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Beyond Profit Motives

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INTRODUCTION

Why do corporations exist? Generations of legal scholars have debated both the origins of business corporations and their purpose.[1] Professor Stephen Bainbridge's new book *The Profit Motive: Defending Shareholder Value Maximization*[2] is a substantial contribution to this literature and an essential read for anyone who wishes to better understand a controversy that has an immense impact on how movers and shakers of today's largest corporations make decisions.

Bainbridge, one of the most prolific and influential corporate law professors in the United States, throws cold water on burgeoning scholarly literature that calls for corporations to embrace corporate social responsibility.[3] The idea of "corporate social responsibility" was developed in the 1950s by economist Howard Bowen, who believed that corporate management is obligated to pursue actions that are "desirable in terms of the objectives and values of our society."[4] Within the past decade or so, this theory has blossomed into a full-fledged social movement under the

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1. *See, e.g.*, Henry N. Butler, *Nineteenth-Century Jurisdictional Competition in the Granting of Corporate Privileges*, 14 J. LEGAL STUD. 129 (1985); J. Newton Baker, *Regulation of Industrial Corporations*, 22 YALE L.J. 306 (1912).

2. Stephen Bainbridge is the William D. Warren Distinguished Professor of Law at University of California, Los Angeles School of Law.

3. Corporate social responsibility generally refers to "initiatives businesses take to positively impact a wide range of local, national, and international stakeholders beyond just their shareholders and employees." Tom C.W. Lin, *Executive Private Misconduct*, 88 GEO. WASH. L. REV. 327, 349 (2020) (footnote omitted).

4. HOWARD R. BOWEN, SOCIAL RESPONSIBILITIES OF THE BUSINESSMAN 6 (1953).

banner of environmental, social, and governance (ESG).[5] Although no consensus exists on what initiatives qualify as ESG, it is generally understood to include issues "ranging from environment and climate, to diversity and other workplace concerns, to privacy and supply chain management."[6] Proponents of ESG have urged a wide range of stakeholders to incorporate ESG metrics, which would impact investment decisions,[7] CEO compensation,[8] and disclosures mandated by federal securities law.[9] Even the White House has defended the ESG movement. On March 20, 2023, President Joe Biden used the first veto in his presidency to defend the Department of Labor's rule on ESG investing.[10]

Bainbridge unabashedly defends shareholder wealth maximization as the sole purpose of modern corporations. He draws on history, law, and economics to explain why shareholder value maximization is the law and ought to be the law going forward (pp. 22–24). Unconvinced about the ESG movement's merits, Bainbridge maintains that shareholder value maximization leads to "more efficient resource allocation, creates new social wealth, and promotes economic and political liberty" (p. 170).

To Bainbridge, the modern stakeholder theorists—who advocate for greater social responsibility—tend to rely on a rather shaky theoretical building block (pp. 94–95). Owing their intellectual debt to the concession theory of corporations, stakeholder theorists typically adhere to the view that corporations are society's creation and "thus have a moral obligation to work in the best interest of society" (p. 95).

It is almost too easy for Bainbridge to critique this view. Often associated with the famous *Dartmouth College* decision rendered by the Supreme Court in 1819,[11] the concession theory made perfect sense in the

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5. *See, e.g.*, Georg Kell, *The Remarkable Rise of ESG*, FORBES (July 11, 2018, 10:09 AM), https://www.forbes.com/sites/georgkell/2018/07/11/the-remarkable-rise-of-esg [perma.cc/SZ3U-AMXJ]. *See generally* Elizabeth Pollman, *The Making and Meaning of ESG*, HARV. BUS. L. REV. (forthcoming) (discussing the origin, rise, and uses of ESG).

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

7. *See* Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 382 (2020).

8. *See, e.g.*, Tom Gosling & Phillippa O'Connor, *Executive Pay and ESG Performance*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 12, 2021), https://corpgov.law.harvard.edu/2021/04/12/executive-pay-and-esg-performance [perma.cc/4HPV-73L6].

9. *See, e.g.*, Cynthia A. Williams & Donna M. Nagy, *ESG and Climate Change Blind Spots: Turning the Corner on SEC Disclosure*, 99 TEX. L. REV. 1453, 1466–67 (2021).

10. Rebecca Morin & Jessica Guynn, *Biden Issues First Veto as President, Blocks Measure by Congress on 'Woke' Investment*, USA TODAY (Mar. 21, 2023, 2:32 PM), https://www.usatoday.com/story/news/politics/2023/03/20/biden-first-veto-esg-woke-climate-investing-retirement/11385255002 [perma.cc/27PE-YCGQ].

11. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

early days of the nation, when forming corporations literally required individual special legislative charters.[12] Today, however, the state's role in the incorporation process is purely ministerial. As Bainbridge observes, "it has been decades since either courts or scholars took concession theory seriously as a rationale for regulating corporations" (p. 95; footnote omitted).

This Review situates Bainbridge's book within the rich literature on corporate purpose and proposes an alternate theoretical framework that can accommodate corporate purpose beyond ruthless profit maximization for shareholders. It does so by developing what I refer to as the "new concession theory of corporations."

The new concession theory contends that corporations ought to accommodate certain societal interests because large corporations—unlike contracts or other forms of business organizations, such as the general partnership—rely on law and legal institutions for their very existence. Professors Taisu Zhang and John Morley's recent article in the *Yale Law Journal* is particularly insightful here.[13] Zhang and Morley argue that the modern state's development of the ability to enforce the law was necessary for the rise of the business corporation.[14] After all, capital-intensive enterprises rely on large groups of dispersed investors. The modern state has the unique capacity to solve the trust problem that inevitably arises when a large group of strangers pool capital for business ventures.[15] For this reason, the corporate form became only "a widespread institutional and economic phenomenon under the auspices of modern statebuilding in the eighteenth and nineteenth centuries."[16] Appreciating the critical role that law and legal institutions play in sustaining the modern corporation is immensely important because it can reveal whether and to what extent business corporations owe certain obligations to society at large.

Importantly, the obligation for corporations to pursue a purpose beyond profits does not derive from the observation that states effectively give birth to corporations by imposing certain governmental requirements for the attainment of corporate status.[17] That narrative is a major shortcoming of the old concession theory that relies too heavily on the outdated practice of states selectively granting charters. Rather, societal

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12. Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. CORP. L. 33, 46–47 (2006).

13. Taisu Zhang & John D. Morley, *The Modern State and the Rise of the Business Corporation*, 132 YALE L.J. 1970, 1970 (2023).

14. *Id.*

15. *Id.* at 1989 (observing that collaboration between a large number of strangers for complex economic activities requires "robust state-driven rule enforcement and information sharing . . . which, in turn, necessitates effective statebuilding").

16. *Id.* at 1986.

