . . . . In this context, the financialization of non-financial firms has been affecting negatively labour management and increasing employment instability.”).
55 Genevieve LeBaron, The Role of Supply Chains in the Global Business of Forced Labour, 57 J. SUPP. CH. MGT. 29, 30 (2021) (“Forced labor has been well-documented across a variety of product supply chains including those that create garments, footwear, food, and electronics, as well as within labor supply chains linked to agriculture, construction, and hospitality.”). See also Robert Caruana et al., Modern Slavery in Business: The Sad and Sorry State of a Non-Field, 60 BUS & SOC’Y 251 (2021) (providing an overview of the recent surge in research and policy development around the dire conditions of workers across global supply chains and the pressure on governments to formulate adequate regulatory responses).
investors, as community members or as, often involuntary, providers of sensitive personal data.

The current concern over the corporation’s role in society stands in a long tradition of contesting private power and the discrepancy between managerial and shareholder agency. Its recent surge is in no small part

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56 Tamas Barko et al., Shareholder Engagement on Environmental, Social, and Governance Performance, 180 J. BUS. ETHICS 777 (2022) (discussing the results of a decade-long study of 660 companies engaging in ESG practices); see also Bebchuk and Tallarita, supra note 4, at 110; see also Benjamin Braun, Exit, Control and Politics: Structural Power and Corporate Governance under Asset Management Capitalism, 50 POL. & SOC’Y 630, 631 (2022) (arguing that as the wealth-preservation function has displaced the financing function, power shifted from banks to mostly large institutional investors which are now assuming key roles in identifying performance goals as dominant shareholders).

57 Norton E. Long, The Corporation and the Local Community, 343 ANN. AM. ACAD. POL. & SOC. SC. 118, 119 (1962) (describing the conflicting loyalties for corporations towards the maximization of profit and the demands from the local community in which they are located). “The problem of the corporation and the local community is different in degree but not in kind in Guatemala or New York State. In either case, the natives are concerned about an institution that does not accept the common territorially bound fate, whose roots are so shallow that it can pick up and leave when its interests so dictate.” And see Priya S. Gupta, The fleeting, unhappy affair of Amazon HQ2 and New York City, 10 TRANS. LEG. TH. 97 (2019) (laying out the significant concessions the city of New York was committed to make to attract Amazon Inc. to open their second corporate headquarter office in the City).

58 Shoshana Zuboff, Big Other: Surveillance Capitalism and the Prospects of an Information Civilization, 30 J. INFO. TECH. 75, 79 (2015) (highlighting the distance that data extraction creates between the individual provider and the different corporate end-users: “The extractive processes that make big data possible typically occur in the absence of dialogue or consent, despite the fact that they signal both facts and subjectivities of individual lives. These subjectivities travel a hidden path to aggregation and decontextualization, despite the fact that they are produced as intimate and immediate, tied to individual projects and contexts...”). Danielle Keats Citron, A New Compact for Sexual Privacy, 62 WM. & MARY L. REV. 1763, 1767 (2021) “The surveillance of intimate life garners significant returns with little risk for businesses. The opposite is true for individuals.” See also Rana Foroohar, Opinion, Our Personal Data Needs Protecting from Big Tech, FIN. TIMES (Nov. 17 2019), https://www.ft.com/content/04d3614e-078a-11ea-a984-fbbcad9e7dd, [https://perma.cc/4X BH-LZFA] (reporting on major healthcare platforms sharing patients’ sensitive data with social media companies); Michael O’Malley, Why You Need To Prepare Now For Privacy Legislation That May Not Pass, FORBES (Mar. 27 2023), https://www.forbes.com/sites/forbestechcouncil/2023/03/27/why-you-need-to-prepare-now-for-privacy-legislation-that-may-not-pass/?sh=32c7ecae769a [https://perma.cc/3HMZ-AV7A] (discussing the competing views on what corporations should do in relation to sensitive data in an evolving regulatory context).

59 See Adolf A. Berle Jr., Corporate Powers as Powers in Trust, 44 HARV. L. REV. 1049 (1931). See also E. Merrick M. Dodd Jr., For Whom Are Corporate Managers Trustees? 45 HARV. L. REV. 1145 (1932). See also Holly J. Gregory, Everything Old is New Again – Reconsidering the Social Purpose of the Corporation, HARV. L. SCH. F. CORP. GOVERNANCE
owed to the finance-driven growth in corporate power which is complemented by a passive-shareholder implication of pensioners in stock markets as their old-age security reserves became key elements in global pension fund investments.60

A. The Long History of Democratic Shareholder Narratives

The just alluded-to distinction between a retail investor’s participation in the stock market and a pensioner’s exposure to market volatility with regard to their retirement savings sheds light on the ambivalent meaning of the word ‘shareholder.’ The involvement of citizens, whether as wealthy investors with the ability to experiment with flexible portfolios or as workers whose old-age savings are institutionally invested in the stock market, has a long history. It is important to acknowledge the degree of corporate concentration and its impact on different kinds of shareholders in that regard. “The early decades of the twentieth century brought us the modern corporation, large and growing larger by waves of mergers facilitated by statutes that allowed mergers and acquisitions with the consent of a bare majority of shareholders. Ordinary Americans became equity investors in

See supra note 49, at 129 (“[S]hareholders got their legitimacy as passive recipients of wealth created. Shareholders thus were the legitimate and only claimants to corporate profits, not necessarily because they are the owners in the traditional property sense, but because they represented to some extent the welfare of the general public.”). See also Lenore M. Palladino, Financialization at Work: Shareholder primacy and stagnant wages in the United States, 25 COMPETITION & CHANGE 382 (2020) (observing a significant gap between investor return and workers’ salary development). See also Palladino, Establishing a public option for asset management in the United States, REV. SOC. ECON. 2 (2023) (“Households, especially the non-wealthy public sector workforce whose only assets are in public sector pension funds, have an interest in reducing systemic risks like climate change, growing economic and social inequality, and macroeconomic instability.”).
unknown corporations, with strangers for managers.” In 1914, two years after leaving the Republican Party and joining the Democrats and two years before his appointment to the U.S. Supreme Court, on which he served until 1939, Louis Brandeis published *Other People’s Money. And How the Bankers Use It.* At the outset of the book, which brought together essays he had written in support of Woodrow Wilson’s campaign for the presidency, Brandeis cites Governor Wilson for the following observation:

> The great monopoly in this country is the money monopoly. So long as it exists, our old variety and freedom and individual energy of development are out of the question. A great industrial nation is controlled by its system of credit. Our system of credit is concentrated. The growth of the nation, therefore, and all our activities are in the hands of a few men, who, even if their actions be honest and intended for the public interest, are necessarily concentrated upon the great undertakings in which their own money is involved and who, necessarily, by every reason of their own limitations, chill and check and destroy genuine economic freedom. This is the greatest question of all; and to this, statesmen must address themselves with an earnest determination to serve the long future and the true liberties of men.

Moving forward, these dynamics of asymmetric shareholder ownership only continued to deepen. As noted by the historian and labor economist, Sanford Jacoby:

> [O]wnership was far from being widespread. It was the affluent who held most of the shares in public corporations, either directly or through retirement plans. Among U.S. households in 2016, the top 1 percent owned 53 percent of all stocks and mutual funds. For the top 10 percent, the figure was 93 percent. Included in the top 1 percent are corporate insiders —executives, founders, and inheritors—who... hold substantial stakes. The bottom half of households own no stock whatsoever. In the three deciles above them are households who own stock—including in their retirement plans—but seven out of ten of these households have holdings worth less than $10,000. In other words, stock markets are mostly irrelevant for 80 percent of US households except to exacerbate

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62 LOUIS D. BRANDEIS, OTHER PEOPLE’S MONEY: AND HOW THE BANKERS USE IT (Frederick A. Stokes Co. 1914).

63 *Id.* at 1-2.
wealth inequality.\textsuperscript{64}

Still, the narrative of ‘democratic finance,’ and widespread, if not universal share ownership continued to provide an important backdrop for the continuing consolidation of the shareholder primacy principle as a social norm.\textsuperscript{65}

It is easy to see how Jacoby’s and Brandeis’ observations and their inherent insistence on taking a long-term perspective on what we should expect from financial institutions have become more widely endorsed amidst the more recent contentions around corporate purpose. Some of the thrust of today’s critical contentions comes from the evidence which has been laid out in excellent legal historical work on the precursor stages of today’s debate,\textsuperscript{66} and which helps us in recognizing the persistence with which arguments for and against a more long-term oriented approach to regulating corporations continue to clash.

The historical perspective also allows us to better identify connections between the long-running trade-off between dominant and minority arguments in corporate law scholarship and policy. The continuing and repeatedly intensifying discussions around corporations, corporate power, and how they should be regulated reveal a persisting tension between a dominant belief in financial markets as arbiters of competing value claims

\textsuperscript{64} Sanford M. Jacoby, Labor in the Age of Finance. Pensions, Politics, and Corporations from Deindustrialization to Dodd-Frank 6 (2021); Lenore Palladino, Financialization at Work: Shareholder Primacy and Stagnant Wages in the United States, 25 Competition & Change 382, 383 (stating that “shareholder primacy – the financialization of the corporation – is a crucial and under-studied cause of rising income inequality in the United States, as rising claims from shareholders hurt labour’s claims to revenue from corporate value creation . . .”).

\textsuperscript{65} See N. Craig Smith and David Rönnegard, Shareholder Primacy, Corporate Social Responsibility, and the Role of Business Schools, 134 J. of Bus. Ethics 463, 463 (2016) (stating, “while the SPN might be muted as a legal norm, we show that it is certainly evident as a social norm among managers and in business schools—reflective, in part, of the sole voting rights of shareholders on corporate boards and of the dominance of shareholder theory—and justifiably so in the view of many managers and business academics.”). See also Paddy Ireland, Shareholder Primacy and the Distribution of Wealth, 68 Mod. L. Rev. 49, 50 (2005) (reporting on research stating that even in social-democratically governed jurisdictions the shareholder primacy norm was gaining ground.); Andrew Ross Sorkin, How Shareholder Democracy Failed the People, N.Y. TIMES (Aug. 20, 2019), https://www.nytimes.com/2019/08/20/business/dealbook/business-roundtable-corporate-responsibility.html [https://perma.cc/D5EE-9C3S] (discussing the context in which shareholder supremacy came to dominate corporate priorities).

\textsuperscript{66} See supra note 52, at 157 (revisiting Chancellor Chandler’s famous 2010 judgment in eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 6 (Del. Ch. 2010) to illustrate the tensions between the public perception of a company’s social significance and the prioritization of shareholder primacy under prevailing corporate law).
on the one hand and the prioritization of market-based access to welfare and health services and the rejection of redistributive politics to address socioeconomic disparities, on the other. Signs of this, as research shows, can also be observed in Europe that traditionally had a robust welfare state tradition. What comes into view from a political economy perspective is the relationship between public and private actors the actual entanglement and complexity of which a focus on “state” and “market” fails to capture.

The business corporation has long become a key actor in the historical development of regulatory politics, public discourse and the struggle not only over competing policy options but also over actually existing possibilities of access, participation, and transformation. As Lee Preston noted in the 1970s, questions about the large business corporation’s “relationship to the economy and to the larger society... are neither obscure nor trivial.” Instead, Preston argued, “In one form or another, they occur to the man on the street as readily as to the academician and professional analyst. And embedded in their answer is most of our economic activity and a substantial part of our political and social life.” To better contextualize the challenges of the present-day contestation of corporate purpose, it is helpful to remember the next observation that Preston makes:

Yet these questions have never entered the mainstream of modern economic analysis. Although the large corporation is clearly the characteristic and most important economic behavioral entity in our economy-and is, indeed, the unique American contribution to the worldwide organizational repertoire-it bears little relationship to the abstract "firm" of economic theory.

67 Walter Korpi, *Welfare-State Regress in Western Europe: Politics, Institutions, Globalization, and Europeanization*, 29 ANN. REV. SOCIO. 589 (2003) (tracing a gradual retrenchment of welfare state politics around Keynesian interventionism and the pursuit of full employment). See also OLIVER NACHTWEY, Germany’s Hidden Crisis. Social Decline in the Heart of Europe (David Fernbach & Loren Balhorn transl., 2018 [orig. German, 2016]), 105 (“What is coming into being is a society of downward mobility... the work-centred society characteristic of social modernity, in which work was still the precondition for social security, is indeed ending.”). See also Jarkko Pyysääinen, Darren Halpin & Andrew Guilfoyle, Neoliberal Governance and ‘Responsibilization’ of Agents: Reassessing the Mechanisms of Responsibility-Shift in Neoliberal Discursive Environments, 18 DISTINKTION: J. SOC. THEORY 215 (2017) (arguing that European states have been favoring ‘responsibilization’ policies that place the burden of securing access to health and social services on the shoulders of citizens).


69 Id.

70 Id.
This observation sheds light on a longstanding concern among historians, political economists and sociologists over the way in which a representation of the corporation as a private law entity which can – in law and theory – be distinguished from the political sphere of the state, falls short of grasping the way in which corporations and corporate decision-making have been shaping the political economy of our time.\textsuperscript{71} A key insight in this respect has been the deconstruction of the public-private divide in assessing the nature and role of the business corporation.\textsuperscript{72}

To see the corporation as \textit{actor} instead of as an object of regulation follows from the premise that the modern-day political economy of the business corporation, at least since the broadly institutionalized waves of privatization and deregulation in the late 1970s and early 1980s, cannot be captured through a focus on public institutions,\textsuperscript{73} but needs to take into account how corporations have been able to concretely shape the public regulatory environment that is supposedly defining what the corporation can and cannot do. As William Bratton observed after the Enron collapse,\textsuperscript{74} and as John Coffee argued with regard to Sarbanes Oxley and Dodd-Frank, if one wants to understand the political economy in which the corporation is situated and in which struggles over regulation or laissez-faire are unfolding, one needs to keep a close eye at the range of private actors, including lobbyists, industry, other interest groups, rating agencies, consultancies, and others which populate the corporation’s environment.\textsuperscript{75}

Periods of marked privatization and deregulation further exacerbate

\begin{footnotesize}
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\item David Jacobs, \textit{Corporate Economic Power and the State: A Longitudinal Assessment and Two Explanations}, 93 AM. J. SOCIOLOG. 852, 853 (1988) (“[T]he relationship between corporate resources and political influence is fundamental to a complete understanding of politics in purportedly democratic systems.”).
\item David Ciepley, \textit{Beyond Public and Private: Toward a Political Theory of the Corporation}, 107 AM. POL. SC. REV. 139, 140 (2013) (“When the privatization of the business corporation commenced, no one anticipated that this fading medieval vestige, the corporate form of business, would draw to itself the most dynamic forces of the industrial age and arise like a phoenix to dominate the landscape. . . or that its privatization would aid and protect this domination.”).
\item Orly Lobel, \textit{The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought}, 89 MINN. L. REV. 342, 380 (2004) (“The generation of interjurisdictional and intrajurisdictional competition—through processes of decentralization, privatization, and participatory administration, as well as the sharing of information and incentives for comparison signifies new public management tools of the governance model.”).
\item William W. Bratton, \textit{Enron and the Dark Side of Shareholder Value}, 76 TUL. L. REV. 1275, 1279-80 (2002) (“Enron spent copiously on politics. . . . Enron thereby achieved something available to no other leading dealer in derivative contracts-complete exemption of its activities from federal supervision and oversight.”).
\item Coffee, \textit{supra}, note 43, at 1023.
\end{enumerate}
\end{footnotesize}
these dynamics.\textsuperscript{76} This creates additional challenges for an anatomy of corporate influence on legislation and regulation, given the high degree of variation that can and has always characterized arrangements of privatization, including forms of public-private partnerships and their different contractual organization: rather than representing clear-cut ruptures between state-led and market-based governance systems, privatization regularly presents a political event and an opportunity to design a specific regulatory arrangement on the basis of policy but within the limits of economic, political and other constraints and compromise.\textsuperscript{77}

By beginning to see corporations as key drivers in an evolving privatized and financialized economy we are assuming a decidedly political economy perspective,\textsuperscript{78} which implies an engagement with the corporation through an investigation into the political, economic, and regulatory context over time, in which the corporation exists. Such an approach renders highlights the interaction between the corporation and its different—public and private—interlocutors.\textsuperscript{79} Taking a political economy approach is aimed at better understanding the predominantly enabling role played by corporate law and corporate governance against the backdrop of developments in economic and financial theory and changes in the (predominantly U.S.) political economy. Given the intensity with which the debate around shareholder primacy and stakeholderism is being conducted today, it seems

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\textsuperscript{76} Martha Minow, \textit{Public and Private Partnerships: Accounting for the New Religion}, 116 \textit{Harv. L. Rev.} 1229, 1245 (2003) ("Privatization stimulates new knowledge and infrastructure by drawing new people into businesses previously handled by government. In addition, experimentation and institutional innovation can promote learning and participation, in tune with the democratic values of participation and dialogue.").

