HIPPIES IN THE BOARDROOM: A HISTORICAL CRITIQUE OF ADDRESSING STAKEHOLDER INTERESTS THROUGH PRIVATE ORDERING

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Modern capitalist theory has been the engine of Western innovation and prosperity for centuries. However, the persistence of the free market and corporate form in the United States has come at a high cost. Industrialization powered by fossil fuels has permanently degraded and destabilized the Earth's climate, wealth continues to concentrate among a handful of individuals, and increasing nativist and anti-immigrant sentiments threaten our institutions. This has led scholars to draw parallels between the current day and the Gilded Age, a period of massive wealth inequality during which the negative externalities of unfettered capitalism became particularly clear. This Note is situated in the rapidly expanding literature about environmental social governance (ESG) and stakeholderism, looking to past instances of corporate reform as well as the present realities of the modern-day corporation to argue that private ordering is an ineffective and improper means of addressing negative externalities of capitalism. It identifies moments of proto-stakeholderism during three periods: the Gilded Age, Progressive Era, and stock market crash of 1929, highlighting the cyclicality of addressing stakeholder concerns throughout history. It critiques two major avenues through which corporations might consider stakeholders—private ordering or government action—and argues that private ordering's legal limits and legitimacy problems are inescapable when considering transformational ESG reform.

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Introduction

Modern capitalist theory has been the engine of Western innovation and prosperity for centuries. Indeed, the free market is often regarded as one of mankind's greatest inventions.[1] Though the origins of the corporate form date back to antiquity,[2] the American corporation is largely an outgrowth of the British joint-stock company in the 1600s.[3] The British Crown granted monopolies to groups of investors, allowing aggregation of labor and capital and enabling groups to take on ventures too large or risky for any one individual. For instance, the Virginia Company aided the expansion of British control over North

[1] *See* Rebecca Henderson, Reimagining Capitalism in a World on Fire 7 (2020).

[2] *See* Robert W. Hillman, *Limited Liability in Historical Perspective*, 54 Wash. & Lee L. Rev. 615–17 (1997) (describing early notions of limited liability in ancient Rome).

[3] *See* Tyler Halloran, *A Brief History of the Corporate Form and Why It Matters*, Fordham J. Corp. & Fin. L. Blog (Nov. 18, 2018), https://news.law.fordham.edu/jcfl/2018/11/18/a-brief-history-of-the-corporate-form-and-why-it-matters (discussing the early influence of British joint-stock companies on the U.S. colonies and the U.S. corporate structures that followed).

America, setting up what would be the first American colony, Jamestown, in 1607.[4] Corporations did not simply expand to North America, but settled it, and remain deeply embedded in our national identity. Indeed, wars have been fought in part over the role of the corporation in American life.[5]

The persistence of the free market in the United States, however, has come at a cost. Industrialization powered by fossil fuels has degraded and destabilized the Earth's climate, causing increasingly extreme weather patterns and rising ocean levels.[6] In 2019, the United Nations released a report indicating that without a major reduction in global emissions, climate change would cause "irreversible damage" within eleven years.[7] Wealth continues to concentrate among fewer and fewer individuals, while artificial intelligence threatens to leave millions out of work.[8] Between 1983 and 2016, the share of U.S. aggregate wealth held by upper-income families increased from 60% to 79%, while the share held by middle- and low-income families fell from 32% to 17% and 7% to 4%, respectively.[9] Perhaps most telling is the growing belief, supported by data, that one's children may *not* be better off than oneself.[10] This has led to increasing nativist and anti-

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4 Zephyr Teachout, *October's Book Club Pick: How Businesses Became People*, N.Y. Times (Mar. 5, 2018), https://www.nytimes.com/2018/03/05/books/review/adam-winkler-we-the-corporations.html.

5 *See id.* ("The bailout of the [East India Company] by England — including the Tea Act of 1773, which lowered the price of tea in the colonies while preserving the tax colonists paid on it — infringed the colonial charters and led to the protests that were instrumental in sparking the Revolutionary War.").

6 *See* Henderson, *supra* note 1, at 8.

7 Press Release, Gen. Assembly, Only 11 Years Left to Prevent Irreversible Damage from Climate Change, Speakers Warn During General Assembly High-Level Meeting, U.N. Press Release GA/12131 (Mar. 28, 2019).

8 *See* Henderson, *supra* note 1, at 8.

9 *See* Juliana Menasce Horowitz, Ruth Igielnik & Rakesh Kochhar, Pew Rsch. Ctr., Most Americans Say There Is Too Much Economic Inequality in the U.S., but Fewer than Half Call It a Top Priority 20 (2020), https://www.pewresearch.org/social-trends/2020/01/09/trends-in-income-and-wealth-inequality ("Upper-income families were the only income tier able to build on their wealth from 2001 to 2016, adding 33% at the median. On the other hand, middle-income families saw their median net worth shrink by 20% and lower-income families experienced a loss of 45%.").

10 *See* Martin Wolf, *Martin Wolf: Why Rigged Capitalism Is Damaging Liberal Democracy*, Fin. Times (Sept. 18, 2019), https://www.ft.com/content/5a8ab27e-d470-11e9-8367-807ebd53ab77 ("From 1948 to 1973 . . . there was a 96 percent chance that a child would have a higher income than his or her parents. Since 1973, the median family has seen its real income grow only 0.4 percent annually . . . . [and] 28 percent of children have lower income than their parents . . . ." (quoting Jason Furman & Peter Orszag, *Slower Productivity and Higher Inequality: Are They Related?* 2 (Peterson Inst. for Int'l Econ., Working Paper No. 18-4, 2018), https://www.piie.com/publications/working-papers/slower-productivity-and-higher-inequality-are-they-related)).

immigrant sentiments,[11] most recently playing out in the rise of antidemocratic populist movements.[12] Indeed, a growing number of scholars and political minds have drawn parallels between the current day and the Gilded Age, a period of massive wealth inequality and social unrest during which the consequences of unfettered capitalism became particularly clear.[13] It does not seem like an overstatement, then, that economists have claimed "the world is on fire."[14]

Corporate America has noticed, too. Chief executives have acknowledged, "the American Dream is alive – but fraying for many."[15] The years 2017–2021 have seen an unprecedented level of public commitment from chief executives to consider the impact of business operations on customers, employees, suppliers, communities, the environment, and other nonshareholder constituencies.[16] Thought leaders have developed an entire vocabulary around these pledges—

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11 *See Immigrants and the Economy*, ACLU, https://www.aclu.org/other/immigrants-and-economy (last visited Mar. 3, 2021) (describing that during difficult economic times, Americans often blame immigrants for "tak[ing] jobs away and . . . drain[ing] . . . the economy").

12 *See* Vincent A. Auger, *Right-Wing Terror: A Fifth Global Wave?* 14 Persps. on Terrorism 87, 87–88 (2020) (describing terrorism by nativist and nationalist far-right groups targeting religious centers and businesses); Nora McGreevy, *Was the Capitol Attack Part of a New Wave of Terrorism?*, JSTOR Daily (Feb. 16, 2021), https://daily.jstor.org/was-the-capitol-attack-part-of-a-new-wave-of-terrorism (describing participants in the 2021 attack on the U.S. Capitol as "shar[ing] a 'triggering cause,' namely a rise in right-wing or populist politics in their countries and concern about rising levels of immigration").

13 *See, e.g.*, Robert Gebelhoff, Opinion, *We Are Living in a New Gilded Age. 2018 Proves It.*, Wash. Post (Dec. 28, 2018), https://www.washingtonpost.com/opinions/2018/12/28/we-are-living-new-gilded-age-proves-it (describing various troubling healthcare and labor trends in the United States); David Huyssen, *We Won't Get Out of the Second Gilded Age the Way We Got Out of the First*, Vox (Apr. 1, 2019, 8:30 AM), https://www.vox.com/first-person/2019/4/1/18286084/gilded-age-income-inequality-robber-baron (contrasting today's economic inequality with conditions during the Gilded Age); Edward T. O'Donnell, *Are We Living in the Gilded Age 2.0?*, History (Jan. 31, 2019), https://www.history.com/news/second-gilded-age-income-inequality (comparing wealth disparities in modern times to those during the Gilded Age).

14 Henderson, *supra* note 1, at 8.

15 Jamie Dimon, *Chairman & CEO Letter to Shareholders*, J.P. Morgan Chase & Co., (Apr. 4, 2019), https://reports.jpmorganchase.com/investor-relations/2018/ar-ceo-letters.htm.

16 *See, e.g.*, *Statement on the Purpose of a Corporation*, Bus. Roundtable (Aug. 19, 2019) [hereinafter 2019 Bus. Roundtable Statement], https://s3.amazonaws.com/brt.org/BRT-StatementonthePurposeofaCorporationOctober2020.pdf (describing corporate commitments to consumers, employees, suppliers, communities, and shareholders signed by 181 chief executives); Klaus Schwab, *Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution* (Dec. 2, 2019), https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution (proposing a five-pronged conception of corporate purpose that includes commitments to employees, suppliers, society at large, and shareholders).

"inclusive capitalism," "social license," and "corporate purpose."[17] However, the effectiveness of corporate policies in addressing the interests and concerns of nonshareholder groups remains to be seen.[18]

Some have considered abandoning capitalism, technological innovation, and/or globalization as an antidote to our current ailments.[19] However, as this Note argues, the problem we face today is not new, but is instead a dramatic example of the free market's well-documented deficiency in accounting for negative externalities as it operates in the real world. Indeed, we have successfully reformed capitalism to correct for similar externalities in the past.[20] As we face yet another critical juncture, we are presented with the opportunity to preserve the freedom and incentive to innovate afforded by the free market while addressing the inequities it has produced.

This Note is situated in the rapidly expanding literature regarding environmental social governance (ESG) and stakeholderism, which refer to the inclusion of environmental, social, and corporate governance risks and opportunities in investing,[21] and corporate leaders'[22] consideration of nonshareholder groups in business decisions,[23] respectively. This Note looks to past instances of corporate reform as well as the present realities of the modern-day corporation to argue that private ordering is an ineffective and improper means of addressing the negative externalities of capitalism, in which businesses should be free to vigorously compete, innovate, and generate financial returns. Part I sketches the origins and contours of the academic debate between maintaining pure shareholder primacy and allowing

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17 *See* Jackie Cook, *Larry Fink's Words Versus Actions on ESG in 2021*, MORNINGSTAR (Feb. 8, 2021), https://www.morningstar.com/articles/1021762/larry-finks-words-versus-actions-on-esg-in-2021 (describing the impact of Blackrock Chief Executive Officer Larry Fink's discussion of corporate social responsibility in his annual letter to CEOs).

18 *See generally* Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91 (2020) (arguing that the small number of Board approval-requiring actions taken in the wake of the 2019 Business Roundtable Statement may be evidence that few meaningful pro-stakeholder reforms will occur in the current climate).

19 Though mostly outside the scope of this paper, Americans have warmed to socialism in recent years as a means of addressing inequities produced by capitalism. *See* Jonah Birch, *The Rise of Socialism in the United States: American "Exceptionalism" and the Left After 2016* (attributing the rise of socialism to the 2008 financial crisis, Iraq War, and disappointment with the presidency of Barack Obama), *in* REFLECTIONS ON SOCIALISM IN THE TWENTY-FIRST CENTURY 103, 103–08 (Claes Brundenius ed., 2020).

20 *See infra* Part II.

21 *ESG Investing & Analysis*, CFA INST., https://www.cfainstitute.org/en/research/esg-investing (last visited Sept. 14, 2021).

22 This paper uses the terms "management," "corporate leaders," and "directors" interchangeably to refer to individuals who make significant corporate decisions.

23 *See* Bebchuk & Tallarita, *supra* note 18, at 93–94.

consideration of nonshareholder interests in business operations. In addition, it articulates the major economic and normative rationales for considering corporate stakeholders in the first instance. It concludes that tying stakeholder welfare to shareholder returns will not meaningfully address stakeholder interests. The novel contribution of this Note is made in Part II, which identifies moments of proto-stakeholderism during three periods: The Gilded Age, Progressive Era, and stock market crash of 1929, highlighting the cyclicality of engaging stakeholders and addressing their varying concerns throughout history. Part III joins the current conversation around ESG and stakeholderism, discussing two primary avenues through which corporations might consider stakeholders—voluntarily via private ordering or by mandate via regulation or legislation. In critiquing each, it argues that private ordering's legal limits and legitimacy problems are inescapable when contemplating the systemic change required to meaningfully address stakeholder concerns. Instead, based on history and theory, this Note argues that some combination of legislation and regulation have more promise in meaningfully addressing the negative externalities of capitalism, which are disproportionately borne by stakeholders.

I
For Whom is the Corporation Managed?

This Part traces the origins of the academic debate between traditional notions of shareholder primacy and stakeholderism. It then discusses various forms of stakeholderism and their rationales, concluding that viewing stakeholderism as a means of increasing shareholder returns is inadequate for making the transformational changes necessary to truly engage stakeholders.

A. Evolution of the Shareholder Primacy/Stakeholderism Debate

Modern-day calls for corporate governance reform have largely focused on shifting away from the American legal norm of shareholder primacy. In theory, shareholder primacy holds that the purpose of a corporation is to prioritize shareholder interests and value over those of other groups.[24] While seemingly straightforward, the manner and degree to which shareholder interests are prioritized has spurred

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[24] *See, e.g.*, Lynn A. Stout, *On the Rise of Shareholder Primacy, Signs of Its Fall, and the Return of Managerialism (in the Closet)*, 36 Seattle U. L. Rev. 1169, 1173 (2013) ("According to shareholder primacy theorists, the only legitimate purpose of the corporation was to maximize shareholder value.").

an immense amount of litigation and academic debate over the past century.

