THE YALE LAW JOURNAL

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Corporate Governance Reform and the Sustainability Imperative

ABSTRACT. Recent years have witnessed a significant upsurge of interest in alternatives to shareholder-centric corporate governance, driven by a growing sustainability imperative—widespread recognition that business as usual, despite the short-term returns generated, could undermine social and economic stability and even threaten our long-term survival if we fail to grapple with associated costs. We remain poorly positioned to assess corporate governance reform options, however, because prevailing theoretical lenses effectively cabin the terms of the debate in ways that obscure many of the most consequential possibilities. According to prevailing frameworks, our options essentially amount to board-versus-shareholder power, and shareholder-versus-stakeholder purpose. This narrow perspective obscures more fundamental corporate dynamics and potential reforms that might alter the incentives giving rise to corporate excesses in the first place.

This Feature argues that promoting sustainable corporate governance will require reforming fundamental features of the corporation that incentivize excessive risk-taking and externalization of costs, and presents an alternative approach more conducive to meaningful reform. The Feature first reviews prevailing conceptions of the corporation and corporate law to analyze how they collectively frame corporate governance debates. It then presents a more capacious and flexible framework for understanding the corporate form and evaluating how corporate governance might be reformed, analyzing the features of the corporate form that strongly incentivize risk-taking and externalization of costs, discussing the concept of sustainability and its implications for corporate governance, and assessing how the corporate form and corporate law might be re-envisioned to produce better results.

The remainder of the Feature uses this framework to evaluate the proposals garnering the most attention today, and to direct attention toward the broader landscape of reforms that become visible through this wider conceptual lens. Recent reform initiatives typically rely heavily on disclosure, which may be an essential predicate to meaningful reform, yet too often is treated as a substitute for it. The Feature then assesses more ambitious reform initiatives that re-envision the board of directors, and rethink underlying incentive structures—including by imposing liability on shareholders themselves, in limited and targeted ways, to curb socially harmful risk-taking while preserving socially valuable efficiencies of the corporate form. The Feature concludes that until we scrutinize the fundamental attributes of the corporate form and the decision-making incentives they produce by reference to long-term sustainability, effective responses to the interconnected environmental, social, and economic crises we face today will continue to elude us.

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FEATURE CONTENTS

INTRODUCTION

Recent years have witnessed a significant upsurge of interest in alternatives to shareholder-centric corporate governance. In 2019, the Business Roundtable, an association of CEOs at prominent U.S. companies, issued a new "Statement on the Purpose of a Corporation," to which 181 members signed on.[1] The document expressed "a fundamental commitment to all of our stakeholders," including customers, employees, suppliers, "the communities in which we work," and—presumably not least, but last on the list—"shareholders, who provide the capital that allows companies to invest, grow and innovate."[2] Emphasizing that "[e]ach of our stakeholders is essential," the signatories "commit to deliver value to all of them."[3] While this rejection of an exclusive focus on shareholders was not uniformly welcomed across the investment community[4] and has prompted considerable academic debate,[5] signatories included leaders of some of the largest asset managers in the world—notably, BlackRock's Larry Fink and Vanguard's Tim Buckley,[6] whose firms manage $9 trillion and $7 trillion in assets, respectively.[7] Fink has been particularly outspoken on the topic, concluding in

1. *Statement on the Purpose of a Corporation*, BUS. ROUNDTABLE (Aug. 19, 2019), https://s3.amazonaws.com/brt.org/BRT-StatementonthePurposeofaCorporationJuly2021.pdf [https://perma.cc/9HPD-7B69] (signatures updated through July 2021).

2. *Id.* at 1.

3. *Id.*

4. *See, e.g.*, *Council of Institutional Investors Responds to Business Roundtable Statement on Corporate Purpose*, COUNCIL INSTITUTIONAL INVS. (Aug. 19, 2019), https://www.cii.org/aug19_brt_response [https://perma.cc/A8AT-3KH5] (expressing concern that the statement "undercuts notions of managerial accountability to shareholders").

5. *Compare* Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 91 (2020) (concluding that corporate governance "that encourages and relies on corporate leaders to serve the interests of stakeholders and not only those of shareholders . . . is an inadequate and substantially counterproductive approach to addressing stakeholder concerns"), *with* Colin Mayer, *Shareholderism Versus Stakeholderism—A Misconceived Contradiction: A Comment on "The Illusory Promise of Stakeholder Governance" by Lucian Bebchuk and Roberto Tallarita* at abstract (Eur. Corp. Governance Inst., Working Paper No. 522/2020, 2020), https://ssrn.com/abstract=3617847 [https://perma.cc/ZBH7-CQ9S] ("Purpose and values hold management to account to a degree that enlightened long-term shareholder value cannot."). For contrasting views on the statement's practical significance, see sources cited *infra* note 152.

6. *See* BUS. ROUNDTABLE, *supra* note 1.

7. *See* Michael Mackenzie, *BlackRock Assets Under Management Surge to Record $9tn*, FIN. TIMES (Apr. 15, 2021), https://www.ft.com/content/e49180b1-2158-4adf-85d6-0eb4766f4d5f [https://perma.cc/R37P-BNH4]; *Fast Facts About Vanguard*, VANGUARD, https://about.vanguard.com/who-we-are/fast-facts [https://perma.cc/H7YE-6JZA].

his 2020 letter to CEOs that "a company cannot achieve long-term profits without embracing purpose and considering the needs of a broad range of stakeholders."[8]

It is tempting to minimize such developments as yet another swing of the corporate governance pendulum, driven in part by a shift in the broader political economy. The managerialism and stakeholder-centric perspective of the postwar decades, for example, had much to do with the political and economic circumstances of the times, including large public companies' status as Cold War champions of capitalism, and the combined capacity for business leaders, a robust labor movement, and the government itself to function as effective coordinating agents in a period of balanced and growing prosperity.[9] This approach gave way, after the rise of the law-and-economics movement in the 1970s, to the strong-form shareholder centrism that now prevails.[10] However, the shift toward stakeholderism that we witness today may signal a more enduring shift due to the unique nature of the underlying impetus for reform. Contemporary calls for corporate governance reform are driven by a growing sustainability imperative—increasingly widespread recognition that business as usual, despite the short-term value generated, could undermine social and economic stability and perhaps even threaten our long-term survival if we fail to grapple with associated costs.[11]

While discourse on sustainability remains as susceptible to charged rhetoric as any domain of public policy,[12] the sustainability imperative has become impossible to dismiss as mere hyperbole due to the range of complex and interconnected environmental, social, and economic crises that we face. The International Panel on Climate Change estimates that we are "more likely than not" to see global warming of 1.5°C above preindustrial levels by 2040, threatening a range of dire environmental consequences and attendant social and economic

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8. Larry Fink, *Larry Fink's 2020 Letter to CEOs: A Fundamental Reshaping of Finance*, BLACKROCK (2020) (emphasis omitted), https://www.blackrock.com/us/individual/larry-fink-ceo-letter [https://perma.cc/U9UT-LW3V].

9. *See* Harwell Wells, *"Corporation Law is Dead": Heroic Managerialism, Legal Change, and the Puzzle of Corporation Law at the Height of the American Century*, 15 U. PA. J. BUS. L. 305, 319-47 (2013).

10. *See* David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 229-31.

11. *See* Beate Sjåfjell & Christopher M. Bruner, *Corporations and Sustainability*, *in* THE CAMBRIDGE HANDBOOK OF CORPORATE LAW, CORPORATE GOVERNANCE AND SUSTAINABILITY 3, 3-11 (Beate Sjåfjell & Christopher M. Bruner eds., 2019).

12. *See, e.g.*, Andrew C. Revkin, *In Climate Debate, Exaggeration Is a Pitfall*, N.Y. TIMES (Feb. 24, 2009), https://www.nytimes.com/2009/02/25/science/earth/25hype.html [https://perma.cc/5ZY3-3FRP].

risks, and concludes that it is now "unequivocal that human influence has warmed the atmosphere, ocean and land."[13] An interdisciplinary team of scientists has sought to define Earth's "planetary boundaries," quantifying what the planet can bear in various respects, and has concluded that several of the identified boundaries have already been exceeded—including climate change and biosphere integrity, which function as "core" boundaries establishing "planetary-level overarching systems."[14] Some estimates suggest that it would require 1.7 Earths to sustain the global population's rate of resource use, and that this figure would balloon to five Earths if everyone consumed resources at the rate the U.S. population does.[15]

Meanwhile, although the worldwide rate of extreme poverty has fallen over recent decades—due principally to the economic rise of China and India[16]—staggering inequalities persist,[17] and the United States has hardly been immune. Income has grown dramatically for the wealthy yet stagnated for most of the U.S.

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13. Richard P. Allan et al., *Summary for Policymakers*, *in* CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS 4, 14-15 (Valérie Masson-Delmotte et al. eds., 2021) (emphasis omitted), https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM_final.pdf [https://perma.cc/U5LK-94KK]; *see also* Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1, 43-44 (2020) (noting that experts expect warming of at least 2.9°C to 3.4°C, even in the unlikely scenario of full and ongoing commitment to the Paris Agreement).

14. Will Steffen et al., *Planetary Boundaries: Guiding Human Development on a Changing Planet*, 347 SCIENCE 1259855, 1259855-1 to -8 (2015); *see also* Johan Rockström et al., *Planetary Boundaries: Exploring the Safe Operating Space for Humanity*, 14 ECOLOGY & SOC'Y (2009) (estimating that "humanity has already transgressed three planetary boundaries: for climate change, rate of biodiversity loss, and changes to the global nitrogen cycle").

15. *See How Many Earths? How Many Countries?*, EARTH OVERSHOOT DAY (2021), https://www.overshootday.org/how-many-earths-or-countries-do-we-need [https://perma.cc/Z9NA-V6ZY].

16. *See* Deborah Hardoon, Sophia Ayele & Ricardo Fuentes-Nieva, *An Economy for the 1%: How Privilege and Power in the Economy Drive Extreme Inequality and How This Can Be Stopped*, OXFAM 8 (Jan. 18, 2016), https://policy-practice.oxfam.org/resources/an-economy-for-the-1-how-privilege-and-power-in-the-economy-drive-extreme-inequ-592643 [https://perma.cc/AED3-EUPX]; *see also World Employment and Social Outlook: Trends 2020*, INT'L LAB. ORG. 14 (2020), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_734455.pdf [https://perma.cc/TR73-44SA] ("While labour income inequality at the global level has declined over the past 15 years—as a result of economic convergence driven by countries such as India and China, which have enjoyed a rise in average labour income—inequality within countries has stagnated over the same period.").

17. *See* Hardoon et al., *supra* note 16, at 13; U.N. Secretary-General, *Progress Towards the Sustainable Development Goals*, ¶ 9, U.N. Doc. E/2020/xxx (May 14, 2020).

population, and "40% of Americans are living so close to the edge that they cannot absorb an unexpected $400 expense."[18] Extraordinary concentrations of wealth and resulting inequalities impede further poverty reduction and more generally undermine social stability in developed and developing economies alike.[19] These challenges have only intensified following the onset of the COVID-19 pandemic.[20]

Businesses and capital markets have contributed significantly to these crises.[21] Business entities are among the world's most significant economic actors, growing in number at an extraordinary rate[22] and sometimes rivaling even the largest countries in their economic magnitude and power.[23] Their operations significantly impact all dimensions of sustainability.[24] The transportation, industrial, and commercial sectors are among the principal emitters of greenhouse

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18. Zeynep Ton, *Raising Wages Is the Right Thing to Do, and Doesn't Have to Be Bad for Your Bottom Line*, HARV. BUS. REV. (Apr. 18, 2019), https://hbr.org/2019/04/raising-wages-is-good-for-employees-and-doesnt-have-to-be-bad-for-your-bottom-line [https://perma.cc/9F9G-6RNY].

19. *See* Hardoon et al., *supra* note 16, at 9-10, 18.

20. *See, e.g.*, Rebecca Robbins & Peter S. Goodman, *Pfizer Reaps Hundreds of Millions in Profits from Covid Vaccine*, N.Y. TIMES (May 4, 2021), https://www.nytimes.com/2021/05/04/business/pfizer-covid-vaccine-profits.html [https://perma.cc/5M86-HY7D]; Erin Schumaker, *Vaccination Rates Lag in Communities of Color, But It's Not Only Due to Hesitancy, Experts Say*, ABC NEWS (May 8, 2021), https://abcnews.go.com/Health/vaccination-rates-lag-communities-color-due-hesitancy-experts/story?id=77272753 [https://perma.cc/RLY8-7RGP]; James Temple, *The Unholy Alliance of Covid-19, Nationalism, and Climate Change*, MIT TECH. REV. (Apr. 10, 2020), https://www.technologyreview.com/2020/04/10/998969/the-unholy-alliance-of-covid-19-nationalism-and-climate-change [https://perma.cc/SV7L-5YRB].

21. *See* CHRISTOPHER M. BRUNER, THE CORPORATION AS TECHNOLOGY: RE-CALIBRATING CORPORATE GOVERNANCE FOR A SUSTAINABLE FUTURE (forthcoming 2022) (manuscript at 2-21) (on file with author).

22. *See* COLIN MAYER, FIRM COMMITMENT: WHY THE CORPORATION IS FAILING US AND HOW TO RESTORE TRUST IN IT 22 (2013) ("[T]he number [of corporations] is growing rapidly—since 1992 the number of firms in the US has increased by about one-third. Elsewhere in the world, they are mushrooming even faster.").

23. *See* Milan Babic, Eelke Heemskerk & Jan Fichtner, *Who Is More Powerful—States or Corporations?*, CONVERSATION (July 10, 2018, 11:14 AM EDT), https://theconversation.com/who-is-more-powerful-states-or-corporations-99616 [https://perma.cc/QW5X-RZAM]; Fernando Belinchón & Qayyah Moynihan, *25 Giant Companies that Are Bigger than Entire Countries*, BUS. INSIDER (July 25, 2018), https://www.businessinsider.com/25-giant-companies-that-earn-more-than-entire-countries-2018-7 [https://perma.cc/EUA2-A5FV].

24. *See generally* THE CAMBRIDGE HANDBOOK OF CORPORATE LAW, CORPORATE GOVERNANCE AND SUSTAINABILITY, *supra* note 11 (providing a comprehensive survey of corporate-sustainability issues).

gases, contributing to global warming.[25] Economic inequalities, too, have been exacerbated in recent decades by the redistribution of corporate gains from labor to capital. That redistribution has been fueled in the United States by growing shareholder power and activism, which have increasingly pressured companies "to cut labor costs, resulting in wage reductions within firms and the 'fissuring' of the workplace."[26] Although such crises cannot be attributed entirely to big business, it is nevertheless "hard to imagine any solution to these problems that does not entail a change in corporate behavior."[27]

Many scholars have argued that sustainability is best pursued through extra-corporate regulation such as environmental and labor laws, leaving corporate governance itself to focus exclusively on shareholders.[28] But the inadequacies of this reactive approach are increasingly apparent. As Sarah Light observes, "managers make decisions with profound environmental consequences long before pollution comes out of a pipe or smokestack as an externality," and greater attention to "fields governing corporate decisionmaking and market architecture can yield solutions to enduring problems that traditional federal environmental law has been unable to solve on its own."[29] Notably, this includes "cumulative

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25. *See Sources of Greenhouse Gas Emissions*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions [https://perma.cc/DJJ9-6J4W]; *see also* Paul Griffin, *The Carbon Majors Database: CDP Carbon Majors Report 2017*, CDP 2, 5 (July 2017), https://6fefcbb86e61af1b2fc4-c70d8ead6ced550b4d987d7c03fcdd1d.ssl.cf3.rackcdn.com/cms/reports/documents/000/002/327/original/Carbon-Majors-Report-2017.pdf [https://perma.cc/7LTS-EFK4] (reporting that, of the one hundred "largest company-related sources" of greenhouse gas emissions, fifty-seven are "investor-owned companies"); Lowell Ungar & Andrew Whitlock, *Energy Efficiency and Corporate Sustainability: Saving Money While Meeting Climate Goals*, AM. COUNCIL FOR AN ENERGY-EFFICIENT ECON. 3-4 (Nov. 20, 2019), https://www.aceee.org/sites/default/files/pdfs/eecs-smmcg_0.pdf [https://perma.cc/2AHZ-2KDW] ("Companies directly control roughly three-fourths of all US energy use and consequent emissions.").

26. Anna Stansbury & Lawrence H. Summers, *The Declining Worker Power Hypothesis: An Explanation for the Recent Evolution of the American Economy* 2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27193, 2020), https://www.nber.org/system/files/working_papers/w27193/w27193.pdf [https://perma.cc/Q7YF-LEXH]; *see also* Zohar Goshen & Doron Levit, *Common Ownership and the Decline of the American Worker* (Eur. Corp. Governance Inst., Working Paper No. 584/2021, 2021), https://ssrn.com/abstract=3832069 [https://perma.cc/2LWD-G8ZF] (arguing that the shift towards "common ownership" of companies by large institutional investors has been a key driver of income inequality).

27. Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1474 (2020).

28. *See, e.g.*, FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 35-39 (1991).

29. Sarah E. Light, *The Law of the Corporation as Environmental Law*, 71 STAN. L. REV. 137, 140-41 (2019).

harms like climate change" that "sit uneasily within the traditional paradigm of environmental law, which tends to focus on controlling, reducing, or reporting significant amounts of pollution" but lacks effective tools to promote changes in harmful day-to-day business practices that produce large-scale aggregate effects over time.[30]

As a practical matter, there is further reason to doubt that extracorporate regulation alone could possibly constrain such politically powerful actors.[31] Even those favoring shareholder-centric corporate governance have conceded that major corporations' ability to neutralize external regulations may effectively undermine attempts to force businesses to internalize the environmental and social costs associated with their activities.[32] It is thus critical to assess how decision-making incentives take shape in the first place, and how governance reforms might render corporate decision-making more sustainable.[33]

Growing awareness of the sustainability imperative has driven the recent shift away from shareholder-centric corporate governance. The Business Roundtable statement, for example, cites the importance of "embracing sustainable practices across our businesses."[34] Fink's letter likewise states that "sustainable investing is the strongest foundation for client portfolios" and that a "company's prospects for growth are inextricable from its ability to operate sustainably."[35] However, prevailing theoretical lenses on corporate governance effectively cabin the terms of the debate in ways that obscure many of the most consequential reform options. In its response to the Business Roundtable state-

30. *Id.* at 147-48.

31. *See* Christopher M. Bruner & Beate Sjåfjell, *Corporate Law, Corporate Governance and the Pursuit of Sustainability*, *in* THE CAMBRIDGE HANDBOOK OF CORPORATE LAW, CORPORATE GOVERNANCE AND SUSTAINABILITY, *supra* note 11, at 713, 714.

32. *See, e.g.*, John Armour, Luca Enriques, Mariana Pargendler & Wolf-Georg Ringe, *Beyond the Anatomy*, *in* REINIER KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 267, 271-72 (3d ed. 2017); *see also* Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and* Citizens United, 100 CORNELL L. REV. 335, 379-87 (2015) (arguing that corporations' increasing financial influence over the legislative process undermines reliance upon regulation as a safeguard).