17. *See* Larry E. Ribstein, *Limited Liability and Theories of the Corporation*, 50 MD. L. REV. 80, 86 (1991) ("The most important remnant of the concession theory is undoubtedly the continued requirement of a state filing." (footnote omitted)).

obligations stem from the nature of corporations relying on the legal authority of modern states for their continued existence.

The new concession theory, to be clear, does not require readers to unsubscribe from Bainbridge's thesis that corporate managers should principally be tasked with maximizing profits for shareholders (p. 1). Rather, it reveals that the people—through state institutions—should be able to demand certain obligations of corporations that may clash with the profit-seeking function of business enterprises. To a certain extent, this viewpoint is already embedded in modern corporate law doctrines. For instance, American corporate law requires that corporate managers comply with the rule of law, even if breaking the law would increase profits.[18] As Professor Elizabeth Pollman explains, such doctrines acknowledge the "societal interests in the rule of law and preserve[] the ability of courts to flexibly respond to particularly salient and egregious violations of public trust."[19]

This Review proceeds in two parts. Part I synthesizes Bainbridge's central thesis and situates his book within the rich literature concerning the purpose of modern corporations. Part I also identifies limits to the shareholder value maximization paradigm. Part II develops the new concession theory of corporations. The new concession theory, at its core, is a descriptive project aimed at fine-tuning our understanding of the legal authority underlying the business corporation. But it necessarily introduces important normative and empirical questions ripe for further scholarly scrutiny. Rather than drawing sweeping conclusions, Part II provides an initial sketch of the theory that can lend support to intellectual movements built around a normative commitment to broader corporate social accountability.

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18. To be sure, this point has been the subject of fierce intellectual contention among legal scholars over the past half century. In an infamous piece of legal scholarship published in 1982, corporate law luminaries Professor (and later Judge) Frank Easterbrook and Professor Daniel Fischel declared that corporate "managers not only may but also should violate the rules when it is profitable to do so." Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1177 n.57 (1982). While academic debates on this point continue to rage on in the pages of prominent law reviews, American corporate law jurisprudence has solidified a firm stance against corporate fiduciaries that knowingly enable the corporation to violate the law. *See, e.g.*, Kandell *ex rel.* FXCM, Inc. v. Niv, No. 11812-VCG, 2017 WL 4334149, at *16 (Del. Ch. Sept. 29, 2017) ("While a Delaware corporation may 'pursue diverse means to make a profit,' it remains 'subject to a critical statutory floor, which is the requirement that Delaware corporations only pursue 'lawful business' by 'lawful acts.' " (quoting *In re* Massey Energy Co., No. 5430-VCS, 2011 WL 2176479, at *20 (Del. Ch. May 31, 2011))).

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

I. SHAREHOLDER VALUE MAXIMIZATION AND THE DEMISE OF THE CONCESSION THEORY

At the turn of the century, Professors Henry Hansmann and Reinier Kraakman famously declared that "[t]here is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value."[20] But today, the demand for corporate managers to pursue social responsibility has taken on a new life. ESG is everywhere. Scholars are openly celebrating and predicting the demise of the shareholder wealth paradigm. In a recent article, Professor Lynn LoPucki imagines the end of the shareholder wealth maximization era.[21] Even the Business Roundtable—comprised of America's leading CEOs—has publicly endorsed the stakeholder view.[22] It is partly this sea change that motivated Bainbridge to write this book.

Bainbridge's central thesis is that corporations exist solely to effectuate the long-term interest of shareholders (p. 1). Several nuances and semantics are worth observing. Perhaps most importantly, Bainbridge is not advocating for corporate managers to ruthlessly seek profits in the short term. Instead, he argues that "the purpose of the corporation is to sustainably maximize shareholder value over the long term" (p. 1). Bainbridge deliberately chooses the term *value* maximization—as opposed to *profit* maximization—in an effort to shield his vision from "caricatures often deployed by proponents of stakeholder capitalism" (p. 14). Under Bainbridge's value maximization paradigm, executives can broadly consider stakeholder interests—the interests of employees, consumers, suppliers, investors, communities, and others with a stake in the organization—so long as decisions are ultimately made to benefit primarily the shareholder (p. 14). It thus appears that Bainbridge is concerned principally with the brand of stakeholder capitalism that assumes managers can subordinate the interest of shareholders when there is a true conflict between shareholders and stakeholders (p. 16).

The book, which draws on some of Bainbridge's most influential works of the past several decades, has both descriptive and normative elements.

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

21. Lynn M. LoPucki, *The End of Shareholder Wealth Maximization*, 56 U.C. DAVIS L. REV. 2017 (2023).

22. *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 [perma.cc/C852-234Q] (committing to lead "companies for the benefit of all stakeholders – customers, employees, suppliers, communities and shareholders"). In the management literature, a stakeholder is generally understood as "any group or individual who can affect or is affected by the achievement of the organization's objectives." R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH 46 (Cambridge Univ. Press 2010) (1984).

Descriptively, Bainbridge maintains that shareholder value maximization is the law (p. 23). As evidence, Bainbridge takes the readers on a journey through familiar American corporate law cases. The opening chapter begins with Ford Motor Company's commercial ascendance and its socially responsible policies in the early 1900s (p. 27). While planning to build a very large factory along the River Rouge, Ford was sued by the Dodge brothers—Ford shareholders, as well as competitors in the nascent automobile industry. The Dodge brothers wanted Ford to stop its expansion and instead pay them special dividends (pp. 27–28). The case, *Dodge v. Ford Motor Co.*, raised fundamental questions about the purpose of business corporations.[23] Ultimately, the court concluded that it was not within the lawful powers of a board of directors to take action that primarily benefits other stakeholders and incidentally benefits shareholders.[24] Bainbridge reads *Dodge* as establishing the principle that corporations exist to further the interests of shareholders—not employees, customers, or the broader community (p. 50).

To Bainbridge's credit, it is not hard to find canonical cases from Delaware—the state of incorporation for more than half of the publicly traded corporations in the United States[25]—that support his view (p. 57). And academic writings from former and current members of the Delaware judiciary are carefully sprinkled throughout the book. Most prominently, former Delaware Supreme Court Justice Leo Strine, who recently wrote in support of incorporating ESG metrics to corporate governance,[26] famously scolded those who contend that "directors may subordinate what they believe is best for stockholder welfare to other interests, such as those of the company's workers or society generally."[27] According to Strine, "[t]he contention that it proves directors are free to promote interests other than those of stockholders ignores the many ways in which [Delaware corporate law] focuses corporate managers on stockholder welfare by allocating power only to a single constituency, the stockholders."[28]

Normatively, Bainbridge marshals a vigorous defense for his viewpoint that shareholder value maximization ought to be the law. Here, Bainbridge synthesizes familiar policy arguments, while teeing up some

23. Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919).

24. *See id.* at 684 ("A business corporation is organized and carried on primarily for the profit of the stockholders.").

