SHAREHOLDER PRIMACY AND LABOR

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Thank you to Eileen Appelbaum and Simon Deakin for their incisive comments, and to Matt Finkin for organizing this symposium. What follows is an historical discussion of shareholder primacy and prospects for global convergence around the Anglo-American model. There's also a brief treatment of private equity and hedge funds. The comments are tilted to the United States, the focus of the book.

The primacy of shareholders is taken for granted today, at least in the Anglo-American world. But it was not always so. For several decades after the Second World War, shareholders were of lesser importance. One reason was the web of domestic regulations that followed the stock market crash and ensuing depression. Another was the Bretton Woods Agreement of 1944, which arose out of those events. Bretton Woods looked ahead to a postwar world in which nations would combine global trade with fiscal activism and social insurance. During the preceding decades of unregulated finance, expansionary deficits had caused devaluations and currency runs that often were followed by gold outflows, austerity, and labor squeezing. To guard against those risks, Bretton Woods contained financial rules that permitted nations to maintain autonomous fiscal and monetary policies. In an important essay, political scientist John Ruggie labeled the Bretton Woods system "embedded liberalism:" the international economy would be embedded in the domestic policies of the Keynesian welfare state. As intended, the new system tamed finance. From 1929 to 1970, there was a decline in stock market capitalizations and corporate funding through equity issues. When a nation adopted capital controls, as Bretton Woods permitted, capital had fewer exit options and labor's bargaining power was enhanced.[1]

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1. John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INTL. ORG. 379 (1982); Dennis Quinn, *The Correlates of Change in International Financial Regulation*, 91 AM. POL. SCI. R. 9131 (1997); Raghuram G. Rajan and Luigi Zingales, *The Great Reversals: The Politics of Financial Development in the Twentieth Century*, 69 J. FIN. EC. 5 (2003). The proffering of social protection as a *quid pro quo* for the risk of trade openness was not new. In Europe during the late 19th and early 20th centuries, openness was associated with protective labor standards and social insurance. Michael Huberman and Wayne Lewchuk, *European Economic Integration and the Labour Compact, 1850–1913*, 7 EUR. R. of EC. HIST. 3 (2003).

Restraints on finance moved in parallel with a decline in income inequality. The top 1%, who owned the bulk of household financial assets, saw the income derived from their capital holdings fall from 18% (1917) to 11% (1949) and down to 9% (1960). Conversely, labor's share rose steadily after the war. The trend reversed after 1980, when financial regulations were loosened, first in the liberal market economies (LMEs) of the Anglo-American world. There, the top 1% income share has a U-shape from the early twentieth century until today. The bottom of the U is the era of embedded liberalism. Top shares in Japan and the central European nations—the coordinated market economies (CMEs)—display an L-shape, relatively flat since the war. Nordic and Southern European inequality is between a U-shape and an L-shape.[2]

The postwar social compact incorporated organized labor in the formulation of national economic policies and centralized wage bargaining, chiefly but not exclusively among the CMEs. Writing about Europe in 1965, Andrew Shonfeld said that "The major interest groups are brought together and encouraged to conclude a series of bargains about their future behaviour, which will have the effect of moving economic events along the desired path." At the enterprise level there were micro corporatist structures such as codetermination, works councils, and, in Japan, enterprise unions. Those institutions were hallmarks of the coordinated market economy.[3]

In the United States, however, employers resisted labor's demands for participation in corporate decisions that were at a remove from the shop floor—price setting, financial and investment policies, and the administration of single-employer health and pension plans. In 1945, the auto workers union (UAW) sought a role in determining profits and prices. It asked for a large wage increase from General Motors that it insisted should be funded out of the company's wartime profits. The union also told GM not to raise its prices to subsidize the pay raise. GM's refusal led to a brutal four-month nationwide strike. The UAW and GM took a different approach in 1950, when they

2. Thomas Piketty and Emmanuel Saez, *Income Inequality in the United States, 1913–1998*, 118 QTRL. J. of EC. 1, 8 (2003); Anthony B. Atkinson, Thomas Piketty, and Emmanuel Saez, *Top Incomes in the Long Run of History,* 49 J. EC. LIT. 3 (2011); Evelyne Huber, Jingjing Huo, and John D. Stephens, *Power, Policy, and Top Income Shares,* 17 SOCIO-EC. R. 17 (2019) 23. Capital income includes capital gains.

3. Andrew Shonfeld, MODERN CAPITALISM: THE CHANGING BALANCE OF PUBLIC AND PRIVATE POWER (1965), 231; Phillipe C. Schmitter, *Still the Century of Corporatism?* 36 R. of POL. 85 (1974); Wolfgang Streeck, *Works Councils in Western Europe: From Consultation to Participation, in* JOEL ROGERS AND WOLFGANG STREECK, WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS (2009); David Soskice, *Reinterpreting Corporatism and Explaining Unemployment: Co-ordinated and Non-coordinated Market Economies*, *in* RENATO BRUNETTA AND CARLO DELL''ARINGA, LABOUR RELATIONS AND ECONOMIC PERFORMANCE (1990). The fascist countries also created corporatist institutions. Business fused with labor, and both were incorporated into, and controlled by, the state.

signed a five-year contract known as the Treaty of Detroit. It provided regular wage increases tied to the cost of living and an "annual improvement factor" based on long-term movements in labor productivity. In return, the UAW foreswore intra-contractual strikes and narrowed its ambit to workplace issues.[4]

Other companies imitated the Treaty of Detroit to varying degrees, leading to fixed allocations of corporate funds among workers, investors, and managers. Workers were paid the GM-style pay formula, shareholders received stable dividends, and executive salaries were "remarkably flat" from the late 1940s through the 1970s. Any cash that remained was retained to finance investment, so-called "plowing back." A 1956 Harvard study said that plowing back "is *the* American method of capital formation," instead of reliance on debt or new equity issues. Fixed shares reflected the stakeholder philosophy professed by United States executives, who, said the study, saw themselves as having "four broad responsibilities: to consumers, to employees, to stockholders, and to the general public…In any case, each group is on an equal footing; the function of management is to secure justice for all and unconditional maxima for none. Stockholders have no special priority." At the core of managerialism was the balancing of stakeholder interests.[5]

Shareholders may have been unhappy with their status but there wasn't much they could do about it. In the Anglo-American world, ownership was dispersed. In 1960, for example, individuals held 85% of United States equities, with the rest in the hands of institutional investors. Shareholders had little say over a company's allocative policies, including the division between retained and disbursed earnings, or anything else for that matter.[6]

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A capsule history of contemporary financialization begins with the development of the lucrative Euromarkets by London bankers in the early 1960s. It was the first step towards Bretton Woods's unraveling. The Euromarkets were based on regulatory arbitrage, permitting financial flows beyond the reach of capital controls. The spillover of funds into the Euromarkets threatened the ability of states to pursue their own economic policies in support of full employment. The Kennedy administration framed

4. Nelson Lichtenstein, WALTER REUTHER: THE MOST DANGEROUS MAN IN DETROIT (1995).

5. Harry DeAngelo, Linda DeAngelo, and Douglas J. Skinner, *Corporate Payout Policy,* 3 TRENDS IN FINANCE 126 (2008); Carola Frydman and Raven E. Saks, *Executive Compensation: A New View from a Long-Term Perspective: 1936–2005*, 23 REV. OF FIN. STUDIES 2100 (2010); Francis X. Sutton, Seymour E. Harris, Carl Kaysen, and James Tobin, THE AMERICAN BUSINESS CREED (1956), 84-85; Edward S. Mason, *The Apologetics of Managerialism,* 31 THE JOURNAL OF BUSINESS 1 (1958).