33. *See* Bruner & Sjåfjell, *supra* note 31, at 714; Light, *supra* note 29, at 200-01; Brett McDonnell, Hari M. Osofsky, Jacqueline Peel & Anita Foerster, *Green Boardrooms?*, 53 CONN. L. REV. 335, 408-09 (2021); Zhong Xing Tan, *Stewardship in the Interests of Systemic Stakeholders: Re-Conceptualizing the Means and Ends of Anglo-American Corporate Governance in the Wake of the Global Financial Crisis*, 9 J. BUS. & TECH. L. 169, 184-86 (2014).

34. BUS. ROUNDTABLE, *supra* note 1.

35. Fink, *supra* note 8.

ment, for example, the Council of Institutional Investors objects that the statement "work[s] to diminish shareholder rights" while "proposing no new mechanisms to create board and management accountability to any other stakeholder group."[36] This exchange reflects the quandary we face when seeking to apply the familiar terminology and conceptual frameworks of traditional corporate governance discourse to the novel sustainability imperative. Options for reform are seemingly limited to recalibrating board-versus-shareholder power, and shareholder-versus-stakeholder purpose.[37]

Meanwhile, even for those more receptive to a broader conception of corporate purpose, the range of conceivable reforms appears limited to tweaked versions of existing capital-market mechanisms. Fink, for example, narrowly conceptualizes climate change as an "investment risk" and advocates for expanded corporate disclosures to permit investors to bring this to bear upon their investment decisions, predicting that "companies and countries that do not respond to stakeholders and address sustainability risks will encounter growing skepticism from the markets, and in turn, a higher cost of capital."[38] This approach takes for granted the sufficiency of such mechanisms for redirecting major corporations toward long-term sustainable operations.[39] Although renewed scrutiny of shareholder-centric corporate governance is a welcome development, such initiatives are ill-equipped to promote corporate sustainability because they remain tethered to a conception of the corporate form that obscures the nature of the underlying problem. Core features of the corporate form, as presently conceived,

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36. COUNCIL OF INSTITUTIONAL INVS., *supra* note 4.

37. *See* CHRISTOPHER M. BRUNER, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD: THE POLITICAL FOUNDATIONS OF SHAREHOLDER POWER 53-65 (2013); *see also infra* Part I (surveying theoretical frameworks).

38. Fink, *supra* note 8. On the relation to investment risk, see Condon, *supra* note 13, at 11-12; Virginia Harper Ho, *Risk-Related Activism: The Business Case for Monitoring Nonfinancial Risk*, 41 J. CORP. L. 647, 655-58 (2016); and Beate Sjåfjell, *Reforming EU Company Law to Secure the Future of European Business*, 18 EUR. CO. & FIN. L. REV. 190, 196-202 (2021).

39. *Cf.* Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1291 (2008) (observing that the Efficient Capital Market Hypothesis, which posits that stock prices accurately reflect companies' fundamental economic value, "has fallen into serious disrepair" as mounting evidence indicates that "stock market prices often depart substantially from reasonable estimates of fundamental economic value"); Tan, *supra* note 33, at 200 (observing that "the premises of [the Efficient Capital Market Hypothesis] are highly questionable").

are simply unsustainable—environmentally, socially, and economically.[40] Promoting sustainable corporate governance will require reforming features of the corporation that incentivize excessive risk-taking and externalization of costs onto society.

This Feature interrogates the conceptual binaries that structure the accepted framework of corporate governance and surfaces more fundamental corporate dynamics giving rise to corporate excesses in the first place. To set the stage, Part I canvasses prevailing conceptions of the corporation and corporate law—specifically, shareholder-primacy theory, nexus-of-contracts theory, and team production theory. The aim is not to provide a comprehensive account of their strengths and weaknesses, but rather to analyze how they collectively frame corporate governance debates. These theories generally focus exclusively on two conceptual binaries: board-versus-shareholder power, and shareholder-versus-stakeholder purpose. Accordingly, reform efforts conditioned by these theories tend to hold constant the underlying features of the corporate form and associated capital-market structures, and so fail to grapple with the fundamental forces that drive risk-taking and cost externalization.

We should instead focus on fundamental drivers of corporate risk-taking and externalization of environmental, social, and economic costs, and ask how we can alter decision makers' incentives so as to steer corporate conduct in a more sustainable direction. Rather than asking which corporate constituency's existing incentives represent the least-bad proxy for larger social goals, we should explore how to adjust their incentives to promote sustainable modes of corporate governance. Accordingly, in Part II, I present a more capacious and flexible framework for understanding the corporate form and evaluating corporate governance reform proposals. I analyze the features of the corporate form that strongly incentivize risk-taking and externalization of costs onto society, discuss the concept of sustainability and its implications for corporate governance, and

40. On this tripartite conception of sustainability, see World Comm'n on Env't & Dev., Our Common Future, ¶¶ 1-30, U.N. Doc. A/42/427, annex (Mar. 20, 1987) [hereinafter *Brundtland Report*], https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf [https://perma.cc/3ZE5-L8RL]. *See also* David Griggs, Mark Stafford-Smith, Owen Gaffney, Johan Rockström, Marcus C. Öhman, Priya Shyamsundar, Will Steffen, Gisbert Glaser, Norichika Kanie & Ian Noble, *Sustainable Development Goals for People and Planet*, 495 NATURE 305, 306 (2013) (arguing that this tripartite conception should be viewed "as a nested concept" in which "[t]he global economy services society, which lies within Earth's life-support system"); Melissa Leach, Kate Raworth & Johan Rockström, *Between Social and Planetary Boundaries: Navigating Pathways in the Safe and Just Space for Humanity*, *in* UNITED NATIONS EDUC., SCI. & CULTURAL ORG. & INT'L SOC. SCI. COUNCIL, WORLD SOCIAL SCIENCE REPORT 2013: CHANGING GLOBAL ENVIRONMENTS 84, 85 (2013) (arguing for "inclusive and sustainable development" between "the inner limits of social boundaries and the outer limits of planetary boundaries"); discussion *infra* Section II.B.

assess how the corporate form and corporate law might be re-envisioned to produce better results.

In Part III, I use this framework to critically evaluate the proposals garnering the most attention today, and to direct attention toward the broader landscape of reforms that become visible through this wider conceptual lens. Recent reform initiatives typically employ disclosure-based strategies, which create the impression of regulatory action, but remain unlikely to substantially improve matters on their own. Disclosure initiatives do not directly require corporate actors to change anything about how they currently operate; do not alter the incentives of shareholders, the predominant audience, making it unlikely that investor pressures would lead managers to reform corporate decision-making in any fundamental way; and are often limited by reference to financial materiality, a narrow concept that is hardly coextensive with society's goals. Although such initiatives might support more robust reform, they too often substitute for it, and are unlikely to produce sufficient change on their own.

More ambitious initiatives that take direct aim at board structure—notably, by improving board diversity, and by involving labor in corporate decision-making—have real potential to promote greater social and economic sustainability. Environmental sustainability remains another matter, however, as the Volkswagen emissions scandal illustrates. Although the German automaker has long had a codetermined board giving labor substantial representation, the company pursued a strategy of relentless growth that encouraged harmful, and thoroughly unsustainable, business practices.[41] Simply put, employees can have bad incentives too—a reality suggesting that, as important as reforming board structure may be in advancing social and economic sustainability, it remains an incomplete response to the broader sustainability imperative.

Reforms taking direct aim at underlying incentive structures merit real attention. Notably, proposals for imposing varying degrees of liability on shareholders themselves, in limited and targeted ways, can be fine-tuned to curb socially harmful risk-taking in particular financial and economic contexts, while preserving socially valuable efficiencies of the corporate form. Likewise, in the context of global value chains—where widespread human-rights abuses and environmental harms have been committed by subsidiaries and suppliers of consumer-facing companies headquartered in more affluent jurisdictions—reforms

41. *See* Matthew T. Bodie, *Worker Participation, Sustainability and the Puzzle of the Volkswagen Emissions Scandal*, *in* THE CAMBRIDGE HANDBOOK OF CORPORATE LAW, CORPORATE GOVERNANCE AND SUSTAINABILITY, *supra* note 11, at 246, 246-59.

are emerging that could sharpen the incentives of corporate parents and contractual "lead firms" to monitor more effectively, to disclose what they find, and to take meaningful action to prevent or remediate such harms.[42]

These analyses suggest that there is in fact no single calibration of the corporate form that will promote optimal levels of risk-taking in all financial and economic contexts. Rather, differing business realities and risk profiles will require more granular assessment by industry, and the optimal liability structures and risk incentives in various settings likely will not be identical. Most critical at this stage is that we begin to ask the right questions, with an eye toward the corporate form's flexible capacities, in order to identify more sustainable governance reforms than those presently garnering substantial attention. Until we begin to scrutinize the fundamental attributes of the corporate form and the decision-making incentives they produce with reference to long-term sustainability, effective responses to the interconnected crises we face today will continue to elude us.

I. CORPORATE THEORY AND THE LANGUAGE OF REFORM

Corporate governance remains hotly contested terrain, and there is a wide range of views on the optimal governance of large public corporations in particular. These debates have increasingly unfolded, however, within a narrow conceptual range. In this Part, I examine prevailing theories of corporate governance in U.S. public corporations (Section I.A), and then situate them amidst broader possibilities (Section I.B).

A. *Prevailing Theories of Corporate Law*

This Section briefly canvasses prevailing theoretical frameworks. It aims not to provide a comprehensive account or a detailed examination of their strengths and weaknesses, but rather to identify how they collectively condition our thinking about corporate governance and limit our sense of the possible by mutually constructing a narrow conceptual language of reform.

1. *Shareholder Primacy: Shareholder Power and Shareholder Purpose*

The "shareholder primacy" theory places shareholders at the heart of the corporation in all respects: shareholders own the corporation and hire managers to run it for them. This view was most famously expressed by Milton Friedman, who wrote that "a corporate executive is an employe[e] of the owners of the

42. *See infra* Section III.C.

business," with "direct responsibility to his employers," and therefore duty-bound "to conduct the business in accordance with their desires, which generally will be to make as much money as possible while conforming to the basic rules of the society."[43] For Friedman, this is a straightforward principal-agent relationship, and the "whole justification for permitting the corporate executive to be selected by the stockholders is that the executive is an agent serving the interests of his principal."[44]

This view prioritizes shareholder interests through majoritarian default rules. For example, Friedman recognizes that a corporation established "for an eleemosynary purpose" need not prioritize shareholders in its decision-making, but he argues that aside from such instances of express deviation from the default approach, "the manager is the agent of the individuals who own the corporation . . . and his primary responsibility is to them."[45] Accordingly, boards and the managers they appoint may not ordinarily prioritize unrelated "'social' purposes" because they lack any legal justification for doing so.[46]

At the same time, shareholder-primacy theory locates ultimate corporate governance power with the shareholders. For Friedman, the shareholder franchise suggests that the board's power is literally delegated to them by shareholders, and the principal-agent characterization suggests that shareholders should ultimately be in a position to call the shots, even if they ordinarily choose to rely on managerial judgment.[47] Subsequent calls for shareholder empowerment are broadly consistent with this view, arguing that board power is more narrowly and specifically grounded in election by shareholders, that board decision-making accordingly should focus exclusively on shareholder interests, and that shareholders' governance powers ought to be enhanced in order to constrain managerial discretion along these lines.[48]

Overall, shareholder primacy theorists prioritize shareholder interests in board decision-making and advocate a high degree of direct accountability

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43. Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Profits*, N.Y. TIMES MAG., Sept. 13, 1970, https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html [https://perma.cc/XTV9-Y2CE].

44. *Id.*

45. *Id.*

46. *Id.*

47. *Cf.* RESTATEMENT (THIRD) OF AGENCY § 8.09 (AM. L. INST. 2006) (describing an agent's duty of obedience).

48. *See, e.g.*, Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 676-79 (2007).

through strong shareholder governance powers.[49] Corporate governance policy essentially amounts to board-versus-shareholder power and shareholder-versus-stakeholder purpose, and for shareholder primacy theorists, the favored approach combines shareholder power and shareholder purpose.

2. *Nexus of Contracts: Board Power and Shareholder Purpose*

The law-and-economics-inspired "nexus of contracts" theory presents the corporation as a nexus of private contracts and correlatively corporate law as an extension of contract law that exists primarily to facilitate raising equity capital. In what is regarded as "the definitive theoretical account of corporate law from a neoclassical, contractarian perspective,"[50] Judge Frank H. Easterbrook and Daniel R. Fischel advance the mixed normative and positive argument that "corporate law should contain the terms people would [hypothetically] have negotiated, were the costs of negotiating at arm's length for every contingency sufficiently low," and that the law "almost always conforms to this model."[51]

For nexus theorists, no particular group can be said to "own" the corporation, because the corporation itself is simply an abstract legal nexus through which various corporate stakeholders negotiate the terms on which they will associate with the business.[52] Corporate law serves primarily to supply the default rules that stand in the background of any particular deal, and nexus theorists argue that those defaults should, and typically do, favor shareholders.[53] On this account, shareholder interests dominate because providers of equity capital, as residual claimants, would rationally negotiate for a governance system that aligns decision-making with their interests—both procedurally, through power to elect the board, and substantively, through directors' duties prioritizing shareholders.[54] Other stakeholders—such as creditors, employees, customers, and suppliers—have various forms of fixed contractual claims, and so, it is assumed,

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49. *See generally id.* (proposing reforms for strengthening shareholder power to remove directors); Bebchuk & Tallarita, *supra* note 5 (rejecting "stakeholderism" as a corporate governance model); Friedman, *supra* note 43 (arguing that the sole social responsibility of corporations is to increase profits, subject to open competition).

50. KENT GREENFIELD, THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES 4 (2006).

51. EASTERBROOK & FISCHEL, *supra* note 28, at 15.

52. *See* Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. REV. 601, 603-04 (2006).

53. *See* EASTERBROOK & FISCHEL, *supra* note 28, at 34-39.

54. *See id.* at 63-70, 90-93.

would place less value on voting rights and duties keyed to their interests. Accordingly, these nonshareholder constituencies are generally left to seek protections elsewhere, notably by negotiating for them in their contracts with the corporation and by pursuing extracorporate forms of regulation through political and administrative processes.[55] The same effectively goes for those who do not directly contract with the corporation but are affected by its activities. While Judge Easterbrook and Fischel largely ignore such effects, going so far as to assume that there are literally no externalities borne by "strangers to the contracts,"[56] they assert that even if there were, they could be comprehensively addressed through other forms of regulation.[57] To be sure, any given corporation might adopt bespoke charter or bylaw provisions favorable to nonshareholders or other interests, but such departures from shareholder-centric governance would violate the implicit deal unless agreed upon up front.[58]

Despite the centrality of shareholder voting rights and shareholder-focused fiduciary duties, however, nexus theory departs from shareholder-primacy theory in favoring strong boards. Nexus theorists argue that minority shareholders in large corporations typically remain rationally apathetic and thereby rely heavily on centralized board decision-making. At most, shareholders discipline management in extreme scenarios, primarily through the market for control that arises from the potential for hostile takeovers.[59] This combination of board power with shareholder purpose reaches its zenith in Stephen M. Bainbridge's "director primacy" theory, essentially a variant of nexus theory building on literature that emphasizes the efficiency benefits of centralized "fiat" in complex organizations.[60] For Bainbridge, the board serves as "a sort of Platonic guardian" for the shareholders, although its governance legitimacy is more broadly grounded.[61] The board, on this view, constitutes "a *sui generis* body serving as the nexus for the various contracts making up the corporation and whose powers

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55. *See id.* at 35-39.

56. *See id.* at 6-7.

57. *See id.* at 35-39.

58. *See id.* at 35-37.

59. *See id.* at 70-72.

60. *See* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 552-60 (2003). For additional background, see generally KENNETH J. ARROW, THE LIMITS OF ORGANIZATION (1974); and R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

61. Bainbridge, *supra* note 60, at 550-51.

flow not from shareholders alone, but from the complete set of contracts constituting the firm."[62]

Nexus theory similarly reduces corporate governance policy to board-versus-shareholder power and shareholder-versus-stakeholder purpose, but the favored approach among nexus theorists combines board power and shareholder purpose.

3. *Team Production: Board Power and Stakeholder Purpose*

The "team production" theory developed by Margaret M. Blair and Lynn A. Stout[63] represents a prominent alternative to the now-dominant nexus-of-contracts theory.[64] But it frames fundamental debates about corporate law in much the same way, which should not be surprising given that team production theory is itself another variant of nexus theory. The critical difference is that team production theorists reject the notion that shareholders are the sole residual claimants. For Blair and Stout, the public corporation represents "a nexus of firm-specific investments" by various groups of stakeholders providing a range of essential contributions to corporate production.[65] Accordingly, while resembling nexus theory in its heavy reliance on board power, team production theory directs that power toward very different ends.[66]

Blair and Stout argue that the fundamental aim of the corporate form is not merely to marshal equity capital, but rather to marshal all the various stakeholder groups contributing to corporate production—shareholders, creditors, employees, and others. They define "team production" as "complex productive activity that requires multiple parties to make contributions that are to some extent both team specific and unverifiable to an outside party," resulting in outputs that cannot be apportioned based on relative contributions to the enterprise.[67] On this view, the corporation is best conceptualized "not as a nexus of implicit and explicit contracts, but as a nexus of firm-specific investments made by many and varied individuals who give up control over those resources to a decisionmaking

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62. *Id.* at 560.

63. *See generally* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999).

64. *See* David Millon, *New Game Plan or Business as Usual? A Critique of the Team Production Model of Corporate Law*, 86 VA. L. REV. 1001, 1001-05 (2000).

65. Blair & Stout, *supra* note 63, at 275-76.

66. *See* Bainbridge, *supra* note 60, at 551-52.

67. Margaret M. Blair & Lynn A. Stout, *Director Accountability and the Mediating Role of the Corporate Board*, 79 WASH. U. L.Q. 403, 418-20 (2001).

process in hopes of sharing in the benefits that can flow from team production."[68]

To the extent that the corporate form and corporate law aim to facilitate team production through the collective contributions of various stakeholders, all of whom are vulnerable to opportunistic behavior, it stands to reason that strong-form shareholder centrism of the sort embraced by shareholder primacy and nexus theorists cannot serve as the organizing principle for corporate law. Excessive shareholder centrism would inhibit the board's capacity to provide credible assurances to everyone else. Accordingly, team production theorists characterize the board as a "mediating hierarch," duty-bound not to focus exclusively on shareholders, but rather to act as a "trustee[] for the corporation itself."[69] Team production theorists resemble nexus theorists in favoring centralized management through a strong board, but they ground board power in an entirely different rationale—the capacity it gives the board to credibly assure each stakeholder group that it will not be exploited by, or for the benefit of, the others.