\textsuperscript{77} Jody Freeman, \textit{Extending Public Law Norms Through Privatization}, 116 \textit{Harv. L. Rev.} 1285, 1286-87 (2003) ("[T]here is nothing inevitable about the shape privatization might take: it is an artifact. Indeed, the word 'privatization' describes nothing in particular so much as it suggests a host of arrangements.").

\textsuperscript{78} See Wolfgang G. Friedmann, \textit{Corporate Power, Government by Private Groups, and the Law}, 57 \textit{Colum. L. Rev.} 155, 164-65 (1957) (illustrating how the focus on how law sustains and enables the changing roles that private actors such as corporations play in society, thereby illuminating the complex political economy and shifting balances between public regulators and private actors, and arguing that the power of large non-state actors such as corporations and foundations has become so “decisive” that it necessitates a reassessment of the state’s legal and political power in relation to them); \textit{see also} John W. Cioffi, \textit{Public Law and Private Power: Corporate Governance Reform in the Age of Finance Capitalism} 3-4 (2011) (arguing that corporate governance has become a field of contestation for different interest groups with regard to regulating corporations in a context of the dominating shareholder value maximization principle). For the general argument, applied across a range of legal doctrine fields, \textit{see} Katharina Pistor, \textit{The Code of Capital: How the Law Creates Wealth and Inequality} (2018).

\textsuperscript{79} Martha Minow, \textit{Partners, Not Rivals: Privatization and the Public Good} (2002).
worthwhile to retrace some of the steps that corporations, corporate law, and both scholarly and public discourse have taken to arrive in the present moment of discontent. It is not that all the answers lie in the past or, worse still, that history always repeats itself—as tragedy or farce. But, an appreciation of the fact that some of the deeper roots in today’s disputes lie in the past will make their stakes more intelligible, and, hopefully, offer insights into the historically evolving constellations against the background of which we should try to make sense of the present challenges facing us.

B. From Lochner to Platform Capitalism

A few years before Brandeis’ eloquent critique of the position of economic and political dominance held by banks, the Supreme Court, in 1905, struck down a New York state law limiting daily and weekly working hours for bakers. As is well known, *Lochner v. New York* formed part of the Court’s repeated interventions into progressive lawmaking efforts and “[became] shorthand for a period in which judges invalidated labor laws based on their view that those laws prevented employers and workers from striking the best deal they could with each other.” The same year *Lochner* was decided, Upton Sinclair published *The Jungle*, which, initially turned down by a number of publishing companies, became a public wakeup call and eventually prompted the creation of the Food & Drug Administration. In 1932, Berle and Means elaborated the thesis of the separation of ownership and control in the modern stock corporation as part of a comprehensive portrait of an economy in a state of transformation.

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80 Karl Marx, *The Eighteenth Brumaire of Louis Napoleon* 1 (2005 [orig. German 1852]) (“Hegel remarks somewhere that all the events and personalities of great importance in world history occur, as it were, twice. He forgot to add: the first time as tragedy, the second as farce.”).


82 “The *Lochner*-era cases were based on an abstract, formalist understanding of bargaining between employers and workers. The idea, which judges often made explicit, was that absent labor legislation employers and workers were each equally free to enter into, or refuse to enter into, contracts with each other.” Samuel Bagenstos, *Lochner Lives On*, *ECON. POL’Y INST.*, 1,1 (2020) https://www.epi.org/unequalpower/publications/lochner-undermines-constitution-law-workplace-protections/[https://perma.cc/3LN9-GFCT].

83 “Sinclair's fictitious 'Durham's' meat-packing firm was intended to represent any one of the five meat-packing companies which dominated American meat-packing at the turn of the century: Armour, Cudahy, Morris, Swift, and Wilson, which together slaughtered some eighty percent of America's cattle.” Roger Roots, *A Muckraker's Aftermath: The Jungle of Meat-Packing Regulation After a Century*, 27 *WM. MITCHELL L. REV.* 2413, 2416 (2001).

Modern Corporation was written during a time of significant change, spanning the late 1920s, the Great Crash of 1929, and the onset of the Great Depression, all of which shaped the authors’ perception of the corporation, its managers and shareholders, but also of its role at time of profound social crisis and pressure on both public and private powerful actors to intervene.85 Some twenty years later, as Berle published The 20th Century Capitalist Revolution, he again combined a quantitative account of corporate power with an astute political analysis of its larger societal implications, emphasizing once more that the emergence of corporate capitalism via the creation of mass production, mass consumption, and mass organization is not merely of economic but of political significance.86

Skipping two, three decades forward, and in the twilight of Bretton-Woods, public as well as scholarly attention became drawn to the ‘ multinational’ corporation as a fast-proliferating, almost ubiquitous organization of stunning proportions and capabilities. “Multinational companies (MNCs) coordinate and control operations in many different parts of the world through unified authority and ownership structures. They represent the extension of the visible hand of managerial hierarchies from national economies to supranational regional and worldwide ones . . . .”87

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85 Bratton & Wachter, supra note 49, at 137 (“Issues like industrial concentration, financial intermediation, and capital formation needed to be studied in a political framework, because each implicated the creation and exercise of power in society, power that society inevitably would control through government economic policy.”).

86 ADOLF A. BERLE, JR., THE 20TH CENTURY CAPITALIST REVOLUTION 164-65 (1954). See also Stimson Bullitt, The 20th Century Capitalist Revolution, by Adolph A. Berle, Jr. (1954) and American Capitalism: The Concept of Counterveiling Power, by John Kenneth Galbraith (1952), 30 WASH. L. REV. 261, 261-62 (1955) (featuring Stimson Bullitt’s review of The 20th Century Capitalist Revolution) (“The corporation has become a quasi-private institution and remains a person only by a space-ship fiction. . . . [B]oards tread carefully to avoid provoking more public regulation. . . . [I]n international affairs, corporations have served as a useful solvent, showing a capacity to work out economic problems among nations more easily than governments for the reason that their executives tend to know the subject matter, put less insistence on dogma and face, and have more spirit of workmanship.”).

87 Richard Whitley, The Multinational Firm as a Distinct Organizational Form, in: IMAGES OF THE MULTINATIONAL FIRM 145, 145 (Simon Collinson and Glenn Morgan eds., 2009). See also Anthony Goerzen and Ari Van Assche, Global Value Chain Governance: A Multinational Enterprise Capabilities View, in: THE OXFORD HANDBOOK OF INTERNATIONAL BUSINESS STRATEGY 421, 422 (Kamel Mellahi et al. eds., 2020) (“[R]eductions in spatial transaction costs have made it profitable for lead MNEs in developed countries to redesign their production processes, pushing them to abandon the practice of concentrating their value chain in a single location. Through outsourcing and offshoring, they have sliced up their production processes and dispersed their activities across multiple countries and suppliers to
Complementing this depiction by an organizational sociologist, a representative insight by a lawyer typically ran like this:

[T]he parent corporation normally operates through subsidiary corporations each organized in the state where it is to operate . . . . While the MNE chain, thus articulated, does represent a tidy system – each corporate unit operating as a native within the country of its incorporation – tensions between that legal theory and the economic interdependence of the MNE keep developing. 88

The limitations of legal theory and doctrine in adequately addressing the actual organizational reality of multinational firms become further accentuated when we focus on their relations to the workers attached to the chain’s multiplied corporate sub-units. 89 Here, the traditional distinction between corporate law with its focus on management-shareholder relations and, there, labor law as being tasked with regulating the (company’s) workers seems less convincing, given that the majority of work for an MNC is regularly outsourced to jurisdictions with little or questionable workers’ rights protection. 90

take advantage of various factors including preferential tax treatment, lower cost factors of production, and more accommodating host country regulatory environments.”) (emphasis added).

89 Kevin Kolben, Transnational private labour regulation, consumer-citizenship and the consumer imaginary, in: RESEARCH HANDBOOK ON TRANSNATIONAL LABOUR LAW 361, 362 (Adelle Blackett and Anne Trebilcock eds., 2015) (“Brands such as Nike and Apple manufacture nothing themselves – they are primarily design, retail, and marketing companies that rely on a far-flung and complex network of suppliers to manufacture and deliver its products.”). See also Evelyne Léonard, Valeria Pulignano, Ryan Lamare and Tony Edwards, Multinational corporations as political actors, 20 TRANSFER. EUR. REV. LAB. & RES. 171 (2014); see also Stephen J. Frenkel, Shahidur Rahman and Kazi Mahmudar Rahman, After Rana Plaza: Governing Exploitative Workplace Labour Regimes in Bangladeshi Garment Export Factories, 64 J. IND. REL. 272 (2022), 274: “Corporate indifference and irresponsibility have contributed to widespread worker exploitation in supply chains, including its most extreme form, modern slavery (MS) . . . .”).
90 DANIEL BERLINGER, ANNE REGAN GREENLEAF, MILLI LAKE, MARGARET LEVY AND JENNIFER NOVECK, LABOR STANDARDS IN INTERNATIONAL SUPPLY CHAINS. ALIGNING RIGHTS AND INCENTIVES 7 (2015) (“Brands are motivated by the drive for profit and growth, the same motivation that has long inspired business to seek ‘the conquest of new markets, and . . . the more thorough exploitation of the old ones’ [Marx and Engels [1848] 1952, p.5). In the absence of external pressure, few brands had incentives to protect labor rights and multiple reasons to ignore violations. The incentives almost entirely lay in lowering labor and transaction costs while simultaneously producing fast fashion and new and ‘hot’ consumer
Today, in the age of ‘platform capitalism’ and the ‘networked’ firm, these concerns are still valid, but the transnational institutional context in which they are raised has again evolved substantially. The organizational sophistication of globe-spanning sourcing, manufacturing, and distribution chains rests on an infrastructure of financial organization, which integrates foreign direct investment into resource extraction and manufacturing industries by taking advantage of market domination to engage in arms-length contracting that unequally distributes benefits towards the Global North. Out of this constellation and significantly driven by advances in information technology emerges a type of economic organization that fundamentally transforms the shape and content of economic exchange. The Finnish sociologist Esko Kilpi describes this stage of economic organization as manifesting a distinct reversal of Ronald Coase’s description of the nature of the firm in 1960:

The existence of high transaction costs outside firms led to the emergence of the firm as we know it, and management as we still have it . . . . What really matters now is the reverse side of the Coasean argumentation. If the (transaction) costs of exchanging value in the society at large go down drastically as is happening today, the form and logic of economic entities necessarily need to change...? Digital transparency makes responsive coordination possible. This is the main difference between Uber and old taxi services. Apps can now do what managers used to do . . . . For most of the developed world, firms, as much as markets, make up goods.”). See also Stephanie Ware Barrientos, ‘Labour Chains’: Analysing the Role of Labour Contractors in Global Production Networks, 49 J. DEV. STUD. 1058 (2013) (contrasting the newly created job opportunities in developing countries with the rise of precarious labor conditions for migrant and other vulnerable workers).

91 NICK SRNICKEK, PLATFORM CAPITALISM 2941-42 (2017) (“[D]ata have come to serve a number of key capitalist functions: they educate and give competitive advantage to algorithms; they enable the coordination and outsourcing of workers; they allow for the optimisation and flexibility of productive processes; they make possible the transformation of low-margin goods into high-margin services . . . .”).

92 INTAN SUWANDI, VALUE CHAINS: THE NEW ECONOMIC IMPERIALISM 3031 (N.Y.U. Press, 2019); see also William Milberg, Shifting sources and uses of profits: sustaining US financialization with global value chains, 37 ECON. & SOC’Y 420 421 (2008) (“[T]he enormous expansion of global value chains has brought a lowering of input costs to lead firms, allowing them to maintain and even increase cost mark-ups, and thus profit rates and the economy-wide profit share, even during a period when domestic (US) product market prices were not moving upwards at historical rates . . . . This has coincided with a decline in manufacturing in most countries, and thus has permitted companies to return a greater share of net revenues to shareholders rather than reinvesting these revenues in new productive capacity. In the financialization literature this is attributed to the ‘shareholder value revolution’ that began in the 1980s.”).
the dominant economic pattern. The Internet is nothing less than an extinction-level event for the traditional firm. The Internet, together with technological intelligence, makes it possible to create totally new forms of economic entities, such as the “Uber for everything” -type of platforms/service markets that we see emerging today. Very small firms can do things that in the past required very large organizations.⁹³

At the center of what some scholars refer to as ‘informational capitalism’⁹⁴ is the accumulation, processing, and monetarization of information in the form of data through ever more rapidly evolving technological capability.⁹⁵ The transformative – financial, socio-economic, and political – significance of data eclipses all else.⁹⁶ “For the increasing number of companies participating in the ‘data economy’ or ‘digital economy,’ deleting data because of storage costs would be like burning piles of money or dumping barrels of oil down the drain because renting a warehouse was too much trouble.”⁹⁷ In order to appreciate the significance

⁹⁴ JULIE E. COHEN, BETWEEN TRUTH AND POWER. THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM 5 (2019) (defining informational capitalism as “the alignment of capitalism as a mode of production with informationalism as a mode of development.”). See Amy Kapcyznski, The Law of Informational Capitalism, 129 YALE L. J. 1460 (2020). Especially Cohen’s book builds on the work of the sociologist and media theorist, Manuel Castells. See MANUEL CASTELLS, THE RISE OF THE NETWORK SOCIETY preface, xxxvi-xxxvii (2nd ed., 2010) (“[T]he network of decision implementation is a global electronic macro-network, while the network of decision-making and the generation of initiatives, ideas, and innovation is a micro-network operated by face-to-face communication concentrated in certain places. This spatial architecture simultaneously explains the concentration of some metropolitan places and network diffusion: the space of places and the space of flows.”).
⁹⁵ Kapcyznski, supra note 94, at 1462 (“Over the past several decades, a series of extraordinary technological developments has drastically expanded human capacities to store, exchange, and process data and information.”). See also Martha Poon, Corporate Capitalism and the Growing Power of Big Data, 41 SCIENCE, TECH., & HUM. VAL. 1088, 1095 (2016) (“Early insurance companies did not make money because data-crunching actuaries churned out better predictions of how death would happen; they made money by managing and manipulating financial elements like the price of the product, the rate at which reserves accumulated, and the calculation of dividends.”).
⁹⁶ Alain Marciano et al., Big Data and Big Techs: Understanding the Value of Information in Platform Capitalism, 50 EUR. J. L. & ECON. 345 346 (2020) (“This dilemma between ‘decentralization’ on the one side and ‘concentration’ on the other is the main puzzle that the emergence of a big data driven economy is actually offering to law and economics scholars and to policy makers.”).
⁹⁷ Jathan Sadowski, When Data is Capital: Datafication, Accumulation, and Extraction, 6 Big DATA & SOC’Y 1, 1 (2019).
of the currently ongoing transformation of capitalist organizations through platforms and data intermediaries, it is important to put this development into perspective. Julie Cohen highlights three distinctive elements in this context:

[T]he propertization of intangible resources, the concurrent dematerialization and datafication of the basic factors of industrial production, and the embedding of patterns of barter and exchange within information platforms.” She concludes that “[o]rganizationally speaking, the platform is key: platforms do not enter or expand markets; they replace (and rematerialize) them.\textsuperscript{98}

But, as Cohen and others emphasize, beyond the profound financial and economic aspects of this transformation of how firms, consumers, and governmental actors interact lies the concern over how the newly emerging constellations are impacting democratic representative processes,\textsuperscript{99} participation, and access rights.\textsuperscript{100} Herein, these authors recognize the key to a growing range of essential services and provisions controlled by market-based actuaries who are engaged in what Fourcade and Healy call “[S]orting people into a diversified set of life trajectories.”\textsuperscript{101} What emerges amid the heightening contentions around the adequate target of regulatory intervention when it comes to the invasive capacity of big data, ranging from privacy protection through contract and tort law to anti-trust law, is a


\textsuperscript{99} Christian Fuchs, \textit{The Digital Commons and the Digital Public Sphere: How to Advance Digital Democracy Today}, 16 WESTMINSTER PAP. COMM. & CULT. 9 (2021); Jürgen Habermas, \textit{Reflections and Hypotheses on a Further Structural Transformation of the Public Sphere} 39 THE., CULT. & SOC’Y 145, 158 (2022) (“[F]or the democratic public sphere, the centrifugal expansion of simultaneously accelerated communication to an arbitrary number of participants across arbitrary distances generates an ambivalent explosive force; for, with its orientation towards the centre constituted by organisations that have the political power to act, the public sphere is for the time being limited to national territories.”). \textit{See also supra} note 31, at 153 (“The particular configurations that those technologies have assumed within the political economy of informational capitalism also make them sites of extraordinary manipulability, creating new risks to the human project of democratic, inclusive, sustainable coexistence.”).

