Department of Economics and Finance

Degree in Economics & Business

Chair of Law and Economics (IUS/05)

Capitalism inequalities and corporate purpose

Illusion or turning point?

Prof. Avv. Pierluigi Matera

SUPERVISOR

Giacomo Lupi

STUDENT (ID 237041)

ACADEMIC YEAR 2020-2021

INTRODUCTION ... 3
I. CAPITALISM: WEALTH AND INEQUALITIES ... 6
A. The recent economic situation: a point of no return? ... 6
1. What is wealth and how do we measure it? ... 6
2. An ever-increasing trend of inequalities ... 9
3. The reasons behind inequalities ... 14
B. The current debate ... 17
1. Senators Warren and Sanders' proposals ... 18
2. The analogy with German codetermination ... 20
3. Larry Fink and the rising role of institutional investors ... 20
II. A POSSIBLE SOLUTION: THE DEBATE ON CORPORATE PURPOSE ... 23
A. The BRT statement ... 23
B. The legal debate ... 25
1. A brief historical account of the policies in corporate purpose ... 26
2. Corporate purpose in the US: judge-made law ... 30
3. Comparison with other countries ... 32
C. An economical point of view ... 38
D. Problems of stakeholderism ... 41
1. Incentives behind the compensation system ... 41
2. Labour and control market ... 46
3. The costs and perils generated by stakeholderism ... 48
III. OTHER POSSIBLE SOLUTIONS TO CAPITALISM INEQUALITIES ... 50
A. Sustainability as a game-changer ... 50
1. The rise of ESG ... 50
2. Do ESG investments always benefit stakeholders? ... 53
B. The need for regulation ... 55
1. The role of regulatory authorities ... 55
2. Market pressure as a regulator ... 57
CONCLUSION ... 59
REFERENCES ... 62

INTRODUCTION

Since the creation of the modern form of corporations in the 18th century, inequalities and criticisms have been raised. Yet, over the past few years, wealth concentration and income inequalities have exponentially increased, becoming a central debate. In fact, the socio-economic situation in the U.S. has deteriorated so much that many economic actors have begun to advocate a change in corporate governance and more generally a change in the form of capitalism. This call for a change is resetting the debate on corporate purpose under different shapes characterized by new players and challenges.

Part I illustrates the context in which the debate on corporate purpose develops, along with the first positions taken by key actors. During the last decades, inequalities and wealth concentration has massively increased. The top 10% wealthiest in the U.S. held more than 75% of the wealth share in 2020 and a CEO earns on average 221 times more than an ordinary worker[1]. The reasons behind these problems are diverse and the government is starting to tackle them by undertaking a set of reforms to protect weaker market participants. Since 2018 some bills have been proposed to the congress. Senators' Bernie Sanders and Elizabeth Warren have sponsored – respectively – the Reward Work Act[2] and the Accountable Capitalism Act (ACA)[3]. Taking inspiration from German codetermination – in which the controlling board is composed by one third of the labour force[4]. They claim for a shift towards stakeholder capitalism asking for workers' representation in the board of directors. The willingness to move from shareholder primacy to stakeholderism comes also from institutional investors. Their role and their point of view is usually carefully monitored by policymakers. Every year, Larry Fink, chairman and CEO of BlackRock issues a letter to the CEOs. Being the world's largest asset manager, the publication of its annual letter has become one of the most awaited moments by financial markets. For the first time, an

[1] Lawrence Mishel & Julia Wolfe, *CEO Compensation Has Grown 940% Since 1978: Typical Worker Compensation Has Risen Only 12% During That Time*, Econ. Pol'y Inst. (2019).
[2] *The Reward Work Act*, S. 2605, 115th Cong (2017-2018).
[3] *The Accountable Capitalism Act*, S. 3348, 115th Cong. (2018).
[4] Hans-Joachim Mertens & Erich Schanze, *The German Codetermination Act of 1976*, 2 J. Comp. Corp. L. & Sec. Reg. 75, 75 (1979).

important market player calls for climate and sustainability issues as key features of future investments.

Part II addresses the debate on corporate purpose as a solution to curb wealth concentration and income inequalities. In summer 2019, the Business Roundtable (BRT) – a trade association composed of approximately 200 CEOs of the major U.S. public companies – issued a new statement on the "purpose of a corporation", reinterpreting the conception of corporate governance[5]. Seeking for the commitment of companies to benefit all their stakeholders. This statement prompted many critics and doubts over the willingness to reshape capitalism from shareholder primacy to stakeholder primacy. In other words, what are the reasons behind the decision of corporate leaders to prefer delivering benefits to stakeholders rather than their principal shareholders? As every business issue, the debate on corporate purpose needs to be studied also under a law perspective. This debate has been addressed since the beginning of the past century by the legislators. Originally courts developed a case law principle according to which a company should have a corporate object clause. They developed the ultra vires [beyond the powers] doctrine. However, the modern incorporation procedure has changed, it eliminated the limitations and the restrictions on the purpose of a corporation. Today's law of corporate purpose is for the most part judge-made law. Indeed, facing this topic, we should make a distinction between the standard of conduct and the standard of review. In other words, we should consider what the law requires and what the law allows. Moreover, this part deals with the economical perspective. Understanding the rationale of shareholder primacy's development is crucial to both find the solution of income inequalities and recognizing the problems of stakeholderism.

Finally, part III provides alternative solutions to capitalism inequalities. The problem of climate change led to an increasing call of ESG investments and sustainable corporate governance. Environmental issues are strongly related to wealth and inequalities. Calling for a sustainable corporate governance could in fact solve the problem of capitalism inequalities. However, it is a new issue and clarifications are required by institutional authorities. Nevertheless, regulations imposed by government or authorities are always

[5] Business Roundtable, *Statement on the Purpose of a Corporation* (Aug. 19, 2019).

helpful to address market failures and protest weaker market players. In fact, as the EU has begun to deal with ESG's metrics in Europe; the SEC is going towards the same direction ordering reports and approaching commissions about ESG's metrics[6].

[6] Request for Rulemaking from Cynthia A. Williams & Jill E. Fisch to Brent J. Fields, Sec'y, SEC (Oct. 1, 2018), https://www.sec.gov/rules/petitions/2018/petn4-730.pdf

I. CAPITALISM: WEALTH AND INEQUALITIES

A. The recent economic situation: a point of no return?

1. What is wealth and how do we measure it?

Statistical analysis has always been the basis for every socio-economic issues. Data are objective and provide an authentic measurement of the population. The problem arises when those data are not provided by official authorities, but they are the product of researchers and scholars, GDP might be the evidence. GDP – considering all its limitations – is the most reliable measure of a country's macroeconomic value and its evidence is controlled and continually updated by governments[7]. This is not the case for the measurement of income inequalities.

In the last few years – in particular after the 2014 Thomas Picketty's publication – an outstanding increase of wealth and inequalities research appeared in the statistical field. Although for different reasons, researchers encounter significant difficulties and limitations to collect data. For example, due to globalization and an increasingly interconnected world, catching an individual's wealth, having a diversified portfolio investment split in different countries and different forms of assets is very complicated. It is very simple and common to invest likewise in a real or financial asset in a completely other region from its own country. In fact, 8% of the world's household financial wealth is held offshore[8].

[7] Saez, Emmanuel, and Zucman, Gabriel, *The Rise of Income and Wealth Inequality in America: Evidence from Distributional Macroeconomic Accounts*, Journal of Economic Perspectives, 1 (2020).
[8] *Id*

In addition to the difficulty of finding evidence of wealth, some countries have special laws – such as secret banking – impeding third parties to control and quantify individual's wealth. Moreover, the absence of a wealth tax – just a few states tax their inhabitants on a purely wealth basis – increases the difficulty of researchers to find realistic, updated and reliable data.

To compare wealth inequalities among different countries and across time, it is essential to adopt a common definition. Adopting a realistic definition of wealth will reflect the real world and the existence of real inequalities. The most exhaustive one, has been Gabriel Zucman's one, defined in the following way:

> *"codified in the System of National Accounts (2009), Piketty and Zucman (2014), and Alvaredo et al. (2016): household net wealth includes all the non-financial assets — real estate, land, buildings, etc. — and financial assets — equities, bonds, bank deposits, life insurance, pensions funds, etc. — over which households can enforce ownership rights and that provide economic benefits to their owners, net of any debts. As a general rule, all assets and liabilities are valued at their prevailing market prices. This definition of wealth includes all funded pension wealth — whether held in individual retirement accounts, or through pension funds and life insurance companies."*[9]

Trying to compute macroeconomical aspects of society always leads to the exclusion of some data. Both for the impossibility to collect them and for the fact that otherwise many other elements would have to be considered. In line with this approach, this definition excludes on the one hand the future value of government spending and health benefits. On the other hand, it excludes durable and valuable goods – like cars – because are considered not relevant compared to household wealth[10]. The last aspect not considered within the definition of wealth is human capital since it cannot be sold on markets[11].

---

[9] *Id.*, at 5
[10] According to Piketty and Zucman's analysis "the value of durable goods appears small and stable over time".
[11] Saez, *supra note* 7 at. 6

The best solution for wealth inequalities' analysis would be – as previously stated – the possibility to collect official government data on household wealth. In fact, the government can easily collect data from third parties – banks, registers, or other financial institutions – to define all of a household's assets. Nowadays, wealth tax is present only in few countries[12] and making a detailed research on inequalities and wealth concentration alone would not be enough. It would be necessary to combine it with other sources.

Wealth tax – contrary to what might be thought – has its roots in Ancient Greece. The first time a tax on wealth appeared was in Athens and was called the *eisphora*. It affected the entire wealth of individuals; whoever, in the absence of a land registry and given the fragmentation of property, only the owner was able to say what he owned and consequently, taxpayers had to declare the value of their property, which left the door open to attempts at fraud.

In the U.S. 2020 Presidential Campaign, Senators Elizabeth Warren and Bernie Sanders proposed the possibility to introduce a tax on wealth for multimillionaires and billionaires[13]. This idea found broad support both from citizens and among Republicans[14] and opened the debate on a new wave of tax reform to curb inequalities.

To estimate wealth inequalities in the U.S., scholars use a method known as income capitalization. Even is it has been invented during the 20th century, in recent years, Saez and Zucman have adopted it again. This technique – as Zucman illustrated – works in the following way:

> *"The idea is to link the Financial Accounts aggregates to the income flows that these assets generate: thus, interest-bearing assets are linked to interest payments, corporate equities are linked to dividends and capital gains, business assets are linked to business*

[12] Nowadays, wealth tax is present only in few countries such as Scandinavian countries.
[13] Ben Steverman & Benjamin Stupples, *Bloomberg Tax, Wealth Taxes Are Going Global, From California to Germany*, January 6, 2021, https://news.bloombergtax.com/daily-tax-report-international/wealth-taxes-are-going-global-fromcalifornia-to-germany
[14] Howard Schneider & Chris Kahn, Reuters, *Majority of Americans Favor Wealth Tax on Very Rich: Reuters/Ipsos Poll*, January 10, 2020, https://www.reuters.com/article/us-usa-election-inequality-poll/majority-of-americans-favorwealth-tax-on-very-rich-reuters-ipsos-poll-idUSKBN1Z9141

profits, and so on. Concretely, if the ratio between the stock of interest-bearing assets in the Financial Accounts and the total flow of interest income reported in tax returns is 50, then someone with $1,000 in interest is assigned $50,000 in bonds, saving accounts, and other interest-generating assets. Wealth, in other words, is estimated by capitalizing income; in the preceding example, interest is capitalized using a capitalization factor of 50, or equivalently an interest rate of 2%."

However, as with every statistical analysis, this approach should be extended with other data to effectively address inequalities.

2. An ever-increasing trend of inequalities

The analysis of wealth inequalities should be addressed by making different subgroups within the wealthiest population. In other words, to understand the trends of the top population wealth share in the United States we should begin analysing the top 10% and then the ever-decreasing percentage.

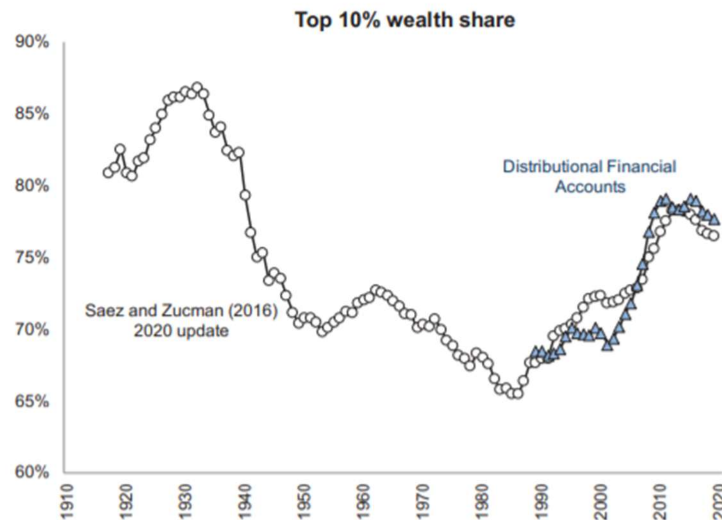
Firstly, in figure 1, we can analyse the evolution of the top 10% of wealth share in the U.S. obtained by capitalizing income. This graph shows a U-shaped evolution in the period between 1910 and 2020.

At the beginning of the 20th-century, there has been an increase, reaching the peak in the 30s with more than 85% of total wealth held by the richest 10 percent of the population.

After this peak, a huge fall occurred until 1940 due to the major 20th century economic crisis – the Great Depression. In the context of the New Deal and the absence of economic growth, the decreasing trend continued until 1980 when it reached 65% – its lower percentage of the last century.
From that moment the wealth share obtained by the top 10 percent gradually increased, reaching more than 75% in recent years.

However, in the last 7 years we are experiencing a decrease as an effect of the 2009 financial crisis.

Figure 1



Notes: All the series use the same definition of household wealth (the market value of all non-financial and financial assets net of all debts, excluding consumer durables and unfunded pensions), have the same total wealth (the official Financial Accounts total, e.g., $76.5 trillion in mid-2016), the same totals asset class by asset class, and use the same unit of observation (tax units). To move from households to tax units in the SCF and the Distributional Financial Accounts, we assume that each tax unit within the top 1 percent corresponds to one household and make no correction for the next 9 percent. To make the SCF comparable to the other two sources, we add the Forbes 400 to the public-use SCF files and adjust reported wealth to match the Financial Accounts totals asset class by asset class. Sources: Federal Resreve, Saez and Zucman (2016), September 2020 update, and Forbes.

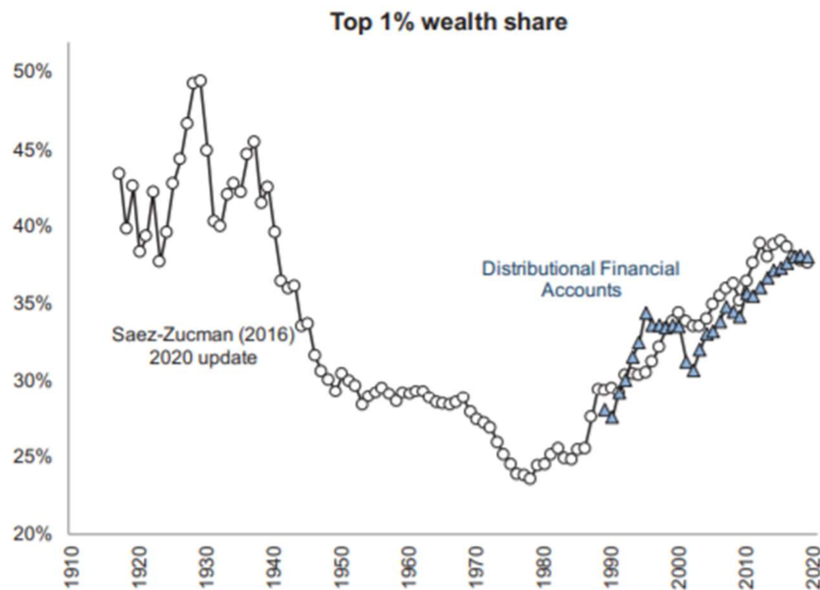
Figures 2 and 3 show the evolution of the top 1% and 0,1% – respectively – wealth share in the U.S. obtained by capitalizing income. In line with the analysis of the top 10 percent, we can observe a U-shaped trend along the last century due to the same reasons.