One of the earliest cases to consider shareholder primacy was *Dodge v. Ford Motor Co.*, heard by the Michigan Supreme Court in 1919.[25] Here, the court considered the decision of Henry Ford, president and majority stockholder of Ford Motor Company, to end special dividends for shareholders while paying his workers increased wages, investing in new plants, and cutting the purchase price of the company's flagship automobile, the Model T.[26] Shareholders, who admittedly had personal grievances against Ford,[27] filed suit expressing their objection to this strategy and demanding that the capital earmarked for future plant openings be instead distributed as special dividends.[28] In ruling against Ford, the court said plainly, "A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end."[29]

The employees and consumers considered in *Dodge* are examples of nonshareholder groups with an interest in the corporation, which have come to be known as "corporate stakeholders" or "other constituencies." Examples of stakeholders include employees, customers, suppliers, creditors, the local community, society, and the environment.[30] These groups often have interests and concerns beyond a company's financial performance, animated by the negative externalities of capitalism. These concerns include, for instance, a company's workplace culture, its ability to service its debt, the sustainability of its supply chain, or its contribution to climate change. Following *Dodge*, debates about defining corporate stakeholders and the extent to which these groups should be considered in corporate decisionmaking made their way to academia. In 1932, Professors Adolf Berle[31] and Merrick

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25 170 N.W. 668 (Mich. 1919); *see* Michael J. Vargas, Dodge v. Ford Motor Co. *at 100: The Enduring Legacy of Corporate Law's Most Controversial Case*, 75 Bus. Law. 2103, 2103 (2020) (identifying *Dodge* as an early shareholder primacy case).

26 *Dodge*, 170 N.W. at 670–71.

27 Nathan Oman, *Corporations and Autonomy Theories of Contract: A Critique of the New* Lex Mercatoria, 83 Denv. U. L. Rev. 101, 135 (2005) ("The Dodge brothers . . . wished to set up their own car company to compete with Ford. Henry Ford wanted to forestall this by denying capital to the Dodge brothers . . . . Accordingly, Henry Ford had the board of directors cease the payment of stock dividends.").

28 *Dodge*, 170 N.W. at 670–71.

29 *Id.* at 684.

30 *See* Bebchuk & Tallarita, *supra* note 18, at 93.

31 *See* Adolf A. Berle, *For Whom Corporate Managers Are Trustees: A Note*, 45 Harv. L. Rev. 1365 (1932).

Dodd[32] wrote clashing law review articles on this matter, with the former advocating for *exclusive* consideration of shareholder interests in business decisionmaking and the latter advocating for *additional* consideration of stakeholder interests.[33] As Dodd's view gained and maintained traction from the 1950s onward,[34] it has been given a variety of names including "corporate social responsibility" (CSR) and "stakeholderism."[35] Notoriously, in the 1970s, economics professor Milton Friedman took issue with CSR in a *New York Times* article, asserting that "the social responsibility of business is to increase its profits."[36] However, despite the tremendous academic attention given to the debate around shareholder primacy and corporate purpose more broadly, it was not until the 1980s that stakeholders were directly addressed via legislation.[37]

During the 1980s and 1990s, a wave of hostile takeovers focused on aggressively maximizing shareholder profits swept through corporate America.[38] These takeovers highlighted the tension between maximizing short-term shareholder returns and creating long-term corporate value, which necessitates consideration of labor, creditors, employees, suppliers, and others who play a role in the success of the

[32] *See* E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 Harv. L. Rev. 1145 (1932).

[33] Another set of dueling articles was published in the *Virginia Law Review* in 2007, penned by Professor Lucian Bebchuk, advocating for shareholder primacy, and founding partner of Wachtell, Lipton, Rosen & Katz, Martin Lipton, arguing that directors must consider stakeholders in corporate decisionmaking. *See* Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 Va. L. Rev. 675 (2007); Martin Lipton & William Savitt, *The Many Myths of Lucian Bebchuk*, 93 Va. L. Rev. 733 (2007). These two have continued their debate through other articles over the years. *See* Gregory J. Millman, *Lipton Takes on Bebchuk over Shareholder Activism*, Wall St. J. (Sept. 30, 2013, 2:47 PM), https://www.wsj.com/articles/BL-252B-2456 (describing Lipton's challenge to Bebchuk's proposition that shareholder activism carries long-term benefits).

[34] *See, e.g.*, Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 Va. L. Rev. 247 (1999) (challenging "the shareholder primacy norm" and "parallel[ing] . . . arguments raised in recent years by the . . . 'progressive' school of corporate scholars"); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. Rev. 733 (2005) (arguing that corporate managers should have discretion to sacrifice profits in the public interest).

[35] *See* Bebchuk & Tallarita, *supra* note 18, at 91.

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

[37] *See* Bebchuk & Tallarita, *supra* note 18, at 105 (discussing the antitakeover legislation of the 1980s and 1990s).

[38] *See id.* (describing a hostile takeover as an acquisition in which the acquiror goes directly to the target company's shareholders against management's will or fights to replace management).

corporation.[39] Directors seeking to ward off an onslaught of hostile bids were constrained by the looming threat of litigation should shareholders allege the directors breached their fiduciary duties in turning down a bid.[40] Subsequently, numerous antitakeover statutes were passed at the state level to afford managers more discretion in running businesses and assessing potential transactions with the goal of promoting long-term corporate value in mind.[41] This legislation, termed the "constituency statute," allowed managers to consider "other constituencies" beyond shareholders.[42] Though thirty-five states have enacted constituency statutes,[43] Delaware, which is home to half of all publicly traded companies, has failed to adopt a statute of its own after considerable debate.[44] Indeed, though management's day-to-day conduct in Delaware-incorporated companies is evaluated through the lens of the deferential business judgment rule, which affords discretion similar to that permitted under constituency statutes,[45] managers are subject to enhanced fiduciary duties to shareholders under *Revlon*, *Unocal*, and *Blasius* in change-of-control situations, ensuring that directors maximize value for shareholders, rather than act in their own self-interest.[46] Despite effectively shielding directors from lia-

[39] *See* Nathan E. Standley, Note, *Lessons Learned from the Capitulation of the Constituency Statute*, ELON L. REV. 209, 211 (2012) ("Hostile takeovers were 'commonly viewed as pitting the shareholder's short-term interests in profit maximization against the best long-term interests of the corporation.'" (quoting Thomas J. Bamonte, *The Meaning of the "Corporate Constituency" Provision of the Illinois Business Corporation Act*, 27 LOY. U. CHI. L.J. 1, 3 (1995)).

[40] *Id.* In fulfilling their managerial roles, directors are charged with certain fiduciary duties arising out of their relationship with shareholders, namely the duty of care and duty of loyalty. In major transactions, Delaware case law imposes additional fiduciary duties under *Revlon*, *Unocal*, and *Blasius*. Michal Barzuza, *The State of State Antitakeover Law*, 95 VA. L. REV. 1973, 1973 (2009). Shareholders are able to file direct lawsuits should they believe a decision by management caused them financial harm (typically in the transactional context, when shareholders question whether they received adequate consideration for their shares), or derivative lawsuits on behalf of the corporation, should they believe management breached their fiduciary duties and harmed the corporation itself. *Id.* at 1981–86.

[41] *See* Bebchuk & Tallarita, *supra* note 18, at 105; Standley, *supra* note 39, at 211–12 ("[C]orporate constituency statutes were rushed through state legislatures as part of an antitakeover package.").

[42] *See* Bebchuk & Tallarita, *supra* note 18, at 105.

[43] *See* Barzuza, *supra* note 40, at 1989.

[44] *See* Standley, *supra* note 39, at 219.

[45] Under the business judgment rule, Delaware courts generally will not second-guess the decisions of corporate directors, including long-term business strategies, unless the decision involves a major transaction or director conflicts of interest, which are subject to heightened scrutiny. *See* Aronson v. Lewis, 473 A.2d 805, 816 (Del. 1984) (establishing the business judgment rule as a "presumption" in favor of management's decisionmaking).

[46] *See* Barzuza, *supra* note 40, at 1975. *Revlon*, a landmark Delaware Supreme Court decision, established heightened fiduciary duties for board members in the change-of-control context (in this case, a hostile takeover), declaring that the board's duty is to

bility, nearly all state constituency statutes are drafted permissively,[47] as in, "directors *may* consider other constituencies" rather than "directors *must* consider other constituencies," and none include a right of action for stakeholders, rendering them legally toothless and ineffective in ensuring that nonshareholder constituencies are, in fact, considered.[48]

Though the stakeholder debate persisted in legal academia throughout the 1990s and 2000s, it led to few meaningful pro-stakeholder legislative developments. This might have been the result of a push to more closely align executive compensation with shareholder returns in the 1990s,[49] and/or the consolidation of shareholder voting power by index fund managers,[50] rendering all corporate leaders especially shareholder-centric. Indeed, a 1997 statement on corporate governance from the Business Roundtable, an organization comprised of the nation's most prominent chief executives, affirmed more traditional notions of shareholder primacy, stating that the "paramount duty" of directors was to serve shareholders.[51]

However, during the last decade, support for stakeholderism has taken hold of the corporate world, largely under the guise of ESG standards. ESG criteria are a set of nonfinancial standards, which socially conscious investors apply to company operations, that paint a more accurate picture of a company's risks and opportunities than

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maximize short-term shareholder value by obtaining the highest price possible. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986). Also addressing the hostile takeover context, the Delaware Supreme Court in *Unocal* created a two-prong standard for evaluating the permissibility of corporate defense tactics adopted in response to takeover bids: (1) the board must reasonably perceive a threat to corporate policy and (2) any defense tactics used must be reasonable in relation to the threat posed. Unocal Corp. v. Mesa Petrol. Co., 493 A.2d 946, 953 (Del. 1985). *Blasius* established heightened scrutiny for director actions in the context of shareholder voting. Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651 (Del. Ch. 1988).

47 *See, e.g.*, Maxwell Silver-Thompson, Note, *Reasonable Consideration of Non-Shareholders: Redrafting State Constituency Statutes to Encourage Socially-Minded Business Decisions*, 13 CARDOZO PUB. L. POL'Y & ETHICS J. 253, 260–61 (2014) (emphasizing that "the large majority of constituency statutes" use "permissive language").

48 *See id.* at 274–75 (stating that the lack of an express private right of action weakens the effectiveness of constituency statutes for stakeholders).

49 *See* Tod Perry & Marc Zenner, *CEO Compensation in the 1990s: Shareholder Alignment or Shareholder Expropriation?*, 35 WAKE FOREST L. REV. 123, 127 (2000) (describing efforts by the United Shareholder Association, legislators, and regulators to better align executive compensation with shareholder returns).

50 *See* John C. Coates, *The Future of Corporate Governance Part I: The Problem of Twelve* 2 (Harvard Pub. L. Working Paper No. 19-07, 2018) (describing that concentration of index fund ownership will potentially lead to twelve individuals controlling most of the American economy).

51 *See* BUS. ROUNDTABLE, STATEMENT ON CORPORATE GOVERNANCE 3 (1997), http://www.ralphgomory.com/wp-content/uploads/2018/05/Business-Roundtable-1997.pdf.

simply analyzing financial statements.[52] Formally, ESG is related to, but distinct from, CSR, as CSR explicitly considers positive social change resulting from business conduct as a valuable end in itself. However, both terms are often used interchangeably; indeed, ESG makes the business case for CSR: Considering stakeholder interests and promoting sustainable business practices leads to better financial returns in the long term. Further, ESG and stakeholderism are inextricably linked, as ESG provides a framework for analyzing how a company engages with its stakeholders.

Broadly, ESG metrics recognize that corporate success is not determined by a single financial measure, but also can be impacted by leading and lagging indicators.[53] As one scholar has summarized, "if companies fail to manage such drivers, organisations remain without control over the point of time, the direction and the extent to which these drivers ultimately influence financial performance in positive or negative ways."[54] These measures have been formalized through the development of "scorecard[s]" and financial modeling tools.[55] For instance, management consulting firm Bain & Company indicates that investors might adopt ESG standards in the environmental context that consider a company's disposal and recycling practices, emissions, water efficiency, land management, energy efficiency, and use of renewables; labor practices, workplace safety, respect for civil liberties, health and wellness programming, and product safety in the social context; and commitment to nonpredatory pricing, local hiring at reasonable wages, supplier financing, compliance with legal obligations, and responsible engagement with public policy in the govern-

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[52] *See ESG Investing & Analysis*, *supra* note 21 (describing various ESG factors and metrics).

[53] *See* Erik G. Hansen & Stefan Schaltegger, *The Sustainability Balanced Scorecard: A Systematic Review of Architectures*, 133 J. Bus. Ethics 193, 195 (2016).