\textsuperscript{100} Cohen, \textit{supra} note 31, at 139 (“Access to basic communications infrastructures — the postal system and print advertising distributed via newspapers and magazines — was becoming more nearly essential for survival, but the relevant infrastructures were available to (almost) anyone willing and able to pay the required fees. As the relevant infrastructures — now digital and networked — have become platforms, both the conditions of access and the need for access have changed. Access to the facilities offered by Amazon or Google or Visa/Mastercard or the iOS operating system, for example, requires assent to complex sets of legal and technical protocols.”).

\textsuperscript{101} Marion Fourcade and Kieran Healy, \textit{Classification situations: Life-chances in the neoliberal era}, 38 ACCOUNTING, ORGANIZATIONS & SOC’Y 559, 561 (2013).
realization of the overall frailty of social cohesion and political governance that the current constellation of global platform economies is bringing to light.\textsuperscript{102}

What kind of power is big data? In other words, what is the mechanism by which these data can be used to exercise an impact in the world? In the tech sector, this is a multibillion-dollar engineering problem. It is also the necessary starting point of a realistic conversation about what equity and social justice can look like in a consumer economy run through personal devices.\textsuperscript{103}

These questions point us to the key nodal points of both access to and subjugation under a wholly intransparent, digitalized sphere of interaction for which the rules of engagement seem to be a far cry from the liberal principles of equal representation, private autonomy, and sovereignty that continue to inspire present-day responses to democratic practices under attack.\textsuperscript{104} As Shoshana Zuboff recently iterated:

In an information civilization individual and collective existence is rendered as and mediated by information. But what may be known? Who knows? Who decides who knows? Who decides who decides who knows? These are the four questions that describe the politics of knowledge in the digital age. What knowledge is produced? How is that knowledge distributed? What authority governs that distribution? What power sustains that authority? The

\textsuperscript{102}Id. (“[M]any important classificatory systems are now embedded in markets. They are by nature private, even to the point of being trade secrets. They are oriented toward the extraction of profit and often manufactured and managed in a quasi-monopolistic manner.”). Peer Zumbansen, \textit{Runaway Train? Decentralized Finance and the Myth of the Private Platform Economy}, 14 TRANS. LEG. TH. (2023 – forthcoming), discussing the practices of platforms ‘scraping’ personal data in the context of influencing internet users’ consumer and voting behaviors.

\textsuperscript{103}Poon, \textit{supra} note 95, at 1097.

\textsuperscript{104}Cristina Rodriguez, \textit{Foreword: Regime Change}, 135 \textit{HARV. L. REV.} 1, 124 (2021) (discussing the Supreme Court’s decision, \textit{Cedar Point}, 141 S. Ct. 2063, in which the court affirmed that labor organizers’ entering on a property constituted a taking: “Much time will be spent speculating over what the Court’s ultimate decision to invalidate the law as a violation of the Takings Clause will mean for all manner of environmental, inspection, and even nondiscrimination rules that effectively direct how property owners control access to their properties. If the decision leads to the proliferation of obligations on the government’s part to compensate property owners so that the state might advance important and even critical regulatory goals, the costs of regulation might become too much to sustain, or the state could be forced to choose among objectives it has long treated as equally important.”); see also Michael J. Klarman, \textit{Foreword: The Degradation of American Democracy – and the Court}, 134 \textit{HARV. L. REV.} 1, 52 (2020) (discussing restrictions on access to voting for previous non-voters, as promulgated by Republican secretaries of state.).
contests over the answers to these questions will shape “the division of learning in society” as the fundamental construct of social order in an information civilization. Right now, however, it is the surveillance capitalist giants—Google/Alphabet, Facebook/Meta, Apple, Microsoft, Amazon—that control the answers to each of these questions, though they were never elected to govern.105

Focusing on these same major players, Michael Guihot and Hannah McNaught argue that a regulatory critique that focuses only on ‘market power’ risks not capturing the “multiple more discrete exertions of power by platforms over individuals that have led to their market and corporate power.” Only by directing our attention to the actual interventions through platform activities into people’s lives on multiple fronts, they argue, will the limitations of existing legal regimes become more clear. As the following section will make clear, the current gap in more effectively regulating big tech corporations is not an accident but emerges from a long history of prioritizing corporate innovation for the almost exclusive benefit of shareholders. Not least, in light of today’s renewed efforts to formulate a more adequate and effective regulatory framework, will it become clear how the current predicaments build on trajectories that go deep into the history of market regulation.108

105 Shoshana Zuboff, Surveillance Capitalism or Democracy? The Death Match of Institutional Orders and the Politics of Knowledge in Our Information Civilization, 2 ORGANIZATION THEORY 1, 3 (2022).
108 K. Sabeel Rahman, The Shape of Things to Come: The On-Demand Economy and the Normative Stakes of Regulating 21st-Century Capitalism, 7 EUR. J. RISK REG. 652, 655 (2016) (“[I]n the late 20th century corporate governance shifted to a model of ‘shareholder primacy,’ which was ‘internalized as the dominant norms of a rising generation of business leaders, investors, academics, journalists, and lawmakers’ into an ‘omnipresent belief system.’.”).
III. THE CORPORATION IN CONTEXT

Over time, the debate over the corporation, its composition, functions, and duties and obligations has undergone a significant change. To appreciate this change, it is important to contrast the specialized discourse around the corporation as it has been taking place in corporate law and securities law but also in economics, on the one hand, and the wider, not strictly legal debate, that has carried on across a range of scholarly disciplines but also in the so-called public sphere. Notably, the actual business corporation itself has rarely been at the center of corporate law-internal disputes, as it still was at the time of the East India Company, the fight over Standard Oil, also

also Derek McKee, The platform economy: natural, neutral, consensual and efficient?, 8 Trans. Legal Theory 455 (2017); Lina M. Khan, Amazon’s Antitrust Paradox, 126 Yale L.J. 710 (2017).


111 Nick Robins, The Corporation That Changed the World: How the East India Company Shaped the Modern Multinational (2012); see also Arthur Meier Schlesinger, The Uprising Against the East India Company, 32 Pol. Sci. Quart’y 60 67 (1917) (providing an earlier account, stating “[t]he radical innovation was introduced in the provision which empowered the East India Company . . . . This arrangement swept away, by one stroke, the English merchant who purchased the tea at the company's auction and the American merchant who bought it of the English merchant; for the East India Company, by dealing directly with the American retailer, eliminated all the profits which ordinarily accumulated in the passage of the tea through the hands of the middlemen”); see also L.S. Sutherland, The East India Company in Eighteenth-Century Politics, 17 Econ. Hist. Rev. 15 19 (1947 (“In the rapidly evolving stock exchange of London its stock enjoyed what would now be considered a gilt-edged reputation and was sought after by the rentier classes of the rich European countries as well as of England, while its short-term bonds played as important a part in the money-market as the government's paper itself.”)).

112 Naomi Lamoreaux, The Problem of Bigness: From Standard Oil to Google, 33 J. Econ. Pers. 2, 3 (2019) (“There was general agreement that Standard had grown large by pursuing
during the debate between Berle and Dodd, or around the widely noted publication of ‘Taming the Giant Corporation.’ In 1977, when he reviewed the provocative contribution by Nader, Green, and Seligman, in which the authors called for a federal charter for large American companies, Larry Blount drily remarked:

Today, the corporation is the creature of a relatively small cadre of professional managers, performing a private function – wealth aggregation – through huge units with multi-structural compartments and multinational bases of operation. Today the corporation is bigger than anything and anyone else in our society.

But, what is largely missing from our account until now is a more substantive engagement with what has arguably remained the all-determining driver of the debate around the corporation and its responsibilities all along. The concept of shareholder value maximization as the standard for corporate governance rose to global prominence in the 1970s against the backdrop of developments in economic and financial portfolio theory. Its rise has to be seen as part of a significant shift in the political economy of public regulation of pensions and labor interests. This triggered a comprehensive critique of a form of economic organization that prioritizes investment returns over the long-term oriented design of corporate as well as governmental economic strategy, which, in different ways, continues until today. The rising influence of management and accounting theory propelled the consolidation of the financialized firm in this context.

But what was a pivotal moment seems, in retrospect, a merely logical precursor to the types of networked and platform firms which today are the face of economic reality and which exacerbate many of the long-standing contentions around the corporation’s responsibilities towards workers and other stakeholders. An important dimension of this development is the anticompetitive practices and should be broken up.”). See also Joseph A. Pratt, The Petroleum Industry in Transition: Antitrust and the Decline of Monopoly Control in Oil, 40 J. ECON. HIST. 815, 818 (1980) (“A reexamination of events in the industry in the first decades of the twentieth century suggests, however, that existing research generally underestimates the impact of legal and political factors in explaining the rise of oligopoly in oil.”).

113 See Fisch, supra note 2.
114 Ralph Nader, Mark Green and Joel Seligman, Taming the Giant Corporation (1977) (advocating for a federal charter for lead American corporations in light of, one the one hand, their significant growth into a dominant force and, on the other, the inadequacy of existing state corporate law to control corporate conduct).
pluralization and hybridization of corporate governance – both institutionally and in terms of the quality of norms now being promulgated. This hybrid constitution of corporate law production poses significant challenges for actual, democratic political intervention, given the points of access and correction are themselves less clearly demarcated in the intersecting lines of ‘hard’ and ‘soft’ law and the mixed concert of institutions and organizations acting as authors of relevant norms.

Institutionally, the circle of rule-makers is no longer limited to regulators and courts, but increasingly includes private actors, corporations themselves, banks, major institutional investors, politically divergent interest groups, and listing organizations. Their respective tasks, as well as actual abilities to monitor, uphold, or even enforce norms, are anything but obvious. This is, as we have already seen, of interest not only from a sociological perspective but also sheds light on the political economy of corporate law-making and on the outdated rhetoric that tended to qualify corporate law as either ‘enabling’ or ‘mandatory.’

In reality, the complexity of norm-production in the form of codes, guidelines, standards, and recommendations and the administration of these norms across public and private authorities trumps this reductionist dualism. As argued, for example, by John Coffee, trying to understand the role of shareholders towards the corporation requires that we actually have a clear understanding of who the shareholders are. That said, we will need to engage with the continuing tensions between the still dominant belief in shareholder primacy by taking a closer look, in particular, at the role that asset managers play today in the context of corporate governance reform, shareholder activism, and ESG – altogether key concerns in the current

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117 Eric W. Orts, The Complexity and Legitimacy of Corporate Law, 50 WASH. & LEE L. REV. 1565, 1577 (1993) (“The forest of corporate law is not focused fundamentally on the participants in a business, ‘enabling’ them to make contracts together and somehow providing a convenient central ‘nexus’ around which a ‘corporate contract’ revolves. This description provides a normative model for what some believe the specific content corporate law should be, but it does not describe the reality of what corporate law is. Instead, I propose the following general description of the nature of corporate law: Corporate law, like most law, is primarily about the rule-oriented structuring of social power, and it is specifically about the rules that structure the organization of economic power.”).
118 Coffee, supra note 43, at 1054-55.
purpose debate. This analysis shines light on the architecture through which the monitoring and, potentially, the reforming of corporate governance can take place. Both would entail the strengthening of more diverse and responsive boards but also bolster corporations’ commitments to pursuing goals of sustainable finance.

Now a commonplace reference, these contentions were put on the table in a widely noted, compelling move in 2019 by the Business Roundtable (“BRT”), a congregation of almost two hundred CEOs of Fortune 500 companies. While its statement on ‘corporate purpose’ continues to meet with significant push-back, it bears mentioning that the BRT’s intervention preceded the outbreak of the global COVID-19 pandemic and yet seemed to premeditate some of the pressing issues that soon after entered the public discussion with the collapse of global supply chains, the stark manifestation of access and distribution problems for some of the most basic health and other social services and the newly exposed vulnerability of a long-marginalized and discriminated populations. As governments strained to contain the spread of the virus, spiraling infection and death rates, as well as the sustenance of essential functions such as nutrition, border control, and public welfare, attention increasingly turned to business corporations and their role in fostering effective crisis response and risk management. In this light, the BRT’s intervention further articulated a critical engagement with the status quo of shareholder-oriented corporate governance, this time from within the cathedral. Our analysis will suggest that what is actually taking place is a certain normalization of stakeholderism as part of a general public engagement with hard questions pertaining to corporate responsibility and accountability.

By placing this analysis against the background of previous discussions of how competing arguments around corporate responsibilities implicated competing visions regarding the firm and its role in society, the stakes of today’s critique of corporations will become more accentuated – but so will the challenges that face us when trying to identify and mobilize political agency in their pursuit. The widening of these debates, driven by demands from different and even newer interest groups, is mirrored, it seems, by an ever-more complex regulatory landscape of unclearly divided public and private authority. In squaring that circle might lie the key to transformative corporate governance reform.

A. Shareholder Primacy as Self-Evidence

Over time, the actual corporation, the brick-and-mortar business company with its plants, production, and distribution lines, concrete
locations, workers, and its connections to the surrounding community itself, moved more and more out of the spotlight while the competing interest groups and their polarizing demands for partisan and exclusionary commitments to an “either-or” began taking the stage.\textsuperscript{119} Caught between these poles, the business corporation became an increasingly abstract reference point and token in the exchange of heated arguments over whose interests a company should serve and who should have the vested authority to set the rules that guide its operation. This debate peaked, one might say, around the early 2000s, when two renowned corporate law academics declared ‘The end of history for corporate law.’ While they acknowledged that its precursors went back already to the nineteenth century, they argued that now, at the end of the 1990s, a global consensus had been reached on an understanding of the firm as an operational vehicle to be governed in the interests of its shareholders – and shareholders only.\textsuperscript{120} Simon Deakin remarked: “By the turn of the millennium, corporate law scholarship had reached a consensus on both fronts: analyses predicted the global convergence of corporate law and practice around the norm of shareholder primacy, in large part because of the efficiency gains then widely associated with shareholder-oriented corporate governance.”\textsuperscript{121}

But, as Deakin and others have argued, this concentrated, myopic view was neither the standard in other disciplines nor had it ever been an adequate or complete depiction of the corporation and its different functions in a globally integrated financial economy.\textsuperscript{122} While within the specialized

\textsuperscript{119} Henry Hansmann & Reinier Kraakman, \textit{The End of History for Corporate Law}, 89 \textit{Georgetown L.J.} 439, 441 (2001) (“The point is simply that now, as a consequence of both logic and experience, there is convergence on a consensus that the best means to this end (that is, the pursuit of aggregate social welfare) is to make corporate managers strongly accountable to shareholder interests and, at least in direct terms, only to those interests.”).