6. Margaret M. Blair, OWNERSHIP AND CONTROL: RETHINKING CORPORATE GOVERNANCE FOR THE TWENTY-FIRST CENTURY (1995), 46; Sutton et al., *ibid.* at 64-65, 84.

the situation as "a struggle over general financial policy between the national government on the one hand and on the other European bankers supported by domestic conservatives who had always opposed Democratic administrations."[7]

The drift away from embedded liberalism picked up speed after 1971, the year that Nixon ended gold convertibility. The rest of the story is well known. Stagflation during the 1970s led to disenchantment with the postwar compromise, followed by a wave of deregulation and privatization. With the dollar, franc, and pound falling, the past returned with a vengeance. To strengthen national currencies and please financiers, Margaret Thatcher and Ronald Reagan (unreservedly) and François Mitterrand (reluctantly) adopted austerity policies and accelerated financial deregulation, as with the United Kingdom's Big Bang. The following decade, centrists such as Bill Clinton, Tony Blair, and Gerhard Schröder also embraced financial deregulation, the economic centrality of stock markets, and an equity culture—an *Aktienkultur*. This was financialization.[8]

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The origins of modern shareholder primacy go back to the immediate postwar period, when a group of brilliant libertarians developed ideas that would guide shareholders in their quest to reclaim power. With Karl Popper, Friedrich Hayek founded the Mont Pélèrin Society in 1947, which would annually bring together libertarian intellectuals from Europe and the United States.[9] At the Society's first meeting, Hayek lamented the absence of lawyers, although shortly they would become part of the group. One was

7. Eric Helleiner, STATES AND THE REEMERGENCE OF GLOBAL FINANCE (1994), 87. This section draws from Louis W. Pauly, WHO ELECTED THE BANKERS? (2018); Judith Stein, PIVOTAL DECADE: HOW THE UNITED STATES TRADED FACTORIES FOR FINANCE IN THE SEVENTIES (2010).

8. Julia Tanndal and Daniel Waldenström, *Does Financial Deregulation Boost Top Incomes? Evidence from the Big Bang,* ECONOMICA 85 (2018): 232. Chile was a testing ground for neoliberal ideas, including those related to corporate organization. After Allende's overthrow in 1973, economists from within the University of Chicago**'s** orbit—the "Chicago Boys"—advised the Pinochet government to privatize pensions, health care, and state-owned companies. The privatized companies were sold, often underpriced, to politically connected insiders. It was a prelude to the Russian privatizations mentioned by Deakin but with at least one notable difference: The advisers were Harvard Boys, also neoclassical economists but less libertarian than their colleagues from Chicago. Felipe González, Mounu Prem, and Francisco Urzúa, *The Privatization Origins of Political Corporations: Evidence from the Pinochet Regime*, 80 J. EC. HIST. 417 (2020); Tarun Khanna and Krishna Palepu, *The Future of Business Groups in Emerging Markets: Long-Run Evidence from Chile*, 43 AC. MGT. J. 268; Janine R. Wedel, *The Harvard Boys Do Russia*, THE NATION, May 14, 1998.

9. At the Society's inaugural meeting, Hayek told the audience that "a great intellectual task must be performed," namely, to update liberal doctrines that went back to the 1830s. In that decade, said Karl Polanyi, "economic liberalism burst forth as a crusading passion, and *laissez-faire* [became] a militant creed." F.A. Hayek, "Opening Address to a Conference at Mont Pélèrin" in F.A. Hayek, STUDIES IN PHILOSOPHY, POLITICS, AND ECONOMICS (1967), 151, 153; Karl Polanyi, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME (1944), 137. On the Mont Pélèrin Society, see Nancy MacLean, DEMOCRACY IN CHAINS: THE DEEP HISTORY OF THE RADICAL RIGHT'S STEALTH PLAN FOR AMERICA (2017).

Henry G. Manne, a graduate of the University of Chicago's law school, who would go on to lead the law and economics movement. Manne's first publication was a 1955 review of a book written by an executive at General Electric, a managerialist corporation *par excellence.* The author praised business's charitable contributions to civic, cultural, and philanthropic organizations, which then were worth around 3% of dividends and more at the largest corporations. Manne said that stockholders would never believe that the contributions would make money for them. He claimed that they believed the opposite.[10]

A few years later, Hayek advanced a more comprehensive critique of managerialism. To restrain executives, "we shall have to confine them much more than we have yet done to one specific goal, that of the profitable use of the capital entrusted to the management by the stockholders…[Corporations] ought to be conducted primarily in the interest of the stockholders." Because stockholders' influence was "small and often negligible," Hayek recommended giving them the right to annually vote on the share of net earnings that would be reinvested, which would give power over payouts to themselves. This single change, he said, would "go very far towards making stockholder control of the corporation a reality" and would prevent executives from using corporate funds inefficiently, as allegedly was the case with plowing back and charitable donations.[11] Hayek's framing—shareholder primacy versus managerialism—would undergird future approaches to agency theory. Forty years later, economists still warned that "Managers, when they are not closely monitored, will pursue goals that are not in shareholders' interests."[12]

Milton Friedman published his enormously influential book, *Capitalism and Freedom*, in 1962. In a section titled "Social Responsibility of Business and Labor," Friedman picked up where Manne had left off, making a bogeyman out of corporate philanthropy, and, by extension, the managerialist model: "Few trends could so thoroughly undermine the very foundations of our free society as the acceptance by corporate officials of a social responsibility other than to make as much money for their stockholders as possible." The corporation, he said, "is an instrument of the stockholders who

10. Ralph L. Nelson, ECONOMIC ANALYSIS OF CORPORATE GIVING (1970), 26, 70; Henry G. Manne, *Review of Richard Eells, Corporation Giving in a Free Society*, 24 U. CHI. L.R. 198, 199 (1956).

11. F.A. Hayek, *The Corporation in a Democratic Society: In Whose Interest Ought It to and Will It Be Run? in* MELVIN ANSHEN AND GEORGE L. BACH, MANAGEMENT AND CORPORATIONS (1960).