[54] *Id.*

[55] *See id.* at 195–96. For instance, the "Balanced Score Card" seeks to synthesize various corporate success measures (financial and nonfinancial, short- and long-term, quantitative and qualitative) via assigning strategic objectives a "performance perspective" (financial, customer, internal processes, learning and growth) and measuring each using key performance indicators and/or cause and effect chains. *Id.* A recent riff on the Balanced Score Card is the Sustainability Balanced Score Card, which "explicitly recogni[zes] sustainability-related objective and performance measures" via an integrated management system. *Id.* Financial analysts have also begun incorporating ESG standards into traditional valuation models, such as adjusting company growth rates to reflect ESG opportunities and risks, adjusting assets' anticipated cash flow to reflect anticipated regulations that may render certain assets inoperable, and adjusting the discount rate used in valuation models by running ESG-focused peer analyses. *See A Practical Guide to ESG Integration for Equity Investing, Fundamental Strategies*, Principles for Responsible Inv., https://www.unpri.org/listed-equity/esg-integration-in-fundamental-strategies/12.article (last visited Aug. 11, 2021).

ance context.[56] Moreover, a growing number of studies have indicated that companies who have implemented strong ESG-related practices have better operational performance than other firms.[57]

One hundred years after a court struck down Henry Ford's decision to look out for his employees and consumers at the expense of stakeholder interests in *Dodge*, it appears that at long last, stakeholderism might have reached the boardroom. Retail investor demand for socially-conscious exchange traded funds (ETFs) has skyrocketed—2020 saw a record $27.4 billion invested in U.S. ETFs that indicate a focus on ESG-related practices.[58] Over the last three years, assets in "sustainable" index funds have quadrupled.[59] Similarly, institutional investors with ever-increasing power[60] have made clear their commitment to investing in companies with strong performance on ESG metrics.[61] Institutional giant BlackRock's CEO Larry Fink has been particularly outspoken, writing annual letters to corporate chief executives that highlight the importance of sustainable investing.[62] Notably, in his 2021 letter, Fink requested companies disclose a plan for how their business model will be compatible with a carbon-neutral economy, serving as another example of the types of ESG metrics that investors might apply to portfolio companies in the future.[63]

Stakeholderism made major headlines in August 2019, when the Business Roundtable released an updated version of their Statement

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56 Hugh MacArthur, Chris Bierly, Jean-Charles van den Branden, Iwona Steclik, Johanne Dessard & Axel Seemann, *Investing with Impact: Today's ESG Mandate in Private Equity*, BAIN & CO. (Feb. 24, 2020), https://www.bain.com/insights/esg-investing-global-private-equity-report-2020.

57 GORDON L. CLARK, ANDREAS FEINER & MICHAEL VIEHS, FROM THE STOCKHOLDER TO THE STAKEHOLDER: HOW SUSTAINABILITY CAN DRIVE FINANCIAL OUTPERFORMANCE 9 (2015) (finding that eighty-eight percent of research on companies with solid ESG practices result in better operational performance).

58 Michael Wursthorn, *Investors Pile into ETFs Devoted to Socially Responsible ESG*, WALL ST. J. (Dec. 16, 2020), https://www.wsj.com/articles/investors-pile-into-etfs-devoted-to-socially-responsible-esg-11608114604.

59 Pippa Stevens, *ESG Index Funds Hit $250 Billion as Pandemic Accelerates Impact Investing Boom*, CNBC (Sept. 2, 2020), https://www.cnbc.com/2020/09/02/esg-index-funds-hit-250-billion-as-us-investor-role-in-boom-grows.html.

60 *See* Coates, *supra* note 50, at 2 ("[C]ontrol of most public companies . . . will soon be concentrated in the hands of a dozen or fewer people.").

61 *See* Kiran Vasantham, David Shammai & Morrow Sodali, *Institutional Investor Survey 2020*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 25, 2020), https://corpgov.law.harvard.edu/2020/03/25/institutional-investor-survey-2020 (identifying the importance of ESG risks and opportunities in investor decisionmaking).

62 Cook, *supra* note 17.

63 *See* Cydney Posner, *Blog: BlackRock Details Its Climate Expectations*, JD SUPRA BLOG (Feb. 22, 2021), https://www.jdsupra.com/legalnews/blog-blackrock-details-its-climate-6573191.

on the Purpose of a Corporation signed by 229 CEOs who committed to lead their companies for the benefit of "all stakeholders" including customers, employees, suppliers, communities, and shareholders.[64] Shortly thereafter, in December 2019, the World Economic Forum released their Davos Manifesto, proclaiming that "the purpose of a company is to engage all its stakeholders in shared and sustained value creation. In creating such value, a company serves not only its shareholders, but all its stakeholders – employees, customers, suppliers, local communities and society at large."[65] Indeed, corporate lawyers have remarked that 2019 was a "watershed" year in the development of corporate governance.[66]

B. Rationales for and Evaluations of Stakeholderism

This Section discusses why focusing on stakeholders is desirable in the first instance, and explores three forms of stakeholderism: (1) stakeholders as a path to shareholder profitability, (2) stakeholders as risk bearers, and (3) stakeholder welfare as an independent end. This Section concludes that treating stakeholders as a means to an end of increasing shareholder profitability is inadequate in addressing pressing social issues raised by today's stakeholder groups.

1. The Double and Triple Bottom Line

As the debate around considering nonshareholder constituencies in corporate decisionmaking has persisted, rationales for stakeholderism have multiplied. Early notions of stakeholderism often embodied the idea that companies can earn better returns for their shareholders by considering stakeholders, summarized by the popular phrase "doing well by doing good."[67] Various "business cases" and economic metrics, such as ESG, in a sense justify sustainable social and environmental business practices.[68] This notion has been called the "double bottom line" (referring to an extension of the bottom line, net income, on financial statements), "triple bottom line,"[69]

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64 *See* 2019 Bus. Roundtable Statement, *supra* note 16, at 1 (2019).

65 Schwab, *supra* note 16.

66 Martin Lipton, Steven A. Rosenblum & Karessa L. Cain, *Thoughts for Boards of Directors in 2020*, Harv. L. Sch. F. on Corp. Governance (Dec. 10, 2019), https://corpgov.law.harvard.edu/2019/12/10/thoughts-for-boards-of-directors-in-2020.

67 *See* Bebchuk & Tallarita, *supra* note 18, at 109.

68 *Id.*

69 The triple bottom line proposes that companies should focus on social and environmental concerns in addition to profit. *Triple Bottom Line*, Economist (Nov. 19, 2009), https://www-economist-com.proxy.library.nyu.edu/news/2009/11/17/triple-bottom-line.

"enlightened shareholder value,"[70] and more recently, "instrumental stakeholderism."[71]

Over the years, a substantial amount of data has been generated to empirically demonstrate the profitability of the double bottom line. A recent study conducted by the BlackRock Investment Institute indicated that companies that met ESG criteria were more resilient in downturn scenarios.[72] Moreover, a Bank of America Merrill Lynch report found that companies with better ESG ratings tended to have a higher return on equity and were also less likely to declare bankruptcy—indeed, between 2005 and 2017, if an individual had only invested in S&P 500 companies with above-average environmental and social ratings, they would have avoided ninety percent of bankruptcies.[73]

The double bottom line reflects the reality that

> how the company treats employees could well affect its ability to attract, retain, and motivate the members of its labor force; how the company deals with customers could affect its ability to attract and retain them; and how the company deals with local communities or the environment could well affect its reputation and standing in ways that could be important for its success.[74]

And indeed, this mindset has become mainstream—directors interested in creating long-term corporate value do in fact take these sorts of stakeholder interests into account at present.[75]

2. *Stakeholders as Risk-Bearers*

Taking the idea of the double bottom line a step further, another form of stakeholderism acknowledges that shareholders, stakeholders, and the company are an ecosystem, reliant on each other for survival.[76] Employee stakeholders depend on companies for salaries; suppliers depend on companies for sales; customers depend on companies for goods and services; communities depend on companies to create

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70 *See* Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, *For Whom Corporate Leaders Bargain*, 93 S. CAL. L. REV. (forthcoming 2021) (on file with the *New York University Law Review*).

71 *See* Bebchuk & Tallarita, *supra* note 18, at 108–09.

72 *See* Saadia Madsbjerg, *Why a Recession Would Be Good for ESG Investors*, BARRON'S (June 21, 2019), https://www.barrons.com/articles/recession-esg-investors-51561062809.

73 *See id.*

74 Bebchuk & Tallarita, *supra* note 18, at 109.

75 *See id.* at 109 ("[T]o effectively serve the goal of enhancing long-term shareholder value, corporate leaders should take into account stakeholder effects—as they should consider any other relevant factors.").

76 *See* Madsbjerg, *supra* note 72.

jobs; and governments depend on companies for tax revenue.[77] Similarly, companies depend on stakeholders—on employees for human capital, suppliers for revenue-generating goods and services, and communities and governments for talent and infrastructure.[78]

As this line of thinking has further developed, some scholars have recognized stakeholders as corporate risk-bearers not unlike shareholders themselves. However, unlike shareholders, stakeholders are unable to diversify their investment risk.[79] An influential paper by Professors Andrei Shleifer and Larry Summers describes the corporation as a "nexus" of long-term implicit and explicit contracts between shareholders and stakeholders, arguing that in the context of hostile takeovers, implicit contracts allow shareholders to transfer stakeholder wealth to themselves.[80] Shareholders build trust with stakeholders by "seek[ing] out or train[ing] individuals who are capable of commitment to stakeholders, elevat[ing] them to management, and entrench[ing] them."[81] This induces stakeholders to invest capital into the business—employees improve productivity, contractors purchase new equipment, and sales representatives service past customers, all expecting that their efforts will be rewarded.[82] In the takeover context, management is ousted and the purchaser is no longer committed to upholding implicit contracts, allowing shareholders to engage in rent-seeking behaviors such as firing large swaths of employees, changing suppliers, and forming new relationships with contractors.[83] Outside the hostile takeover scenario as well, corporate stakeholders *always* bear a degree of undiversifiable risk from corporate decision-making—bondholders may lose interest payments or the principal if a corporation fails to repay them, suppliers may lose business of their own, and managers and employees develop critical job-specific skill-sets during their highest productivity years.[84] Though widely discussed in academia, this form of stakeholderism has not been adopted by cor-

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[77] Bebchuk & Tallarita, *supra* note 18, at 108–09.

[78] *See id.* at 109.

[79] For an analysis of the implications of stakeholders' inability to diversify risk, see Richard A. Booth, *Stockholders, Stakeholders, and Bagholders (or How Investor Diversification Affects Fiduciary Duty)*, 53 Bus. Law. 429 (1998).

[80] Andrei Shleifer & Lawrence H. Summers, *Breach of Trust in Hostile Takeovers* 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 2342, 1987).

[81] *Id.* at 11 (emphasis omitted).

[82] *Id.* at 7.

[83] *See id.* at 13 (describing the common pattern in hostile takeovers whereby bidders oust incumbent managers and subsequently expropriate rents from stakeholders by reneging on their implicit contracts).

[84] Edward S. Adams & John H. Matheson, *A Statutory Model for Corporate Constituency Concerns*, 49 Emory L.J. 1085, 1102–03 (2000).

porate leaders, in part due to the nature of financial reporting and disclosure regulations.[85]

3. Stakeholder Welfare as an Independent End

As the notion of stakeholders as risk-bearers gained academic traction, it opened the door to more expansive notions of stakeholderism in which benefitting stakeholders is seen as a desirable end in itself. Famed corporate social responsibility scholar Archie Carroll has discussed the moral responsibilities of business managers, asserting that society expects businesses to conduct themselves ethically.[86] He argues: "The goal of these expectations is that businesses will be responsible for and responsive to the full range of norms, standards, values, principles, and expectations that reflect and honor what consumers, employees, owners and the community regard as consistent with respect to the protection of stakeholders' moral rights."[87] Further, Margaret Blair and Lynn Stout have characterized the corporation in terms of a "team," contending that corporations serve as vehicles through which stakeholders including shareholders, creditors, executives, and employees, invest resources and rely on directors to manage such investments for the collective interest.[88] Einer Elhauge has argued that using managerial discretion to sacrifice corporate profits "in the public interest" will "move corporate behavior in the right direction . . . assuming our society's social and moral norms correctly identify which direction is right."[89] Rebecca Henderson has gone so far as to advocate a reimagining of capitalism so that companies "embrac[e] a pro-social purpose beyond profit maximization and tak[e] responsibility for the health of the natural and social systems."[90]

Outside the realm of academic discourse, brands themselves have taken public stances on stakeholder welfare as an end goal in their codes of conduct and mission statements, though this form of stakeholderism has not yet made its way to corporate governance documents.[91] However, codes of conduct and mission statements are nonetheless instructive as a means of evaluating a company's actual conduct against its publicly stated stakeholder welfare goals. For instance, Google's unofficial motto of "don't be evil," codified in its

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85 *See infra* Section I.C.

86 Archie B. Carroll, *Carroll's Pyramid of CSR: Taking Another Look*, 1 Int'l J. Corp. Soc. Resp., July 2016, at 1, 3 ("In addition to what is required by laws and regulations, society expects businesses to operate and conduct their affairs in an ethical fashion.").

87 *Id.*

88 *See* Blair & Stout, *supra* note 34, at 288.

89 Elhauge, *supra* note 34 at 804.

90 Henderson, *supra* note 1, at 11.

91 *See* Bebchuk & Tallarita, *supra* note 18 at 135–36.

code of conduct since 2000, was "mythical" for its time.[92] The phrase was initially meant to reflect the company's commitment not to sell search results to advertisers, seeking to build trust with users.[93] The meaning of this phrase developed over time as signifying the company's broad commitment to stakeholders and has been referenced in relation to Google's dealings with authoritarian regimes and privacy policy.[94]

However, in 2018, "don't be evil" was removed from the code of conduct, though broad language focused on "do[ing] the right thing" remains.[95] While there is no clear explanation for this change, some have surmised that it has become much more difficult for Google to uphold its "don't be evil" promise in recent years. For instance, in 2020, the United States Department of Justice filed suit against the company alleging antitrust violations.[96] Recently, the company has come under fire for, on the one hand, its lax treatment of misinformation, and on the other, its censoring of partisan speech.[97] The company's own internal tension has also bubbled to the surface—in 2018, 20,000 employees protested the company's handling of several sexual harassment claims.[98] In 2020, Google's Head of International Relations left the company, writing a lengthy piece on Google's failure to not "be evil" in the context of cooperation with the Chinese and Saudi governments, alleging that the company was complicit in human rights violations.[99] Indeed, Google's reckoning with "don't be

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92 Evgeny Morozov, *Don't Be Evil*, New Republic (July 13, 2011, 9:30 PM), https://hci.stanford.edu/courses/cs047n/readings/morozov-google-evil.pdf.

