THE START OF HISTORY FOR CORPORATE LAW: SHIFTING PARADIGMS OF CORPORATE PURPOSE IN THE COMMON LAW

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ABSTRACT

The release of the new "Statement on the Purpose of a Corporation" by the U.S. Business Roundtable in 2019 reignited the Berle-Dodd debate about whether companies should have a broader corporate purpose beyond that of maximizing short-term shareholder value. This tracks similar corporate governance developments in the U.K., Australia, Singapore and other common law jurisdictions, which appear to denote shifting paradigms of corporate purpose from one based upon shareholderism in the strict sense to one that embraces some notion of stakeholderism. A closer examination, however, reveals different approaches adopted by each jurisdiction with respect to resolving the agency costs arising from conflicts between the company and its various constituencies.

Drawing primarily on the experiences of the U.S., U.K., Australia, Singapore and other key common law jurisdictions, this article provides a comparative overview of the regulatory developments in these jurisdictions to ascertain the extent to which each jurisdiction is moving away from a "shareholder primacy" model in respect of the extent to which directors of public corporations are increasingly required to take into account the interests of the company's broader stakeholders in corporate decision-making. It discusses the implications of these developments with respect to the potential for convergence towards a new common law "enlightened shareholder value" model. In this respect, it is argued that we are witnessing the start of a nascent shift toward a new corporate form(s), which challenges the "end of history" thesis that had suggested the triumph of the "shareholder primacy" model as the standard normative corporate form. At the same time, any potential for convergence is impeded by marked differences in broader institutional factors such as distinctive patterns of corporate ownership, corporate culture, and ultimately the

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institutions of political economy in the respective common law jurisdictions examined in this article.

INTRODUCTION

The Berle-Dodd debate[1] over the objectives of the corporation has been reignited in corporate governance debates today. The orthodox position—often referred to as the "shareholder primacy" model—is that shareholders are the "residual owners" of the company and, therefore, directors' duties should be exercised in the shareholders' interest.[2] Such a model would require the maximization of shareholder value and is

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1 Berle argued that "all powers granted to a corporation or to the management of a corporation, or to any group within the corporation, whether derived from statute or charter or both, are necessarily and at all times exercisable only for the ratable benefit of all the shareholders as their interest appears." Adolf A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931). In response, Dodd contended that "[i]f the unity of the corporate body is real, then there is reality and not simply legal fiction in the proposition that the managers of the unit are fiduciaries for it and not merely for its individual members, that they are . . . trustees for an institution rather than attorneys for the stockholders." E. Merrick Dodd Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1160 (1932).

2 *See* Ronald J. Gilson, *From Corporate Law to Corporate Governance*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 3, 23–25 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018).

characteristic of companies with dispersed ownership often found in common law liberal market economies such as the U.S. and U.K. (i.e. the Anglo-American "outsider" model).[3] In contrast, the stakeholder "insider" model—which is prevalent in civil law coordinated market economies in continental Europe, where there is a greater prevalence of concentrated ownership[4]—requires directors to take into account not simply shareholders' interests, but the interests of other stakeholders which may affect or be affected by the company, including those of employees, creditors, customers, suppliers, regulators and the wider community.[5] Such a binary classification, however, is questionable when "shareholderism"[6] is arguably a universal phenomenon that prevails in both common and civil law jurisdictions.[7] Differences between jurisdictions instead lie in the extent and manner in which stakeholders' interests are taken into account within the corporate governance framework, with the laws on creditor and employee protection demonstrating greater divergence than those relating to shareholders.[8]

Along with the popularity of the law and economics movement, the globalization of capital markets and the increasing competition for investors, the "shareholder primacy" model has come to be seen as the dominant model for modern corporations.[9] In a well-known article titled *The End of History for Corporate Law*, Hansmann and Kraakman predicted the convergence towards the "'standard shareholder-oriented model' of the corporate form", which reflected the intellectual climate at

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3 Marina Martynova & Luc Renneboog, *An International Corporate Governance Index*, *in* THE OXFORD HANDBOOK OF CORPORATE GOVERNANCE 97, 99 (Douglas Michael Wright, et al., eds., 2013); Sigurt Vitols, *Varieties of Corporate Governance: Comparing Germany and the UK*, *in* VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE 337, 337–60 (Peter A. Hall & David Soskice eds., 2001) (comparing the shareholder and stakeholder models with the UK and Germany as examples).

4 Martynova & Renneboog, *supra* note 3, at 114; Vitols, *supra* note 3.

5 Gilson, *supra* note 2, at 16–19.

6 "Shareholderism" has been defined as "a motivated, principled approach that generally considers it a desirable strategy to enhance shareholder value." Shareholderism stands in contrast with "stakeholderism," which "views shareholders as one among several stakeholders whose interests deserve consideration." Renèe B. Adams et al., *Shareholders and Stakeholders: How Do Directors Decide?*, 32 STRATEGIC MGMT. J. 1331, 1332 (2011).

7 *See* Amir N. Licht & Renée Adams, *Shareholders and Stakeholders around the World: The Role of Values*, *Culture, and Law in Directors' Decisions* 15 (Eur. Corp. Governance Inst., Working Paper No. 459, 2019).

8 *See* John Armour et al., *How Do Legal Rules Evolve? Evidence from a Cross-Country Comparison of Shareholder, Creditor, and Worker Protection*, 57 AM. J. COMP. L. 579 (2009).

9 ANDREW KEAY, THE ENLIGHTENED SHAREHOLDER VALUE PRINCIPLE AND CORPORATE GOVERNANCE 16 (Routledge 2012).

the time and the triumph of liberal market economies.[10] While most extant corporate governance research has since been shareholder-centric, contemporary debates have shifted towards the need to balance the interests of multiple stakeholders within an overarching framework of governance, particularly in light of the financial crisis in 2008 and the increasing recognition of environmental, social, and governance (ESG) risks.[11] In this context, the current challenges for corporate governance reforms lie in minimizing agency costs in respect of the conflict between the company's shareholders and its stakeholders by ensuring that the board does not behave opportunistically towards its stakeholders in pursuit of shareholder maximization.[12]

In this connection, recent corporate governance reforms in the U.S. and other common law jurisdictions like the U.K., Australia, and Singapore have increasingly challenged the credibility and apparent supremacy of the "shareholder primacy" model—and with it, the notion of the "end of history" itself—through the emergence of the "enlightened shareholder value" (ESV) principle.[13] First introduced as a central element in U.K. corporate governance in the 2000s, the ESV principle requires directors to take into account non-shareholder interests as a means of enhancing shareholder value over the long-term, and has drawn parallels and attracted discussions in more recent corporate governance reforms in other common law jurisdictions, including the U.S., Australia, Singapore, Canada, Hong Kong and South Africa.[14] These developments may be seen as an attempt to mitigate the negative externalities brought about by globalization and the excesses of capitalism, which resonates with the income inequality debates and populist themes in many democracies today.

Drawing on recent regulatory developments primarily in the U.S., U.K., Australia, Singapore and other key common law jurisdictions, this

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[10] Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 441 (2001).

[11] *See* Lynn S. Paine & Suraj Srinivasan, *A Guide to the Big Ideas and Debates in Corporate Governance*, HARV. BUS. REV. (Oct. 14, 2019), https://hbr.org/2019/10/a-guide-to-the-big-ideas-and-debates-in-corporate-governance [https://perma.cc/PX4V-4PVX]; Colin Mayer, PROSPERITY (Oxford University Press 2018).

[12] John Armour, Henry Hansmann & Reinier Kraakman, *Agency Problems and Legal Strategies*, *in* THE ANATOMY OF CORPORATE LAW—A COMPARATIVE AND FUNCTIONAL APPROACH 29–30 (Reinier Kraakman et al. eds., 2017).

[13] *See* Virginia Harper Ho, *Enlightened Shareholder Value: Corporate Governance beyond the Shareholder-Stakeholder Divide*, 36 J. CORP. L. 59 (2010); Cynthia A. Williams & John M. Conley, *An Emerging Third Way – The Erosion of the Anglo-American Shareholder Value Construct*, 38 CORNELL INT'L. L.J. 493 (2005).

[14] *See* KEAY, *supra* note 9, at 263–64.

article ascertains how each jurisdiction is moving away from a "shareholder primacy" model in respect of the extent to which directors of public corporations are increasingly required to take into account the interests of the company's stakeholders in corporate decision-making. It begins by examining the extent of convergence in *form*,[15] or at least a shift, in terms of the formal rules underlying the director's fiduciary duty to act *bona fide* in the best interests of the company. It discusses the implications of these developments with respect to the potential for formal convergence towards a new common law "enlightened shareholder value" model. In this respect, it is argued that we are witnessing the start of a nascent shift toward a new corporate form(s) that challenges the "end of history" thesis that had suggested the triumph of the "shareholder primacy" model as the standard normative corporate form. These reforms appear to denote a shifting paradigm of corporate purpose from one based upon shareholderism in the strict sense to one that embraces some notion of stakeholderism. A closer examination, however, reveals different regulatory approaches adopted by each jurisdiction with respect to resolving the agency conflicts between the company and its various constituencies. At the same time, we are at risk of presuming superficial "convergence" on the premise of formal similarities belying important functional differences.[16] On this basis, this article proceeds to examine the extent to which functional convergence is likely to be impeded by broader institutional factors such as distinctive patterns of corporate ownership, corporate culture, and ultimately the institutions of political economy in the respective common law jurisdictions examined in this article.

This article proceeds as follows: Part I provides a brief overview of the "shareholder primacy" and stakeholder theories in the U.S. context; Part II discusses the recent key regulatory developments in the U.K., Australia, and Singapore, along with other common law jurisdictions; Part III ascertains the potential for convergence, or at least a shift from the "shareholder primacy" model, toward the "enlightened shareholder value" model amongst common law jurisdictions; and Part IV concludes.

I. SHIFTING PARADIGMS OF CORPORATE PURPOSE IN THE

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[15] *See* Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, 49 AM. J. COMP. L. 329 (2001).

[16] *Id.*

COMMON LAW

Joseph Schumpeter, in his classic *Capitalism, Socialism and Democracy*, predicted the "creative destruction" of capitalism by becoming a victim of its own success.[17] His work remains insightful in the contemporary context, owing in part to his prescient views on the increasing discontent toward capitalist interests[18] even as his discussions of the destruction of capitalism and transition to socialism have not borne out in reality. Much ink has been spilled on the trite debate about the correct explanatory and normative "model" of the corporation and its corporate purpose. Mayer, for example, has proposed that corporate purpose, in the contemporary context, should be redefined to mean "finding ways of solving problems profitably where profits are defined net of the costs of avoiding and remedying problems."[19] Suffice to say, these respective corporate models serve to provide a simplified analytical framework but are not necessarily sufficient in providing us with sufficient granularity and context in evaluating corporate behavior, nor are they necessarily mutually exclusive as they tend to be seen.[20] This article does not purport to attempt a survey of the vast literature on this subject, which has been discussed extensively in other works,[21] except for the following observations which inform and underlie the conceptual framework of this article.

Modern corporate governance theory credits Adam Smith,[22] and subsequently Berle and Means,[23] with recognizing the risk of agency

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17 "Capitalism, then, is by nature a form or method of economic change and not only never is but never can be stationary," Joseph A. Schumpeter, CAPITALISM, SOCIALISM AND DEMOCRACY 82 (Taylor & Francis 2010) (1943).

18 *Id*. at 126, 136–38.

19 Colin Mayer, *The Future of the Corporation and the Economics of Purpose* 1, 2 (Eur. Corp. Governance Inst., Working Paper No. 710, 2020).

20 *See generally* Gilson, *supra* note 2; Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91 (2020).

21 *See e.g.*, Gilson, *supra* note 2; Shelley Marshall & Ian Ramsay, *Corporate Purpose: Legal Interpretations and Empirical Evidence*, *in* THE OXFORD HANDBOOK OF THE CORPORATION (Thomas Clarke, Justin O'Brien & Charles R. T. O'Kelley eds., 2018); Bebchuk & Tallarita, *supra* note 20.

22 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 574–75 (S. M. Soares ed., MetaLibri Digital Library 2007) (1776) (noting that "[t]he directors of such companies, however, being the managers rather of other people's money than of their own, it cannot well be expected, that they should watch over it with the same anxious vigilance with which the partners in a private co-partnership frequently watch over their own").

23 "The separation of ownership from control produces a condition where the interests of owner and of ultimate manager may, and often do, diverge, and where many of the checks which formerly operated to limit the use of power disappear." Adolf A. Berle, Jr. & Gardiner C. Means, MODERN CORPORATION AND PRIVATE PROPERTY 6 (Routledge 2017) (1933).

conflicts arising from the separation between ownership and control. The primary objective of corporate governance has, thus, largely focused on the means by which such managerial opportunism may be constrained through shareholder oversight.[24] The most important idea in Anglo-American corporate law is the contractarian theory of the corporation, which posits that directors are agents of the shareholders under the corporate contract with fiduciary obligations to maximize shareholder wealth.[25] Corporate governance was viewed by neo-institutional economists predominantly as the mechanism of the ordering of private interests[26] in the form of the "legal fiction" of the corporation, "which serves as a nexus for a set of contracting relationships"[27] through corporate hierarchies that are structured preferably in a "non-interventionist" framework of legal rules.[28] The "shareholder primacy" model has consequently become the dominant theory in academic literature and business practice.[29] It is defended on the basis that it is essential to have a standard measurable corporate objective by which to hold directors accountable.[30] On this basis, the principal elements of the "shareholder primacy" model are that: (i) control over the corporation should rest with shareholders; (ii) directors should be required to manage the corporation in the interests of its shareholders only; (iii) other corporate stakeholders, including employees, suppliers, and customers, should have their interests safeguarded by contractual and regulatory means instead of participation in corporate governance; (iv) minority shareholders should have strong protection from exploitation by controlling shareholders; and (v) the key

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24 Michael Jensen & William Meckling, *Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 310 (1976).

25 FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 38, 90–93 (Harvard University Press 1991).

26 *See* OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS AND RELATIONAL CONTRACTING 64–84 (1985); Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 388–89 (1937) (arguing that the distinguishing characteristic of the firm is "the supersession of the price mechanism" which is replaced with "vertical" integration or the power of the "entrepreneur-coordinator," who directs the allocation of corporate resources).

27 Jensen & Meckling, *supra* note 24.

28 Peer Zumbansen, *Governance: An Interdisciplinary Perspective*, *in* THE OXFORD HANDBOOK OF GOVERNANCE 84, 91 (David Levi-Faur ed., 2012). *See* John C. Coffee Jr., *The Political Economy of Dodd-Frank: Why Financial Reform Tends to be Frustrated and Systemic Risk Perpetuated*, 97 CORNELL L. REV. 1019, 1024–25 (2012).

29 Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y TIMES (Sept. 13, 1970) at 6 (noting that "[t]here is one and only one social responsibility of business—to use its resources and engage in activities designed to increase 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").