12. Marianne Bertrand and Sendhil Mullainathan, *Enjoying the Quiet Life? Corporate Governance and Managerial Preferences*, 111 JOURNAL OF POLITICAL ECONOMY 1043 (2003). The article is a study of state-level constituency statutes that represented managerialism's last gasp.

own it." Friedman's prescription was rather weak: to forbid the tax deductibility of corporate donations.[13]

Three years later, Manne published a widely noticed article on "the market for corporate control." Manne praised hostile takeovers as a way to remedy managerial complacence and the waste of funds that ostensibly belonged to shareholders. To those investors who thought they could raise share prices more effectively than current executives, he recommended tender offers to be priced at a premium somewhere between the current price and the price they anticipated after they took control. A hostile takeover would provide protection to dissatisfied smallholders who otherwise could not remove incompetent incumbents, said Manne. He discussed two additional methods for taking control other than purchasing shares—proxy fights and mergers. Of the three he preferred mergers, and his thinking here may have been influenced by the conglomerate mergers then in full swing. Conglomerates fell by the wayside in the 1980s, when corporate raiders—hedge fund managers—began busting them up.[14]

Removing barriers to hostile takeovers developed into a prime recipe in the shareholder-centric cookbook discussed by Deakin. However, as I show in the book, the efficiency gains from hostile takeovers were overstated, and their profitability derived from a reallocation of rents from workers to owners. The breach of implicit contracts that accompanied hostile takeovers was described by Andrei Shleifer and Lawrence Summers as "rent-seeking and not value-creating exercises…takeovers that transfer wealth from stakeholders to shareholders must be hostile." The advent of an active market for corporate control was another nail—or ten—in the managerialist order.[15]

During the era of embedded liberalism, stock-based pay for CEOs was a small portion of their total compensation, and the share declined until the 1980s. The most important figure touting the benefits of stock-based pay was Michael C. Jensen, an economist trained at Chicago. In 1976, Jensen made the now-famous argument that stock-based pay would "align" the interests of shareholders and executives. Stock-based pay, whatever its defects, was the single most important governance mechanism for creating shareholder primacy.[16]

13. Milton Friedman, CAPITALISM AND FREEDOM (1962), 161.

14. Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. EC. 110 (1965).

15. Sanford M. Jacoby, LABOR IN THE AGE OF FINANCE: PENSIONS, POLITICS, AND CORPORATIONS FROM DEINDUSTRIALIZATION TO DODD-FRANK (2021), 46-47, note 28, 244; Andrei Shleifer and Lawrence Summers, *Breach of Trust in Hostile Takeovers*, *in* ALAN J. AUERBACH, CORPORATE TAKEOVERS: CAUSES AND CONSEQUENCES (1988).

16. Frydman and Saks, note 5, *passim*; Michael C. Jensen and William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure,* 3 J. FIN. EC. 305 (1976); Michael C. Jensen and Kevin J. Murphy, *Performance Pay and Top-Management Incentives*, 98 J. POL. EC. 225 (1990).

At the time, there were calls to add a larger number of outside directors to boards. The issue was elevated in 1965 by the New York Stock Exchange's new listing standard requiring at least two outside directors. Claims were made that outsiders would more effectively monitor executives than would insiders, and that they would serve as the shareholders' advocate. Indeed, they did. A study of forty countries finds that the degree of board independence is associated with the generosity of payouts.[17] An entirely different conception of outside directors came from reformers like Ralph Nader, who, in the late 1960s and 1970s, demanded that companies add outsiders to represent non-shareholder constituencies. Endorsing Nader's approach were socially responsible investors and, later on, union pension funds. It's one reason that unions backed proxy access in the 2000s.[18]

Michael Jensen is also known for championing the theory of free cash flow, which recommended that cash be paid to shareholders and that investments be financed with debt. Under managerialism, the bulk of earnings went to investments (plowing back), and also to rent sharing with employees and payouts to shareholders. Jensen, however, asserted that all free cash flow "must be paid out to shareholders if the firm is to be efficient and to maximize value for shareholders." Jensen and other finance economists believed that having to meet regular debt payments, instead of relying on internal funds, would discipline managers, forcing them to invest only in the most profitable projects. More money for shareholders and greater efficiency. Who could object?[19]

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Putting these ideas into practice required that institutional investors flex their collective muscle. They grew larger and stronger with the transition from dispersed to concentrated ownership, which began in the 1960s and ultimately went farthest in LMEs. Holdings of a United States company's ten largest investors rose from 16% (1980–1991) to over 40% (2017), and similarly in the United Kingdom.[20]

17. New York Stock Exchange, THE CORPORATE DIRECTOR AND THE INVESTING PUBLIC (1965), 7. Lynn A. Stout, *Bad and Not-so-Bad Arguments for Shareholder Primacy,* 75 S. CAL. L. REV. 1189 (2001); Kee-Hong Bae, Sadok El Ghoul, Omrane Guedhami, and Xiaolan Zheng, *Board Reforms and Dividend Policy: International Evidence*, 56 J. FIN. AND QUANT. ANLYS. 1296 (2021). The effectiveness of board monitoring depends on the vagaries of human behavior, which is why economists prefer economic incentives such as stock-based pay and the market for corporate control. Independent boards receive far less attention from economists.

18. Jacoby, LABOR IN THE AGE OF FINANCE, note 15 at 47-48, 152-166, 246.

19. Michael C. Jensen, *Takeovers: Their Causes and Consequences*, 2 J. EC. PERSPS. 21 (1988): 21-48. Debt is also used as an anti-union strategy. David A. Matsa, *Capital Structure as a Strategic Variable: Evidence from Collective Bargaining*, 65 J. OF FIN. 1197 (2010).

20. A. De La Cruz, A. Medina and Y. Tang, OWNERS OF THE WORLD''S LISTED COMPANIES (2019), 24; Roni Michaely, Jillian Popadak, and Christopher Vincent, *The Deleveraging of US Firms and Institutional Investors'' Role*, MUNICH REPEC ARCHIVE, paper no. 66128 (2015).