Team production theory arrives at a very different conception of the aims of corporate decision-making, yet corporate governance policy is again reduced to board-versus-shareholder power, and shareholder-versus-stakeholder purpose. For team production theorists, the favored approach combines board power and stakeholder purpose.

4. *The Incompleteness of Prevailing Theories*

The foregoing theories vary considerably in their positive claims and normative preferences. But the fundamental nature of the disagreements among them can be expressed concisely, because they all focus on two dimensions of corporate governance, each framed in binary terms. To be sure, these two dimensions alone provide ample fodder for spirited disagreement. However, it should not surprise us that efforts to capture the complexities of the corporate form and corporate law by reference to two binary variables ultimately fail to provide compelling positive or normative conceptions of the field.

For present purposes, it is unnecessary to dilate on these theories' strengths and weaknesses, which I have explored elsewhere.[70] Briefly, the now-dominant nexus theory does well with those areas of U.S. corporate law that tend to insulate boards from shareholder interference, such as boards' sweeping statutory

68. Blair & Stout, *supra* note 63, at 285 (emphasis omitted).

69. *Id.* at 280-81 (emphasis omitted).

70. *See, e.g.*, BRUNER, *supra* note 37, at 53-65; Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385, 1395-1408 (2008).

governance authority[71] and veto power over fundamental actions.[72] But this theory offers no coherent account of shareholder capacity to act unilaterally through bylaws,[73] or domains of managerial discretion, such as corporate charitable donations[74] and capacity to deploy powerful takeover defenses,[75] that appear to be grounded in broader values.

Conversely, team production theory does well with structures that deviate from strict adherence to shareholder interests, yet offers no compelling account of structures that clearly favor shareholders—notably, board election and approval rights,[76] direct fiduciary duties,[77] and derivative standing.[78] Further, the "mediating hierarch" conception of the board would seem to require a mandate to consider all stakeholders, not mere discretion to do so. As David Millon observes in his critique of team production theory, "[t]he very discretion that allows corporate boards to pay attention to nonshareholder as well as shareholder

71. *See, e.g.*, DEL. CODE ANN. tit. 8, § 141(a) (2021).

72. *See, e.g.*, *id.* § 242(b) (charter amendments); *id.* § 251(b) (mergers); *id.* § 271(a) (asset sales).

73. *See, e.g.*, *id.* § 109(a). On the implications, see generally Christopher M. Bruner, *Managing Corporate Federalism: The Least-Bad Approach to the Shareholder Bylaw Debate*, 36 DEL. J. CORP. L. 1, 1 (2011), which explores "the contested nature of bylaws" and "the fundamental issues of corporate power and purpose that they implicate."

74. *See, e.g.*, DEL. CODE ANN. tit. 8, § 122(9) (2021); *see also* Kahn v. Sullivan, 594 A.2d 48, 61 (Del. 1991) (explaining that section 122(9) of the Delaware General Corporation Law authorizes reasonable charitable gifts); Theodora Holding Corp. v. Henderson, 257 A.2d 398, 405 (Del. Ch. 1969) (same); A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581, 586 (N.J. 1953) (explaining that the New Jersey statute allows corporate donations "within reasonable limits").

75. *See, e.g.*, Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954-55 (Del. 1985); Moran v. Household Int'l, Inc., 500 A.2d 1346, 1350-54 (Del. 1985); Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1149-54 (Del. 1989). Delaware nominally legitimates defenses by reference to "some rationally related benefit accruing to the stockholders." Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 176 (Del. 1986); *see also* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 33 (Del. Ch. 2010) ("Promoting, protecting, or pursuing non-stockholder considerations must lead at some point to value for stockholders."). Many other states do not, expressly providing broad discretion to balance competing interests. *See, e.g.*, IND. CODE § 23-1-35-1(d)-(g) (2021). The business-judgment rule effectively accomplishes the same in Delaware. *See, e.g.*, Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 770-71 (2005); Lyman Johnson, *The Delaware Judiciary and the Meaning of Corporate Life and Corporate Law*, 68 TEX. L. REV. 865, 914-16 (1990); Jonathan R. Macey, *Corporate Law as Myth*, 93 S. CAL. L. REV. 923, 949-50 (2020).

76. *See, e.g.*, DEL. CODE ANN. tit. 8, § 216 (2021) (elections and ordinary matters); *id.* § 242(b) (charter amendments); *id.* § 251(c) (mergers); *id.* § 271(a) (asset sales).

77. *See, e.g.*, Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939).

78. *See, e.g.*, N. Am. Cath. Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 99-103 (Del. 2007).

interests also allows them to pursue shareholder value with relentless disregard for social costs."[79]

Shareholder primacy, meanwhile, faces the same problems that nexus theory does in explaining deviations from shareholder interests, but encounters additional challenges as well. Notably, it offers no coherent account of structures that empower boards and insulate them from shareholder interference. Indeed, characterization of the shareholder-board relationship in principal-agent terms is straightforwardly contradicted by the accepted position in U.S. corporate law that the board's power, once elected, flows directly from the incorporation statute.[80] As a doctrinal matter, officers are agents of the corporation, not the shareholders, and directors are not agents at all (although they are certainly fiduciaries).[81] The shareholder-primacy account may be somewhat more persuasively applied to the U.K. company, in which the board's power is in fact directly delegated by shareholders (via the articles); shareholders retain extraordinary governance powers unavailable to their U.S. counterparts; and directors are expressly duty-bound by statute to prioritize shareholders, considering other interests and values only as means to that end—so-called "enlightened shareholder value."[82] Even in the United Kingdom, however, directors are not legally regarded as agents of the shareholders.[83]

As I have argued elsewhere, given the varying strengths and weaknesses of these prevailing theories, U.S. corporate law appears fundamentally "ambivalent" on the issues of board-versus-shareholder power and shareholder-versus-stakeholder purpose.[84] The incompleteness of such frameworks suggests that a comprehensive account of the corporation and corporate law must embrace a broader range of dynamics and interests.

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79. Millon, *supra* note 64, at 1022.

80. *See, e.g.*, Manson v. Curtis, 119 N.E. 559, 562 (N.Y. 1918) (describing board powers as "original and undelegated" in that they are "received from the state in the act of incorporation"); *see also* DEL. CODE ANN. tit. 8, § 141(a) (2021) ("The business and affairs of every corporation organized under this chapter shall be managed by . . . a board of directors, except as may be otherwise provided in this chapter.").

81. *See* WILLIAM T. ALLEN & REINIER KRAAKMAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 97-101 (5th ed. 2016).

82. *See* BRUNER, *supra* note 37, at 29-36, 161-66; *see also* Companies Act 2006, c. 46, § 172(1) (Eng.) (charging company directors with acting in "the way . . . most likely to promote the success of the company for the benefit of its members as a whole," and to consider other priorities only in servicing that end).

83. *See* MARC MOORE & MARTIN PETRIN, CORPORATE GOVERNANCE: LAW, REGULATION AND THEORY 72-74 (2017).

84. *See* Bruner, *supra* note 70, at 1386 (arguing that corporate law is ambivalent about who holds governance authority and who benefits from corporate production).

B. *Broader Possibilities*

That debates regarding a domain of activity as multifaceted as public-company governance have effectively shrunk to just two binary variables should give us pause. What might a broader range of possibilities include, and how might our modes of conceptualizing corporate governance evolve to embrace them?

Remaining with these twin binaries for the moment, it is telling that they focus on three possibilities but ignore a fourth. As the discussion above suggests, the shareholder-primacy theory, the nexus of contracts theory, and the team production theory essentially populate three of the four cells of a two-by-two matrix:

	BOARD POWER	SHAREHOLDER POWER
SHAREHOLDER PURPOSE	Nexus of contracts	Shareholder primacy
STAKEHOLDER PURPOSE	Team production	?

Why does no prevailing theory of corporate governance pair shareholder power with stakeholder purpose? Presumably, shareholders cannot be expected to use the governance powers at their disposal to advance anyone's interests but their own. As Iman Anabtawi and Lynn Stout observe, "outside the narrow contexts of closely held companies and self-dealing by majority shareholders, many commentators assume shareholders have no duties at all," remaining "at liberty to try to influence corporate policy as they see fit—including . . . in ways that favor their own interests over those of the corporation and other shareholders."[85]

This doctrinal reality has prompted particular concerns about activism pursued by hedge funds, given their "short-term focus" relative to other types of institutional investors such as index funds, pensions, and insurance companies.[86] Indeed, the fundamental divergence of interests prompts Anabtawi and Stout to advocate that "all shareholders, like all directors and officers, be viewed as owing latent duties to the firm and their fellow shareholders," which should

85. Anabtawi & Stout, *supra* note 39, at 1257.

86. *Id.* at 1291; *see also* Leo E. Strine, Jr., *One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed for the Long Term Unless Their Powerful Electorates Also Act and Think Long Term?*, 66 BUS. LAW. 1, 3-12 (2010) (arguing that investors with long-term incentives produce better outcomes).

apply whenever a shareholder "in fact manages to successfully influence the company's actions with regard to a particular issue in which that shareholder has a material, personal economic interest."[87] This proposal amounts to a normative call to reconceive the exercise of shareholder power to render it more compatible with stakeholder purpose, at least to a limited extent and in limited circumstances—underscoring the fact that corporate law presently provides no reason to expect this. The "investor stewardship" movement that followed the global financial crisis—taking the form of nonbinding codes exhorting institutional investors to engage with corporate management to promote greater orientation toward the public interest—might be interpreted as a tentative step in this direction.[88] But such initiatives typically provide no account of why shareholders would be likely to exercise their discretionary powers in this manner, and the practical results remain underwhelming.[89] These dynamics suggest that we should not expect much from shareholder-focused reform efforts unless we are prepared to revisit the legal structures and market dynamics that condition the incentives of shareholders themselves.[90]

These observations are reinforced by a comparison with corporate governance models prevailing elsewhere, which plainly cannot be described by reference to the twin binaries that preoccupy U.S. theorists. In Germany, for example, workers in large companies are granted substantial participation rights, described as "codetermination," in the form of works councils in the workplace and representation on the supervisory board, which in turn appoints and monitors the management board in the two-tier German board structure.[91] The Works Constitution Act requires works councils at companies with five or more em-

87. Anabtawi & Stout, *supra* note 39, at 1295.

88. *See* Tan, *supra* note 33, at 209-12 (advocating stewardship codes as a more moderate alternative to Anabtawi and Stout's proposal); Harper Ho, *supra* note 38, at 699 ("Policy guidelines modeled on the investor codes adopted by the United Kingdom and other governments offer the most direct approach to address the twin challenges of generally incentivizing active monitoring by institutional investors and improving the accountability of shareholder activists.").

89. *See* Dionysia Katelouzou, *Shareholder Stewardship: A Case of (Re)Embedding the Institutional Investors and the Corporation?*, *in* THE CAMBRIDGE HANDBOOK OF CORPORATE LAW, CORPORATE GOVERNANCE AND SUSTAINABILITY, *supra* note 11, at 581, 594-95 ("[T]he current self-regulatory route has only limited potential for promoting strong sustainability."); *see also* BRUNER, *supra* note 37, at 265-67, 272-73 (evaluating the U.K. Stewardship Code's ability to moderate shareholders' prioritization of short-term performance).

90. *See infra* Part II; Section III.C.

91. *See Co-determination*, FED. MINISTRY LAB. & SOC. AFFS. 4 (2019) [hereinafter *Co-determination*], https://www.bmas.de/SharedDocs/Downloads/EN/PDF-Publikationen/a741e-co-determination.pdf?__blob=publicationFile&v=1 [https://perma.cc/4J8Q-CS3Y].

ployees, and gives workers extensive rights to participate in a wide array of decisions affecting "social welfare, personnel and economic matters."[92] The Codetermination Act further requires that most companies with over 2,000 employees give shareholders and employees equal supervisory board representation, although shareholders elect the tie-breaking chair.[93] For smaller companies with over 500 employees, the employees receive one-third of the supervisory board seats.[94] In the coal, iron, and steel industries, where German codetermination originated, a special regime applies under which employees receive one-half representation on the supervisory boards of companies with over 1,000 employees, and the tie-breaking vote remains neutral.[95] Numerous other jurisdictions similarly give employees some form of governance role, including a majority of the members of the European Union,[96] as well as China, which has adopted a German-style quasi-two-tier board structure.[97] The theoretical frameworks

92. *Id.* at 5-6; *see also* Betriebsverfassungsgesetz [BetrVG] [Works Constitution Act], Sept. 25, 2001, BUNDESGESETZBLATT I [BGBL I] at 2518, as amended (Ger.) (trans. *id.* at 17-71) (providing the full text of the Works Constitution Act).

93. *See Co-determination*, *supra* note 91, at 11 (explaining that shareholders "do have slightly more say, since the chairperson—who in practice is invariably a shareholder representative—has an additional casting vote to ensure that a majority is obtained whenever the board has come to a tied voting decision at the second attempt"); *see also* Mitbestimmungsgesetz [MitbestG] [Co-determination Act], May 4, 1976, BUNDESGESETZBLATT I [BGBL I] at 1153, as amended (Ger.) (trans. *id.* at 88-102) (providing the full text of the Co-determination Act); Aktiengesetz [AktG] [Stock Corporation Act], Sept. 6, 1965, BUNDESGESETZBLATT I [BGBL I] at 1089, §§ 96, 101, last amended by Gesetz [G], July 17, 2017, BGBL I at 2446, art. 9 (Ger.), http://www.gesetze-im-internet.de/englisch_aktg/englisch_aktg.html [https://perma.cc/6GJX-5XCV] (full text of the Stock Corporation Act, translated by Samson Übersetzungen GmbH, Dr. Carmen von Schöning, published by the Federal Ministry of Justice and Consumer Protection).

94. *See Co-determination*, *supra* note 91, at 12; *see also* Drittelbeteiligungsgesetz [DrittelbG] [Law on One-Third Employee Representation in the Supervisory Board], May 18, 2004, last amended Apr. 24, 2015, arts. 1, 4 (Ger.) (trans. *id.* at 103-06) (providing the full text of the Law on One-Third Employee Representation in the Supervisory Board).

95. *See Co-determination*, *supra* note 91, at 12.

96. *See* Inst. for Codetermination & Corp. Governance, *Why Codetermination?: A Collection of Good Arguments for Strong Workers' Voice*, HANS-BÖCKLER-STIFTUNG (Oct. 2019), https://www.boeckler.de/pdf/mbf_praes_arguments_co_determination.pdf [https://perma.cc/4TW6-XGS8].

97. *See* JINGCHEN ZHAO, CORPORATE SOCIAL RESPONSIBILITY IN CONTEMPORARY CHINA 97-98 (2014).

described above cannot accommodate this broader conception of corporate governance, which even defies tidy doctrinal distinctions between corporate and labor law, and between private and public law generally.[98]

South Africa offers another example of a corporate governance system defying accepted theoretical frameworks and doctrinal categories. South African company law was historically built upon shareholder-centric English models.[99] But reforms have made powerful remedies such as derivative suits available to various other stakeholders, including employee representatives.[100] They have also required listed companies (among others) to form a "social and ethics committee" charged with monitoring corporate performance as it affects a wide range of stakeholders, society in general, and the environment.[101] Although the extent of this committee's formal governance power remains uncertain,[102] influential commentators have advocated a relatively robust role.[103] Theoretical frameworks like those described above cannot accommodate governance innovations like these, which aim to empower stakeholders other than shareholders and to advance a wide array of private and public interests and values.

Such structures convey by contrast how circumscribed our contemporary corporate governance debates have become. While the theoretical frameworks described above vary considerably in their visions of corporate power and purpose, they imagine only a narrow range of potential outcomes because they hold constant several fundamental dimensions of the corporate form. Students of corporate law, in the United States and increasingly elsewhere, are typically taught that the corporation has certain fixed, intrinsic, and universal attributes, including legal personality for the business entity, limited liability for shareholders,

98. *See* JOHN W. CIOFFI, PUBLIC LAW AND PRIVATE POWER: CORPORATE GOVERNANCE REFORM IN THE AGE OF FINANCE CAPITALISM 38-39 (2010) (arguing that the law governing corporate governance in general sits at the nexus of securities, corporate, and labor law).

99. *See* Tshepo H. Mongalo, *The Social and Ethics Committee: Innovating Corporate Governance in South Africa*, *in* THE CAMBRIDGE HANDBOOK OF CORPORATE LAW, CORPORATE GOVERNANCE AND SUSTAINABILITY, *supra* note 11, at 360, 367.

100. *See* Companies Act 71 of 2008 § 165(2) (S. Afr.); *see also id.* §§ 20(4), 218(2) (providing legal remedies to a broad range of corporate stakeholders).

101. *See id.* § 72(4); Companies Regulation, 2011, Reg. 43, GN R.351 of GG 34239 (26 Apr. 2011) (S. Afr.); *JSE Limited Listings Requirements*, JOHANNESBURG STOCK EXCH. ¶ 3.84(c) (2019), https://www.jse.co.za/sites/default/files/media/documents/2019-04/JSE%20Listings%20Requirements.pdf [https://perma.cc/4UEF-YXRG].

102. *See* Mongalo, *supra* note 99, at 364-72.

103. *See King IV: Report on Corporate Governance for South Africa 2016*, INST. DIRS. S. AFR. 29-30, 57 (2016), https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/684B68A7-B768-465C-8214-E3A007F15A5A/IoDSA_King_IV_Report_-_WebVersion.pdf [https://perma.cc/FW4K-WF7D].

free transferability of shares, centralized management through a board of directors, and election of directors by shareholders.[104] In this framework, corporate law exists to provide and manage these specific attributes, its main preoccupation being the shareholder-board relationship. As the German and South African examples demonstrate, however, the capacities of the corporation and the aims of corporate law are not so simple or universal as these generalizations suggest. There are in fact numerous workable approaches to corporate governance that deviate from this static conception, pursuing very different visions of who should run corporations and toward what ends.

II. CORPORATE SUSTAINABILITY AND THE CORPORATE FORM

We need a more capacious framework for understanding corporate governance dynamics, moving beyond the binaries of board-versus-shareholder power and shareholder-versus-stakeholder purpose. This Part proposes a means of redirecting the conversation along such lines. First, I analyze features of the corporate form that strongly incentivize risk-taking and externalization of costs onto society (Section II.A). I then discuss the concept of sustainability as a normative framework for evaluating corporate governance (Section II.B). Finally, I propose a means of re-envisioning what the corporate form is, and what it could become (Section II.C), to facilitate discussion of potential reforms (Part III).

A. Excessive Risk-Taking and Cost Externalization

Assessing our options moving forward requires a clear sense of today's core problems. Fundamental problems associated with prevailing modes of corporate governance include both financialization and the excessive risk-taking and cost externalization it promotes.