\textsuperscript{120} \textit{Id.}; see also Michael C. Jensen, \textit{Value Maximization, Stakeholder Theory, and the Corporate Objective Function}, 22 \textit{J. Applied Corp. Fin.} 32, 34 (2010) (“It is logically impossible to maximize in more than one dimension at the same time . . . telling a manager to maximize current profits, market share, future growth in profits, and anything else one pleases will leave that manager with no way to make a reasoned decision. In effect, it leaves the manager with no objective.”).


\textsuperscript{122} See, e.g., Ruth V. Aguilera & Cynthia A. Williams, \textit{Law and Finance: Inaccurate, Incomplete, and Important}, 2009 \textit{B. Y. U. L. Rev.} 1413, 1434 (2009) (“In short, we have not reached the “end of history” for law and finance.”); Donald C. Clarke, “Nothing But Wind”? \textit{The Past and Future of Comparative Corporate Governance}, 59 \textit{Am. J. Comp. L.} 75 (2011); John C. Coffee, Jr., \textit{The Future as History: The Prospects for Global Convergence in
discourse of corporate law, the scrutiny of the firm began to translate into a prolonged dispute between adherents to competing models of shareholder value maximization and stakeholderism against the background of the rise-to-fame of conceptualizing the firm from the vantage point of law and economics as the optimal organizational architecture to reduce transaction costs and generate wealth for its owners, a broader perspective on the corporation revealed its changing roles in an evolving domestic and international economic and political context. Unsurprisingly, business scholars, historians, political economists, and sociologists had long


Jensen & Meckling, supra note 44, at 357 ("The publicly held business corporation is an awesome social invention. Millions of individuals voluntarily entrust billions of dollars, francs, pesos, etc., of personal wealth to the care of managers on the basis of a complex set of contracting relationships which delineate the rights of the parties involved. The growth in the use of the corporate form as well as the growth in market values of established corporations suggests that at least, up to the present, creditors and investors have by and large not been disappointed with the results, despite the agency costs inherent in the corporate form."). Ronald H. Coase, The Nature of the Firm, 4 ECONOMICA 386, 388 (1960) ("Within a firm, these market transactions are eliminated and in place of the complicated market structure with exchange transactions is substituted the entrepreneur-co-ordinator, who directs production.").


See C. Wright Mills, Power Elite (1956) (identifying large corporations as an integral part of a dominating societal elite composed of political, military and business leaders); see also Dusky Lee Smith, Sociology and the Rise of Corporate Capitalism, 29 SCI. & SOC’y 401, 416 (1965) (citing the Frankfurt School lawyer and sociologist, Franz L. Neumann for his concern that the creation of law in the context of complex and asymmetric power relationships “tends to distract focus from the locus of power.” This contention was also central to much of the Legal Realist writings in the 1920s); See, e.g., Robert L. Hale, Coercion and Distribution in a Supposedly Non-Coercive State, 38 POL. SCI. Q. 470 (1923), Morris R. Cohen, The Basis of Contract, 46 HARV. L. REV. 553 (1933), and Friedrich Kessler, Contracts of Adhesion – Some Thoughts About Freedom of Contract, 43 COLUM. L. REV. 629 (1943); see also John Gerard Ruggie, International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order, 36 INT’L ORG. 379, 400 (1982) (highlighting the expansion of border-crossing intra-firm trade and its alignment with financial investment towards the creation of transnational business clusters).
been investigating the actual organization of the business corporation, the rules pertaining to its control and its embeddedness in different and changing regulatory and geopolitical environments. Their studies continue to provide a wealth of resources through which to see more clearly the interaction between business corporations and corporate law, tax law and, say, anti-trust law, on the one hand, and evolving regimes of corporate finance, securities regulation, banking law, labor law and industrial relations, on the other. This contextualization corrects the over-stylized representation of the corporation within the oppositional and reductionist dispute between shareholders and stakeholders by illuminating the embeddedness of the corporation in historical context in an interaction with the expansive range of laws – from property, contract and tort to trust and pension law – in which it operates.\footnote{\textsuperscript{126} Mary O’Sullivan, \textit{The Political Economy of Comparative Corporate Governance}, REV. INT’L POL. ECON. 23 (2003); Antoine Rebérioux, \textit{European Style of Corporate Governance at the Crossroads}, 40 J. COMM. MKT. STUD. 111 (2002); Ruth V. Aguilera & Gregory Jackson, \textit{Comparative and International Corporate Governance}, 4 ACAD. MGT. ANN. 485 (2010); Katharina Pistor, \textit{The Code of Capital. How the Law Creates Wealth and Inequality} 19 (2019) (“This account contradicts the standard argument that capitalist economies are defined by free markets that allocate scarce resources efficiently and that prices reflect the fundamental value of assets. . . . legal coding accounts for the value of assets, and thus for the creation of wealth and its distribution.”).}

The proposal to pay close attention to the actual diversity and evolving pluralism\footnote{\textsuperscript{127} Lynn Stout, “Maximizing Shareholder Value” Is an Unnecessary and Unworkable Corporate Objective, in: \textit{RE-IMAGINING CAPITALISM} 159, 161 (Dominic Barton ed., 2016) (“[T]he idea that organizations can and should pursue multiple objectives has a long and respectable—if sometimes forgotten— lineage in economic theory.”). Benedict Sheehy, \textit{Scrooge-The Reluctant Stakeholder: Theoretical Problems in the Shareholder-Stakeholder Debate}, 14 U. Mia. BUS. L. REV. 193, 194 (2005) (“At the most basic level, this debate can be analyzed as a discussion between monotonic and pluralistic approaches to corporations.”).} of the laws and norms that shape the corporation\footnote{\textsuperscript{128} Lance Ang, \textit{The Start of History for Corporate Law: Shifting Paradigms of Corporate Purpose in the Common Law}, 38 WIS. INT’L L. J. 427, 430 (2021) (“While most extant corporate governance research has since been shareholder-centric, contemporary debates have shifted towards the need to balance the interests of multiple stakeholders within an overarching framework of governance, particularly in light of the financial crisis in 2008 and the increasing recognition of environmental, social, and governance (ESG) risks.”).} pushes back against the already mentioned, simplistic thesis that corporate law may be explained by distinguishing between “enabling” and “mandatory” law.\footnote{\textsuperscript{129} For an insightful mapping of the competing views over time, see David Millon, \textit{Theories of the Corporation}, 39 DUKE L. J. 201 (1990); see also Mark J. Roe, \textit{Corporate Purpose and Corporate Competition}, European Corporate Governance Institute Working Paper No. 601/201, 7-11 (2021), https://www.ecgi.global/sites/default/files/working_papers/documents/roefinal_0.pdf [https://perma.cc/L6SA-G3C4] (outlining the emergence of the shareholder value maximization paradigm and its critiques).} Notably, this was also suggested by the former Chief Justice of the Supreme
Court of Delaware, Leo Strine. Justice Strine has repeatedly argued for a
deep engagement with the history of corporate law regulation in order to
contextualize and unpack the current clashes between allegedly incompatible
arguments between ‘shareholder primacy’ and ‘stakeholderism,’ hereby
echoing the careful historical analysis by William Bratton, Michael Wachter,
Mark Roe, John Cioffi, Mary O’Sullivan and Lisa Fairfax, contributing to a
historically informed evaluation of the corporation’s place in the changing
political economy.

Given the actual limitations of formulas such as the ‘invisible hand’ to
provide guidance for practical, policy-designing applications, we are
bound to see how concrete, historical and contemporary instances of

130 Leo E. Strine Jr., Restoration: The Role Stakeholder Governance Must Play in
Recreating a Fair and Sustainable American Economy: A Reply to Professor Rock, 76 Bus.
Lawy. 397, 29 (2020) https://scholarship.law.upenn.edu/cgi/viewcontent
.cgi?article=3240&context=faculty_scholarship [https://perma.cc/TA7G-5X2K] (“This
stockholder-focused scholarship was not without contention, but it primarily centered on the
question of whether corporate governance changes would have the effect of increasing stock
prices . . . the blinkered metric that many corporate law academics took to be the correct
measure, often without thinking deeply about it.”); see also Leo E. Strine Jr., Corporate
Power is Corporate Purpose II: An Encouragement for Future Consideration from
Professors Johnson and Millon, 74 Wash. & Lee L. Rev. 1165, 117071 (2017) (“To me,
these realities mean that if the “ought” that Professors Johnson and Millon desire is to
become something more like reality, then changes must be made to the power dynamics
under which all corporations operate. That might mean changes within corporate statutory
law to require — not permit — the consideration of other constituencies, and to put some
teeth behind that idea. That might mean changes to the obligations of institutional investors
to consider the full range of their human investors’ interests, including their interest in a
sustainable, responsible system of wealth creation. That might mean enhanced externality
protections for workers, consumers, communities in which the corporation operates, and the
environment. That might mean limiting the ability of corporations to use other people’s
money in a way that compromises our political system.”).

131 Bratton & Wachter, Berle and Means, supra note 46; Mark Roe, Strong Managers,
Weak Owners. The Political Roots of American Corporate Finance (1994); John W.
Cioffi, Governing Globalization? The State, Law, and Structural Change in Corporate
Governance, 27 J. L. & Soc’y 572 (2000); O’Sullivan, Political Economy, supra note 126;
1163, 1167 (2022) (“Throughout the history of corporate law, various scholars and
corporate actors have advanced the view that corporations have an obligation to be socially
responsible and serve the interests of all stakeholders impacted by the corporation’s activities,
including shareholders, non-shareholders, and the broader community.”).

132 O. Scott Stovall, John D. Neill & David Perkins, Corporate Governance, Internal Decision
of Smith’s life work in attempting to comment on human behavior, neoclassical economists
not only assert that market participants generally act to promote their own interests, they
maintain that market participants pursuing self-interest without regard to the interests of
others will collectively and ultimately provide the optimal benefit to society.”).
regulatory dilemmas arising out of competing claims around the corporation repeatedly prompt us to rethink the starting premises of corporate law and to place them in dialogue with competing contentions regarding the different legal framings of the corporation, its status under law and its seemingly infinite organizational variety.

B. Corporate Law’s Pluralism

The competing framings of the corporation reflect the diversity of the debate and its participants. And its substantive range is a mirror image of the political economy of attention that is paid – both in the public and the academy – to concrete developments in the economic sphere, which due to the digitization not only of news media but the role of personal phones renders visible related events anywhere and everywhere.133 With that, the sphere of debating the corporation has become a transnational one, which regularly crosses borders and feeds into a fast moving and wide-ranging discourse. An important outcome of this discourse, which has been making the already heated discussions regarding corporate responsibilities for stakeholders and the environment134 even more complicated, is the shrinking distance between us and the events implicating multinational businesses and their manifold subsidiaries, suppliers and sub-contractors in previously ‘remote’ corners of the world. In this transnational context, the actual corporation reappears as a key actor and culprit in an unsustainable and destructive global economy, suggesting the shortcomings of law along with its softer, more malleable normative CSR arrangements which, arguably today, might be ceding space to efforts under the auspices of ‘Business &


Human Rights,” geared towards concreter forms of accountability and bringing international and transnational actors together. Simultaneously, these efforts are additionally propelled by an increasingly urgent concern with climate change and over how to achieve ‘just transition’ with regard to decarbonization and sustainability.

The increasing attention to ‘distant’ corporate human rights abuses has certainly begun to shed light on the larger context of corporations’ embeddedness in global value chains and on the long-standing history of multinational business involvement in then colonized states. The potential benefit of providing a historical context for global value chains and the role played by institutional arrangements and legal regulation illuminates the regulatory embeddedness of value chains in historically evolved production networks and colonial governance structures. It furthermore offers insights into the long trajectories of environmental degradation which have

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135 Anita Ramasastry, *Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability*, 14 J. HUM. RTS. 237, 242 (2015) (“None of these actions by itself was the catalyst of the business and human rights movement but these events all coalesced to provide a consistent image: victims in the Global South suffering as a result of corporate involvement with repressive regimes, conflict zones, or states with weak governance.”).

136 Éléonore Lèbre et al., *The social and environmental complexities of extracting energy transition metals*, 11 NATURE. COMM’NS. 18 (2020) (Article 4823) https://www.nature.com/articles/s41467-020-18661-9 [https://perma.cc/UNQ2-5DDB]; John D. Graham, John A. Rupp, & Eva Brungard, *Lithium in the Green Energy Transition: The Quest for Both Sustainability and Security*, 13 SUSTAINABILITY 1 (2021), https://doi.org/10.3390/su13201274 [https://perma.cc/DL6T-CYLY] (“[T]echnically and economically recovering the reserve portion of the resource without inflicting ecological and social harm is a complex challenge.”). Nicholas Bainton et al., *The energy-extractives nexus and the just transition*, 29 SUSTAINABLE DEV. 624, 626 (2021) (“A cursory mapping of the members of the International Council of Mining and Metals indicates that very few major mining companies have, as yet, opined upon or engaged with the concept of a just transition (the term does not feature on their websites or in their policies or public reports).”).

137 Matthew Amengual, Rita Mota & Alexander Rustler, *The ‘Court of Public Opinion:’ Public Perceptions of Business Involvement in Human Rights Violations*, 185 J. BUS. ETHICS 49, 51 (2023) (“Social expectations are one of the extra-legal factors of particular importance to MNE compliance with human rights standards, especially where domestic legislation is insufficient to address MNE behavior.”).


oftentimes accompanied their operation. The significance of the detrimental impact of the Global North’s economic and financial activities in the Global South was recognized by Third World international lawyers at the height of decolonization and more recently reassessed among postcolonial scholars in the TWAIL-Third World Approaches to International Law school of thought. The historical, combined weight of colonial corporate activity in the Global South puts current calls for a more fundamental critique of capitalism and its normative foundations into clearer perspective. As Thijs Etty and collaborators have observed:

. . . [A] growing group of scholars and advocates, including TWAIL (Third World Approaches to International Law) scholars, are raising their collective voice to question the legitimacy of the post-World War II liberal order – including the core structures and institutions of international and transnational law – and the degree to which this liberal order really is (or ever was) accepted by wide swaths of the global population. These voices challenge the degree to which existing systems of law reflect consensus and shared values.

This observation has begun to resonate in domestic critiques of corporate capitalism. Focusing on the U.S., Anna Akbar, Sameer Ashar and Jocelyn Simonson note that the:

[S]cale and volume of left social movement activity . . . marks a resurgence of contestation after decades of relative quiet. Today’s social movements are meeting the existential crises of our time with vision, scale, and infrastructure. They reflect the growing

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140 Flomo v. Firestone Nat. Rubber Co., LLC, 643 F.3d 1013, 1023-24 (7th Cir. 2011). See Jessica Bergman, The Alien Tort Statute and Flomo v. Firestone Natural Rubber Company: The Key to Change in Global Child Labor Practices?, 18 I. INT’L LEGAL STUD. 455, 458-59 (2011) (“While past international regulatory mechanisms have failed to effectively regulate child labor, in part due to the difficulties in defining child labor, private parties may, be able to effectively regulate child labor practices through the judicial process.”).

141 Usha Natarajan, TWAIL and the Environment: The State of Nature, the Nature of the State, and the Arab Spring, 14 UNIV. OR. REV. INT’L L. 177, 183 (2012) (“Third World international lawyers’ focus on environmental and natural resource issues occurred in the context of their movement to inaugurate a New International Economic Order (NIEO) in the 1960s and 1970s to improve Third World participation in the global economy.”); see also Usha Natarajan and Kishan Khoday, Locating Nature: Making and Unmaking International Law, 27 LEIDEN J. INT’L L. 573, 575 (2014) (arguing that, historically, international law explicitly or implicitly treated nature as a resource for wealth creation, with seeing environmental degradation to be “dealt with as an economic externality to be managed by special regimes of technology and finance.”).