93 *Id.*

94 *Id.*

95 Kate Conger, *Google Removes 'Don't Be Evil' Clause from Its Code of Conduct*, Gizmodo (May 18, 2018, 5:31 PM), https://gizmodo.com/google-removes-nearly-all-mentions-of-dont-be-evil-from-1826153393.

96 Shirin Ghaffary & Alex Kantrowitz, *"Don't Be Evil" Isn't a Normal Company Value. But Google Isn't a Normal Company.*, Vox (Feb. 16, 2021, 8:01 AM), https://www.vox.com/recode/2021/2/16/22280502/google-dont-be-evil-land-of-the-giants-podcast ("The suits charge that Google holds monopoly power in online search and digital ad technology, and it is using that power to stifle competition.").

97 *Id.* ("Some politicians think the company isn't doing enough in taking down misinformation about things like Covid-19 or the 2020 election on its platforms. Other politicians allege the company is already doing too much and stifling partisan speech, like when Google's YouTube recently suspended Donald Trump's account . . . .").

98 *Id.*

99 Ross LaJeunesse, *I Was Google's Head of International Relations. Here's Why I Left.*, Medium (Jan. 2, 2020), https://medium.com/@rossformaine/i-was-googles-head-of-international-relations-here-s-why-i-left-49313d23065 (describing Google's development of the censored search engine, Dragonfly, in China, dealings with the Saudi government regarding Google Cloud, and decision to establish the Google Center for Artificial Intelligence in Beijing a few years after the Chinese government hacked Gmail accounts of human rights advocates).

evil" highlights the challenges corporations face when making decisions that involve tradeoffs (market expansion, profit generation) with stakeholder welfare (choosing to do business in a region controlled by an authoritarian regime).

C. Shortcomings of the Business Case for Stakeholders

Despite the challenges of pursuing stakeholder welfare as an end goal and the proliferation of studies and thought pieces extolling the feel-good returns of the double and triple bottom lines, instrumental stakeholderism leaves much to be desired in meaningfully assessing and addressing stakeholder concerns. Despite the development of scorecards like ESG, "there are still no universally adopted standards for how companies can measure and report on their sustainability performance."[100] Indeed, currently accepted financial reporting standards do not lend themselves well to providing information about a company's engagement with its stakeholders.

For instance, while some companies often colloquially remark that employees are their most valuable assets, under current accounting and disclosure regulations, this is simply false—per Generally Accepted Accounting Principles (GAAP), employees are treated as costs via wage expense, rather than assets, as firms do not have direct control over their employees (a GAAP requirement for classification of assets).[101] Firms must disclose capital investments related to assets, but firms need not disclose investments in employee development such as training, education, or retention, given their treatment as expenses, and often choose not to.[102] The lack of disclosure strips investors of the ability to "reward" companies who take care of their employees (by investing) and to "punish" those who do not (by selling shares or not investing).[103]

Further, companies often use the flexibility of accounting rules governing financial statements to minimize disclosure of stakeholder-related risks. For instance, accounting rules generally require future cash outflows to be probable and the amount reliably estimable to

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[100] Richard Barker, Robert G. Eccles & George Serafeim, *The Future of ESG Is . . . Accounting?*, HARV. BUS. REV. (Dec. 3, 2020), https://hbr.org/2020/12/the-future-of-esg-is-accounting.

[101] Ethan Rouen, *The Problem with Accounting for Employees as Costs Instead of Assets*, HARV. BUS. REV. (Oct. 17, 2019), https://hbr.org/2019/10/the-problem-with-accounting-for-employees-as-costs-instead-of-assets.

[102] *See id.* (describing how current reporting requirements allow "companies to hide behind platitudes and not disclose whether they invest in their workers in ways that promote long-term success").

[103] *Id.*

result in on-balance-sheet accrual.[104] Possible cash outflows are only recognized as a contingent liability (not on balance sheet), and no disclosure is required for "remote" cash outflows.[105] In the climate context, this means the majority of environmental risks do not result in on-balance-sheet accrual, but are instead listed as contingent liabilities buried in the footnotes to the financial statements, "due to the unpredictability of the timing and quantum of their impact."[106] Some companies go so far as to say that cash outflows related to environmental risks are remote, leaving them completely absent from financial statements and their footnotes.[107]

Taking advantage of the discretion that GAAP allows has led to the adoption of creative accounting strategies in other contexts as well. Notably, Boeing uses an industry-specific form of accounting, titled "program accounting," to defer the massive costs of building its airplanes by spreading them out over time and anticipating product sales far into the future, ultimately enabling them to hide the extent of losses due to design issues or other unanticipated costs.[108] The flexibility inherent in accounting and disclosure requirements means that investors are often under- or uninformed about a company's ESG standing, potentially leading to undervaluation of stakeholder-friendly businesses.

However, challenging as it may be to assess a company's standing with respect to stakeholder policies, even more troubling are the implications of the double bottom line as a starting place for addressing stakeholder concerns in the first instance. The application of the double bottom line in the diversity context during the late 1990s, termed "the business case for diversity,"[109] is a useful case study in the theory's inadequacies. In theory, this idea calls for recruiting and promoting individuals from underrepresented groups

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104 Imre Guba & Sam C. Holland, *Reimagining Accounting to Measure Climate Change Risks*, S&P GLOBAL (Dec. 4, 2020), https://www.spglobal.com/ratings/en/research/articles/201204-reimagining-accounting-to-measure-climate-change-risks-11762634.

105 *Id.*

106 *Id.*

107 *Id.*

108 Jon Ostrower, *Boeing's Unique Accounting Method Helps Improve Profit Picture*, WALL ST. J. (Oct. 4, 2016), https://www.wsj.com/articles/boeings-unique-accounting-method-helps-improve-profit-picture-1475522362 (describing the Securities and Exchange Commission's investigation into Boeing's accounting for its 787 project and concerns of overstated profits).

109 *See* Robin J. Ely & David A. Thomas, *Getting Serious About Diversity: Enough Already with the Business Case*, HARV. BUS. REV. (Nov.–Dec. 2020), https://hbr.org/2020/11/getting-serious-about-diversity-enough-already-with-the-business-case.

and using their unique perspective to learn how organizations can perform better.[110]

The business case for diversity poses two sets of problems—the first is practical and the second is theoretical. On a practical level, though businesses have made a concerted effort to make diverse hires, women and people of color remain largely underrepresented in particular industries and in senior roles.[111] A World Economic Forum report shows that at the current rate of progress, it will take 100–150 years for North American workplaces to reach gender parity, and that hiring discrimination against Black Americans has not declined in the last twenty-five years,[112] suggesting that the business case in its current form has not led to much progress.

Moreover, despite some incremental gains in hiring, simply employing a larger number of diverse individuals alone—what one scholar has termed the "'add diversity and stir' approach"[113]—will not improve firm performance. In fact, some research shows that increased diversity alone can even harm an organization, as differing perspectives can lead to increased conflict and tension.[114] Ultimately, to increase effectiveness, diversity must be harnessed, and power structures reconsidered.[115] Research shows that performance improves "when team members are able to reflect on and discuss team functioning; when status differences . . . are minimized; . . . and . . . when teams orient members to learn from their differences."[116] Indeed, it has taken business leaders about twenty years to move from a recognition of "diversity" to a nascent awareness of "diversity and inclusion."[117]

On a theoretical level, the business case for diversity makes many rightfully uneasy—using financials to justify diversity decisions betrays the idea that diversity and inclusivity should be an intrinsic part of a business due to their own importance.[118] Research has shown that justifying diversity initiatives in terms of financial performance makes diverse individuals question whether the organization is some-

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110 *Id.*

111 *Id.*

112 Sarah Kaplan, *Why the 'Business Case' for Diversity Isn't Working*, FAST CO. (Feb. 12, 2020), https://www.fastcompany.com/90462867/why-the-business-case-for-diversity-isnt-working.

113 Ely & Thomas, *supra* note 109.

114 *Id.*

115 *Id.*

116 *Id.*

117 *Id.*

118 *See, e.g.*, Vadim Liberman, *The Business Case Against Diversity?*, TLNT (Nov. 5, 2020), https://www.tlnt.com/the-business-case-against-diversity.

where they belong and decreases interest in joining in the first instance.[119] Perhaps most damningly, an economic rationale suggests that incremental change (adding one more diverse hire, creating a dedicated diversity and inclusivity director) will be enough.[120] Rather, only a moral imperative—or in this Note's terms, recognizing stakeholder welfare as an independent end—would lead to the sort of systemic transformation that prioritizes workplace equality and meaningfully engages stakeholders.

II
Everything that Is Old Is New Again

A number of scholars have claimed that America is experiencing a second Gilded Age due to growing wealth disparities and the consolidation of power by asset managers and large companies in the technology and e-commerce sectors.[121] This Part revisits the Gilded Age and two subsequent periods, the Progressive Era and the stock market crash of 1929, drawing novel parallels between today's stakeholder and ESG movements to argue that these three periods were inflected with "proto-stakeholderism," as stakeholder terminology was not developed until the 1980s.[122] The hallmark of a "proto-stakeholder" in this conception is an actor who is subject to negative externalities of capitalism without the clout or recourse shareholders possess to influence corporate conduct. These periods reveal the cyclicality of addressing stakeholder interests and concerns, which begins with calls to the private sector that, left unanswered, lead to government intervention, highlighting that private ordering is an ineffective means of comprehensively engaging with stakeholders.

A. A Patinaed Plutocracy: The Gilded Age (1870–1900)

The corporate form is inextricably intertwined with American national identity.[123] One of the earliest business charters approved in the United States was for the national bank, in response to Alexander

[119] *See* Kaplan, *supra* note 112 (explaining how businesses' unfulfilled diversity promises lead to workforce disillusionment).

[120] *Id.* (arguing that a moral and legal case for diversity will lead to transformational gains, while an economic case will merely lead to increased bias and friction).

[121] *See supra* note 13 and accompanying text.

[122] Friedman, *supra* note 36; *see also* Thomas Donaldson & Lee E. Preston, *The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications*, 20 Acad. Mgmt. Rev. 65, 65 (1995) ("Since the publication of [R. Edward] Freeman's landmark book, *Strategic Management: A Stakeholder Approach* (1984), about a dozen books and more than 100 articles with primary emphasis on the stakeholder concept have appeared.").

[123] *See supra* Introduction.

Hamilton's second *Report on Public Credit*, which enabled centralized development of America's fledgling financial sector.[124] The government further directed the development of American industry via industrial corporations such as railroad companies.[125] During the mid-1800s, most state governments prohibited corporations from existing and operating outside the purpose specified in their legislature-approved charters.[126] However, during the late 1800s, the passage of several state statutes enabled corporations to expand their scope and power, whilst a number of other enterprise forms—namely the limited partnership and the corporate trust—became widespread, leading to an explosion of economic growth termed the Gilded Age.[127]

1. The Plight of the American Working Class

Following the Civil War, America experienced an economic transformation, moving from historically local and regional economies to a national economy. This led to major economic growth, even at the individual level, as per capita income doubled between the 1860s and 1900[128]: The "white-collar population of managers, technicians, clerks and sales and other personnel rose from under 400,000 in 1870 to more than three million by 1910. Moreover, the standard of living of skilled industrial workers also measurably improved. . . . The[ir] purchasing power . . . doubled between 1865 and the end of the century."[129] However, economic growth began to slow in the 1870s,[130] and the wealth disparity the Gilded Age has become notorious for became clearer.

As the nation witnessed the rise of railroads, the oil that powered their engines, and the corresponding rise in cities, titans of industry emerged including John Rockefeller, Cornelius Vanderbilt, Andrew Carnegie, Henry Ford, and J.P. Morgan. By the middle of the Gilded Age, the wealth gap between the richest families and the rest of America was undeniable. This period saw America's first multimillionaires; about 4,000 families owned as much wealth as the remaining 11.6 million Americans, and 200,000 individuals controlled about

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124 *See* Halloran, *supra* note 3 (explaining how Hamilton's argument for a federally chartered national bank spurred the popularity of corporations).

125 *Id.* (detailing the chartering of the Union Pacific Railroad and its role in the expansion of industrial corporations).

126 *See* Harwell Wells, *The Modernization of Corporation Law, 1920-1940*, 11 U. Pa. J. Bus. L. 573, 582 (2009).

127 *See id.* at 584–86.

128 *See* Steve Fraser, The Age of Acquiescence: The Life and Death of American Resistance to Organized Wealth and Power 65 (2015).

129 *Id.*

130 *Id.* at 66.

70–80% of American property.[131] Put dramatically, "[t]he . . . descent into the new American proletariat went like this: while 87 percent of private wealth belonged to a privileged fifth of the population and 11 percent to the next luckiest fifth, the bottom 40 percent had none at all."[132] It is then unsurprising, perhaps, that American novelist William Dean Howells surmised, "Are we a plutocracy?"[133]

To make things worse, labor conditions in America were dismal. Laborers, who worked approximately sixty hours per week while only earning $800 annually, were generally impoverished.[134] Health and safety conditions were also poor—America had the highest workplace accident rate in the world, and was the only industrial nation without worker's compensation.[135] In the meantime, the nation's demand for unskilled and semiskilled labor attracted immigrants as well as women and even children to the labor force.[136] By 1880, one out of every six children was working full time—and consequently receiving little or no education.[137] As discontent among American-born workers grew, so did tensions between those workers and immigrant laborers.[138] On the West Coast, backlash against Chinese workers ultimately turned violent.[139] In the meantime, economic recessions (dubbed "panics") struck the nation multiple times, leaving high urban unemployment, low incomes for farmers, low profits for business, slow overall growth, reduced immigration, and ultimately political unrest.[140]

The absence of government action to implement workplace protections paved the way for the development of the Anarchist movement, viewing government as oppressive and seeking its ultimate disappearance.[141] Further, in the book that gave this period its namesake, *The Gilded Age*, Mark Twain describes the alliance between

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131 *See id.*

132 *Id.*

133 *Id.* at 68.