30 Stephen Bainbridge, *A Duty to Shareholder Value*, N.Y. TIMES (Apr. 16, 2015), https://www.nytimes.com/roomfordebate/2015/04/16/what-are-corporations-obligations-to-shareholders/a-duty-to-shareholder-value [https://perma.cc/3HHV-T9S2].

measure of shareholders' interests is the market value of the publicly traded corporation's shares.[31] At the same time, the board's prerogative to decide what constitutes the best interests of the company, as part of its responsibility of managing the business of the company, is reflective of what is a de jure "shareholder primary" model but a de facto "director primacy" model that exists in many common law jurisdictions, including the U.S.,[32] U.K., Singapore, and Hong Kong.[33]

The "stakeholder" model, in contrast, posits that the purpose of the corporation is to create value for stakeholders—that is "those who can affect or are affected by [the actions of companies]"—which include shareholders, employees, creditors, customers, suppliers, and communities.[34] It suggests that "the interests of these groups are joint and that to create value, one must focus on how value gets created for each and every stakeholder."[35] In a similar vein, the "team production" model postulates that boards exist not simply to protect shareholders' interests per se, but as "mediating hierarchs" responsible for protecting the enterprise-specific investments by coordinating the activities and balancing the competing interests of all the members of the corporate "team" (i.e. stakeholders), including shareholders, managers, employees and other groups.[36] In this regard, stakeholder theorists argue that stakeholderism and shareholderism are not mutually exclusive because taking into account stakeholder interests and managing stakeholder relationships are not simply about corporate social responsibility but because they are necessary to maximize shareholder value.[37]

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31 Hansmann & Kraakman, *supra* note 10, at 440–41.

32 The U.S. model may be better described as a "director primacy" system given that directors are more insulated from shareholder pressure as compared to the U.K. *See generally* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547 (2003).

33 *See* Del. Code Ann. tit. 8, § 141(a) (2020) ("The business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation"). Similarly, the Singapore Companies Act provides that "[t]he business of a company shall be managed by, or under the direction or supervision of, the directors." *See* Companies Act (Cap 50, 2006 Rev Ed) § 157A(1) (Sing.). Hong Kong's Model Articles for Public Companies state that "the business and affairs of the company are managed by the directors, who may exercise all the powers of the company" subject to the Companies Ordinance and the articles. *See* Companies (Model Articles) Notice, (2013) Cap. 622H, BLIS § 2(1) (H.K.), https://www.elegislation.gov.hk/hk/cap622H?pmc=1&m=1&pm=0 [https://perma.cc/JD9T-TLAF].

34 R. EDWARD FREEMAN ET AL., STAKEHOLDER THEORY: THE STATE OF THE ART 9 (2010).

35 *Id.*

36 Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law,* 85 VA. L. REV. 247, 251, 253, 280–81 (1999).

37 *See* FREEMAN ET AL., *supra* note 34, at 10–12.

In this context, the ESV model was developed in the course of the review and reform of the U.K. Companies Act around 2000, which this article discusses in Part III below. As opposed to a radical departure from the "shareholder primacy" model, the ESV model may be seen as building on the premises of the "shareholder primacy" model by recognizing that corporate performance over the long-term depends not simply on capital contribution from shareholders, but also on the company's relationships with its customers, employees, suppliers, and the wider community. Simply put, under the ESV model, directors should have regard for non-shareholder interests, in addition to shareholder interests, as a means of enhancing shareholder value over the long-term. On this basis, ESV comprises four elements: (i) the board must act in good faith in the best interests of the company, a duty which is owed not to the shareholders but to the company as a separate legal entity; (ii) the best interests of the company refer to the enhancement of long-term shareholder value and sustainability (as opposed to short-term profit maximization); (iii) in enhancing long-term shareholder value and sustainability, the directors must consider the interests of the company's stakeholders, which include employees, suppliers, customers, creditors, regulators, the environment, and the wider community; and (iv) management and control remain with the board and shareholders respectively, and stakeholders' interests are not directly enforceable. The ESV model may be seen as a "hybrid" approach to the extent that it adopts elements of both the shareholder and stakeholder models.[38] The notion of an "enlightened" shareholder challenges the basic premise of corporate governance that shareholders can best look after the company's interests when they have sufficient rights and access to information and recognizes the potential for short-termism arising from a corporate governance framework premised exclusively on shareholders' interests. Instead, the ESV model appeals to the notion of the long-term investor by prescribing what the interests of such a shareholder *ought* to take into account in its enlightened self-interest.

The broad elements of the ESV model are reflected in the US Business Roundtable's release of a new "Statement on the Purpose of a Corporation" in 2019, which emphasizes its commitment to all corporate stakeholders, including delivering value to customers, investing in employees, dealing fairly with suppliers, supporting communities and embracing sustainable practices, and generating long-term value for

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[38] *See* Mihir Naniwadekar & Umakanth Varottil, *The Stakeholder Approach Towards Directors' Duties Under Indian Company Law: A Comparative Analysis* 2 (Nat'l Univ. of Sing., Ctr. for L. & Bus., Working Paper No. 16/03, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2822109# [https://perma.cc/DCR4-XM6D].

shareholders.[39] Each version of the Business Roundtable Statement issued since 1997 had endorsed the principles of shareholder primacy—that corporations exist to generate financial returns for shareholders.[40] In the U.S., at least thirty states have adopted constituency and benefit corporation statutes, which expressly permit or require directors to consider stakeholder interests and to prioritize long-term shareholder value.[41] Further, under Delaware law—as the law of incorporation for most of the largest companies in the U.S.—shareholder value maximization by the board is not required, save in certain circumstances such as takeover situations.[42]

Despite the U.S.'s historical antipathy toward "socialism" (as used here in the broad sense), the financial crisis in 2008 upended the contractarian framework that underpinned corporate governance. Critics argued that shareholder value maximization in the limited sense and private ordering were not the best means of promoting efficiency and corporate responsibility, and the mechanisms used to ensure management accountability were not as effective as previously thought.[43] Entity shielding, coupled with the separation of ownership and control, in a limited liability corporation were understood to produce agency costs by increasing conflicts, not simply between shareholders and managers, but also between shareholders and broader stakeholders, by providing a vehicle for externalizing the costs of corporate plundering to involuntary

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[39] *See* BUSINESS ROUNDTABLE, STATEMENT ON THE PURPOSE OF A CORPORATION (2019), https://system.businessroundtable.org/app/uploads/sites/5/2021/02/BRT-Statement-on-the-Purpose-of-a-Corporation-Feburary-2021-compressed.pdf [https://perma.cc/MMB8-CATF].

[40] *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'*, BUS. ROUNDTABLE (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/37XA-EKD6].

[41] *See* Edward Rock, *For Whom is the Corporation Managed in 2020?: The Debate over Corporate Purpose* 8 (Eur. Corp. Governance Inst., Working Paper No. 515, 2020); Jennifer G. Hill, *Evolving Directors' Duties in the Common Law World*, *in* RESEARCH HANDBOOK ON DIRECTORS' DUTIES 3, 31 (Adolfo Paolini ed., 2014). *See* Del. Code Ann. tit. 8, § 365(a) (2020) (requiring that the board manages the public benefit corporation "in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation"). *See also* 15 PA. CONS. STAT. § 1715(a)-(b) (2016).

[42] *See, e.g.*, Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140, 1150–51 (Del. 1989); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986). Directors, however, are permitted to take into account stakeholder interests in a hostile takeover. *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955–56 (Del. 1985). *See also* Dodge v. Ford, 170 N.W. 668, 682, 684 (Mich. 1919) (a well-known articulation of shareholder primacy); eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 33 (Del. Ch. 2010).

[43] *See generally* P.M. Vasudev & Susan Watson, *Introduction*, *in* CORPORATE GOVERNANCE AFTER THE FINANCIAL CRISIS 1 (P.M. Vasudev & Susan Watson eds., 2012) (giving an overview of corporate governance practices following the financial crisis).

creditors.[44] Corporate governance reforms post-crisis have, therefore, been premised on the need to align managerial preferences with not only the interests of shareholders but broader stakeholders as well through increasing political and market pressure exerted on the corporation from broader corporate stakeholders (or "outsiders").[45]

In this light, the Accountable Capitalism Act was introduced in the U.S. Senate by then-Democratic presidential candidate Elizabeth Warren in 2018, which proposed that corporations with more than $1 billion in annual revenue be required to obtain a federal corporate charter that would require directors to consider the interests of all major corporate stakeholders in company decisions, and for at least 40% of directors to be elected by employees.[46] At the crux of the matter is the growing recognition of the vulnerability of the individual worker within a capitalist system that prioritizes shareholder profits, which has led to proposals such as a universal basic income,[47] employee share ownership, and the election of board directors by workers.[48] Nevertheless, the current U.S. approach to ESG disclosures is largely reliant on private ordering and voluntary disclosure.[49] Under current regulations and guidance from the U.S. Securities and Exchange Commission (SEC), mandatory disclosures are generally required only if the information is "material" for investors.[50] The Investor Advisory Committee of the SEC has recommended that the SEC include specific ESG disclosure policies into the integrated disclosure requirements for SEC-registered issuers, and the SEC has most recently indicated that it is working "toward a comprehensive ESG disclosure

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[44] *See* Edward B. Rock, *Adapting to the New Shareholder-Centric Reality*, 161 U. PA. L. REV. 1907, 1917–28 (2013).

[45] *See generally* Katharine V. Jackson, *Towards a Stakeholder-Shareholder Theory of Corporate Governance: A Comparative Analysis*, 7 HASTINGS BUS. L.J. 309 (2011).

[46] Accountable Capitalism Act, S. 3348, 115th Cong. (2018).

[47] *See The Freedom Dividend, Defined,* YANG 2020, https://2020.yang2020.com/what-is-freedom-dividend-faq/ (last visited Feb. 25, 2021) [https://perma.cc/5KYX-BHYR].

[48] *See Corporate Accountability and Democracy,* BERNIESANDERS.COM, https://berniesanders.com/issues/corporate-accountability-and-democracy/ (last visited Feb. 25, 2021) [https://perma.cc/ESL2-AU5K]; LYNN STOUT, SERGIO GRAMITTO & TAMARA BELINFANTI, CITIZEN CAPITALISM 4–5 (2019) (arguing for every U.S. citizen of age to become a citizen-shareholder in a "Universal Fund" constituted to hold an investment portfolio of stocks and other assets).

[49] *See* Virginia Harper Ho & Stephen Kim Park, *ESG Disclosure in Comparative Perspective: Optimizing Private Ordering in Public Reporting*, 41 U. PA. J. INT'L L. 249, 290–95 (2019).

[50] *See* 17 C.F.R. §§ 229.303, 230.408 (2020); SEC, Commission Guidance Regarding Disclosure Related to Climate Change (Feb. 8, 2010), https://www.sec.gov/rules/interp/2010/33-9106.pdf; SEC, Business and Financial Disclosure Required by Regulation S-K (Apr. 13, 2016), https://www.sec.gov/rules/concept/2016/33-10064.pdf. *See also* Basic Inc. v. Levinson, 485 U.S. 224, 231 (1988), citing TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

framework aimed at producing the consistent, comparable, and reliable data that investors need."[51] In 2015, the SEC adopted a final rule pursuant to section 953(b) of the Dodd-Frank Act pushed by labor unions, which requires public companies to disclose the ratio of the compensation of its chief executive officer (CEO) to the median compensation of its employees from 2018 unless excluded.[52] The rule may be understood as an attempt to assist workers in their bargaining positions in wage negotiations rather than as a strict metric for measuring corporate performance.[53] In this regard, one may ask whether special recognition should be accorded to employees as an important constituency in corporate governance. Much has been written about the incompleteness of the employment contract,[54] which calls into question the extent to which employees' interests may be sufficiently protected by contractual means as claimed by Hansmann and Kraakman.[55] Employees may also be regarded as an important residual claimant and rank ahead of shareholders as preferential creditors in the event of a corporate bankruptcy.[56] The lack of a formal role for employees in corporate governance in common law liberal market economies may be juxtaposed with legally-mandated employee board representation in eighteen countries out of the twenty-seven E.U. Member States (including Norway),[57] most notably Germany with its system of codetermination.[58] If the broader objective of corporate governance is to induce socially-efficient incentives and reduce agency conflicts between the corporation and society, then such proposed reforms

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[51] *See* SEC Inv. Advisory Comm., Recommendation Relating to ESG Disclosure (May 21, 2020), https://www.sec.gov/spotlight/investor-advisory-committee-2012/esg-disclosure.pdf [https://perma.cc/EZC7-BDER]; Acting Chair Allison Herren Lee, A Climate for Change: Meeting Investor Demand for Climate and ESG Information at the SEC (Mar. 15, 2021). *See also* Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEO. L.J. 923, 939 (2019).

[52] *See* Pay Ratio Disclosure, Exchange Act Release No. 33,9877, 80 Fed. Reg. 50104 (Aug. 18, 2015), https://www.govinfo.gov/content/pkg/FR-2015-08-18/pdf/2015-19600.pdf [https://perma.cc/Z9RN-54WD]; 17 C.F.R. § 229.402(u) (2020).

[53] *See* Luca Enriques et al., *The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies*, *in* THE ANATOMY OF CORPORATE LAW—A COMPARATIVE AND FUNCTIONAL APPROACH 80, 89, 94 (Reinier Kraakman et al. eds., 3d ed. 2017).

[54] *See, e.g.,* Oliver E. Williamson, Michael L. Wachter & Jeffery E. Harris, *Understanding the Employment Relation: The Analysis of Idiosyncratic Exchange,* 6 BELL J. ECON. 250 (1975), https://www.jstor.org/stable/3003224?seq=1 [https://perma.cc/35LK-N8AC].

[55] *See* Hansmann & Kraakman, *supra* note 10, at 440–41.

[56] *See* 11 U.S.C. § 507(a) (2018); Insolvency, Restructuring & Dissolution Act (No. 40, 2018) § 203 (Sing.).

[57] *See* Aline Conchon & Jeremy Waddington, *Board-level Employee Representation in Europe: Challenging Commonplace Prejudices, in* 1 THE SUSTAINABLE COMPANY: A NEW APPROACH TO CORPORATE GOVERNANCE 91, 95 (Sigurt Vitols & Norbert Kluge eds., 2011).

[58] *See* Katharina Pistor, *Codetermination: A Sociopolitical Model with Governance Externalities, in* EMPLOYEES AND CORPORATE GOVERNANCE 163 (Margaret M. Blair & Mark J. Roe eds., 1999).

may be seen as an attempt, for better or for worse, to incentivize management to align its interests with those of employees and broader stakeholders in order to maximize the social value of the corporation.[59]

Notably, however, these recent developments have generated much controversy. Predictably, responses are two-fold: some herald this development as a long overdue admission of the social inefficiencies inherent in capitalism,[60] while others are understandably skeptical of the intentions and lack of substance behind such developments.[61] What is more certain is that the trend toward greater stakeholderism, long-term sustainability, and ESG management in corporate governance is a growing international norm that is likely to continue into the foreseeable future.[62] The U.S. is hardly the first mover here, and the Business Roundtable's announcement comes on the back of a sustained trend toward an ESV corporate model in other common law jurisdictions. Canada recently granted legislative recognition to non-shareholder constituencies with respect to the directors' duty to act in the best interests of the corporation under the Canada Business Corporations Act.[63] This amendment codifies the position set out by the Supreme Court of Canada, which recognized that the "'best interests of the corporation' should be read not simply as the 'best interests of the shareholders,'"[64] and "directors may look to the

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[59] *See* Zoe Adams & Simon Deakin, *Corporate Governance and Employment Relations*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 1038, 1038, 1059 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018); Andrew Pendleton & Howard Gospel, *Corporate Governance and Labor*, *in* THE OXFORD HANDBOOK OF CORPORATE GOVERNANCE 635 (Douglas Michael Wright et al. eds., 2013).