104. *See, e.g.*, ALLEN & KRAAKMAN, *supra* note 81, at 75-77; ROBERT CHARLES CLARK, CORPORATE LAW 2-4 (1986); John Armour, Henry Hansmann, Reinier Kraakman & Mariana Pargendler, *What Is Corporate Law?*, *in* KRAAKMAN ET AL., *supra* note 32, at 1, 1-2, 5-15*; see also* Christopher M. Bruner, *The Corporation's Intrinsic Attributes*, *in* UNDERSTANDING THE COMPANY: CORPORATE GOVERNANCE AND THEORY 60, 66-70 (Barnali Choudhury & Martin Petrin eds., 2017) (discussing distinguishing features among various lists of the corporation's intrinsic attributes).

Financialization refers to the general trend since the 1970s whereby "financial considerations became increasingly central to the workings of the economy."[105] In the corporate context, financialization has manifested through structures prioritizing shareholder interests and appealing to financial markets.[106] These are complex economic and social phenomena,[107] but the normative shift toward shareholder-wealth maximization mainly reflects the rise of the law-and-economics movement and the associated framing of corporate governance as a matter of managing agency costs—an account that, as we have seen, strictly prioritizes equity financing and shareholder interests.[108] This perspective has been reinforced by growing adherence among legal and business academics;[109] by other forms of regulation requiring major investors to maximize their own re-

105. Gerald F. Davis & Suntae Kim, *Financialization of the Economy*, 41 ANN. REV. SOCIO. 203, 205 (2015).

106. *See* Stefanie Hiss, *The Politics of the Financialization of Sustainability*, 17 COMPETITION & CHANGE 234, 239 (2013).

107. *See* Gerald F. Davis, *After the Corporation*, 41 POL. & SOC'Y 283, 283 (2013); Davis & Kim, *supra* note 105, at 203; Ronald J. Gilson & Charles K. Whitehead, *Deconstructing Equity: Public Ownership, Agency Costs, and Complete Capital Markets*, 108 COLUM. L. REV. 231, 231 (2008).

108. *See generally* EASTERBROOK & FISCHEL, *supra* note 28 (arguing that corporate law resembles contractual arrangements that corporate stakeholders might hypothetically negotiate); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976) (describing a theory of corporate-ownership structure based on theories of agency, property rights, and finance); David Millon, *Radical Shareholder Primacy*, 10 U. SAINT THOMAS L.J. 1013, 1018-21 (2013) (describing the relation between shareholders and management in terms of agency and the normative implications of this view).

109. *See* Lyman P.Q. Johnson, *The Social Responsibility of Corporate Law Professors*, 76 TUL. L. REV. 1483, 1485-86 (2002); Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2603-05 (2021); Millon, *supra* note 108, at 1042.

turns, prompting further pressure on corporate managers to maximize distributable profits;[110] and by a shift toward securities regulation as a source of corporate governance rules.[111] Financialization can cause the short-term interests of investment intermediaries to displace the longer-term interests of most beneficial investors,[112] while at the same time distancing those beneficial investors from any direct confrontation with the corporate conduct that their savings finance.[113]

These dynamics promote excessive risk-taking and cost externalization, which are most readily understood in balance-sheet terms. Financial accounting defines equity as whatever is left after liabilities are subtracted from assets,[114] and shareholders accordingly favor actions that increase assets or decrease liabilities. Such actions benefit other stakeholders to the extent they involve mutually value-enhancing transactions,[115] but these ends might be pursued in less benign ways—for example, through fraud, excessive risk-taking, and indiscriminate cost cutting.[116]

Corporate financial statements simply do not reflect costs borne by workers and communities, environmental harms, human-rights violations in global

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110. 29 C.F.R. § 2550.404a-1(c), (e)(2)(ii), (f)(3) (2022); *see also* Christopher M. Bruner, *Center-Left Politics and Corporate Governance: What Is the "Progressive" Agenda?*, 2018 BYU L. REV. 267, 303-14 (2018) (describing the impact of pension-fund managers' duties under the Employee Retirement Income Security Act (ERISA) and associated regulations). Whether the Biden administration will alter this approach remains unclear. *See* Press Release, U.S. Department of Labor, U.S. Department of Labor Statement Regarding Enforcement of Its Final Rules on ESG Investments and Proxy Voting by Employee Benefit Plans (Mar. 10, 2021); *see also* Brian Croce, *DOL ESG Investing Rule Could Be Here to Stay: New Biden Administration Proposal Vastly Different from One Finalized Under Trump*, PENSIONS & INVS. (Nov. 1, 2021), https://www.pionline.com/washington/new-dol-proposal-esg-investing-could-be-here-stay-experts-say [https://perma.cc/337Y-ABKQ] (suggesting that a proposed Department of Labor rule recognizing the potential financial materiality of ESG factors could make it easier for ERISA fund managers to consider them, but noting that long-standing "regulatory 'pingpong'" on the subject could limit their confidence in doing so).

111. *See* Bruner, *supra* note 110, at 284-93, 314-26; Lund & Pollman, *supra* note 109, at 14-27 (discussing also the impacts of various capital-market actors, including institutional investors, investor and industry associations, proxy advisors, exchanges, indices, and rating agencies).

112. *See* Leo E. Strine, Jr., *Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance*, 33 J. CORP. L. 1, 10, 15-18 (2007).

113. *See* Bruner, *supra* note 70, at 1433-34.

114. *See* ALLEN & KRAAKMAN, *supra* note 81, at 105-09.

115. *See* Armour et al., *supra* note 104, at 23.

116. *See* LYNN A. STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 67-69, 87-89 (2012).

value chains, and so on.[117] Such externalized costs are very difficult to quantify, but existing estimates put them at a substantial percentage of U.S. gross domestic product (GDP).[118] This amounts to a public subsidy of businesses to the extent that society bears costs of production, which distorts markets because those costs are not brought to bear upon prices.[119] Although efforts are underway to devise "impact-weighted" financial statements that more fully reflect such costs, they remain nascent.[120]

Excessive risk-taking and cost externalization are directly rooted in the prevailing structural approach to the corporate form. Limited liability, in particular, generally leads shareholders to favor more risk-taking because they capture the upside without facing the full downside—indeed, promoting the financing of entrepreneurial risk-taking is understood to be the very purpose of conferring limited liability.[121] Structures reducing directors' exposure—including the business-judgment rule, exculpation, indemnification, and directors and officers (D&O) insurance[122]—make management more comfortable taking the risks that shareholders rationally prefer.[123] These structures straightforwardly lead to cost

117. *See* GREENFIELD, *supra* note 50, at 129.

118. *See, e.g.*, RALPH ESTES, TYRANNY OF THE BOTTOM LINE: WHY CORPORATIONS MAKE GOOD PEOPLE DO BAD THINGS 171-94 (1996) (estimating the social costs imposed by corporations at "$2,618 billion in 1994 dollars"); *see also* Walter H. Corson, *Recognizing Hidden Environmental and Social Costs and Reducing Ecological and Societal Damage Through Tax, Price, and Subsidy Reform*, 22 ENVIRONMENTALIST 67, 67-72 (2002) (estimating the environmental, economic, and social costs of "human activities" more generally at $5.1 trillion); Michael Simkovic, *Limited Liability and the Known Unknown*, 68 DUKE L.J. 275, 304-06 (2018) (arguing that the magnitude of externalization merits policy intervention).

119. *See* DAVID C. KORTEN, THE POST-CORPORATE WORLD: LIFE AFTER CAPITALISM 48 (1999).

120. For a prominent example of such an effort, see generally George Serafeim, T. Robert Zochowski & Jen Downing, *Impact-Weighted Financial Accounts: The Missing Piece for an Impact Economy*, HARV. BUS. SCH. (2019), https://www.hbs.edu/impact-weighted-accounts/Documents/Impact-Weighted-Accounts-Report-2019.pdf [https://perma.cc/9QRM-28CA] (arguing for the introduction of impact-weighed accounts, which "supplement the statement of financial health and performance by reflecting a company's positive and negative impacts on employees, customers, the environment and the broader society").

121. *See* Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 93-97 (1985).

122. *See, e.g.*, Aronson v. Lewis, 473 A.2d 805, 812-13 (Del. 1984); DEL. CODE ANN. tit. 8, §§ 102(b)(7), 145 (2020).

123. *See* Gagliardi v. TriFoods Int'l, Inc., 683 A.2d 1049, 1051-53 (Del. Ch. 1996). As the court explains in *Gagliardi*, shareholder returns "will be maximized if corporate directors and managers honestly assess risk and reward and accept for the corporation the highest risk adjusted returns available." *Id.* at 1052. But corporate directors "will tend to deviate from this rational acceptance of corporate risk if in authorizing the corporation to undertake a risky investment, the directors must assume some degree of personal risk relating to ex post facto claims of

externalization to the extent that harms imposed on others exceed the value of the company's assets,[124] and this incentivizes undercapitalization (including through strategic use of subsidiaries), underinvestment in precautions against third-party harms, and bet-the-farm risk-taking in the face of financial distress.[125] Such problems may loom even larger in contexts where risk-taking is further encouraged by public guarantees (explicit or implicit), as with financial firms, some of which are regarded as too big or too central to the financial system to be allowed to fail.[126] In recognition of these dynamics, corporate law has offered limited protections for creditors, such as distribution constraints and equitable doctrines of veil piercing and subordination, but these are widely regarded as weak and unpredictable.[127]

The potential for these dynamics to produce socially undesirable forms and degrees of risk-taking has been vividly illustrated over recent decades—notably, by the global financial crisis, which revealed how risk-taking to boost short-term returns for financial-firm shareholders can have devastating long-term consequences. For example, empirical studies following the crisis have associated higher degrees of shareholder centrism with more risk in the run-up to the crisis and worse outcomes afterward. Rüdiger Fahlenbrach and René M. Stulz found evidence suggesting that "banks led by CEOs whose interests were better aligned with those of their shareholders had worse stock returns and a worse return on equity" following the onset of the crisis.[128] A "plausible explanation," they suggest, is that bank management "focused on the interests of their shareholders in the build-up to the crisis and took actions that they believed the market would

derivative liability for any resulting corporate loss." *Id.* (emphasis omitted). Accordingly, through the business-judgment rule and similarly motivated statutory protections, corporate law "protects shareholder investment interests against the uneconomic consequences that the presence of such second-guessing risk would have on director action and shareholder wealth." *Id.* (emphasis omitted).

124. *See* Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879, 1883 (1991).

125. *See* ALLEN & KRAAKMAN, *supra* note 81, at 103-04, 112-14, 131-41; John Armour, Gerard Hertig & Hideki Kanda, *Transactions with Creditors*, *in* KRAAKMAN ET AL., *supra* note 32, at 109, 111-16; Easterbrook & Fischel, *supra* note 121, at 109-13.

126. *See* Christopher M. Bruner, *Corporate Governance Reform in a Time of Crisis*, 36 J. CORP. L. 309, 311-16 (2011); *see also infra* Section III.C (discussing this issue further, including pathways to reform).

127. *See* ALLEN & KRAAKMAN, *supra* note 81, at 109-11, 116-39; Easterbrook & Fischel, *supra* note 121, at 109-17.

128. Rüdiger Fahlenbrach & René M. Stulz, *Bank CEO Incentives and the Credit Crisis*, 99 J. FIN. ECON. 11, 12 (2011).

welcome," effectively prioritizing short-term returns over long-term consequences.[129] Similarly, Andrea Beltratti and Stulz found that "[b]anks with a shareholder-friendly board performed worse during the crisis," and suggested that "the most likely explanation is that shareholder-friendly boards positioned banks in ways that they believed maximized shareholder wealth . . . but left them more exposed to risks that manifested themselves during the crisis and had an adverse impact."[130] Consistent with this literature, "financial institutions with stronger and more shareholder-focused corporate governance mechanisms and boards of directors" have been found to be "associated with higher levels of systemic risk."[131]

Meanwhile, shareholder-centric corporate governance reforms, combined with growing institutional power, have prompted similar shifts in corporate policy in nonfinancial firms—including increased leverage and risk-taking, and reduced equity buffers following stock buybacks.[132] As Leo E. Strine, Jr., former Chief Justice of the Supreme Court of Delaware, has observed:

> [I]f the [corporate] electorate itself does not have the correct incentives and does not push an agenda that appropriately focuses on the long term, the responsiveness of managers to the incentives they face can result in business strategies that involve excessive risk and, perhaps most worrying, underinvestment in future growth.[133]

Additionally, empirical work examining the systemic-risk dynamics of nonfinancial firms has found that such corporate policies can propagate systemic shocks through the economy.[134]

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129. *Id.*; *see also* Luc Laeven & Ross Levine, *Bank Governance, Regulation and Risk Taking*, 93 J. FIN. ECON. 259, 273 (2009) (finding that "banks with more powerful owners tend to take greater risks").

130. Andrea Beltratti & René M. Stulz, *The Credit Crisis Around the Globe: Why Did Some Banks Perform Better?*, 105 J. FIN. ECON. 1, 2 (2012).

131. Jamshed Iqbal, Sascha Strobl & Sami Vähämaa, *Corporate Governance and the Systemic Risk of Financial Institutions*, 82 J. ECON. & BUS. 42, 43 (2015).

132. *See* Strine, *supra* note 86, at 14-15.

133. *Id.* at 16; *see also* Anabtawi & Stout, *supra* note 39, at 1290-92 (describing excessive risks promoted by short-term investors).

134. *See* Mardi Dungey, Thomas Flavin, Thomas O'Connor & Michael Wosser, *Industrial Firms and Systemic Risk* 15-16 (Maynooth Univ. Dep't of Econ. Fin. & Acct., Working Paper N298-20, 2020), https://ssrn.com/abstract=3555836 [https://perma.cc/8K49-LKAY] ("[D]ividend-paying firms are positively related to our measure of contribution to systemic risk. . . . Firms with a dual-class ownership structure . . . appear to be less systemically important."). They find corporate governance to be less significant in terms of firm vulnerability to systemic

To be sure, specifying optimal levels of risk-taking requires regard not just for negative externalities, but positive externalities as well,[135] and as discussed below, it is unlikely that socially desirable levels of risk will be identical across all industries.[136] It is critical to recognize, however, that endeavoring to assess this through a simplistic netting of negative and positive externalities against one another will likely prove impractical. For example, how might one coherently net social and economic positives against environmental negatives—particularly those threatening our long-term survival?[137] Tackling such questions will require a more robust normative conception of what the corporate form and corporate law exist to achieve, and how they aim to achieve it.

B. Conceptualizing Sustainability

There is a pressing need to revisit the underlying assumptions about the corporate form embedded in the twin binaries of board-versus-shareholder power and shareholder-versus-stakeholder purpose. We should begin by revisiting the fundamental aims of corporate law.

Prioritizing the sustainability of corporate operations provides a coherent and normatively desirable framework for evaluating prevailing modes of corporate governance and assessing options moving forward. Sustainability, as described in an influential 1987 United Nations report, aims to ensure that humanity "meets the needs of the present without compromising the ability of future generations to meet their own needs"—a challenge involving interrelated environmental, social, and economic dimensions.[138] This basic tripartite conception continues to frame the pursuit of sustainability today,[139] although the sustaina-

shocks, suggesting that bailout-related moral-hazard dynamics are less prominent in the nonfinancial context. *See id.* at 13-14. *But see infra* Section III.C (discussing events suggesting otherwise in the wake of the COVID-19 pandemic).

135. *See* Simkovic, *supra* note 118, at 327-28.

136. *See infra* Section III.C; *infra* Conclusion.

137. *See* Jukka Mähönen, *Comprehensive Approach to Relevant and Reliable Reporting in Europe: A Dream Impossible?*, SUSTAINABILITY 8 (June 30, 2020), https://www.mdpi.com/2071-1050/12/13/5277/pdf [https://perma.cc/E4QZ-SBHK]; *see also* Jeremy Andrew Nicholls, *Integrating Financial, Social and Environmental Accounting*, 11 SUSTAINABILITY ACCT. MGMT. & POL'Y J. 745, 756-57 (2020) (framing issues of substitution and resource allocation in such accounting systems); Serafeim et al., *supra* note 120, at 11 ("Care must be taken when aggregating impacts to not obscure material impacts to stakeholders through netting.").

138. *Brundtland Report*, *supra* note 40, ¶ 27.

139. *See, e.g.*, G.A. Res. 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development pmbl., ¶¶ 54-59 (Sept. 25, 2015).

bility paradigm has developed considerably since then—including through concerted application in the corporate context, where it contrasts starkly with narrower alternatives.[140]

Corporate social responsibility, for example, generally focuses on the "business case" for sustainability, subordinating sustainability concerns to existing corporate governance structures and priorities—an approach sometimes described as "weak sustainability."[141] To be sure, profit-driven rationales consistent with the business case are easily identified—notably, risk management and appealing to various constituencies[142]—and there is certainly evidence suggesting that sustainability-oriented policies can redound to a corporation's long-term benefit.[143] However, empirical results on the financial impacts of sustainable investing remain mixed,[144] and reliance on the weak-sustainability approach leaves companies with no clear incentives to pursue initiatives that are unlikely to generate profits, or likely to impair them,[145] suggesting that this limited form of sustainability commitment is unlikely to respond effectively to the fundamental problems discussed above. As George Serafeim observes, "many companies have already plucked the low-hanging fruit," and further progress "typically requires innovation—sometimes at a major scale—in processes, products, and business models."[146] Companies' willingness to pursue such initiatives "will largely depend on the corporate governance model that prevails."[147]

Strong sustainability, by contrast, reverses the priorities—subordinating pursuit of financial returns to what can actually be sustained—and accordingly

140. *See* Sjåfjell & Bruner, *supra* note 11, at 7-11.

141. *See id.* at 4, 7.

142. *See, e.g.*, Shlomit Azgad-Tromer, *The Virtuous Corporation: On Corporate Social Motivation and Law*, 19 U. PA. J. BUS. L. 341, 349-59 (2017); Gadinis & Miazad, *supra* note 27, at 1410-11.

143. *See, e.g.*, Robert G. Eccles, Ioannis Ioannou & George Serafeim, *The Impact of Corporate Sustainability on Organizational Processes and Performance*, 60 MGMT. SCI. 2835, 2836 (2014); Ioannis Ioannou & George Serafeim, *Corporate Sustainability: A Strategy?* 5-6 (Harv. Bus. Sch., Working Paper No. 19-065, 2021), https://www.hbs.edu/ris/Publication%20Files/WP19-065rev4-23-21_aefe2c98-5fa6-44c4-bbae-f68e6f283642.pdf [https://perma.cc/P4D4-6CM5]; *see also* George Serafeim, Ctr. for Effective Pub. Mgmt., *Turning a Profit While Doing Good: Aligning Sustainability with Corporate Performance*, BROOKINGS, INST. 8-10 (Dec. 2014), https://www.brookings.edu/wp-content/uploads/2016/06/serafeim.pdf [https://perma.cc/AF3B-TZ93] (discussing findings in Eccles et al., *supra*).

144. *See Global Financial Stability Report: Lower for Longer*, INT'L MONETARY FUND 85-87 (Oct. 2019), https://www.imf.org/-/media/Files/Publications/GFSR/2019/October/English/text.ashx [https://perma.cc/PG3G-CM84].