A variety of organizations were created to coordinate and legitimize the interests of large investors. Among the best-known are the Council of Institutional Investors and the International Corporate Governance Network, both established by CalPERS, a giant public pension fund based in California. Endorsing the approach were economists employed by international agencies (e.g., the IMF, OECD, and the World Bank), who believed that shareholder primacy would hasten economic growth. There were new entities that rated firms on their adherence to the shareholder agenda (e.g., Institutional Shareholder Services (ISS), and Governance Metrics International (GMI). Outside the G-20, compliance with the codes, even if skin-deep, signaled to foreign investors that the country was an attractive place to invest.[21]

Globally, pension funds are the second-largest owners of financial assets, worth around $34 trillion versus $51 trillion for banks. In the United States, defined-benefit (DB) occupational pension plans—public and private—hold assets worth around $12 trillion, which represent around 15% of total domestic financial assets (not including real estate). The funds were beneficiaries of financialization, while also fueling it via massive equity investments to fund baby-boomer retirements. One might expect—as I did when I began research for the book—that union-influenced pension plans, the largest of which are public funds like CalPERS—would be sympathetic to workers in the companies where they invest. Sometimes they were, but often they were not. Occupational pensions create wedges between the plan's beneficiaries and other workers, and between pension-less and pensioned workers.[22]

DB pension plans are one part of the institutional complex that constitutes market liberalism. The top seven OECD countries ranked by the size of their plans (relative to GDP) are the Netherlands, Iceland, Switzerland, Australia, the United Kingdom, Canada, and the United States. Six are classified as liberal market economies (LMEs) or LME-like. The LMEs also have bigger stock market capitalizations relative to GDP.[23]

21. Sanford M. Jacoby, *Convergence by Design: The Case of CalPERS in Japan*, 55 AM. J. COMP. LAW 239 (2007); Lucian A. Bebchuk, Alma Cohen, and Scott Hirst, *The Agency Problems of Institutional Investors 31* J. EC. PERSPS. 89, 103 (2017). On economists, see Bruce Kogut and Muir Macpherson, *The Mobility of Economists and the Diffusion of Policy Ideas: The Influence of Economics on National Policies*, 40 RESEARCH POLICY 1307 (2011).

22. BlackRock, WHO OWNS THE ASSETS? DEVELOPING A BETTER UNDERSTANDING OF THE FLOW OF ASSETS AND THE IMPLICATIONS FOR FINANCIAL REGULATION (2014); US Federal Reserve Bank, FLOW OF FUNDS (2021). CalPERS is the California Public Employees'' Retirement System, whose assets currently are worth around $500 billion. In the US, union-influenced pension plans are of two types: the public funds, whose trustees sometimes include union members, and multiemployer plans, in which unions are legally entitled to half the trustee positions.

23. The exception is Iceland. OECD.STAT at https:// stats.oecd.org/ Index.aspx? DatasetCode= PNNI_NEW; Katharina Pistor, *Legal Ground Rules in Coordinated and Liberal Market Economies,* EUROPEAN CORPORATE GOVERNANCE INSTITUTE (ECGI) LAW WORKING PAPER 30/2005

For the United States, there's direct evidence that shareholder primacy contributes to inequality. A recent study finds that from 1989 to 2017, $34 trillion of real equity wealth was created by the United States corporate sector. 44% of the increase is attributable to a reallocation from labor compensation to shareholders. The investors reaping these rewards primarily are the rich and the merely affluent, whose assets are managed by institutions. In the United States today, the top 1% owns 40% of United States equities; for the top 10% it's 84%. The equity holdings of the bottom 90% range from small to nil. It's not only shareholders who extract value. Top executives do too. They're often blamed for rising inequality, and their compensation does play a role, but payouts to institutional investors are much, much larger.[24]

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As Deakin shows, an ever-larger number of countries are adopting shareholder-centric laws, listing requirements, and voluntary codes concerning takeover bids and independent boards. It suggests that shareholder primacy is diffusing far beyond the LMEs. But what is the extent of consummate versus perfunctory compliance? Two examples of the latter: Evidence from Europe shows that dominant shareholders are circumventing mandatory bid laws, while in China, there's widespread evasion of legal mandates requiring outside directors.[25]

Table 1 suggests that institutionalizing the preferences of arms-length investors still has a way to go. In Europe and Japan, there is less reliance than in the US on stock-based pay (LTIP), which, as mentioned, is the most effective governance practice for inducing shareholder-centric outcomes (this despite the fact that in the United States, some CEOs manipulated their pay during the 2000s). Note that the figures in Table 1 overestimate the

(2005); Martin R. Schneider and Mihai Paunescu. *Changing Varieties of Capitalism and Revealed Comparative Advantages from 1990 to 2005: A Test of the Hall and Soskice Claims,* SOCIO-EC. R. 10 (2012) 731, 736.

24. Daniel L. Greenwald, Martin Lettau, and Sydney C. Ludvigson, How *the Wealth Was Won: Factors Shares as Market Fundamentals* NBER WORKING PAPER 25769 (2019); Kathleen M. Kahle and René M. Stulz, *Is the US Public Corporation in Trouble,* 31 J. OF ECON. PERS. (2017), 67, 69; Edward N. Wolff, *Household Wealth Trends in the United States, 1962 to 2016: Has Middle Class Wealth Recovered,* NBER working paper 24085 (2017); Emmanuel Saez and Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data,* 131 Q.J. ECON. 519 (2016). In 2000-2005 the three-highest paid executives of the fifty largest companies owned 0.14 percent of outstanding shares, double the 1941-1989 level. Alex Edmans, Xavier Gabaix and Dirk Jenter, *Executive Compensation: A Survey of Theory and Evidence,* HANDBOOK OF THE ECONOMICS OF CORPORATE GOVERNANCE (2017) 383-539. Although payouts drive inequality more than CEO pay, until recently U.S. unions focused on the latter. One reason was the needs of their pension plans. The issue is discussed in the book.

25. Jeremy Grant, Tom Kirchmaier, and Jodie A. Kirshner, *Financial Tunnelling and the Mandatory Bid Rule,* 10 EUR. BUS. ORG. L.R. (2009) 233; Xuanli Xie, Wei Shen, and Edward J. Zajac, *When Is a Governmental Mandate Not a Mandate? Predicting Organizational Compliance Under Semicoercive Conditions,* 47 J. OF MGT. 2169 (2021). For more on managerial impression management see James Westphal and Sun Hyun Park, SYMBOLIC MANAGEMENT: GOVERNANCE, STRATEGY, AND INSTITUTIONS (2020).

significance of stock-based pay outside the United States, where CEO pay is less sensitive to share performance than in the United States.[26]

TABLE 1. CEO COMPENSATION: TOTAL AND STOCK-BASED, 2019

	US	UK	GERMANY	FRANCE	JAPAN
Level	1475	610	743	566	156
LTIP share	.71	.48	.34	.36	.21

Level in million JPY. Sumio Morita, Naoto Ogawa, Yuki Sato, and Johnathon Brown, *CEO Pay Landscape in Japan, the U.S., and Europe—2019 Analysis*, Willis Towers Watson, Dec. 6, 2019. Figures are for companies listed on a country's largest exchange. LTIP is long-term incentive pay, usually tied to return on equity or total shareholder returns.