[60] *See, e.g.*, Tim Wu, *The Goals of the Corporation and the Limits of the Law*, THE CLS BLUE SKY BLOG (Sept. 3, 2019), https://clsbluesky.law.columbia.edu/2019/09/03/the-goals-of-the-corporation-and-the-limits-of-the-law/ [https://perma.cc/859V-G3SR].

[61] *See, e.g.*, Jesse Fried, *The Roundtable's Stakeholderism Rhetoric is Empty, Thankfully*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REGUL. (Nov. 22, 2019), https://corpgov.law.harvard.edu/2019/11/22/the-roundtables-stakeholderism-rhetoric-is-empty-thankfully/#more-124585 [https://perma.cc/UPY7-8U2Z].

[62] *See* Larry Fink, *2018 Letter to CEOs: A Sense of Purpose*, BLACKROCK (2018), https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter [https://perma.cc/6HCR-U8U9]; *Measuring Stakeholder Capitalism: Towards Common Metrics and Consistent Reporting of Sustainable Value Creation,* WORLD ECON. F., https://www.weforum.org/stakeholdercapitalism (last visited Feb. 25, 2021) [https://perma.cc/7LWL-EXKY]; Klaus Schwab, *Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution*, WORLD ECON. F. (Dec. 2, 2019), https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/ [https://perma.cc/3MSU-E8GH]; *Study on Directors' Duties and Sustainable Corporate Governance*, EUROPEAN UNION at i, vi (July 2020), https://op.europa.eu/en/publication-detail/-/publication/e47928a2-d20b-11ea-adf7-01aa75ed71a1/language-en [https://perma.cc/EN73-YR6N].

[63] *See* Canada Business Corporations Act, R.S.C. 1985, c C-44 § 122 (1.1).

[64] *See* Peoples Dep't Stores Inc. (Trustee of) v. Wise, 2004 SCC 68, [2004] 3 S.C.R. 461, ¶ 42 (Can.).

interests of, inter alia, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions."[65] The next part of this article provides a broad, high-level survey of the recent developments in this regard in key common law jurisdictions.

II. CORPORATE PURPOSE, SHAREHOLDER VALUE, AND STAKEHOLDERS IN OTHER COMMON LAW JURISDICTIONS

Under the common law, the directors of the company are subject to the fiduciary duty to act *bona fide* in the best interests of the company (i.e. the "best interests duty"). This often refers to the collective interest of the company's shareholders and requires the board to promote the commercial interests of the company.[66] Whilst a duly-incorporated company has separate legal personality from its shareholders, shareholders are accorded a pre-eminent position within the company through exclusive appointment, decision, and interventionist rights. As contributors of capital, shareholders are effectively treated as the company's "owners"[67] for whose benefit the company is managed.[68] As a matter of principle, this approach towards directors' duties is followed in most, if not all, common law jurisdictions.

Further, under the business judgment rule, the courts generally do not interfere with the commercial decisions of the board so long as it acts in a *bona fide* manner.[69] Except where the company is insolvent or near insolvency—in which case, creditors' interests must be taken into account—directors are permitted but are not legally required to consider the interests of other stakeholders of the company.[70] This has often been taken to mean that directors are required to pursue short-term profit maximization for the benefit of shareholders. Subsequent cases, however, have deviated from this narrow approach of profit maximization. The courts have recognized that what amounts to "the company's interests" varies in different circumstances[71] and may be distinct from the

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65 *See* BCE Inc. v. 1976 Debentureholders, 2008 SCC 69, [2008] 3 S.C.R. 560, ¶ 40 (Can.).

66 In re Smith and Fawcett, Ltd. (1942) 1 Ch 304, 306 (UK).

67 *See* Foss v. Harbottle (1843), 67 Eng. Rep. 189, 203; 2 Hare 461 (UK) (the board is "always subject to the superior control of the proprietors assembled in general meetings").

68 Greenhalgh v. Arderne Cinemas Ltd. [1951] Ch 286, 291 (UK).

69 Howard Smith Ltd. v. Ampol Petroleum Ltd. [1974] PC 3, 6.

70 *See* Lonrho Ltd. v. Shell Petroleum Co. Ltd. [1980] 1 WLR 627 (UK).

71 Brady v. Brady [1989] AC (HL) 755 (appeal taken from Eng.), (1988) 4 BCC 390 at 407, [1989] BCLC 20 at 40 (UK).

shareholders' interests.[72] It is, therefore, questionable whether the common law actually imposes a legal obligation on directors to maximize shareholder value.[73] As observed in the 1883 case of *Hutton v. West Cork Railway Co.*, "[t]he law doesn't say that there are to be no cakes and ale, but that there are to be no cakes and ale except such as are required for the benefit of the company."[74] Arguably, the common law has always acknowledged that the reality of corporate decision-making in promoting the interests of the company often requires directors to consider and balance a wide range of interests.[75] In practical terms, therefore, it is often necessary for the board, in discharging its duty, to pay due regard to the interests of stakeholders, especially where failure to do so would ultimately hurt shareholder value. On this basis, the best interests duty is compatible with the duty to take into account the interests of stakeholders so long as directors do so in good faith for the purpose of promoting the best interests of the company as a separate legal entity.

A. UNITED KINGDOM

The U.K. is one of the few jurisdictions which has imposed a legislative requirement reflecting the ESV principle. Under section 172 of the Companies Act 2006:

> (1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—*(a) the likely consequences of any decision in the long term, (b) the interests of the company's employees, (c) the need to foster the company's business relationships with suppliers, customers and others, (d) the impact of the company's operations on the community and the environment, (e) the desirability of the company maintaining a reputation for high standards of business conduct, and (f) the need to act fairly as between members of the company.*
>
> (2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the

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[72] Fulham Football Club Ltd. v. Cabra Estates PLC (1994) 1 BCLC 363, 379 (UK).

[73] Daniel Attenborough, *How Directors Should Act When Owing Duties to the Companies' Shareholders: Why We Need to Stop Applying Greenhalgh*, 20 INT'L CO. & COM. L. REV. 339, 343–46 (2009). ("[A]s a positive matter, UK company law does not and never has imposed a legal obligation to maximize shareholder value").

[74] Hutton v. West Cork Railway Co. (1883) 23 Ch D 654 (UK).

[75] *See* Richard Williams, *Enlightened Shareholder Value in UK Company Law*, 35 UNIV. NEW S. WALES L.J. 360, 376 (2012).

> company for the benefit of its members were to achieving those purposes.
>
> (3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company.[76]

In its review, the Steering Group of the Company Law Review recognized that the common law requires directors to manage companies for the benefit of shareholders, but argued that the overall objective of wealth generation for the benefit of all could be best achieved through an "inclusive" approach to directors' duties and broader public accountability through improved company disclosures.[77] In doing so, the Steering Group introduced the ESV principle, under which directors must promote the company's success for the benefit of shareholders by taking proper account of all relevant considerations for such a purpose. This means taking "a proper balanced view of the short and long term; the need to sustain effective ongoing relationships with employees, customers, suppliers and others; and the need to maintain the company's business reputation and to consider the impact of its operations on the community and the environment."[78] The U.K. government accepted the proposal and stated that the ESV principle "is most likely to drive long-term company performance and maximise overall competitiveness and wealth and welfare for all," and added that the statement of duties "reflects modern business needs and wider expectations of responsible business behaviour."[79] Crucially, however, the stakeholder model as manifested in the "pluralist" approach—which would have permitted or required directors "to set interests of others above those of shareholders"—was soundly rejected.[80] This was on the basis that the "pluralist" approach would be counterproductive and confer an unpoliced policy discretion on directors, and allow directors to frustrate takeover bids on the basis of a "wider public interest" against the wishes of shareholders. Further, a "pluralist" duty would undermine the duty of loyalty to the company and the institutional relationship between directors and shareholders.[81]

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76 Companies Act 2006, c. 46, § 172 (UK) (this provision came into force in 2007 following a wide-ranging review of UK company law); COMPANY LAW REVIEW STEERING GROUP, MODERN COMPANY LAW FOR A COMPETITIVE ECONOMY: DEVELOPING THE FRAMEWORK, 2000–1 HC (UK) [hereinafter COMPANY LAW REVIEW].

77 COMPANY LAW REVIEW, *supra* note 76, at vii.

78 *Id.* at 13.

79 DEPARTMENT OF TRADE AND INDUSTRY, COMPANY LAW REFORM WHITE PAPER, 2005, Cm. 6456, at 20–21 (UK).

80 COMPANY LAW REVIEW, *supra* note 76, at 10.

81 *Id.* at 24–26.

Notwithstanding the new legislative formulation, it has been argued that it is by no means certain that the reforms have changed the ambit of corporate purpose. Some have suggested that the contrary has been achieved, with the subjective nature of the duty entrenching the concept of "shareholder primacy" more firmly than before.[82] The legislative provision expressly equates the best interests of the company with the shareholders' collective interest, as opposed to the earlier provision which had required directors to balance the interests of the company's employees with those of shareholders.[83] Arguably, such criticisms are mistaken given that the ESV principle was not intended to displace the director's overarching duty of advancing the interests of the company by maximizing shareholder value. Instead, the reforms simply require that the board take into account stakeholder interests, in addition to shareholders' interests, in advancing the long-term interests of the company.[84] Nevertheless, it is not entirely clear whether the intent of the reforms has been achieved as yet. The U.K. government had reported that the "changes thus far appear to represent more of an evolution rather than revolution, but changes have placed renewed emphasis on directors' responsibilities and on planning for the longer term."[85] Subsequent case law has suggested that notwithstanding its traditional reluctance to interfere with management decisions under the business judgment rule, the court may, in certain circumstances, when determining whether a director has failed to act in the best interests of the company, review the decision against what was objectively in the interests of the company.[86]

Further, in support of the ESV approach, the U.K. legal framework requires boards to account for how ESG factors have been incorporated into their decision-making processes and to engage in ESG

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82 David Collison, et al., *Financialization and Company Law: A Study of the UK Company Law Review*, 25 CRITICAL PERSPS. ON ACCT. 5, 5 (2014). *See also* KEAY, *supra* note 9, at 290.

83 Companies Act 1985, c. 6, § 309 (UK). ("The matters to which the directors of a company are to have regard in the performance of their functions include the interests of the company's employees in general, as well as the interests of its members").

84 Companies Act 2006, c. 46, Explanatory Notes ¶ 325–28 (UK). ("The duty requires a director to act in the way he or she considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole and, in doing so, have regard to the factors listed. . . . It will not be sufficient to pay lip service to the factors, and, in many cases the directors will need to take action to comply with this aspect of the duty. At the same time, the duty does not require a director to do more than good faith and the duty to exercise reasonable care, skill and diligence would require, nor would it be possible for a director acting in good faith to be held liable for a process failure which would not have affected his decision as to which course of action would best promote the success of the company").

85 DEPARTMENT FOR BUSINESS, INNOVATION AND SKILLS, EVALUATION OF THE COMPANIES ACT 2006, VOLUME ONE, 2009–10, at 163 (UK).

86 *See* Antuzis v. DJ Houghton Catching Servs. Ltd. [2019] EWHC 843 (QB).

disclosures. The Companies Act 2006 introduced the requirement for certain companies to produce a business review, which has since been replaced by the requirement of companies not entitled to the small companies' exemption to produce a strategic report "to inform members of the company and help them assess how the directors have performed their duty under Section 172 (duty to promote the success of the company)."[87] The strategic report for a listed company must, to the extent necessary to understand the company's business, include additional information about "(i) environmental matters (including the impact of the company's business on the environment), (ii) the company's employees, and (iii) social, community, and human rights issues, including information about any policies of the company in relation to those matters and the effectiveness of those policies."[88] More recently, in a further shift towards a more stakeholder-oriented model, then-Prime Minister Theresa May expressed apparent support in 2016 for some form of codetermination.[89] The latest U.K. Code of Corporate Governance, which took effect in 2019, introduced a new requirement for the board to "ensure that workforce policies and practices are consistent with the company's values and support its long-term sustainable success."[90] Pursuant to the U.K. Code, to engage with the workforce, the company should either have a director appointed from the workforce, a formal workforce advisory panel or a designated non-executive director, or otherwise explain what alternative arrangements it has in place and why it considers them to be effective.[91] The Companies (Miscellaneous Reporting) Regulations 2018 was also introduced, under which listed companies with more than 250 U.K. employees are required to publish pay ratio information comparing the CEO's remuneration to the remuneration of the company's U.K. employees in the 25th, 50th and 75th percentile in the directors' remuneration report.[92] Such companies would also have to disclose supporting information, including whether the median pay ratio is

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[87] Companies Act 2006, c. 46, § 414C(1) (UK).

[88] *Id*. at § 414C(7)(b).

[89] Andrew Sparrow, et al., *Theresa May to Call for Unity, Equality and Successful Exit from EU*, THE GUARDIAN (July 11, 2016) ("I want to see changes in the way that big business is governed. The people who run big businesses are supposed to be accountable to outsiders, to non-executive directors, who are supposed to ask the difficult questions, think about the long term and defend the interests of shareholders . . . In practice, they are drawn from the same narrow social and professional circles as the executive team and–as we have seen time and time again–the scrutiny they provide is just not good enough. So if I'm prime minister, we're going to change that system–and we're going to have not just consumers represented on company boards, but workers as well").

[90] U.K. CODE OF CORPORATE GOVERNANCE, FINANCIAL REPORTING COUNCIL, at 4 (July 2018).

[91] *Id.* at 5.

[92] The Companies (Miscellaneous Reporting) Regulations 2018, SI 860, reg. 17, ¶ 19(C) (UK).

consistent with the company's wider employment policies.[93] In view of the foregoing reforms, it appears that the U.K. is looking to inject new life into and strengthen the implementation of the ESV principle in light of earlier criticisms of its lack of efficacy.