However, in the 1910s and the 1920s, for both top 1 and 0,1 percent, we can observe stronger increases, reaching respectively 50% and 25% of wealth share – in particular during the second half of the 20s. In addition, the little

decrease experienced by the top 10 percent in the last years, seems not or almost not affecting their wealth share.

The share owned by the top 1 percent - representing more or less 170.000 families - has increased by 11 points the share of total wealth since 1989. Concurrently, the share of wealth owned by the 90% has fallen by the same percentage in that period. This huge difference is highlighted even more comparing the wealth per tax unit. In fact, the top 1 percent in 2020 own on average 17,6 million U.S. dollars, representing nearly 40 times the average wealth per tax unit of 453.000$.[15]

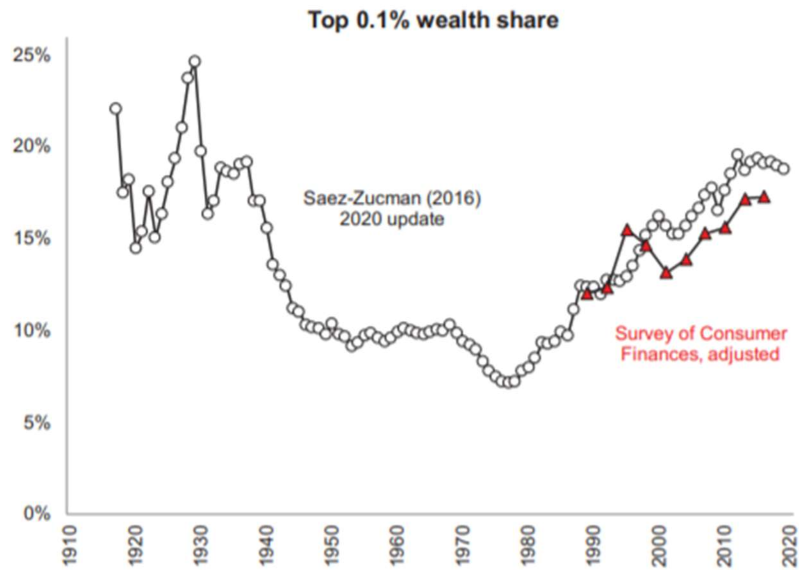
Figure 2



Note: see figure 1

[15] Zucman, Gabriel *Global Wealth Inequality* NBER Working Papers 25462, National Bureau of Economic Research, Inc., 15 (2019).

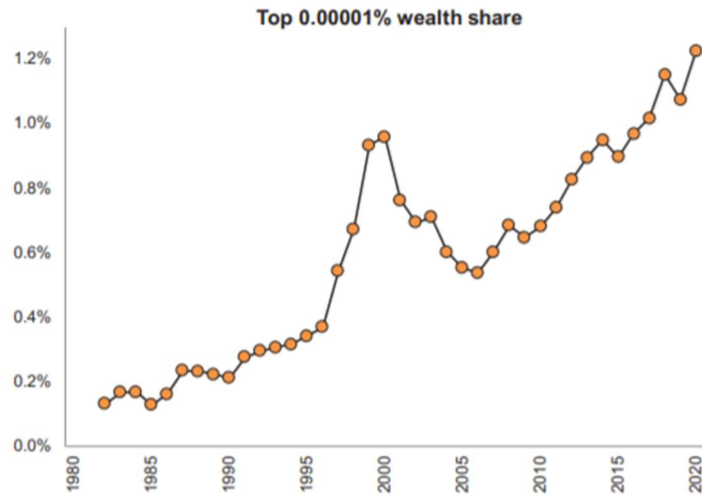
Figure 3



Note: see figure 1

Finally, we can observe the evolution of the wealthiest 0,00025 percent of households, as Forbes has ranked them as the 400 richest persons in the U.S. Among this list – even though some households are missing due to the difficulty of tracking their portfolio – we can confirm the presence of a huge concentration of wealth in the hands of a few. Moreover, their portion has increased - in proportion - more than any other category in the last decades. This elite group owned 0,13% of total U.S. wealth in the 80s and raised to 1,2% in 2020 – and this trend does not seem to be changing.

Figure 4



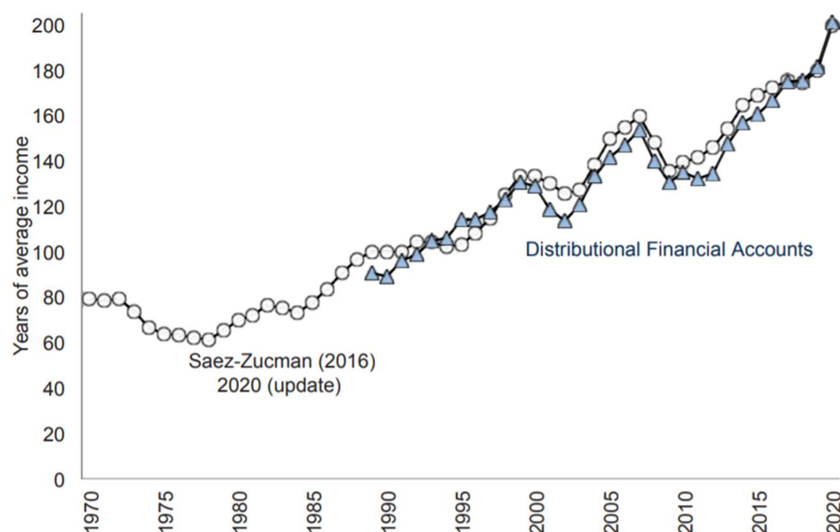
Note: see figure 1

The last half-century has been characterized by an incredible accumulation of wealth among the wealthiest population.
Meanwhile, the concentration of wealth has increased with the top 10% of the U.S. population. Wealth itself has grown at an unprecedented rate, even higher than income and output[16]. In fact, during this period the ratio of aggregate household wealth to national income has reached 570% in 2020; 270 points more than the ratio in 1980.

As shown in figure 5, in 1980 the average wealth owned by members of the top 1 percent was equivalent to 60 years of average U.S. income. This ratio – as Saez and Zucman research point out – surprisingly increased to more than 200 years.

[16] Saez, *supra note* 7 at. 8.

Figure 5: Average Wealth of 1% Wealthiest Adults (Divided by Average U.S. Income Per Adult)



Notes: This figure shows the average wealth of the top 1% wealthiest adults (with wealth equally split among married spouses), expressed as a ratio to average US national income per adult. For the Distributional Financial Accounts, we assume that the average wealth of the top 1% households is the same as the average wealth of the top 1% equal-split adults. Source: Saez and Zucman (2016), September 2020 update, available on WID.world, and Federal Reserve Distributional Financial Accounts.

3. The reasons behind inequalities

The previous section highlighted the increasing problem of inequalities and wealth concentration, these phenomena have ground in both macro- and microeconomic approach, from the problems of globalization to the variety of discrimination in our society[17].

The last decades have been characterized by the most important wave of globalization mankind has ever seen. Due to many factors such as lower cost of transportation and lower tariffs, trade has become global at every scale. This trend helped rich, emerging and poor countries to develop and increase

[17]*See generally* Gatti, Matteo & Ondersma, Chrystin D., *Can a Broader Corporate Purpose Redress Inequality? The Stakeholder Approach Chimera* (March 4, 2020). 46 J. Corp. L. 1 (2020).

their quality of life. However, there is a side of the same coin that is being considered only in recent years.

Trade and globalization are hurting many rich countries – in particular to the lower-skilled population, working in sectors that have been replaced by imports. Many domestic firms have gone out of business[18] and many workers have lost their job[19]. Some commentators argue that the corporate governance approach of shareholder primacy has contributed to the rising of this problem instead of tackling it. For this reason, globalization has become a hot political debate, characterizing Trump Presidential mandate and could be the grounds for many possible reforms in the next years.

Technology and education are two aspects that should be considered together since they are interconnected[20]. In other words, technological development will require new kinds of workers with new skills. And this leads to a "race of education" that will affect part of the population, in particular low-class families unable to invest an increasing amount of money in education.
In absence of adequate regulation and reforms, technological development will increase inequalities, leading both to lower wages and eliminating jobs with routine tasks and low skills preparation[21].

A key issue concerning wealth inequalities is market power. Indeed, within the market, there are always some participants in a stronger position than others and regulators have the role and the goal to set the rules for fairness and competitiveness. In particular, in the labour market, different types of power positions can occur. The first one is between firms and the second one is within firms. In the former, authorities should regulate the efficiency of the market and the fairness of all participants, otherwise, a player can abuse its position - and inequalities will by consequence increase. Only in the last

[18] Andrew B. Bernard, J. Bradford Jensen & Peter K. Schott, *Survival of the Best Fit: Exposure to LowWage Countries and the (Uneven) Growth of U.S. Manufacturing Plants*, 68 J. INT'L. ECON. 219, 219–20 (2006).
[19] David Weil, *The fissured workplace: why work became so bad for so many and what can be done to improve it* 168–77 (2014). On offshorability, *See generally* Alan S. Blinder, *How Many U.S. Jobs Might Be Offshorable?*, 2 WORLD ECON. 41 (2009).
[20] *See generally* Jan Tinbergen, *Substitution of Graduate by Other Labour*, 27 KYKLOS 217 (1974).
[21] *See* David H. Autor, Frank Levy & Richard J. Murnane, *The Skill Content of Recent Technological Change: An Empirical Exploration*, 118 Q.J. ECON. 1279 (2003).

year, the political debate has begun to address this problem[22]. The latter is another actual topic and concerns the abuse of power by companies against their employees. Especially in the case of concentration of power, the few firms on the market will have a huge weight in hiring new workers and attributing them to fair remuneration and work hours[23].

After years of silence[24], commentators and regulators have begun in recent years questioning this issue again, highlighting, in particular, the problem of inequalities[25].

Managerial capitalism has characterized the U.S. economy for a long time and even if during the last decades the model of capitalism has slightly changed, excessive CEOs and high managers compensation remains actual. Inequalities grow in parallel to the rise of super managers compensation[26]. Between 1978 and 2018, the top 350 U.S. firms CEOs' compensation raised by 940%[27]. Today a CEO earns on average 221 times more than a normal worker[28].

Executive compensation has been a focus of public attention for decades. There is an ongoing debate about whether executives receive excessive compensation, and many are concerned with the disparity between the compensation rates of CEOs compared with companies' wider salary schemes. Others argue that efficient CEOs deserve large compensation packages due to the value that their leadership brings to the company. Some corporate governance experts, however, say that high CEO pay does not always correlate with high returns and with the company's performance. As

[22] *See* Cecilia Kang, David McCabe & Daisuke Wakabayashi, *U.S. Accuses Google of Illegally Protecting Monopoly*, N.Y. TIMES (Oct. 20, 2020), https://www.nytimes.com/2020/10/20/technology/google-antitrust.html; Sen. Elizabeth Warren, *Keynote Remarks at New America's Open Market Program Event: Reigniting Competition in the American Economy*, (June 29, 2016) (transcript available at https://washingtonmonthly.com/2016/06/30/elizabeth-warrens-consolidation-speech-could-change-the-election/ [https://perma.cc/TAW8-F2PQ.

[23] *See* Evan Starr, J.J. Prescott & Norman Bishara, *Noncompete Agreements in the U.S. Labor Force*, J.L & ECON. 6 (forthcoming 2020).

[24] *See* Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 236–37 (2017).

[25] Gatti & Ondersma *supra note* 17 at. 139.

[26] *See* Anthony Atkinson, *Inequality* 107–08 (2016); *See also* Thomas Piketty, *Capital in the twenty first century* 397–405 (2014).

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

[28] *Id.*

the gap between CEO and average worker pay continues to grow, so too, has shareholder activism aimed at narrowing it. Since 2011, U.S. companies have been required to hold periodic Say-on-Pay, in which shareholders cast an advisory vote on an executive's compensation package.

Finally, taxes are strongly linked with inequalities. Taxes appeared with the firsts human civilisations and are the main source of income of modern public sectors. Their first goal was to finance public expenditures such as wars but subsequently, governments began to use taxes as a tool to reduce wealth inequalities[29]. However, since the 1980s, the U.S. has experienced several tax cuts in particular referring to the wealthiest portion of the population – and this trend does not seem to cease. Some commentators[30] report different research emphasizing how the rate at which low and middle-class families are taxed has remained the same. Opposed to the richest portion of the population which has experienced an important decrease – if today they are taxed at an overall effective rate of 23%, in 1950 the rate was 70%[31].

B. The current debate

In the last years, the economic situation has become more and more critical. Section I. A has highlighted the increasing trends of inequalities and wealth concentration. The reasons behind these problems are diverse and the government should tackle them by undertaking a set of reforms to protect weaker market participants. In addition, the COVID-19 pandemic has brought even sharper focus inequalities among the U.S. population.

---

[29] *See* Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient Than the Income Tax in Redistributing Income*, 23 J. LEG. STUD. 667 (1994).

[30] Gatti & Ondersma, *supra note at.* 155.

[31] *See* Emmanuel Saez & Gabriel Zucman, *The triumph of injustice, how the rich dodge taxes and how to make them pay* (2019) 14, 19–20.

1. Senators Warren and Sanders' proposals

Usually, every economic crisis or corporate scandal is followed by a wave of modernisation and actualisation of laws. In other words, it is known that crises and scandals occur when and where authorities have failed to control the market. Subsequently to any economic issues having a global echo, governments and politicians claim for new rules. It is the case of the Great Depression and the following reforms in the 1930s – known as the New Deal; the Sarbanes-Oxley Act of 2002 after the Enron scandal; and the Dodd-Frank Act enacted after the 2009 financial crisis[32].

U.S. corporate governance is principally concerned with shareholder primacy. Other stakeholders are very narrowly considered by corporate decision-makers. Initially, only a small portion of scholars supported an increased power of stakeholders in corporate governance. But, in 2018 two democratic senators – at that time contenders of the Democratic presidential nomination – supported the idea of reshaping corporate governance by proposing two reforms.

The first bill was proposed in March 2018 by Senator Tammy Baldwin of Wisconsin - and then sponsored by Bernie Sanders, citing it as the "Reward Work Act". The problem addressed was income inequality due to stock buybacks.

However, the most relevant aspect of this Act is illustrated in section 3: "worker representation on corporate board of directors". Concerning the policy of the reward work act, senator Baldwin invokes regulation:

> *(1) to ensure that director elections at issuing firms are fair and democratic; and*
>
> *(2) to ensure that 1⁄3 of an issuer's board of directors will be composed of employee representatives within 2 years of the date of enactment of this Act.*[33]

[32] Matera, Pierluigi, Delaware's Dominance, *Wyoming's Dare. New Challenges, Same Outcome?* (April 5, 2021). Fordham Journal of Corporate and Financial Law, Vol. 27, No. 1, 19, forthcoming 2021.

[33] *See supra note* 2.