145. *See* Serafeim, *supra* note 143, at 4-6.

146. *Id.* at 15.

147. *Id.* at 16.

focuses on bringing corporate governance into conformity with the sustainability imperative.[148] This approach is exemplified by the work of economist Kate Raworth, who advocates that we aim to occupy "an ecologically safe and socially just space for humanity" between an environmentally defined ceiling and a socially defined floor.[149] Raworth's approach requires adopting different maximands at both macro and micro levels to prioritize a balanced existence within that safe and just space, rather than maximizing growth-oriented metrics such as GDP and shareholder wealth.[150]

Sustainability offers the benefit of a coherent long-term policy benchmark more directly keyed to broader human interests and more robustly supporting direct responses to fundamental problems of corporate governance. From this perspective, corporate sustainability means:

> [B]usiness and finance creating value in a manner that is (a) *environmentally* sustainable, in that it ensures the long-term stability and resilience of the ecosystems that support human life; (b) *socially* sustainable, in that it facilitates the achievement of human rights and other basic social rights, as well as good governance; and (c) *economically* sustainable, in that it satisfies the economic needs necessary for stable and resilient societies.[151]

Corporate sustainability, understood in such terms, measures corporate governance against a widely desired outcome to which business and investment leaders have expressed commitment,[152] even if its pursuit through corporate governance could take a variety of forms.

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148. *See* Sjåfjell & Bruner, *supra* note 11, at 4, 7-11.

149. KATE RAWORTH, DOUGHNUT ECONOMICS: SEVEN WAYS TO THINK LIKE A 21ST-CENTURY ECONOMIST 39 (2017).

150. *Id.; see also id.* at 37-51, 197-98 (arguing that economic development and business should be focused on creating a thriving world for humanity); Griggs et al., *supra* note 40, at 306 (arguing for a redefinition of sustainable development that accounts for planetary boundaries); Leach et al., *supra* note 40, at 84-85 (developing a framework for sustainable development based on inner social boundaries and outer planetary boundaries); *cf.* Light, *supra* note 29, at 201-12 (advocating an "environmental priority principle"). In economic usage, "maximand" refers to a "quantity which is to be maximized." *Maximand*, OXFORD ENG. DICTIONARY ONLINE (3d ed. 2001, modified June 2018), https://www.oed.com/view/Entry/239609 [https://perma.cc/9NSA-5LAZ].

151. Sjåfjell & Bruner, *supra* note 11, at 11.

152. *See, e.g.*, BUS. ROUNDTABLE, *supra* note 1, at 1; Fink, *supra* note 8. The practical significance of the Business Roundtable's 2019 statement is heavily contested. *Compare* Lucian A. Bebchuk & Roberto Tallarita, Opinion, *'Stakeholder' Talk Proves Empty Again*, WALL ST. J. (Aug. 18, 2021, 6:20 PM ET), https://www.wsj.com/articles/stakeholder-capitalism-esg-business-

C. Re-envisioning the Corporate Form and Corporate Law

In addition to rethinking our normative priorities, meaningfully addressing problems stemming from excessive risk-taking and cost externalization will require re-envisioning the corporate form. Specifically, in order to take advantage of the flexible capacities of the corporate form, we need to abandon the notion that it possesses a set of fixed attributes. This Section considers how fundamental features of the corporate form might be recalibrated to achieve different goals, and how various forms of recalibration might interact.

This is not to say that recalibrating the corporate form will render other reforms unnecessary. Since structures incentivizing socially undesirable risk-taking emanate from multiple legal fields, external forms of regulation will undoubtedly prove critical to constraining such excesses. For example, bankruptcy law increases the vulnerability of tort victims by treating them as unsecured creditors[153] and similarly deprioritizes environmental, labor, and other regulatory debts.[154] This creates incentives to externalize costs that reinforce those emanating from limited liability[155] and further incentivizes overinvestment in risky industries.[156] As in the corporate-law context, bankruptcy law prompts policy debates between theorists favoring narrower versus broader maximands,[157] complicated by similar dynamics of regulatory competition,[158] and commentators have observed that problems associated with excessive risk-taking could be

roundtable-diversity-and-inclusion-green-washing-11629313759 [https://perma.cc/PR8K-HCLN] (concluding that "signatory CEOs didn't intend to make any significant changes to how they do business" based on review of "an array of corporate documents"), *with* Martin Lipton, *More Myths from Lucian Bebchuk*, HARV. L. SCH. F. ON CORP. GOVERNANCE, (Aug. 24, 2021), https://corpgov.law.harvard.edu/2021/08/24/more-myths-from-lucian-bebchuk [https://perma.cc/U2YN-HS9X] (responding that Bebchuck and Tallarita's study focused on "high-level corporate governance documents and policies where evidence of stakeholder commitment is unlikely to be found"). Regardless, the statement clearly expresses normative commitment to corporate sustainability. Part III, *infra*, discusses proposals for more concrete reforms along those lines.

153. *See* Vincent S.J. Buccola & Joshua C. Macey, *Claim Durability and Bankruptcy's Tort Problem*, 38 YALE J. ON REGUL. 766, 767-68, 774-75 (2021).

154. *See id.* at 768 n.9, 789-92; *see also* Light, *supra* note 29, at 190-200 (discussing the disincentives bankruptcy law creates for firms to comply fully with their environmental obligations).

155. *See* Buccola & Macey, *supra* note 153, at 773-83; Joshua Macey & Jackson Salovaara, *Bankruptcy as Bailout: Coal Company Insolvency and the Erosion of Federal Law*, 71 STAN. L. REV. 879, 882-89, 904-11 (2019).

156. *See* Macey & Salovaara, *supra* note 155, at 949-50.

157. *See id.* at 943-45.

158. *See* Buccola & Macey, *supra* note 153, at 814-16.

addressed either through bankruptcy law or corporate law.[159] Meanwhile, antitrust law may inhibit corporate coordination to combat climate change, reflecting prioritization of the narrow maximand of "low prices and market 'efficiencies'" over broader "social benefits"[160] in a manner resembling debates about corporate purpose. This suggests that corporate responses to climate change and improved management of climate risks could be promoted through reforms to antitrust law as well.[161]

These examples suggest potential for mutually reinforcing reforms across multiple fields of law. But there is reason to doubt that extracorporate regulation alone could address the problems of excessive risk-taking and cost externalization, embedded as they are at the heart of the corporate form.[162] Many corporate scholars have questioned the prevailing assumption that externalities can be sufficiently addressed through extracorporate mechanisms and called attention to the general disregard prevailing corporate governance theories show for the possible insufficiency of external regulation.[163] Indeed, "economic effects that were treated as 'externalities' in twentieth-century theory have turned into defining social and ecological crises in the twenty-first century."[164] Given these realities, and the extraordinary influence that major corporations exert upon the political processes generating the regulations purportedly constraining them, there is growing recognition that it is no longer tenable to rely on extracorporate regulation alone to constrain risk-taking and cost externalization.[165] There is a pressing need to revisit the underlying assumptions about the corporate form embedded in the twin binaries of board-versus-shareholder power and shareholder-versus-stakeholder purpose, with respect to both our overarching aims and the means by which corporate law might help achieve them.

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159. *See id.* at 769-70, 778-83*;* BRUNER, *supra* note 37, at 193-96.

160. Paul Balmer, *Colluding to Save the World: How Antitrust Laws Discourage Corporations from Taking Action on Climate Change*, 47 ECOLOGY L. CURRENTS 219, 230 (2020).

161. *See id.* at 223-29; *see also* Light, *supra* note 29, at 176-80 (discussing the "conflict between antitrust law's goals of promoting competition and environmental law's goals of promoting conservation").

162. *See* Bruner, *supra* note 110, at 277-81; *cf.* Light, *supra* note 29, at 140-41 (advocating looking to "fields of law governing the corporation throughout its life cycle" for "solutions to enduring problems that traditional federal environmental law has been unable to solve on its own").

163. *See, e.g.*, GREENFIELD, *supra* note 50, at 14-19; David Millon, *Communitarianism in Corporate Law: Foundations and Law Reform Strategies*, *in* PROGRESSIVE CORPORATE LAW 1, 1-2, 7-9 (Lawrence E. Mitchell ed., 1995).

164. RAWORTH, *supra* note 149, at 123.

165. *See supra* notes 28-33 and accompanying text.

Consider again the purportedly fixed attributes of the corporate form: legal personality for the business entity, limited liability for shareholders, free transferability of shares, centralized management through a board of directors, and election of directors by shareholders.[166] It is a point of emphasis in the law-and-economics literature that these attributes interact in consequential ways. Judge Easterbrook and Fischel, for example, present a rationale for limited liability in public corporations that emphasizes how this policy interacts with other corporate features and affects corporate governance.[167] Limited liability, they argue, promotes a "division of labor" between capital providers and professional managers, reducing the costs of such an arrangement principally by promoting diversification and obviating the need to engage in various forms of monitoring.[168] Specifically, limited liability reduces the need to monitor managers because shareholders have less at risk; reduces the need to monitor other shareholders because, unlike in a joint-and-several liability regime, their wealth has no bearing on a given shareholder's exposure; promotes share transferability and a market for control because a single share price focusing on the quality of the business and its management can emerge; reduces research costs to the extent investors believe that share prices efficiently impound such information; promotes diversification because, unlike in a joint-and-several liability regime, additional investments reduce idiosyncratic risks; and "facilitates optimal investment decisions," in that shareholders with downside protection (plus diversification opportunities) will permit managers to undertake greater risks in pursuit of greater rewards.[169]

The key is to recognize the contingency of this arrangement. If we set aside Judge Easterbrook and Fischel's assumption that this configuration promotes socially optimal risk-taking, then their insights actually point toward alternative approaches that might promote more sustainable operations. Just as reduced shareholder exposure promotes greater governance centralization, greater focus on shareholder interests, and more risk-taking—and presumably leads shareholders to prefer reduced board exposure as well[170]—so we should expect greater shareholder exposure to have the opposite effects. To the extent we prefer less risk-taking and cost externalization, greater shareholder exposure would curb shareholders' risk appetite, and correlatively leave them less comfortable with insulating managers from exposure as well. At the same time, greater exposure

166. *See supra* Section I.B.

167. Easterbrook & Fischel, *supra* note 121, at 93-103.

168. *See id.* at 94.

169. *See id.* at 94-97.

170. *See* Gagliardi v. TriFoods Int'l, Inc., 683 A.2d 1049, 1052-53 (Del. Ch. 1996).

associated with equity investment would presumably curb the availability of capital for highly risky business models because shareholders would rationally require a price discount to be induced to absorb that exposure.[171] This would in turn force businesses to more fully internalize costs of production, reducing the potential for risky corporate activities to impose harms exceeding the value of the company.[172]

As the foregoing suggests, we have choices to make about how to structure various aspects of the corporate form in pursuit of our goals—potential recalibrations of the "levers" of corporate governance, as I have described them elsewhere.[173] We could pursue more or less governance centralization; impose more or less liability exposure on shareholders and boards alike, directly impacting their risk appetites; and promote more or less emphasis on shareholders' interests. We could alter the degree to which shareholders control board composition, how much capacity they have to promote their own interests through litigation, and the degree to which directors' duties prioritize shareholders' interests over other interests and values.[174] These all represent policy levers that we could recalibrate—individually, or in coordination—to promote more sustainable corporate governance.

III. TOWARD SUSTAINABLE CORPORATE GOVERNANCE

In light of the limitations of prevailing theories discussed above, corporate sustainability presents a useful lens through which to assess extant reform initiatives and also points toward other types of reforms that merit real attention. Accordingly, the remainder of this Feature uses the approach presented above to evaluate the strengths and weaknesses of the proposals garnering the most attention today (Section III.A) and to explore a broader range of potential reforms (Sections III.B and III.C).

A. *Disclosure-Based Strategies*

Reform initiatives aimed at promoting corporate sustainability have often built upon disclosure-based strategies. Such initiatives appear unlikely to substantially move the dial, however, for multiple reasons. They do not directly require corporate actors to change anything about how they operate; they do not alter the incentives of shareholders, the primary audience for such disclosures,

171. *See* Easterbrook & Fischel, *supra* note 121, at 97.

172. *See* Hansmann & Kraakman, *supra* note 124, at 1879-81, 1932-34.

173. *See* BRUNER, *supra* note 21 (manuscript at 79-102); Bruner, *supra* note 104, at 81.

174. *See* BRUNER, *supra* note 21 (manuscript at 79-102).

rendering it unlikely that investor pressures will lead managers to reform corporate decision-making in any fundamental way; and they are often limited by reference to financial materiality, a narrow concept hardly coextensive with societal sustainability.

Disclosure-based regulatory regimes assume that speaking to a given matter will focus directors' and officers' minds on it, and that targeted stakeholders armed with relevant information will bring it to bear upon their decisions in a manner that exerts market-based pressures upon regulated entities. Securities regulation, for example, mandates extensive disclosures aimed principally at financial investors.[175] In the corporate-sustainability context, many reform initiatives have aimed to require companies to make sustainability-relevant disclosures, assuming that various stakeholders armed with such information—investors, customers, employees, and so on—will do the rest.[176] These initiatives are limited, however, by numerous practical challenges, including inconsistent disclosure standards, the use of financial materiality as a disclosure criterion, and the isolation of sustainability reports from companies' core securities disclosures.[177] Given the flexibility of current regimes, sustainability reporting tends toward greenwashing, generalization, and boilerplate, and may paradoxically reinforce the effects of financialization to the extent that they conceptualize disclosure subjects solely by reference to investment risk.[178]

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175. *See* STEPHEN J. CHOI & A.C. PRITCHARD, SECURITIES REGULATION: CASES AND ANALYSIS 1-45 (4th ed. 2015). For a discussion of the role disclosure plays in affecting corporate practices, see Condon, *supra* note 13, at 40 & n.195, discussing literature suggesting that "socially undesirable corporate practices can be reduced through disclosure alone"; Harper Ho, *supra* note 38, at 671, describing how "voluntary disclosure of nonfinancial risks" may ultimately "motivate boards toward improved risk oversight and risk management"; and Afra Afsharipour, *Women and M&A*, 12 U.C. IRVINE L. REV. 359, 406 (2022), which notes, "Institutions value what they measure, and they measure what they value. For M&A deal making, data regarding leadership has thus far remained unmeasured and undisclosed."

176. *See* Iris H.-Y. Chiu, *Disclosure Regulation and Sustainability: Legislation and Governance Implications*, *in* THE CAMBRIDGE HANDBOOK OF CORPORATE LAW, CORPORATE GOVERNANCE AND SUSTAINABILITY, *supra* note 11, at 521; Virginia Harper Ho & Stephen Kim Park, *ESG Disclosure in Comparative Perspective: Optimizing Private Ordering in Public Reporting*, 41 U. PA. J. INT'L L. 249, 273-74 (2019).

177. *See Global Financial Stability Report*, *supra* note 144, at 82, 87-89; Harper Ho, *supra* note 38, at 669-71; Virginia Harper Ho, *Non-Financial Reporting & Corporate Governance: Explaining American Divergence & Its Implications for Disclosure Reform*, 10 ACCT. ECON. & L.: A CONVIVIUM 1, 5-13 (2020); Harper Ho & Park, *supra* note 176, at 255, 266-69; McDonnell et al., *supra* note 33, at 363-71.

178. *See* Bruner & Sjåfjell, *supra* note 31, at 718.

Given these shortcomings, it is unsurprising that public-disclosure regimes have largely remained weak and ineffective. For example, in 2020, the U.S. Securities and Exchange Commission (SEC) expanded on the prior requirement to disclose basic employment figures to require further that public companies provide a general description of "human capital resources."[179] Such disclosures remain cabined by reference to financial materiality, and open-ended in that no particular disclosure standard is required—indeed, the term "human capital" remains undefined.[180] Early evidence "suggests that the quality of disclosure provided by firms has been low so far."[181] Meanwhile, disclosures regarding governmental proceedings under environmental laws were simultaneously carved back by substantially increasing the dollar threshold for required reporting,[182] and it remains unclear whether the SEC will require any significant climate-related disclosures.[183] Public-disclosure regimes adopted in other jurisdictions similarly remain modest and highly flexible—sometimes employing a "comply or explain" structure that permits disclosure in lieu of compliance with a recommended practice—and typically focus on shareholders and their interests.[184]

Growing discontent with the state of sustainability disclosures is entirely comprehensible. As Stavros Gadinis and Amelia Miazad observe, such disclosures generally "say nothing about what the company is not acting upon," give "no insight into what stakeholders' real concerns are," and describe the company's actions "without any basis on which to assess their adequacy."[185] To date, such regimes are thought to have had "limited or, in some cases, no effects at

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179. Modernization of Regulation S-K Items 101, 103, and 105, 85 Fed. Reg. 63,726, 63,739 (Oct. 8, 2020) (to be codified at 17 C.F.R. pt. 229, 239, 240).

180. *See id.*

181. George S. Georgiev, *The Human Capital Management Movement in U.S. Corporate Law*, 95 TUL. L. REV. 639, 718 (2021).

182. *See* Modernization of Regulation S-K Items 101, 103, and 105, 85 Fed. Reg. at 63,742.

183. *See* Andrew Ramonas, Andrea Vittorio & Amanda Iacone, *SEC Plans Rules on Climate Disclosures, Cyber Risks this Fall*, BLOOMBERG L. (June 11, 2021, 2:59 PM), https://news.bloomberglaw.com/securities-law/sec-proposals-on-climate-esg-disclosures-planned-for-october [https://perma.cc/TGR5-DZFC]; Andrew Ramonas, *SEC 'Mission Creep' on Climate Ups Republican Lawsuit Threats*, BLOOMBERG L. (June 29, 2021, 6:01 AM), https://news.bloomberglaw.com/securities-law/sec-mission-creep-on-climate-ups-republican-lawsuit-threats [https://perma.cc/XNC8-CCJU].

184. *See, e.g.*, Christopher M. Bruner, *Leaders or Laggards? Corporate Sustainability in Hong Kong and Singapore*, *in* THE CAMBRIDGE HANDBOOK OF CORPORATE LAW, CORPORATE GOVERNANCE AND SUSTAINABILITY, *supra* note 11, at 504, 511-12, 514-15; Chiu, *supra* note 176, at 523-26; Mähönen, *supra* note 137, at 19-30.