B. AUSTRALIA

Under Australia's corporate governance regime, the best interests duty is generally correlated with the duty to act in the interest of shareholders in the board's business judgment.[94] However, the Supreme Court of Western Australia *in Bell Group Ltd. (in liq) v. Westpac Banking Corp. (No 9)* observed that:

> [t]his does not mean that the general body of shareholders is always and for all purposes the embodiment of 'the company as a whole'. It will depend on the context, including the type of company and the nature of the impugned activity or decision. And it may also depend on whether the company is a thriving ongoing entity or whether its continued existence is problematic. In my view the interests of shareholders and the company may be seen as correlative not because the shareholders are the company but, rather, because the interests of the company and the interests of the shareholders intersect . . . . *It is, in my view, incorrect to read the phrase 'acting in the best interests of the company' and 'acting in the best interests of the shareholders' as if they meant exactly the same thing . . . it is almost axiomatic to say that the content of the duty may (and usually will) include a consideration of the interests of shareholders. But it does not follow that in determining the content of the duty to act in the interests of the company, the concerns of shareholders are the only ones to which attention need be directed or that the legitimate interests of other groups can safely be ignored.*[95]

The Corporations and Markets Advisory Committee (CAMAC) was requested by the Australian government in 2005 to consider whether legislative reform was necessary to clarify the extent to which directors may, or are required to, consider the interests of specific classes of stakeholders or the broader community under their best interests duty. In its report, CAMAC stated:

> The environmental and social matters referred to in the debate on corporate social responsibility *are really factors that directors should already be taking into account in determining what is in the best*

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93 *Id.* at ¶ 19(G).

94 Corporations Act 2001 (Cth) §§ 180(2), 181 (Austl.).

95 The Bell Group Ltd (in liq) v. Westpac Banking Corporation [No. 9] [2008] WASC 239, 1127–28 (Austl.) (emphasis added).

> *interests of their corporation in its particular circumstances*. . . . The Committee considers that the current common law and statutory requirements on directors and others to act in the best interests of their companies . . . *are sufficiently broad to enable corporate decision-makers to take into account the environmental and other social impacts of their decisions, including changes in societal expectations about the role of companies and how they should conduct their affairs*.[96]

It left the door open for a broader judicial interpretation of the best interests duty: "the courts, through their interpretation of the law, including the requirement in [Section 181] of the Corporations Act for directors and others to act in the 'best interests of the company,' can assist in aligning corporate behaviour with changing community expectations."[97] Prior to the CAMAC report issued in 2006, the Parliamentary Joint Committee on Corporations and Financial Services (PJC) had conducted a parallel inquiry on similar issues. The PJC recommended the "enlightened self-interest" interpretation of the best interests duty, under which directors may act on the legitimate interests of stakeholders where such interests are relevant to the company.[98] It stated:

> The committee considers that an interpretation of the current legislation based on enlightened self-interest is the best way forward for Australian corporations. *There is nothing in the current legislation which genuinely constrains directors who wish to contribute to the long term development of their corporations by taking account of the interests of stakeholders other than shareholders.* An effective director will realise that the wellbeing of the corporation comes from strategic interaction with outside stakeholders in order to attract the advantages described earlier in this chapter. The committee considers that more corporations, and more directors, should focus their attention on stakeholder engagement and corporate responsibility. However it is clear from this chapter that any hesitation on the part of corporate Australia does not arise from legal constraints found in the Corporations Act. As the problem is not legislative in nature, the solution is unlikely to be legislative in nature.[99]

While the legislative reviews did not bring about legislative reforms, the inquiries indicated that directors are expected to give due regard to the interests of broader stakeholders in discharging their best

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96 Corporations and Markets Advisory Committee, *The Social Responsibility of Corporations* (Report, December 2006) 111 (emphasis added).

97 *Id.*

98 Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Responsibility: Managing Risk and Creating Value* (Report, June 2006) ¶ 4.32.

99 *Id*. at ¶¶ 4.76-.77 (emphasis added).

interests duty, which has "softened" the concept of shareholder primacy.[100] Indeed, an empirical study conducted after the inquiries found that 94.3% of directors believed that the existing law of directors' duties allowed them to take into account the interests of non-shareholders, while 55% believed that acting in the company's best interests means balancing the interests of all stakeholders, even though the interests of the company and shareholders still ranked highest in priority.[101] The issue of corporate purpose has also gained further traction more recently following a series of high-profile inquiries of poor corporate governance. In a 2019 review by the Australian Securities and Investments Commission Corporate Governance Taskforce, board management of non-financial risk in seven large listed companies in the financial services sector were found wanting.[102] This followed an earlier review by the Financial Services Royal Commission of corporate governance failures in the financial services industry. With respect to the nature and extent of the best interests duty, the Commission stated in its report that:

> it is the *corporation* that is the focus of their duties. And that demands consideration of more than the financial returns that will be available to shareholders in any particular period. . . . It is not right to treat the interests of shareholders and customers as opposed. Some shareholders may have interests that are opposed to the interests of other shareholders or the interests of customers. But that opposition will almost always be founded in differences between a short term and a longer-term view of prospects and events. . . . *The longer the period of reference, the more likely it is that the interests of shareholders, customers, employees and all associated with any corporation will be seen as converging on the corporation's continued long-term financial advantage. And long-term financial advantage will more likely follow if the entity conducts its business according to proper standards, treats its employees well and seeks to provide financial results to shareholders that, in the long run, are better than other investments of broadly similar risk.*[103]

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[100] Alice Klettner et al., *Corporate Governance Reform: An Empirical Study of the Changing Roles and Responsibilities of Australian Boards and Directors*, 24 AUSTL. J. CORP. L. 148, 167 (2010).

[101] Shelley Marshall & Ian Ramsay, *Stakeholders and Directors' Duties: Law, Theory and Evidence,* 35 UNIV. NEW S. WALES L.J. 291, 312–13 (2012).

[102] Australian Securities & Investment Commission Governance Task Force, *Director and Officer Oversight of Non-Financial Risk Report* (Report, Oct. 2019).

[103] Australian Treasury, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Report, Oct. 2019) 402 ("Financial returns to shareholders [or 'value' to shareholders] will always be an important consideration but it is not the only matter to be considered. The best interests of the corporation cannot be determined by reference only to the current or most recent accounting period. They cannot be determined by reference only to the economic advantage of those shareholders on the register at some record date. Nor can they be

In addition, further governance requirements are set out under the Listing Rules of the Australian Securities Exchange (ASX) and the Corporate Governance Principles and Recommendations issued by the ASX Corporate Governance Council (ASX Principles), which applies to listed companies[104] on a "comply-or-explain" basis. As with the U.K., in a further shift towards a more stakeholder-oriented model to arrest the decline in trust in business, the recent amendments to the ASX Principles, which took effect in 2020, addressed key issues concerning culture and values and requires listed companies to "instil and continually reinforce a culture across the organisation of acting lawfully, ethically and responsibly."[105] This is underpinned by new requirements for the company to disclose its values and its whistleblower, anti-bribery and corruption policies, and comply with and enforce its code of conduct.[106] Notably, however, the proposed amendments to the ASX Principles for the listed company to give regard to the views and interests of "a broader range of stakeholders" as part of its "social licence to operate" was considered too controversial and incompatible with the best interests duty. This was replaced by the requirement for the company to "consider what behaviours are needed from its officers and employees to build long term sustainable value for its security holders," including the need "to preserve and protect its reputation and standing in the community and with key stakeholders, such as customers, employees, suppliers, creditors, law makers and regulators."[107] While Australian corporate law is generally less prescriptive about ESG disclosures except where such matters have an impact on a company's financial performance,[108] many companies publish

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judged by reference to whatever period some of those shareholders think appropriate for determining their results") (emphasis added).

104 AUSTRALIAN SECURITIES EXCHANGE, LISTING RULE 4.10.3 (2019), https://www2.asx.com.au/content/dam/asx/rules-guidance-notes-waivers/asx-listing-rules/rules/Chapter04.pdf [https://perma.cc/94MU-VPDV].

105 AUSTRALIAN SECURITIES EXCHANGE CORPORATE GOVERNANCE COUNCIL, CORPORATE GOVERNANCE PRINCIPLES AND RECOMMENDATIONS, PRINCIPLE 3 (2019), https://www2.asx.com.au/content/dam/asx/about/corporate-governance-council/cgc-principles-and-recommendations-fourth-edn.pdf [https://perma.cc/FUH5-48D5] [hereinafter CORPORATE GOVERNANCE PRINCIPLES AND RECOMMENDATIONS].

106 *Id*. at ¶¶ 3.1–-3.4.

107 *Id.* at ¶ 4.

108 Corporations Act 2001 (Cth) §§ 299, 299A (Austl.). Cf. id. at §§ 1013D–1013DA. For listed companies, the ASX Principles recommend that they should disclose whether they have "any material exposure to environmental or social risks," and if so, how they manage or intend to manage such risks. CORPORATE GOVERNANCE PRINCIPLES AND RECOMMENDATIONS*, supra* note 105, at Recommendation 7.4.

integrated reports on a voluntary basis, a practice which is fast becoming mainstream.[109]

Like Australia, the New Zealand Corporate Governance Code also requires listed entities to "act responsibly and ethically to build and maintain its reputation with investors and other stakeholders" and comply with and enforce its code of ethics, along with recommending an ESG reporting and risk management framework.[110] One might have the impression of a stakeholder model from the reference in the New Zealand Companies Act 1993 to "the value of the company as a means of achieving economic and social benefits through the aggregation of capital for productive purposes." However, the best interests duty, as codified by the said legislation, expressly recognizes shareholder interests in the context of a joint venture and a holding company-subsidiary relationship, whilst permitting directors to make provisions for the benefit of employees in the event of cessation of business.[111] The company's "social purposes" were considered by the Law Commission to be outside the legislative framework during an earlier legislative review. The consideration of shareholder and non-shareholder interests were, however, recognized to be part of the directors' fundamental duty to act in the best interests of the company, as a separate legal entity distinct from its collective shareholders.[112]

Likewise, Malaysia amended its Companies Act in 2007, which requires directors to exercise their powers "for a proper purpose and in good faith in the best interest of the company" in accordance with their business judgment.[113] In its review, the Corporate Law Reform Committee supported "the proposition that a company must be a good corporate citizen and for the long-term, sustainability of a company must foster a relationship with its stakeholders," but was "of the view that social obligations of the company should not be incorporated in the Companies

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109 KPMG, *Corporate Reporting* (Report, Nov. 2020).

110 NEW ZEALAND EXCHANGE, NEW ZEALAND CORPORATE GOVERNANCE CODE, PRINCIPLES 1, 6 (2020), https://www.nzx.com/regulation/nzx-rules-guidance/corporate-governance-code [https://perma.cc/SZY7-G4JH] (which applies similarly on a "comply or explain basis"); NEW ZEALAND EXCHANGE, LISTING RULE 3.8.1 (2020), https://www.nzx.com/regulation/nzx-rules-guidance/nzx-listing-rules [https://perma.cc/U7RG-RBZW]).

111 Companies Act 1993, Preamble, §§ 131–32 (N.Z.).

112 New Zealand Law Commission, *Company Law: Reform and Restatement*, 47–49 (1989) ("We appreciate that if directors are given competing responsibilities, accountability becomes extremely difficult: one interest can be played off against another. . . . It does not preclude the imposition of direct and primary obligation to other interests through other Acts. Obligations to employees, for example, which might be thought to go beyond the best interests of the company, should be imposed directly through employment legislation").

113 Companies Act 2016, §§ 213(1), 214 (Malay.) (which repealed the Companies Act 1965 (Malay.)).

Act 1965."[114] The ESV approach is also reflected in the Malaysian Code on Corporate Governance, which provides that "[t]he board is collectively responsible for the long-term success of a company and the delivery of sustainable value to its stakeholders," and "should set the company's values and standards, and ensure that its obligations to its shareholders and other stakeholders are understood and met."[115]

C. SINGAPORE

Under Singapore law, the best interests duty pursuant to the Companies Act[116] has generally been interpreted to mean the interests of the company's shareholders collectively.[117] This often refers to the advancement of the commercial interests of the company as determined subjectively by the board.[118] However, the Companies Act permits, but does not require, directors to have regard for "the interests of the company's employees generally, as well as the interests of its members."[119] Except in the case where the company is insolvent or near insolvency,[120] directors are not legally required to consider the interests of other stakeholders. The courts have recognized, however, that what amounts to "the company's interests" does not simply mean profit maximization.[121] Purchasing gifts to reward long-serving employees has been held to be for the benefit of the company.[122] Directors may also prefer the company's interests "as a commercial entity over the interests of the shareholders and employees as individuals."[123] This is reflected in a recent study which found that a large majority of directors in Singapore disagreed that the best interests duty required a director "to consider only the interests of the shareholders," with a similar majority agreeing that a

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[114] Corporate Law Reform Committee for the Companies Commission of Malaysia, *A Consultative Document on Clarifying and Reformulating the Directors' Role and Duties* (2006) at ¶ 4.7.

[115] SECURITIES COMMISSION MALAYSIA, MALAYSIAN CODE OF CORPORATE GOVERNANCE, PRINCIPLE A (2017). This applies to listed companies on an "apply or explain an alternative" basis and to non-listed entities, including state-owned enterprises and small and medium enterprises, on a recommendatory basis.

[116] Companies Act (Cap 50) § 157(1) (Sing.).

[117] Re S Q Wong Holdings [1987] SLR(R) 286 (Sing.).

[118] Vita Health Laboratories Pte Ltd v. Pang Seng Meng [2004] 4 SLR(R) 162 (Sing.); ECRC Land Pte. Ltd. v. Ho Wing On Christopher [2004] 1 SLR(R) 105. (Sing.).

[119] Companies Act, *supra* note 116, at § 159(a).

[120] In such cases, creditors' interests need to be taken into account. *See*, *e.g.,* Liquidators of Progen Engineering v. Progen Holdings [2010] 4 SLR 1089 (Sing.).

[121] Ho Kang Peng v. Scintronix Corp. [2014] 3 SLR 329, at ¶ 40 (Sing.).

[122] Goh Chan Peng v. Beyonics Technology [2017] SGCA 40 (Sing.).

[123] Raffles Town Club v. Lim Eng Hock Peter [2010] SGHC 163 at ¶ 162 (Sing.).

"director is permitted to take into account the interests of stakeholders other than shareholders."[124] The High Court has held that directors cannot be allowed "to put at risk the wider interests which all stakeholders have in the company" and "[a] director who crosses that line will be held to have breached his duty to the company." The law on directors' duties, the Court observed, "serves not only to vindicate the shareholders' private interest in having their capital applied in accordance with their agreement and for proper corporate purposes in order to maximise returns but also to vindicate a public interest in holding directors to minimum standards of commercial morality in directing a company's affairs."[125]

Following a recent review, the Singapore Code of Corporate Governance introduced a new principle in 2018 for listed companies to adopt "an inclusive approach by considering and balancing the needs and interests of material stakeholders, as part of its overall responsibility to ensure that the best interests of the company are served."[126] A company's long-term success, the Monetary Authority of Singapore observed, is influenced by its "ability to foster and maintain effective relationships with not just shareholders but also other stakeholders such as employees, customers, suppliers, creditors, regulators, and the broader community."[127] Nevertheless, the ESV requirement under the Singapore Code is arguably circumscribed by its narrow scope as companies are only required to put in place means by which they may engage and communicate with their material stakeholders from an investor or public relations perspective.[128] When viewed in light of comparative developments, this requirement contemplates less stakeholder engagement or board accountability to stakeholders as compared with the corresponding requirements in the U.K. and Australia. Instead, stakeholder engagement pursuant to the Singapore Code is contemplated to serve as a "complement" to the company's annual

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[124] Pearlie Koh & Hwee Hoon Tan, *Directors' Duties in Singapore: Law and Perceptions*, 14 ASIAN J. COMPAR. L. 37 (2019).

