Varieties of Shareholderism: Three Views of the Corporate Purpose Cathedral

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Amir N. Licht
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For helpful comments I am grateful to James Nelson, Mariana Pargendler, Elizabeth Pollman (the co-editor), Leo Strine, Jr., and to participants in the colloquium on Research Handbook on Corporate Purpose and Personhood. Accountability for all errors remains with me.

Abstract

This Chapter seeks to make three modest contributions by offering views of the corporate purpose cathedral that bear on the role of law in it. These views underscore the difference and the tension between an individual perspective and a societal/national legal perspective on the purpose of the corporation. First, it reviews a novel dataset on national legal shareholderism - namely, the degree to which national corporate laws endorse shareholder primacy - as an exercise in operationalizing legal constructs. Second, it anchors the two archetypal approaches of shareholderism and stakeholderism in personal human values. It is this connection with the fundamental conceptions of the desirable which animates attitudes and choices in this context. The upshot is potentially subversive: Legal injunctions to directors on corporate purpose might be an exercise in futility. Third, this Chapter highlights the importance of acknowledging the tensions between the two levels of analysis by looking at the works of prominent writers. Adolf Berle, Victor Brudney, and Leo Strine have been careful to keep this distinction in mind, which has enabled them to hold multiple views of the cathedral without losing sight of it.

Keywords: corporate purpose, corporate governance, fiduciary duties, stakeholders

JEL Classifications: K22

Amir N. Licht
Professor of Law
Interdisciplinary Center Herzliya, Harry Radzyner School of Law
8 University Street
Herzliya 4610101, Israel
phone: +972 995 273 32
e-mail: alicht@idc.ac.il

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Three Views of the Corporate Purpose Cathedral

Amir N. Licht*

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* Professor of Law, Harry Radzyner Law School, Interdisciplinary Center Herzliya, Israel. alicht@idc.ac.il. For helpful comments I am grateful to James Nelson, Mariana Pargendler, Elizabeth Pollman (the co-editor), Leo Strine, Jr., and to participants in the colloquium on Research Handbook on Corporate Purpose and Personhood. Accountability for all errors remains with me.

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I. INTRODUCTION

Any analysis of corporate purpose, or the objective of the business corporation, is, has always been, and must be, intimately related to the status and role of corporate stakeholders. These are its shareholders, creditors, employees, suppliers and customers, the communities in which it operates, and the general social and natural environment. The discourse on the purpose of the corporation has a very long pedigree. Milton Friedman's much-debated thesis - that "the social responsibility of business is to increase its profits" - which is often treated as the battle cry of shareholder-wealth maximizers, was published more than fifty years ago, in 1970.[1] A deeper and more thorough analysis was presented by Adolf Berle and E. Merrick Dodd in their scholarly exchange during the 1930s.[2]

Courts have been called to state the law on this subject even earlier. One could go a little bit further back in time to the iconic decision in *Dodge v. Ford Motor Co.* of 1919, where the Michigan Supreme Court famously held that "[a] business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end."[3] The truly seminal judicial holding (and my personal favorite) comes from even further back in legal history. Bowen LJ's 1883 decision in the English Chancery Division in *Hutton v.*

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[1] Milton Friedman, *The Social Responsibility of Business is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 32.

[2] *See* Adolf A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931); Adolf A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932).

[3] Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919).

West Cork Railway Co. deserves quoting at some length, as it foreshadowed much of what has ensued since then:

> Most businesses require liberal dealings. The test there again is not whether it is *bonâ fide*, but whether, as well as being done *bonâ fide*, it is done within the ordinary scope of the company's business, and whether it is reasonably incidental to the carrying on of the company's business for the company's benefit. Take this sort of instance. *A railway company, or the directors of the company, might send down all the porters at a railway station to have tea in the country at the expense of the company. Why should they not? It is for the directors to judge, provided it is a matter which is reasonably incidental to the carrying on of the business of the company*, and a company which always treated its employés with Draconian severity, and never allowed them a single inch more than the strict letter of the bond, would soon find itself deserted—at all events, unless labour was very much more easy to obtain in the market than it often is. *The law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company*.[4]

The literature on the subject is vast. For example, Friedman's article has been cited in over 20,000 scholarly works by the fall of 2020, according to Google Scholar. Thomas Donaldson and Lee Preston's conceptual survey has been cited in nearly 15,000 scholarly works,[5] and R. Edward Freeman's landmark book, *Strategic Management: A Stakeholder Approach* - in over 40,000 works.[6] The most recent additions to this perpetual exchange leverage the massive economic disruption wrought by the Covid-19 pandemic to propound claims for or against (but usually for) stakeholderism, namely, a stakeholder-oriented corporate governance. For example, the World Economic Forum has endorsed "Stakeholder Principles in the COVID Era", about which it declared that the "first priority is to win the war against coronavirus" and committed to "continue to embody 'stakeholder capitalism'".[7]

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[4] Hutton v. West Cork Ry. Co. (1883) 23 Ch.D. 654, 672-673 (U.K.) (emphases addes).

[5] Thomas Donaldson & Lee E. Preston, *The Stakeholder Theory for the Corporation: Concepts, Evidence, Implications*, 20 ACAD. MGMT. REV. 65 (1995).