25. William J. Moon, *Delaware's Global Competitiveness*, 106 IOWA L. REV. 1683, 1693 (2021).

26. Leo E. Strine, Jr., Kirby M. Smith & Reilly S. Steel, Caremark *and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective* Caremark *and EESG Strategy*, 106 IOWA L. REV. 1885, 1887 (2021).

27. P. 63 (quoting Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 764 (2015)).

28. Strine, *supra* note 27, at 766.

more novel arguments. We see in these chapters that Bainbridge is far from an ideological zealot. He carefully deconstructs several theoretical building blocks that support the shareholder value maximization paradigm and abandons ones he finds unpersuasive. For instance, Bainbridge rejects a strand of shareholder value maximization theory grounded in property-based conceptions of the corporation (p. 126). This move represents a stark departure from the teachings of Nobel Prize-winning economist Milton Friedman. In his famous essay published in the *New York Times*, Friedman conceptualized shareholders as "the owners of the business" to whom corporate executives owe a responsibility "to conduct the business in accordance with their desires, which generally will be to make as much money as possible" without violating basic societal rules.[29] Friedman's property-based conception of the corporation remains influential in modern corporate law scholarship, often deployed to support the shareholder profit maximization paradigm.[30]

To Bainbridge, property-based conceptions of the corporation rely on a misleading form of reification because a corporation is "not a thing capable of being owned" (p. 126). Instead, Bainbridge subscribes to a contractarian view of the corporation, observing that "shareholders do not own the corporate entity but rather simply possess contractual rights to the residual claim on the corporation's assets and cash flows" (p. 127). The contractarian paradigm allows Bainbridge to turn the table on stakeholder theorists. To Bainbridge, "[t]he goal of maximizing shareholder value thus is pro-stakeholder, in the sense that shareholders, as residual claimants have incentives to maximize the total value of the firm, which benefits the fixed claimants," including employees and creditors.[31] Because of this paradigm, it is unsurprising that Bainbridge reaches the provocative conclusion that "[m]aximizing shareholder value is thus the most socially responsible thing a corporation can do" (p. 128; footnote omitted).

Bainbridge does not deny that corporations create negative societal externalities. Although corporate law's canonical doctrine of limited liability—the idea that the firm's shareholders risk no more than the money they invest into the business enterprise—encourages entrepreneurial

29. Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html [perma.cc/38YY-FVER].

30. *See, e.g.*, Julian Velasco, *Shareholder Ownership and Primacy*, 2010 U. ILL. L. REV. 897, 944–47.

31. P. 128. This point will likely generate a strong reaction from scholars who have observed that corporate law has failed to facilitate a fair share of gain between shareholders and other stakeholders, including workers. *See, e.g.*, GRANT M. HAYDEN & MATTHEW T. BODIE, RECONSTRUCTING THE CORPORATION: FROM SHAREHOLDER PRIMACY TO SHARED GOVERNANCE 6 (2021).

risk-taking,[32] limited liability also "generates negative externalities by creating incentives for shareholders to cause the company to invest in higher risk projects than would the firm's creditors".[33] This feature of business corporations has inspired generations of legal scholars and social scientists to associate corporations with a wide range of social ills, ranging from environmental degradation and human rights violations to income inequality.[34] Bainbridge recalls his personal experience growing up on the Nashua River in Massachusetts, where many textile and paper mills operated. These corporations dumped their effluent into the river, thereby opting to "externalize [the] costs onto those who lived downriver" (p. 10). Although not unsympathetic to the grave social ills created by corporations, Bainbridge views societal interests as better accomplished through general welfare laws rather than abandoning the shareholder value maximization paradigm (p. 90).

Bainbridge reinforces his normative argument by making the case against stakeholder capitalism—the notion that directors ought to make decisions that benefit not only shareholders but also a broad range of groups like the employees and consumers impacted by corporate decisionmaking.[35] To Bainbridge, American corporate law would need to undergo significant alterations to realize a world of stakeholder capitalism (ch. 5). Currently, shareholders retain the exclusive right to elect directors, amend corporate documents, and make some of the most important decisions affecting the corporation. Moreover, modern corporate law doctrines impose fiduciary duties upon directors and officers that can be

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32. STEPHEN M. BAINBRIDGE & M. TODD HENDERSON, LIMITED LIABILITY: A LEGAL AND ECONOMIC ANALYSIS 2, 13 (2016). Risk-taking substantially benefits society by generating "financial returns to investors, jobs for employees, and desirable products and services for consumers." David Millon, *Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability*, 56 EMORY L.J. 1305, 1317 (2007). Moreover, the related concept of entity shielding underlying the modern corporate form ensures that personal creditors of the owners cannot opportunistically withdraw capital from the firm. *See* Henry Hansmann, Reinier Kraakman & Richard Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1333, 1335 (2006).

33. P. 9. Similarly, although modern corporate form may also encourage the flow of capital to business enterprises by preserving the business owner's ability to control knowledge about oneself to the world—the concept of identity shielding—that feature does not come without societal cost. *See* William J. Moon, *Anonymous Companies*, 71 DUKE L.J. 1425, 1430–34 (2022).

34. *See, e.g.*, LYNN STOUT, THE SHAREHOLDER VALUE MYTH vi (2012); William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 705 (1974); Seema Kakade & Matt Haber, *Detecting Corporate Environmental Cheating*, 47 ECOLOGY L.Q. 771, 771 (2020); Matthew T. Bodie, *Income Inequality and Corporate Structure*, 45 STETSON L. REV. 69, 70 (2015); Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here?*, 19 CONN. J. INT'L L. 1, 7 (2003).

35. Although stakeholder capitalism does not entirely overlap with related concepts like corporate social responsibility and the ESG movement, they do share a normative commitment built around the idea that corporations ought to care about more than just profits for shareholders. *See* p. 16.

enforced by shareholders through the judicial process (p. 74). Although not unaware of corporations in foreign nations where employees enjoy the right to board representation,[36] Bainbridge assesses that such forms of codetermination "necessarily reduce[] the likelihood that the board will be an effective monitoring device" (p. 145).

Even if radical changes to the corporate codes of Delaware and other states were politically palatable in the United States, stakeholder theorists have failed to reach a consensus about the normative criteria for judging the purpose of modern corporations. "The absence of such a consensus means that stakeholder theory provides no criteria for determining which of potentially multiple options are superior to others, let alone determining which is best" (p. 135). Shareholder value maximization, on the other hand, "provides a quantifiable metric by which to assess whether directors and officers have used their authority responsibly or for their own selfish benefit" (p. 141).