After 5 months – in August 2018 – Senator Elizabeth Warren of Massachusetts proposed the “Accountable Capitalism Act” (ACA)[34]. Following the Reward Work Act, Warren’s proposal also claimed for the possibility of employees to be represented on the board of directors. Although, this proposal represents a broader set of reforms, trying to address the problem of big companies managed with the only goal of maximizing shareholders' benefit and drawing the attention of all stakeholders. In particular, she claims for the creation of a new charter “United State corporation” for companies having more than one billion dollars in gross receipt per year. This subsection is similar to Delaware's model of a public benefit corporation.

The common aspect between the Reward Work Act and the ACA is the intention to allow employees to be represented on the board of directors. Senator’s Warren suggests that “Not less than 2⁄5 of the directors of a United States corporation shall be elected by the covered employees of the United States corporation”.

Employees representation on the board is like to the German codetermination and even though the two bills have some different way of applying: the will is common. On one hand, they both want to curb corporate power by restricting CEOs power against their increasing desire of competing and lobbying against countries due to their economical non-binding power[35]. On the other hand, codetermination could be relevant for helping employees making their voice heard in the corporate decision[36]. In other words, having part of the board elected by employees would mean having employee’s opinion and fair treatment in corporate concerns.

[34] *See supra note* 3.

[35] *See* Jens Dammann & Horst Eidenmüller, *Taming the corporate Leviathan: Codetermination and the Democratic State* (ECGI., Law Working Paper No. 536, 2020).

[36] Lowell Gallaway, *The Economic Consequences of Codetermination on Employment and Income Distribution, in the codetermination movement in the west* 169, 170 (Svetozar Pejovich, ed. 1977).

2. The analogy with German codetermination

Many commentators compare the Reward Work Act and the ACA with the German board Codetermination. However, to implement a successful concept abroad, it is necessary to identify the differences in terms of corporate law and corporate governance in those two countries. In American corporate law, there is a stronger Border of Directors and a sort of hidden mistress of the General Meeting.

By contrast, in Europe, there is a primacy of the General Meeting, due to the idea that shareholders are the owners of the company and delegate part of the power to the Board of Directors.

Even the corporation's structure changes all around the world. In the U.S., the General Meeting elect the Board of Directors – within which stands different committees – which as a result appoint the officers (CEO, CFO…). In Germany, the General Meeting elects the controlling board which itself nominates the managing board. The peculiarity is that the controlling board is composed of ⅓ of the labour force (workers). In this way they are involved in managerial affairs: it is the Codetermination – enacted in Germany for the first time in 1976 – mandating all companies with more than 2.000 employees to appoint half their directors[37].

3. Larry Fink and the rising role of institutional investors

Larry Fink, chairman and CEO of BlackRock, the world's largest asset manager, issues every year a "Letter to CEOs". He began to write those letters after the 2009 financial crisis seeking to highlight important and key issues such as sustainability, long-term management, climate change and purpose. In other words, at the beginning of each year, Larry Fink stands out three or

[37] *See* Hans-Joachim Mertens & Erich Schanze, *The German Codetermination Act of 1976*, 2 J. COMP. CORP. L. & SEC. REG. 75, 75 (1979).

four key arguments and exposes his opinion intending to influence as many managers, policymakers, and investors as he can.

Being a company investing in markets all around the world and acquiring relevant positions among shareholders, Larry Fink's annual letter to the CEOs has become one of the most awaited moments by financial markets.
A controversial letter has been surely 2018 one, named "A sense of purpose" where he stressed out some issues that have been subsequently taken up by the 2018 Business Roundtable. Stating that: "*without a sense of purpose, no company, either public or private, can achieve its full potential"*[38] *He* has been the first one to publicly reignite the modern debate on the purpose of a corporation.

He tried to shape a new model of corporate governance based on the perception that outsiders have of the company. He affirmed that companies "without a sense of purpose" will "lose the license to operate from key stakeholders."[39] This view of the company is mainly focused on the recognition that stakeholders and society as a whole have, assuming that shareholder primacy would have a fatalistic effect[40].

In the 2020 annual letter, Larry Fink successfully addressed the market calling for a "reshaping of finance". For the first time, an important market player calls for climate and sustainability issues as key features of current investments.

As opposed to previous letters, the 2020 one not only illustrates the guidelines that CEOs should seek but also shows how BlackRock is supposed to invest for long term objectives. The role of corporations should be in line with the competent regulatory authorities in the pursuit of totally green capitalism. By announcing that "a strong sense of purpose and a commitment to stakeholders" means that the company's part is to inform and promote sustainable investment for a common benefit.

---

[38] Larry Fink's 2018 Letter to CEOs, *A Sense of Purpose*, available at https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter
[39] Larry Fink, *A Sense of Purpose,* HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 17, 2019), available at https://corpgov.law.harvard.edu/2018/01/17/a-sense-of-purpose/.
[40] Bebchuk, Lucian A. & Tallarita, Roberto, *The Illusory Promise of Stakeholder Governance* (February 26, 2020). Cornell Law Review, Volume 106, 2020, pp. 91-178, Harvard Law School John M. Olin Center Discussion Paper No.1052, Harvard Law School Program on Corporate Governance Working Paper 2020-1, 16.

In addition to the letter to the CEOs, BlackRock's executives published last year a letter to the shareholders, disclosing their investing guidelines. What emerges is a shift towards ESG metrics focusing on both passive and active investments. These initiatives are however non-binding but recommendations and could be analysed as a greenwashing tool. For example, BlackRock took part at the Climate Action 100+ after being criticized for their contrary votes – and subsequent non-approval – for some sustainable initiatives sponsored by minority shareholders.

Institutional investor sustainable activism is increasing in recent years and their policies or campaigns have strong effects on society. Being one of the most influential investors, BlackRock statements and investment guidelines influence the market. In fact, its support for stakeholderism had effects also on policymakers. The American Law Institute decided to draft a Restatement of Corporate Law in 2019. The project had as its main focus the question of corporate purpose and the appropriate role that stakeholder interests should play in director decision-making.[41]

[41] In an NYU roundtable on December 6, 2019, The Reporter has discussed this possibility.

II. A POSSIBLE SOLUTION: THE DEBATE ON CORPORATE PURPOSE

A. The BRT statement

In summer 2019, the Business Roundtable (BRT) issued a new statement on the purpose of a corporation, reinterpreting the conception of corporate governance. The BRT is a trade association[42] composed of approximately 200 CEOs of major U.S. public companies – 187 of which have signed the latest statement – which was formed in 1972[43].

Since its creation, the BRT issues periodic reports on the Principle of Corporate Governance which receive substantial consideration and have relatively important influence on policymakers.[44] At the end of the 20th century – in 1997 – the BRT issued a statement embracing shareholder value, highlighting that "the principal objective of a business enterprise is to generate economic returns to its owners"[45]. In other words, they claim that directors should focus only on maximizing shareholders' welfare[46]. From that year until 2019, every statement "endorsed principles of shareholder primacy – that corporations exist principally to serve shareholders."

The latest statement is in complete contradiction with the old ones, in fact it imposes to companies a commitment to all parties related to the corporation. The statement of August 2019 on the purpose of a corporation is the following:

> *While each of our individual companies serves its own corporate purpose, we share a fundamental commitment to all of our stakeholders. We commit to:*

[42] *See* Benjamin C. Waterhouse, *Lobbying America* 76-78 (2013).
[43] Alma Cohen *et. al.*, *The Politics of CEOs*, 11 J. Legal Analysis 1, 11 (2019).
[44] *See* Bainbridge, Stephen Mark, *Making Sense of The Business Roundtable's Reversal on Corporate Purpose* (July 30, 2020). UCLA School of Law, Law-Econ Research Paper No. 20-03.
[45] *See* Ludema, Jim & Johnson, Amber *The purpose of the corporation? Business Roundtable advances the conversation, now we all need to contribute*, Forbes, Aug. 20, 2019.
[46] Business Roundtable, Statement on Corporate Governance 3 (Sept. 1997).

- *Delivering value to our customers. We will further the tradition of American companies leading the way in meeting or exceeding customer expectations.*
- *Investing in our employees. This starts with compensating them fairly and providing important benefits. It also includes supporting them through training and education that help develop new skills for a rapidly changing world. We foster diversity and inclusion, dignity and respect.*
- *Dealing fairly and ethically with our suppliers. We are dedicated to serving as good partners to the other companies, large and small, that help us meet our missions.*
- *Supporting the communities in which we work. We respect the people in our communities and protect the environment by embracing sustainable practices across our businesses.*
- *Generating long-term value for shareholders, who provide the capital that allows companies to invest, grow and innovate. We are committed to transparency and effective engagement with shareholders.*

  Each of our stakeholders is essential. We commit to deliver value to all of them, for the future success of our companies, our communities and our country.[47]

This statement seems to call for a shift among the most relevant U.S. corporations towards an intention to move away from shareholder primacy and fit with modern standards of corporate governance. However, many commentators have addressed the fairness and the real objectives of this statement. Two main critics have been raised.

Firstly, on the real reasons behind this statement. To reshape corporate governance towards sustainability and stakeholder interest, directors should have additionally discretionary power. That is why some commentators are suggesting that CEOs – pretending to create benefits to all their stakeholders – are trying to find a solution to resist the rise of hedge funds activism. Thereby

[47] Business Roundtable, *Statement on the Purpose of a Corporation* (Aug. 19, 2019)

creating a sort of coalition between CEOs and asking for a broad power to their stakeholders to safeguard their benefit[48].

Secondly, this statement brought up the possibility of greenwashing. Calling for a stakeholder-friendly corporate governance, they might try to prevent legislative reforms which may in perspective be detrimental for corporate directors. For example, the early cited reforms proposed by Senator Warren and Senator Sanders. This statement can be considered an attempt demonstrating to the market and to the media desire for a change on sustainability and social issues.

In addition, this statement raised an important debate – that will be deeply discussed in the next sections – towards law scholars and commentators about its enforceability in American Corporate law and in particular in Delaware law. Where directors are legally bound to act in the interest of the shareholders[49].

B. The legal debate

For whom the corporation is managed is a never-ending debate, being discussed for decades. In the past the debate was focused on “shareholder primacy” v. “stakeholder governance”. While after a long period of shareholder primacy supremacy, the recent economic and political situation relaunched the debate in the name of “corporate purpose”. To efficiently address this topic, it is necessary to deal with the historical analysis and the legal evolution from corporate charters to the modern form of Article of association.

[48] *See generally* Roe, Mark, *Why are America's CEOs talking about stakeholder capitalism now?* Project Syndicate, 4 Nov 2019.

[49] *See generally* Pierce, Morton, *Analysis of the Business Roundtable statement* Harvard Law School Forum on Corporate Governance, 26 Sept 2019.

1. A brief historical account of the policies in corporate purpose

The modern view of companies has its origins with colonialism in the 16th century by the English – and Dutch – which had a poor army, and economical purposes were their main objective. Companies started as commercial agreements made by merchants and the government for reciprocal advantages. It was in the interest of the Crown to grant privileges. Under the name of the Charter, companies' owners had privileges such as monopolies trading rights, tax-free and limited liability on venture capital. In other words, the government created incentives for private investments and collectively use their granted privilege to make common benefits[50]. Merchants combined their stock turning it into company stock creating the world's first modern commercial corporation and the first public-private collaboration: it is the first form of modern capitalism. At that time, there were two types of companies: companies with no limited liability and Chartered companies. The latter were companies having privileges such as monopoly, trading rights, tax exemptions and limited liability – the main privilege. The rationale behind the creation of this corporate form was to give importance to the role and interests of private suppliers of capital[51]. In addition of giving the privilege, the corporate purpose served for coordinating the corporation's long-term activities[52].

Yet, this created a paradox: inequalities. Chartered companies became powerful and bigger compared to other companies – not having limited liability. Companies with limited liabilities became the exception to the rule.

The mechanism of incorporation for Chartered companies was based on the requirement that firms explicitly specify a purpose. There was no form of self-chartering available, meaning that a business could not fill a charter to have the right to operate in the corporate form: English corporate entities were

---

[50] *See* Margaret M. Blair, *Corporate Personhood & The Corporate Persona*, 2013 U. ILL. L. REV. 785, 786 (2013).

[51] *See* Dari-Mattiacci, Giuseppe, Oscar Gelderblom, Jonker Joost & Enrico C. Perotti, *The Emergence of the Corporate Form*, 33 J. LAW, ECON. & ORG. 193 (2017).

[52] Pollman, Elizabeth, *The History and Revival of the Corporate Purpose Clause* (March 12, 2021). U of Penn, Inst for Law & Econ Research Paper No. 21-15, Texas Law Review, Forthcoming.

required by law to receive a Parliamentary concession for a formation charter[53]. In other words, companies operate for a specified purpose – described in their charters[54] and were granted one by one by the Parliament.

By the 18th century, the case of the South Sea Company[55] occurred. The South Sea Company was a company created to reduce the British national debt, having a monopoly charter on trading in South America and the nearby seas. When the company failed, it created many troubles for the British Government, forcing them to create a new law: The Bubble Act 1719. Stating that only Chartered Companies could sell shares on the market – companies or associations with no charter could not – to boost the value of their company and their shares. This mechanism worked for a very short time, after a while the company collapsed and the trust in them faded. The development of capitalism through colonialism stopped and investors shifted from companies to partnerships. The Bubble Act has been a temporary law that stayed in law books for 100 years.

From the other side of the Atlantic Ocean, Americans were fighting for their independence – ignoring the Bubble Act – and began to incorporate chartered companies. Chartered companies were called “corporations” and non-chartered ones were called “partnerships”. Corporations have been imported into the U.S. in the form of a legal entity incorporated by the sovereign power. In other words, each State’s parliament had the authority to issue a special act to incorporate a business. Still today, the U.S. applies the internal affairs doctrine, according to which the corporation’s affairs are regulated by the law of the state in which it is incorporated. In other words, in the U.S. “a corporate matter is a state matter”. This massively important principle will not become relevant until the second half of the 19th century when the competition in the market of corporation started[56].

[53] Ferrarini, Guido, *Corporate Purpose and Sustainability* (December 7, 2020). European Corporate Governance Institute - Law Working Paper #559/2020, 108. An edited version of this paper will be published as a chapter in Danny Busch, Guido Ferrarini and Seraina Grünewald (eds.), Sustainable Finance, Palgrave MacMillan (forthcoming).

[54] Blair *supra note* 50.

[55] Hanson, L.W., *Contemporary printed sources for british and irish economic history* 1701-1750, at 1712 (Cambridge Press 1963).

[56] See Stephen M. Bainbridge, Introduction, in *Can Delaware Be Dethroned?: Evaluating Delaware's Dominance of Corporate Law* 1–15 (Stephen M. Bainbridge et al. eds., 2018).

In 1811, the New York State Legislature had great intuition and passed a general law for the first time in the U.S. for the formation of a corporation. The reason was officially to stop corruption, but the real reason was that the State Parliament was not able to satisfy all the demand for incorporation[57]. The American economy was running a boom and as a result, they needed private businesses – having a quasi-public function – to address basic social needs. In other words, accepting one by one every demand for incorporation was time-consuming, in this context they provided a general framework for corporations. Meaning that a transition from special charters to general charters was ongoing. Satisfying some requirements and disclosing that the corporation was created to engage *in any lawful purpose or business activity*[58], everyone could incorporate its business: incorporating a business became a legal right.

Thereby, there were two ways to incorporate business: the standardized way for small capitalists and the special charter – as before, having more privileges – for wealthy capitalists. The latter were incorporated by a special act conferring on them some special privileges like extracting oil or building railroads[59]. In fact, during that period in America, capitalism expanded and there was a need for a private organisation to accomplish public utilities. They started using corporation – incorporated by special charter – to overcome all the issues upon the land and raw materials[60]. This created a two tears system which was not fair. Some states – Louisiana first in 1845 – attempted to kill the old system and stay with the new and standardized one (general law of corporation) but without success.