142 Thijs Etty et al., Energy Transition in a Transnational World, 10 TRANSNAT’L ENV’T L. 197, 198 (2021).
sense that neoliberal law and politics has failed the majority of people in the United States. And they point the way toward transformation.\footnote{Anna A. Akbar et al., Movement Law, 73 STAN. L. REV. 821, 825 (2021).}

Meanwhile, scholars such as the late Emily Webster and her co-author Laura Mai, in focusing on the transnational dimensions of environmental activism, have pointed to a significant degree of institutional and procedural pluralism: “Transnational environmental law . . . incorporates international law, yet widens the inquiry to include ‘all environmental norms that apply to transboundary activities or that have effects in more than one jurisdiction.’”

And citing Jolene Lin, they highlight:

[\text{T}ha\text{t} the state is but one of the many actors that ought to be involved in governing human actions vis-à-vis the environment. It also recognises the important normative contributions made by non-state actors. This transnational lens or ‘frame’ through which to view legal responses to increasingly urgent environmental problems is a useful mechanism with which to ground the search ‘for more effective responses to the environmental calamities that threaten the wellbeing and even the survival of present and future generations.’\footnote{Emily Webster & Laura Mai, Transnational environmental law in the Anthropocene, 11 TRANSNAT’L LEGAL THEORY 1, 5-6 (2020).}

This pluralization and historical extension of interests in and around the corporation have become a defining feature of debates around the corporation and a persistent challenger to depictions of the corporation as investment vehicle and ‘agency problem.’ The diversity of interests and contentions around the corporation does not, meanwhile, remain a matter of rhetoric, but manifests itself in distinctly pluralizing constellations of actors that are actively implicated in contributing to the body of hard and soft law norms that govern the corporation.\footnote{Kishanti Parella, Hard and Soft Law Preferences in Business and Human Rights, 114 AM. J. INT’L L. UNBOUND 168 (2020); ORGANIZATION OF ECONOMIC COOPERATION AND DEVELOPMENT, TRANSNATIONAL PRIVATE REGULATION, https://www.oecd.org/gov/regulatory-policy/transnationalprivateregulation.htm [https://perma.cc/495W-HAF5] (“As markets and regulatory tasks become increasingly global, forms of private international regulatory cooperation are emerging along with—or sometimes as a replacement for—intergovernmental cooperation.”).}

This pluralism, from a legal-sociological perspective, manifests itself in the diversity of actors engaged in producing norms for the corporation and the different degrees of ‘hard’ and ‘soft’ law that characterize these norms. In that hybrid normative landscape, which is populated by international and national, public and
private actors and spans from the UN Guiding Principles on Business and Human Rights\textsuperscript{146} through different domestic regulations of supply chain transparency and ‘modern slavery’,\textsuperscript{147} on to the annual shareholder letters of BlackRock’s Chairman Larry Fink,\textsuperscript{148} the sociological depiction points to the complex political underpinnings of debating, in this day and age, corporate purpose and sustainability. What becomes more clearly visible is that corporate law as a confined doctrinal field is only one, certainly important, piece within a rich tapestry of relevant norms, laws, codes, guidelines and standards, which continue to be developed across a densely populated landscape of regulators, institutions and organizations interacting not only through transnational processes of norm negotiation, litigation and incremental law reform but simultaneously through lively contestation.\textsuperscript{149}

\textit{C. The Corporation and Financialization}

The here offered sociological perspective further illuminates the environment in which the corporation exists – both as a ‘real world’ actor and as a subject of doctrinal and conceptual legal debate. Ever since its inauguration as a legal person, adorned with limited liability, asset transferability and eternal existence, the corporation itself – regardless of whether the underlying firm makes cars, manufactures steel, owns baseball fields or trades mortgages – is situated on a frontier line that demarcates

\begin{footnotesize}
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  \item \textsuperscript{147} See, e.g., Fiona McGaughey et al., \textit{Corporate Responses to Tackling Modern Slavery: A Comparative Analysis of Australia, France and the United Kingdom}, 7 \textit{Bus. & Hum. Rights J.} 1, 1 (2021).
\end{itemize}
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allegedly incompatible conceptions of political and economic freedom. Beyond the dispute between shareholders, managers and a wide range of ‘stakeholders’ lies the conflict between those who claim the right to govern the corporation as a case in point of how markets should be regulated. While the line was drawn between freedom of contract and governmental ‘intervention’ during the Lochner era of the early 20th century, the 1940s saw it running between property rights and a state accused of ‘planning’ and creating ‘serfdom.’

In the 1970s, with the ascendance of ‘law and economics’, the demarcation separated the corporation as a contractual arrangement of investors as residual risktakers from its progressive critics who accused corporate leaders of prioritizing investment returns over the pursuit of economic growth, employment and social responsibility. In the ‘roaring nineties’, fueled by the expansion of financial flows and the ubiquitous commodification of public functions, the conflict both globalized and deepened. At loggerheads were, on one side, claims regarding the triumph of shareholder-value-maximizing capitalism and an ‘end of history’ and, on the other, the insistence on the comparative advantage of long-term institutional arrangements in the ‘varieties of capitalism.’ Eventually, the adherence to principles of nation state-driven, macro-economic planning, regulated labor markets, industrial relations and social welfare against the backdrop of bank-based corporate finance could not provide a bulwark resilient enough to withstand the pressure of capital markets’ insatiable appetite for investment opportunities and the widespread dissolution of coordinated market economic arrangements.


151 Adam D. Dixon, The New Geography of Capitalism: Firms, Finance, and Society 99 (2014) (“The geography of production has changed and with that the ability of national economies to capture and contain the value generated from economic growth and development, through the loss of the power (or unwillingness) to tax, and from slow productivity growth at home. Global financial integration, moreover, has facilitated the geographical concentration of the ownership of higher value-added components of the value chain (e.g., intangible assets and intellectual property) from tangible production.”); see also, Andrea Louise Campbell & Kimberly J. Morgan, Financing the Welfare State: Elite Politics and the Decline of the Social Insurance Model in America, 19 Stud. Am. Pol. Dev. 173, 174 (2005) (“Efforts to trim program growth in the late 1970s and early 1980s diminished the
Entering the twenty-first century, the ‘financialized’ firm remains the core institution of global investment and supply chain capitalism which corporate and banking law, securities regulation and anti-trust law had helped create and today are struggling to get a proper handle on.\footnote{\textit{\textsuperscript{152}} Following advances in investment theory made, inter alia, by later Nobel Prize laureates Harry Markowitz, Merton Miller and William Sharpe in the 1950s and 1960s\textsuperscript{153} and by the emergence and soon dominating belief in quantitative accounting as yardstick of a company’s performance and value,\textsuperscript{154} corporate management began shifting their strategy from pursuing economic growth of their entrusted companies through design and innovation to a focus on enhancing the financial value of the firm as reflected in its place in the equity and bonds market. Retracing the path that led to the wreckage caused by the global financial crisis of 2008/09,\textsuperscript{155} Rana Forohar of the \textit{Financial Times} expected lifetime returns from Social Security and Medicare for the affluent, and they increasingly turned against the programs even as the average citizen remained favorable. This divergence in public opinion emerged at precisely the time when political changes increased the incentives for politicians to follow their own policy preferences and those of the affluent – now opposed to payroll taxation – rather than those of the average citizen.

\textit{\textsuperscript{152}} William Lazonick, \textit{The Financialization of the U.S. Corporation: What Has Been Lost, and How It Can Be Regained}, 36 \textit{Seattle U.L. Rev.} 857 (2013); Anat R. Admati, \textit{A Skeptical View of Financialized Corporate Governance}, 31 \textit{J. Econ. Persp.} 131 (2017); see also Anat R. Admati, \textit{Why Financialized Corporate Governance Works Poorly}, \textit{Harv. L.S.F. On Corp. Governance} (Aug. 9 2017) https://corpgov.law.harvard.edu/2017/08/09/why-financialized-corporate-governance-works-poorly/ [https://perma.cc/58HX-7BD4] (‘‘[I]n the name of creating ‘shareholder value,’ corporate managers have incentives to engage in conduct that harms and endangers the corporation and its stakeholders inefficiently, as well as to lobby and influence governments, sometimes through the courts, to affect the rules and get away with such conduct. Even in well-functioning democracies, as seen most clearly in the financial sector, governments may lack the political will to design and enforce proper rules for corporations. Policymakers are not sufficiently accountable for the bad outcomes, particularly when the issues are complex and not well understood by the public, so the policy failures are difficult to see.’’); see also \textit{Cédric Durand}, \textit{Fictitious Capital: How Finance Is Appropriating Our Future} 2 (David Broder trans., 2017) (2014) (referring to the development of financialization in Florence in the 14\textsuperscript{th} century, “Financialization, deindustrialization and social polarization marched in concert – and they signaled decline.”).

\textit{\textsuperscript{153}} Hal Varian, \textit{A Portfolio of Nobel Laureates: Markowitz, Miller and Sharpe}, 7 \textit{J. Econ. Persp.} 159 (1993) (“Finance is one of the great success stories of quantitative economics. . . . From today’s perspective it is hard to understand what finance was like before portfolio theory. Risk and return are such fundamental concepts of finance courses that it is hard to realize that these were once a novelty.”).

\textit{\textsuperscript{154}} See RANA FOROHAAR, \textit{MAKERS AND TAKERS: HOW WALL STREET DESTROYED MAIN STREET} (2016) (tracking the emergence of managerial theories and a focus on accounting and share price as the all-determining driver for corporate decision-making).

\textit{\textsuperscript{155}} John C. Coffee, Jr., \textit{What Went Wrong? An Initial Inquiry into the Causes of the 2008}
has described how during the financialization of management:

Designers and engineers were put on shorter leashes and given tighter budgets. Where finance had once been nearly nonexistent within Ford, it quickly became the control hub of the firm . . . . Bob McNamara was behind the effort to install profit centers throughout the corporation so they could take the pulse of each operation. The men went beyond the traditional control of manufacturing costs, to include control over everything, from marketing to purchasing . . . .

The long-existing concept of ‘portfolio investment’ was transposed and emboldened from the 1600s into the present day of post-World War II economic recovery and eventually translated into a wholesale overhaul of economic organization from the securitization of retirement savings and

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*Financial Crisis, 9 J. Corp. L. Stud. 1 (2009); Emilios Avgouleas, The Global Financial Crisis, Behavioral Finance and Financial Regulation: In Search of a New Orthodoxy, 9 J. Corp. L. Stud. 23 (2009); Adam Tooze, Crashed: How A Decade of Financial Crises Changed The World (2018); Eric Helleiner, Understanding the 2007-2008 Global Financial Crisis: Lessons for Scholars of International Political Economy, 14 Ann. Rev. Pol. Sci. 67, 68 (2011) (“After listening to economists discuss the crisis during a tour of the London School of Economics in November 2008, Queen Elizabeth II famously asked (Sunday Times 2008): ‘If these things were so large, how come everyone missed them?’ Her question crystallized a widespread view that the economics profession largely failed to predict the massive event and had much to learn from its failure. The sentiment has provoked a wide-ranging debate among economists about what specific lessons can be learned from the crisis—that is, how understanding the crisis ought to shape the future direction of their discipline.”).*


*Harry M. Markowitz, The Early History of Portfolio Theory: 1600-1960, 55 Fin. Analysts J. 5 (1999) (“Diversification of investments was a well-established practice long before I published my paper on portfolio selection in 1952. . . . What was lacking prior to 1952 was an adequate theory of investment that covered the effects of diversification when risks are correlated, distinguished between efficient and inefficient portfolios, and analyzed risk-return trade-offs on the portfolio as a whole.”).*
mortgages\textsuperscript{158} to rewriting the curriculum of business schools\textsuperscript{159} and the adaptation of corporate governance to the principle of shareholder value maximization.\textsuperscript{160} This shift manifested itself in a burgeoning stock market with notable gains in access by individual ‘retail’ investors, on the one hand, and a significant concentration of ownership interests in the hands of a small number of institutional investors, on the other:

Households increasingly became both investors (through pension plans and retail mutual funds) and issuers (through securitized home mortgages, credit card debt, student loans, and insurance payoffs). As ties to particular corporate employers waned, ties to financial markets waxed. The old model of the organization man was increasingly replaced by a model of the investor trading in various species of capital (financial, human, social).\textsuperscript{161}

IV. THE PERSISTENT CONCERN WITH CORPORATE ‘PURPOSE’

A. Shareholder Power

The account up to this point has retraced a seemingly linear progression

\textsuperscript{158} Robin Greenwood and David Scharfstein, \textit{The Growth of Finance}, 27 J. ECON. PERSP. 3, 5 (2013); James D. Gwartney and Joseph Connors, \textit{The Crash of 2008: Causes and Lessons to be Learned}, 72 SOC. EDUC. 63, 66-7 (2009) (“The mortgage-backed securities, financed with short-term leverage lending, were highly lucrative and investment banks sharply expanded their activities in this area . . . . The highly leveraged investment banks had incurred massive short-term debt obligations in order to finance their holdings of these securities, but the securities had lost their value as collateral, and the investment banks had too few reserves on which to draw when their short-term debts became due.”).

\textsuperscript{159} Merton H. Miller, \textit{The History of Finance: An Eyewitness Account}, 25 J. PORTFOLIO MGMT. 95 (1999) (“Finance in its modern form really dates only from the 1950s. In the forty years since then, the field has come to surpass many, perhaps even most, of the more traditional fields of economics in terms of the numbers of students enrolled in finance courses, the numbers of faculty teaching finance courses, and above all in the quantity and quality of their combined scholarly output.”).

\textsuperscript{160} Brian R. Cheffins, \textit{Corporate Governance and Countervailing Power}, 74 BUS. LAW. 1, 36 (2018-2019) (“While mainstream institutional shareholders retained their bias in favor of passivity from the 1970s through to the 2000s, shareholder pressure on public company executives would intensify following 2000. This was due to hedge funds coming to prominence that specialized in targeting underperforming companies and lobbying for changes to boost shareholder returns. The modus operandi of the subset of hedge funds that engaged in activism was to accumulate quietly a sizeable strategic holding, make proposals that management unlock shareholder value by off-loading weak divisions, distributing cash to shareholders, or even selling the company, and then count on support from other shareholders to maximize pressure on management.”).