Then there's the pay ratio between the CEO and the company's median employee, which also shows large gaps between the United States and Europe, due to sky-high CEO compensation in the US. (Table 1) Rather than compare national ratios at a single point in time, it makes more sense to compare them during the periods that marked the takeoff of a nation's executive pay levels. In the United States it was the years from 1989 to 2007; in Germany it was 2006 to 2018. There's some arbitrariness here; the exercise is illustrative rather than definitive. The United States pay ratio rose 443% (from 61 to 331) during 1989–2007, while in Germany it rose 23% (from 43 to 53) during 2006–2018. I don't know the level of CEO pay that would trigger the German "outrage constraint" imposed by the media and the public, but it's lower than in the United States. The ceiling in Japan is very low. It kicks in when the CEO's pay exceeds $10 million, as was discovered by Nissan's former CEO, Carlos Ghosn. In corporate governance as in other

26. Volkan Muslu, *Executive Directors, Pay Disclosures, and Incentive Compensation in Large European Companies,* 25 *J. ACCTG. AUDITING & FIN.* 25 (2010) 569; Neslihan Ozkan, *CEO Compensation and Firm Performance: An Empirical Investigation of UK Panel Data,* J. FIN. MGT. 260 (2011); Luyao C. Pan and Xianming Zhou, *CEO Compensation in Japan: Why So Different from the United States?* 53 J. OF FIN. & QUANT AN. (2018) 2261; Shinya Shinozaki, Hiroshi Moriyasu, and Konan Uchida, *Shareholder Composition and Managerial Compensation,* 51 J. OF FIN. & QUANT. AN. (2016) 1719; email to author from Konan Uchida, Aug. 2021. The belief that stock-based pay contributed to the 2008 financial crisis was followed by a "drastic reduction" in its use outside the US. There also were fresh doubts about the superiority of US-style corporate governance. Matthias Efing, Harald Hau, Patrick Kampkötter, and Johannes Steinbrecher, Incentive Pay and Bank Risk-Taking: Evidence from Austrian, German, and Swiss Banks, 96 J. INTL. ECON. 96 (2015) S123; Jesse Hajer, The National Governance and Policy Context of Social Impact Bond Emergence: A Comparative Analysis of Leaders and Skeptics, 22 J. COMP. POL. AN. 116 (2020).

realms, the United States and Japan are outliers, while Europe, although variegated, is in between.[27]

Deakin and his co-authors have found in their studies of hedge funds in Japan that, to preserve managerialist practices, executives and boards repeatedly have rebuffed demands from hedge funds for divestitures, board seats, and the transfer of a corporation's cash to the funds and other shareholders. Given that Japanese companies have successfully repelled aggressive hedge funds, diversified institutional shareholders, who own smaller blocks of a company's shares, have an even smaller chance of forcing shareholder primacy and less of an incentive to try. Nevertheless, there's been an increase in share buybacks at a minority of firms in Japan.[28]

In Europe buybacks also are rising but their value and their portion of a firm's net income are well below levels in the United States. The median size of a country's ten largest buybacks in 2018 (in billions of USD) were: Germany (1.8), France (4.3) Japan (7.8), United Kingdom (17), and the United States (49). Regulatory stringency has been shown to reduce buyback size. In Japan and Europe, buybacks are subject to national and transnational (European Union) regulations that are stricter than in the United States. Whenever Europe or Japan appears to be catching up, the United States moves the goalposts farther down the field, at least when it comes to corporate payouts and CEO compensation. It's directional convergence but the gap remains large and, in some dimensions, has widened.[29]

27. Lawrence Mishel and Jori Kandra, CEO Pay Has Skyrocketed 1233% Since 1978, Economic Policy Institute, August 10, 2021; Daniel Beck, Gunther Friedl, and Peter Schäfer Executive Compensation in Germany, 90 J. BUSINESS ECON. (2020) 787; Robert L. Jackson Jr. and Curtis J. Milhaupt, *Corporate Governance and Executive Compensation: Evidence from Japan*, 2014 COLUM. BUS. L.R. (2014), 111.

28. John Buchanan, Dominic Heesang Chai, and Simon Deakin, HEDGE FUND ACTIVISM IN JAPAN: THE LIMITS OF SHAREHOLDER PRIMACY (2011); John Buchanan, Dominic Heesang Chai, and Simon Deakin, *Agency Theory in Practice: A Qualitative Study of Hedge Fund Activism in Japan,* 22 CORP. GOV: INTL. R. (2014), 296; Julian R. Franks, Colin P. Mayer, Hideaki Miyajima, and Ryo Ogawa, *Stock Repurchases and Corporate Control: Evidence from Japan*, RIETI Discussion Paper 18E-074, (2018). Although dated, an annual survey of Japanese executives asked them to rank the stakeholders they most prioritize. In 2001, 39 percent ranked shareholders first, whereas by 2012 it had fallen to 18 percent. It's unclear whether the survey is representative, but it should give pause to the notion that shareholder primacy is taking a grip, at least with respect to preferences if not behavior of senior executives. Mitsuru Yamashita, *The Corporate Community and Changes in the Japanese-style Employment System*, 3 JAPAN LABOR ISSUES (2019), 5, 11.

29. Lenore Palladino, *The $1 Trillion Question: New Approaches to Regulating Stock Buybacks*, 36 YALE J. ON REG. BUL. 89 (2019); Ni-Yun Chen and Chi-Chun Liu, *The Effect of Repurchase Regulations on Actual Share Reacquisitions and Cost of Debt*, *North Am. 55* J. ECON. FIN. (2021) 101298; Andrew Ludwig, *CEO Pay Trends Around the Globe*, HARV. L. FORUM ON CORP. GOV. Feb. 3, 2019 at https://corpgov.law.harvard.edu/2019/02/03/ceo-pay-trends-around-the-globe/ Data provided by Lenore Palladino. Twenty years ago, a survey asked managers how they would choose between stable dividend payouts—even if if they required layoffs—versus maintaining stable employment. Managers in Japan, Germany, and France chose stable employment, while in the UK and US they preferred to maintain dividends. Later on, in reaction to the 2008 financial crisis, US companies still "were more prone to cut labor costs and reduce leverage as compared to German and Japanese firms." Franklin Allen, Elena Carletti, and Yaniv Grinstein, *International Evidence on Firm Level Decisions in*

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Everything said until this point is about public corporations. Yet they seem to be disappearing. The number of listings on United States stock exchanges has fallen by more than half since the mid-1990s, while the number of companies backed by private equity has doubled from 2006 to 2017.[30] The change creates economies of scale for shareholder activism and taller barriers for hedge funds and private-equity buyouts. Has the growth of private equity been responsible for the decline in listed companies? Probably not. The primary cause of delistings is a plethora of mergers and acquisitions. Private equity's effect is to *add* a small number of listed firms via companies it funded that later went public.[31]

Private equity is a very important asset class for pension funds, especially for state and local employees. Currently, the average asset allocation is 9%, and larger than that for some giant public funds, such as the Los Angeles City's Employees' Retirement System and the Pennsylvania Public Schools Employees' Retirement System, both at 17%. Pension plan investments are a major source of capital for private equity, as Appelbaum notes.[32]

Public and union pension funds ignore their own principles when it comes to private equity. Private equity lacks transparency, investors have little or no ability to exercise either voice or exit, and there's not much in the way of social responsibility. In fact, pension funds are important customers of private equity funds that invest in fossil fuels.[33] Appelbaum and her co-author Rose Batt have documented how United States private equity investments often are harmful to workers. On average, they're associated with plant closings, layoffs, anti-union campaigns, and cost cuts through offshoring and contracting out. In Sweden, private equity is especially harmful to unionized workers. Where unions are strong, private equity is

Response to the Crisis: Shareholders vs. Other Stakeholders, 47 *J.* JAPANESE INTL. ECONOMIES 3 (2018).