The State of New Jersey has been the first to take the opportunity to attract companies to incorporate in their State passing a general law allowing a self-chartering format which permitted general purpose statements[61]: it is the first modern sense of company law. Realising the opportunity, Delaware

[57] Steele Gordon, John, *The great game: the emergence of wall street as a world power* 1653-2000 76 (1999)
[58] Leacock, Stephen J., *The Rise and Fall of the Ultra Vires Doctrine in United States, United Kingdom, and Commonwealth Caribbean Corporate Common Law: A Triumph of Experience Over Logic*, 5 DEPAUL BUS. & COMM. L.J. 67, 81 (2006)
[59] Ron Chernow, *Titan: The life of John Rockfeller Sr*, Random House, New York (1998).
[60] Susan Pace Hamill, *From Special Privilege To General Utility: A Continuation Of Willard Hurst's Study Of Corporations,* 49 AM. U.L. REV. 81, 92 (1999).
[61] *See* Christopher Grandy*, New Jersey Corporate Chartermongering*, 1875-1929, 49 J. Econ. Hist. 677 (1989).

followed this wave[62] of race for incorporation and to reach its dominance in company law[63]. Under this innovative rule of general incorporation, corporate charters and corporate purpose still consider a collaboration – weakened compared to the earlier period – between the public and private sector[64]. Corporations were required to fill a specific corporate purpose in their charters. In other words, the State imposed confinement of the company's operations to the specific purpose identified in their charter and established that all activities taken outside the scope of that specification were ultra vires – beyond the corporation's legal power or ultra vires[65].

In the 19th century courts developed a case law principle according to which a company had a sort of limited capacity: the limitation being the object of the corporation. In the legislation in force at that time, during the formation procedure, members of the company were required to make a statement concerning the corporate object clause. The court believed that this object – filed at the moment of the registration – would have become a limitation of the corporate capacity. In other words, a company would have been able to act within the limit of the object and those limitations could affect third parties' transactions. They developed the *ultra vires* doctrine [beyond the powers]. This doctrine suggests that if a company enters into a transaction with a third party regarding a scope being beyond the limitation provided by the corporate object clause: then the contract is void *ab initio*[66]. The contract will be void and it will not even be able to be ratified, because it is beyond its legal capacity. To ratify it, the limitation should have been removed from the memorandum. The rationale behind this very strict doctrine is a misconceived idea of creditors and shareholders protection. It is considered a misconception because at the origin of a company, it is not usually clear in which sector the business will expand in the long term. The historical application of this doctrine is illustrated in the United States by the U.S. Supreme Court's decision in *Thomas v. R.R. Co*[67] –

[62] Joel Seligman, *A Brief History of Delaware's General Corporation Law of 1899*, 1 Del. J. Corp. L. 249 (1976).
[63] Bainbridge et al., *supra note* 56.
[64] *See* Pollman *supra note* 52.
[65] See generally Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. Va. L. Rev. 173, 186-87 (1985).
[66] *See* Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality*, 87 Va. L. Rev. 1279, 1302 (2001).
[67] 101 U.S. 71 (1880).

a case concerning a railroad company. In particular the Court rejected the view that the railroad company had the power to lease its property to the plaintiffs in exchange for a receipt of half the plaintiffs' profits[68].

Today the ultra vires doctrine is no more considered[69] and the statutory language concerning a lawful corporate purpose is linked to the duty of good faith to which directors are subject to. Some commentators argue that this view is still consistent with the obligation of serving a public function[70].

2. Corporate purpose in the US: judge-made law

Modern incorporation procedure has changed and has eliminated limitations and restrictions on the purpose of a corporation. Corporations were required to set in the articles of incorporations a lawful purpose for which the business was incorporated[71]. As explained earlier, if a company entered into a transaction outside their capabilities, that transaction would have been challenged as *ultra vires* and declared void[72]. Today most corporate charters contain generic purposes and do not affect business transactions.

What law requires in this area, represents the unique aspect of the U.S. and U.K.: common law. In other words, corporate law is judge-made law. In fact, the law of corporate purpose for the most is not statutory but claims from judicial opinion. To address this topic, we should make a distinction between the standard of conduct and the standard of review. In other words, we should consider what laws require and what law permits.

The standard of conduct is the amount of care and loyalty an individual is expected to meet when he is running a business and is acting as a director.

---

[68] Jill E Fisch and Steven Davidoff Solomon, *Should Corporations have a Purpose?* (February 17, 2021). Texas Law Review, Forthcoming, U of Penn, Inst for Law & Econ Research Paper No. 20-22, 110, European Corporate Governance Institute - Law Working Paper No. 510/2020.
[69] DGCL § 124 ("No act of a corporation and no conveyance or transfer of real or personal property to or by a corporation shall be invalid by reason of the fact that the corporation was without capacity or power to do such act or to make or receive such conveyance or transfer…")
[70] Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 Vand. L. Rev., 2026, 2013, (2019).
[71] *See* Bainbridge *supra note* 44 at. 60.
[72] *Id*. at 61-62

Those two duties – duty of care and duty of loyalty – are too broad in U.S. corporate law while in the U.K. they have been listed in the CA2006.

On the other hand, the standard of judicial review is the amount of second-guessing a court will perform in reviewing a business decision, with the possibility of being very strict or very broad. Violating the standard of conduct does not typically resolve liabilities while violating the standard of review does.

The standard of conduct in corporate law – as early anticipated – describe the conduct corporate executives are supposed to follow. In this area, scholars often use the classic case of *Dodge v. Ford*[73] when the Michigan Supreme Court in 1919 held that a corporation's purpose was to maximize shareholder profit. Directors have discretion on how to pursue shareholder profit. They do not have the discretion to change the nature of the business to pursue the benefit of others.

In American corporate law, Delaware law is the dominant source for different reasons. Some of the most important being Delaware's court system – having a considerable amount of expertise; dominance by inaction – long silence on certain aspects being favourable for directors. Or its shareholder value – a by-product of Delaware's dominance adopted many decades ago, according to which the primary duty of directors is to maximize the value of shareholders and not of stakeholders. In fact, Delaware corporate law is consistent with the law made by *Dodge v. Ford*. According to which the job of directors is to promote the value of the corporation for its stockholders. Recognizing that, directors have discretion how they are going to achieve this goal. Nevertheless, what the law expects is that directors will use their power in the pursuit of shareholders profit.

The most important doctrine in American corporate law is the Business Judgment Rule. It is the foundation of American corporate law. It is a presumption that in making a business decision corporate directors act in good faith and on an informed basis. If the Business Judgment Rule applies, the courts are not going generally to review directors' decisions. As long as that

[73] *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end and does not extend to a change in the end itself.").

decision was made in good faith, there was no conflict of interest and there was not a grossly negligent position during the process; the court is not going to review the merits of that decision.

It is true that theoretically the law says that the standard of conduct is maximizing shareholder wealth, but in the real world, directors have the discretion to pursue their goals. In fact, if directors do not abuse of that discretion by engaging in self-dealing or do not assume grossly negligent positions during the process, the court will not review the merits of its decision.

However, we can distinguish two categories of cases in which the Business Judgment Rule does not apply.

The first ones are the cases that former Delaware Chief Justice Leo Strine calls 'confession' cases. In these cases, directors publicly "admits that he is treating an interest other than stockholder wealth as an end in itself, rather than as an instrument to stockholder wealth."

While the second type of cases are the cases of corporate acquisitions. When the board of directors is deciding that the company is for sale, then the Business Judgement Rule does not apply, and the board has the legal obligation to get the best possible deal for the shareholders. Scholars apply to this situation as *Revlon-land,* an auction situation where the only aim of the board of directors is to increase shareholder value. This standard of review was the response of academics and the corporate law community to take back what *Unocal* said to how important stockholders are.

3. Comparison with other countries

UK

Both the U.S. and U.K. company law have its roots in the same case law, even if these two jurisdictions have evolved in different directions. As with many other aspects of the law, purpose reflects the correlation of these jurisdictions, having different evolution but with similar outcomes[74]. The

[74] *See* Ferrarini *supra note* 53 at. 32.

Companies Act 2006 is the biggest piece of legislation the U.K. has ever established. It forms the primary source of U.K. company law. Its redaction has been helped through a revision of European Law, Common Law Principles, and the introduction of new provisions.

Nowadays, it is common for articles of large companies to confer extremely broad discretionary powers upon the board of such companies. The board of directors needs both rules and discretion. On one side directors require discretion and efficiency, on the other hand, there is the need to control mismanagements and agency costs.

Fiduciary duties are directly laid by the company on the board as to limits within which they should exercise their powers. The rules were developed by courts at the beginning of the 17th century, on the basis that rules apply to trustees.

The proposal for high-level statutory restatement was to promote understanding of the basic principle underlying the common law, especially among directors themselves. This restatement gives the court plenty of interpretative scope when applying principles to the changing circumstances of commercial life. The reason why legal duties exist is that the board of directors is the decision-making body of a corporation and is the one entitled to determine the success of the corporation. Its main scope is to manage the company according to the interests of shareholders as a whole. However, such concentration of power can actually lead directors to benefit themselves rather than the company, that is the reason why the law has provided for the imposition of a number of legal duties. Their scope is to set the limits within which directors can exercise their power and historically they were developed by the courts of equity and by analogy with the rules applied to trustees.

The two core categories of duties which have been listed in the Companies Act 2006 from section 171 to 177 are the duty of care and duty of loyalty. These duties originated from the two main risks that the owners of the company run due to the delegation of power.

First, directors may run the business according to their interests and not the ones of shareholders. Second, the board may be slack, so not sufficiently competent to run the business. A distinction must be made between the principles of these two duties. The duty of loyalty is based on a fiduciary

principle, while the duty of care is based on the principle of the law of negligence. In other words, the duty of care refers to business decisions directors undertake. In fact, they must be fully and adequately informed and act in reasonable care, which encompasses both the good faith of the board and the accomplishment of the interests of the corporation.

While the duty of loyalty refers to the board's loyalty to the corporation and its shareholders while acting in their best interests. Thus, the board must not engage in self-dealing-transactions, and so in conflicts of interests.

Under section 172 of the 2006 UK Companies Act comes the most relevant duty concerning the debate on corporate purpose. This duty is the basic version of the duty of loyalty, and it can be reformulated by saying that directors must act in the way they consider – in good faith – most likely to promote the success of the company for the benefit of its members as a whole, and in doing so they must have regard of the six elements that this provides. The word "success" refers to the long-term increase in the financial value of the company since directors are required to make business judgments for the long-term benefit of the company and its shareholders. The fact that subsection (3) is about creditors' interests has been very discussed since courts remain free to set a general principle and raised many controversies about whether this section could lie under the duty of care or a duty of loyalty.

This provision is consistent with what the literature calls "enlightened shareholder value (ESV)"[75]. This approach proposes that corporate leaders follow a decision rule that contains an explicit reference to the interests of stakeholders[76].

However, the most relevant aspect of this provision is in in subsection (1), the legislator states that the main duty of directors is to "promote the success of the company for the benefit of its [shareholders]"[77]. By doing so, they highlight shareholder primacy and rejects the pluralist approach – given that the interests of stakeholders are subordinate to those of shareholders[78].

---

[75] *See generally* Chohan, Amita, *Is Section 172 of the Companies Act 2006 Capable of Delivering for All Stakeholders?* (August 31, 2012).

[76] Joan Loughrey, Andrew Keay & Luca Cerioni, *Legal Practitioners, Enlightened Shareholder Value and the Shaping of Corporate Governance*, 8 J. CORP. L. STUD. 79 (2008).

[77] Companies Act (UK) §172(1)

[78] *See* Davies, Paul, *Introduction to Company Law*, Oxford University Press, 48, 3rd ed., 2020.

In other words, directors should consider the listed factors in seeking to enhance shareholder value.

Germany

The European Union does not yet provide an harmonization of company law, meaning that corporate purpose in Europe is mainly regulated by the national law of each country.

The first allusion and definition in Germany of corporate purpose, has been in the Corporate Law of 1937. This definition does not appear as the modern view of corporate purpose, having strong influences from the ideology of that period. It does not refer to shareholders but refers mainly to the *common good of the enterprise, the people and the Empire*[79].

In the mid-20th century, they tried to reform German Corporate Law redefining the purpose of a corporation but without a substantial effect. According to some scholars, this new provision had impact only in a few cases[80] and courts tend to attach validity of the 1937 provision and defend the pluralistic approach of corporate purpose[81]. During the last decades, the law of corporate purpose has been reshaped in different situations due to the role of the German Corporate Governance Code. After the 2009 financial crisis, the role of stakeholders and the importance of long-term value creation have been accentuated.

Recently, the German Corporate Governance Code has amended the regulation on corporate purpose stating that the board of directors should manage the company pursuing its own best interest. Through this new restatement, the German legislator wants to point out both the importance of taking interest of the company's stakeholders and the seeking of a sustainable value creation for the company’s interest.

---

[79] *See* Ferrarini *supra note* 53; *see also* Holger Fleischer, ‘*Gesetzliche Unternehmenszielbestimmungen im Aktienrecht – Eine vergleichende Bestandsaufnahme*’, in ZGR, 46, p. 411. Quoted from the Italian traduction of this paper, ‘La definizione normativa dello scopo dell’impresa azionaria: un inventario comparato’, in Rivista delle Società, 2018, 803.

[80] *Id*. at 806.

[81] *See* Ferrarini *supra note* 53 at. 28.

The stakeholder governance's continuous evolution and discussion assert the political value and the attention of the social market economy that Germany gives to corporate purpose.

France and Italy

Recently, the French Parliament has approved a new law developing the role of companies called the Loi PACTE. This Act provides a legal purpose for companies, promoting *l'intérêt social* and a Corporate Social Responsibility (CSR). The goal is to foster CSR policies through three measures: the first two, relating to the corporate purpose are mandatory; the third, relating to the articles of association is optional.

Previously to this Act, Article 1833 of the Civil Code provided that any company should have "a legal purpose and shall be formed in the common interest of the partners".

This reform provided the introduction of a second paragraph stating: "A company shall be managed in its corporate interest, factoring in the social and environmental issues raised by its business activity"[82]. Regarding this new provision, two measures affect the corporate purpose of the company. The first one contributes to the corporate interest to become an imperative for the proper management of companies. The second one provides that during their business decisions companies must take into consideration the social and environmental issues of their activity.

During the last ten years, the French government implemented an extensive set of reforms trying to accentuate the importance of CSR policies. Some commentators argue that this latest reform raised a strong political dimension and "should be seen more as a restatement than a revolution. However, the violation of these two obligations by the company does not lead to their nullity, but the liability of the director may be sought and may even constitute grounds for dismissal. That is why it has faced significant opposition from the Senate – having a right-wing majority – advocating that there is an

[82] *See* the Law No. 019-486 of 22 May 2019 concerning the growth and transformation of enterprises, known as Loi PACTE.

increasing risk of directors and executives, which could be sued for not considering sufficiently environmental and social issues[83].

The Loi PACTE, also inserted a new provision to the Article 1835 of the Civil Code according to whom, a company may insert a "*raison d'être*" in their articles. A company's *raison d'être* [corporate purpose] should not be confused with its corporate object or with the corporate interest – even if the latter is not clearly defined. The *raison d'être* consists in the company's purpose, its contribution to society – and broadly – to the planet. However, the *raison d'être* [corporate purpose] and corporate interest are two company law concepts that sometimes overlap[84]. It is in any case a mandatory prerequisite for obtaining the status of "*entreprise à mission*" [mission-oriented company]. It is a label for companies that respect the first two measures – social interest and consideration of social and environmental issues – and have adopted a raison d'être. Once this label has been obtained, the company can display this quality to third parties.