134 *See id.* at 66.

135 George B. Tindall & David E. Shi, America: A Narrative History 769 (9th ed. 2013) [hereinafter America: A Narrative History].

136 *Id.* Notably, immigration to America prior to and during the Gilded Age was also influenced by factors outside of the United States. For instance, the United States received a massive influx of Irish immigrants due to potato famine in Ireland in 1845. *Id.* at 396 ("By 1850 the Irish constituted 43 percent of the foreign-born population of the United States.").

137 *Id.* at 770.

138 *Id.* at 773.

139 *Id.*

140 *See generally* Elmus Wicker, Banking Panics of the Gilded Age (2000) (analyzing the history, drivers, and monetary consequences of individual banking "panics" during the Gilded Age).

141 *See* America: A Narrative History, *supra* note 135, at 777 (describing anarchist involvement in labor unrest, in particular the infamous Haymarket Affair).

business and political leaders at every level, and consequent corruption.[142] This corruption bred general distrust in the competence of government summarized cuttingly by Twain: "[S]uppose you were an idiot. And suppose you were a member of Congress. But I repeat myself."[143]

Americans took it upon themselves to organize and lobby management directly, though it was difficult to do so under such harsh labor conditions.[144] Workers began to stage spontaneous strikes in response to wage cuts and other grievances.[145] Eventually, the National Labor Union (NLU) emerged promoting ideas including "the eight-hour workday, workers' cooperatives, greenbackism (the printing of paper money to inflate the currency and thereby relieve debtors), and equal rights for women and African Americans."[146] Though the NLU ultimately disbanded after the sudden death of its leader in 1872, another national labor union, the Noble Order of the Knights of Labor, emerged.[147]

Tensions, particularly over the failure of companies to adopt the eight-hour workday, came to a head during an incident now known as the Haymarket Affair.[148] In 1884, the Knights of Labor demanded the eight-hour workday be adopted by May 1, 1886. When the deadline passed without adoption, a major strike of approximately 40,000 workers was staged outside a Chicago factory.[149] When union workers clashed with nonunion workers, police intervened, killing two strikers.[150] This precipitated violence against the police and led to the banning of labor meetings.[151] Additional strikes took place across industries, with notable violence in the railroad sector as well as in the American West.[152]

Separately, populism was on the rise, promising to address the needs of small farmers, many of whom did not own their land.[153] Conditions for farmers had been worsening since the end of the Civil War due to decreasing commodity prices as a result of overproduction and

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142 *See id.* at 848.

143 1 ALBERT BIGELOW PAINE, MARK TWAIN, A BIOGRAPHY 724 (Centenary ed. 1912).

144 *See* AMERICA: A NARRATIVE HISTORY, *supra* note 135, at 771 (providing reasons why it was difficult for workers to unionize).

145 *Id.*

146 *Id.* at 774.

147 *Id.* at 774–75.

148 *Id.* at 776.

149 *Id.* at 776–77.

150 *Id.* at 777.

151 *Id.*

152 *Id.* at 772, 782–83.

153 *Id.* at 864.

international competition.[154] Farmers were often overleveraged, investing in more manufactured goods and supplies to increase production, but struggling to make repayment as commodity prices continued to fall due to the increased production.[155] They blamed railroads and food processors who raised freight rates in regions where no alternative transportation was available.[156] The time was ripe for change.

2. *Proto-Stakeholderism in the Rise of Labor Unions and Agricultural Sectors*

Looking back, we might reconceptualize the Gilded Age as a period of proto-stakeholderist struggle in America. Both the fact that other enterprise forms were popular during the Gilded Age and that the concept of shareholder primacy was not yet developed by corporate law are mostly irrelevant to this analysis, if not another strike against private ordering. Even without a legal mandate to prioritize shareholders, for the most part corporate leaders at this time ruthlessly pursued expansion, generating profit for themselves and those who had an ownership stake in their business. Indeed, even limits to conducting business lawfully were ignored without a strong legislative and regulatory regime overseeing corporate activity. As Cornelius Vanderbilt quipped, "What do I care about law? Hain't I got the power?"[157]

Despite direct lobbying and a growing consensus that something must be done to address violence, unrest, and poverty, the robber barons continued to build their empires with little consideration for stakeholders. At least a few indicated awareness of stakeholder concerns, reminiscent of the double bottom line. Vanderbilt blithely remarked, "I have always served the public to the best of my ability. Why? Because, like every other man, it is to my interest to do so."[158] Nonetheless, Vanderbilt was a notoriously exploitative businessman.[159] On the other hand, Henry Ford, as depicted in the aforementioned *Dodge* case, was in certain respects regarded as a

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154 *Id.* at 865.

155 *Id.*

156 *Id.*

157 *Id.* at 759.

158 Larry Light, *What Cornelius Vanderbilt Can Teach Investors Today*, FORBES (Mar. 29, 2016, 9:32 AM), https://www.forbes.com/sites/lawrencelight/2016/03/29/what-cornelius-vanderbilt-can-teach-investors-today.

159 *See id.* ("Newspapers ran cartoons picturing Vanderbilt as a leech, sucking the blood of the hapless poor.").

somewhat "humanitarian" businessman for his time.[160] Ford's wage decisions can be viewed as his embracing a form of proto-stakeholderism akin to the double bottom line—by paying his employees high wages, he could expand the market for the Model T and prevent costly employee turnover.[161] However, Ford was not exactly the model of employer benevolence that he was made out to be at the time; indeed, he has been sharply criticized as a staunch opponent of employee unionization efforts.[162] Nonetheless, the differences between Ford and Vanderbilt's employment practices highlight a key pitfall of relying on private ordering to address proto-stakeholder issues during this period—a lack of consistency across private sector policies. Though some business leaders may choose to address stakeholder concerns, others will not. Today, while institutional investors may choose to "punish" those managers who do not meet ESG standards, there is something disquieting about all this *choosing* of labor policy by democratically unaccountable individuals.

Proto-stakeholderism akin to uncompensated risk-bearing also lurks in the background of the Gilded Age as American workers risked limbs for meager wages. As the assembly line and fungibility of workplace functions had not been developed in the manufacturing context, factory workers invested in developing firm-specific skills that were not easily transferable across businesses or industries. Similarly, in the agricultural sector, popular posters distributed by farmers' unions, known as granges, placed farmers at the center of society and read, "I feed you all!"[163] Despite providing fuel for American workers, farmers faced exploitation by unchecked monopoly conditions in the form of high freight prices, which provided the only means of transporting their crops to booming cities.[164] Increased costs in manufactured goods and grain storage fees meant that farmers had to either invest more money (taken on loan at high interest rates) to cover the costs, or to leave the farming sector altogether.[165] Creditors,

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160 *See* Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919) (explaining that Ford's decision to increase wages and reinvest in his automobile company were influenced by "humanitarian" motives).

161 *See* Tim Worstall, *The Story of Henry Ford's $5 a Day Wages: It's Not What You Think*, FORBES (Mar. 4, 2012, 12:28 PM), https://www.forbes.com/sites/timworstall/2012/03/04/the-story-of-henry-fords-5-a-day-wages-its-not-what-you-think (discussing some reasons behind Henry Ford's wage rates).

162 *See This Day in History: Ford Signs First Contract with Autoworkers' Union*, HISTORY (June 17, 2021), https://www.history.com/this-day-in-history/ford-signs-first-contract-with-autoworkers-union (describing the protracted battle between union leaders and Ford in the years prior to 1941).

163 AMERICA: A NARRATIVE HISTORY, *supra* note 135, at 864.

164 *Id.* at 865.

165 *Id.*

in turn, faced increased and unpredictable repayment risk as agricultural profits rapidly shrunk due to decreased demand and increased transportation costs. These monopolistic practices are reminiscent of the breaches of trust between shareholders and stakeholders following a hostile takeover: With new management—in this case freight monopolists—in charge, farmers were powerless to negotiate better transportation terms for their crops, leading to decreased profits for some, and "firing" in the form of bankruptcy for others. And, indeed, there was little in the way of stakeholder welfare as a normative goal during this period.

However, while Vanderbilt and other robber barons' personal ruthlessness, greed, and disdain for the law and the American working class are reprehensible, they are also instructive as they reveal the consequences of capitalism running off the rails. The absence of strong legislative and regulatory regimes during the Gilded Age's business boom created a cycle in which politicians made their own rules and kept score for themselves. Proposed internal ESG scorecards today, though not overtly sinister, are rooted in the same troubling principle—despite institutional investor-shareholders' influence over managers, there is no oversight over such large shareholders.

Seeing an opening for their unchecked behavior, Gilded Age business leaders spent enormous amounts of money ensuring that government left their conduct unregulated—in fact, this became so commonplace that in 1868, New York State legalized the bribery of politicians.[166] But again, while this conduct is morally abhorrent, capitalism cannot function properly by relying on the altruism or humanitarianism of business leaders. Instead, the onus for defining acceptable business conduct is to be placed on the government, which, during this time period, was too feeble to institute meaningful reforms.[167]

B. *Pathologies of the Progressive Era (1896–1916)*

Amidst the chaos and excesses of the Gilded Age, a new social movement, Progressivism, gained momentum. The movement

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166 *Id.* at 752.

167 The Progressive Era was also marked by erratic judicial review of state labor laws. Most famously, in *Lochner v. New York*, the Supreme Court struck down a law limiting workdays to ten hours, reasoning that the statute violated workers' freedom of contract to accept whatever job under whatever conditions they wanted. *Id.* at 948. In *Muller v. Oregon*, the Supreme Court upheld a similar law aimed at limiting women's workdays, largely relying on data that suggested detrimental impacts on the health and morals of women who worked long hours. *Id.* at 948–49. However, in *Bunting v. Oregon*, the Supreme Court upheld a law that limited the workday to ten hours for both men and women, as legislation aimed at improving working conditions gained traction following workplace tragedies. *Id.* at 949.

originated because political Progressives were interested in reforming corruption in government and business, increased participation in the democratic process, efficient and effective government, regulation of business, and general social justice for the working class.[168] Interestingly, they looked to government to address their concerns, with some believing the institution that had failed them could be "an agency of human welfare."[169]

1. *The Persistence of Gilded Age Social Problems*

Dysfunctional government throughout the Gilded Age meant virtually all of the period's problems in both urban and rural America persisted into the Progressive Era. However, in addition to concerns lodged by farmers, laborers, women, immigrants, and children, various consumer harms were revealed. Two major drivers of the Progressive movement were the proliferation of photography and journalism documenting social ills, which sparked national outrage.[170] Investigative journalists, known as "muckrakers," exposed large corporations whose products, which were not subject to government regulation, endangered consumer health and safety.[171] In 1906, Upton Sinclair wrote *The Jungle*, exposing unhygienic conditions in Chicago meatpacking plants.[172] Sinclair focused on exposing the deceptive advertising that falsely portrayed the quality of meat products,[173] generating regulatory action over the quality of American meat.[174]

Many other muckraking headlines captured and held national attention. For instance, a series of articles detailed how patent medicine manufacturers manipulated the press to avoid state regulation.[175] The articles also revealed the presence of alcohol, opiates, narcotics, heart depressants, and liver stimulants in patent medicines sold to the general public.[176] Some journalists chose to dig deeper into

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168 *Id.* at 934.

169 *Id.*

170 *See id.* 942–43 (discussing the role of investigative journalists in exposing corruption and garnering public support for reform).

171 *Id.*

172 Marc T. Law & Gary D. Libecap, *The Determinants of Progressive Era Reform: The Pure Food and Drugs Act of 1906*, *in* CORRUPTION AND REFORM: LESSONS FROM AMERICA'S ECONOMIC HISTORY 319, 331 (Edward L. Glaeser & Claudia Goldin eds., 2006).

173 *Id.* at 331 ("Sinclair described how 'potted chicken' contained no chicken at all; how meat that had turned sour was rubbed with soda to remove the smell; how moldy sausage rejected from Europe found its way back into the American market; and how meat was contaminated on the slaughterhouse floor.").

174 *Id.* (describing how Sinclair's book resulted in the 1906 Meat Inspection Act).

175 *Id.* at 331–32.

176 *Id.* at 332.

dismal working conditions that had their roots in the Gilded Age. In 1904, Ida Tarbell published the *History of the Standard Oil Company* revealing corporate corruption and horrific living and working conditions at John D. Rockefeller's Standard Oil company.[177]

The Progressive Era, like the Gilded Age, was marked by discussions around the workplace and labor rights. Indeed, the labor movement continued to grow during this period. In tension with empowering workers, however, was a newfound interest in workplace productivity and efficiency.[178] The first "efficiency expert," Frederick W. Taylor, developed techniques for industrial management that broke down the production process into smaller steps, observing the time it took each worker to complete a given step and making recommendations for improvement.[179] This constant supervision, however, bred discontent among the working class who felt a loss of workplace autonomy.[180] Relatedly, a hyper-focus on efficiency and aggressive supervision took hold in the workplace, adding to the myriad of woes already plaguing the American worker.[181]

As workers flocked to urban centers for factory jobs, newly industrialized American cities expanded rapidly.[182] Unfortunately, however, these cities lacked sufficient infrastructure to support the population boom. Cities were dirty and disease-filled—garbage, contaminated water, and human and animal sewage were commonplace. Lack of clean water caused outbreaks of typhoid fever, yellow fever, and cholera in urban areas.[183] Tenement buildings were commonplace in immigrant neighborhoods in New York City, with twenty-four to thirty-six families crammed into buildings only six to eight stories high.[184] Inevitably, the mortality rate in urban areas, especially for the poor, was much higher than that of the general population.[185] Nascent social justice movements advocated for city cleanup through personal hygiene campaigns, creating municipal sewers, closing saloons, and

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177 *See* America: A Narrative History, *supra* note 135, at 943 (mentioning how Tarbell's reporting ultimately led to the Supreme Court deciding to break up Standard Oil).