Toward the end of the book, Bainbridge advances a provocative claim—that stakeholder capitalism threatens democracy (p. 149). This is likely the most aggressive claim made in the book. Here, Bainbridge observes that stakeholder theorists demand "corporate social responsibility precisely because they 'have failed to persuade a majority of their fellow citizens to be of like mind and that they are seeking to attain by undemocratic procedures what they cannot attain by democratic procedures.' " [37] To Bainbridge, stakeholder capitalism "subverts the basis of a liberal democracy" because it asks unelected executives to solve social ills (p. 150). The move is reminiscent of Friedman's famous piece that likened the calls for social responsibility to "preaching pure and unadulterated socialism."[38] Bainbridge also makes the affirmative case that the profit motive promotes freedom: "A legal system that encourages shareholder value maximization necessarily allows individuals freedom to pursue the accumulation of wealth. Economic liberty, in turn, is a necessary concomitant of personal liberty."[39]

So why is stakeholder capitalism experiencing a renaissance under the banner of ESG? Bainbridge diagnoses the social responsibility movements as lip service, at best, and a trojan horse that enables corporate

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36. *See, e.g.*, Jens Dammann & Horst Eidenmüller, *Codetermination: A Poor Fit for U.S. Corporations*, 2020 COLUM. BUS. L. REV. 870, 878–85 (discussing the German law on codetermination).

37. P. 149 (quoting Friedman, *supra* note 29).

38. Friedman, *supra* note 29.

39. P. 168. This point may be lost on a substantial number of Americans who live paycheck to paycheck. Gallup poll shows that about 40 percent of Americans do not own stocks, with a strikingly high percentage of lower-income Americans reporting no stock ownership. Jeffrey M. Jones, *What Percentage of Americans Own Stock?*, GALLUP (May 24, 2023), https://news.gallup.com/poll/266807/percentage-americans-owns-stock.aspx [perma.cc/24JZ-M3P4].

directors to skirt managerial accountability, at worst. For example, Bainbridge describes the new Business Roundtable statement[40] as a "collective exercise in greenwashing" (p. 121). Drawing on a recent work by Professors Lucian Bebchuk and Roberto Tallarita,[41] Bainbridge also observes that the widespread use of ESG "would further reduce CEO accountability" by giving CEOs the opportunity to insulate themselves from shareholder oversight in the name of steering the company towards stakeholder welfare (p. 140).

To his credit, Bainbridge expertly debunks a core theoretical foundation relied on by many stakeholder theorists. Legal scholars advocating for stakeholder capitalism often rely on the concession theory, believing that corporations owe societal obligations because they are chartered by governments.[42] In broad strokes, these scholars argue that because corporations are formally "created" by the state conferring charters, the state can presumptively enact a broad range of regulations.[43]

These instincts are driven in part by the understandable recognition that the concession theory is the only mainstream theory left in town that presumptively supports government regulation.[44] The stakes are high. Shareholder value maximization theorists tend to advocate for a position that the corporation is "merely a legal recognition afforded to a natural aggregation of business people."[45] To these scholars, corporations are a mere "nexus of contracts."[46] Because corporations could be replicated via private contracting alone, the state assumes only a minimal regulatory role.[47] If the state is involved only in the rubber stamping of modern cor-

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40. BUS. ROUNDTABLE, *supra* note 22.

41. Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 164 (2020).

42. *See, e.g.*, Stefan J. Padfield, *Rehabilitating Concession Theory*, 66 OKLA. L. REV. 327, 333 (2014) ("Under concession theory, the state retains significant presumptive authority to regulate the corporate entity in exchange for granting this bundle of rights to incorporators." (footnote omitted)).

43. *See, e.g.*, Robert Hessen, *A New Concept of Corporations: A Contractual and Private Property Model*, 30 HASTINGS L.J. 1327, 1328 (1979) ("The importance of the concession theory can hardly be overstated. . . . From this basic premise, they conclude that corporations must submit to whatever constraints or demands government may choose to impose on them.").

44. Padfield, *supra* note 42, at 327 ("[W]ithout a vibrant concession theory we are left primarily with aggregate theory and real entity theory, two theories of the corporation that both defer to private ordering over government regulation.").

45. Benedict Sheehy, *Scrooge—The Reluctant Stakeholder: Theoretical Problems in the Shareholder-Stakeholder Debate*, 14 U. MIA. BUS. L. REV. 193, 199 (2005).

46. FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 12 (1991).

47. William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1475 (1989) ("The contractual response locates the source of all firms' economic energy in individuals. Stated most strongly, this view

porations, it is unclear whether the state can demand social responsibility.[48] On the other hand, if one views the corporation as a concession granted by the government for the public good, it is easier to justify infusing the public interest into the purpose of the corporation. It is for this reason that "[c]ontractarians have been particularly vicious and dismissive in their rejection of concession theory."[49]

Discrediting the descriptive accuracy of the concession theory is critical to Bainbridge's shareholder value maximization paradigm. Although Bainbridge acknowledges that "[a]lmost all early corporations [in the United States] . . . served public interests beyond making a profit for their shareholders" (p. 28), the corporations changed drastically during the nineteenth century, becoming entities primarily devoted to the private pursuit of profit. As Bainbridge explains, by the late nineteenth century, corporate charters were no longer special privileges granted by sovereigns (p. 29). Instead, general incorporation statutes that reduced the state's role of chartering to a filing requirement swept across the United States.[50] It is this version of business corporations that Bainbridge seeks to perpetuate.

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Loyal subscribers of the shareholder value maximization paradigm will find Bainbridge's new book to be music to their ears. But his book will not persuade everyone—some will be baffled (and perhaps even outraged) over the purported link between shareholder value maximization and democracy. Regardless of one's intellectual predispositions, it is crucial that both consumers and producers of corporate law scholarship read the book because it tees up questions critical to the future of the enterprise.

One such topic worthy of scrutiny is whether modern corporate managers actually adhere to the goal of *long-term* profit maximization. This is in part because decisions in corporate boardrooms today are not just a reflection of corporate law doctrines (or academic sermons about the purpose of modern corporations gracing prestigious law reviews and elite university press books!). They are driven heavily by capital markets

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holds that the individuals' freedom of contract implies a right to do business as a corporation without state interference.").

48. *See* Grant M. Hayden & Matthew T. Bodie, *The Uncorporation and the Unraveling of "Nexus of Contracts" Theory*, 109 MICH. L. REV. 1127, 1127 (2011) (reviewing LARRY E. RIBSTEIN, THE RISE OF THE UNCORPORATION (2010)) ("The nexus of contracts theory is meant to point up the voluntary, market-oriented nature of the firm and to dismiss the notion that the corporation owes anything to the state." (footnote omitted)).

49. HAYDEN & BODIE, *supra* note 31, at 54 (footnote omitted).

50. *See* Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1630 ("Viewing the corporation as a concession from the state is a relic of a time before incorporating became a mere administrative formality.").

and how investors value companies.[51] If capital markets incentivize short-term profit maximization by scrutinizing quarterly earnings reports,[52] it is unclear if corporate purpose practiced on the ground—in corporate boardrooms and C-Suites of large public corporations—is really short-term profit maximization, regardless of whether corporate law doctrines embrace or tolerate long-term profit maximization strategies.