Italian company law regarding corporate purpose is mainly recognized by a common interest of the company to pursue shareholder value maximization. They tend to recognize the company's purpose as the purpose of profit. In fact, according to Article 2247 of the Civil Code, the final goal of a company is to reach a corporate profit.

However, in recent years, some scholars have begun to argue that companies should also seek a value maximization in the medium-long run. This view is getting increasingly proximate to that of considering the interest of stakeholders. In this context, the 2020 edition of the Italian Corporate Governance Code states in one of the first principles that the board of directors should pursue a sustainable success creating a long-term value that benefits shareholders.

[83] Conac, Pierre-Henri, *Le nouvel article 1833 du Code Civil Français et l'intégration de l'intérêt social et de la responsabilité social d'entreprise: constat ou révolution?*, in Orizzonti del diritto commerciale, 3, 501, (2019).
[84] See Urbain Parleani, Isabelle *L'article 1835 et la raison d'être*, in Orizzonti del diritto commerciale, 542 (2019).

C.An economical point of view

The debate over corporate purpose cannot fail to address the economic rationale behind both the creation and the management of a company. As minutely described in the past section, companies have originally been founded to pursue a public interest and have evolved to pursue both a public and private interest. Over time, the public interest has faded, and the main target was to maximize the profits of its owners.

This doctrine is known as shareholder value maximization – or shareholder primacy – has its roots in the 1970s and 1980s. According to this theory, shareholders are the owners, and the residual claimants of the company and executives are therefore bound to run the company in their interest. Managers' targets become to maximize shareholder welfare[85]. The economist Milton Friedman is considered the father of shareholder primacy thanks to his well-known paper stating:

> *"There is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud*"[86].

However, it is not correct to blame – or credit – Milton Friedman for the rise of shareholder primacy[87] and the subsequent problems and crises related to it. In his 1970 paper, he claimed for the obligation of directors to pursue stockholders' interests – and not follow social purposes – being agents of stockholders. For example, in his view, a director could not increase the price of a product to sustain employee's welfare. This has changed and today a company increasing the price of their goods to achieve sustainable goals can benefit the company as whole and its shareholders as residual claimants. The

---

[85] *See* Vermaelen, Theo, *Maximizing Shareholder value: An Ethical Responsibility,* 2009.
[86] *See* Friedman, Milton *Capitalism and Freedom*, University of Chicago Press, 1962, 112.
[87] *See generally* Cheffins, Brian R., *Stop Blaming Milton Friedman!* (March 11, 2020). University of Cambridge Faculty of Law Research Paper No. 9/2020, European Corporate Governance Institute - Law Working Paper No. 523/2020.

shareholder primacy doctrine domination can be attributed to the effect of the hostile takeover wave that America has experienced in the 1980s.

Even if shareholder primacy has been prevalent among scholars and practitioners[88], stakeholderism has been the object of extensive literature since the beginning of the 20th century. However, in recent years thanks to some proposals of reforms and some public positions – such as the 2019 BRT statement on the purpose of a corporation – the view of stakeholder primacy is back in popularity. According to stakeholder view, the welfare produced by a company should be shared between all the related parties of the company. In other words, corporate leaders should not manage the company to benefit only shareholders but should take care of all parties related to the company.

Within stakeholder doctrine, we can identify different versions of stakeholderism being defined as Instrumental and Pluralistic Stakeholderism. The first version is attributable to Enlightened Shareholder Value (ESV) and is based on a long-term shareholder value maximization taking attention to stakeholders. In fact, stakeholders are all parties related to the company and in order to maintain in the long run a peaceful and profitable ground, corporate leaders should take care of all stakeholders in taking their decisions. Paradoxically Milton Freedman would agree in taking stakeholder-friendly decision to increase shareholder value[89]. For example, raising salaries might seem to be a stakeholder-friendly decision which does not benefit shareholders, however, if this raise allows corporate leaders to avoid the recruitment of new labour force – rising more costs – and rising productivity – thus rising returns for shareholders – this decision should be taken following the ESV doctrine. Shifting from shareholder value to the instrumental stakeholder value would probably not have a substantial effect but it would seem more like a semantic and inconsequential change[90].

The second version – the pluralistic approach – views stakeholder welfare as an end. In other words, every stakeholder has its own interest and each of them should be considered when taking decisions. This pluralistic approach had an important impact on U.S. corporate law. In fact, in the 1980s

[88] Lynn A. Stout, *The Shareholder Value Myth* 1, 18 (2012).
[89] *See* Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970.
[90] *See* Bebchuk, & Tallarita, *supra note* 40 at. 15.

and 1990s during the hostile takeover period, stakeholderism influenced law decision-maker to adopt antitakeover legislation to take care of the interest of stakeholders. Some states adopted the so-called constituency statutes “that explicitly allowed directors to consider the interests of other constituencies when making a decision on an acquisition of the company or, more generally, on any issue”[91]. Most states adopted these new laws, although the main state for corporate law – Delaware – did not approve it and retained a shareholder-centric view of corporate purpose[92].

The promise of constituency statutes was a deeper regard for stakeholders’ interest and protection from directors' decisions. Importantly, many scholars – among which Professor Lucian Bebchuck – have tried to analyse the development of these statutes and most of them agree on the failure of constituency statutes to deliver benefits for stakeholders. And find the most plausible explanation on the incentives corporate leaders have in taking their decisions. The problem raised through this approach is the creation of new agency costs between stakeholders and shareholders, and within stakeholders. Corporate leaders should decide which interests prevail or to balance all interests to achieve a good management. Each decision is in the hands of corporate leaders. In other words, all difficulties are led to discretionary judgment of corporate leaders and in the past, we have learned with constituency statutes that this power – theoretically bound to perform stakeholder benefits – has only brought significant benefits – large premiums – for shareholders and big remuneration for themselves.

A new form of corporation has been born in recent years: it is the case of the Public Benefit Corporation (PBC). In the U.S. there exist different forms of corporation and under the idea of creating a company with an end in the middle between a not-for-profit corporation and a traditional one there have been the creation of benefit corporations. Today, 36 states have adopted Public Benefit Corporation statutes – among which are the economically strongest states such as California, Texas, or Delaware – and many others have bills under consideration to adopt it. This new type of statutes is designed to allow a

[91] *Id* at 9.
[92] *See* Bebchuk, Lucian A. and Kastiel, Kobi and Tallarita, Roberto, *For Whom Corporate Leaders Bargain* (August 19, 2020). Forthcoming, Southern California Law Review, Volume 93, 10, 2021.

corporation identifying its social goal to pursue, rather than pursuing only shareholder maximization. In managing a company, corporate leaders will deal with what is called the *triple bound line*. In other words, managers should balance the interest of stockholders, stakeholders, and attempt to benefit the public benefit.

During the pandemic inequalities have been highlighted and the call for a stakeholder corporate governance has increased the consideration of PBC as an efficient pathway[93]. In fact, during the last year the number of PBC has doubled to over 10.000[94] and its acceptance in the financial world is growing[95]. However, PBC is not yet popular among publicly traded companies[96] and it is unlikely to become so under these circumstances. The fundamental structure and the number of investments involved in publicly-traded corporations – leading, among others, to a substantial market pressure[97] – will have difficulties in pursuing its social purpose.

D.Problems of stakeholderism

1. Incentives behind the compensation system

This part will analyse how the compensation system for CEOs and directors is shaped in big companies. They both have similar salary systems and the same incentives towards their decisions, that is why focusing on CEOs compensation we will also consider directors.

[93] *See* Peter Geogescu, *The Aspirations For Stakeholder Capitalism Must Be Very, Very High*, Forbes, Jun. 10, 2020.
[94] *See* Frederick Alexander, et al., From Shareholder Primacy to Stakeholder Capitalism A Policy Agenda for Systems Change, 14, Sept. 7, 2020.
[95] Fisch, Jill E. and Davidoff Solomon, Steven, *The "Value" of a Public Benefit Corporation,* 5, (April 14, 2021). U of Penn, Inst for Law & Econ Research Paper No. 20-54.
[96] *See* Michael Dorff, James Hicks, & Steven Davidoff Solomon, *The Future or Fancy? An Empirical Study of Public Benefit Corporations*, Harv. Bus. L. Rev.
[97] *See* Leo Strine, *Corporate Power is Corporate Purpose I: Evidence from My Hometown*, 33(2) OXFORD REV. OF ECON. POL. 176 (2017).

CEOs are subject to take important corporate governance decisions and are therefore able to generate greater shareholder value[98]. On the other hand, underperforming firms are also due to bad governance decisions thus their managers are equally monitored.

Literature shows that the attention of shareholder activists is directed primarily towards ineffective corporate governance mechanisms, as well as negligible executive pay packages[99]. There are three main objectives behind executive compensation; to provide incentives and solutions to increase shareholders' value, to determine and retain key talents and to limit the cost of the shareholders[100]. The compensation is an incentive to reduce the losses caused by the self-serving agent. In the U.S. and in the U.K., it consists of a basic fixed salary, annual bonuses linked to accounting performance, long term incentive plans, and stock options based on the firm's stock[101]. The latter option, links pay to performance by giving a stake of ownership to the manager and therefore increase his/her interest in its success[102].

The first section has stressed inequalities and the parallel growth of managers compensation[103]. Today, a CEO earns on average 221 times more than an ordinary worker and the median CEO compensation of the 500 largest U.S. companies is 12 million dollars a year[104]. As corporate governance, also executive's compensation has also evolved over the years. Nowadays, more than a half of a CEO's remuneration is formed by an equity-based compensation in the form of preferred or restricted stock[105]. This practice is recommended by two major proxy advisory firms such as ISS and Glass Lewis

---

[98] *See* Diane Del Guercio & Jennifer Hawkins, T*he motivation and impact of pension fund activism*, 52 J. FIN ECO. 293 (1999).

[99] *See* Ferri, Fabrizio & Sandino, Tatiana, *The impact of shareholder activism on financial reporting and compensation: The case of employee stock options expensing,* 84 ACC. REV. 433, 441-442 (2009).

[100] Stephen F. O'Byrne, *Say on Pay: Is It Needed? Does It Work?* 30 J. APP. CORP. FIN 30, 34 (2018) Available at: https://doi.org/10.1111/jacf.12275.

[101] *See*, Clementi, Gian Luca & Cooley, Thomas F., *Executive compensation: Facts*, Working Paper No. 15426, NAT. BUR. ECO. RES., 2-3 (2009).

[102] *See* Carola Frydman & Dirk Jenter, *CEO compensation*, Working Paper 16585-2 NAT. BUR. ECO. RES., (2010).

[103] *See* Anthony Atkinson, *Inequality* 107–08 (2016); Thomas Piketty, *Capital in the twenty first century* 397–405 (2014).

[104] *See also* Equilar, *CEO Pay Trends* 14 (2018). These and the other data points in this paragraph refer to the companies included in the Equilar 500 index for the fiscal year 2017.

[105] Rebecca Burton & Peter Kim, *Board Pay Under the Microscope*, HARV. L. SCH. F. ON CORP. GOVERNANCE (NOV. 17, 2019), https://corpgov.law.harvard.edu/2019/11/17/board-pay-under-the-microscope/.

and the rationale behind this scheme is the alignment of interest between directors and shareholders. In fact, basing the remuneration system mainly on financial metrics that are relevant for shareholders such as profit or revenues is a strong incentive to align executives and shareholders' interests[106].

To analyse the effects of the CEOs remuneration system in more detail, we reviewed the 2019 and 2021 proxy statements – before and after the BRT statement – of some companies in the BRT Board Sample. The following table represents the details of each component of total compensation (salary, bonuses, and equity incentives) and the fraction of total compensation that is linked to the performance of the company[107]. As the table shows, in each company a large portion of total CEO compensation - between 88% and 95% – is based on the goals achieved during the year. The reach of those bonuses is strongly related to financial performance and thus to shareholder value. In addition, thanks to this table we can highlight that there is no substantial difference between the performance-based compensation before and after the 2019 BRT statement. In fact, the percentage has remained between 89% and 95% and sometimes has also increased. This lack of change can be explained through an absence of real will of change in the compensation system towards a stakeholder approach rather than only shareholder centric incentives.
A stakeholder metric is present in only a few rare cases among which are Eastman and Marriott. However, this portion of bonus is literally not significant. For example, in the case of Marriott, the stakeholder metric is based on the satisfaction of employees and guests but the weight on the total compensation is only 1% and 2% respectively[108].

The analysis of CEO compensation stresses out two main points. The first one is that even in companies in which the CEO has signed the BRT statement in August 2019, the remuneration system has not changed and is mainly based on shareholder centric pattern. In fact, bonuses – the largest part of CEO annual compensation – is based on financial performance that benefits shareholders. There is a lack of overlapping interests to align CEOs – and

[106] *See* Bebchuk, & Tallarita, *supra note* 40 at. 45.
[107] *See* Table 1
[108] *See* Bebchuk, & Tallarita supra note 40 *at note* 149; the quantitative goals are not explicitly indicated in the proxy materials, but it seems that bonus payments are determined on the basis of quantified objectives. Marriott International, Inc., 2019 Proxy Statement (Schedule 14A) 40 (Apr. 10, 2019).

directors – incentives to pursue stakeholder benefit. However, this alignment of shareholder and CEOs interest is not total and agency costs arise even between them; but there is a robust link to create an effective remuneration system.

The second point is the question that arises in developing a stakeholder metric: which stakeholder's benefit should be considered on top of the others? In other words, is it fair to focus on employee satisfaction and ignoring the environmental impact of the firm? Stakeholderist do not provide an answer to this question.

Table 1. 2018 and 2020 Compensation of CEOs on the BRT Board

Company (CEO)	**Salary**		**Bonus**		**Equity**		**PBC**	
	2018	*2020*	*2018*	*2020*	*2018*	*2020*	*2018*	*2020*
JPMorgan (Dimon)	$1.500.000	$1.500.000	$5.000.000	$5.000.000	$23.000.000	$25.000.000	95%	95%
General Motors (Barra)	2.100.000	2.100.000	4.452.000	4.200.000	14.506.766	15.000.000	90%	90%
Eastman (Costa)	1.226.110	1.303.312	1.540.625	1.950.000	12.592.479	9.503.799	92%	90%
Johnson&Johnson (Gorsky)	1.642.308	1.650.000	3.570.497	3.148.515	14.625.057	18.140.649	92%	93%
Walmart (McMillon)	1.276.892	1.272.000	5.088.000	3.816.000	15.592.404	15.827.794	94%	94%
Marriott Int'l (Sorenson)	1.300.000	414.615	2.925.000	-	8.429.788	8.351.926	90%	95%
Duke Energy (Good)	1.350.000	1.390.500	2.268.961	1.169.578	9.873.135	11.431.738	90%	90%
United Technologies (Hayes)	1.575.000	1.413.333	3.500.000	2.500.000	12.044.070	14.595.975	91%	92%
Cummins (Linebarger)	1.442.500	1.214.063	6.574.400	5.253.600	4.510.275	4.998.723	88%	89%
International Paper (Sutton)	1.433.333	1.450.000	3.364.700	2.386.000	9.821.775	10.318.788	90%	90%
Stryker (Lobo)	1.194.833	1.109.125	2.709.720	1.434.375	9.592.795	10.343.262	91%	91%
Average	**$1.604.098**	**$1.481.695**	**$4.099.390**	**$3.085.807**	**$13.458.854**	**$14.351.265**	**92%**	**92%**

This table reports CEO compensation as disclosed by the company in its annual proxy statement, filed with the SEC in 2019 and in 2021. Column "PBC" reports the fraction of performance-based compensation over the total compensation.