[125] Ong Bee Chew v. Ong Shu Lin [2019] 3 SLR 132 at ¶¶ 81, 84 (Sing.).

[126] MONETARY AUTHORITY OF SINGAPORE, CODE OF CORPORATE GOVERNANCE, PRINCIPLE 13 (2008). This applies to Singapore-listed companies on a "comply-or-explain" basis. SINGAPORE EXCHANGE MAINBOARD RULES, § 710 (2019).

[127] MONETARY AUTHORITY OF SINGAPORE, CONSULTATION PAPER ON RECOMMENDATIONS OF THE CORPORATE GOVERNANCE COUNCIL 18 (2018).

[128] Lance Ang, *Revision of the Singapore Code of Corporate Governance*, LAW GAZETTE (Feb. 2019); MONETARY AUTHORITY OF SINGAPORE, CODE OF CORPORATE GOVERNANCE, Provisions 13.1–13.3, (2018); MONETARY AUTHORITY OF SINGAPORE, PRACTICE GUIDANCE 13 (2018).

ESG reporting requirements,[129] which apply on a comply-or-explain basis.[130]

D. HONG KONG

Hong Kong is somewhat of an anomaly in comparison with the jurisdictions discussed above insofar as the best interests duty under the common law has been interpreted more unequivocally in terms of shareholder value maximization.[131] The codification of the ESV principle under the Companies Ordinance was considered in 2008 but rejected on the basis that it was unclear and difficult to comply with, and would increase burdens on directors.[132] The ESV model has thus not gained traction. Where it has fallen short in this regard, it has made up for in expanding the annual ESG reporting requirements for listed companies. The Listing Rules of the Hong Kong Exchanges and Clearing Limited (HKEX) imposes on the board the "overall responsibility for an issuer's ESG strategy and reporting"[133] in alignment with global trends and its efforts to develop a "green finance" hub.[134] Such disclosures, however, offer a high degree of deference to board judgment regarding ESG materiality and non-mandatory disclosure of "comply or explain" ESG matters.[135] In addition, the HKEX Listing Rules also require an issuer's directors' report to contain a business review in accordance with the Companies Ordinance, which must include discussions of the issuer's environmental policies and performance, as well as "an account of the issuer's key relationships with its employees, customers and suppliers and

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[129] MONETARY AUTHORITY OF SINGAPORE, RESPONSE TO FEEDBACK RECEIVED ON RECOMMENDATIONS OF THE CORPORATE GOVERNANCE COUNCIL 21 (2018).

[130] SINGAPORE EXCHANGE MAINBOARD RULES, §§ 711A–B (2016); SINGAPORE EXCHANGE PRACTICE NOTE 7.6: SUSTAINABILITY REPORTING GUIDE (2016).

[131] COMPANIES REGISTRY HONG KONG, A GUIDE ON DIRECTORS' DUTIES, PRINCIPLE 1 (2014) ("This means that a director owes a duty to act in the interests of all its shareholders, present and future"); STEFAN HC LO & CHARLES Z. QU, LAW OF COMPANIES IN HONG KONG, at ¶ 8.030, (2d ed. Sweet & Maxwell 2015).

[132] COMPANIES REGISTRY HONG KONG, REWRITE OF THE COMPANIES ORDINANCE: CONSULTATION CONCLUSIONS ON COMPANY NAMES, DIRECTORS' DUTIES, CORPORATE DIRECTORSHIP AND REGISTRATION OF CHARGES 8–9 (2008), https://www.fstb.gov.hk/fsb/co_rewrite/eng/pub-press/doc/cdrc_conclusion_e.pdf.

[133] HONG KONG EXCHANGES AND CLEARING, APPENDIX 27, ENVIRONMENTAL, SOCIAL AND GOVERNANCE REPORTING GUIDE OF LISTING RULES, at ¶ 10 [hereinafter HKEX ESG GUIDE].

[134] *See* HONG KONG SEC. & FUT. COMM'N, STRATEGIC FRAMEWORK FOR GREEN FINANCE 4 (Sept. 2018), https://www.sfc.hk/en/Green-and-sustainable-finance [https://perma.cc/LL3W-BDMW].

[135] HKEX ESG GUIDE, *supra* note 133, at ¶ 3.

others that have a significant impact on the issuer and on which the issuer's success depends."[136]

III. PROSPECTS FOR CONVERGENCE TOWARDS A COMMON LAW ENLIGHTENED SHAREHOLDER VALUE MODEL

There are a number of factors that indicate a trend towards a more stakeholder-oriented model in common law jurisdictions. First, "global governance" standards have played an influential role in harmonizing corporate governance reforms at an international level, especially after the Asian financial crisis in 1997 and the global financial crisis in 2008.[137] For example, the G20/OECD Principles of Corporate Governance (2015) states:

> The board is not only accountable to the company and its shareholders but also has a duty to act in their best interests. In addition, boards are expected to take due regard of, and deal fairly with, other stakeholder interests including those of employees, creditors, customers, suppliers and local communities. Observance of environmental and social standards is relevant in this context.[138]

Second, institutional pressures for greater ESG disclosures and corporate social responsibility have contributed to the breakdown of the historically unified Anglo-American "shareholder primacy" model and the growing convergence centering around the ESV model.[139] Third, the shift toward a less shareholder-centric model is arguably simply an overdue recognition of modern business reality and practices.[140] A Harvard Business Review article described shareholder value maximization as

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[136] HONG KONG EXCHANGES AND CLEARING, APPENDIX 16 OF THE MAIN BOARD LISTING RULES, at ¶ 28(2)(d).

[137] Jeffrey N. Gordon, *Convergence and Persistence in Corporate Law and Governance, in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 47–51 (Jeffery N. Gordon & Wolf-Georg Ringe eds., 2018).

[138] ORG. FOR ECON. COOP. & DEV., G20/OECD PRINCIPLES OF CORPORATE GOVERNANCE 34–36, 45–54 (OECD 2015).

[139] *See* Williams & Conley, *supra* note 13.

[140] Jack Welch, the former CEO of GE and long-time proponent of shareholder value maximization, declared in 2009 that shareholder value is "the dumbest idea in the world." Shareholder value, he argued, "is a result, not a strategy. . . Your main constituencies are your employees, your customers and your products," and added that "managers and investors should not set share price increases as their overarching goal" and "short-term profits should be allied with an increase in the long-term value of a company." Francesco Guerrera, *Welch Condemns Share Price Focus,* FIN. TIMES (Mar. 13, 2009).

"flawed in its assumptions, confused as a matter of law, and damaging in practice."[141]

While there are indications of a common trend toward the ESV model as a general principle at least on a formal level in terms of its signaling effect,[142] there are also concurrent factors which lean toward divergence in terms of the extent and pace of reforms and the type of regulatory approach undertaken by each jurisdiction in any purported shift toward the ESV model. This is seen in the varying regulatory approaches undertaken in the U.S., U.K., Australia, and Singapore thus far. For each jurisdiction, one may identify ESG disclosures as a common regulatory requirement or practice for listed companies. There are, however, broad variations amongst them, including whether the disclosures are mandatory or recommendatory and the scope of such disclosures, even though there is a continued trend toward increased expectation of disclosures of non-financial information. In the case of the U.S. and Australia, for example, ESG disclosures are generally voluntary and the requirements provide a lot of leeway for boards to decide what to disclose.[143] As compared with the other jurisdictions, the reforms in the U.K. and Australia go further than simply recommending corporate engagement with stakeholders on a superficial level with more prescriptive requirements for the consideration of ESG matters as part of the company's risk management framework[144] within the framework of the company's disclosure requirements.[145] The U.K. has in turn placed the duty for directors to consider stakeholders' interests on a firm statutory footing and mandated extensive disclosures for compliance with this duty, and has also recommended some form of employee representation at the board-level.[146] One may also point to a broad stakeholder-oriented version of the best interests duty legislated in

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[141] Joseph L. Bower & Lynn S. Paine, *The Error at the Heart of Corporate Leadership*, HARV. BUS. REV. 4 (May-June 2017), https://hbr.org/2017/05/the-error-at-the-heart-of-corporate-leadership [https://perma.cc/9LM7-SRU9] (the "interests of the corporation are distinct from the interests of any particular shareholder or constituency group").

[142] *See* Ronald J. Gilson & Curtis J. Milhaupt, *Shifting Influences on Corporate Governance: Capital Market Completeness and Policy Channeling* (EUR. CORP. GOVERNANCE INST., Working Paper No. 546, 2020).

[143] For this reason, the World Economic Forum has released a set of ESG metrics and disclosures called the Stakeholder Capitalism Metrics that seek to standardize the measurement of long-term enterprise value creation. WORLD ECON. FORUM, MEASURING STAKEHOLDER CAPITALISM: TOWARDS COMMON METRICS AND CONSISTENT REPORTING OF SUSTAINABLE VALUE CREATION 3 (2020).

[144] UK Companies Act 2006, c. 46, § 414CB (UK); CORPORATE GOVERNANCE PRINCIPLES AND RECOMMENDATIONS, *supra* note 105.

[145] *Id.*

[146] UK Companies Act 2006, c. 4A (UK); FINANCIAL REPORTING COUNCIL, THE UK CORPORATE GOVERNANCE CODE, PROVISION 5 (2018).

India,[147] along with a notional form of stakeholder board representation prescribed in India[148] and South Africa.[149] The adoption of these respective ESV reforms must be understood against the backdrop of the distinctive institutional contexts in the various jurisdictions from which they emerged[150] in light of path dependencies and institutional complementarities.[151] In this regard, it is argued that marked differences in patterns of corporate ownership, corporate culture, and ultimately the institutions of political economy amongst the main common law jurisdictions examined in this article are likely to militate against the potential for functional convergence.

A. SHAREHOLDING PATTERNS

For the purpose of our discussion, it should be stated at the outset that the Berle-Means corporation is dead. An OECD study found that almost 85% of the world's largest listed companies have a single shareholder holding more than 10% of the company's share capital, with the three largest shareholders holding more than 50% of the share capital in half of the listed companies worldwide.[152] The widespread presence of controlling shareholdings across jurisdictions directly refutes the presumption of the convergence toward the dispersedly-held Berle-Means

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[147] Section 166 of the India Companies Act 2013 provides that: "A director of a company shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment." India Companies Act, 2013, § 166(2).

[148] Under Section 135 of the India Companies Act 2013, every company with a prescribed net worth, turnover or net profit in the past financial year is required to form a corporate social responsibility (CSR) committee with three or more directors (at least one of whom must be an independent director) to formulate and recommend to the board a CSR policy. Further, the board must also ensure that at least 2% of the average net profits of the company made during the three preceding financial years are spent on the CSR policy every year, or otherwise disclose the reasons for its failure to do so. India Companies Act, 2013, § 135(1), (3)(a), (5).

[149] Under Section 72 of the Companies Act 71 of 2008 (read with regulations 26(2) and 43 of the Companies Regulations), all public listed companies, state-owned companies, and other companies that have a prescribed "public interest score" in any two of the past five years must appoint a "social and ethics committee" comprising not fewer than three directors or prescribed officers of the company. The functions of the committee include monitoring and reporting on the company's activities and compliance with respect to social and economic development, good corporate citizenship, environmental, health and public safety, consumer relationships, and employment issues. Companies Act 71 of 2008, § 72.

[150] Lance Ang, *Capitalist Variations in "Say on Pay": A Look at Corporate Governance Contradictions in Singapore and Hong Kong*, 15 U. PA. ASIAN L. REV. 222 (2020).

[151] Lucian Arye Bebchuk & Mark J. Roe, *A Theory of Path Dependence of Corporate Ownership and Governance*, 52 STAN. L. REV. 127 (1999).

[152] ADRIANA DE LA CRUZ, ALEJANDRA MEDINA, Y. TANG, OWNERS OF THE WORLDS LISTED COMPANIES 17–18 (OECD Capital Market Series, 2019).

corporate model as the "end of history."[153] At the same time, ownership concentration is observed to be significantly higher in jurisdictions other than the U.S. and U.K.[154]

The prevalence of controlling shareholding patterns has implications for board decision-making, and consequently the potential weight and influence of stakeholders' interests in corporate policy and strategy. Where controlling shareholders are able to use financial and non-financial incentives to align managerial interests with those of the firm, these may have the consequence (intended or unintended) of tying managerial interests with those of the controlling shareholders.[155] The risks of the board becoming passive or captured by the majority shareholders increases with concentrated shareholdings.[156] Where managers are (or are affiliated with) the controlling shareholders themselves, managerial discretion over corporate policy is likely to decrease with less of a separation between ownership and control. A conventional principal-agent analysis would suggest that conflicts of interest are likely to arise between controlling shareholders and the corporation. This may exacerbate the agency problems faced by minority shareholders and non-shareholders at the hands of controlling shareholders, leading to the separate agency risk of "tunneling," or expropriation by controlling shareholders of minority interests, and by extension, negative externalities at the expense of the interests of employees, creditors, and broader stakeholders.[157] In such circumstances, the issue revolves less around providing for sufficient shareholder oversight, but in ensuring that effective mechanisms are in place to tie controlling shareholder and managerial incentives with the long-term interests of the firm as a whole.[158]

The effect of controlling shareholder power on stakeholders, such as employees, however, is complex and the academic literature does not speak in one voice. On one view, a majority shareholder may, under certain circumstances, be better positioned to make credible commitments

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[153] Hansmann & Kraakman, *supra* note 10.
[154] De La Cruz, Medina & Tang, *supra* note 152, at 17–18.
[155] ORG. FOR ECON. COOP. & DEV., CORPORATE GOVERNANCE BOARD PRACTICES: INCENTIVES AND GOVERNING RISKS 37 (OECD 2011).
[156] *Id.*
[157] Luca Enriques et al., *supra* note 53, at 79.
[158] *Id.* On this basis, Lim argues that the exercise of controlling shareholder powers should be subject to fiduciary duties. ERNEST LIM, A CASE FOR SHAREHOLDERS' FIDUCIARY DUTIES IN COMMON LAW ASIA 3–8 (2019).

to workers, which may facilitate employee relations.[159] Ownership dispersion, therefore, is associated with shorter employee tenures, even though highly concentrated ownership was found not to be correlated with stable employment, suggesting that shareholding patterns alone may not be sufficient to explain employee tenure.[160] Others argue that the presence of controlling shareholders increases the risk of worker exploitation. Gelter contends that concentrated ownership exacerbates the holdup problem in respect of non-shareholder constituencies as controlling shareholders with large cash flow rights have the opportunity and incentive to obtain private benefits of control.[161] There is some empirical evidence, for example, indicating that where managers have greater discretion and control relative to shareholders, employees' pay tends to be higher.[162]

It is not necessarily a foregone conclusion that stakeholder interests would necessarily be compromised in closely held corporations. Everything would depend on the specific context and nature of the interests concerned, and the circumstances of the company at hand. Each of the three principal constituencies of a corporation—managers, shareholders, and workers[163]—may form different coalitions toward different objectives, depending on the interests and preferences of each constituency in different circumstances.[164] While the long-term interests of controlling shareholders—and, by extension, their appointed directors—may coincide with those of stakeholders, broad alignment in all circumstances is implausible. The extent to which stakeholder interests are likely to be considered favorably in corporate decision-making would depend on whether—depending on the firm-specific context and institutional environment of the firm concerned—the board or controlling shareholders perceive it to be in their respective self-interest that the costs which their relationships with each relevant class of stakeholders impose

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[159] John Armour et al., *What is Corporate Law?*, *in* THE ANATOMY OF CORPORATE LAW—A COMPARATIVE AND FUNCTIONAL APPROACH 1, 27–28 (Reinier Kraakman et al. eds., 2017).