More fundamentally, an uncomfortable truth about the shareholder value maximization paradigm is that it does not involve managers adhering to a singular goal. This is because mainstream shareholder profit maximization theories, including the one advocated by Bainbridge, typically acknowledge that corporations must "obey[] the law."[53] But if corporate law is just about solving the agency problem between shareholders and managers, why would shareholder profit maximization need to take a backseat to legal compliance?[54]

Importantly, the shareholder value maximization paradigm does not give easy answers to how corporate law ought to deal with cases where shareholder interests conflict with obeying applicable positive law. This is in part because corporations are not monolithic entities—they are legal fictions comprised of human agents with varying incentive structures when it comes to ascertaining, obeying, and breaking the laws governing corporations.[55] Corporate law can powerfully shape how those tradeoffs occur. For instance, the extent to which directors are liable for failing to implement policies designed to prevent lawbreaking by the corporation's

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51. James J. Park, *From Managers to Markets: Valuation and Shareholder Wealth Maximization*, 47 J. CORP. L. 435, 438 (2022) (assessing that managerial behavior is driven not only by shifts in ideology on corporate purpose but also "fundamental changes in the methods investors used to value public companies"). More broadly, corporate purpose is shaped not only by corporate law but also by "proxy advisors, stock exchanges, rating agencies, institutional investors, and associations." Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2565–66 (2021).

52. Park, *supra* note 51, at 439 ("As quarterly projections became the standard, a distinction between short-term and long-term shareholder wealth maximization was created. Companies faced pressure to meet short-term market expectations and often sacrificed stakeholder interests as a result.").

53. *See* p. 14.

54. After all, scholars have long noted that directors might rationally turn to lawbreaking in order to maximize profits. David Rosenberg, *Delaware's "Expanding Duty of Loyalty" and Illegal Conduct: A Step Towards Corporate Social Responsibility*, 52 SANTA CLARA L. REV. 81, 85 (2012).

55. John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 394–400 (1981); Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?*, 99 TEX. L. REV. 1309, 1322 (2021) ("[C]orporations are comprised of a variety of stakeholders with widely varying objectives.").

thousands of employees—also known as board oversight claims—can directly impact the extent to which the corporation's human agents break the law.[56]

Viewed from this light, shareholder value maximization actually has multiple strands. In its strongest form, imposing severe penalties on directors and officers for causing corporate lawbreaking could swallow the basic doctrinal tenet of the shareholder profit maximization paradigm. As Bainbridge observes elsewhere, an expansive reading of board oversight claims will "undermine the long established protections of the business judgment rule."[57] In its weakest form, the rule of law takes a back seat to ruthless profit-seeking strategies. Indeed, corporate law regimes that make it virtually impossible to hold directors and officers accountable for corporate lawbreaking could encourage directors and officers to turn a blind eye to employee lawbreaking, predictably boosting corporate profits without ordering the corporation's employees to break the law. After all, directors and officers need not directly participate in lawbreaking to facilitate the employees' illicit activities that can fatten the corporate coffers.[58] Corporate law doctrines that "punish" directors and officers who turn a blind eye to lawbreaking with the proverbial slap on the wrist would hardly be a system where corporations are truly "obeying the law" (p. 14).

By simply declaring that corporations obey the law, we fail to understand the tension between the goals of profit maximization and maintaining fidelity to the rule of law. We need a different paradigm to reassess whether and to what extent law and legal institutions are necessary for the flourishing of large business enterprises. That paradigm, in turn, will hold important lessons for those who seek a more radical departure from the status quo when it comes to corporate social responsibility. The next Part explains this new paradigm and preliminarily explores its implications for the longstanding debate on corporate purpose.

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56. *See* William J. Moon, *Delaware's New Competition*, 114 NW. U. L. REV. 1403, 1456–57 (2020).

57. Stephen M. Bainbridge, *Don't Compound the* Caremark *Mistake by Extending It to ESG Oversight*, 77 BUS. LAW. 651, 655 (2022) [hereinafter Bainbridge, *Don't Compound*] (quoting *In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 130 (Del. Ch. 2009)). Corporate law's canonical doctrine, known as the "business judgment rule," generally protects directors even for mistakes in judgment. Shlensky v. Wrigley, 237 N.E.2d 776, 778 (Ill. App. Ct. 1968). The business judgment rule, however, does not apply to "directors' and officers' knowing violation of the law." Elizabeth Pollman, *Corporate Disobedience*, 68 DUKE L.J. 709, 721 (2019).

58. Jennifer Arlen, *Evolution of Director Oversight Duties and Liability Under* Caremark*: Using Enhanced Information-Acquisition Duties in the Public Interest* (Eur. Corp. Governance Inst., Working Paper No. 680/2023, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4202830 [perma.cc/7F3Z-3SVF].

II. THE NEW CONCESSION THEORY

When debating whether and to what extent corporations owe social responsibility to the general public, we would all benefit from a more nuanced understanding of the complex relationship between business corporations and society at large. That inquiry may begin with the premise that any obligation in the name of the public that we may demand from private business enterprises be at least loosely tied to what individuals who share the entrepreneurial risk of "co-owning" business corporations derive from the modern state—the dominant way that we govern ourselves today. No single academic article, let alone a review essay, can sufficiently cover the vast implications of this inquiry. Rather than drawing sweeping conclusions, this Part provides a preliminary sketch that can be developed further in future scholarship.

It is important to acknowledge up front that a garden variety of business enterprises have existed throughout human civilization, often predating the emergence of the modern Westphalian state.[59] For instance, historians offer fascinating accounts of business enterprises organized in ancient Rome that relied on the pooling of capital and shared risk for financial services, maritime transport, and joint trading in wine.[60]

Although history can provide justification for a rejection of governmental regulation, the scale at which some businesses exist today could not be possible without the modern state. That is the central insight from Zhang and Morley's recent *Yale Law Journal* article.[61] Through a rich excavation of history across the globe, their article forcefully pushes back on standard accounts that identify the growth of economic activities as the causal variable that compelled the rise of the business corporation. Instead, the corporate form became widespread under the auspices of modern statebuilding in the eighteenth and nineteenth centuries because collaboration between a large number of strangers for complex economic activities requires "robust state-driven rule enforcement and information sharing . . . which, in turn, necessitates effective statebuilding."[62] Critical to Zhang and Morley's thesis is that the modern state—through

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59. *See generally* KEITH ROBERTS, THE ORIGINS OF BUSINESS, MONEY, AND MARKETS (2011) (chronicling the origins of local businesses in the Middle East, Greece, and Rome); MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 54 (Guenther Roth & Claus Wittich eds., Ephraim Fischoff et al. trans., Univ. of Cal. Press 1978) (1922) (conceptualizing the state as an entity that monopolizes the legitimate use of force within a defined territory).