178 *See id.* at 945 (discussing the emerging focus on corporate efficiency during the Progressive Era).

179 *See id.*

180 *Id.*

181 *See id.* at 945–46 (describing various efficiency techniques that became popular during the Progressive Era aimed to boost productivity).

182 *See id.* at 824 (detailing the migration to cities and "unregulated urban growth" of the period).

183 *Id.* at 825.

184 *Id.*

185 *Id.*

improving prison conditions, among other things.[186] The time was ripe for change.

2. *Proto-Stakeholderism in Progressive-Era Business Reform*

Sprawling in their identities and causes, Progressives sought a range of public services from the government: public schools, robust infrastructure, environmental conservation, workplace regulations (including curbing abuses of child labor), public health initiatives, and agricultural loans.[187] Some of these concerns—namely workplace regulations, consumer welfare, consideration for the impacts of business on communities, and environmental conservation—directly map onto modern-day stakeholder concerns.

America's move from the country to the city corresponded to a loss of insight and autonomy for the American worker. Prior to the Gilded Age and Progressive Era, goods were made, sold, and consumed locally—individuals were aware of the processes and components that went into their products. The nationalization of the economy led to information asymmetries between businesses and the public, with especially stark consequences in the consumer welfare context.[188] Particularly in the realm of food and drugs, consumers could not detect adulterated products themselves, and, absent regulation, the market did not consistently produce quality goods.[189] Meanwhile, the attitudes of the robber barons and their successors remained mostly the same between the Gilded Age and Progressive Era: Interest in these proto-stakeholder concerns was inconsistent, and the private sector continued to remain solely profit-focused. There was only so much that charitable organizations and grassroots efforts could accomplish—by 1890, nearly half of American workers labored for up to twelve hours per day, six or seven days per week, in largely unregulated conditions for very low wages.[190] Finally, the government stepped in.

Between 1905 and 1917, a slew of regulations and statutes were passed at the state and federal levels addressing the byproducts of unrestrained capitalism, which had failed to be adequately addressed by businesses themselves. Following the publishing of Sinclair's *The Jungle*, the 1906 Meat Inspection Act was passed, expanding the

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186 *Id.* at 947.

187 *See id.* at 944–50 (identifying a wide breadth of solutions sought by Progressive reformers).

188 *See* Law & Libecap, *supra* note 172, at 321 (highlighting one such asymmetry as the increased complexity of many new consumer products).

189 *Id.*

190 *See* AMERICA: A NARRATIVE HISTORY, *supra* note 135, at 948.

United States Department of Agriculture's oversight over the meat production process.[191] At the federal level, Congress passed the Pure Food and Drug Act of 1906, which prohibited the sale of misbranded or adulterated food and drugs, setting the stage for the Food and Drug Administration, the first national consumer protection agency.[192] In the labor context, the Keating-Owen Act cracked down on child labor abuses.[193] Following a tragic factory fire that left 146 workers dead in New York City, thirty-six new city and state laws were enacted, with other states following suit.[194] The Adamson Act finally established the eight-hour workday.[195]

Finally, the boundaries of capitalism itself were reformed. The Federal Reserve Act of 1913 created a new national banking system, replacing the unstable, decentralized system in place since Andrew Jackson dismantled the Second Bank of the United States in the 1830s.[196] The enactment of the Sherman Antitrust Act and subsequent creation of the robust Federal Trade Commission prevented the massive accumulation of capital and power that was the hallmark of Gilded Age capitalism.[197]

Examining Progressive Era proto-stakeholder concerns through the lens of today's versions of stakeholderism, even under the most generous version of the double bottom line, it is clear that the private sector was both unable and unwilling to address social issues as effectively as the government. Particularly in the antitrust context, it is difficult to imagine a business willfully giving up monopoly power for the sake of sustainable, long-term economic growth of the economy. Moreover, in certain industries that produce widely used or necessity goods and services, normal threats to monopoly power such as boycotts are blunted. Today, we are seeing a version of this dynamic play out in the technology sector with the rise of powerful conglomerates whose advertising practices have threatened the existence of many journalistic institutions,[198] often described as government "watch-

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191 *See* Law & Libecap, *supra* note 172, at 331.

192 *The Pure Food and Drug Act*, UNITED STATES HOUSE OF REPRESENTATIVES, HISTORY, ART & ARCHIVES, https://history.house.gov/Historical-Highlights/1901-1950/Pure-Food-and-Drug-Act (last visited Aug. 6, 2021); *When and Why Was FDA Formed?*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/about-fda/fda-basics/when-and-why-was-fda-formed (last updated Mar. 28, 2018) (discussing the origins of the FDA).

193 *See* AMERICA: A NARRATIVE HISTORY, *supra* note 135, at 976.

194 *Id.* at 949; *see supra* note 167 and accompanying text (offering further context on state labor laws and how they fared under judicial review).

195 AMERICA: A NARRATIVE HISTORY, *supra* note 135, at 976.

196 *See id.* at 968.

197 *See id.* at 969.

198 *See* Cecilia Kang, *House Opens Tech Antitrust Inquiry with Look at Threat to News Media*, N.Y. TIMES (June 11, 2019), https://www.nytimes.com/2019/06/11/technology/

dogs," critical to a healthy democracy. The pervasiveness of social media has rendered it almost a necessity, and consumers have become increasingly willing to hand over massive amounts of personal data, accelerating the decline of journalism and leaving their personal information vulnerable to hacking attempts.[199]

Relatedly, businesses during the Gilded Age, Progressive Era, and today have little incentive to correct information asymmetries between producers and consumers, leaving consumer stakeholders at risk of purchasing a poor good or service—the classic "lemons" problem in economics.[200] Information asymmetries are typically corrected via government action, either by increasing the availability of information in the market or by setting quality control standards, or via the private sector, by reputational harms that accrue to firms who repeatedly sell lemons and increased patronage of firms who sell products with guarantees.[201] With relatively small purchasing power due to low wages, however, American workers at the end of the Gilded Age were likely unable to pay more for a guaranteed product, and were simply forced to take the risk that they might end up with a lemon, or in this case adulterated food or drugs, absent government intervention like the Pure Food and Drug Act.

Toward the end of this period, when Progressivism had reached its zenith, President Woodrow Wilson remarked that the future would be "a time of healing because [it would be] a time of just dealing."[202] Perhaps subconsciously, this statement recognizes just how inextricably intertwined business dealings and public welfare were during the

antitrust-hearing.html (noting that news publishers now rely on platforms like Facebook and Google to find audiences).

199 *See* Jimmy Wales & Orit Kopel, *The Internet Broke the News Industry—and Can Fix it Too*, FOREIGN POLICY (Oct. 19, 2019, 12:01 AM), https://foreignpolicy.com/2019/10/19/internet-broke-journalism-fake-news ("Advertising around news is no longer attractive when internet giants like Google, Facebook, and Amazon offer far more effective ways to target consumers."); *see also* Kate Paxton-Fear, *I'm an Ethical Hacker. Here's How I Could Use Social Media to Scam You*, FAST CO. (Feb. 22, 2021), https://www.fastcompany.com/90606386/social-media-scam-phishing-ethical-hacker ("The oversharing we all do online is a gold mine for cybercriminals who go digital dumpster diving . . . .").

200 Nobel Prize winner George Akerlof established the "lemons" problem, which refers to uncertainty regarding the value of a good or service due to asymmetric information possessed by the buyer and seller. *See* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 489 (1970). "Lemons" are poor products or services that enter the market and are sold for more than they are worth as consumers are unable to evaluate the good or service due to lack of information or expertise. *See id.*

201 *See* Barclay Palmer, *What a "Lemon" Product Is, and How to Avoid Purchasing One*, INVESTOPEDIA (Feb. 22, 2019), https://www.investopedia.com/articles/pf/11/solutions-to-lemon-problem.asp.

202 AMERICA: A NARRATIVE HISTORY, *supra* note 135, at 970.

Progressive Era and more broadly throughout American history. And while much work in addressing stakeholder concerns was left to be done at the end of the Progressive Era,[203] American government at the local, state, and federal levels had made much more meaningful strides than the private sector toward addressing the negative externalities of the free market.

C. An "Orgy of Mad Speculation"[204]: The Wall Street Crash of 1929 and Preceding Financial Panics

1. The 1920s Roar Back

Known for jazz, automobiles, and the newly burgeoning entertainment industry, the 1920s were broadly the decade of the consumer.[205] Movie theaters and radio stations became widely available, and transportation boomed with the development of airplanes, high-speed trains, and personal cars.[206] Nonetheless, other groups fared less well. In particular, the agricultural sector faced economic shocks and many farmers struggled to stay afloat. A brief boom during World War I drove crop sales abroad, but led to price collapses once the war was over.[207] Overproduction kept prices low—wheat prices dropped around sixty percent in just a year and a half, and cotton prices dropped even more.[208] Meanwhile, the most successful farms grew larger and more technologically advanced, allowing them to take advantage of economies of scale, while smaller farms watched their profit margins grow ever thinner.[209]

In cities, however, urban workers experienced increased prosperity, gaining about twenty percent in real wages between 1921 and 1928,[210] businesses kept wages low and prices high, aggressively rein-

[203] Despite discussions of increased participation in the democratic process and improving the standard of living for working class Americans, the Progressive Era saw widespread disenfranchisement of Black Americans and few strides toward racial equality following the end of the Civil War. *See id.* at 977. In addition, the country saw a resurgence of anti-immigrant prejudice during the early 1900s. *Id.* This is in part due to the fact that much Progressive Era policymaking was done by elites, rather than representative members of the population. *See id.* Indeed, to adequately address stakeholder concerns today, the government will need to meaningfully consider and respond to the needs of these minority groups.

[204] *Id.* at 1082.

[205] *See id.* at 1044 (discussing how "[t]he nation's total wealth almost doubled between 1920 and 1930 . . . . More people had the money and time to indulge their consumer fancies").

[206] *Id.* at 1045–47.

[207] *Id.* at 1075.

[208] *See id.*

[209] *See id.*

[210] *Id.* at 1076.

vesting capital to expand their businesses.[211] Paradoxically, low wages meant low consumer spending power and consequent demand for high-priced products was mostly artificial, fueled by purchasing on credit or via installments.[212] Though not as extreme as during the Gilded Age, the years preceding the stock market crash of 1929 were marked by major wealth disparities, with five percent of the population taking home about a third of total American income.[213]

Following slow economic growth after World War I, the idea that the economy would never *stop* growing inexplicably took hold of America.[214] The first signs of instability were seen during the Florida real estate boom—numerous Americans invested in the growing state's real estate market, hoping to get rich quick, but many were left with losses when the bubble burst in 1926.[215] In the stock market, although stock values rose to reflect increasing corporate profits, stock and margin trading quickly turned speculative.[216] The increase in popularity of purchasing stock on margin led to an explosion (a doubling) in brokers' loans to stock purchasers in the two years leading up to 1929.[217] Investors did not see the writing on the wall.

Throughout the month of October 1929, stock values tumbled, triggering investor panic and hysteria that did not let up for months. Between September 1929 and July 1932, the stock market average declined from 452 to 52 points.[218] The national economy collapsed, bringing with it record levels of unemployment, capping out at a high of twenty-three percent.[219] Ultimately, unprecedented economic depression set in.

2. *Retail Investors as Proto-Stakeholders*

A number of threads of proto-stakeholderism run through the years before 1929. Numerous reforms had made life better for the American worker, but the rapid pace of industrialization led to evolving social problems that needed attention. Though workers did experience a wage increase in the private sector, it was insufficient to provide them with enough purchasing power to live comfortably.

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211 *Id.* at 1082.

212 *Id.* at 1082–83.

213 *Id.* at 1082.

214 *See id.* at 1081.

215 *Id.*

216 *Id.*

217 *Id.* at 1082.

218 *Id.*

219 *Id.*

Indeed, America would need strong minimum wage laws, not introduced until after the Great Depression, to get there.[220]

Perhaps most interestingly, however, is the rise of the retail investor during this period. While stock trading was historically conducted by wealthy businessmen and investment professionals, the 1920s saw everyday Americans engaging in all forms of trading.[221] Counterintuitively, while many of these individuals were formally shareholders (as they owned company stock), they fit the proto-stakeholder mold rather nicely. They suffered from the same information and power asymmetries seen in Progressive Era consumers concerned about canned chicken. At the time, assessing the value of stocks and derivatives was incredibly challenging given limited access to information and lack of strong disclosure policies, another version of the lemon problem.

This is particularly striking when considering a quote from a prominent bank president who told the press amidst the 1929 panic that there was "nothing fundamentally wrong with the stock market or with the underlying business and credit structure."[222] Again remarkably, President Herbert Hoover asserted that "the fundamental business of the country" was alright.[223] Everyday Americans had little way of knowing whether or not either was correct as they could not evaluate the underlying financials of publicly traded companies themselves—they were not yet subject to federal disclosure regulations.[224] Indeed, the continued selloff that ensued revealed retail investor distrust. And in the midst of multiyear financial hysteria, corporate leaders who could have provided financial data offered little beyond lip service to assuage investor concerns. Viewing these statements with stakeholderism in mind, it is clear that while increased information might have slowed or stopped repeated selloffs, thus fitting within a double bottom line framework, any information shared would have been piecemeal and not standardized, rendering it virtually useless.