[160] Gregory Jackson, *Towards a Comparative Perspective on Corporate Governance and Labour Management: Enterprise Coalitions and National Trajectories*, *in* CORPORATE GOVERNANCE AND LABOUR MANAGEMENT: AN INTERNATIONAL COMPARISON 285, 285–86 (Howard Gospel & Andrew Pendleton eds., 2004).

[161] Martin Gelter, *The Dark Side of Shareholder Influence: Managerial Autonomy and Stakeholder Orientation*, 50 HARV. INT'L L.J. 129, 132–33, 178–79 (2009).

[162] Cronqvist et al., *Do Entrenched Managers Pay Their Workers More?* 64 J. FIN. 309, 310 (2009).

[163] *See* Mark J. Roe & Massimiliano Vatiero, *Corporate Governance and Its Political Economy*, *in* OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 56, 57 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018).

[164] PETER A. GOUREVITCH & JAMES SHINN, POLITICAL POWER AND CORPORATE CONTROL: THE NEW GLOBAL POLITICS OF CORPORATE GOVERNANCE 59–66 (Princeton University Press 2007).

on their private benefits of control in the short-term are outweighed by the net gains to their (pecuniary and non-pecuniary) private benefits of control over the long-term.[165] This calculus would invariably vary across firms, industries, and jurisdictions. In this light, the "end of history" hypothesis must be reframed in view of the contemporary context in which a controlling shareholder (or block of shareholders) possesses large control and cash-flow rights in the majority of public companies in all the main common law jurisdictions, including the U.S. and U.K. If we accept that the trend towards an ESV model is likely to persist in the foreseeable future, it is not a choice between shareholderism or stakeholderism, a choice which does not accord with current practices in any event, but *which* group of shareholders' interests are likely to prevail and which the board is likely to pay particular attention to in maximizing firm value, and in turn what the implications for the firm's stakeholders are.[166] This would depend on the identity and preferences of the firm's controlling block of shareholders, to which we now turn.

1. Institutional Investors

There are four main categories of investors that dominate shareholder ownership in today's publicly listed companies—institutional investors, public sector owners, private corporations, and individuals or families, with the largest category being institutional investors, which hold 41% of global stock market capitalization.[167] Concentrated ownership is making inroads even in jurisdictions generally characterized by dispersed shareholdings,[168] with growing portfolio investment by institutional investors.[169] The influence of institutional investors has led to increased shareholder activism which has been instrumental in the adoption of

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165 *See generally* Sang Y. Kang, *"Generous Thieves": The Puzzle of Controlling Shareholder Arrangements in Bad-Law Jurisdictions*, 21 STAN. J.L. BUS. & FIN. 57 (2013).

166 Jeffrey Gordon argues that stability-minded shareholders, such as family groups, governments, and institutional investors, may prefer a long-term approach in the way companies are run, as opposed to efficiency-minded shareholders which would be more profit-minded and cost conscious. Gordon*, supra* note 137, at 54.

167 De La Cruz, Medina & Tang, *supra* note 152, at 6.

168 These are namely the U.S., U.K., Canada, and Australia.

169 These include pension funds, mutual funds, insurers, commercial trusts, hedge funds, and private equity. With this growing concentration of institutional investor ownership, institutional investors have been the focus of recent academic literature as a key linchpin in corporate governance. *See, e.g.*, Ronald J. Gilson & Jeffery N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863 (2013); Lucian A. Bebchuk, Alma Cohen & Scott Hirst, *The Agency Problems of Institutional Investors*, 31 J. ECON. PERSP. 89 (2017).

reforms on executive compensation[170] as institutional investors seek better alignment between executive remuneration and the long-term performance of the company.[171] Institutional investors have increasingly integrated ESG assessments into their asset allocation decisions in determining whether their investee companies are adequately managing ESG risk.[172] This has in turn driven investor demand for ESG disclosures to guide investment decisions and align their portfolio strategies to achieve long-term value.[173] As of 2018, the number of signatories of the UN Principles of Responsible Investment (UN PRI), which calls for factoring ESG considerations into investment analysis and ownership practices, had increased to over 2,300, which in aggregate manage over $80 trillion USD in assets.[174] The market for ESG investing was estimated to increase by more than 30% since 2016 and exceed $30 trillion USD in total assets by 2019 in the U.S., Europe, Australia, New Zealand, Canada, and Japan.[175]

Another important trend has been the proliferation of stewardship codes following the financial crisis[176] drafted on the premise that institutional investors "as 'universal owners' with broad economic exposure" should exercise their decision rights to ensure accountability to their beneficiaries and to promote the interests of society as a whole as stewards of the public good.[177] These stewardship codes broadly serve to incentivize institutional shareholders to become active "stewards" in their investee companies to mitigate the type of short-termism and excessive

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170 Randall S. Thomas & Christoph van der Elst, *Say on Pay Around the World*, 92 WASH. U. L. REV. 653, 716 (2015); Pamela Brandes & Palash Deb, *Executive Compensation and Corporate Governance: What Do We "Know" and Where Are We Going?, in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 229–30 (Douglas M. Wright et al. eds., 2013).

171 Guido Ferrarini & Maria Cristina Ungureanu, *Executive Remuneration, in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 354, 356 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018).

172 ORG. FOR ECON. COOP. & DEV., *OECD Business and Finance Outlook 2020: Sustainable and Resilient Finance* (Sept. 29, 2020) [hereinafter *Sustainable and Resilient Finance*].

173 *See generally* John C. Coffee, *The Future of Disclosure: ESG, Common Ownership, and Systematic Risk* (EUR. CORP. GOVERNANCE INST., Working Paper No. 541, 2020).

174 *Sustainable and Resilient Finance*, *supra* note 172.

175 The OECD states that almost $1 trillion USD of assets were held in sustainable funds at the end of 2019, of which about 75% were held by institutional investors and the remaining 25% by retail investors. *Id.* Goldman Sachs, for example, announced plans to commit $750 billion USD by 2030 toward financing and advising companies focused on sustainable projects. *See* David Solomon, *Goldman Sachs Commercially Driven Plan for Sustainability*, FIN. TIMES (Dec. 16, 2019).

176 Stewardship codes originated in the U.K. with the issue of the UK Stewardship Code in 2010 by the Financial Reporting Council. *See* Jennifer G. Hill, *Good Activist/Bad Activist: The Rise of International Stewardship Codes*, 41 SEATTLE U. L. REV. 497, 506–07 (discussing stewardship codes around the world).

177 Luca Enriques et al., *supra* note 53, at 97. *See also* Alex Edmans et al., *Governance Under Common Ownership*, 32 REV. FIN. STUD. 2673 (2019).

risk-taking that were found to be the key causes of the global financial crisis.[178] They also serve to promote the interests of beneficiaries by factoring ESG considerations in their investment objectives and engagement with their investee companies.[179] Following its inception in 2010 in the U.K., stewardship codes have been issued in nineteen jurisdictions in six continents, and are being considered in more jurisdictions.[180]

These developments are in themselves an important source of convergence in corporate governance as global institutional investors have contributed to the international adoption of governance practices prevailing in typically U.S. and U.K. markets.[181] Any such convergence, however, will be limited by the disparities in ownership stakes held by institutional investors in different jurisdictions. While institutional shareholders are on the rise in Singapore and Hong Kong as well, with institutional investors contributing to 55% of total market turnover on the HKEX in 2018,[182] institutional shareholder activism remains rare and primarily an Anglo-American phenomenon (which is not without its critics).[183] Institutional shareholder activism and private ordering are less effective where institutional shareholders have little prospect of challenging incumbent boards that are in the hands of controlling shareholders.[184] Outside the U.S. and U.K., institutional shareholders are effectively minority shareholders, holding an average stake of 11% and 21% in Asia and Europe respectively.[185] The typical activist in Hong Kong owns a stake of less than 5% of the company's equity, and has to rely on

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[178] *See generally* Dionysia Katelouzou & Alice Klettner, *Sustainable Finance and Stewardship: Unlocking Stewardship's Sustainability Potential* (ECGI, Working Paper No. 521/2020, 2020); Paul Davies, *The UK Stewardship Code 2010-2020: From Saving the Company to Saving the Planet* (ECGI, Working Paper No. 506/2020, 2020).

[179] *Id.*

[180] Dan W. Puchniak & Ernest Lim, *The False Hope of Stewardship in the Context of Controlling Shareholders Making Sense Out of the Global Transplant of a Legal Misfit,* (Sept. 28, 2020) (working draft) (on file with ECGI). *See also* Martin Lipton et al., *It's Time To Adopt The New Paradigm,* WACHTELL, LIPTON, ROSEN & KATZ (Feb. 11, 2019), https://www.wlrk.com/webdocs/wlrknew/WLRKMemos/WLRK/WLRK.26357.19.pdf [https://perma.cc/UYF3-YUVL]; DEPARTMENT FOR BUSINESS, INNOVATION & SKILLS, THE KAY REVIEW OF UK EQUITY MARKETS AND LONG-TERM DECISION MAKING: FINAL REPORT, 2012, (UK); *Commission Green Paper: The EU Corporate Governance Framework*, at 2, COM (2011) 164 final (May 4, 2011).

[181] *See* John Armour, et al., *Beyond the Anatomy*, *in* THE ANATOMY OF CORPORATE LAW—A COMPARATIVE AND FUNCTIONAL APPROACH 270–71 (Reinier Kraakman et al. eds., 2017).

[182] CASH MARKET TRANSACTION SURVEY 2018 2 (HKEX 2018).

[183] *See* Stephen Foley, *Shareholder Activism: Battle for the Boardroom*, FIN. TIMES (Apr. 24, 2014).

[184] Yu-Hsin Lin, *When Activists Meet Controlling Shareholders in the Shadow of the Law: A Case Study of Hong Kong*, 14 ASIAN J. COMPAR. L. 1, 3 (2019).

[185] Puchniak & Lim, *supra* note 180.

solidarity with other shareholders in order to engage with management.[186] For this reason, the introduction by the Hong Kong Securities and Futures Commission of the "Principles of Responsible Ownership," based on the U.K. Stewardship Code, has been argued to have little effect in spurring engagement on the part of institutional shareholders.[187] Institutional shareholder activism is perhaps even rarer in Singapore, with the market for proxy advisory firms still at a nascent stage[188] and institutional investors on average collectively holding a stake of only 6% in listed companies.[189]

It would also be an overstatement to contend that the growing concentration of institutional shareholdings would necessarily lead to greater ESG engagement with boards. Fiduciary and other similar duties of institutional investors generally permit, but do not require, institutional shareholders to take into account ESG factors under certain circumstances.[190] Further, institutional shareholders—apart from hedge funds, which, in any event, are focused on short-term financial returns—are generally passive due to their highly diversified portfolios, short-term investment focus, and performance metrics and compensation mechanisms based on volume, rather than the performance, of assets under management. Collective action and free rider problems amongst institutional investors render board engagement even less likely.[191] According to the OECD's 2019 survey, constructive engagement by institutional shareholders with management is required in only four and recommended in sixteen jurisdictions out of forty-nine jurisdictions

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186 James Early & Alex Pape, *Why Hong Kong Should Embrace Active Investors*, EJINSIGHT (Nov. 10, 2015), http://www.ejinsight.com/20151110-why-hong-kong-should-embrace-active-investors [https://perma.cc/5NLR-CCW8] (contending that "the shorter an investor's time horizon, the more likely he is to view himself as a renter than an owner with concerns about long-term shareholder value creation").

187 John Kong Shan Ho, *Bringing Responsible Ownership To The Financial Market Of Hong Kong: How Effective Could It Be?*, 16 J. CORP. L. STUD. 437, 442–43, 465 (2016).

188 Luh Luh Lan & Umakanth Varottil, *Shareholder Empowerment in Controlled Companies: The Case of Singapore, in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 572, 582 (Jennifer G. Hill & Randall S. Thomas eds., 2015).

189 Puchniak & Lim, *supra* note 180.

190 UK Law Commission, *Fiduciary Duties of Investment Intermediaries* (Report, June 30, 2014) (UK); 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. 381 (2020). *Cf.* Rory Sullivan et al., *United Nations Env't Programme, Fiduciary Duty in the 21st Century Final Report*, UNITED NATIONS (2019).

191 ORG. FOR ECON. COOP. & DEV., THE ROLE OF INSTITUTIONAL INVESTORS IN PROMOTING GOOD CORPORATE GOVERNANCE 9–13 (OECD 2011). *See also* Lucian A. Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 COLUM. L. REV. 2029, 2071–72 (2019).

surveyed.[192] Any engagement on ESG matters is also likely to vary widely across the broad spectrum of institutional investor categories and even amongst those that are generally considered to be more "stakeholder-oriented," such as pension funds. Hertig has pointed out that firms invested in by mutual funds, for example, are very diverse and their beneficiaries have divergent expectations in respect of ESG matters.[193] Crucially, board engagement has not necessarily led to firms adopting stakeholder-oriented corporate policies, with limited success by activists in procuring a shareholders' vote in favor of stakeholder-oriented resolutions, even though it has not been uncommon for firms to change their policies when confronted with a significant dissenting shareholder minority.[194]

2. *State-Owned Enterprises*

The next largest category of shareholders after institutional investors is the public sector, which holds 14% of the global stock market capitalization, with state-owned enterprises (SOEs) proving resilient in many jurisdictions.[195] With respect to the state's role as shareholder, the OECD Guidelines on Corporate Governance of State-Owned Enterprises provide that the state's ownership should be exercised in the interest of the general public, and its ownership policy should define its role in the governance of SOEs and "recognise SOEs' responsibilities towards stakeholders" and "any expectations the state has in respect of responsible business conduct by SOEs."[196] It may be argued that SOEs are expected to operate differently from other profit-driven businesses,[197] but beyond this assumption, the relationship between SOEs and stakeholders is anything but straightforward. SOEs face different agency problems depending on the state's incentives and how it behaves as a shareholder.[198] If the purpose of state ownership is to maximize profits of the SOE, there is the similar risk that the state will extract private benefits of control as a controlling

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[192] ORG. FOR ECON. COOP. & DEV., OECD CORPORATE GOVERNANCE FACTBOOK 2019, 164–65 (OECD 2019).

[193] Gerard Hertig, *Governance by Institutional Investors in a Stakeholder World*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 821, 830–32 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018).

[194] *Id.*

[195] De La Cruz, Medina & Tang, *supra* note 152, at 5.