2. Labour and control market

The analysis of CEOs compensation system should be combined with the role that labour and control have on CEOs and directors' incentives into taking their decisions.

A corporation is a legal fiction – namely an artificial person which cannot act on its own – and needs a delegation of power to act in the real world. For this reason, shareholders - the owners of the company – can usually appoint directors that will act on the behalf of the corporation – and on its interests. Since managers are different from the company, their objectives and aims, risk to differ. Due to this risk, the shareholder-management agency cost arises and cannot be totally eliminated. I can only be reduced by applying some rules to align management's interests with which corporation's ones.

The labour and control market play a fundamental role in considering a stakeholder or shareholder approach. It is a very competitive market and both directors and CEOs are not exempted from it. Indeed, on the one hand even a little case of mismanagement or an error could be harmful to the company and in particular to managers' professional career. And on the other hand, managers find a significant source of incentives in this market[109].

We can argue that the labour market can be self-regulated and is strictly correlated with takeovers. A company having a low stock's value is more easily subject to a takeover bid and managers of the target company will probably lose their job. In fact, high managers of the acquired company, by losing their position, will struggle to find a new occupation of the same or a higher level. By consequence, they have strong incentives to prefer shareholders' interest to stakeholders to maximize the value of the company.

According to this view, the literature provides some evidence highlighting that a low performance increases the likelihood of an acquisition. By contrast, the probability of receiving a bid decreases in case of good performance[110].

[109] *See* Bebchuk, & Tallarita supra note 40 at.32.
[110] *See* Alex Edmans, Itay Goldstein, & Wei Jiang, *The Real Effects of Financial Markets: The Impact of Prices on Takeovers*, 67 J. FIN. 933, 953–956 (2012).

In addition to the fear of losing their job due to a hostile takeover, managers have incentives to protect shareholder profit maximization instead of stakeholder's interest due to the fear of being replaced after a poor performance. Usually, shareholder discontent is linked to bad company performance, putting pressure on the board to replace the CEO[111]. In support of this statement, a research conducted by Steven Kaplan and Bernadette Minton have highlighted that CEO turnover – both internal (decided by the board) and external (resulting from a takeover or bankruptcy) is significantly related to companies' – and stock – performance[112]. The literature provides in fact, a strong correlation between a firm's performance and both CEOs and directors turnover[113]. Creating a shareholder-friendly reputation is vital for managers trying – not only – to preserve their position, but also to acquire an upgrade. Building such a positive connection is influential – for both CEOs and directors - to their business success in a broad sense. For example, if Company's X director has always pursued policies promoting shareholder value maximization and has never implemented policies benefiting stakeholders at the expense of shareholders and for a certain reason - not caused by bad performance - is fired from its position. He will surely find a new directorship at or higher level than previous one. According to this perception, also the literature supports this view with some research and evidence[114].

In the analysis of the labour market and control's role, the importance of shareholders value is recurrent. Consistently with the above analysis, a key feature in corporate governance have become hedge funds activism and proxy fights. A situation of low shareholder return can be considered as an opportunity for hedge funds looking for a change in a company's management. Hedge fund activism is increasing, and some evidence suggests that those settlements are usually associated with board turnover[115]. Thus, generates the fear of CEOs and directors of losing their position to the benefit of the activists. Returning to shareholder value, managers have strong incentives to maximize

---

[111] *See* Bebchuk, & Tallarita supra note 40 at. 40.
[112] *See* Steven N. Kaplan & Bernadette A. Minton, *How Has CEO Turnover Changed?*, 12 Int'l. Rev. Fin. 57,58 (2012).
[113] *See* Bebchuk, & Tallarita supra note 40 at 40.
[114] *See* Yonca Ertimur, Fabrizio Ferri, & Stephen R. Stubben, *Board of Directors' Responsiveness to Shareholders: Evidence from Shareholder Proposals*, 16 J. CORP. FIN. 53 (2010).
[115] *See generally* Lucian A. Bebchuk et al., *Dancing with Activists,* 137 J. FIN. ECON. 1 (2020).

stock returns and avoid a poor Tobin's q to reduce the probability to fall in a weaker position in a proxy fight.

To conclude the discussion about the control that the labour market has on high executives we should keep in mind C. Edward Fee, Charles Hadlock, and Joshua Pierce study on the analysis of the managerial labour market. Their claim is that losing a top managerial position will have negative effects on future positions. In fact, they state that "new positions tend to be substantially inferior to prior positions measured along a variety of dimensions."[116] This view strongly supports the concept advanced in this section, according to which high executives have no incentives of serving stakeholders interest at the expense of shareholders[117].

3. The costs and perils generated by stakeholderism

The analysis on the compensation system and labour market has highlighted that stakeholderism benefits are illusory and that CEOs have no incentives to benefit stakeholders at the expenses of shareholders. Therefore, some stakeholderists argue that even if these benefits are illusory, companies should at least try to change their corporate governance because it can only have some positive impact[118]. However, this is not what reflects the reality. Stakeholderism – not only has illusory promises but also – creates costs and perils for society.

Firstly, it increases corporate leaders' insulation reducing their accountability. Secondly it has a negative impact on stakeholders detracting importance to stakeholder-oriented reforms[119]. The call for stakeholderism and for corporate leaders' additional discretionary power can turn out to be detrimental for controlling them. In fact, if shareholders are no longer able to

---

[116] *See* C. Edward Fee et al., *New Evidence on Managerial Labor Markets: An Analysis of CEO Retreads,* 48 J. CORP. FIN. 428, 429 (2018).
[117] Taekjin Shin & Jihae You, *Changing Words: How Temporal Consistency in a CEO's Use of Language toward Shareholders and Stakeholders Affects CEO Dismissal,* 28 CORP. GOV. INT'L. REV. 47, 48 (2020).
[118] See generally Bebchuk, & Tallarita supra note 40.
[119] *See* Bebchuk, & Tallarita supra note at. 53.

supervise executives' decisions; stakeholders are not even entitled to do so. Commentators argue that "support for stakeholderism may well be strategic: an attempt to advance a managerialist agenda dressed in stakeholder clothing to make it more appealing to the general public."[120] As stated in the previous section, corporate leaders are blamed to receive freer decision-making in order to fight against institutional investors and preserve their supremacy. Therefore, this corporate leader's insulation would lead to bad economic efficiency[121]. It is empirically known that in case of lack of supervision and incentives, business decision-makers do not have incentives to undertake new investments. By consequence, economic revenues will lower, and every party will be worse off.

The second main cost generated by stakeholderism has its roots in a misconception and illusion that this new form of corporate governance can bring. Thinking that a corporate leader would protect their employees or clients in the name of a stakeholder commitment would bring policymakers easing new regulations to legally protect stakeholders. It is globally recognized that capitalism has negative externalities that push policymakers to undertake policies and regulations to contrast them. On the other hand, this fear of being alleged, incentives corporate leaders to efficiently provide benefit to all stakeholders. Contrary to this, these reforms will not be undertaken if policymakers rely on the illusion of stakeholders, thus creating perils for stakeholders and society as a whole.

---

[120] *Id*. at. 54.

[121] For a survey of this empirical evidence, see Lucian A. Bebchuk, *The Myth That Insulating Boards Serves Long-Term Value*, 113 COLUM. L. REV. 1637, 1673-86, (2013).

III. OTHER POSSIBLE SOLUTIONS TO CAPITALISM INEQUALITIES

The question of capitalism inequalities hardly remains with a single solution and the debate on corporate purpose which is the central issue in the ongoing discussion have different declinations. CEOs credibility on the stakeholder's approach after the BRT statement must be closely observed. Theoretically, most important business decision should be approved by the board of directors and 97,9% of companies – having responded to the enquiry proposed by Professor Bebchuck – stated that the board of directors did not approved anything[122]. In addition, as a result of the statement, almost no companies have amended their corporate governance guidelines to embrace a stakeholder friendly approach. Proving that a stakeholder's treatment will not have significant change[123] towards the debate on corporate purpose.

The increasing importance of sustainability in corporate governance is providing a new reading key to tackle wealth and inequalities. In this section will be addressed relevant possibilities to curb social and environmental inequalities.

A. *Sustainability as a game-changer*

1. The rise of ESG

Social impact of companies on society is not a brand-new debate, even if it has evolved over the years and now sustainability plays a central role. Some commentators argue that even in the 1980s – during the South African Apartheid period – investors were considering the social impact of

[122] *See* Bebchuk, & Tallarita supra note 40 at. 29.
[123] *Id*.

companies[124]. At that time, the leading concept was the Social Responsible Investing (SRI) one and a huge wave of disinvestment by ethical investors led to a crisis.

The concept has been declined as a governance factor, naming it "Environmental, social and corporate governance" (ESG)[125]. This new version embraces not only the ethical value of investing "doing good" but adds the financial performance through "doing better", giving to ESG a new and efficient form of corporate governance[126]. In fact, the need for corporations to address environmental and social – among which wealthy and wage inequalities[127] – issues have grown to be urgent[128].

The role of ESG investing and ESG rankings are increasingly frequent. However, this debate has grown into a major challenge: the absence of a clear definition of ESG. There exist today more than 600 – and the number does not seem to stop growing – ESG rating organizations and rankings worldwide. Each organization uses its proper definition on both collecting data and methodology to elaborate disclosures and rankings. This leads to substantial confusion and unreliability of those documents. However, this has not had a significant impact on the development in the growth of ESG investment strategies. Investments using ESG criteria have almost doubled in the last four years – period between 2016 and 2020 – passing to 22.9 trillion dollars to over 40 trillion[129]. There are nonetheless three mains different ESG investment strategies: screening, engagement, and impact investing[130]. Screening investment strategy is based on the use of ESG metrics in order to decide which company to invest in. It can be negative – avoid companies working in

---

[124] *See* Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee,* 72 STAN. L. REV. 453 (2020).
[125] *See* Coffee, John C., *The Future of Disclosure: ESG, Common Ownership, and Systematic Risk* (March 16, 2021). European Corporate Governance Institute - Law Working Paper 541 28 (2020).
[126] *See* Paul Gompers, Joy Ishiii & Andrew Merrick, *Corporate Governance and Equity Prices*, 118 Q.J. ECON. 107, 114-29 (2003); *see also* Lucian Bebchuk, Alma Cohen & Allen Ferrell, *What Matters in Corporate Governance*, 22 REV. FIN. STUD. 783, 785 (2009).
[127] *See* Melissa Repko, et al., *Hashtags won't cut it. Corporate America faces a higher bar in a reckoning on racial inequality*, CNBC, June 12, 2020.
[128] Curtis, Quinn and Fisch, Jill E. and Robertson, Adriana, *Do ESG Mutual Funds Deliver on Their Promises?* 9, (April 23, 2021).
[129] ESG Data Integration by Asset Managers: Targeting Alpha, Fiduciary Duty & Portfolio Risk Analysis (June 2020).
[130] *See* Curtis et. al. *supra note* 128 at. 12.

certain fields – or it can be positive – investing only in companies in accordance with their ESG results. Otherwise, engagement strategy is based on the active role of investors in certain companies[131]. In other words, the engagement consists in using its rights – voting, proposal or others – to pursue and perform ESG goals. Finally, impact investing strategy consists in investing in companies with a specific goal of benefiting society[132]. For example, investing in a company engaged in cleaning up oceans or providing clean energy.

An important attention should be given to regulatory systems. In fact, regulatory systems adopted singularly by countries will certainly have a little impact on global emissions[133]. Due to globalization, companies may incorporate in one country, manufacture in another and sell in other countries. Thereby, greenhouse gas emission problems should be tackled through a joint international regulation. It is obviously hard work to coordinate at an international level a set of reforms and regulations but to tackle externalities having global incidence there should be cooperation between countries. Lonely attempts will not be efficient. According to this view, it is important to quote Milton Friedman when he wrote that the social responsibility of a business is "to increase its profits so long as it stays within the rules of the game"[134]. As highlighted in the previous section, a misconception of Friedman's doctrine is very common. In fact, he advocates those companies and manager should act within the limits of the law to serve its principal while preserving society. It is therefore the role of law – and it will be deeply analysed later – to create the boundaries within which corporate managers should act.

Among those advocating for standardized and generally accepted ESG disclosure there are two main groups of activists having different incentives: political and investors activists. The former claim for a change in policies towards a socio-environmentally friendly directions asking the SEC to regulate ESG disclosure. They suggest that having standardized disclosure will help them to compare companies and blame those not following "green"

---

[131] *See* Michelle Edkins, *The Significance of ESG Engagemen*t, Engagement Strategies, 4 (2014).

[132] Michael Martin, *ESG: a trend we can't afford to ignore*, Fin. Times, Nov. 26, 2020, https://www.ft.com/content/87a922a1-8d60-4295-a9d8-d2c1ab5d788e.

[133] *See* Mahoney, Paul G. and Mahoney, Julia D., *The New Separation of Ownership and Control: Institutional Investors and ESG*, 11, (March 22, 2021). Columbia Business Law Review, Forthcoming.

[134] *See* Friedman *supra note* 86 at.133.

governance[135]. On the other hand, institutional investors are claiming – or are seeming to claim – for ESG disclosures with the goal of investing in "green" companies and using their voting rights to undertake sustainable transition in "brown" companies.

Some commentators raised the question of why institutional investors would be required to adopt ESG disclosures and a possible solution could be understood in the field of interests. In other words, the main problem of corporate law is due to ownership and control companies' and they agency cost raised due to the divergence of interest between investors and those managing their money[136].

Traditionally companies' stocks were mainly owned by individuals and agency costs raised between investors and directors[137]. Today, corporate ownership has completely changed, and individuals invest in funds or other financial intermediaries – known as institutional investors – which in turn invest in companies.

2. Do ESG investments always benefit stakeholders?

The rise and the increasingly important role of ESG funds have grown curiosity and concerns about whether those funds have effectively the results that they claim[138]. Basing their assumptions on research and working papers, many commentators argue that ESG funds do not effectively accomplish what they suggest. On the one hand, sceptical, advocate for a strategy aimed at sustaining the company's environmental reputation without real and credible results – known as greenwashing[139]. On the other hand, some commentators

[135] *See* Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 Yale J. On Reg. 499, 513–17 (2020).
[136] *See* Mahoney & Mahoney *supra note* 133 at. 12.
[137] *See* Adolf A. Berle & Gardiner C. Means, *The Modern Corporation And Private Property*, 47-68 (1932).
[138] *See* Curtis et. al*. supra note* 128, at. 16.
[139] *See* Rachel Evans, *How Socially Responsible Investing Lost Its Soul*, Bloomberg Businessweek, Dec. 18, 2018, https://www.bloomberg.com/news/articles/2018-12-18/exxon-great-marlboros-awesomehow-esg-investing-lost-its-way.

argue that ESG funds are charging investors higher fees in the name of socio-environmental issues without a real return[140].

The literature on ESG funds, having the goal of ensuring the effective results is experiencing an important expansion. However, running into this objective is a difficult task due to the new nature of the object. Recent research analyses under different perspectives whether ESG funds invest in stakeholder-friendly companies[141]. The emerging evidence suggests that ESG funds perform equally – or even worse – than non-ESG funds with respect to stakeholder-friendly metrics such as labour or environmental violations. In fact, when ESG investors make their investment decisions, they give more attention to the quantity of ESG information disclosed rather than the quality[142]. This appears to be a superficial - but for instance effective – method used by mutual funds to attract investors. The strategy depends more on greenwashing strategy relying mostly on persuasion and not on the effective achievements released by ESG disclosures. Indeed, the only findings to emerge after the review of the evolution of ESG disclosure related to higher fees requested by fund holders relies on the increased likelihood of emission disclosure and not on an improvement on the level of emission[143].