Following the crisis, Congress passed the Securities Act of 1933 and Securities Exchange Act of 1934, which would oversee most

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220 *Id.* at 1108, 1228 (discussing the introduction of the minimum wage during the New Deal era, and expansions under President Truman).

221 *Id.* at 1081 (discussing retail investor speculation during the 1920s).

222 *Id.*

223 *Id.*

224 Will Kenton, *Securities Act of 1933*, INVESTOPEDIA (Oct. 20, 2020) [hereinafter Kenton, *Securities Act of 1933*], https://www.investopedia.com/terms/s/securitiesact1933.asp ("The Securities Act of 1933 was the first federal legislation used to regulate the stock market.").

securities and secondary sales in the United States, respectively.[225] In addition, Congress passed the Glass-Steagall Act of 1932, which provided broad federal support to commercial loans, and the Banking Act, which created the Federal Deposit Insurance Commission, helping to restore confidence in the economy.[226] These robust regulations ensured retail investors remained protected and have largely remained in effect to this day.[227]

The treatment of stakeholder concerns during and leading up to the stock market crash of 1929, placed alongside the Gilded Age and Progressive Era, reveal the cyclicality of stakeholderism in American history. Capitalism under real-world conditions produces inequities and negative externalities when left unchecked. While in theory grassroots movements and charitable organizations might make some progress in addressing social ills and stakeholder groups can influence corporate conduct to a certain extent, their effectiveness is determined by their power relative to businesses and to each other. During periods with particularly high concentrations of private sector power, these groups are unable to effect large scale and meaningful change and instead turn to government for redress.

III
The Perils of Private Ordering

Building on the novel historical analysis of Part II, this Part examines potential avenues for addressing current stakeholder concerns, which fall along the lines of the longtime debate about whether social harms are best addressed via the private or public sector. This Part first describes the current conversation around reform via private ordering and identifies two major areas of critique: legal and legitimacy. It then discusses the broad range of public sector solutions that have been proposed and addresses critiques of public sector intervention to address ESG concerns at a theoretical level. It concludes that relying on companies themselves to internalize the costs of social harms they have contributed to, which I refer to as "private ordering," will be insufficient for effecting long-term change.

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225 *Id.*; Will Kenton, *Securities Exchange Act of 1934*, Investopedia (Oct. 30, 2020) [hereinafter Kenton, *Securities Act of 1934*], https://www.investopedia.com/terms/s/seact1934.asp (explaining that the Securities Exchange Act of 1934 (SEA) was created to govern securities transactions on the secondary market).

226 America: A Narrative History, *supra* note 135, at 1089–90, 1103.

227 *See id.*; Kenton, *Securities Act of 1933*, *supra* note 224; Kenton, *Securities Act of 1934*, *supra* note 225.

A. Private Ordering in Theory

Private ordering relies on corporate leaders themselves to make decisions that promote stakeholder welfare. Statements such as the aforementioned 2019 Business Roundtable Statement on the Purpose of a Corporation and the World Economic Forum Davos Manifesto endorse this view, directly calling on the private sector to "deliver value" to nonshareholder constituents.[228] Addressing stakeholder concerns through private ordering is often cloaked in language about long-term, sustainable growth. Famously, in 2016, corporate governance giant Martin Lipton unveiled a framework for corporate governance which he dubbed "The New Paradigm," that "recalibrates the relationship between public corporations and their major institutional investors and conceives of corporate governance as a collaboration among corporations, shareholders and other stakeholders working together to *achieve long-term value and resist short-termism*."[229] Lipton has claimed that if corporations adopt The New Paradigm, or something like it, private ordering will ensure that stakeholder concerns are adequately addressed.[230]

However, the results of commitments by private sector leaders have been mixed. In 2020, legal scholars Lucian Bebchuk and Roberto Tallarita extensively surveyed and analyzed chief executives and corporations who had signed onto the 2019 Business Roundtable Statement, finding that most had chosen to sign on without seeking board approval.[231] In addition, the authors examined any revisions to corporate governance guidelines of companies whose CEOs had signed on in the year following the 2019 statement, finding that almost none of these revisions had to do with ESG initiatives.[232] Though the survey's response rate was relatively small, its findings suggest that corporate directors (1) already believe they are making adequate strides toward meeting ESG initiatives or (2) are, for whatever reason,

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228 *See* 2019 Bus. Roundtable Statement, *supra* note 16, at 1; *see also* Schwab, *supra* note 16, at 1 ("The purpose of a company is to engage all its stakeholders in shared and sustained value creation.").

229 Martin Lipton, World Econ. F., The New Paradigm: A Roadmap for an Implicit Corporate Governance Partnership Between Corporations and Investors to Achieve Sustainable Long-Term Investment and Growth 1 (2016), https://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.25960.16.pdf (emphasis added).

230 *See* Martin Lipton, *Corporate Governance—The New Paradigm—A Better Way than Federalization*, Wachtell, Lipton, Rosen & Katz (Aug. 17, 2018), https://www.wlrk.com/webdocs/wlrknew/WLRKMemos/WLRK/WLRK.26165.18.pdf.

231 *See* Bebchuk & Tallarita, *supra* note 18, at 130.

232 *See id.* at 134–37.

unable or unwilling to make major (i.e., requiring board approval) commitments to stakeholder concerns.

If this is really the case, stakeholder initiatives ring with the same hollowness as the "business case for diversity,"[233] and the private sector is unlikely to adequately address stakeholder concerns with the urgency and depth they require. Speed, however, is not the only nor the biggest challenge that corporate leaders are up against in effecting stakeholder-aware policies. Two key problems—legal constraints and questions around legitimacy in the private sector—may prevent the private sector from meaningfully addressing stakeholder concerns across any time horizon.

B. The Legal Limits of Long-Term Value

The limits of corporate law itself present a formidable challenge to meaningfully engaging with stakeholder interests and concerns. Over half of all publicly traded U.S. companies[234] and seventy percent of the U.S. companies who signed onto the Business Roundtable statement are incorporated in Delaware,[235] a strongly shareholder-centric jurisdiction.[236] Numerous members of the Delaware Chancery Court have emphasized that "directors must make stockholder welfare their sole end."[237] However, managerial discretion provides some wiggle room for stakeholders. The Delaware Supreme Court's *Revlon* opinion, establishing boards' heightened duties in change of control scenarios, reads, "A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders."[238] "Rational relation" is the operative phrase here—indeed, the court says in *Revlon* that while considering nonshareholder constituencies is not de facto impermissible, it is subject to "fundamental limitations."[239]

With this in mind, it appears that corporate law (which has been mainly developed by Delaware courts) embraces the double bottom

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[233] *See supra* Section II.C.

[234] *See* Bebchuk & Tallarita, *supra* note 18, at 112 n.66.

[235] *Id.* at 137.

[236] *See supra* note 40 and accompanying text (discussing the powers that shareholders can exercise in Delaware).

[237] Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 Wake Forest L. Rev. 761, 768 (2015); *see also* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010) ("Having chosen a for-profit corporate form . . . directors are bound by the fiduciary duties and standards that accompany that form . . . includ[ing] acting to promote the value of the corporation for the benefit of its stockholders.").

[238] Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986).

[239] *Id.*

line version of stakeholderism. The question, then, is whether management can consider stakeholder interest as an independent end or when it may not or does not clearly benefit shareholders across any time horizon. Indeed, this has garnered substantial academic debate.[240] Though "rational relation" might seem like a rather flexible standard, Delaware courts have struck down corporate decisions that are *too* pro-stakeholder. In *eBay Domestic Holdings v. Newmark*, the founders of craigslist notoriously and unambiguously stated that they wanted to run their largely unmonetized website for the benefit of local communities, rather than their stockholders.[241] Concluding that this stance breached the directors' fiduciary duties, the court remarked "Jim and Craig opted to form craigslist, Inc. as a *for-profit Delaware corporation* and voluntarily accepted millions of dollars from eBay as part of a transaction whereby eBay became a stockholder. Having chosen a for-profit corporate form, the craigslist directors are bound by . . . fiduciary duties and standards . . . ."[242] While a rather extreme example, *eBay* reveals that addressing stakeholder concerns in a corporation must be justified as a business case. However, as previously discussed, double bottom line stakeholderism, even when used solely to pass judicial scrutiny, is inadequate for meaningfully grappling with stakeholder concerns.[243]

Many have argued that there are a number of alternatives to the corporate form. Indeed, as Professor Edward Rock remarks in a recent paper, "as an enterprise form, the 'general corporation' has competition."[244] He then goes on to describe alternative business forms, noting that at other times the general corporation has not been the preferred form of doing business.[245] In recent times, a number of states, including Delaware, have enacted benefit-corporation provisions, freeing management of the confines of shareholder primacy and allowing corporate leaders to consider social impact and public benefit.[246]

But a moment of realism: There has been little rush for companies to move to the benefit-corporate form, and this is likely to remain

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240 *See supra* note 32 and accompanying text. *See also supra* note 33 and accompanying text.

241 *See* 16 A.3d at 34 (discussing the business ethos of the founder and CEO of craigslist as being not directly centered on monetization).

242 *Id.*

243 *See supra* Section II.B.2.

244 Edward Rock, *For Whom Is the Corporation Managed in 2020?: The Debate over Corporate Purpose* 27 (Eur. Corp. Governance Inst., Working Paper No. 515/2020, 2020), https://ecgi.global/sites/default/files/working_papers/documents/rockfinal.pdf.

245 *Id.* at 27–28.

246 *Id.* at 11.

the case. As previously discussed, thirty-five states have constituency statutes on the books that afford management increased discretion to consider stakeholder interests. Indeed, a study of private equity transactions in jurisdictions with constituency statutes demonstrated that corporate leaders, despite the discretion such statues afford them, ultimately used their power to secure benefits for shareholders and themselves, rather than stakeholder protections.[247] Notably, the majority of corporate leaders did not negotiate employment policies, leaving their employees vulnerable to post-transaction layoffs, nor did they impose constraints on buyers that would ensure consumer, supplier, creditor, or environmental protection.[248]

Theorizing based on the findings of this study, while the Delaware corporation reigns supreme, companies will continue to face a clear collective action problem.[249] As not all companies will consider stakeholder concerns to the same degree (if at all), those that place the most emphasis on stakeholders will have at least a short-term disadvantage in the capital market, due to the lower short-term returns implicit in prioritizing stakeholders.[250] This increases the cost of capital for stakeholder-friendly corporations in the short term,[251] perpetuating the notion that a focus on stakeholders will harm a company's financial performance. Whether the prominence of Delaware corpo-

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247 *See* Bebchuk et al., *supra* note 70 (manuscript at 47) (discussing the results of the stakeholder and shareholder analysis, which found that constituency statutes did little to protect stakeholder interests).

248 *See id.* (manuscript at 38).

249 Collective action problems refer to the theory that in certain instances, individual rationality does not result in group rationality, as conflicting individual interests may differ from the interests of the group as a whole. *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 2 (20th prtg. 2002) (stating that it is rare for individuals despite being self-interested to be heavily invested in group success). The classic example of a collective action problem is game theory's prisoner's dilemma in which two individuals, A and B, are accused of a crime. If A turns B in while B remains silent, A will receive no prison time, while B receives a substantial sentence. If both turn each other in, they will receive the same substantial prison sentence. If both choose to remain silent, they will both receive commuted sentences. The individuals as a whole would be better off if they chose to remain silent (as they receive commuted sentences), but absent communication and due to the rational fear of one player reneging on their promise to remain silent, individuals in the prisoner's dilemma are induced to turn one another in, which leaves the group as a whole worse off. Steven Kuhn, *Prisoner's Dilemma*, STAN. ENCYCLOPEDIA PHIL. (Apr. 2, 2019), https://plato.stanford.edu/entries/prisoner-dilemma.

250 *See* Kent Greenfield, *A Skeptic's View of Benefit Corporations*, 1 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. 17, 19 (2014) ("Because not all companies will choose to become benefit corporations, those that do will suffer competitive disadvantage in the capital market, at least in the short term.").

251 *Id.*

rate law or simply market forces that recognize the primacy of shareholders have caused this phenomenon remains unclear.

C. The Legitimacy Problem

Perhaps the most pernicious problem facing the private sector's attempts to integrate stakeholder concerns into business models on its own is that it raises legitimacy questions across various dimensions. Most obviously, corporations creating the score card, and keeping score for themselves, are rife with conflicts of interest that will ultimately undermine the legitimacy of corporate decision making. Though asset managers like BlackRock have grown so large that they have tremendous influence over corporate policy and director conduct, separation of ownership and control means that they are not doing the day-to-day work of running the corporation where much work to improve stakeholder welfare must be done.[252] As a normative aside, there is also good reason not to rely on shareholder monitoring in the stakeholder context—while implementing stakeholder initiatives is pressing, they need to be long-term—what if current use of ESG metrics proves to be asset managers' passing fancy? What if they resemble the problematic double bottom line? Proverbially, who watches the watchers?[253]

Extending the monitoring problem, it is tremendously difficult for corporations (let alone groups of corporations like the Business Roundtable) to identify relevant stakeholders and their interests and balance those interests, which are almost always unquantifiable or generally difficult to measure. While corporate leaders make difficult decisions daily, even legislatures specifically tasked with drafting constituency statutes were uncertain about who to deem a corporate stakeholder. A survey of state constituency statutes illustrated many different, and defensible, variations of stakeholders identified by state legislatures—out of thirty-one state statutes, all included employees and customers as stakeholders, twenty-eight included suppliers, twenty-two included creditors and the local community each, thirteen included society, twelve included the economy of the state/nation, two

[252] *See* Coates, *supra* note 50, at 2, 13–14.