185. Gadinis & Miazad, *supra* note 27, at 1471.

all," leading Barnali Choudhury and Martin Petrin to conclude that "governments are more focused on giving the appearance that these types of problems are being addressed rather than working to eradicate the problem's root causes."[186]

Meaningful public disclosures undoubtedly represent "a necessary step to incentivize firms to change,"[187] but we have been too ready to assume their sufficiency due to questionable assumptions about investors' capacity to pressure corporate managers to adopt sustainable practices. To be sure, investors have themselves actively pushed for increased disclosures,[188] and have even had some limited success through more aggressive forms of activism, including shareholder proposals and proxy contests supported by institutional investors[189]—although such efforts themselves often make the case in predominantly financial terms.[190] At the same time, it remains unclear that the largest and most significant institutions would, or could, bring sustainability disclosures fully to bear upon their investment decisions. Major investment funds certainly possess the sophistication to do so and may follow an activist investor's lead by voting in favor of a given initiative.[191] Indeed, certain categories of highly diversified funds that are effectively "universal owners" of the whole market may even be incentivized to engage with companies to reduce sustainability-related systemic risks in order to maximize returns on their overall investment portfolio.[192]

Even where portfolio-protective dynamics operate, however, they remain insufficient for two reasons. First, funds' investment portfolios are not coextensive

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186. BARNALI CHOUDHURY & MARTIN PETRIN, CORPORATE DUTIES TO THE PUBLIC 91 (2019) (emphasis omitted); *see also* Chiu, *supra* note 176, at 526 (noting that disclosure obligations "do not improve stakeholder or third-party standing against companies in terms of influence or enforcement"); Georgiev, *supra* note 181, at 725 (suggesting that the SEC adopt the comply-or-explain approach as "a middle ground between highly-prescriptive line items and the existing . . . disclosure rule").

187. *Global Financial Stability Report*, *supra* note 144, at 81; *see also infra* Section III.C.

188. *See, e.g.*, Condon, *supra* note 13, at 19-26; Fink, *supra* note 8; Harper Ho & Park, *supra* note 176, at 260-62; Cathy Hwang & Yaron Nili, *Shareholder-Driven Stakeholderism*, U. CHI. L. REV. ONLINE (Apr. 15, 2020), https://lawreviewblog.uchicago.edu/2020/04/15/shareholder-driven-stakeholderism-hwang-nili [https://perma.cc/64ZQ-HSB9].

189. *See, e.g.*, Hwang & Nili, *supra* note 188; Saijel Kishan & Joe Carroll, *Exxon Activist Victory Marks Coming of Age for ESG Investing*, BLOOMBERG L. (June 9, 2021, 5:09 PM), https://news.bloomberglaw.com/environment-and-energy/exxon-activist-victory-marks-coming-of-age-for-esg-investing [https://perma.cc/5JME-JBA6].

190. *See, e.g.*, Kishan & Carroll, *supra* note 189.

191. *See* Harper Ho, *supra* note 38, at 653, 678.

192. *See id.* at 673. *See generally* Condon, *supra* note 13 (describing diversified institutional investors' efforts to mitigate climate harms in their portfolios).

with society, and "the ideal level of externality reduction is less for capital owners than the general population."[193] Second, these incentives would not apply straightforwardly to the growing segment of the investment market pursuing passive indexing strategies that aim not to beat the market, but simply to match the market return at the lowest cost possible. Such strategies preclude exit and undercut any strong-form incentive to pursue costly engagement efforts, which simply drive up fees and thereby render the fund less competitive.[194] BlackRock's vocal position on climate change appears to have been prompted in part by criticism of BlackRock itself,[195] and the fact remains that they hold substantial fossil-fuel investments,[196] have an extraordinary range of clients with diverse interests,[197] and employ a very small stewardship team.[198]

Michal Barzuza, Quinn Curtis, and David H. Webber have persuasively argued that the key to resolving the apparent paradox of sustainability-related engagement by passive index-fund operators is the competition, already underway, to attract the assets that millennials are expected to inherit over coming decades.[199] There is certainly evidence that such dynamics loom large for index-fund operators,[200] and there is good reason to anticipate that competition for millennial assets could prompt some degree of engagement. But we should not expect too much. While index-fund operators' actions regarding board diversity have

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193. Condon, *supra* note 13, at 68.

194. *See* Christopher M. Bruner, *Corporate Governance Reform in Post-Crisis Financial Firms: Two Fundamental Tensions*, 60 ARIZ. L. REV. 959, 970-74 (2018). For additional background, see Lucian A. Bebchuk, Alma Cohen & Scott Hirst, *The Agency Problems of Institutional Investors*, 31 J. ECON. PERSPS. 89, 94-104 (2017); Dorothy S. Lund, *The Case Against Passive Shareholder Voting*, 43 J. CORP. L. 493, 510-20 (2018); John D. Morley, *Too Big to Be Activist*, 92 S. CAL. L. REV. 1407 *passim* (2019); and Yesha Yadav, *Too-Big-to-Fail Shareholders*, 103 MINN. L. REV. 587, 624-31 (2018).

195. *See* Annie Massa, *BlackRock Puts Climate at Center of $7 Trillion Strategy*, BLOOMBERG L. (Jan. 14, 2020, 8:10 AM), https://www.bloomberg.com/news/articles/2020-01-14/blackrock-puts-environmental-sustainability-center-of-strategy [https://perma.cc/8T5B-MC7T].

196. *See* Dominic Rushe, *'Reading the Writing on the Wall': Why Wall Street Is Acting on the Climate Crisis*, GUARDIAN (Mar. 16, 2021, 6:00 AM EDT), https://www.theguardian.com/us-news/2021/mar/16/wall-street-climate-crisis-emissions [https://perma.cc/22HE-D4TM].

197. *See* Massa, *supra* note 195 ("[BlackRock's] clients include large sovereign wealth funds, state pension plans and financial advisers with viewpoints that don't necessarily align on what to do about climate change and social justice issues.").

198. *See* Georgiev, *supra* note 181, at 712-13.

199. Michal Barzuza, Quinn Curtis & David H. Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243, 1303-12 (2020).

200. *See, e.g.*, Fink, *supra* note 8 (predicting growing calls for institutions to address climate change "as trillions of dollars shift to millennials").

been relatively aggressive, they have remained reluctant to push as hard on climate change.[201] Barzuza, Curtis, and Webber plausibly attribute this reluctance to a cost-benefit analysis that could limit major asset managers' appetite for engagement in areas critical to corporate sustainability: asset managers remain dependent on corporate managers, who select the investment funds to be included in their companies' 401(k) platforms,[202] and "fear of confronting management may explain index funds' more cautious approach to climate change so far."[203] Although "millennials care about both diversity and climate, the gender composition of a corporate board is a far less sensitive issue for most firms than their carbon footprint"; accordingly, the big index funds can be expected to "intervene aggressively when the cost is low and tread lightly when it is not."[204]

Although robust disclosures may be an essential complement to more meaningful reforms,[205] disclosure alone remains an inadequate response to the sustainability imperative. Disclosure does not directly require corporate actors to change anything about how they currently operate; it does not alter the incentives of shareholders, rendering it unlikely that investor pressures would prompt managers to fundamentally reform decision-making; and it does not provide any incentive to account for values and interests that cannot be characterized as financially material. In some cases, the attraction of disclosure as a reform strategy is precisely that it represents "a regulatory tool of minimum intrusion."[206] Disclosure initiatives too often cultivate "the illusion that something is being done,"[207] while at most nibbling around the edges of the core drivers of risk-taking and cost externalization.

A more dynamic perspective on the corporation points toward reform strategies that offer greater potential to improve sustainability by more directly grappling with fundamental dynamics of decision-making. Some reform strategies focus on who the decision makers are (Section III.B), while others focus on how

201. *See* Barzuza et al., *supra* note 199, at 1265-69, 1272-75.

202. *See id.* at 1259-60, 1308.

203. *Id.* at 1305.

204. *Id.* at 1305-06.

205. *See, e.g.*, Andrew Johnston et al., *Corporate Governance for Sustainability Statement* 2-3 (2020), https://ssrn.com/abstract=3502101 [https://perma.cc/4CEN-4827]; Sjåfjell, *supra* note 38, at 215-16. Section III.C, *infra*, describes initiatives, including due-diligence laws, that build on disclosure as a foundation for more extensive reforms.

206. Chiu, *supra* note 176, at 521; *see also* Georgiev, *supra* note 181, at 702 (describing human-capital-management disclosure requirements as "positively anodyne next to some of the transformational proposals coming from progressive politicians and from prominent corporate governance commentators").

207. Mähönen, *supra* note 137, at 18.

decision makers' incentives are conditioned by structural features of the corporate form itself (Section III.C).

B. *Restructuring the Board*

Jurisdictions around the world have developed workable alternative board structures that could significantly impact corporate sustainability,[208] and these alternatives are, to varying degrees, receiving attention in U.S. corporate governance discourse. These include structures aimed at promoting board diversity and various modes of structural regard for labor interests at the board level.[209] It is important to recognize, however, that bad decision-making incentives may persist regardless of who the decision makers are, underscoring the need to examine closely the core features of the corporate form that drive those incentives and to consider reforms more directly responding to them.

1. *Diversity in the Boardroom*

Although calls for greater gender diversity on public company boards date back at least to the 1940s,[210] contemporary initiatives effectively date to the new millennium. Norway enacted a board gender quota in 2003, and since then several other countries have followed suit.[211] For example, Norway and France impose forty-percent floors for each gender,[212] and Germany imposes a thirty-percent floor for codetermined boards of listed companies.[213] In the United States, California has adopted a quota that varies depending on the size of the board, requiring listed companies headquartered in the state to have one self-identified

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208. *See supra* Section I.B.

209. *See* BRUNER, *supra* note 21 (manuscript at 157-64).

210. *See* Sarah C. Haan, *Corporate Governance and the Feminization of Capital*, 74 STAN. L. REV. (forthcoming 2022) (manuscript at 22-29), https://ssrn.com/abstract=3740608 [https://perma.cc/AZD8-JRSC] (discussing a push for gender diversity on U.S. boards "in the late 1940s, expressly capitalizing on the significant numbers of women shareholders").

211. *See* Institutional S'holder Servs., Inc., *Gender Parity on Boards Around the World*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 5, 2017), https://corpgov.law.harvard.edu/2017/01/05/gender-parity-on-boards-around-the-world [https://perma.cc/7BAN-95KK].

212. *See* Darren Rosenblum & Daria Roithmayr, *More than a Woman: Insights into Corporate Governance After the French Sex Quota*, 48 IND. L. REV. 889, 889-90 (2015).

213. *See* Christoph H. Seibt & Sabrina Kulenkamp, *Corporate Governance and Directors' Duties in Germany: Overview*, THOMSON REUTERS PRAC. L. (June 1, 2020), https://1.next.westlaw.com/Document/I9fb3f7b51cac11e38578f7ccc38dcbee/View/FullText.html [https://perma.cc/44HW-U34H].

female director if there are four or fewer directors on the board, two if there are five directors, and three if there are six or more directors.[214] Many other jurisdictions have adopted soft-law guidance encouraging greater board-level gender diversity,[215] and institutional investors have become increasingly vocal on the issue—notably State Street, the U.S. index-fund operator.[216] There is evidence suggesting that quota regimes have been effective,[217] but other factors also appear to be at work. For example, Sweden exhibits a high degree of female board representation by global standards but has not imposed a quota.[218]

Empirical literature on the performance impacts of board-level gender diversity remain mixed, at least partly due to the methodological difficulty of isolating particular governance-relevant variables.[219] However, evidence suggesting a positive association between diversity and "financial outperformance" has grown stronger.[220] Hypotheses to explain this have generally focused on process-oriented dynamics such as mitigating the effects of groupthink, and benefits associated with improved sensitivity to consumer and employee preferences.[221] At the same time, it is becoming clear that hoped-for downstream effects in the form of greater executive-level diversity have not been realized, suggesting that distinctive strategies will be required in that critical decision-making context.[222]

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214. *See* CAL. CORP. CODE §§ 301.3, 2115.5 (West 2021).

215. *See* Institutional S'holder Servs., Inc., *supra* note 211.

216. *See* Barzuza et al., *supra* note 199, at 1266-69.

217. *See* Institutional S'holder Servs., Inc., *supra* note 211; Rosenblum & Roithmayr, *supra* note 212, at 899; Anne Steele, *California Rolls out Diversity Quotas for Corporate Boards*, WALL ST. J. (Oct. 1, 2020, 12:01 AM EDT), https://www.wsj.com/articles/california-rolls-out-diversity-quotas-for-corporate-boards-11601507471 [https://perma.cc/WX2J-APHM].

218. *See* Institutional S'holder Servs., Inc., *supra* note 211.

219. *See* Rosenblum & Roithmayr, *supra* note 212, at 902-03.

220. Sundiatu Dixon-Fyle, Kevin Dolan, Vivian Hunt & Sara Prince, *Diversity Wins: How Inclusion Matters*, MCKINSEY & CO. 6 (May 19, 2020), https://www.mckinsey.com/~/media/mckinsey/featured%20insights/diversity%20and%20inclusion/diversity%20wins%20how%20inclusion%20matters/diversity-wins-how-inclusion-matters-vf.pdf [https://perma.cc/Q2PE-85N4].

221. *See* Rosenblum & Roithmayr, *supra* note 212, at 903-06; Afsharipour, *supra* note 175, at 44-49.

222. *See* Jeff Green, *Black CEO Ranks Dwindle with Ken Frazier's Exit from Merck*, BLOOMBERG L. NEWS (Feb. 5, 2021, 8:35 AM), https://www.bloomberg.com/news/articles/2021-02-04/black-ceo-ranks-dwindle-with-ken-frazier-s-exit-from-merck [https://perma.cc/H27Q-YZP7] (reporting "renewed pressure . . . to increase workforce diversity," and that positions involving "division responsibility for profit and loss" represent "the traditional track to be a big-company CEO"); Institutional S'holder Servs., Inc., *supra* note 211; Steele, *supra* note 217; Afsharipour, *supra* note 175, at 38-40.

Although other forms of board diversity have not received the same level of attention, this is beginning to change. Board-level racial diversity has received greater attention as the "focus on social justice and racism . . . has prompted a wave of businesses to examine diversity within their ranks more closely."[223] Most dramatically, California has enacted the world's first quota addressing board diversity in terms of race, sexual orientation, and gender identity,[224] applying a structure broadly resembling the earlier gender quota to the same category of companies. This quota differs, however, as the brackets are structured in a way that requires less diverse representation on larger boards, and it lumps together these differing forms of diversity under the umbrella concept of "underrepresented communities."[225] As a result, overall compliance could be achieved solely by reference to one form of diversity falling within that umbrella concept.[226]

Lawsuits have been filed challenging the constitutionality of California's gender quota, and are expected in response to this more recent quota, but such challenges are not generally expected from businesses themselves. In fact, businesses appear to have accepted the need to pursue greater board diversity,[227] underscoring its broader relevance to social and economic sustainability. Meanwhile, California's initiatives appear to have inspired Nasdaq to propose listing rules aimed at promoting board diversity along the same lines through a comply-or-explain regime, which the SEC ultimately approved.[228]

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223. Steele, *supra* note 217; *see also Take the Pledge. It's Time for Action. Let's Close the Gap on Board Diversity*, BOARD CHALLENGE, https://www.theboardchallenge.org [https://perma.cc/Z36H-2T7N] ("The Board Challenge is a movement to improve the representation of Black directors in the boardrooms of U.S. public and private companies.").

224. *See* Darren Rosenblum, *California Pioneers New Quotas for People of Color & LGBT People*, FORBES (Oct. 5, 2020, 12:34 PM EDT), https://www.forbes.com/sites/darrenrosenblum/2020/10/05/california-pioneers-new-quotas-for-people-of-color--lgbt-people [https://perma.cc/H975-M79M].

225. *See* CAL. CORP. CODE §§ 301.4, 2115.6 (West 2021).

226. *Cf.* Rosenblum, *supra* note 224 (observing that "one risk with including LGBT folks in a quota principally about race is that firms may declare themselves diversity-compliant with few or no people of color," but adding that "the paucity of openly LGBT people in corporate middle management makes this unlikely").

227. *See* Cydney Posner, *New Report on California Board Gender Diversity Mandate*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 18, 2020), https://corpgov.law.harvard.edu/2020/03/18/new-report-on-california-board-gender-diversity-mandate [https://perma.cc/H7NM-DWR5] ("California's businesses appear to have accepted the requirements of the legal mandate—perhaps also feeling the pressure from large asset managers . . . ."); Steele, *supra* note 217 ("Some supporters of the new law mandating diversity have been heartened by the outcome of California's gender mandate for boards.").

228. *See* Nasdaq Stock Market LLC, *Form 19b-4 Amendment No. 1* (Feb. 26, 2021), at 9-10, 61-62, https://listingcenter.nasdaq.com/assets/RuleBook/Nasdaq/filings/SR-NASDAQ-2020-081

2. *Workers and Corporate Governance*

In addition to board diversity, reform initiatives have focused on board composition by reference to types of inputs—notably, shareholders providing equity capital versus workers providing labor.[229] The exemplar system providing board-level representation to the workforce is the German codetermination system described above.[230] The structural emphasis placed on employee interests dovetails with other German corporate governance features that deviate from strict shareholder centrism, including a stakeholder-oriented conception of directors' duties,[231] a more prominent corporate governance role for banks (acting both as lenders and as proxyholders voting brokerage clients' shares),[232] and substantial reliance on institutional bargaining rather than litigation as a means of resolving disputes.[233]

These characteristics of German corporate governance straightforwardly curb risk-taking incentives and externalization of costs. Indeed, German companies performed better following the onset of the global financial crisis than their U.S. and U.K. counterparts did, prompting "renewed appreciation of its consensus-based approach."[234] Employee-appointed directors on German supervisory boards face the same liability exposure for breach of duty as shareholder-appointed directors, but concerns about lesser capacity to bear such exposure and

_Amendment_1.pdf [https://perma.cc/A8BV-DHQG]; Securities and Exchange Commission, Release No. 34-92590 (Aug. 6, 2021), https://www.sec.gov/rules/sro/nasdaq/2021/34-92590.pdf [https://perma.cc/RXK3-JLJC] (approving Nasdaq's proposed rule changes).

229. *Cf.* Henry Hansmann, *All Firms Are Cooperatives—and So Are Governments*, 2 J. ENTREPRENEURIAL & ORGANIZATIONAL DIVERSITY 1, 2 (2014) (describing firms as types of cooperatives controlled by various "sellers of inputs" or "purchasers of outputs").

230. *See* sources cited *supra* notes 91-98 and accompanying text.

231. *See* Andreas Rühmkorf, *Stakeholder Value Versus Corporate Sustainability: Company Law and Corporate Governance in Germany*, *in* THE CAMBRIDGE HANDBOOK OF CORPORATE LAW, CORPORATE GOVERNANCE AND SUSTAINABILITY, *supra* note 11, at 232-36; Andreas Rühmkorf, Felix Spindler & Navajyoti Samanta, *Evolution of German Corporate Governance (1995-2014): An Empirical Analysis*, 19 CORP. GOVERNANCE 1042, 1045 (2019).

232. *See* CIOFFI, *supra* note 98, at 46, 71, 155.

233. *See id.* at 68-69, 81-84, 174-78, 241-42.