[196] ORG. FOR ECON. COOP. & DEV., OECD GUIDELINES ON CORPORATE GOVERNANCE OF STATE-OWNED ENTERPRISES 23 (OECD 2015).

[197] Hans Christiansen, *Balancing Commercial and Non-Commercial Priorities of State-Owned Enterprises* 6 (OECD Corp. Governance Working Paper No. 6, 2013).

[198] Mariana Pargendler, *Controlling Shareholders in the Twenty-First Century: Complicating Corporate Governance beyond Agency Costs*, 45 J. CORP. L. 953, 968 (2020).

shareholder to the detriment of minority shareholders and broader stakeholders.[199] The state's objectives for corporate ownership, however, have been argued to differ from those of private controlling shareholders. In particular, the state may be incentivized to appropriate non-pecuniary benefits of control in the pursuit of public policy objectives through ownership of the SOE.[200] Milhaupt and Pargendler argue that these forms of "policy channelling" may be beneficial to stakeholders, where SOEs serve as providers of public goods, for example, and enhance social welfare, even if this may be at the expense of profit maximization.[201] On the contrary, they may be harmful, as in the case where the state generates rents by extracting financial value for itself which is not passed on to citizens,[202] resulting in a third "layer of agency costs" where the state's ownership interests of SOEs diverge from those of its beneficiary citizens on behalf of whom the firm is ultimately held (at least in theory).[203] The COVID-19 pandemic might also result in increased state ownership or control of financially distressed companies, which may be beneficial to both shareholders and stakeholders to the extent that such interventions generate positive externalities by bailing out companies whose failure could pose broader systemic risks.[204] Yet, such potential "related-party transactions" through "propping" may decrease social welfare over the long-term by distorting the allocation of resources[205] if such firms prove to be ultimately unviable in the marketplace.

In this regard, the available evidence suggests that SOEs tend to have slightly higher ESG ratings on average than private corporations, even though this depends on the state's ownership policy.[206] Importantly, however, not all SOEs are alike in this respect. For example, Temasek Holdings (Private) Limited, the holding company through which the Singapore Minister for Finance, as the sole equity shareholder, maintains

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[199] *See generally* Ernest WK Lim, *Concentrated Ownership, State-Owned Enterprises and Corporate Governance*, 41 OXF. J. LEG. STUD. 1 (2021); Curtis J. Milhaupt & Mariana Pargendler, *Governance Challenges of Listed State-Owned Enterprises Around the World: National Experiences and a Framework for Reform*, 50 CORNELL INT'L L.J. 473, 478 (2017).

[200] Pargendler, *supra* note 198, at 968; Lim, *supra* note 199.

[201] Milhaupt & Pargendler, *supra* note 199, at 478.

[202] *See* KLAUS SCHWAB & PETER VANHAM, STAKEHOLDER CAPITALISM: A GLOBAL ECONOMY THAT WORKS FOR PROGRESS, PEOPLE AND PLANET 173 (John Wiley & Sons 2021).

[203] Milhaupt & Pargendler, *supra* note 199, at 475–78.

[204] *See* ORG. FOR ECON. COOP. & DEV, *The COVID-19 Crisis and State Ownership in the Economy: Issues and Policy Considerations* (OECD, June 25, 2020).

[205] *Id.* Curtis J. Milhaupt & Mariana Pargendler, *Related Party Transactions In State-Owned Enterprises, in* THE LAW AND FINANCE OF RELATED PARTY TRANSACTIONS 247, 248 (Luca Enriques & Tobias Troger eds., 2019).

[206] *Sustainable and Resilient Finance*, *supra* note 172, at 16, 154–55.

substantial ownership of listed SOEs (i.e., government-linked companies),[207] adheres to a policy of long-term shareholder value maximization[208] but incorporates ESG factors into its investment analysis and management. Pursuant to this policy, it does not intervene in day-to-day corporate decision-making, but engages as a "steward" with its investee companies in respect of policies and practices to enhance its long-term performance, including "ESG-related areas critical to their businesses."[209] In the case of China, by comparison, the state exercises its ownership though the state's holding company, the State-Owned Assets Supervision and Administration Commission of the State Council, to pursue considerations beyond shareholder value.[210] The state takes on an active governance role in SOEs, which are expected to implement its strategic economic planning and safeguard the country's "economic security" and the "well-being of the people," including participating in natural disaster relief and major events in China, such as the Beijing Olympic Games.[211] Since the Chinese Communist Party is the ultimate arbiter of how different stakeholders are treated, China is said to have "the world's most extreme form of stakeholder-oriented corporate governance."[212] The types and extent of stakeholder engagement by SOEs may, therefore, be expected to operate differently depending on the state's varying policy objectives, as well as on the underlying institutions of political economy in each respective jurisdiction.

3. Family-Owned Firms

One would be remiss if family shareholders were excluded from this discussion, since family shareholders remain a key player in corporate

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[207] *See* Cheng-Han Tan et al., *State-Owned Enterprises In Singapore: Historical Insights Into A Potential Model For Reform*, 28 COLUM. J. ASIAN L. 61, 88–89 (2015). *See also* LINDA LOW, THE POLITICAL ECONOMY OF A CITY-STATE REVISITED 378–99 (2006); ISABEL SIM, STEEN THOMSEN & GERARD YEONG, THE STATE AS SHAREHOLDER: THE CASE OF SINGAPORE 6–8 (2018); A. Goldstein & P. Pananond, *Singapore Inc. Goes Shopping Abroad: Profits and Pitfalls*, 38 J. CONTEMP. ASIA 417, 418–28 (2008).

[208] Ministry Of Finance Singapore, *What Comprises The Reserves And Who Manages Them?*, https://www.mof.gov.sg/policies/reserves/what-comprises-the-reserves-and-who-manages-them [https://perma.cc/9RU6-EY8F] (last visited Apr. 12, 2021).

[209] Temasek, *Mainstreaming Sustainability*, https://www.temasek.com.sg/en/our-sustainability-journey/mainstreaming-sustainability#our-stewardship-practices [https://perma.cc/3UNA-N7RM] (last visited Apr. 12, 2021).

[210] *See generally* Jiangyu Wang, *The Political Logic of Corporate Governance in China's State-Owned Enterprises*, 47 CORNELL INT'L L.J. 631 (2014).

[211] *Id.*

[212] Gilson & Milhaupt, *supra* note 142.

governance today.[213] There are two competing influences of family control and ownership on firm value. Stewardship theory suggests that family ownership gives such companies a long-term orientation often found lacking in other public companies.[214] It has been found, for example, that the average long-term financial performance was higher for family companies than non-family companies across business cycles from 1997 to 2009.[215] Importantly, family-owned companies have been found to have greater stakeholder engagement. A study by Credit Suisse of more than 1000 publicly listed family or founder-owned firms found that family-owned firms tended to have slightly better ESG scores on average than non-family-owned firms. Family-owned firms have also outperformed non-family-owned firms since 2006 and proved more resilient during the COVID-19 crisis.[216] It may be argued that family shareholders have stronger incentives to facilitate the succession process and preserve the non-pecuniary value of the firm's organizational social capital, which comprises its relationships with its employees, customers, suppliers, and other stakeholders in the firm's networks.[217]

At the same time, the entrenchment of family shareholders risks the extraction of private benefits of control. In such circumstances, it is difficult to ignore the risks of managerial and controlling shareholder unaccountability in an environment characterized by insider boards appointed by and affiliated with family shareholders. In this regard, in an empirical study of the remuneration practices of 609 firms listed on the Singapore Exchange, it was reported that companies with employees who were family members of management and who earned at least $50,000 in annual compensation also generally paid higher compensation to directors

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[213] Åsa Björnberg, Heinz-Peter Elstrodt, & Vivek Pandit, *The Family-Business Factor In Emerging Markets*, MCKINSEY Q. (Dec. 1, 2014), https://www.mckinsey.com/featured-insights/winning-in-emerging-markets/the-family-business-factor-in-emerging-markets [https://perma.cc/2XCQ-YL2H]. For family-owned companies in Singapore, *see* Tan Lay Hong, *Family-Owned Firms in Singapore: Legal Strategies for Constraining Self-Dealing In Concentrated Ownership Structures*, 23 SING. ACAD. L.J. 890, 892 (2011); MARLEEN DIELEMAN ET AL., SUCCESS AND SUCCESSION: A STUDY OF SGX-LISTED FAMILY FIRMS 8 (2011).

[214] Lorraine M. Uhlaner, *Family Business and Corporate Governance, in* THE OXFORD HANDBOOK OF CORPORATE GOVERNANCE 389, 395–96 (and accompanying endnotes), (Douglas Michael Wright et al. eds., 2018).

[215] Nicolas Kachaner, George Stalk, & Alain Bloch, *What You Can Learn From Family Business*, HARV. BUS. REV. (Nov. 2012), https://hbr.org/2012/11/what-you-can-learn-from-family-business [https://perma.cc/7W3E-UUVE].

[216] *Family Businesses Take On ESG*, CREDIT SUISSE (Sept. 2, 2020), https://www.credit-suisse.com/about-us-news/en/articles/news-and-expertise/family-businesses-take-on-esg-202009.html [https://perma.cc/5LTL-WSJU].

[217] Jean-Luc Arregle et al., *The Development of Organizational Social Capital: Attributes of Family Firms*, 44 J. MGMT. STUD. 73, 83 (2007).

and key management relative to market capitalization, revenues, and total assets.[218] This, the report noted, suggested that "companies with extensive family involvement in the business are less efficient or pay higher remuneration."[219] It has also been noted that, unlike in professionally-managed firms where CEO pay is generally benchmarked with peer companies of similar industry and size, in family-managed firms, family shareholders in Singapore generally have a great deal of influence over compensation, with remuneration consultants and independent directors having little influence.[220] This has often resulted in CEOs in family-managed firms receiving much higher compensation than their counterparts in professionally-managed firms.[221] The predominance of insider boards nominated by controlling shareholders correlates positively with shareholderism.[222] This militates against the likelihood of independent directors taking a broader view of the firm's objective, including its stakeholders' interests.[223] For example, as opposed to the conception of US-style independent directors as a watchdog for dispersed minority shareholders, independent directors in family-controlled firms in Singapore have been argued to reinforce controlling shareholder power by leveraging their close ties with family controllers to act as mediators in inter-family shareholder disputes or trusted advisors to the family chairman.[224] One may also question the extent to which family ownership correlates with long-term value. In a study of 217 publicly listed companies across Hong Kong, Singapore and Taiwan, it was found that Asian family firms lose 60% of their value during generational succession.[225] Yet, apart from the foregoing, little else is known about the relationship between family shareholders and stakeholders' interests in corporate decision-making.

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[218] MAK YUEN TEEN & CHEW YI HONG, THE SINGAPORE REPORT ON REMUNERATION PRACTICES: AVOIDING THE APAYCALYPSE 5, 31 (Jan. 2018), https://governanceforstakeholders.com/wp-content/uploads/2018/01/Remuneration-Practices-Volume-1-1.pdf [https://perma.cc/6K2L-4YA2]

[219] *Id.* at 42, 45.

[220] Vivien Shiao, *Fat Cats Or Top Dogs: Is The Singapore CEO Overpaid*?, THE BUS. TIMES (Mar. 16, 2019), https://www.businesstimes.com.sg/brunch/fat-cats-or-top-dogs-is-the-singapore-ceo-overpaid [https://perma.cc/U3RK-BKF6].

[221] *Id.*

[222] Licht & Adams, *supra* note 7.

[223] *Id.*

[224] Dan W. Puchniak & Luh Luh Lan, *Independent Directors in Singapore: Puzzling Compliance Requiring Explanation*, 65 AM. J. COMP. L. 265, 270 (2017).

[225] *See generally* MORTEN BENNEDSEN & JOSEPH FAN, THE FAMILY BUSINESS MAP: ASSETS AND ROADBLOCKS IN LONG TERM PLANNING (Palgrave Macmillan 2014).

B. CORPORATE CULTURE

Apart from shareholding patterns, culture, as studies increasingly affirm, serves as a substantial influence on corporate decision-making.[226] Cultural orientations, for example, manifest themselves in social tolerance for economic inequality and attitudes toward remuneration disclosure.[227] Employing the terminology advanced by Hofstede and Schwartz,[228] corporate culture in neo-Confucianist societies, such as Singapore and Hong Kong, may be characterized by paternalistic control by dominant owners, relative power distance, and a sense of hierarchy limiting manager-worker interdependence. This may indirectly explain the subordination of the role of broader (minority) shareholders in capital markets and corporate governance, and the entrenchment of the relationship between ownership and control.[229] Total CEO compensation and the ratio of CEO compensation to the lowest level employee's compensation have been found to correlate positively with power distance, with the former relating positively with individualism.[230] Teemu Ruskola offered a three-fold typology of the business enterprise: liberal, Confucian, and socialist. At risk of oversimplification, "liberal" firms prevalent in the West, on which the Anglo-American "theory of the firm" is premised, are organized according to the economic logic of contract, with each actor—managers, shareholders, and workers—acting rationally in the pursuit of their respective self-interests and the profit incentive. In contrast, "Confucian" family firms, or what Ruskola has termed "clan corporations," which are prevalent in Chinese businesses, are organized based on the fiduciary logic of kinship relations, which emphasize interpersonal hierarchies, long-term stability, and non-confrontation, as

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226 Amir N. Licht, *Culture And Law In Corporate Governance*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 129, 144, 149–50 (Jeffery N. Gordon & Wolf-Georg Ringe eds., 2018).

227 Jennifer G. Hill, *Regulating Executive Remuneration After The Global Financial Crisis: Common Law Perspectives*, *in* RESEARCH HANDBOOK ON EXECUTIVE PAY 219, 221 (and accompanying endnotes) (Randall S. Thomas & Jennifer G. Hill eds., 2012).

228 GEERT H. HOFSTEDE, CULTURE'S CONSEQUENCES: COMPARING VALUES, BEHAVIORS, INSTITUTIONS, AND ORGANIZATIONS ACROSS NATIONS 104 (2001); Shalom H. Schwartz, *Culture Matters: National Value Cultures, Sources, and Consequences*, *in* UNDERSTANDING CULTURE: THEORY, RESEARCH, AND APPLICATION 127, 136 (Robert S. Wyerm et al. eds., 2009).

229 *See* Gordon Redding et al., *Hong Kong: Hybrid Capitalism as Catalyst*, *in* THE OXFORD HANDBOOK OF ASIAN BUSINESS SYSTEMS 34, 40–42 (Michael A. Witt & Gordon Redding eds., 2014); Gordon Redding, Michael Harris Bong, & Michael A. Witt, *Culture and the Business Systems of Asia*, *in* THE OXFORD HANDBOOK OF ASIAN BUSINESS SYSTEMS 358, 366–67 (Michael A. Witt & Gordon Redding eds., 2014).