According to the evidence that emerged in this analysis, we should highlight the importance and the need for greater regulation to ascertain both the efficient policies implemented by companies to curb inequalities and to control the accuracy of ESG disclosures.

---

[140] Principles for Responsible Investment, *How Can a Passive Investor Be a Responsible Investor?*, 15, (Aug. 2019).
[141] *See generally* Raghunandan, Aneesh and Rajgopal, Shivaram, *Do ESG Funds Make Stakeholder-Friendly Investments?* (May 3, 2021).
[142] *Id* at. 25.
[143] *Id* at. 30.

B. The need for regulation

1. The role of regulatory authorities

In 2018, the SEC has mandated two Professors – Cynthia Williams and Jill Fisch – a formal petition for the regulation of ESG disclosures[144]. The petition has been approved by many investors and associations; and concluded that ESG information is important. It does not define what ESG information nor states which subset of ESG – climate change, gender inequalities or others – is material. It came to an end that ESG information is generally material and thus many investors rely on it[145]. Indeed, they suggest that "it is time for the Commission to engage in a rulemaking process to develop a framework for public reporting companies to use to disclose specific, much higher-quality ESG information than is currently being produced pursuant either to voluntary initiatives or current SEC requirements."[146] They addressed an important point, being the quality of ESG disclosures. Voluntary disclosures are not standardized, and each company can adopt the standard that best suits them. As pointed out in the previous part, many private standards have been developed leading to confusion and unreliability. The need for a public standard is necessary. Investors – and in general stakeholders – are not otherwise protected and informed.

The SEC started giving importance to ESG disclosure. In fact, in May 2020, the SEC Investment Advisory Committee (IAC) advocated for the development of a new ESG disclosure framework, supporting the importance that investors give to ESG information[147].

In addition, the "ESG Disclosure Simplification Act" has been introduced for the second time in February 2021 in the House Financial Services

[144] Request for Rulemaking from Cynthia A. Williams & Jill E. Fisch to Brent J. Fields, Sec'y, SEC (Oct. 1, 2018), https://www.sec.gov/rules/petitions/2018/petn4-730.pdf.
[145] *See* Rose, Amanda M., *A Response to Calls for SEC-Mandated ESG Disclosure* (May 8, 2021). Washington University Law Review, 10, Vol. 98, Forthcoming 2021.
[146] *See* supra note 144.
[147] Investor-as-Owner Subcomm., SEC Inv. Advisory Comm., *Recommendation Relating to ESG Disclosure* 1–2 (May 14, 2020), https://www.sec.gov/spotlight/investor-advisory-committee2012/recommendation-of-the-investor-as-owner-subcommittee-on-esgdisclosure.pdf .

Committee[148]. The bill proposes the obligation for public companies to disclose in their annual proxy statement a description related to ESG metrics. It also supports the requirement for the SEC to require public companies to "to disclose environmental, social, and governance metrics"[149]. Related to this point, the bill, importantly calls for an official definition ESG metrics by the SEC through rulemaking[150].

Notably, since 2018 the EU has mandated all listed companies to issue ESG disclosures in their annual reports[151]. In recent years, the EU is experiencing a political wave for taking into consideration Corporate Social Responsibility (CSR) and environmental issues[152]. Leading in June 2020 to a commission for EY on sustainable corporate governance[153]. The EY "Study on directors" tries to point out some aspects negatively affecting corporate governance and proposes many changes. However, many critics have been raised after the publication highlighting the failure both on defining and addressing problems[154]. In addition, the EU has not yet drafted a standardized ESG framework to be used by all companies. It instead relies on the private decisions of every single actor. This regression on how the EU is dealing with ESG disclosures is important to predict the difficulties the U.S. will probably encounter[155]. In other words, the inability of the EU to draft and adopt a standard ESG framework highlights the complexity that probably the SEC will encounter.

In economics, negative externalities are usually subject to governmental intervention. In other words, in case an individual produces negative externalities, a tax is levied on him. An example is the Pigouvian tax, according

---

[148] ESG Disclosure Simplification Act of 2021, H.R.1187, 117th Congress (2021).
[149] ESG Disclosure Simplification Act of 2021, H.R.1187, 117th Congress (2021) at § 2(b)(1)(A).
[150] *See* Rose *supra note* 145 at. 11.
[151] Communication from the Commission on Guidelines on Non-Financial Reporting (Methodology for Reporting Non-Financial Information), 2017 O.J. (C 215) 1, 2 (EU).
[152] *See* Virginia Harper Ho, *Non-Financial Reporting & Corporate Governance: Explaining American Divergence & Its Implications for Disclosure Reform*, 9, 10 ACCT., ECON., & L. 1, 12 (2020).
[153] Ernst & Young, *Study On Directors' Duties And Sustainable Corporate Governance: Final Report* (2020), https://op.europa.eu/en/publication-detail/-/publication/e47928a2-d20b-11ea-adf7-01aa75ed71a1/languageen?mc_cid=664fe83cf0&mc_eid=657d91711d .
[154] *See* Roe, Mark J. and Spamann, Holger and Fried, Jesse M. and Wang, Charles C. Y., *The European Commission's Sustainable Corporate Governance Report: A Critique* (October 14, 2020). European Corporate Governance Institute - Law Working Paper 553/2020, Harvard Public Law Working Paper No. 20-30, Yale Journal on Regulation Bulletin.
[155] *See* Rose supra note 145 at. 29.

to which a tax levied on each unit of a polluter's output in an amount just equal to the marginal damage it inflicts[156]. However, the success of governments to policy externalities is unlikely – big companies can influence policymakers or the international dimension of environmental externalities[157].

Calling for regulations to be adopted, we should focus on all players running and affecting a business. Firstly, policymakers should aim to regulate the most important role of a business: directors. In other words, tackling a company from the top of the corporate pyramid organigramme is essential. For example – instead of creating additional duties – directors' fiduciary duties could be specified with additional emphasis through the preservation of socio-environmental issues[158]. Other types of regulation can be attributed to directors related to their performance. However, imposing rules would not probably be sufficient and efficient, the adoption of incentives can be vital to achieve the desired results[159].

However, an essential consideration not to be forgotten are disclosures. As we have seen in the previous parts, disclosures have already begun to be implemented, but not yet reaching its full effect[160]. There exist many different ESG frameworks but an official certified one. Having achieved this objective, ESG disclosures can be reliable.

The role of regulatory authorities is to find the adequate balance of laws and incentives for managers, shareholders, and other stakeholders to align their interests. Company law and socio-environmentally matters are in this way useful to obtain an optimal corporate governance and can attempt to curb inequalities.

2. Market pressure as a regulator

[156] *See* Arthur C. Pigou, *The Economics of Welfare*, London: Macmillan (1920).

[157] Pacces, Alessio Maria, *Sustainable Corporate Governance: The Role of the Law,* 3 (September 30, 2020). European Corporate Governance Institute - Law Working Paper No. 550/2020, Amsterdam Law School Research Paper No. 2020-66, Amsterdam Center for Law & Economics Working Paper No. 2020-05.

[158] Möslein, Florian and Sørensen, Karsten Engsig, *Sustainable Corporate Governance: A Way Forward* 5, (January 4, 2021). Nordic & European Company Law Working Paper No. 21-03, Forthcoming in European Company Law, European Corporate Governance Institute - Law Working Paper No. 583/2021.

[159] *Id*. at 4

[160] *Id*. at 6

Hard and soft law, sometimes require the need of both market pressure and informal mechanisms to be effective. Empirical studies have highlighted the role or ratings – in particular ESG ratings – on investors preferences and stock performance. The resulting evidence is that "sustainability ratings are important to investors and the shifts in ESG ratings can alter capital allocation in the markets"[161]. In other words, ESG ratings have the power to influence an individual investment portfolio. Companies following ESG metrics are therefore more likely to outperform.

An additional strategy that public enforcers can undertake is the publication of information regarding companies. This approach allows to enter a reputational mechanism, an example being the "name and shame". This practice has been adopted in the U.K. and seeks to discourage companies from not respecting some rules.

Finally, an important role is played by new generations – the so-called millennials and generation Z[162]. The younger generation seems to have greater interest in environmental issues[163]. In other words, they prefer to work in a company perceived as eco-friendly and they tend to buy goods made taking care of the environment and workers.

Contrary to the older population, new generations seem to be aware of environmental risks and of rising inequalities all around the world. Thereby, companies must adapt to this wave of "social justice activists"[164] changing their strategies to not be excluded from the market.

---

[161] *See* Latino, Carmelo and Pelizzon, Loriana and Rzeźnik, Aleksandra, *The Power of ESG Ratings on Stock Markets* 20, (March 2, 2021). SAFE Working Paper No. 310.

[162] *See* Bainbridge *supra note* 44 at. 50.

[163] *See* Jessica Love, *Is Maximizing Shareholder Value a Thing of the Past?,* KelloggInsight (Sep. 19, 2019), https://insight.kellogg.northwestern.edu/article/shareholder-value-purpose-corporation

[164] *See* Richard Levick, *The New "Rules" Of Corporate Social Activism*, Forbes (Dec. 18, 2019), https://www.forbes.com/sites/richardlevick/2019/12/18/the-new-rules-of-corporate-socialactivism/#4265316651a9

CONCLUSION

The rise of inequalities and wealth concentration during the last years has pushed economic actors to call for a change. Curiously, the will of “changing the rules' did not only come from the complaining party. Obviously, Democrats' politicians – like senators Elizabeth Warren and Bernie Sanders – sponsored bills that increment workers’ rights. Yet, corporate leaders also are aligned in favour of stakeholders. On one hand Larry Fink personally exposed himself to pursuing sustainable investments delivering benefit to all its stakeholders. On the other hand, many other corporate leaders have signed the 2019 BRT statement on the purpose of a corporation committing their companies to deliver benefits to all their stakeholders.

However, what corporate leaders say, does not always correspond to what they do. Or even worse, the real reasons behind corporate leaders are not always clear and sincere. It is in fact unusual that corporate leaders prefer to benefit stakeholders at the expenses of shareholders. A reading key for this shift towards stakeholder primacy, desired by managers, can be through the consideration of their position as at risk. Pretending to create benefits to all their stakeholders, they are instead trying to find a solution to resist the rise of hedge funds activism. Thereby creating a sort of coalition between CEOs and asking for a broad discretionary power to return to a managerial capitalism.

Alternatively, calling for a stakeholder-friendly corporate governance, may be desired to prevent legislative reforms which may in perspective be detrimental for them.

Another important issue raised by the BRT statement regards a legal aspect. About the enforceability of commitment to all their stakeholders in American Corporate law and in particular in Delaware law. Where directors are legally bound to act in the interest of the shareholders. The corporate purpose debate has been discussed for decades and has evolved. In the 19th century courts developed a case law principle according to which a company had a sort of limited capacity: the limitation being the object of the corporation. The doctrine applied was the ultra vires [beyond the powers].

Today this doctrine is no longer considered, and the modern incorporation procedure has eliminated any limitations or restrictions on the corporate purpose. The law of corporate purpose is thus regulated by the standard of conduct and the standard of review usually adopted in the state of incorporation. Being Delaware the dominant source of corporate law and being Delaware corporate law consistent with the view according to which the role of directors is to promote the value of the corporation for its stockholders. We can conclude that Delaware corporate law has a strong mark of shareholder primacy. Moreover, in the U.S. applies the Business Judgment Rule, being a further protection for corporate leaders. In fact, in pursuing shareholder-friendly objectives rather than stakeholders' ones, the court will rarely review the merits of the decision.

The debate on corporate purpose and stakeholder primacy should be tackled also under the economical point of view, to understand the rationale behind. In fact, within stakeholder doctrine, we can identify two different versions of stakeholderism being the instrumental one and the pluralistic one. Shifting from shareholder primacy to the instrumental stakeholder value would probably not have a substantial effect but it would seem more like a semantic and inconsequential change. Otherwise, switching the instrumental doctrine would create new agency costs between stakeholders and shareholders, and within stakeholders. As a result, corporate leaders would have complete discretion on their decision-making and even if they are theoretically bound to perform stakeholder benefits, they will probably use it for their interest. Besides, in recent years Public Benefit Corporation – a new form of corporation – has been born. Although, it is not yet popular among publicly traded companies, and it is unlikely to become so under these circumstances.

Stakeholderism would encounter problems also in the compensation system. Nowadays – and the BRT statement has not changed it – it is mainly based on a company's stock performance and does not consider any type of stakeholder benefit. Corporate leaders have therefore no incentives to pursue stakeholder interest at the expenses of shareholders. On the contrary they have incentives to pursue shareholder-friendly achievement both to increase their remuneration based on company's performance and to avoid the risk of being replaced and losing their position.

At this point, since there are no evident risks but simply the possibility of failing to achieve the desired outcome, embracing stakeholderism would seem a meaningful solution. However, it is not. Stakeholderism would bring two main costs. First, corporate leaders would have more discretionary power and controlling their decisions would become quasi-impossible. By consequence they will have less incentives to undertake new investments leading to bad economic performances. Secondly, if corporate leaders would have more discretionary power in the name of benefiting stakeholders, policymakers will ease new regulations to legally protect stakeholders.

However, the problem of capitalism inequalities has other possible solutions. The increasing importance of sustainability in corporate governance is providing a new approach to deal with it. ESG metrics provide a major tool to disclose investment strategies or create ESG ratings encouraging corporations to invest in socio-environmentally friendly activities. Although, the absence of a clear definition of ESG investment or an official metric approved by the government lead to confusion and a non-conclusive approach. Although, recently the SEC is undertaking ESG framework more attentively.
Here comes the role of governments and regulatory authorities. In fact, in case of danger, authorities could take the situation into their own hands. As with the COVID-19 pandemic, where governments have been forced to take measures to prevent the situation from worsening and protect the weaker part of the population. In a similar way, undertaking new regulations, national and international authorities are a valid solution to attempt to curb wealth inequalities.

Finally, it is important to highlight that sometimes, hard and soft law require the intervention of both market pressure and informal mechanisms to be effective. In fact, market pressure is a well-grounded solution to be adopted in parallel with other measures.

REFERENCES

Alexander, Frederick, et al., *From Shareholder Primacy to Stakeholder Capitalism A Policy Agenda for Systems Change*, Sept. 7, 2020.

Atkinson, Anthony, *Inequality* 107–08 (2016)

Autor, David H.; Levy, Frank & Murnane, Richard J., *The Skill Content of Recent Technological Change: An Empirical Exploration*, 118 Q.J. ECON. 1279 (2003)

Bainbridge, Stephen M. Introduction, in *Can Delaware Be Dethroned?: Evaluating Delaware's Dominance of Corporate Law* (Stephen M. Bainbridge et al. eds., 2018).

Bainbridge, Stephen Mark, *Making Sense of The Business Roundtable's Reversal on Corporate Purpose* (July 30, 2020). UCLA School of Law, Law-Econ Research Paper No. 20-03

Bebchuk, Lucian A. and Kastiel, Kobi and Tallarita, Roberto, *For Whom Corporate Leaders Bargain* (August 19, 2020). Forthcoming, Southern California Law Review, Volume 93, 2021.

Bebchuk, Lucian A. & Tallarita, Roberto, *The Illusory Promise of Stakeholder Governance* (February 26, 2020).

Bebchuk, Lucian A. et al., *Dancing with Activists,* 137 J. FIN. ECON. 1 (2020).