234. Rühmkorf et al., *supra* note 231, at 1049-50; *see also* Grant M. Hayden & Matthew T. Bodie, *Codetermination in Theory and Practice*, 73 FLA. L. REV. 321, 352-53 (2021) (observing that codetermination facilitates coordination that "avoids painful layoffs and allows companies to retain their core workforces, which, in turn, allowed the economy as a whole to avoid the worst of the economic slump").

excessive risk aversion are diminished due to substantially lower levels of litigation in general.[235] Additionally, there is a limited form of risk calibration between management and supervisory boards in that D&O insurance policies for the former are required to include a substantial deductible—covered personally or separately insured at personal expense—whereas policies for the latter are not.[236] Although empirical literature on codetermination's performance impacts remains mixed, at least partly due to methodological challenges resembling those in the board-diversity context,[237] the trend has been toward more positive assessments, emphasizing codetermination's resilience in crisis situations, benefits for various stakeholders, and capacity to "promote a well-functioning democracy and help prevent social division" more generally.[238]

There is good reason to use such structures to rethink our own approaches,[239] particularly given recent work associating growing U.S. inequalities with increasing shareholder centrism and a decline in worker power.[240] Reformers have attempted to introduce limited forms of codetermination in the United States; in 2018, for example, Senator Elizabeth Warren proposed an "Accountable Capitalism Act" that would have required U.S. businesses with over $1 billion in gross receipts to obtain a federal charter, identify a public benefit to be pur-

235. *See* Willi Joachim, *The Liability of Supervisory Board Directors in Germany*, 25 INT'L L. 41, 60-61, 67 (1991) (discussing the standard of liability imposed on directors and the low level of corporate litigation in Germany); Gerhard Wagner, *Officers' and Directors' Liability Under German Law—A Potemkin Village*, 16 THEORETICAL INQUIRIES L. 69, 77-80, 84-89 (2015) (describing impediments to corporate litigation in Germany).

236. *See* Aktiengesetz [AktG] [Stock Corporation Act], Sept. 6, 1965, BUNDESGESETZBLATT I [BGBL I] at 1089, §§ 93, 116, last amended by Gesetz [G], July 17, 2017, BGBL I at 2446, art. 9 (Ger.), http://www.gesetze-im-internet.de/englisch_aktg/englisch_aktg.html [https://perma.cc/6GJX-5XCV] (full text of the Stock Corporation Act, translated by Samson Übersetzungen GmbH, Dr. Carmen von Schöning, published by the Federal Ministry of Justice and Consumer Protection); *see also* Wagner, *supra* note 235, at 80-84, 89-91 (arguing that the deductible itself should not be insurable).

237. *See* Jens Dammann & Horst Eidenmüller, *Codetermination: A Poor Fit for U.S. Corporations*, 3 COLUM. BUS. L. REV. 870, 889-900 (2020).

238. *See* Hayden & Bodie, *supra* note 234, at 349-57; *see also* Jörg Heining, Simon Jäger & Benjamin Schoefer, *Labour in the Boardroom: The Effects of Codetermination on Firm Performance and Wages*, VOXEU.ORG (Apr. 8, 2020), https://voxeu.org/article/codetermination-firm-performance-and-wages [https://perma.cc/FHD2-D7CX].

239. *See* Hayden & Bodie, *supra* note 234, at 358; *see also* GREENFIELD, *supra* note 50, at 146-52 ("Once we understand . . . that corporations are to serve *all* their stakeholders by equitably sharing the corporate surplus, it becomes clear that the dominance of shareholders within corporate management is a mistake . . . .").

240. *See, e.g.*, Stansbury & Summers, *supra* note 26; Goshen & Levit, *supra* note 26.

sued alongside the pursuit of profit, and provide at least forty percent board representation to employees.[241] However, such proposals have been perfunctorily dismissed. As Grant M. Hayden and Matthew T. Bodie sum up the U.S. discourse, "the academic debate about the superiority of shareholder primacy versus codetermination has not really been joined."[242] They explain that the "strategy of law-and-economics scholars to this point has been primarily to ignore, belittle, or sequester codetermination as a practice that does not deserve real examination."[243] This is unfortunate, given the potential benefits that some form of structural regard for workers' interests at the board level might offer.

It bears emphasizing that codetermination itself is not an all-or-nothing proposition. Apart from the varying forms of board-level representation already adopted by various jurisdictions, applying differing levels of representation to differing categories of companies,[244] there are more modest possibilities worthy of consideration as well. For example, major companies including HP and Shell have used "stakeholder councils in advisory capacities and to gain strategic 'on the ground' insight into their operations," representing a form of "network governance" connecting boards with nonshareholder stakeholders.[245] Likewise, more modest adjustments could be made to the board itself. Leo Strine, for example, advocates giving workers "more voice within the corporate boardroom."[246] Although he doubts that codetermination "fits with our economy," he suggests that boards in large U.S. companies might be required to have "a committee focused on workforce concerns," with a mandate including "fair gainshar-

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241. *See* Accountable Capitalism Act, S. 3348, 115th Cong. §§ 4-6 (2018). The opt-in public-benefit corporation has not achieved its goals; very few companies have adopted this form, yet their very existence creates a negative implication that standard corporate law is more shareholder-centric than it in fact is. *See* BRUNER, *supra* note 37, at 45 n.95; Carol Liao, *Social Enterprise Law: Friend or Foe to Corporate Sustainability?*, *in* THE CAMBRIDGE HANDBOOK OF CORPORATE LAW, CORPORATE GOVERNANCE AND SUSTAINABILITY, *supra* note 11, at 655, 666-68; Ann Lipton, *Benefit Corporations Go Public*, BUS. L. PROF BLOG (July 18, 2020), https://lawprofessors.typepad.com/business_law/2020/07/benefit-corporations-go-public.html [https://perma.cc/LD5G-RDR2]. Warren's proposal differs, however, in that companies under the Act's coverage would be federally chartered with codetermined boards, and would be required to identify a public benefit.

242. Hayden & Bodie, *supra* note 234, at 348-49.

243. *Id.* at 349.

244. *See* Inst. for Codetermination & Corp. Governance, *supra* note 96.

245. Tan, *supra* note 33, at 208.

246. Leo E. Strine, Jr., *Toward Fair and Sustainable Capitalism* 5 (Aug. 2020) (Roosevelt Inst. Working Paper), https://rooseveltinstitute.org/wp-content/uploads/2020/08/RI_TowardFairandSustainableCapitalism_WorkingPaper_202008.pdf [https://perma.cc/Q3LV-PPFZ].

ing between workers and investors, training that assures continued employment, and maintaining a safe, inclusive, and tolerant workplace."[247] Such an approach would do less than codetermination to address problems associated with strong-form shareholder centrism. But the nascent trend among U.S. public companies toward more formalized board-level regard for workers (through broadened committee mandates) is nevertheless encouraging.[248]

Reforms like those described above require a broader conception of the corporation, and recognition that the current structural approach reflects a series of policy choices rather than anything truly intrinsic to the corporate form.[249] Were the conceptual aperture broadened in this way, reforms along the foregoing lines could attract meaningful attention and offer real benefits—particularly in terms of the social and economic dimensions of corporate sustainability.[250]

At the same time, however, we should not assume that altering the decision-makers will render corporate activities sustainable in all respects—a lesson amply conveyed by the Volkswagen emissions scandal. Volkswagen has a particularly robust form of codetermination that creates "a de facto worker majority" on the supervisory board due to seats reserved for representatives of the government of Lower Saxony, who have "tended to side with the employees."[251] Yet Volkswagen nevertheless embedded a "defeat device" within their cars' software to "reduce emissions to legal levels during emissions testing" and then "release those constraints during normal driving."[252] This underscores that stakeholder-oriented governance does not inherently promote environmental sustainability. "No multinational companies have governance that is quite as worker-friendly as Volkswagen," Bodie observes, yet the emissions scandal "demonstrates that high levels of worker participation in corporate governance do not guarantee good behavior or sustainable practices."[253] Simply put, employee-appointed directors

247. *Id.* at 9-10.

248. *See* Georgiev, *supra* note 181, at 674-75 (describing trends suggesting that board-level compensation committees are evolving toward an expanded set of responsibilities including various aspects of "human capital management").

249. *See supra* Part I.

250. *Cf.* Rühmkorf, *supra* note 231, at 237-38 (suggesting that corporations with codetermined supervisory boards have the potential to promote sustainable development, particularly in its social and economic dimensions).

251. Hayden & Bodie, *supra* note 234, at 333.

252. Bodie, *supra* note 41, at 246.

253. *Id.* at 257-59; *cf.* McDonnell et al., *supra* note 33, at 403-04 (discussing the potential for an environmental representative on the board or an environmental advisory council).

can have bad incentives just like anyone else—particularly when it comes to the environmental dimension of corporate sustainability.[254]

This is not to suggest that codetermination could not provide broader sustainability-related benefits—indeed, there is some evidence suggesting that it can and does.[255] But Volkswagen's experience provides a vivid cautionary tale suggesting that codetermination could not realistically achieve corporate sustainability on its own. As important as it may be to rethink board composition, it remains critical to examine closely the core features of the corporate form that drive incentives for risk-taking and cost externalization, and to consider potential reforms to recalibrate those incentives toward more sustainable decision-making—regardless of who the decision makers may be.

C. *Liability and Risk Incentives*

Focusing on the fundamental structure of the corporate form reveals an additional set of potential corporate governance reforms. Understanding that accountability to a broader set of stakeholders may prove insufficient to deliver corporate sustainability, some have called for corporate law to expressly adopt a broader conception of corporate purpose and associated board duties—whether by reference to "the public" generally,[256] or by reference to the concept of sustainability itself.[257] There is much to recommend such proposals, given the problems associated with financialization.[258] It bears emphasizing, however, that this approach effectively holds constant the core incentives that create such pressures in the first instance. Accordingly, it remains critical to explore ways to condition the ex ante incentives of all corporate decision makers—including directors and shareholders alike—to promote environmentally, socially, and economically sustainable corporate conduct.

254. *See, e.g.*, Bodie, *supra* note 41, at 250 (observing that the CEO's "plan to expand globally was popular with VW workers, as it meant more jobs and higher pay," and that "[i]n exchange for the generally prosperous times at the company, the workers and their representatives generally gave [the CEO] free reign to run the company").

255. *See* Hayden & Bodie, *supra* note 234, at 354-57 (reviewing literature associating codetermination with benefits for other stakeholders and stronger "CSR policies" more generally).

256. *See, e.g.*, CHOUDHURY & PETRIN, *supra* note 186, at 4-5, 83.

257. *See, e.g.*, Johnston et al., *supra* note 205; Sjåfjell, *supra* note 38, at 208-16.

258. *See supra* Section II.A.

1. *Financial Firms*

At the risk of truism, we should take seriously the notion that the best way to reduce excessive risk-taking and cost externalization would be to curb decision makers' incentives to take excessive risks and externalize the costs.[259] The point bears emphasizing precisely because it has been routinely ignored—most vividly in the wake of the global financial crisis. Despite ample literature suggesting that the crisis had much to do with excessive risk-taking aimed at boosting returns for financial firm shareholders,[260] postcrisis reforms in both the United States (e.g., the Dodd-Frank Act) and the United Kingdom (e.g., the Stewardship Code) focused on further empowering shareholders.[261] These reforms were apparently premised on the belief that shareholders could be counted upon to discipline reckless managers, despite the fact that shareholders themselves are the most risk-preferring corporate constituency.[262] This is true particularly in large financial firms, where the effects of limited liability are reinforced by moral hazard stemming from too-big-to-fail dynamics.[263] As I have argued elsewhere, this response reflected a crisis-reform narrative that quickly zeroed in on financial-firm managers as the proximate cause without investigating the ultimate sources of incentives for excessive risk-taking and cost externalization—a failure reflecting incapacity to conceptualize corporate governance beyond the narrow theoretical binaries described above.[264]

Proposals to recalibrate liability structures in financial firms to reduce risk-taking and cost externalization did not gain substantial traction in the wake of

259. *See* BRUNER, *supra* note 21 (manuscript at 132-55).

260. *See, e.g.*, Renée Birgit Adams, *Governance and the Financial Crisis*, 12 INT'L REV. FIN. 7, 32 (2012); Beltratti & Stulz, *supra* note 130, at 2, 8-16; Fahlenbrach & Stulz, *supra* note 128, at 12, 22-25; Iqbal et al., *supra* note 131, at 43-44; Laeven & Levine, *supra* note 129, at 264-69, 273.

261. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 165(h), 951, 953, 956, 971, 124 Stat. 1376, 1429-30, 1899-1900, 1903-04, 1905-06, 1915 (2010) (codified as amended in scattered sections of 12 U.S.C. and 15 U.S.C.); *The UK Stewardship Code 2020*, FIN. REPORTING COUNCIL 15-22 (2020), https://www.frc.org.uk/getattachment/5aae591d-d9d3-4cf4-814a-d14e156a1d87/Stewardship-Code_Dec-19-Final-Corrected.pdf [https://perma.cc/9HJ5-H4UP]. The UK Stewardship Code was initially adopted in 2010. *See History of the UK Stewardship Code*, FIN. REPORTING COUNCIL, https://www.frc.org.uk/investors/uk-stewardship-code/origins-of-the-uk-stewardship-code [https://perma.cc/Z9C4-S5PA].

262. *See, e.g.*, DAVID WALKER, A REVIEW OF CORPORATE GOVERNANCE IN U.K. BANKS AND OTHER FINANCIAL INDUSTRY ENTITIES: FINAL RECOMMENDATIONS 25-27, 70 (2009).

263. *See* Bruner, *supra* note 126, at 311-16.

264. *See id.* at 335; Christopher M. Bruner, *Conceptions of Corporate Purpose in Post-Crisis Financial Firms*, 36 SEATTLE U. L. REV. 527, 557-60 (2013).

the crisis, but such reforms remain viable and worthy of consideration today as part of a broader rethinking of corporate governance. Although corporate governance in today's largest bank holding companies essentially mirrors that of other publicly traded companies, with concomitant risk incentives,[265] this was not always the case. Financial-firm corporate governance historically placed greater emphasis on limiting risk. As Jonathan R. Macey and Geoffrey P. Miller have explored, multiple liability rules were commonplace across the United States in the nineteenth and early twentieth centuries and functioned relatively effectively as a means of disincentivizing risk-taking in commercial banks.[266] Similarly, as Patricia A. McCoy has explored, diminished business-judgment-rule protection for commercial-bank directors has also constrained risk-taking.[267] Investment banks, for their part, typically operated as general partnerships until the 1970s, which imposed a brake on risk-taking due to the partners' unlimited personal liability.[268]

Postcrisis reform proposals to augment liability exposure in financial firms have sought to resurrect the historical emphasis on risk reduction, while flexibly accommodating contemporary financial market realities. Claire Hill and Richard Painter, for example, suggest imposing personal liability upon the highest-paid individuals in bankrupt financial firms, either by contract or through compensation in the form of assessable stock, but in either case subject to a generous personal asset exemption, as a means of fine-tuning risk incentives.[269] Peter Conti-Brown focuses on systemically important financial institutions (SIFIs), proposing an "elective shareholder liability" regime under which SIFI shareholders could choose between facing pro rata personal liability following a

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265. *See* Bruner, *supra* note 194, at 963-64.

266. *See generally* Jonathan R. Macey & Geoffrey P. Miller, *Double Liability of Bank Shareholders: History and Implications*, 27 WAKE FOREST L. REV. 31 (1992) (finding empirical evidence that multiple liability schemes incentivized bank shareholders to decrease the risks their banks took on); Jonathan R. Macey & Geoffrey P. Miller, *Double Liability of Bank Shareholders: A Look at the New Data*, 28 WAKE FOREST L. REV. 933 (1993) (same).

267. *See* Patricia A. McCoy, *A Political Economy of the Business Judgment Rule in Banking: Implications for Corporate Law*, 47 CASE W. RSRV. L. REV. 1, 58-59 (1996) (noting that stricter business-judgment case law has reduced some bank risk-taking but finding little empirical evidence of long-term risk aversion).

268. *See* Claire Hill & Richard Painter, *Berle's Vision Beyond Shareholder Interests: Why Investment Bankers Should Have (Some) Personal Liability*, 33 SEATTLE U. L. REV. 1173, 1177-78 (2010).

269. *Id.* at 1189-95.

bailout or maintaining a larger capital buffer.[270] Alessandro Romano, Luca Enriques, and Jonathan R. Macey similarly focus on SIFIs, but instead propose an "extended shareholder liability" regime. [271] Under this regime, shareholder liability following a bailout would be scaled based on the centrality of a given institution within the financial system, such that associated incentives to curb risk-taking would track the potential scale of externalities that the firm's failure could impose on society. Again, however, liability would be pro rata, and shareholders would have the option to reduce their exposure by maintaining a larger capital buffer.[272]

Such proposals trigger a predictable chorus of "standard objections" to the effect that incursions on limited liability might impose bankrupting personal liability on shareholders ill-equipped to monitor effectively, impair companies' ability to raise equity capital, and pose substantial administrative difficulties.[273] It is not my aim here to comprehensively evaluate particular proposals, but there is good reason to conclude that such generic objections are overblown.

Critically, personal liability exposure is not an on/off switch, and proposals like these are hardly the all-or-nothing propositions that such objections imply. Degrees of liability could be precisely calibrated by tethering the resulting exposure to a multiple (or fraction) of the initial investment or through liability caps or asset exemptions,[274] and derivatives products offering further opportunities to manage shareholders' exposure could plausibly emerge.[275] Such a regime could likewise apply to a broader or narrower range of entities, further tailoring application.[276]

270. Peter Conti-Brown, *Elective Shareholder Liability*, 64 STAN. L. REV. 409, 428-41 (2012). Although the Dodd-Frank Act created a new resolution mechanism to prevent bailouts, this approach is not considered credible given the potential impact of a major financial institution's failure. *See, e.g.*, *id.* at 417-25.

271. Alessandro Romano, Luca Enriques & Jonathan R. Macey, *Extended Shareholder Liability for Systemically Important Financial Institutions*, 69 AM. U. L. REV. 967, 993-1003 (2020).

272. *See id.* at 994-97, 1000-02.

273. *See id.* at 1008 (listing some such objections).

274. *See, e.g.*, Hill & Painter, *supra* note 268, at 1191 (proposing an asset exemption); Romano et al., *supra* note 271, at 995-97 (proposing a multiplier based on risk posed to the financial system).

275. *See, e.g.*, Conti-Brown, *supra* note 270, at 438-40; Romano et al., *supra* note 271, at 1003-05.

276. *See, e.g.*, Conti-Brown, *supra* note 270, at 412-13; Hill & Painter, *supra* note 268, at 1189-92. For a current example of such a liability regime, see N.Y. BUS. CORP. LAW § 630(a) (McKinney 2016), which applies joint and several liability for unpaid wages to the "ten largest shareholders" in unlisted corporations.