30. By another measure, listed firms are more important than ever before. Although fewer in number, they are larger, such that their market cap as a share of GDP rose three-fold from 1975 to 2015. Kahle and Stulz, note 24 at 69.

31. Gabriele Lattanzio and William L. Megginson, and Ali Sanati, *Dissecting the Listing Gap: Mergers, Private Equity, or Regulation* (2021) SSRN working paper 332955. The same phenomenon is found in Western Europe: from a peak in 2006 through 2018, public listings fell by 21 percent. This is less than the half the US rate, possibly because of tougher European anti-trust enforcement. René M. Stulz, P*ublic versus Private Equity,* 36 OX. REV. ECON. POL. 275 276 (2020).

32. Heather Gillers, *Funds Pump More Money into PE*, WALL STREET JOURNAL, Jan. 22, 2022; Rob Kozlowski, *PennPSERS Eliminates $5.9 Billion Absolute-Return Portfolio*, PENSIONS & INVESTMENTS, Dec. 27, 2021.

33. Rosemary Batt and Eileen Appelbaum, *The Agency Costs of Private Equity: Why Do Limited Partners Still Invest?* 35 ACAD. MGT. PERSPS (2021) 45.

associated with more layoffs than where they are less powerful. In this respect the United States is not exceptional. [34]

In retrospect, I wish my book had delved deeper into hedge funds. Their power over companies derives from the large holdings they can amass to put a firm in play. Since 2012, the book's terminus, the number of hedge fund campaigns in the United States has more than doubled. Enabling their activism are several recent changes. Staggered boards have nearly disappeared, making it easier for hedge funds to take board seats. A similar effect obtains because large companies have voluntarily adopted more lenient proxy access rules. Dodd-Frank's ban on broker voting reduced the number of shares voted in support of management, another boon to hedge funds. What makes these changes notable is that all of them were advocated by pension funds, public and union, one of many paradoxes **associated** with worker pension funds.

Hedge fund managers are reincarnations of corporate raiders from the 1980s (who also were funded by pension plans). Like the raiders, hedge funds seek to disgorge a company's cash, either by breaking up the company, or simply by grabbing cash on hand. Also like the raiders, they have short-time horizons and are associated with cuts in R&D budgets. The median time from a hedge fund's announcement of targeting to its exit is around nine months. The evidence that hedge funds improve long-term performance and profits is weak. Hedge funds also target socially responsible firms in the belief that social responsibility signals that the firms are making "wasteful" expenditures. Friedman and Manne would have been pleased.[35]

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In 1992 Francis Fukuyama pronounced that liberalism's global return marked the end of history. The claim was a mirror image of Karl Polanyi's 1944 opus, *The Great Transformation*, which documented the movement from liberalism to the Keynesian welfare state. Polanyi wrote as if the great transformation had stopped the wheels of change. Surely, he did not believe it, but the book failed to discuss evidence that a countermovement already was underway. There was no mention of Friedrich Hayek, who also published a widely noticed book, *The Road to Serfdom*, in 1944, nor of the University of Chicago's increasingly vocal band of libertarians and their

34**.** Julia Rock, *How Workers Unknowingly Fund the Climate Crisis with Their Pensions,* THE GUARDIAN, Nov. 15, 2021; Eileen Appelbaum and Rosemary Batt, PRIVATE EQUITY AT WORK: WHEN WALL STREET MANAGES MAIN STREET (2014); Martin Olsson and Joacim Tåg, *Private Equity, Layoffs, and Job Polarization,* 35 J. LAB. EC. tableot2017), 697.

35. This section draws from Albert M. Ahn and Margarethe F. Wiersema, *Activist Hedge Funds: Beware the New Titans*, 35 ACAD. MGT. PERSPS. (2021) 96; John C. Coffee Jr. and Darius Palia, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance*, 41 J. CORP. L. (2015) 545. Also see Mark R. DesJardine, Emilio Marti, and Rodolphe Durand, *Why Activist Hedge Funds Target Socially Responsible Firms: The Reaction Costs of Signaling Corporate Social Responsibility* 64 ACAD. MGT. J. 851 (2021).

fellow travelers. One Chicago economist, Henry C. Simons, attacked the Beveridge Plan in the same year that Hayek published his book. Also missing was Michal Kalecki, the Polish Marxian economist. In a 1942 lecture, Kalecki said that Keynesian spending had brought full employment to the United States and the United Kingdom, but that this would draw opposition from the business community. Businessmen, he said, had a general dislike of government expenditures and low unemployment rates. They believed that tight labor markets would cause "the sack" to lose its power to prevent workers from getting "out of hand."[36]

When the Covid pandemic first took hold in 2020, I thought that it might weaken neoliberalism. During the economic collapse of the 1930s, individuals came to see each other as fellows, stuck in the same leaky boat. Robert Putnam captured the idea in his book, *Bowling Alone*, while historian Peter Baldwin reckoned with it through the concept of risk groups that constitute a *Schicksalgemeinschaft*, a community of shared fate. Elsewhere Baldwin examined the 19th century response to cholera through a similar lens. It seemed possible that the pandemic would strengthen collective sentiments and support for social spending.[37]

Seeds of change sprouted in 2021. Eight million United States workers quit their jobs in the second half of the year, the so-called Great Resignation. It was a staggering mass movement. Major work stoppages occurred at several large companies, and unions began poking at previously impregnable giants like Amazon and Starbucks. Walmart defensively raised its wage rates (though they remain low) and converted two-thirds of its part-time jobs to full-time. Workers seemed to be "out of hand." Facing labor shortages, employers raised hourly earnings (for private non-supervisory employees) by 6.2%, the largest gain in recent years. Meanwhile, seven in ten of surveyed individuals said that they approve of labor unions, the highest figure since 1965. Among that group are more than a few Republicans.[38]

36. Francis Fukuyama THE END OF HISTORY AND THE LAST MAN (1992); Polanyi at note 9; F.A. Hayek, THE ROAD TO SERFDOM (1944); MacLean, note 9 at 38-39; Henry C. Simons, *The Beveridge Program: An Unsympathetic Interpretation*, 53 J. OF POL. EC. (1945) 2132; M.A. Kalecki, *Political Economy of Full Employment*, 14 POL. Q. (1943) 233. On the counterrevolution, see James T. Patterson, CONGRESSIONAL CONSERVATISM AND THE NEW DEAL (2014); Kim Phillips-Fein, INVISIBLE HANDS: THE MAKING OF THE CONSERVATIVE MOVEMENT FROM THE NEW DEAL TO REAGAN (2009); Robert M. Collins, THE BUSINESS RESPONSE TO KEYNES 1929-1964 (1981).