\textsuperscript{161} Gerald F. Davis, \textit{The Rise and Fall of Finance and the End of the Society of Organizations}, 23 ACAD. MGMT. PERSP. 27, 28 (2009).
of the twin pair of corporate governance and corporate finance towards ever-greater power of institutional shareholders, backed by a regulatory framework that continues to externalize social and environmental risks to political “regulation.”162 Where, then, are the openings and blind-spots in the dominant narrative that reveal opportunities for correction – and, transformation? A definition of shareholder value maximization published in 2022 serves as a useful reminder of its longstanding prominence and the impact it had on shaping corporate governance for several decades.163 At the same time, it is not only this legacy which is now under heightened scrutiny but with it the larger political context in which financial and non-financial institutions are operating.164 Today, under growing public pressure, which is itself fueled by seemingly constant, devastating news of factory accidents, human rights violations, and climate change-related environmental degradation, the traditional approach of appealing to companies to assume decent degrees of ‘social’ responsibilities under the auspices of “CSR” has eventually begun to cede pride of place to multipolar debates over corporations’ involvement in long-term efforts to battle socio-economic, racial and gender-based inequalities, structural discrimination and planetary

163 Aneil Kovvali, *Countercyclical Corporate Governance*, 101 N.C. L. Rev. 141, 147-48 (2020) (“The shareholder primacy or shareholder wealth maximization norm posits that a corporation should be managed only to generate profits for its shareholders. Under this paradigm, employees, creditors, and other groups that are affected by a corporation’s decisions must either bargain for specific contractual protections or obtain relief through governmental regulations. Absent some specific formal limitation, corporate directors and officers are to focus solely on shareholder welfare. This norm is supported by the majority of academics and is the conventional account of the law of Delaware, America’s most important corporate law jurisdiction.”).
164 Stephen Maher & Scott M. Aquanno, *The New Finance Capital: Corporate Governance, Financial Power, and the State*, 48 Critical Socio. 55, 58 (2022) (referring to “the doctrine of ‘shareholder value,’ according to which firms identify the maintenance of a high share price as the fundamental goal of corporate strategy.”); Tristan Auvray et al., *Corporate Financialization’s Conversation and Transformation: From Mark I to Mark II*, 2 Rev. Evolutionary Pol. Econ. 431, 432 (2021) (“After decades of relative managerial autonomy, the shareholder value orientation (SVO) progressively asserted the primacy of equity holders among other stakeholders on legal and economic grounds. . . . Overall, these self-reinforcing changes resulted in a new assertiveness of the claims of the financial community (banks, financial institutions, investment funds, and ultimate owners of assets . . .) and in a weakening of labor position, which suffered an increasing commodification and a relative devaluation vis-à-vis capital.”).
destruction.\textsuperscript{165} Even if the contemporary ESG label remains limited in giving expression to the complexity of the contestations that are being advanced under its umbrella, it resonates across a range of regulatory institutions, social activists and corporate and commercial actors. But what is being recognized more widely today is the potential radicalness of the critique which is being directed at the corporation and at the regulatory system which sustains it. Arguably, the current contestation of the corporation aims beyond changes in corporate governance in that it envisages a ground-up reconsideration of economic governance, a renewal and reinvigoration of democratic representation and sustainable policy making. It is this scope of challenges that exposes the “either or” approach as between shareholders \textit{or} stakeholders as insufficient to address what is before us. Only a comprehensive engagement with the place and role of the actual corporation will shed a light on the diversity of stakeholders caught up in the struggle to rethink and redefine the purpose of the corporation but also its place in a democratic society in crisis.

Where and how should we place the current unrest around the corporation on the historical canvas we have been painting? Already before the global pandemic, certainly, since the collapse of Enron and its affiliated accounting firm, Anderson Consulting in 2001\textsuperscript{166} and after the global financial crisis and the implosion of the real estate market with trillions of dollars of earned retirement savings lost in 2008/2009,\textsuperscript{167} corporations had ceased merely being objects of interest for a specialized profession, academics, regulators or retail investors as members of the ‘ownership society.’ The position and role of the corporation in a national and international economy in an evolving context of privatization and


\textsuperscript{166} William W. Bratton, \textit{Enron and the Dark Side of Shareholder Value}, 76 Tul. L. Rev. 1275, 1385 (2002) (“The criminal justice system took over and made Andersen the scapegoat.”); id. at 1277 (“Corporate failures as big and fast as this one tend to be held out as examples for future business regulation. Enron’s failure is no exception, implicating a long list of regulatory topics well before completion of formal investigations into the company’s management and the collapse’s cause.”).

commercialization of services and resources – from garbage removal to operating prisons, hospitals and managing long-term care facilities to land and water – have long become a matter of increased public interest and growing concern.\textsuperscript{168} The cause for this concern lies in the fundamental transformation of the economy under the auspices of financialization, and to a significant degree the stage for much of today’s discontent was set in the 1970s through the financialization of pensions. Remarkably, some two decades later, ‘Enron’ – at a half-way point between that time and today – is still a relatively recent illustration of the consequences of a long-term and far-reaching transformation of pension governance at the heart of which lies the commodification of an employee’s claims towards their retirement savings as a tradable asset.\textsuperscript{169}

Putting the financial transformation of old age security governance into historical perspective turns a bright light on the tensions between the alleged triumph of shareholder value maximization and today’s pronounced shift towards a distinctly more critical perception.\textsuperscript{170} The reasons for this shift have been accumulating over time but became more broadly articulated in response to the continuously shrinking of public services (already before the


\textsuperscript{169} Abbye Atkinson, \textit{Commodifying Marginalization}, 71 DUKE L.J. 773, 783-84 (2022) (“Pension funds, alternatively known as ‘labor’s capital’ are an important aspect of the U.S. public-private welfare regime. They are tasked with securing the retirement income of workers and their beneficiaries. Maintaining sufficient assets to meet this tremendous burden, however, is a perennial challenge for pension funds, rendering the investment returns from employer and employee contributions absolutely crucial. For example, public pension systems rely on investment returns to fund sixty cents of every dollar promised to pensioners.”).

\textsuperscript{170} Judd F. Sneirson, \textit{The History of Shareholder Primacy, from Adam Smith, through the Rise of Financialism}, in \textit{The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability} 73, 76 (Beate Sjåfjell & Christopher M. Bruner eds., 2019) (“Shareholder primacy is not so much a legal obligation as it is a powerful social norm. . . . Market forces largely reinforce the shareholder primacy norm.”).
COVID-19 pandemic), and the already highlighted stagnating of wages and the decline of labor power amidst a stupendous accumulation of wealth income for some. In June 2015, an IMF paper opened with the statement: “Widening income inequality is the defining challenge of our time. In advanced economies, the gap between the rich and poor is at its highest level in decades.” The earlier highlighted changes in economic and investment theory had a significant impact on corporate governance by incentivizing management to aim for cost-reduction, including through the design of strategies to radically outsource labor and production. A center piece in

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171 Linda Labao et al., The Shrinking State? Understanding the Assault on the Public Sector, 11 CAMBRIDGE J. REGIONS, ECON. & SOC’Y 389, 389-90 (2018) (“The erosion of the state as an institution can be seen in cuts to social programmes and public sector jobs, under-funded infrastructure, the sale of public assets and other forms of privatisation, along with the more general weakening of regulatory authority and diversion of resources to the private sector.”); see also Leilani Farha et al., Covid-19 has Exposed the Catastrophic Impact of Privatising Vital Services, THE GUARDIAN (Oct. 19 2020), https://www.theguardian.com/society/2020/oct/19/covid-19-exposed-catastrophic-impact-privatising-vital-services [https://perma.cc/9DSD-N8H7] (“For many years, vital public goods and services have been steadily outsourced to private companies. This has often resulted in inefficiency, corruption, dwindling quality, increasing costs and subsequent household debt, further marginalising poorer people and undermining the social value of basic needs like housing and water.”).

172 James Manyika et al., A NEW LOOK AT THE DECLINING LABOR SHARE OF INCOME IN THE UNITED STATES, MCKINSEY GLOBAL INSTITUTE (May 22, 2019) https://www.mckinsey.com/featured-insights/employment-and-growth/a-new-look-at-the-declining-labor-share-of-income-in-the-united-states [https://perma.cc/6CL9-NZGS] (“Labor’s share of national income—that is, the amount of GDP paid out in wages, salaries, and benefits—has been declining in developed and, to a lesser extent, emerging economies since the 1980s. . . . The decline has been much discussed and the rising power of companies vis-à-vis workers—whether from new technology, globalization, the hollowing out of labor unions, or market consolidation—has shaped much of that discussion.”); see also Thomas Piketty, CAPITAL IN THE TWENTY-FIRST CENTURY 276 (2014) (“From the 1990s on . . . numerous studies mention a significant increase in the share of national income in the rich countries going to profits and capital after 1970, along with the concomitant decrease in the share going to wages and labor.”).

173 Eva Dabla-Norris et al., Causes and Consequences of Income Inequality: A Global Perspective, INTERNATIONAL MONETARY FUND STAFF DISCUSSION NOTE 4(June 2015), https://www.imf.org/external/pubs/ft/sdn/2015/sdn1513.pdf; see also Piketty, supra note 159, at 11 (“[R]ising income inequality . . . in most advanced and many emerging market economies has been driven primarily by the growing income share of the top 10 percent. . . . The top 1 percent now account for around 10 percent of total income in advanced economies.”).

174 Milberg, supra note 91, at 424 (“Although offshoring has a long history for US companies . . . , the creation of Asian suppliers for large US retail firms began in the late 1960s, it was in the 1990s that managing the global supply chain became in itself an important ‘strategic asset’ for US companies in their competition with low-cost and flexible Japan and increasingly innovative Europe.”); Mark Anner, Squeezing Workers’ Rights in Global Supply Chains:
this shift of economic policy towards the pursuit of financial values was the
deregulation of pension funds that resulted in a fundamental transformation
of a publicly maintained and co-funded old-age security system. A key piece
of evidence here is the 1977 ERISA [the Employee Retirement Income
Security Act]\textsuperscript{175} which allowed for the securitization of retirement savings\textsuperscript{176}
and “was crafted under an assumption that employees would retire into a
world that is habitable and free of existential risk — an assumption that, for
millennials and Generation Z, might no longer be valid.”\textsuperscript{177}

The impact of ERISA was significant. “[A]s pensions moved from
defined benefit to defined contribution, risk was shifted from employer to
employee . . . This supply-side shift tied the interests of workers directly to
the financial markets, as workers became ‘forced capitalists,’ and workers' 
retirement savings started the shift from pension funds to mutual funds.”\textsuperscript{178}
The privatization and commodification of retirement plans stood in direct
relation to the large-scale shift from public regulatory governance of
institutionalized welfarist programs to the privatization and
contractualization of an ever-larger expanse of services and deliverables
since the late 1970s and early 1980s.\textsuperscript{179} These processes propelled the
financialization of the economy and the adaptation of formerly public
functions to market rationalities.\textsuperscript{180} Writing in 2000, the business historian
Mary O’Sullivan noted that “[t]he trend toward a growing reliance of
households on pension and mutual funds has increased at an accelerating

\textit{Purchasing Practices in the Bangladesh Garment Export Sector in Comparative Perspective},
27 R\textsc{ev.} I\textsc{nt’l} P\textsc{ol.} E\textsc{con.} 320, 321 (2019) (“. . . lower prices help to increase inventory
turnover [and] impacts workers in the form of chronic and forced overtime, and unauthorized
outsourcing to unsafe factories.”).  
\textsuperscript{176}Batt & Appelbaum, supra note 8.  
\textsuperscript{177}Jason Fernandes & Janelle Orsi, Rethinking Retirement Savings, 134 Harv. L. Rev. For.
348 (2021).  
\textsuperscript{178}Lenore Palladino, A Public Option for Asset Management in the United States
RI_PublicOptionForAssetManagementUS_202204.pdf.  
\textsuperscript{179}Maria K. Boutchkova & William L. Megginson, Privatization and the Rise of Global
Capital Markets, 29 Fin. Mgmt. 31 (2000); see also Alexander Dyck, Privatization and
Corporate Governance: Principles, Evidence, and Future Challenges, 16 World Bank
Rsch. Observer 59 (2001) (“Over the past 15 years, privatization programs have transformed
the economic landscape in countries around the globe, transferring close to $1 trillion in assets
from government-controlled enterprises to private hands.”).  
\textsuperscript{180}Christoph Hermann, The Critique of Commodification: Contours of a Post-
Capitalist Society (2021) (Reviewing different policies of privatization); Ronald Dore,
pace: from 1982 to 1994, pension and mutual funds alone accounted for approximately 67 percent of the net growth of households’ total financial assets . . .”

ERISA was a regulatory response to the sobering realization that under prevailing inflation conditions and existing regulations, “pension funds and insurance companies could no longer offer households positive real rates of return.”

B. Asset Managers and Agency

Today, this trend has seemingly continued unabatedly, but what requires our attention beyond the staggering level of capital held by pension funds, is what the organization of this sector says about the management of corporations and, more specifically, about the prospects of corporations taking a leading role in addressing social and environmental problems of broader political concern. In a series of widely noted papers, Benjamin Braun has analyzed the level of concentrated agency power as it has formed over time in the hands of large institutional asset managers:

The upswing in financialization since the 1970s has coincided with the steady accumulation of longterm retirement savings and their consolidation in institutional capital pools. Pension fund demand for high-yield, long-term financial claims has acted as a catalyst for financialization, understood as the reorganization of ownership relations and economic activity in ways that serve the needs of institutional capital pools. In the driver’s seat of this

182 Id. at 158 ("[ERISA] permitted pension funds and insurance companies to invest substantial proportions of their portfolios in corporate equities and other risky securities such as so-called junk bonds and venture funds rather than just in high-grade corporate and government securities as had previously been the case.").
183 Tom Gosling, Can Shareholders Save Capitalism?, EUR. CORP. GOVERNANCE INST. [ECGI] BLOG (Oct. 2022) https://www.ecgi.global/blog/can-shareholders-save-capitalism [https://perma.cc/94WY-DEGG] (“Will shareholder action on environmental and social goals make a major contribution to rescuing capitalism? It remains to be seen, and there are reasons to be doubtful. But clients certainly want the industry to play a role. Asset owners and individual investors will likely demand more say in how stewardship is exercised. And to retain legitimacy, the asset management industry will need to respond with ways to make that a reality.").
reorganization sits a financial sector whose primary function has shifted from financing investment to preserving wealth, along with a shift in institutional form from banks to asset managers.\footnote{Benjamin Braun, \textit{Fueling Financialization: The Economic Consequences of Funded Pensions}, 31 NEW LAB. F. 70, 71 (2022).}

Braun’s central contention is that the long-sustained premise that corporate law’s question was the problem of ownership and control as elaborated by Berle and Means and that its answer could be found in Jensen’s and Meckling’s allocation of agency power to shareholders “wrong-footed many students of corporate governance,” causing them to focus on dispersed ownership rather than directing their gaze to the “dramatic acceleration” of the “re-concentration of U.S. stock ownership.”\footnote{Benjamin Braun, \textit{Asset Manager Capitalism as a Corporate Governance Regime}, AMERICAN POLITICAL ECONOMY: POLITICS, MARKETS, AND POWER 270, 271-77 (Jakob S. Hacker et al. eds., 2021). (Pointing to the “puzzle” that asset manager capitalism presents in a political economy context such as the U.S., where dispersed ownership had been considered an instrument against “concentrated economic or political power.”; \textit{see also} Roe, \textit{supra} note 131, at 22 (“Opinion polls show a popular mistrust of large financial institutions with accumulated power, a wariness of Wall Street’s controlling industrial America. Politicians responded to that distrust by restricting private accumulations of power by financial institutions.”).}

Braun delineates four hallmark characteristics of present-day ‘asset manager capitalism’:

First, U.S. stock ownership is concentrated in the hands of giant asset managers. Second, due to the size of their stakes, asset managers are, in principle, strong shareholders with considerable control over corporate management. While this divergence from ‘dispersed and weak’ alone would require corporate governance scholars to rekindle their conceptual toolkit, two additional features distinguish asset manager capitalism from previous corporate governance regimes. The third hallmark is that large asset managers are “universal owners” that hold fully diversified portfolios . . . Finally, as for-profit intermediaries with a fee-based business model, asset managers hold no direct economic interest in their portfolio companies. Whereas under the shareholder primacy regime the dominant shareholders sought to maximize the stock market value of specific firms, under asset manager capitalism the dominant shareholders are incentivized to maximize their assets under management.\footnote{\textit{See} Braun, \textit{supra} note 186, at 273.}

Braun’s analysis provides a crucial, missing piece to the puzzle that today’s divisive debate around ‘corporate purpose’ represents. By zeroing in on the actual institutional composition of major shareholder ownership today, he is
able to illuminate the potential as well as the continuing limitations of investor activism and ‘stewardship’, geared towards social inclusivity, equality or sustainability. In light of both the high level of portfolio diversification of the assets under management and the existing pressure on asset managers to mobilize high returns for shareholders, Braun finds that “[t]his concentration of share ownership at the top counteracts the benign logic of universal ownership – shareholders may be fully diversified, but only half of the population own any shares at all.” 188 And Braun argues further that the “logic of universal ownership” and its inherent suggestion of strong agency “is counteracted by the causes of diversification – indexing and size – and by the economic incentives faced by asset managers.” 189

This landscape of different asset owners, including insurers, pension funds, and sovereign wealth funds and asset management companies is further populated by a “wealth defence industry” of lawyers and accountants assisting asset managers” in “constantly reorganiz[ing] economic activity with the goal of increasing financial returns.” 190 A particularly noteworthy dimension of this dynamic is that asset managers – as universal owners – should act with a commitment to sustainability. Empirically, however, it appears that “[i]nstead of a green transition driven by large-scale corporate investment in renewable energy and other green technologies, the United States in particular has seen increasingly monopolistic market structures and record payouts to shareholders.” 191 In inquiring into the reasons for the asset managers’ apparent failure to deliver on social and environmental goals – despite their obvious power – Braun points to the particular context in which

188 Braun, supra note 186, at 290. 189 Id. at 285; see also Federico Lupo-Pasini, Sustainable Finance and Sovereign Debt: The Illusion to Govern By Contract, 25 J. INT’L ECON. L. 680, 688 (2022) (“Notwithstanding investors’ desire to contribute to the public good, portfolio managers in charge of the fund’s investment strategy have a fiduciary duty to comply with the investment mandate approved by the fund’s board. Typically, the mandate is to make a financial profit for the investors. The achievement of secondary objectives such as promoting sustainability, when contemplated at all, is always subordinate to achieving the main financial goal, profit, for which funds are created.”); Iris H-Y Chiu, Lin Lin & David Rouch, Law and Regulation for Sustainable Finance, 23 EUR. BUS. ORG. L. REV. 1, 6 (2022) (“[P]olitical and social structures. Market activity can help to sustain these. However, there is a balance beyond which it can also undermine them through marketisation and financialisation. Among other things, this could weaken the key role of states and public finance, ideologically and practically, for example in the important areas of governance and distribution. Worse, over-reliance on private sector finance can be hazardous for states in managing their sovereign debt exposures and volatile foreign capital flows.”). 190 Benjamin Braun, Exit, Control, and Politics: Structural Power and Corporate Governance under Asset Manager Capitalism, 50 Pol. & Soc’y 630, 631 (2022). 191 Id. at 631.
they operate and which shapes the space in which they are likely to exercise – activist – agency: “When asset managers exercise ‘voice,’ they address not only a portfolio company’s management but also [prospective] clients, regulators, and politicians and their voters. . . . Today, the messy politics of actually existing asset manager capitalism is characterized by a growing tension between the overriding goals of maximizing assets under management and minimizing political and regulatory risk.”