60. Andreas M. Fleckner, *Corporate Law Lessons from Ancient Rome*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 19, 2011),

https://corpgov.law.harvard.edu/2011/06/19/corporate-law-lessons-from-ancient-rome [perma.cc/75T3-7GXM]; *see also* Ulrike Malmendier, *Law and Finance "at the Origin"*, 47 J. ECON. LITERATURE 1076, 1076 (2009) (presenting evidence from ancient Rome, "where an early form of shareholder company, the *societas publicanorum*, developed").

61. Zhang & Morley, *supra* note 13, at 1973.

62. *Id.* at 1989.

its legal enforcement mechanism—can instill trust among strangers within a defined geographic area.[63] As Zhang and Morley explain, a modern state "has a geographical reach that extends across many social communities and a land area large enough to encompass complex economic activities of long duration and enterprises with many unfamiliar owners."[64]

Important for our purpose, Zhang and Morley infer from their historical evidence that there is a functional difference between corporate law and other subfields of private law. In their words,

> Much more so than contract law, tort law, or even property law, corporate law deals with complex and not-fully-foreseeable interactions between large numbers of strangers who share interests in a common pool of resources. These attributes render corporate law unusually reliant on state institutions, as opposed to private contractual arrangements or communal self-governance, for legal enforcement.[65]

For instance, Zhang and Morley demonstrate how American statebuilding—in the form of an enhanced ability of courts to enforce corporate charters and resolve disputes from the 1830s onward—set the stage for the rise of the business corporation in the United States.[66] Even for those who are not fully sold on Zhang and Morley's thesis, their work makes it difficult to maintain that large-scale business enterprises can exist through private ordering alone.[67]

The "new concession theory" is the term that I offer to capture this updated understanding of the relationship between the modern state and the business corporation. The new concession theory shares a core tenet with the old concession theory: It acknowledges the centrality of governmental institutions in the flourishing of certain business corporations. As a result, it observes that the state can demand certain obligations from

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63. *Id.* at 2001.

64. *Id.*

65. *Id.* at 2045.

66. *Id.* at 2031–37.

67. In an important work, Professor Paul Mahoney argued that a private system of governance could have evolved into the modern corporation without the state. *See* Paul G. Mahoney, *Contract or Concession? An Essay on the History of Corporate Law*, 34 GA. L. REV. 873, 881 (2000). As prime evidence, Mahoney points to long-distance trade in Europe in the eleventh and twelfth centuries known as the Law Merchant, which were interregional commercial networks that relied on rules "set by merchants and enforced by merchants." *Id.* at 880. Historians, however, have produced a robust body of evidence undermining the idea that medieval merchants created a fully functioning system of transnational private law. *See, e.g.*, Emily Kadens, *The Myth of the Customary Law Merchant*, 90 TEX. L. REV. 1153, 1153–61 (2012). Zhang and Morley further observe that such self-regulatory interregional commercial networks could address "relatively simple economic transactions by linking outsiders and insiders via brokers and other middlemen, but they were unable to do so for business corporations with complicated, long-lasting activities and numerous unfamiliar owners." Zhang & Morley, *supra* note 13, at 2000.

corporations because the state's legal and administrative capacity is a necessary condition for the continued existence of large business corporations.

Although it shares some traits with the old concession theory, the new concession theory departs from the old concession theory on several fronts. First, the new theory reframes the underlying relationship between the modern state and the business corporation. The state is not reduced to a ministerial role of supplying charters on demand.[68] Instead, large corporations depend on the law and the administrative capacity of modern states for their very existence.[69] Although this relationship is perhaps harder to observe than the visual of state government officials handing out charters to corporations, it nevertheless captures the essence of what business corporations are: large groups of humans who rely on the coercive power of the state when pooling capital for business enterprises. Second, the obligation for corporations to engage in social responsibility does not derive from the act of chartering—or formal state action like the filing requirement[70]—that metaphysically gives "birth" to corporations. Rather, any purported obligation for social responsibility ought to derive from the corporation's reliance on law and legal institutions for their continuous existence and for the legal institutions that allow corporate equity holders to obtain the benefit of their bargains.[71] Finally, contrary to some proponents of the old concession theory who

68. For an account that does construe the state's relationship to business corporations as ministerial, see Hessen, *supra* note 43, at 1337 ("The state does not give life or birth to the corporation. Just as the registrar of deeds records every sale of land, and the county clerk records the birth of every baby, so the commissioner of corporations records the formation of every corporation—nothing more. The function of the state—to record the creation of corporations—is not essential to their existence any more than the registrar of births is essential to the conception or birth of a child." (emphasis omitted)).

69. After all, the modern state enables the corporation to credibly guarantee "potential investors that they will be treated uniformly by the law-enforcement apparatus regardless of their social affiliations." Zhang & Morley, *supra* note 13, at 1996 (emphasis omitted).

70. William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 435 (1989) ("The only corporate doctrine supporting concession theory was the requirement of filing with the state.").

71. It is important here that the role of the state is more than just the enforcement of private contracts. The late Professor Larry Ribstein, for instance, rejected the assessment that the state creates the corporation in a "sense that state courts and other agencies recognize and enforce corporate features" on grounds that such state involvement is "no different from state recognition and enforcement of any contract." Ribstein, *supra* note 17, at 86 n.22. Zhang and Morley's work, however, persuasively demonstrates how the legal authority required for large business enterprises is distinct from ordinary contract enforcement—the latter of which does not require significant reliance on the state's legal institutions. Zhang & Morley, *supra* note 13, at 2045 ("The legal technologies used by the corporation, particularly asset partitioning and tradable shares, are not socioeconomically viable without robust institutional support by a modern state.").

understand the privilege to be granted "by the state where they are incorporated,"[72] the privilege is not necessarily granted by the chartering state. Rather, the privilege for large corporations today often derives from multiple jurisdictions lending their legal enforcement capacity to a large group of investors who pool capital for business enterprises.[73] That is, a corporation may be incorporated in Delaware, but it relies on the legal institutions of every state (and foreign nation) where it operates to enforce the corporate bargain.

Several clarification points are in order. For one, the new concession theory abandons the old concession theory's obsession with assigning social responsibility by observing that the state granted modern corporate features like limited liability and tradable shares.[74] The fact that the corporation requires some form of the modern state's legal infrastructure is distinct from whether or not states offer business organizations certain features, such as limited liability for contractual claims—the latter of which can arguably be accomplished through private contracts.[75] Moreover, the new concession theory does not suggest that societal obligations ought to be imposed on all business enterprises, nor does it necessarily call for unfettered governmental intervention into the affairs of private business enterprises. Forming a corporation by filing with the state itself does not necessarily trigger social responsibility at the time of entity formation. An individual about to launch an e-commerce business on eBay or Amazon, for instance, can form a corporation through the click of a mouse.[76] And, at least in some states, they can designate themselves as

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72. Abdurrahman Kayıklık, *How Elizabeth Warren Is Reviving the Concession Theory of the Corporation*, COLUM. L. SCH.: CLS BLUE SKY BLOG (Nov. 1, 2019), https://clsbluesky.law.columbia.edu/2019/11/01/how-elizabeth-warren-is-reviving-the-concession-theory-of-the-corporation [perma.cc/HJW3-4692]. This approach is often criticized on grounds that the state granting charters today virtually have no authority to demand corporations to be managed in the name of public interest. Hessen, *supra* note 43, at 1337 ("When this information is presented to the secretary of state or commissioner of corporations in the state in which the incorporators choose to establish the legal residence of their enterprise, the state official has no discretionary powers. Such officials cannot demand any additional information; they cannot extract any oath of corporate allegiance to 'the public interest' . . . .").