37. Sanford M. Jacoby, *Return of the Repressed: Will the Coronavirus Bring a Great Transformation to America?* 41 COMP. LAB. L & POL. J. 503 (2021); Robert D. Putnam, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000) Peter Baldwin, THE POLITICS OF SOCIAL SOLIDARITY: CLASS BASES OF THE EUROPEAN WELFARE STATE, 1875-1975 (1990); Peter Baldwin, CONTAGION AND THE STATE IN EUROPE, 1830-1930 (1999).

38. David Dayen, *The Great Resignation*, AMERICAN PROSPECT, Nov./Dec. 2021, 16; https://www.bls.gov/web/wkstp/monthly-listing.htm; Celine Castronuovo, *Walmart to Convert Majority of US Hourly Jobs to Full-time Positions*, THE HILL, April 14, 2021;

There's a less heroic way of reading 2021. The wage figure fails to adjust for inflation, which spiked that year and has remained at high levels ever since. It caused inflation-adjusted hourly earnings to *decline* 1.5%. The only workers whose real wages increased were those employed in the hospitality and food service industries, where quit rates were highest. Productivity rose 6.6% in the fourth quarter, meaning that wages still are not tracking productivity, the Treaty of Detroit formula that began to unravel in the 1970s. In other words, labor's share of an expanding pie continues to shrink, while CEOs and shareholders keep getting ever-larger slices.[39] CEOs at major corporations received *real* pay increases totaling 10% in 2021. It also was a banner year for profits due, in part, to the gap between prices and wages. Stock buybacks hit record levels, more than $1 trillion across the United States economy. The S&P 500 companies repurchased $850 billion of their shares, worth about $34,000 for each of their employees. Dividends also reached new heights, worth a total of $511 billion for the year. These trends persisted in 2022.[40]

George Akerlof, the Noble Prize-winning economist, said some years ago that if employers fail to provide real wage protection from inflation, "workers' anger" would surge. There's definitely anger out there. Workers are mindful that their pay is failing to keep up with inflation. Employees at Apple Stores have begun to organize and, as Akerlof predicted, they're demanding better real wages as well as a share of the company's record profits. It hasn't helped Apple that its board recently approved a pay package for its CEO worth $99 million.[41]

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Can anything be done to restrain shareholder primacy, especially in the LMEs where it's most deeply rooted? Raising union density in the private sector, currently 6.1% in the United States (the same level as in 1929) would

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https://www.bls.gov/news.release/wkstp.nr0.htm; https://www.bls.gov/web/wkstp/monthly-listing.htm; https://www.bls.gov/news.release/archives/realer_02102022.htm; https://news.gallup.com/poll/354455/approval-labor-unions-highest-point-1965.aspx . There are echoes of the Great Resignation in Europe but as of this writing they are faint. See *The Great Resignation: Is the American Workplace Revolution Coming to Europe?* EURONEWS, Dec. 1, 2021; *Evidence for the ''Great Resignation'' is Still Hard to Find,* THE ECONOMIST, Dec. 5, 2021.

39. Ben Winck, *Most Americans Saw Their Real Wages Drop in 2021 — Except for Hotel and Restaurant Employees*, BUSINESS INSIDER, Jan. 12, 2022; https://www.bls.gov/news.release/prod2.nr0.htm; https://www.bls.gov/news.release/realer.t01.htm;Anna M. Stansbury and Lawrence H. Summers, *Productivity and Pay: Is the Link Broken?* NBER working paper 24165 (2018); Ian Dew-Becker and Robert J. Gordon, *Where Did the Productivity Growth Go? Inflation Dynamics and the Distribution of Income*, 68 BROOKINGS PAPERS ON ECONOMIC ACTIVITY 67 (2005).

40. Kristin Broughton, *Bigger Bonuses Lift CFO Pay as Companies Rebound from Pandemic Shock*, WALL ST. J., Feb. 3, 2022; Mark Maurer, *Companies Plan More Dividends, Share Buybacks*, WALL ST. J., Dec. 23, 2021; *S&P Dow Jones Indices Reports U.S. Indicated Dividend Payments*, DOW JONES INSTITUTIONAL NEWS, Jan. 4, 2022.

41. George A. Akerlof, *What They Were Thinking Then: The Consequences for Macroeconomics During the Past 60 Years*, 33 J. EC. PERSP. 171 (2019); Reed Albergotti, *Some U.S. Apple Store Employees Are Working to Unionize, Part of A Growing Worker Backlash*, WASH. POST, Feb. 18, 2022.

be a start. In the United States, the presence of a union is associated with reduced levels of CEO pay and buybacks.[42] The negative buyback effect is recapitulated in the case of German codetermination. Codetermination also is associated with higher levels of retained earnings relative to debt, that is to say, with less risk exposure for the corporation and its employees.[43]

There have been several recent proposals to reform corporate governance. The TUC's report on corporate governance is an important development.[44] It says that "directors' duties should be rewritten to remove the current requirement for directors to prioritize the interests of shareholders over those of other stakeholders:" that worker-directors must comprise one-third of board seats; and that companies report publicly the figures on wages and shareholder payouts over a ten-year period. The report challenges claims by the country's pension funds that any reduction in payouts from United Kingdom companies will harm pension returns. Its rejoinder is that the United Kingdom's pension funds have more equity assets outside the country than within (presumably on the other side of the pond), so they wouldn't be terribly hurt by a reduction in payouts. There's no mention of United States workers, whose employers fund the payouts flowing into British pension plans.

The United States labor movement for the most part has advanced few criticisms of the shareholder-centric ethos. It's tangled in the contradictions of its pension capital. The task has been left to others, as with Senator Elizabeth Warren's proposed Accountable Capitalism Act of 2018. Corporations would be compelled to obtain federal charters requiring them to create public benefits, an old idea revived in the 1970s by Ralph Nader and his followers. The Act stated that directors have an obligation to consider stakeholder interests—not only shareholders but also communities, customers, employees, and the environment. It mandated that 40% of the board be selected by employees. The legislation also contained limits on buybacks.[45]

42. Feng Qianqian, Feng Jiang, Erik Lie, and Tingting Que, *The Effect of Labor Unions on CEO Compensation,* 52 *J.* FIN. & QUANT. AN. 52 (2017) 553; Rafael Gomez and Konstantinos Tzioumis, *What Do Unions Do to Executive Compensation?* London School of Economics and Political Science, Centre for Economic Performance, (2006); John DiNardo, Kevin F. Hallock, and Jörn-Steffen Pischke, *Unions and Managerial Pay*, NBER working paper 6318 (1997).