We must now turn our attention to the issues at the heart of these ‘messy politics.’ In doing so, we see overlapping and intersecting contentions that compete in charting a way forward for an understanding – and regulation – of corporate governance fit to respond to the mounting critique of corporations for their lack of responsiveness to stakeholder interests and their shortcomings in promoting inclusiveness, equality and climate change mitigation.

C. The Business Roundtable’s Intervention in the Debate around Capitalism

As the COVID-19 pandemic has both highlighted the gaps left by decades of privatizing state functions and the inability to effectively address an existential health crisis and offers a unique opportunity to address and correct long-standing policy directions, we shall try to situate very recent developments in critical corporate law debates in this context. When the Business Roundtable (“BRT”), an association of CEOs of leading U.S. corporations with some 20M employees and an 18Tr stock market capitalization, issued its Statement on Redefining the Purpose of a

192 Id.
194 Mariana Mazzucato & Rainer Kattel, COVID-19 and Public Sector Capacity, OXFORD REV. ECON. POL.’Y 1, 2 (2020) (“The COVID-19 crisis has underlined the importance of public-sector capacity and capabilities to handle emergencies, and the particular capabilities required to solve societal challenges—most visibly the protection of public health.”); see also Daniel Béland et al., COVID-19, Crisis Responses, and Public Policies: from the Persistence of Inequalities to the Importance of Policy Design, 41 POL’Y & SOC’Y 187 (2022) (Highlighting the different forms of economic, livelihood, health and safety inequalities the pandemic both exposed and deepened).
Corporation on 19 August 2019, it only took hours for a debate to unfold, which continues to this day, some four years later. Signed in 2019 by CEOs of 181 companies, by August 2021 by 243, the Statement’s key commitment to ‘all stakeholders of the corporation’ was aimed directly at the principle of shareholder value maximization that had been the gold standard for decades and had attained quasi-universal acclaim during the 1980s and then in the decade after the end of the cold war – a period marked by an explosion in global financial flows, foreign direct investment and M&A activity.

The BRT’s intervention, ten years after the global financial crisis, almost twenty years after ‘Enron’ and thirty years after the collapse of communism, occurred ‘pre-pandemic’ and thus found itself put to a considerable test in the years since its publication. Despite the pandemic having cast a bright light on deep-rooted societal disparities, the invocation of a ‘return to normal’ has been a constant fixture of the discourse of the past two years. While a September 2021 poll revealed that shareholders were still coming out ahead of other stakeholders in the race for


198 Amelia Fiske et al., The Second Pandemic: Examining Structural Inequality through Reverberations of COVID-19 in Europe, 292 SOC. SCI. & MED. 1 (2022); see also Dayna Bowen Matthew, Structural Inequality: The Real COVID-19 Threat to America’s Health and How Strengthening the Affordable Care Act Can Help, 106 GEO. L.J. 1679 (2020); Daniel L. Mendoza, The Role of Structural Inequality of COVID-19 Incidence Rates at the Neighborhood Scale in Urban Areas, COVID 186-02 (2021), https://doi.org/10.3390/covid1010016 [perma.cc/Y7H9-DQXB]; Martin Gelter & Julia M. Puaschunder, COVID-19 and Comparative Corporate Governance, 46 J. CORP. L. 557, 607 (2021) (“COVID-19 has exacerbated inequality, if considering the current divide between winning and losing industries or the rising gap between financial markets and the real economy, which has also drawn public attention lately. Concerns about growing inequality have increasingly been discussed since the 2008–09 world financial recession, which was particularly hard on minorities. Already now we can detect that the impetus of the novel coronavirus hits the poor and vulnerable, including low-skilled workers and refugees, unequally hard when it comes to infection rates, seriously-critical symptoms and unfavorable disease trajectories, economic fall-outs in declined income, furloughs or job insecurity, and/or degraded lifestyles due to the lack of personal space, mobility, connectivity, and quality of life. Both the human and financial cost appear to fall more heavily on those disfavored in the economic system already.”).
corporate attention and diligence, much suggests that the context of corporate business and the conversation around it have changed – likely irreversibly. “[T]he COVID-19 pandemic, as an exogenous shock with the potential to change many aspects of the economy, will push corporate governance further away from shareholder orientation by turning around a number of trends and accelerating other shifts that have already begun during the past ten years.” Such trends, it is important to remember, don’t emerge or unfold in a vacuum, but in a contested space. So, while it is more and more acknowledged that, “[a] poor corporate track record on climate change, data security, executive compensation, workers’ rights, and consumers’ rights have fueled public support for greater regulation of corporate activity,” it is also true that “[s]takeholderism critics fear that corporate leaders may use stakeholderism to re-establish their legitimacy and prevent regulation through voluntary measures.”

No longer ‘niche’ but also not quite mainstream or second nature yet, current conversations now feature frequent uses of the ‘c-word’ as in capitalism as well as varying critiques of it. The debate seems to shift away from a mere focus on stakeholders to sharpen our perception of the stakes themselves. Unsurprisingly, then, an increasingly wide and diverse range of topics now makes up the list of corporate ‘to-dos’ and ‘to-be-aware-ofs’, including green finance, sustainable governance, gender equality, inclusion and diversity. Historically, we know that already long before the 2019 Business Roundtable’s call to rethink the ‘purpose’ of the corporation,

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199 Mizell, supra note 197, at 11.
200 Gelter and Puaschunder, supra note 198, at 559.
201 Kishanti Parella, Contractual Stakeholderism, 102 B.U.L. REV. 865, 871 (2022); see also Kishanti Parella, International Law in the Boardroom, 108 CORNELL L. REV. 839, 845 (2023) (“Corporations are not direct subjects of international law, and yet. . .corporations continue to comply with international law even when a government actor does not make them do it.”).
corporate law has been a forum for competing interests. The current debate around ‘the promise of stakeholder governance’ marks another important moment in the century-plus-long effort to understand the nature of the business corporation, its place in society and the role of law. How, then, are we to make sense of this moment? In order to grasp the scope of the nexus between the corporation and law, it is important not only to acknowledge the rising substantive pressure and expectations regarding CSR, ESG and diversity, equity, and inclusion (“DEI”) today but also the changing regulatory map of how corporate governance norms are produced locally and transnationally, by public and private actors.

Today’s debate offers fresh perspectives and a number of ambitious prospects on a more sustainable economic system and the place of the business corporation—and its manifold stakeholders—in it, not least with regard to the structural racial bias in and around companies. And as Lisa Fairfax argues, “…decades of studies consistently reveal that the lack of racial and ethnic diversity at the C-suite level is the direct result of historical and current discrimination and racial bias from corporate employers at every stage of the employment process.” This line of critique redirects our attention to the reality, the sociology of the corporation and those who work in it—even where such work takes place far removed from the public eye. Recent case law out of the UK invites us to take off the shield and not only to face but to doctrinally engage the complex entanglements of companies

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204 Chris Brummer & Leo E. Strine Jr., Duty and Diversity, 75 Vand. L. Rev. 1, 99 (2022) (“[C]orporate. . . law itself has a positive role to play in supporting corporations in taking ambitious actions to promote DEI and contributing to a more inclusive and fair economy and nation.”).

205 Lisa M. Fairfax, Empowering Diversity Ambition: Brummer and Strine’s Duty and Diversity Makes the Legal and Business Case for Doing More, Doing Good, and Doing Well, 75 Vand. L. Rev. 131, 136-37 (2022) (“Such studies reveal persistent and pervasive patterns of racial bias and discrimination that affect employee resume screening, interviews, hiring, retention, and promotion. . . . These patterns result in people of color being systematically excluded from employment opportunities and thus systematically eliminated from the highest rungs of the corporate ladder.”); see also Alon-Beck, Michal Agmon-Gonen & Darren Rosenblum, A Duty to Diversify, 75 Vand. L. Rev. 101, 104 (2022) (Arguing for a DEI fiduciary duty: “Corporate law allows, encourages, and perhaps, today, even mandates, corporate leaders to do the right thing. Not only does it seem appropriate to ask corporate leaders, such as institutional investors, to carry this fiduciary duty, but imposing this duty on them may prove far more effective than other efforts. As a new generation begins leading firms, this new fiduciary duty may provide a novel, central means for improving governance.”).
with individuals\textsuperscript{206} and communities.\textsuperscript{207} It is then, by looking beyond those who either invest in or run the company, that our attention turns to the places and forms of business in a complex and constantly evolving political economy. This context and environment of ‘corporate lives’\textsuperscript{208} has socio-economic, cultural as well as geopolitical dimensions all of which become part of studying the corporation – and its law. It is also from this perspective, that we cannot only break open the corporation as framed by corporate and, certainly, securities law, to see its other dimensions\textsuperscript{209} – as workplace, as innovation hub, as (self-)regulator and community member – but we can also see how the corporation should be the object and subject of much more than just corporate law.

V. THE PROMISE AND LIMITATIONS OF ‘STAKEHOLDERISM’

A. Who are the Stakeholders?

The key argument here is that stakeholderism is not just a political, but a cognitive challenge. Today’s struggle between shareholder vs. stakeholder capitalism\textsuperscript{210} does more than merely build on continuing debates concerning the relationship between capital and labor, shareholders and workers.\textsuperscript{211} The

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\footnotetext[208]{Marina Welker et al., Corporate Lives: New Perspectives on the Social Life of the Corporate Form, 52 Supp. 3 CURRENT ANTHROPOLOGY No. S3 (2011).}

\footnotetext[209]{Brishen Rogers, Democracy in the firm and the Workplace, Bos. Rev. (Oct. 1, 2019).}


\footnotetext[211]{Michael P. Fogarty, Company and Corporation Reform and Worker Participation: The State of the Debate, 10 BRIT. J. INDUS. REL. 1 (1972); Lord Wedderburn, Trust, Corporation and the Worker, 23 OSGOODE HALL L.J. 203 (1985); Katharina Pistor, Co-Determination in}
invocation of stakeholderism signals the need to recognize a question of knowledge, not merely a logistical one as in whether or not to include a certain group or set of interests. Instead, the vehemence with which corporations, as they continue to assume quasi-public functions, are associated with forms of structural, not merely incidental discrimination, exclusion and exploitation, raises unavoidable questions as to how to adequately assess the place and the role of corporations as a regulator. In order to understand the manifold roles companies play today we need to invest more energy in understanding the changing environments in which they operate, which they shape and through which they change. For example, as regards corporations and their workers, corporate lawyers have left it to labor lawyers, sociologists and anthropologists to assess the changing nature of work, the implications of platform and other forms of data-driven economies\(^{212}\), the ‘hidden costs’ of supply chain labour\(^{213}\) or the structural racism that private business reinforces and perpetuates.\(^ {214}\) The use and exploitation of racialized workers manifests itself in the manufacturing


business\textsuperscript{215}, delivery and janitorial services and in prison labor\textsuperscript{216} and repeats itself in the universe of largely privatized border securitization\textsuperscript{217} today.

The scope of vulnerability which is implied here cannot be appreciated without looking at the historical evolution of the choices that have led to these shifts of public functions and authority to the private sector, for example in health, long-term care\textsuperscript{218} or carceral facilities.\textsuperscript{219} It is also against this background, that we must engage in the fight over ‘critical race theory’ and the removal of BIPOC\textsuperscript{220} and LGBTQ books from classrooms\textsuperscript{221} not just as a problem of governmental choice and partisan politics but, instead, by pressing for a clearer articulation of the role played by private business in this process.

As we are trying to understand the current moment of ‘corporate purpose’, ESG, as well as the advances made under the auspices of “EDI” in drawing on #MeToo, #BLM and #RacialCapitalism, it was warranted to retrace some more of the steps in (the struggle over) corporate law reform


that have come before. In that regard, we must acknowledge the aliveness\textsuperscript{222} of the ‘separate legal person’, authoritatively launched in \textit{Salomon v Salomon} in 1897, cautiously reminisce\textsuperscript{223} the Michigan Supreme Court’s 1919 reasoning in \textit{Dodge v Ford} and replay the above cited moves by Dodd and Berle in 1932.\textsuperscript{224} As on a Monopoly board we inevitably have to, at some point, ‘go to’ Milton Friedman’s 1970 ‘Social Responsibility of Business Is to Increase Its Profits’ missive\textsuperscript{225}, then move on to recognize the re-endorsements in the 1980s of Hayek’s warning not to take the ‘roads to serfdom’ before considering numerous reinstatements of the already mentioned U.S. Supreme Court’s \textit{Lochner} decision in the 1990s and 2000s.\textsuperscript{226} The earlier discussion in this paper of the financialized firm has provided the backdrop for a closer look at the consolidation of global value chains as the defining architecture of international trade and labor exploitation but also of the transnationalization and hybridization of corporate governance rule-making.\textsuperscript{227} As highlighted before, the latter manifests itself in the co-evolution of private codes of conduct\textsuperscript{228} around

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board composition, executive pay and sustainability\textsuperscript{229}, quasi-public standard-setting relating to corporate governance\textsuperscript{230} and significant advances in ‘business & human rights’ regulation, including at the UN level\textsuperscript{231} and across expanding instances of ‘domestication’\textsuperscript{232}, now more than a decade after the publication of the UNGP, also known as the ‘Ruggie Principles.’\textsuperscript{233} What is crucial at this point is to move this kind of analysis beyond the confines of scholarly preoccupation and interrogate it from the perspective of a critical political intervention. The main challenge that the acknowledgement of this new geography of corporate governance presents us with concerns the place of the corporation in a democratic society and the reinvigoration of political agency. It concerns the identification of points of access and intervention, rendered difficult by the co-existence of differently tasked public and private actors.