73. *See* Stephen J. Choi & Andrew T. Guzman, *National Laws, International Money: Regulation in a Global Capital Market*, 65 FORDHAM L. REV. 1855, 1856 (1997) ("Today issuers regularly cross international boundaries to raise capital across multiple countries. Similarly, investors may place their funds in a multitude of investment opportunities around the globe." (footnote omitted)).

74. *See* Ribstein, *supra* note 17, at 86 ("Some have argued that the long survival of a rule of state involvement in the creation of the corporation lends some normative support to such state involvement." (footnote omitted)).

75. Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 429–30 (2000).

76. *See How to Build an Online Store in 5 Steps*, AMAZON, https://sell.amazon.com/build-an-online-store [https://perma.cc/4K58-29T3]; *Open an eBay Store*, EBAY: CUSTOMER SERV., https://www.ebay.com/help/selling/ebay-stores/opening-

the sole director and CEO of the corporation[77]—even if they may not actually have a functioning business.[78] It is hard to imagine why they owe social responsibility all of a sudden because they took the time to fill out glorified paperwork online.[79] On the flip side, social responsibility is particularly strong for large business enterprises that rely on the state's lending of legal enforcement capacity beyond the mere act of chartering.[80]

The fact that corporations rely on law and legal institutions also does not obligate corporations to serve the public interest in a way that a hard-core member of the Communist Party USA might fantasize about. One might observe, for instance, that efficiency gains created by large-scale corporate activity benefit society at large. As Bainbridge observes, "[p]rofits may not lift all boats, but they do grow the size of the social pie by creating new wealth" and "incentivize[] companies to develop new or improved goods and services" (p. 167).

Rather, the new concession theory fills a critical theoretical shortcoming for those who adhere to the shareholder value paradigm on why corporations try to obey the law. Of course, in some cases, investing in legal compliance can help protect long-term shareholder interests. As Professor Claire Hill explains, there is "a considerable convergence between profit maximization and corporate social responsibility."[81] But that is not always the case as an empirical matter. As Professor Jennifer Arlen observes, directors and officers can set compliance policies that predictably induce lawbreaking—ones that may benefit the corporation's wealth and their own personal wealth.[82] And by many accounts, our standard tools for holding corporations "even to bare legality suffer from inherent limitations and fail adequately to deter corporate misconduct."[83]

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ebay-store?id=4092 [https://perma.cc/B5XY-QHBR]; *Start Your Corporation on the Right Path*, LEGALZOOM, https://www.legalzoom.com/marketing/business-formation/inc [perma.cc/M7QM-RSHJ].

77. *See* Nazgole Hashemi, *Protected but Prejudiced: Redefining a Corporation's Ability to Pursue or Defend Litigation Without Counsel*, 55 LOY. L.A. L. REV. 373, 375 (2022); Bethany K. Laurence, *How to Start a Corporation in 7 Steps*, NOLO, https://www.nolo.com/legal-encyclopedia/form-corporation-how-to-incorporate-30030.html [perma.cc/4BW4-H9LB].

78. *See* Moon, *supra* note 33.

79. *Cf.* William J. Moon, *Tax Havens as Producers of Corporate Law*, 116 MICH. L. REV. 1081, 1095 (2018) (reviewing CHRISTOPHER M. BRUNER, RE-IMAGINING OFFSHORE FINANCE: MARKET-DOMINANT SMALL JURISDICTIONS IN A GLOBALIZING FINANCIAL WORLD (2016)) (noting that legal formalities may allow a corporation's business center to be in a particular jurisdiction using little more than glorified paperwork).

80. Zhang & Morley, *supra* note 13, at 1974; *see also* William J. Moon, *Transnational Corporate Law Litigation*, 74 DUKE L.J. (forthcoming 2025).

81. Claire A. Hill, Caremark *as Soft Law*, 90 TEMP. L. REV. 681, 681 (2018).

82. Arlen, *supra* note 58, at 4–5.

83. David Ciepley, *Can Corporations Be Held to the Public Interest, or Even to the Law?*, 154 J. BUS. ETHICS 1003, 1003 (2019) (internal punctuation omitted).

In that sense, legal compliance systems within corporations constitute a form of public good. The new concession theory helps us understand why corporate law ought to demand fidelity to the rule of law, even when it conflicts with profit maximization goals. Because a corporation is necessarily reliant on the modern state's legal institutions, it should put in effort to uphold the infrastructure responsible for its existence. To a certain extent, current law reflects this premise. Although American corporate law is principally constituted of "enabling" rules,[84] the set of doctrines that require legal compliance is mandatory and not subject to private ordering.[85] The mandatory nature of legal compliance helps ensure that corporations, as a collective group, uphold law and legal institutions. Consider, for instance, corporate managers who have an opportunity to engage in lucrative yet illicit anticompetitive behaviors that are perpetually undetected and underenforced.[86] If legal compliance were a set of default rules, such corporate decisionmakers would be encouraged to break the law to perform better than law-abiding corporations. The case for investing in legal compliance is particularly strong for large-scale businesses that can outstrip modern states in their political and social significance.

To say the least, the new concession theory is not only for those who are losing sleep over the ostensible decline of the shareholder value maximization theory. It has the potential to unchain stakeholder theorists from the intellectually rotten core of the old concession theory.

At a minimum, the new concession theory can help conceptualize a version of stakeholder capitalism that infuses societal interests into corporate law that mandates fidelity to the rule of law. Doctrinally, that can be accomplished by imposing heightened liability on the directors and officers who cause the corporation to violate "positive law."[87] Arguably, a recent shift in American corporate law's oversight jurisprudence—which requires directors and officers to implement policies, in good faith, aimed

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84. EASTERBROOK & FISCHEL, *supra* note 46, at 2 ("The corporate code in almost every state is an 'enabling' statute. An enabling statute allows managers and investors to write their own tickets, to establish systems of governance without substantive scrutiny from a regulator.").

85. Pollman, *supra* note 19, at 2025–27 ("[A] certain core of fiduciary duty remains mandatory, beyond the reach of private ordering, and at the heart of this is the elusive duty of good faith, which contains both obedience and oversight responsibility.").