Regarding potential equity-market impacts, it bears emphasizing that flexibility to fine-tune shareholder liability not only permits calibration of general risk incentives, but also renders maximum exposure knowable and amenable to pricing, particularly given beneficial investors' increasing reliance upon sophisticated financial intermediaries. The fact that some degree of shareholder liability would reduce share prices as investors discount for this exposure[277] represents a feature rather than a bug, reflecting internalization of costs that would otherwise be externalized and accordingly promoting board-level risk management to bolster the stock price.[278] Accordingly, the degree of any such impacts on firms' cost of capital could be calibrated through system-level fine-tuning of liability levels and firm-level fine-tuning of risk management, in addition to other means of promoting investment.[279]

As to administration, such proposals could work in tandem with other regulatory regimes, as illustrated by those posing a tradeoff between shareholder liability and capital adequacy.[280] Implementation via corporate law naturally raises the specter of regulatory arbitrage, but this could be managed through federal implementation of a regulatory regime.[281] At the same time, one must bear in mind that imperfect compensatory collections are not fatal to such proposals. Again, the principal aim is deterrence, reducing ex ante incentives to take big risks threatening big externalities in the first place.[282] While the generic objections above may be germane to a nuanced discussion of the design of recalibrated liability structures, they are not sufficiently weighty to foreclose such reform strategies outright.

2. *Real-Economy Firms*

Liability-related reform in the financial context should prompt us to think harder about risk and externalization dynamics in other settings as well. Alt-

277. *See* Easterbrook & Fischel, *supra* note 121, at 97.

278. *See* Hansmann & Kraakman, *supra* note 124, at 1907-09; *see also* Conti-Brown, *supra* note 270, at 436-38 (discussing the likelihood that greater shareholder liability would promote increased levels of risk management).

279. *See, e.g.*, Simkovic, *supra* note 118, at 327-28 (citing potential for "increases in public investment" and tax reductions).

280. *See, e.g.*, Conti-Brown, *supra* note 270, at 429-31; Romano et al., *supra* note 271, at 1000-02.

281. *See, e.g.*, Conti-Brown, *supra* note 270, at 434-35, 461-64; Hansmann & Kraakman, *supra* note 124, at 1922-23; Romano et al., *supra* note 271, at 1002-03.

282. *See, e.g.*, Conti-Brown, *supra* note 270, at 436-38; Hill & Painter, *supra* note 268, at 1189; Romano et al., *supra* note 271, at 993, 1002.

hough it is often said that banks are "special" due to their maturity-transformation function—borrowing short-term and lending long-term, creating potential for destabilizing runs, and so requiring a higher level of managerial prudence[283]—moral hazard dynamics like those associated with financial firms arise in other industries as well. For example, major automakers received bailouts following the financial crisis because the industry exhibits similar systemic dynamics, threatening similarly dire consequences if a large entity were allowed to fail.[284] More recently, such dynamics have arisen with large public companies in other systemically significant industries such as airlines, where debt-financed stock buybacks for the benefit of shareholders have depleted capital buffers.[285] These trends presumably reflect firms' confidence that they would not be allowed to fail in the event of an unanticipated cash crunch, such as that following the onset of the COVID-19 pandemic.[286] In light of such dynamics, Oscar Couwenberg and Stephen J. Lubben have drawn attention to "real economy" companies that, like financial firms, may be regarded as "too big to fail."[287] Shlomit Azgad-Tromer has similarly focused on what she calls SINFIs—"socially important non-financial institutions."[288] Such companies may be candidates for the sort of corporate governance reforms described above because their decision-

283. *See* Jonathan R. Macey & Maureen O'Hara, *The Corporate Governance of Banks*, 9 FRBNY ECON. POL'Y REV. 91, 97-99, 102-03 (2003).

284. *See* BRUNER, *supra* note 37, at 285 (observing that the bailout of U.S. automakers became "a social and political imperative" due to their role as major providers of social welfare benefits, notably health care); Tan, *supra* note 33, at 182-84 (discussing systemic risks emanating from financial activities of large nonfinancial firms, including automakers).

285. *See* Henry Grabar, *Why Do the Airlines Need a Bailout?*, SLATE (Mar. 17, 2020), https://slate.com/business/2020/03/airlines-bailout-coronavirus.html [https://perma.cc/L3SK-PXPD].

286. *See, e.g.*, *id.*; Stefan Redlich, *This Time It Is 'Too Many to Fail' Rather than 'Too Big to Fail'*, SEEKING ALPHA (Mar. 20, 2020), https://seekingalpha.com/article/4333214-this-time-is-too-many-to-fail-rather-too-big-to-fail [https://perma.cc/T4XD-462G]; *see also* Kathryn Judge, *The Truth About the COVID-19 Bailouts*, FORBES (Apr. 15, 2020), https://www.forbes.com/sites/kathrynjudge/2020/04/15/the-covid-19-bailouts [https://perma.cc/Q8CJ-R4GW] (arguing that bailouts create moral hazard and that "for large, public companies—precisely the ones that have been loading up on debt to buy back shares in recent years—the bankruptcy process works reasonably well").

287. Oscar Couwenberg & Stephen J. Lubben, *Not a Bank, Not a SIFI; Still Too Big to Fail*, 35 EMORY BANKR. DEVS. J. 53, 54 (2019).

288. Shlomit Azgad-Tromer, *Too Important to Fail: Bankruptcy Versus Bailout of Socially Important Non-Financial Institutions*, 7 HARV. BUS. L. REV. 159, 162 (2017). On the systemic risk dynamics associated with nonfinancial firms, see generally Dungey et al., *supra* note 134.

making incentives are skewed toward excessive risk in essentially the same manner.[289]

Others have asked whether risk-taking incentives should be revisited even further afield. Some proposals focus on the tort context, advocating increased ex post liability for (at least some) shareholders as a means of reducing risk-taking and overinvestment in peculiarly "hazardous" industries, as Henry Hansmann and Reinier Kraakman[290] and Nina A. Mendelson[291] have proposed. Others would require that a price be paid ex ante to get the benefit of limited liability, as Robert J. Rhee[292] and Michael Simkovic[293] have proposed.

In general, such proposals to restructure risk incentives through augmented shareholder liability merit real attention, and represent a far more direct means of achieving corporate sustainability than the disclosure-based proposals presently dominating the discourse.[294] Further, if the possibility of fine-tuned application were more widely appreciated, this mode of reform might actually be considered a less dramatic divergence from the status quo than those altering control structures.[295] Liability-related reforms essentially hold control structures constant, seeking to make shareholder-centric governance correlatively less objectionable to the degree that shareholders' own incentives align more closely with broader public interests. The potential benefits of such reforms would likely come into focus quickly, were we to stop treating limited liability like a "sacred cow" and acknowledge the broader landscape of governance arrangements achievable through the corporate form.[296]

The emerging trend toward greater accountability in global value chains suggests that risk dynamics are receiving some attention as more sustainable modes of corporate governance take shape.[297] Such arrangements, organized through

289. *See* Azgad-Tromer, *supra* note 288, at 163 (citing "the structural characteristics and distorted corporate governance of SINFIs"); Grabar, *supra* note 285 ("The question for Congress . . . is not whether to save the airlines—but how to redraw corporate governance to fix its bad incentives.").

290. Hansmann & Kraakman, *supra* note 124, at 1896-97.

291. Nina A. Mendelson, *A Control-Based Approach to Shareholder Liability for Corporate Torts*, 102 COLUM. L. REV. 1203, 1205-07 (2002) (focusing on increasing liability for controlling shareholders).

292. Robert J. Rhee, *Bonding Limited Liability*, 51 WM. & MARY L. REV. 1417, 1450-56 (2010).

293. Simkovic, *supra* note 118, at 281.

294. *See supra* Part II, Section III.A.

295. *See supra* Section III.B.

296. *Cf.* Conti-Brown, *supra* note 270, at 456-58 (pointing out "other examples in the law where profit allocations are revisited").

297. *See* BRUNER, *supra* note 21 (manuscript at 169-80).

corporate parent-subsidiary relationships or alternatively through contractual buyer-supplier relationships,[298] aim principally to reduce costs by outsourcing production to jurisdictions where labor is cheaper and environmental compliance less demanding.[299] They now account for a staggering eighty percent of global trade,[300] and have become extraordinarily complex. Apple, for example, as of 2015, had "785 suppliers in 31 countries worldwide contributing to the production of the iPhone."[301] The opacity of global value chains has raised significant concerns about environmental and social harms arising from operations in jurisdictions far removed from the consumer-facing companies headquartered in more affluent jurisdictions.[302]

While the parent companies and contractual "lead firms" coordinating global value chains[303] disclaim responsibility for activities occurring at distant subsidiaries and suppliers organized as distinct entities,[304] legal responses have begun to impose greater accountability. Case law in some jurisdictions (not including the United States[305]) has increasingly recognized circumstances in which the parent company of a multinational corporate group owes a direct duty of care to

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298. *See* Jaakko Salminen, *Sustainability and the Move from Corporate Governance to Governance Through Contract*, *in* THE CAMBRIDGE HANDBOOK OF CORPORATE LAW, CORPORATE GOVERNANCE AND SUSTAINABILITY, *supra* note 11, at 57, 59-61.

299. *See* Davis & Kim, *supra* note 105, at 210-13; Charlotte Villiers, *Global Supply Chains and Sustainability: The Role of Disclosure and Due Diligence Regulation*, *in* THE CAMBRIDGE HANDBOOK OF CORPORATE LAW, CORPORATE GOVERNANCE AND SUSTAINABILITY, *supra* note 11, at 551, 552-54.

300. *See* Villiers, *supra* note 299, at 552.

301. *Id.* at 553.

302. *See id.* at 552-54.

303. *See* Salminen, *supra* note 298, at 61.

304. *See* Vivian Grosswald Curran, *Harmonizing Multinational Parent Company Liability for Foreign Subsidiary Human Rights Violations*, 17 CHI. J. INT'L L. 403, 406-14 (2016); Salminen, *supra* note 298, at 62-63.

305. *See* Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1936-40 (2021); *see also* Adam Liptak, *Supreme Court Limits Human Rights Suits Against Corporations*, N.Y. TIMES (June 17, 2021), https://www.nytimes.com/2021/06/17/us/supreme-court-human-rights-nestle.html [https://perma.cc/X8VW-FJMP] (noting that the Supreme Court's decision in *Nestlé USA, Inc. v. Doe* limits corporate liability for alleged harmful conduct that occurred abroad when this conduct is insufficiently tied to the corporation's activities in the United States); Greg Stohr, Kimberly Robinson & Jordan Rubin, *Supreme Court Backs Nestle, Cargill on Child-Slavery Suit*, BLOOMBERG L. (June 17, 2021, 7:14 PM EDT), https://www.bloomberg.com/news/articles/2021-06-17/supreme-court-backs-nestle-cargill-on-child-slavery-suit [https: //perma.cc/LD29-8YHC] (same).

those harmed by activities of its foreign subsidiary.[306] Statutory responses are likewise emerging. While some are purely disclosure-based,[307] and appear largely ineffective for reasons resembling those discussed above,[308] others have built on disclosure to require real action in the form of due-diligence requirements, and even remediation obligations.

France's recent Corporate Duty of Vigilance Law requires large French companies to create and implement "an effective vigilance plan," including "reasonable vigilance measures to allow for risk identification and for the prevention of severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks resulting directly or indirectly from the operations of the company and of the companies it controls."[309] Significantly, the law reaches subcontractors and suppliers with which the company has "an established commercial relationship, when such operations derive from this relationship." This requirement for a vigilance plan builds on disclosure but extends well beyond it, as the plan must include "[a]ppropriate action to mitigate risks or prevent serious violations."[310] Moreover, "any person with a legitimate interest" can petition the government to pursue enforcement, or directly pursue damages in court.[311] French law defines the concept of an established commercial relationship broadly, and based on employee thresholds for application, the new law is estimated to reach 100-150 large French companies.[312]

306. *See, e.g.*, Vedanta Res. PLC v. Lungowe [2019] UKSC 20, ¶¶ 42-62 (U.K.) (discussing the circumstances under which a parent company's intervention in a foreign subsidiary's management could give rise to "a common law duty of care" to those affected by the subsidiary's operations); Curran, *supra* note 304, at 436-44 (summarizing case law in the United Kingdom, the Netherlands, Canada, and the European Union).

307. *See, e.g.*, Modern Slavery Act 2015, c. 30, § 54 (UK); California Transparency in Supply Chains Act, CAL. CIV. CODE § 1714.43 (West 2019); *see also* Slave-Free Business Certification Act, S. 4241, 116th Cong. §§ 2-4 (2020) (proposed by Senator Josh Hawley) (requiring reporting on covered business entities' "use of forced labor").

308. *See supra* Section III.A; *see also* Villiers, *supra* note 299, at 555-57 (describing weaknesses of the California and U.K. regimes).

309. Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Corporate Duty of Vigilance Law], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 28, 2017, art. 1 (trans. Eur. Coal. for Corp. Just.), https://respect.international/french-corporate-duty-of-vigilance-law-english-translation [https://perma.cc/LU4Q-NN3Q].

310. *Id.*

311. *Id.* arts. 1-2.

312. *French Corporate Duty of Vigilance Law: Frequently Asked Questions*, EUR. COAL. FOR CORP. JUST., at [3]-[4] (Mar. 24, 2017), http://corporatejustice.org/wp-content/uploads/2021/04/french-corporate-duty-of-vigilance-law-faq-1.pdf [https://perma.cc/L3U6-DBWM].

While legal actions have already been filed under this statute, they remain pending[313] and the law's effectiveness remains to be seen. Meanwhile, however, similarly demanding laws are emerging in other jurisdictions.[314] Collectively, these developments demonstrate an emerging trend toward greater liability exposure for companies supplied by far-flung subsidiaries and contractors around the world, taking direct aim at risk incentives in the firms coordinating these value chains in order to promote sustainable corporate conduct.

CONCLUSION

To date, none of the liability-based reform strategies discussed above have gained substantial traction in the United States (and most have gained little traction elsewhere).[315] As I have suggested above, this has much to do with how prevailing theories have conditioned our thinking about corporate governance, and limited our sense of the possible, by mutually constructing a narrow conceptual language of reform.[316]

Within the confines of that limited conceptual terrain, the prevailing view is that "corporate law is fundamentally about the process of corporate decisionmaking," and that potential reform strategies are correlatively "twofold"—"changing the decisionmaker" who holds corporate power or "changing the decision rule" that defines corporate purpose.[317] This formulation expressly holds

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313. *See Case Report: Wind Farm in Mexico: French Energy Firm EDF Disregards Indigenous Rights*, EUR. CTR. FOR CONST. & HUM. RTS. (Nov. 2020), https://www.ecchr.eu/fileadmin/Fallbeschreibungen/CASE_RESPORT_EDF_MEXICO_NOV2020.pdf [https://perma.cc/S2DV-YBGL]; *Total Sued Under France's New Duty of Vigilance Law*, ENV'T NEWS SERV. (Oct. 23, 2019), https://ens-newswire.com/total-sued-under-frances-new-duty-of-vigilance-law [https://perma.cc/DSE2-P4MF].

314. *See, e.g.*, Wet zorgplicht kinderarbeid van 7 februari 2017 [Child Labor Due Diligence Act], arts. 4-9 (Neth.) (trans. Ropes & Gray LLP), https://www.ropesgray.com/-/media/Files/alerts/2019/06/20190605_CSR_Alert_Appendix.pdf [https://perma.cc/72PN-QKRX]; Désirée Maier, Dorina Bruns & Tanja Woempner, *Current Status Supply Chain Act (Germany)*, HOGAN LOVELLS (Feb. 19, 2021), https://www.hlregulation.com/2021/02/19/current-status-supply-chain-act-germany [https://perma.cc/L2KS-95RD]. On the status of such laws and proposals across Europe, see *Map: Corporate Accountability Legislative Progress in Europe*, EUR. COAL. FOR CORP. JUST. (June 14, 2021), https://corporatejustice.org/publications/map-corporate-accountability-legislative-progress-in-europe [https://perma.cc/76M2-KHYB]; and Sjåfjell, *supra* note 38, at 202-04.

315. *See supra* Section III.C. The trend toward due-diligence laws in Europe is the exception.

316. *See supra* Part I.

317. D. Gordon Smith, *Response: The Dystopian Potential of Corporate Law*, 57 EMORY L.J. 985, 994 (2008) (responding to Kent Greenfield, *Proposition: Saving the World with Corporate Law?*, 57 EMORY L.J. 947 (2008)); *see also* Stephen Bainbridge, *Properly Understood, Corporate Law Can't* constant certain fundamental "legal characteristics," including limited liability,[318] and the result—cabining potential reforms to altering the decision maker or the decision rule—effectively defines liability-based reforms out of the debate entirely. Not surprisingly, this in turn tends to deflect attention away from corporate law as a means of responding to sustainability-related problems,[319] because many of the most consequential features of the corporate form are treated as if they were etched in stone.

When it comes to corporate governance reform, we consistently arrive at narrow answers because we ask narrow questions. Asking different questions can yield strikingly different answers, revealing a much broader landscape of governance arrangements achievable through the corporate form—and therefore a broader range of potential reforms than prevailing views on corporate governance can accommodate. As the preceding discussion amply conveys, revisiting fundamental attributes of the corporate form can help identify far more direct responses to the interconnected crises we face, and offer greater potential to achieve corporate sustainability.

I have presented here a more capacious and flexible framework for understanding the corporate form and its capabilities and have analyzed the present features of the corporate form that strongly incentivize risk-taking and externalization of costs as a means of illuminating what sorts of reforms might produce better results.[320] It bears emphasizing, however, that the aim should not be to replace one purportedly universal calibration of the corporate form with another. If anything, the discussion of liability-related reforms above strongly suggests that there is no single calibration of the corporate form that will promote optimal levels of risk-taking in all financial and economic contexts. The differing business realities and risk profiles of financial firms, systemically significant nonfinancial firms, firms involved in inherently hazardous industries, and firms engaged in far-flung global value chains require more granular and context-specific assessment, and the optimal liability structures and risk incentives in these various settings likely will not be identical.

Much work remains to determine what a truly sustainable calibration of the corporate form would involve, in these and other contexts. But asking the right questions, with an eye toward the corporate form's flexible capacities, will be a precondition to identifying more sustainable modes of corporate governance.

Do Squat About Sustainability, PROFESSORBAINBRIDGE.COM (May 11, 2021, 5:33 PM), https://www.professorbainbridge.com/professorbainbridgecom/2021/05/properly-understood-corporate-law-cant-do-squat-about-sustainability-.html [https://perma.cc/RES7-CKX2] (endorsing D. Gordon Smith's framing of corporate governance reform debates).

318. *See* Smith, *supra* note 317, at 990.

319. *See, e.g.*, Bainbridge, *supra* note 317.

320. *See supra* Part II.

Corporate governance debates too often default to the rigid binaries of prevailing theories, and reform proposals too often default to disclosure. Ultimately, we need to focus on a more robust conception of corporate sustainability and to reckon honestly with the corporate features and decision-making incentives standing in the way. Until we engage with the fundamental drivers of risk-taking and cost externalization, real solutions will continue to elude us. Taking seriously the broader range of possibilities that the corporate form offers, however, reveals ample means of redirecting corporate governance toward a sustainable path.