As the historical sketch in this article illustrates, the roots of the current constellation of public and private actors being pressed by different interest groups to lead towards the implementation of a more sustainable and equitable system of corporate governance and finance has helped us in accentuating the choices regarding the privatization of public security guarantees and the ensuing consolidation of an institutional and regulatory infrastructure in support of financial wealth creation. At stake is the question whether or not it is possible to reverse such choices or what might be achieved through an interrogation of the underlying normative justifications that led to them in light of current contentions. What is clear is that the more we are able to learn about the intricate infrastructure of today’s globally connected economy and the more we recognize the public’s concerns with its repercussions, the more pressing it becomes to understand the discussion

\textsuperscript{229} Michele Siri & Shanshan Zhu, Integrating Sustainability in EU Corporate Governance Codes, SUSTAINABLE FIN. IN EUR. 175 (Danny Busch et al. eds., 2021), https://link.springer.com/chapter/10.1007/978-3-030-71834-3_6 [https://perma.cc/W93Y-MEDM].


\textsuperscript{231} René Wolfsteller & Yingru Li, Business and Human Rights Regulation After the UN Guiding Principles: Accountability, Governance, Effectiveness, 23 HUM. RTS. REV. 1 (2022), https://doi.org/10.1007/s12142-022-00656-2 [https://perma.cc/2BMM-V5AH].


around corporate purpose as one at the center of current democratic practice. As the Asia-Pacific representative of the United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises, Professor Surya Deva, recently put it: “Several continuing challenges in regulating transnational business remain: complex corporate structures, long supply chains, the emergence of the gig economy, the slow and reactive nature of legal norms, lack of political will on the part of states, asymmetry between the generally territorial nature of state regulations and the transnational nature of business operations, the foreign investment–driven model of development, the power of corporations, corporate capture of the state, shrinking civic space, barriers to corporate accountability, democratic deficits, and weak rule of law.”

The here-sketched map – part historical, part sociological – offers a number of rough markers of a permanently evolving engagement and contestation of the corporation and how and where it should be regulated. These markers direct our attention to the ‘big picture’ context in which corporate governance, along with CSR, ‘business & human rights’, ESG and stakeholderism, is situated. This account supports the proposition that what the Business Roundtable put ‘on the table’ in 2019 is not only practically and conceptually relevant, but politically. To be sure, the ‘purpose’ intervention has broken open the corporate law silo to reveal the inadequacy of approaching the pressing questions around the corporation through an oppositional stand-off between shareholders and stakeholders. This is reflected in the much expanded range of expectations now being articulated towards the corporation, including pressure to actively manage and improve the diversity of their staff, including the composition of their board, to adopt and clearly communicate their stance on climate change.

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236 Harv. L. Center on the Legal Pro., Law Firms in the ESG Game: ESG practices Practice Pervade the legal industry (Jan./Feb. 2023), https://clp.law.harvard.edu/knowledge-hub/magazine/issues/esg-and-lawyers/law-firms-in-the-esg-game/ [https://perma.cc/28V3-3H2L]; see also Concepcíon Galdón et al., Business Schools Must Do More to Address the Climate Crisis, HARV. BUS. REV. (Feb. 1, 2022), https://hbr.org/2022/02/business-schools-must-do-more-to-address-the-climate-crisis [https://perma.cc/9HNL-B2Q2] (“Although evidence of climate change has been emerging for more than four decades, business schools have been late in acknowledging and responding to this urgent and existential issue.”).
237 Karis Stephen et al., Understanding the Business of Corporate Board Diversity, REGUL.
mitigation, to develop contractual duties as well as other strategies to eradicate unacceptable working and human rights conditions in their warehouses and throughout their supply chains, to acknowledge and engage with the impact of their activities on sustainability in the long run and to meet the staggering challenges arising from artificial intelligence.


239 Kishanti Parella, *Protecting Third Parties in Contracts*, 58 AM. BUS. L.J. 327, 336-37 (2021) (“Under this duty contracting parties must take into account negative externalities to third parties when the contracting parties could reasonably foresee that performance of the contract would create a risk of physical harm to these third parties.”); Parella has more recently compellingly conceptualized this duty towards corporate stakeholders in *Contractual Stakeholderism*, supra note 201, at 878. By applying a tort duty to contract design, corporate actors must be mindful of the risks that their contracts create for nonsignatories to the contract. Specifically, they must account for their contract’s negative externalities, which “occur where a decision is taken that results in an event which has adverse, uncompensated effects on another party who does not consent to it.” This analysis is especially significant where applicable regulations do not sufficiently address the negative externalities that the contracts create for corporate stakeholders.”; see also Ola Tucker, *Combating Exploitative Labour Practices and Other Human Rights Violations Through Supply Chain Transparency*, HUM. RTS. PULSE 27 (Jan. 27, 2020), https://www.humanrightspulse.com/mastercontentblog/combating-exploitative-labour-practices-and-other-human-rights-violations-through-supply-chain-transparency [https://perma.cc/6CK2-33DD] (providing another approach).


241 Peter Cihon et al., *Corporate Governance of Artificial Intelligence in the Public Interest*,
and in the context of fintech.242

B. Regulating Corporate Law as Crisis Response

The ‘business environment’ and its regulatory landscape have changed significantly, not least since the 2002 passage of the Sarbanes Oxley Act [SOX]. Omitting the ‘s’ for ‘social’ from the phrase ‘corporate responsibility’243 was, at the time, a clear signal directed at shareholders whose confidence the act, above all, was meant to restore. Today, it becomes visible how much has changed since the ‘corporate social responsibility’ (“CSR”) disputes in the 1930s. There is, for example in Air Canada’s,244 Denton’s245 and Sodexo’s246 commitments to battle ‘modern slavery’247 and the growing number of supply chain and modern slavery legislations248 in

248 Fiona McGaughey et al., Corporate Responses to Tackling Modern Slavery: A Comparative Analysis of Australia, France and the United Kingdom, 7 BUS. & HUM. RTS. J. 1 (2021).
the UK, France, Germany, Canada and elsewhere, a much more expansive range of concerns and expectations which companies, and, notably, the law firms, consultancies and accountants that advise them, are asked to address. In order to more fully appreciate the degree of change in companies’ relation to CSR in a lead-up to today’s efforts around ESG, it is worthwhile to briefly review the history, focusing here on the Sarbanes-Oxley Act, and to locate it within today’s larger landscape of corporate governance norm creation.

Sarbanes Oxley remains a remarkable legislation, twenty years’ on. For one, despite the significant organizational burden, it triggered a slew of reforms in the corporate governance of companies that came at a time at which ‘some companies’ operations and reporting [had become] opaque even to the people in charge. Admittedly, the 1980s and 1990s had been

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a period marked by ‘a frantic pace of mergers and acquisitions and less-than-seamless integration of the combined entities; the rapid implementation of new information technologies and their incompatibility with legacy systems . . ., foreign expansion . . ., proliferation of business alliances and outsourcing, and the stringing together of supply chains.’ Its target, then, was the improvement of investment security and auditing and reporting related accountability, something that both placed a rent on foreign companies now operating in the U.S. and reverberated into other countries more actively addressing their own corporate governance shortcomings.

The other aspect of SOX is the one that wasn’t, however: the direct regulatory response to the impact of Enron’s and WorldCom’s fraudulent accounting practices on the life savings of workers. The AFL-CIO commented at the time that ‘[t]he Enron bankruptcy has exposed major vulnerabilities in working families’ retirement security’, raising ‘public questions about defined contribution pension plans’ and focusing ‘attention on the threat posed by proposals to privatize Social Security.’ Writing in 2002, Robin Blackburn noted how the cashing-in of stock options by Enron’s directors “perfectly illustrat[ed] that the capital which they and other major shareholders dispose of possesses different rights and qualities to the savings of their employees. The impotence of Enron’s workers, and of all those whose pensions were tied up in the company’s shares and bonds, was part of the normal working of today’s savings regime.”

Not even ten years later, with the Global Financial Crisis, history seemed to repeat itself, again as tragedy. In the U.S., unemployment rose from 5% to 10.2%, with some 8.5M jobs lost, in China, due to the market collapse’s impact on export-oriented manufacturing, more than 20M rural migrant workers became unemployed. As we now know, a Google search even in April 2022 for ‘great recession’ was bound to bring up sources that speak to 2020, not 2008/9. And now, in 2023, the GFC is even further away. One of the early insights at the outset of the pandemic in early 2020 was that

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258 Id.
it would impact workers and other vulnerable populations very differently in the Global North and South.\textsuperscript{263} But, time marches on mercilessly, it seems, and a greater and more longstanding concern with those who are ‘far away’ requires sustained attention and effort, particularly amidst a seemingly universal push for the ‘return to normal’, with private business\textsuperscript{264} playing a pivotal role in setting the agenda for what is to come. Beware the blind spots.\textsuperscript{265}

VI. VISIONS, CHOICES AND STRATEGIES

As the pandemic has made evident, humanity and the environment are interconnected, intensely tying human and non-human, local and global. Any effort of trying to paint the picture of the ‘aftermath’ turns into an odd mixture of memorializing and repressing much of which still feels incomprehensible, unbearable, much of it having come so unexpectedly: the struggle for survival of the next coffee shop after pandemic lockdowns, by the individual facing the choice of driving for Uber or Prime in addition to her already existing precarious jobs, by the single parent trying to maintain employment with recurring kindergarten closures, by the Amazon warehouse worker contemplating whether or not to join their colleagues’ brave struggle for unionization. But, again, time has not stood still since 24 February 2022 and 7 October 2023. While the Wars in Ukraine and Gaza


have irreversibly changed the geopolitical context and political consciousness, the so far presented questions regarding a more equitable, inclusive and sustainable organization of the economy remain on the table. For most workers, the incessantly hypothesized ‘return to normal’ is not a choice between ‘home office’ and ‘going in for work.’ For many, their employment or in lack thereof, their hustle for jobs, amidst the layoff of hundreds of thousands of workers, rising interest rates to address a sobering inflation, is a matter of precariousness. Adding the steeply elevated costs for food, energy and gas since early 2022, the context of ‘post-pandemic economic recovery’ is experienced by many as a particularly difficult and uncertain one. It appears inevitable not to think of companies and workers as being in this process of recovery and reconstruction together. That, however, requires a fundamental shift in perspective, informed in part by an appreciation of the dramatic changes in work and employment after decades of financialization and privatization, and in part by a critical revisiting of how law has and continues to provide the code\textsuperscript{266} for these changes, whether we focus on the local plant fight for unionization or on a legal framework for global supply chains.\textsuperscript{267} From the perspective of the UN’s Intergovernmental Panel on Climate Change (IPCC), their reports of August 2021\textsuperscript{268} and February 2022\textsuperscript{269} were meant to sound alarm and prompt a – long, desperately awaited – shift in strategy and immediate policy making. Leaving no doubt as to the addressees of their missive, the IPCC continues to aim at both governments and businesses to take action.\textsuperscript{270}

What can be discerned from this cursory snapshot of corporate law in context? At a minimum, that – as William Savitt and Aneil Kovvali convincingly argue – the push for companies to take the BRT’s cue for a


more inclusive approach to stakeholder governance, a) is neither barred by an alleged ‘all-in’ obligation of directors only to shareholders and, b) does not logically disincentivize regulatory and legislative intervention271 both of which has repeatedly been maintained272 by Lucian Bebchuk and his co-authors. Savitt and Kovvali note, that “[a] growing number of companies have sought to tie executive compensation to metrics focused on environmental, social, and governance issues.”273 But, how reliably can the validation of contentions on either side be tested? Bebchuk, Kastiel and Tallarita have repeatedly argued that—in the context of a pandemic that saw a staggering number of corporate acquisitions and “even though the pandemic heightened risks for stakeholders, corporate leaders negotiated for little or no stakeholder protections”—their findings are consistent with the view that corporate leaders face structural incentives not to benefit stakeholders beyond what would serve shareholder value.274

And, now what? Is the ‘evidence’ conclusive in suggesting that change is impossible? Is it a question of perspective, or one of time horizon? In many ways, the scholarly stand-off around ‘purpose’ bears reminisce to the earlier debate around the ‘legal origin’ thesis as popularized in the 1990s by Law Porta, Lopez-de-Silanes and Shleifer (“LLSV”). Their widely noted intervention built on a comparison between different regulatory frameworks relating to the protection of outside investors. LLSV argued not only that common law countries provided stronger shareholder and creditor protection than civil law countries275 but also maintained “that legal investor protection is a stronger protector of financial development.”276 In a context of volatile financial markets277 unfolded an increasingly sophisticated scholarship in comparative corporate governance,278 which provided a sensitive resonance

273 Id., at 1890.
275 Rafael La Porta et al., Law and Finance, 106 J. POL. ECON. 1113, 1116 (1998).
276 Rafael La Porta et al., The Economic Consequences of Legal Origins, 46 J. ECON. LITERATURE 285, 286 (2008).
278 John W. Cioffi, State of the Art: A Review Essay on Comparative Corporate Governance:
Critics of the LLSV approach highlighted the overly stylistic reliance on the common-civil law distinction that failed to take into account the much messier and historically evolving intricacies of different political economies, a critique that echoed and built on the varieties of capitalism work as it had emerged in the 1990s. What this critique showed at the time and what bears remembering today, is that there is a crucial difference between ‘financial development’ and what would be an institutionally supported system of economic growth that incorporates principles of equality, access and sustainability. The alleged irrefutability of arguments such as those promoted by LLSV rests remains waterproof until its limitations in that regard are being articulated.

In the present-day discussion of ‘corporate purpose’, there would much more to say and recoup from this important period which could have been an even more significant landmark moment in inter-disciplinary engagement between corporate lawyers, political economists, economic sociologists and comparative political science scholars. Such engagement occurred, albeit only in limited form, with ships passing in the night for much of the time.

The present moment could be a suitable one to renew and reinvigorate past discussions around the goals of corporate governance as part of an inquiry into how to make our society more inclusive, fair and just. Instead of forcing...

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a choice between allegedly incompatible interests in protecting either investors or stakeholders, it is the recognition of a fundamentally broadened substantive arena\textsuperscript{284}, on the one hand, and of a sociologically diverse, public-private and transnationalized regulatory landscape, on the other, which we should appreciate as the backdrop for a renewed, democratic engagement with the role of corporations in our society.\textsuperscript{285}

This actual, rich and tangible environment, not an over-hypothesized, abstract trade-off between “state” and “market”, creates immense opportunities for dialogue and collaboration across different actors towards developing structures of forward-looking, critically informed corporate governance. And these opportunities should be taken seriously by leading asset managers as well. As the related transnational and comparative discussion is now well under way\textsuperscript{286} we should begin to mobilize law – including corporate law – as a forum, as a site of engagement, and as a toolkit with which to engage in a democratic manner. Such engagement should not be confined to choices between ‘politics’ and ‘markets’ or between ‘intervention’ and ‘freedom.’ Instead, law as a site of democratic practice creates and shapes, resists and reforms socio-economic relations. That law’s forum and regulatory laboratory is today populated by public and private, domestic and international actors and institutions, deliberating, collaborating and at times competing in new, transnational processes of norm creation, is – actually – something that practitioners, along with legal sociologists, transnational law, governance and regulation scholars\textsuperscript{287} have long recognized and been engaging with – with a distinctly inter- and transdisciplinary methodology.\textsuperscript{288} The key today is to step out of one’s well habituated reference systems and echo chambers and to actively seek dialogue and learning with those who have been excluded. Only then will it

\textsuperscript{284} Martin Petrin, \textit{Is Stakeholderism Bad for Stakeholders?}, COLUM. L. SCH. BLUE SKY BLOG (May 21, 2020), https://clsbluesky.law.columbia.edu/2020/05/21/is-stakeholderism-bad-for-stakeholders/ [https://perma.cc/FMR5-Q24C].

\textsuperscript{285} \textit{Id.} (“Concerns that the pursuit of multiple goals – beyond a sole focus on profits – would have negative effects on managerial performance and behavior appear increasingly unfounded.”).


be possible to address the challenges for existing understandings of legal/political authority, let alone legitimacy. Here, arguably, lie the stakes of debating ‘stakeholderism’ for the future.