[253] Some have suggested that shareholders have little incentive to monitor lackluster business or financial performance that is not substantial or easy to fix. *See* Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 Colum. L. Rev. 2029, 2097 (2019) (noting that "activist hedge funds have incentives to engage only when performance problems are very large and can be fixed quickly"). However, recent initiatives such as Larry Fink's call for concrete business plans for a carbon-zero economy suggest either that stakeholder issues are large enough to require monitoring, or that perhaps institutional investor attitudes toward monitoring have changed. *See supra* note 62 and accompanying text.

included the environment, and fourteen provided a vague catch-all.[254] Affording managers discretion to decide who counts as a stakeholder, even with shareholder oversight, also raises legitimacy concerns.

Diving deeper, even if some sort of consensus does emerge about the degree to which stakeholder interests should be considered, how to resolve competing interests among stakeholder groups presents another thorny issue. For stakeholderists committed to the "win-win" ethos of the double bottom line, this should not be a problem. Considering stakeholders in the "win-win" context is easy, but unrealistic. It is easy to imagine the variety of scenarios in which considering tradeoffs between stakeholder and shareholder welfare could occur. Take the seminal *Dodge* case for instance—in order to increase employee wages and decrease the price of a Model T so that more consumers could afford the vehicle, Henry Ford decided to halt shareholder dividends.[255] Though some might try to shoehorn this into a long-term value argument, as the court considered in its decision, his corporate policy had a strong humanitarian slant—he paid his workers more than double that of other car manufacturers,[256] and had a history of charitable giving.[257] Though in hindsight his decisionmaking seems admirable from an ESG perspective, it is conceivable that some might dispute how he handled the stakeholder–shareholder tradeoff. This questioning by shareholders undermines the legitimacy of corporate decisionmaking. There is a rich and relatively well-defined body of law that delineates the permissible contours of managerial discretion in a purely business context.[258] When entering the realm of stakeholder welfare, the waters are much murkier.

Here, some of the more insidious consequences of addressing stakeholder concerns through private ordering emerge. As Milton Friedman wrote in his now-famous article, *The Social Responsibility of Business Is to Increase Its Profits*, corporate leaders are often "shortsighted and muddle-headed in matters that are outside their businesses but affect the possible survival of business in general," particularly in the context of social responsibility.[259] Remarking, "this may

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[254] *See* Bebchuk & Tallarita, *supra* note 18, at 117 tbl.1.

[255] *See* Dodge v. Ford Motor Co., 170 N.W. 668, 670–71 (Mich. 1919) (discussing the motivations behind Ford's policy, which was primarily to hire more employees and make their lives materially comfortable).

[256] *See* Worstall, *supra* note 161 (noting that Ford paid employees $5 per day as opposed to the $2.25 his employees had previously earned).

[257] *See* Martin Morse Wooster, *Henry Ford*, PHILANTHROPY ROUNDTABLE, https://www.philanthropyroundtable.org/almanac/people/hall-of-fame/detail/henry-ford (last visited Sept. 14, 2021).

[258] *See supra* note 45 and accompanying text.

[259] Friedman, *supra* note 36.

gain them kudos in the short run,"[260] Friedman hints at another kind of legitimacy problem—that corporate social responsibility initiatives have the appearance of publicity moves, rather than legitimate concern for stakeholder welfare.[261] Indeed, corporate responses have been treated with suspicion, as seen in the rise of accusations of "greenwashing" in the 1980s.[262] This referred to the practice of corporations publicly positioning themselves as environmentally friendly while engaging in unsustainable conduct, resulting in consumer backlash during the 2010s.[263] More recently, in 2020, following the murder of George Floyd and a summer of protests against police brutality, a number of American companies publicly pledged to fight racism, leading to the creation of the term "blackwashing."[264] In the wake of these corporate statements, a number of movements called for disclosure of company statistics around employee diversity, revealing startlingly low numbers, particularly for Black employees, and raising doubts that companies were in fact committed to the cause.[265]

This perhaps points to the most pernicious problem of using private ordering to address stakeholder concerns: undermining the legitimacy of the free market as a whole. In responding to the Business Roundtable statement, the *Economist* wrote in its cover story, "[c]ompetition, not corporatism, is the answer to capitalism's problems."[266] Lobbying free market participants to act in ways other than pursuing profit distorts the functioning of capitalism as a whole.

However, rising above shareholder primacy, another requirement is placed on corporations: conducting business lawfully.[267] This point underscores the importance of directors acting in accordance with

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260 *Id.*

261 *Id.*

262 *See* Bruce Watson, *The Troubling Evolution of Corporate Greenwashing*, GUARDIAN (Aug. 20, 2016, 10:00 AM), https://www.theguardian.com/sustainable-business/2016/aug/20/greenwashing-environmentalism-lies-companies (discussing Chevron's advertising campaign depicting employees with "all manner of cute and cuddly animals").

263 *See* Bart King, *Survey Suggests Brands Risk Greenwashing Backlash*, REUTERS (Mar. 25, 2011, 3:37 PM), https://www.reuters.com/article/idUS297296127920110325.

264 While a robust discussion of corporate blackwashing is outside the scope of this Note, see Tiffany Jana, *How to Avoid Corporate Blackwashing*, MEDIUM (July 11, 2020), https://medium.com/swlh/how-to-avoid-corporate-blackwashing-e59822279ea4.

265 *See, e.g.*, Jamie Feldman, *Pull Up for Change Calls on Brands to Address Their Role in White Supremacy*, HUFFINGTON POST (June 15, 2020, 5:08 PM), https://www.huffpost.com/entry/pull-up-for-change-sharon-chuter-uoma-beauty_l_5ee0cecdc5b6a457582a1539.

266 *What Companies Are For*, ECONOMIST (Aug. 22, 2019), https://www.economist.com/leaders/2019/08/22/what-companies-are-for.

267 *See* DEL. CODE ANN. tit. 8, § 101(b) (2021) ("A corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purposes, except as may otherwise be provided by the Constitution or other law of this State.").

well-established fiduciary duties to maintain their legitimacy. Professor Rock aptly said, "using private law to solve social problems will destroy the value generating potential of private law while failing to solve the social problems, leaving all of us worse off."[268] Importantly, the constraint on businesses acting lawfully serves as a starting point for discussing where meaningful stakeholder reform might happen: in the public sector. Through regulation and legislation, the public sector draws the boundaries within which the free market can operate, upholding the incentives to innovate and generate profit afforded by true competition.

D. The Promise of the Public Sector

Though they range in scope, public-law solutions suggest that government actors should intervene to remedy negative externalities imposed on society by corporations. This might be done via creation of a new regulatory agency or regime, as suggested in Elizabeth Warren's Accountable Capitalism Act.[269] The Act would provide for the formation of the Office of United States Corporations, requiring corporations to adopt federal charters that require consideration of stakeholders, mandating employee participation in at least some board elections, restricting sales of company shares by directors and officers, and prohibiting political expenditures without supermajority approval by directors and shareholders.[270] Alternatively, ESG-related disclosure requirements might be imposed.[271]

Other solutions have looked to strengthening and increasing adoption of state constituency statutes that permit or mandate boards of directors to consider interests of stakeholders when making corporate decisions.[272] Some have suggested that corporate law itself should change and should formally reform how companies think about corporate purpose though their charters.[273]

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268 Rock, *supra* note 244, at 30.

269 *See generally* Accountable Capitalism Act, S. 3348, 115th Cong. (2018).

270 *Id.* §§ 3, 5–7.

271 *See generally* ESG Disclosure Simplification Act of 2021, H.R. 1187, 117th Cong. § 2(a) (2021) (requiring issuers to report on "a clear description of the views of the issuer about the link between ESG metrics and the long-term business strategy of the issuer; and . . . a description of any process the issuer uses to determine the impact of ESG metrics on the long-term business strategy of the issuer." (internal quotations omitted)).

272 *See, e.g.*, Silver-Thompson, *supra* note 47, at 261–62 (discussing how constituency standards could be adjusted and how some states have modified them to "demand corporate consideration of social effects from constituency statutes"); Standley, *supra* note 39, at 211.

273 *See* Rock, *supra* note 244, at 27–28 (citing COLIN MAYER, PROSPERITY: BETTER BUSINESS MAKES THE GREATER GOOD 39–42 (2019)) (analyzing a recent proposal by Colin Mayer that seems to argue that if large scale businesses were required to adopt

Public-law proposals have faced the usual criticisms—the political dysfunction and gridlock that characterizes modern-day politics may prevent large-scale regulation or legislation from addressing stakeholder concerns with the urgency and thoughtfulness they require. More specifically, reforms at the federal level have garnered criticism for "federalizing corporate law,"[274] which the U.S. Supreme Court has looked unfavorably on in other contexts, namely with the adoption of the Securities and Exchange Act.[275] Indeed, the Supreme Court has held that federal securities laws do not preempt state corporate law, but instead place a "limited gloss on the broader body of state law."[276]

On the other hand, uneven reforms at the state level have been criticized as ineffective given the "race to the bottom."[277] Conceptualizing states as competing for corporate charters (as corporations generate state tax revenue), each might be incentivized to create regimes that are excessively friendly to management, at the expense of shareholders and stakeholders alike.[278] Indeed, under the current status quo, some have called corporate magnet Delaware the "poster-child for bad corporate governance."[279] However, market forces should correct this—investors and lenders will likely price in the cost of bad corporate governance, causing their "cost of capital to rise, while their earnings . . . fall."[280] Ultimately, this leaves firms vulnerable to hostile takeovers.[281] In reality, this reveals that corporate leaders have strong incentives to incorporate in states with investor-friendly rules, or at least follow the standards set by such states. It remains unclear, however, where this leaves stakeholders.[282]

While there is no silver bullet for ensuring stakeholder concerns are meaningfully addressed, a combination of legislation and regulations that target disclosure, corporate consideration of stakeholders, and negative externalities of capitalism directly show promise.

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specific and legally enforceable purpose provisions, they could be reoriented away from short term focus on shareholder returns and towards solving social problems).

274 *See* Stephen M. Bainbridge, *A Critique of Senator Elizabeth Warren's "Accountable Capitalism Act" (Part 2): The Case Against Federalization of Corporate Law*, ProfessorBainbridge.com (Aug. 15, 2018), https://www.professorbainbridge.com/professorbainbridgecom/2018/08/a-critique-of-senator-elizabeth-warrens-accountable-capitalism-act-the-case-against-federalization-o.html.

275 *See, e.g.*, CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 94 (1987) (holding that Indiana State corporate law was not preempted by federal securities law).

276 *See* Bainbridge, *supra* note 274.

277 *Id.*

278 *Id.*

279 *Id.*

280 *Id.*

281 *Id.*

282 *Id.*

Increased disclosure would help solve information asymmetries between investors and companies with respect to stakeholder concerns. The Securities and Exchange Commission's recent announcement of a dedicated task force to enforce ESG-related disclosure requirements is a good start.[283] Updating constituency statutes uniformly at the state level to orient corporate conduct toward stakeholders would help stop the "race to the bottom" and promote good corporate governance across the board.[284] Directly targeting negative externalities—for example, through stronger labor protections with respect to pay equity and adopting carbon pricing proposals—would establish boundaries within which the market can operate freely.

Finally, it is instructive to revisit the tragedy of the commons, particularly in the stakeholder context. Recall Garrett Hardin's livestock analogy in which ranchers allow animals to graze on a shared field—considering personal benefit rather than collective good, ranchers will continue to add livestock and consequently increase profit until the field is over-capacity and no room to graze remains, leaving all worse off.[285] The participants in modern commons of capitalism have failed to find a way to monitor themselves and each other—indeed, the formation of private collectives, likely impermissible under antitrust laws, is one solution to the tragedy of the commons. Traditional solutions, however, point to the public sector to ensure all have adequate grazing space.

Conclusion

The Gilded Age, Progressive Era, and stock market crash of 1929 reveal the rhythm of stakeholderism in America that drums along today. The free market, operating in real-world conditions, will inevitably produce negative externalities, animating stakeholder concerns. Without the bureaucratic constraints and gridlock of government, the agile private sector is an appealing starting point for addressing these concerns. When private ordering, for one of the reasons outlined above but perhaps most persuasively due to the design of the free market itself, fails to adequately internalize these externalities, government is often the next and last line of defense. With enough

283 *SEC Announces Enforcement Task Force Focused on Climate and ESG Issues*, U.S. Sec. & Exch. Comm'n (Mar. 4, 2021), https://sec.gov/news/press-release/2021-42.

284 *See* Adams & Matheson, *supra* note 84, at 1121 (describing a model corporate constituency statute that would establish a fiduciary duty and provide stakeholders standing to sue, guaranteeing consideration of stakeholder concerns).

285 *See* Margaret E. Banyan, *Tragedy of the Commons*, Encyc. Britannica (May 14, 2020), https://www.britannica.com/science/tragedy-of-the-commons.

urgency and political pressure, government inevitably acts. And so it goes.

But in the current context—the proverbial "world on fire"—turning to the private sector has become increasingly costly. A series of crises have come to a head: from climate change, to social equity, to the destabilization of democratic institutions. In the corporate context, the United States is in a similarly precarious position. Left unchecked, the rise of megatechnology conglomerates and consolidation of stock ownership by asset managers could make for a new generation of robber barons should the quasi-humanitarianism currently embodied in the application of ESG investing principles fade away. Indeed, expecting or allowing the private sector to step into the government's role will only add to the chaos, further eroding trust in our institutions for perceived failure to act and delegitimizing the free market. Not only is time of the essence in addressing today's particular crises, but solutions to complex social problems require comprehensive and thoughtful consideration with legitimizing political accountability on the other side.