Bebchuk, Lucian A., *The Myth That Insulating Boards Serves Long-Term Value*, 113 COLUM. L. REV. 1637, 1673-86, (2013).

Bebchuk, Lucian; Cohen, Alma & Ferrell, Allen, *What Matters in Corporate Governance*, 22 REV. FIN. STUD. 783, 785 (2009)

Berle, Adolf A. & Means, Gardiner C., *The Modern Corporation And Private Property*, 47-68 (1932).

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

Blair, Margaret M., *Corporate Personhood & The Corporate Persona*, 2013 U. ILL. L. REV. 785, 786 (2013)

Blinder, Alan S., *How Many U.S. Jobs Might Be Offshorable?*, 2 WORLD ECON. 41 (2009).

Burton, Rebecca & Kim, Peter, *Board Pay Under the Microscope*, HARV. L. SCH. F. ON CORP. GOVERNANCE (NOV. 17, 2019), https://corpgov.law.harvard.edu/2019/11/17/board-pay-under-the-microscope/.

Business Roundtable, Statement on Corporate Governance 3 (Sept. 1997).

Cheffins, Brian R., *Stop Blaming Milton Friedman!* (March 11, 2020). University of Cambridge Faculty of Law Research Paper No. 9/2020, European Corporate Governance Institute - Law Working Paper No. 523/2020

Chernow, Ron, *Titan: The life of John Rockfeller Sr*, Random House, New York (1998).

Chohan, Amita, *Is Section 172 of the Companies Act 2006 Capable of Delivering for All Stakeholders?* (August 31, 2012).

Clementi, Gian Luca & Cooley, Thomas F., *Executive compensation: Facts*, Working Paper No. 15426, NAT. BUR. ECO. RES., 2-3 (2009)

Coffee, John C., *The Future of Disclosure: ESG, Common Ownership, and Systematic Risk* (March 16, 2021). European Corporate Governance Institute - Law Working Paper 541/2020.

Cohen, Alma et. al., *The Politics of CEOs*, 11 J. Legal Analysis 1, 11 (2019)

Conac, Pierre-Henri, *Le nouvel article 1833 du Code Civil Français et l'intégration de l'intérêt social et de la responsabilité social d'entreprise: constat ou révolution?*, in Orizzonti del diritto commerciale, 3, 2019.

Curtis, Quinn and Fisch, Jill E. and Robertson, Adriana, *Do ESG Mutual Funds Deliver on Their Promises?* (April 23, 2021)

Dammann, Jens & Eidenmüller, Horst, *Taming the corporate Leviathan: Codetermination and the Democratic State* (ECGI., Law Working Paper

No. 536, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3680769&download=yes

Dari-Mattiacci, Giuseppe, Oscar Gelderblom, Jonker Joost & Enrico C. Perotti, *The Emergence of the Corporate Form*, 33 J. LAW, ECON. & ORG. 193 (2017).

Davies, Paul, *Introduction to Company Law*, Oxford University Press, 3rd ed., 2020.

Del Guercio, Diane & Hawkins, Jennifer, T*he motivation and impact of pension fund activism*, 52 J. FIN ECO. 293 (1999)

Dorff, Michael; Hicks, James, & Davidoff Solomon, Steven, *The Future or Fancy? An Empirical Study of Public Benefit Corporations*, HARV. BUS L. REV

Edkins, Michelle, *The Significance of ESG Engagemen*t, ENGAGEMENT STRATEGIES, 4 (2014)

Edmans, Alex, *Grow the Pie. How Great Companies Deliver Both Purpose and Profit*, Cambridge University Press, 2020.

Edmans, Alex; Goldstein, Itay, & Jiang, Wei, *The Real Effects of Financial Markets: The Impact of Prices on Takeovers*, 67 J. FIN. 933, 953–956 (2012).

Ernst & Young, *Study On Directors' Duties And Sustainable Corporate Governance: Final Report* (2020), https://op.europa.eu/en/publication-detail/-/publication/e47928a2-d20b-11ea-adf7-01aa75ed71a1/languageen?mc_cid=664fe83cf0&mc_eid=657d91711d

Ertimur, Yonca; Ferri, Fabrizio, & Stubben, Stephen R., *Board of Directors' Responsiveness to Shareholders: Evidence from Shareholder Proposals*, 16 J. CORP. FIN. 53 (2010).

Evans, Rachel, *How Socially Responsible Investing Lost Its Soul*, Bloomberg Businessweek, Dec. 18, 2018, https://www.bloomberg.com/news/articles/2018-12-18/exxon-great-marlboros-awesomehow-esg-investing-lost-its-way.

Fee, C. Edward et al., *New Evidence on Managerial Labor Markets: An Analysis of CEO Retreads,* 48 J. CORP. FIN. 428, 429 (2018).

Ferrarini, Guido, *Corporate Purpose and Sustainability* (December 7, 2020). European Corporate Governance Institute - Law Working Paper #559/2020.

Ferri, Fabrizio & Sandino, Tatiana, *The impact of shareholder activism on financial reporting and compensation: The case of employee stock options expensing,* 84 ACC. REV. 433, 441-442 (2009).

Fink, Larry, *A Sense of Purpose,* HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 17, 2019), https://corpgov.law.harvard.edu/2018/01/17/a-sense-of-purpose/.

Fisch, Jill E. and Davidoff Solomon, Steven, *Should Corporations have a Purpose?* (February 17, 2021). Texas Law Review, Forthcoming, U of Penn, Inst for Law & Econ Research Paper No. 20-22, European Corporate Governance Institute - Law Working Paper No. 510/2020.

Fisch, Jill E. and Davidoff Solomon, Steven, *The "Value" of a Public Benefit Corporation* (April 14, 2021). U of Penn, Inst for Law & Econ Research Paper No. 20-54.

Fleischer, Holger, '*Gesetzliche Unternehmenszielbestimmungen im Aktienrecht – Eine vergleichende Bestandsaufnahme*', in ZGR, 46, p. 411. quoted from the Italian traduction of this paper, 'La definizione normativa dello scopo dell'impresa azionaria: un inventario comparato', in Rivista delle Società, 2018.

Friedman, Milton, *Capitalism and Freedom*, University of Chicago Press, 1962.

Friedman, Milton, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970.

Frydman, Carola & Jenter, Dirk, *CEO compensation*, Working Paper 16585-2 NAT. BUR. ECO. RES., (2010).

Gallaway, Lowell, *The Economic Consequences of Codetermination on Employment and Income Distribution, in the codetermination movement in the west* 169, 170 (Svetozar Pejovich, ed. 1977).

Gatti, Matteo and Ondersma, Chrystin D., *Can a Broader Corporate Purpose Redress Inequality? The Stakeholder Approach Chimera* (March 4, 2020). 46 J. Corp. L. 1 (2020).

Geogescu, Peter, *The Aspirations For Stakeholder Capitalism Must Be Very, Very High*, FORBES, Jun. 10, 2020.

Gompers, Paul; Ishiii, Joy & Merrick, Andrew, *Corporate Governance and Equity Prices*, 118 Q.J. ECON. 107, 114-29 (2003).

Grandy, Christopher*, New Jersey Corporate Chartermongering*, 1875-1929, 49 J. Econ. Hist. 677 (1989).

Greenfield, Kent, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality*, 87 VA. L. REV. 1279, 1302 (2001).

Hanson, L.W., *Contemporary printed sources for british and irish economic history* 1701-1750, at 1712 (Cambridge Press 1963).

Harper Ho, Virginia, *Non-Financial Reporting & Corporate Governance: Explaining American Divergence & Its Implications for Disclosure Reform*, 10 ACCT., ECON., & L. 1, 12 (2020).

Horwitz, Morton J., *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 186-87 (1985).

Kang, Cecilia; McCabe David & Wakabayashi, Daisuke, *U.S. Accuses Google of Illegally Protecting Monopoly*, N.Y. TIMES (Oct. 20, 2020), https://www.nytimes.com/2020/10/20/technology/google-antitrust.html;

Kaplan, Steven N. & Minton, Bernadette A., *How Has CEO Turnover Changed?*, 12 INT'L. REV. FIN. 57,58 (2012).

Khan, Lina & Vaheesan, Sandeep, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 236–37 (2017).

Latino, Carmelo and Pelizzon, Loriana and Rzeźnik, Aleksandra, *The Power of ESG Ratings on Stock Markets* (March 2, 2021). SAFE Working Paper No. 310.

Leacock, Stephen J., *The Rise and Fall of the Ultra Vires Doctrine in United States, United Kingdom, and Commonwealth Caribbean Corporate Common Law: A Triumph of Experience Over Logic*, 5 DEPAUL BUS. & COMM. L.J. 67, 81 (2006).

Levick, Richard, *The New "Rules" Of Corporate Social Activism*, Forbes (Dec. 18, 2019), https://www.forbes.com/sites/richardlevick/2019/12/18/the-new-rules-of-corporate-socialactivism/#4265316651a9

Lipton, Ann M., *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. ON REG. 499, 513–17 (2020).

Loughrey, Joan; Keay, Andrew & Cerioni, Luca, *Legal Practitioners, Enlightened Shareholder Value and the Shaping of Corporate Governance*, 8 J. CORP. L. STUD. 79 (2008).

Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient Than the Income Tax in Redistributing Income*, 23 J. LEG. STUD. 667 (1994).

Love, Jessica, *Is Maximizing Shareholder Value a Thing of the Past?,* KelloggInsight (Sep. 19, 2019), https://insight.kellogg.northwestern.edu/article/shareholder-value-purpose-corporation

Ludema, Jim & Johnson, Amber *The purpose of the corporation? Business Roundtable advances the conversation, now we all need to contribute*, Forbes, Aug. 20, 2019.

Mahoney, Paul G. & Mahoney, Julia D., *The New Separation of Ownership and Control: Institutional Investors and ESG* (March 22, 2021). Columbia Business Law Review, Forthcoming.

Martin, Michael, *ESG: a trend we can't afford to ignore*, FIN. TIMES, Nov. 26, 2020, https://www.ft.com/content/87a922a1-8d60-4295-a9d8-d2c1ab5d788e.

Matera, Pierluigi, Delaware's Dominance, *Wyoming's Dare. New Challenges, Same Outcome?* (April 5, 2021). Fordham Journal of Corporate and Financial Law, Vol. 27, No. 1, forthcoming 2021.

Mayer, Colin, *Prosperity: Better Business Makes the Greater Good*, Oxford University Press, 2018.

Mertens, Hans-Joachim & Schanze, Erich, *The German Codetermination Act of 1976*, 2 J. COMP. CORP. L. & SEC. REG. 75, 75 (1979).

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

Möslein, Florian and Sørensen, Karsten Engsig, *Sustainable Corporate Governance: A Way Forward* (January 4, 2021).

O'Byrne, Stephen F., *Say on Pay: Is It Needed? Does It Work?* 30 J. APP. CORP. FIN 30, 34 (2018) Available at: https://doi.org/10.1111/jacf.12275

Pacces, Alessio Maria, *Sustainable Corporate Governance: The Role of the Law* (September 30, 2020). European Corporate Governance Institute - Law Working Paper No. 550/2020.

Pace Hamill, Susan, *From Special Privilege To General Utility: A Continuation Of Willard Hurst's Study Of Corporations,* 49 AM. U.L. REV. 81, 92 (1999).

Pierce, Morton, *Analysis of the Business Roundtable statement* Harvard Law School Forum on Corporate Governance, 26 Sept 2019.

Pigou, Arthur C., *The Economics of Welfare*, London: Macmillan (1920).

Piketty, Thomas, *Capital in the twenty first century* 397–405 (2014).

Pollman, Elizabeth, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013 (2019).

Pollman, Elizabeth, *The History and Revival of the Corporate Purpose Clause* (March 12, 2021). U of Penn, Inst for Law & Econ Research Paper No. 21-15, Texas Law Review, Forthcoming.

Raghunandan, Aneesh and Rajgopal, Shivaram, *Do ESG Funds Make Stakeholder-Friendly Investments?* (May 3, 2021).

Repko, Melissa, et al., *Hashtags won't cut it. Corporate America faces a higher bar in a reckoning on racial inequality*, CNBC, June 12, 2020.

Rock, Edward B., *For Whom is the Corporation Managed in 2020?: The Debate over Corporate Purpose* (May 1, 2020). European Corporate Governance Institute - Law Working Paper No. 515/2020, NYU School of Law, Public Law Research Paper No. 20-16, NYU Law and Economics Research Paper.

Roe, Mark J.; Spamann, Holger; Fried, Jesse M. & Wang, Charles C. Y., *The European Commission's Sustainable Corporate Governance Report: A Critique* (October 14, 2020). European Corporate Governance Institute

- Law Working Paper 553/2020, Harvard Public Law Working Paper No. 20-30, Yale Journal on Regulation Bulletin.

Roe, Mark, *Why are America's CEOs talking about stakeholder capitalism now?* Project Syndicate, 4 Nov 2019.

Rose, Amanda M., *A Response to Calls for SEC-Mandated ESG Disclosure* (May 8, 2021). Washington University Law Review, Vol. 98, Forthcoming 2021.

Saez, Emmanuel & Zucman, Gabriel, *The triumph of injustice, how the rich dodge taxes and how to make them pay* (2019).

Saez, Emmanuel, and Zucman, Gabriel, *The Rise of Income and Wealth Inequality in America: Evidence from Distributional Macroeconomic Accounts* (2020) Journal of Economic Perspectives (2020).

Schanzenbach, Max M. & Sitkoff, Robert H., *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee,* 72 STAN. L. REV. 453 (2020).

Schneider, Howard & Kahn, Chris, Reuters, *Majority of Americans Favor Wealth Tax on Very Rich: Reuters/Ipsos Poll*, January 10, 2020, https://www.reuters.com/article/us-usa-election-inequality-poll/majority-of-americans-favorwealth-tax-on-very-rich-reuters-ipsos-poll-idUSKBN1Z9141

Seligman, Joel, *A Brief History of Delaware's General Corporation Law of 1899*, 1 DEL. J. CORP. L. 249 (1976).

Shin, Taekjin & You, Jihae, *Changing Words: How Temporal Consistency in a CEO's Use of Language toward Shareholders and Stakeholders Affects CEO Dismissal,* 28 CORP. GOV. INT'L. REV. 47, 48 (2020).

Starr, Evan; Prescott, J.J. & Bishara, Norman, *Noncompete Agreements in the U.S. Labor Force*, J.L & ECON. 6 (2020).

Steele Gordon, John, *The great game: the emergence of wall street as a world power* 1653-2000 76 (1999).

Steverman, Ben & Stupples, Benjamin, *Bloomberg Tax, Wealth Taxes Are Going Global, From California to Germany*, January 6, 2021, https://news.bloombergtax.com/daily-tax-report-international/wealth-taxes-are-going-global-fromcalifornia-to-germany

Stout, Lynn A., *The Shareholder Value Myth* 1 (2012).

Strine, Leo, *Corporate Power is Corporate Purpose I: Evidence from My Hometown*, 33(2) OXFORD REV. OF ECON. POL. 176 (2017).

Tinbergen, Jan, *Substitution of Graduate by Other Labour*, 27 KYKLOS 217 (1974).

Urbain Parleani, Isabelle *L'article 1835 et la raison d'être*, in Orizzonti del diritto commerciale.(2019).

Vermaelen, Theo, *Maximizing Shareholder value: An Ethical Responsibility.*

Waterhouse, Benjamin C., *Lobbying America* 76-78 (2013).

Weil, David, *The fissured workplace: why work became so bad for so many and what can be done to improve it* 168–77 (2014).

Zucman, Gabriel *Global Wealth Inequality* NBER Working Papers 25462, National Bureau of Economic Research, Inc. (2019).