86. JOHN C. COFFEE, JR., CORPORATE CRIME AND PUNISHMENT: THE CRISIS OF UNDERENFORCEMENT 81 (2020).

87. *E.g.*, Guttman v. Huang, 823 A.2d 492, 506 n.34 (Del. Ch. 2003) ("[O]ne cannot act loyally as a corporate director by causing the corporation to violate the positive laws it is obliged to obey." (citation omitted)). Fundamentally, directors and officers who fail to implement reasonable legal compliance programs designed to prevent lawbreaking or knowingly engage in unlawful activities amounts to betraying shareholders, even if it is pursued in the name of maximizing profit for shareholders. Leo E. Strine, Jr., Lawrence A. Hamermesh, R. Franklin Balotti & Jeffrey M. Gorris, *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629, 650 (2010).

at reducing lawbreaking[88]—reflects this vision of stakeholder capitalism. In recent years, significant shareholder claims have been sparked by widespread sexual harassment,[89] Boeing's 737 MAX airplane crashes,[90] and a deadly listeria outbreak connected to an iconic American ice cream company.[91] Described by Professor Roy Shapira as "a new era of enhanced oversight duties,"[92] an unusual number of shareholder suits in recent years have managed to survive a motion to dismiss. These lawsuits may better align the interest of corporations with that of societal interests by shaming directors and officers complicit in lawbreaking.[93]

Although imperfect in its own regard, heightened oversight liability is a powerful tool to effectuate societal interests through better enforcement of laws on the books, including environmental, labor, antitrust, and consumer protection laws. In some respects, this approach also addresses several criticisms underlying stakeholder capitalism. To Bainbridge, stakeholder theories suffer from a lack of a single goal, providing "no criteria for determining which of potentially multiple options are superior to others, let alone determining which is best" (p. 135). With all its imperfections, positive law is at least tied "securely to the entity that created it, with that same official entity calling the shots when the time comes to apply, interpret, alter, or overrule it."[94] This vision of corporate law also pushes back on criticisms that stakeholder capitalism is antidemocratic. To the extent that we can effectuate societal interests by ensuring that corporate law better internalizes external laws, it is also prodemocratic.

Those who wish to pursue a more radical departure from the status quo need not stop there. Today, general welfare laws of nation-states cannot fully capture the popular will even in well-functioning democracies. For one, the increasing mobility of capital enables business enterprises to evade domestic laws by physically "exiting" their territorial borders.[95] They can also deploy sophisticated legal devices through an army of

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88. *In re* McDonald's Corp. S'holder Derivative Litig., 289 A.3d 343, 360–62 (Del. Ch. 2023); Pollman, *supra* note 19, at 2015.

89. *In re* McDonald's Corp., 289 A.3d at 343.

90. *In re* Boeing Co. Derivative Litig., No. 2019–0907, 2021 WL 4059934 (Del. Ch. Sept. 7, 2021).

91. Carliss Chatman & Tammi S. Etheridge, *Federalizing* Caremark, 70 UCLA L. REV. 908, 952–55 (2023).

92. Roy Shapira, *A New* Caremark *Era: Causes and Consequences*, 98 WASH. U. L. REV. 1857, 1857 (2021).

93. *Id.* at 1861; Pollman, *supra* note 19, at 2013.

94. Lea Brilmayer, *Untethered Norms After* Erie Railroad Co. v. Tompkins*: Positivism, International Law, and the Return of the "Brooding Omnipresence"*, 54 WM. & MARY L. REV. 725, 726 (2013); *see also* Bainbridge, *Don't Compound*, *supra* note 57, at 668 ("In the case of regulatory compliance, there is an objective measure of what commands the firm must obey—only those commands promulgated by the appropriate government body are 'law.' ").

95. *See* William J. Moon, *Regulating Offshore Finance*, 72 VAND. L. REV. 1 (2019).

transactional lawyers aimed at regulatory arbitrage.[96] Corporations are unlikely to be able to completely transcend the modern state, but they have shown an increasing capacity to constrain the regulatory authority of modern states. The well-documented phenomenon of corporate tax evasion is just a fragment of that reality.[97] Then there is the problem of corporations shaping the law itself through massive political donations enabled by *Citizens United v. FEC*.[98] As assessed by Leo Strine and Nick Walter, in a post-*Citizens United* world, "corporations are likely to engage in political spending solely to elect or defeat candidates who favor industry-friendly regulatory policies, even though human investors have far broader concerns, including a desire to be protected from externalities generated by corporate profit seeking."[99] With that in mind, the new concession theory can be a foundation to imagine even more aggressive forms of corporate law and policy that can accommodate corporate purposes beyond profit maximization for shareholders. This version of stakeholder capitalism is particularly worth venturing into, given that it finds its normative grounding *not* on the recognition that shareholders may actually prefer ethical and social concerns over profits[100] but rather on the recognition that the very existence of large business enterprises is contingent on the continued blessings of modern states.

CONCLUSION

Bainbridge's new book is an essential read for anyone wishing to better understand the contemporary debate over the purpose of modern corporations. It is a first-class defense tactic—to use corporate law lingo—of an entrenched view, eager to fend off a formidable takeover attempt led by prominent academics, politicians, and business leaders. The

96. *See, e.g.*, Eric L. Talley, *Corporate Inversions and the Unbundling of Regulatory Competition*, 101 VA. L. REV. 1649 (2015); Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 227, 240–42 (2010).

97. *See* Jane G. Gravelle, *Tax Havens: International Tax Avoidance and Evasion*, 62 NAT'L TAX J. 727 (2009).

98. Citizens United v. FEC, 558 U.S. 310 (2010). For an excellent commentary contextualizing the impact of *Citizens United*, see Heather K. Gerken, *The Real Problem with* Citizens United*: Campaign Finance, Dark Money, and Shadow Parties*, 97 MARQ. L. REV. 903 (2014). *See also* LEE DRUTMAN, THE BUSINESS OF AMERICA IS LOBBYING 1 (2015) ("[F]or-profit corporations invest billions of dollars each year to influence political outcomes.").

99. Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and* Citizens United, 100 CORNELL L. REV. 335, 335–36 (2015).

100. *See* Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J.L. FIN. & ACCT. 247, 248 (2017) ("[I]t is too narrow to identify shareholder welfare with market value. The ultimate shareholders of a company . . . are ordinary people who in their daily lives are concerned about money, but not just about money. They have ethical and social concerns." (footnote omitted)).

book should be particularly lauded for being widely accessible without sacrificing nuance.

For those committed to stakeholder capitalism, the book is a powerful reminder that a different theoretical foundation is needed to build a house that justifies infusing social responsibility into business corporations. Such efforts would benefit from fine-tuning our knowledge in a way that more accurately captures the complex relationship between business corporations and the modern state. The new concession theory can be a promising starting point to work towards that goal.