230 Henry L. Tosi & Thomas Greckhamer, *Culture and CEO Compensation,* 15 ORG. SCI. 657 (2004).

opposed to individualism and short-term interests.[231] The Chinese family firm has been said to have a management structure rooted in Chinese social history, and tend to be run by dominant owners, who make all important decisions and are assisted by family members and trusted subordinates. Corporate decision-making is embodied by a spirit of paternalism and conveys "the Confucian ideals of responsibility downwards in exchange for disciplined obedience upwards" and that "[s]ocial respect is accorded to owners, not employees."[232]

Any discussion of culture, however, opens a Pandora's box of controversies—what does one make of the influence of "Confucian paternalism" by corporate managers on corporate decision-making with respect to stakeholders, for example? On the one hand, it suggests that the priority of the collective interest of the firm over self-interest would lead to relative self-restraint on the part of owner-managers not to extract beyond a fair share of their contribution to the firm's value in view of the interests of other stakeholders. David Donald, thus, argues that the limited liability company originating from the West, which was designed largely to allow a firm to transact with the financial system and investors to profit from the firm's business, should be modified to reflect the distinct corporate environment of Asia.[233] Values which a family might find important, such as firm autonomy, longevity or culture, are not taken into account in the Anglo-American corporate model, which is premised on short-term value maximization of the firm.[234] Yet, there remain the risks of nepotism and managerial unaccountability in an environment that emphasizes family loyalty within a paternalistic hierarchical framework based upon power distance.

C. INSTITUTIONS OF POLITICAL ECONOMY

The firm's corporate culture is influenced, at least in part, by its broader institutional environment, which differs from jurisdiction to jurisdiction. The distribution of power amongst the principal players within the corporation—shareholders, managers and employees—vis-à-vis its broader stakeholders are affected by their interaction with the state's political economy though political institutions, ideologies and interest

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[231] Teemu Ruskola, *Theorizing the Corporation: Liberal, Confucion, and Socialist Perspectives, in* THE OXFORD HANDBOOK OF THE CORPORATION 298, 307 (Thomas Clarke et al. eds., 2019).

[232] Gordon Redding et al., *supra* note 229, at 41.

[233] David C. Donald, *Conceiving Corporate Governance for an Asian Environment*, 12 U. PA. L. REV. 88, 92, 113 (2016) (discussing cultural values that are important to family-run firms in Asia).

[234] *Id.*

groups.[235] Not surprisingly, board members have been found to balance shareholders and stakeholders' interests differently depending on the compatibility of their value preferences with their social institutional environment.[236] Shareholderism is observed to correlate negatively with cultural embeddedness, harmony, and egalitarianism.[237] Similarly, positive correlations were shown between cultural egalitarianism and firm-level ESG practices, such as paying a higher proportion of firm surplus to workers, the scope of non-financial disclosures, and organizational practices that take into consideration the broader community more generally.[238]

The "Varieties of Capitalism" theory sets out a broad framework within which different models of corporate governance may be analyzed. In liberal market economies (LMEs), firms coordinate their endeavors primarily through hierarchies and competitive market arrangements, while in coordinated market economies (CMEs), firms rely more heavily on non-market relations supported by public and private regulatory arrangements.[239] This broadly corresponds with the Anglo-American common law shareholder primacy model and the continental European civil law stakeholder-oriented model.[240] The structural differences in the institutional political economy between LMEs and CMEs would suggest that LMEs would generally be less accommodative of employees' interests in corporate governance, which are instead dealt with in a competitive fluid labor market.[241] In this regard, however, in LMEs such as the U.S. and U.K., populist movements and public pressure stemming from the global financial crisis have compelled legislatures to constrain board power.[242] Populist pressures have moved the Democratic Party's center of gravity to the left, with a greater emphasis on the role of the state

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[235] Roe & Vatiero, *supra* note 163, at 57.

[236] *See, e.g.,* Renée B. Adams et al., *Shareholders and Stakeholders: How Do Directors Decide?*, 32 STRAT. MGMT. J. 1331 (2011) (finding that the more compatible the board's social institutional environment and values are with an entrepreneurial value profile, the more likely the board will side with shareholders).

[237] Licht & Adams, *supra* note 7.

[238] Jordan I. Siegel et al., *Egalitarianism, Cultural Distance, and Foreign Direct Investment: A New Approach*, 24 ORG. SCI. 1174, 1175 (2013).

[239] Peter A. Hall & David Soskice, *An Introduction to Varieties of Capitalism, in* VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE 1, 8–9 (Peter A. Hall & David Soskice eds., 2001).

[240] *See* Vitols, *supra* note 3.

[241] *Cf.* CHRISTOPHER M. BRUNER, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD: THE POLITICAL FOUNDATIONS OF SHAREHOLDER POWER 7–12 (2013) (arguing that the degree of social democracy amongst common law jurisdictions correlates positively with shareholderism).

[242] *See e.g.*, Gordon, *supra* note 137, at 43–44.

in regulating market economies, protecting the weakest sectors of society, reducing poverty and inequality under the capitalist framework, and strengthening labor unions.[243] This parallels similar historical developments in Europe, and is in stark contrast with the traditional deregulated, everyone-for-himself, free-market American model, which contributed to economic development in the U.S. since the 1950s.[244] At the same time, the lack of a historical tradition of social democracy and egalitarianism in LMEs is likely to constrain reforms toward stakeholderism. While arguably akin to LMEs in an economic sense, Hong Kong and Singapore have been described as distinct from the standard Western liberal democratic model[245] and defined by their "corporatist" structures.[246] Both polities also rank relatively low in terms of income inequality, with Singapore—which has not introduced a minimum wage—ranking among the bottom ten countries in the world for its efforts to reduce inequality.[247] Stakeholderist reforms at the company-level may not necessarily cohere well with Singapore's consensus-driven policy of tripartism, which refers to the collaboration amongst labor unions represented by the National Trades Union Congress (NTUC), employers represented by the Singapore National Employers Federation, and the government.[248] Under Singapore's tripartite framework, the National Wage Council—a tripartite body consisting of representatives of employers, trade unions and the government—conducts annual

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[243] Jorge G. Castañeda, *Of Course Americans Are Turning to Social Democracy*, N.Y. TIMES (Aug. 1, 2019), https://www.nytimes.com/2019/08/01/opinion/social-democracy.html [https://perma.cc/4Q9U-PF8Z]. Such recent proposals include Medicare for All or universal health care, raising the minimum wage to $15 an hour, tuition-free higher public education, and raising taxes on the wealthy.

[244] *Id.*

[245] Singapore Parliament Reports, Vol. 84, Col. 3406 (Aug. 27, 2008) (statement of Prime Minister Lee Hsien Loong), https://sprs.parl.gov.sg/search/topic?reportid=016_20080827_S0003_T0003 [https://perma.cc/F8RC-LPHU]; THE ECONOMIST INTELLIGENCE UNIT'S DEMOCRACY INDEX, INFOGRAPHIC, (2018), https://infographics.economist.com/2019/DemocracyIndex [https://perma.cc/7NJ7-7ES8].

[246] Ma Ngok, *The Making of a Corporatist State in Hong Kong: The Road to Sectoral Intervention*, 46 J. CONTEMP. ASIA 247 (2016) (discussing the corporatist nature of the Hong Kong state); Chris Leggett et al., *Employers' Associations in Singapore: Tripartite Engagement*, *in* EMPLOYERS' ASSOCIATIONS IN ASIA: EMPLOYER COLLECTIVE ACTION 82, 89–91 (John Benson et al. eds., 2017).

[247] OXFAM INTERNATIONAL, THE COMMITMENT TO REDUCING INEQUALITY INDEX 2018 (2018), https://www.oxfam.org/en/research/commitment-reducing-inequality-index-2018 [https://perma.cc/G4K9-PKWY].

[248] *What is Tripartism*, SING. MINISTRY OF MANPOWER, https://www.mom.gov.sg/employment-practices/tripartism-in-singapore/what-is-tripartism [https://perma.cc/PZ5V-LV2M] (last visited Feb. 27, 2021).

deliberations to forge a "national consensus" on employment matters.[249] In Hong Kong, labor relations are described as "quiescent" and collective bargaining generally takes place only with respect to the few large and prominent organizations.[250] Pay issues in Singapore and Hong Kong are dealt with against a highly fluid labor market, with the World Economic Forum's latest Global Competitiveness Report ranking them amongst the highest in terms of hiring and firing flexibility.[251] In this context, there is arguably less room for private sector-driven stakeholderist reforms in respect of the firm's employees in view of the existing institutional environment governing Singapore and Hong Kong's industrial relations.

IV. CONCLUSION

In light of the above, whether the regulatory reforms underlying the trend towards an "enlightened shareholder value" model amongst the respective common law jurisdictions discussed will continue to be sustained remains an open question. Controlling shareholders will continue to occupy a pre-eminent position within the company and shareholder pressure will remain the most influential factor in corporate decision-making not least because of managerial self-interest. Nevertheless, it is possible to hypothesize that, at least for the foreseeable future, the strict "shareholder primacy" model in the common law will continue to adapt to a more stakeholder-oriented one, subject to the distinctive patterns of corporate ownership, corporate culture, and institutions of political economy underlying the institutional contexts in the respective common law jurisdictions examined in this article. This trend in itself calls into doubt the triumph of the "shareholder primacy" model as the standard normative corporate form.[252] In this regard, in a subsequent article, Hansmann and Kraakman clarified that the "standard

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[249] On the basis of the tripartite consensus reached during the deliberations, it issues annual guidelines on wage-adjustment recommendations, taking into account public views and factors such as "productivity growth, employment situation, international competitiveness, and economic growth and prospects." These guidelines are intended to serve as a reference point by companies in determining salary increments for their employees. Singapore Tripartisan Forum, *National Wages Council*, https://www.tripartism.sg/page/National-Wages-Council [https://perma.cc/N9SC-WMXQ] (last visited Feb. 27, 2021).

[250] Gordon Redding et al., *supra* note 229, at 41.

[251] WORLD ECONOMIC FORUM, THE GLOBAL COMPETITIVENESS REPORT 2019, at 266–68, 506–08 (2019).

[252] *See* Leonard I. Rotman, *Debunking the "End of History" Thesis for Corporate Law,* 33 B.C. INT'L & COMP. L. REV. 219 (2010); Adam Winkler, *Corporate Law Or The Law Of Business?: Stakeholders And Corporate Governance at the End Of History*, 67 L. & CONTEMP. PROBS. 109 (2004).

shareholder-oriented model" does not impose a legal obligation on directors to maximize shareholder returns without regard to the consequences for third parties. Rather, it simply requires that "managers should do what the shareholders, as a group, would prefer them to do . . . Shareholders presumably do not want their corporate managers to cheat customers, abuse workers, or foul the environment even if doing so would be both legal and profitable."[253] If we accept this broader conception of the "standard shareholder-oriented model," one may then argue that the current regulatory reforms are compatible with such a model, insofar as the ESV principle only requires directors to take into account non-shareholder interests as a means of enhancing shareholder value over the long term.

At the same time, the COVID-19 pandemic has once again highlighted the importance of taking a long-term view of firm value,[254] with corporations which have taken long-term positions found to be weathering the economic crisis better than others.[255] The trend of the increasing focus on stakeholders will likely gain further traction as we emerge from the pandemic, with increased expectations for companies, institutional investors, and governments to act (or at least to be seen to be acting) in the interests of broader stakeholders (particularly employees) and society as a whole. At the very least, the pandemic would require boards to reorientate their priorities in the short-term, particularly with respect to the payment of dividends, share buybacks, and limitations on executive compensation to preserve capital.[256]

It is equally likely, however, that the COVID-19 pandemic will result in the pendulum swinging back the other way, insofar as it has

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[253] Henry Hansmann & Reinier Kraakman, *Reflections on the End of History for Corporate Law*, *in* CONVERGENCE OF CORPORATE GOVERNANCE: PROMISE AND PROSPECTS 36 (Abdul Rasheed & Toru Yoshikawa eds., 2012). They also left the door open in acknowledging that "[t]he more difficult part is to work out the details in implementing the [standard shareholder-oriented model] and continually re-adapting it to an ever-changing environment." *Id.* at 46.

[254] *See* Lynn S. Paine, *Covid-19 is Rewriting the Rules of Corporate Governance*, HARV. BUS. REV. (Oct. 6, 2020), https://hbr.org/2020/10/covid-19-is-rewriting-the-rules-of-corporate-governance [https://perma.cc/CDK3-2Q76] (discussing how the pandemic has compelled corporate directors to focus more on stakeholders).

[255] Rui Albuquerque et al., *Resiliency of Environmental and Social Stocks: An Analysis of the Exogenous COVID-19 Market Crash* 3–4 (Eur. Corp. Gov. Inst., Finance Working Paper No. 676/2020, June 2020).

[256] At the time of writing, the Coronavirus Economic Stabilization Act of 2020 (CARES Act), restricts employee compensation and businesses from repurchasing any of its or its parent entity's listed equities, paying dividends or making other capital distributions while any loans or guarantees under the CARES Act are outstanding and for a one-year period thereafter. Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020, Pub. L. No. 116–36, §§ 4003–4004, 134 Stat. 471 (2020).

shown that the economic fundamentals on which shareholder primacy is premised have not changed significantly (or at all). The S&P 500 has rebounded by more than 30% since its March low,[257] surpassing its pre-pandemic high even as record job losses continue, revealing the stark divide between the financial markets and the real economy. "Hard" measures of financial resilience are likely to be prioritized than "soft" measures of corporate sustainability, particularly during times of economic crisis.[258] The most immediate impact of COVID-19 would be to bring to the fore the challenges and trade-offs directors face in balancing the competing demands and determining the distribution of losses amongst shareholders, management, employees, creditors, customers, suppliers and other stakeholders. Two constituencies—namely creditors and employees—are likely to be most disadvantaged, at least in the immediate aftermath of the economic crisis. Insolvency laws have been weakened at the expense of creditors as a result of the pandemic, with the implementation of temporary moratoriums on creditors commencing proceedings against debtors[259] and the suspension of wrongful trading rules.[260] If the record job losses are any indication, companies must prioritize safeguarding their balance sheets and would not hesitate to retrench workers and cut costs in order to preserve shareholder value and to ensure that the company is to continue to survive as a viable entity. The consideration of "long-term" shareholder value is superfluous if the company is unable to even survive in the short-term. Broader stakeholder interests have instead been safeguarded by governmental intervention through bailouts and wage support, demonstrating once again that corporate governance in itself is an insufficient and imperfect mechanism to ensure that such interests are not compromised. Ultimately, as with the global financial crisis, the pandemic has shone a spotlight on the fact that in times of economic crisis, it is broader stakeholders—namely the state and, ultimately, taxpayers—which are forced to provide a backstop to the diminution of shareholder value.

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[257] As of November 2020.

[258] *See* Simon Glossner et al., *Where Do Institutional Investors Seek Shelter when Disaster Strikes? Evidence from COVID-19*, 4–5 (Eur. Corp. Gov. Inst., Finance Working Paper No. 688/2020, Nov. 2020).

[259] *See, e.g.*, COVID-19 (Temporary Measures) Act 2020, 14/2020 Part 3 (Sing.).

[260] *See, e.g.,* Corporate Insolvency and Governance Act 2020, c. 12, § 12 (UK) (suspending liability for wrongful trading during a portion of 2020).