43. Sheng-Syan Chen, Yan‐Shing Chen, and Yanzhi Wang, Does Labor Power Affect the Likelihood of a Share Repurchase? 44 *Fin. Mgt.* 623 (2015); Jie He, Xuan Tian, and Huan Yang, *Labor Unions and Payout Policy: A Regression Discontinuity Analysis,* SSRN ELECTRONIC JOURNAL (2016) at http://centerforpbbefr.rutgers.edu/2011PBFEAM/Download/AS/AS-05/2011PBFEAM-096.pdf Marc Rapp, Marc Steffen, and Michael, Wolf, *Strong Codetermination−Stable Companies: An Empirical Analysis In Lights Of The Recent Financial Crisis,* Mitbestimmungsreport, No. 51e, Hans-Böckler-Stiftung, Institut für Mitbestimmung und Unternehmensführung (I.M.U.)

44. TUC, Commonwealth and the High Pay Centre, *Do Dividends Pay our Pensions?* Jan. 10, 2022.

45. The Accountable Capitalism Act of 2018, S. 3348, 115th Cong. 2nd sess. (2017–2019) at https://www.warren.senate.gov/imo/media/doc/Accountable%20Capitalism%20Act.pdf; Donald E.

The recently-signed Inflation Reduction Act contains a provision for a 1% tax on buybacks, which the Biden administration hopes will induce companies to plow back cash, including for workers' pay rather than for shareholders. The tax is so small, however, that even Wall Street says it will not have much of an effect. Besides Elizabeth Warren, others on the Democratic Party's left flank, people like Senators Sherrod Brown, Bernie Sanders, and Ron Wyden, continue to press for worker representatives on boards and for stricter limits on buybacks than those in the Inflation Reduction Act. On another front, California now requires at least one woman on corporate boards, less than Norway's 40% rule but possibly a harbinger for other parts of the country. Whether the presence of female directors will affect shareholder primacy is unknown, although it may reduce directorial groupthink. Currently there's an SEC proposal to enhance corporate transparency around climate issues, which might establish a precedent for transparency in employment matters, although there is stiff opposition to the proposal.[46]

Leo Strine Jr., the former chief justice of the pro-corporate Delaware Supreme Court, has offered his own plan for "fair and sustainable capitalism." It overlaps the TUC and Warren proposals but predictably tilts towards private orderings. A significant recommendation is to widen fiduciary duties to permit consideration of stakeholder interests. Strine recommends that companies annually disclose how they treat stakeholders, including reports on their investments in human capital, something else that the SEC is considering. He also endorses the adoption of European style works councils. Strine, like Warren and other Democrats, supports passage of the PRO Act that would make it easier to organize unions in the private sector.[47]

There are parts of these proposals that do not excite unions. The labor movement is skeptical of the stakeholder approach because it undermines the prioritization of worker interests, the group that unions believe has the largest stake in the corporation. In the past, unions shied away from seeking employee directors and from works councils, believing that they dilute the

Schwartz, *Federal Chartering of Corporations: An Introduction* GEO. LJ 61, 71 (1972); Jacoby, LABOR IN THE AGE OF FINANCE, note 15 at 221-223.

46. Peter Eavis, *Will Tax End Buying Back of Stocks?* NY TIMES, Nov. 2021; Patricia Elias, *Climate Change Is a Business Risk That Can No Longer Be Ignored,* NY L.J., Nov. 1, 2021.

47. Leo E. Strine Jr., *Toward Fair and Sustainable Capitalism,* U OF PENN, INST FOR LAW & ECON RESEARCH PAPER (2019). As Grace Palladino argues, providing employee voice in corporate governance will require adaptation of European practices to the US context. It also will require scrutiny to ensure compliance. Lenore Palladino, *Economic Democracy at Work: Why (and How) Workers Should Be Represented on US Corporate Boards* 1 J. LAW AND POL. ECON. 373 (2021). In Europe, some companies are evading legal requirements for consultation and information-sharing with their works councils. Valerio Pulignano and Jeremy Waddington, *Management, European Works Councils and Institutional Malleability,* 26 EUR. J. IND. RELS. 5 (2020).

union's role, remove an incentive for organizing, and blur the line between management and workers. However, the idea has surfaced a few times in recent years. At the grassroots, the Food and Commercial Workers union in Southern California recently demanded that worker-elected directors be added to the boards of the region's supermarket chains. But this is an isolated occurrence.[48]

The response to trauma—financial crises, wars, and pandemics—has always had a darker side. Recall the mass movements launched by Father Coughlin, Charles Lindbergh, Oswald Mosley, and others who emulated fascist Germany and Italy. Coughlin, for one, loathed the financial elites in banking and Wall Street, especially "international bankers" (read Jews). Throughout the world today, there are echoes of the past: nationalism, anti-elitism, and antipathy to minorities and immigrants. There's also an anti-finance undercurrent. Some groups on the far right supported the Occupy Wall Street movement. More recently, the right has attacked proponents of ESG investing for their "woke" ideas, including Larry Fink, the CEO of BlackRock. These tendencies come mixed with anti-Semitic tropes, as with attacks on George Soros and other financiers with Jewish backgrounds. [49]

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It's time to think more deeply and speak more forthrightly about what politics can do to restrain shareholder primacy. Unlike private orderings, the law's reach is market-wide and empowers those whose preferences otherwise count for nothing. More can be done to join democratic politics and discussions of corporate governance, other than during financial crises like the 1930s and 2008.

One barrier will be the collective action problem. The wealthy and the small number of financial institutions who manage their money can more easily mobilize to resist change than the vast majority with little in the way of financial assets. Another difficulty is that corporate governance is a recondite subject, not one that easily will motivate the citizenry.[50] That's where political leadership, including from labor unions, can play a role by translating shareholder primacy into everyday concerns. Neoclassical economists and those who emulate them will shake their heads at the prospect. Deep down they have a "lack of faith in the common sense of ordinary people and in the efficacy of political institutions." Today, a good

48. Jacoby, LABOR IN THE AGE OF FINANCE, note 15 at 327; Jaime Ding, *2 Out Of 3 Kroger Workers Struggle To Afford Food And Housing, Survey Finds,* LA TIMES, Jan. 11, 2022.

49. Spencer Sunshine, *The Right Hand of Occupy Wall Street,* THE PUBLIC EYE (2014); Sally Denton, *Why Is So Little Known About The 1930s Coup Attempt Against FDR?* THE GUARDIAN, Jan. 12, 2022; Patrick Beuth et al., *QAnon's Inexorable Spread Beyond the U.S.*, SPIEGEL INTl., Sept. 24, 2020; Thomas B. Edsall, *America Has Split, and It's Now in 'Very Dangerous Territory*, NY TIMES, Jan. 26, 2022.

50. Pepper D. Culpepper, QUIET POLITICS AND BUSINESS POWER (2011).

number of those who write about corporate governance remain "slaves of some defunct economist," as Keynes, the mastermind of Bretton Woods, wrote in 1935.[51] Fresh ideas about the corporation and its public purpose will have to come from other sources.

51. Dani Rodrik, *Understanding Economic Policy Reform* 34 J. OF ECON. LIT. 9, 33 (1996); John Maynard Keynes, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY (1936), 383.