[6] R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH (1984).

[7] World Economic Forum (WEF), Stakeholder Principles in the COVID Era (April 2020), http://www3.weforum.org/docs/WEF_Stakeholder_Principles_COVID_Era.pdf. On the WEF's Stakeholder Capitalism *see* World Economic Forum, Stakeholder Capitalism: A Manifesto for a Cohesive and Sustainable World, 14 Jan. 2020, https://www.weforum.org/press/2020/01/stakeholder-capitalism-a-manifesto-for-a-cohesive-and-sustainable-world/. *See* also International Corporate

These calls come on the heels of the Business Roundtable's 2019 Statement on the Purpose of a Corporation, in which prominent corporate leaders announced that they "share a fundamental commitment to all of our stakeholders."[8] Academics were quick to respond to the current wave of stakeholderism.[9] In short order, empirical evidence began to be marshaled, as studies examine whether firms' stock prices during the pandemic crisis related to their corporate social responsibility activities.[10]

To those who are familiar with the earlier rounds of this debate, the views propounded now, energized as they are by the Covid-19 emergency circumstances, are modestly novel. They all revolve around the question whether it is good - in different meanings of goodness - to have regular business companies managed with a single focus on shareholder interest or with multiple foci on the interests of multiple stakeholders. Crucially, commentators from all angles of this debate often point to the law as a key mechanism in engendering the outcome they argue about.

Against this backdrop, this Chapter seeks to make three (also modest) contributions by offering views of the corporate purpose cathedral that bear on the role of law in it. These views underscore the difference and the tension between an individual perspective and a societal/national legal perspective to the purpose of the

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Governance Network, Governance Priorities During the Covid-19 Pandemic, 23 April 2020, https://bit.ly/2STYQZo; Byron Loflin, *The Coronavirus Crisis will Speed the End of Shareholder Primacy,* FAST COMPANY, 14 April 2020, https://www.fastcompany.com/90489502/the-coronavirus-crisis-will-speed-the-end-of-shareholder-primacy. Byron Loflin is the global head of board engagement at Nasdaq.

[8] The Business Roundtable, Statement on the Purpose of a Corporation (2019), https://opportunity.businessroundtable.org/ourcommitment/.

[9] *See*, e.g., Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, CORNELL L. REV. (forthcoming 2020); Edward Rock, For Whom is the Corporation Managed in 2020?: The Debate over Corporate Purpose, WASH. U. L. REV. (forthcoming 2021); Colin Mayer, Shareholderism Versus Stakeholderism – a Misconceived Contradiction. A Comment on 'The Illusory Promise of Stakeholder Governance' by Lucian Bebchuk and Roberto Tallarita, European Corporate Governance Institute - Law Working Paper No. 522/2020 (2020).

[10] *See* Wenzhi Ding *et al.*, Corporate Immunity to the COVID-19 Pandemic, J. FIN. ECON. (forthcoming 2020); Rui Albuquerque *et al*, Love in the Time of COVID-19: The Resiliency of Environmental and Social Stocks, CEPR Discussion Paper No. DP14661 (2020); Elizabeth Demers *et al.*, ESG didn't Immunize Stocks against the COVID-19 Market Crash. NYU Stern School of Business working paper (2020).

corporation. After a brief introduction to the structural aspects of shareholderism and stakeholderism, I first review a novel dataset on national legal shareholderism - namely, the degree to which national corporate laws endorse shareholder primacy. Constructed in a joint study with Renée Adams, this measure is the first to address the comparative aspect of legal shareholderism directly by polling legal experts about it. Second, I review research that anchors these two archetypal approaches in personal human values. It is this connection with the fundamental conceptions of the desirable that everybody harbors which animates attitudes and choices in this context. The upshot is potentially subversive: Legal injunctions to directors on the corporate purpose might be an exercise in futility. Third, I highlight the importance of acknowledging tensions between the two levels of analysis by looking at the works of prominent writers. Adolf Berle, Victor Brudney, and Leo Strine, Jr. have been careful to keep this distinction in mind, which has enabled them to hold multiple views of the cathedral without losing sight of it.

II. MONISM, PLURALISM, SHAREHOLDERISM, STAKEHOLDERISM

Stances about the purpose of the corporation correspond with a conceptual distinction between monistic and pluralistic approaches.[11] Monism and pluralism refer to the number of stakeholder constituencies whose interest is identified with, or linked with, that of the corporation. That is, those in whose interest the company is managed, or, simply, those who matter most. Promoting the interest of the latter with exceptionally demanding duties of loyalty entails affording analogically strong legal protection to that or those constituencies, respectively. The monistic approach upholds shareholder primacy as the focal objective - i.e., the maximand: that which is

[11] *See* Amir N. Licht, *The Maximands of Corporate Governance: A Theory of Values and Cognitive Style*, 29 DEL. J. CORP. L. 649 (2004); Ronald K. Mitchell *et al.*, *Stakeholder Agency and Social Welfare: Pluralism and Decision Making in the Multi-Objective Corporation*, 41 ACAD. MGMT. REV. 252 (2016).

to be maximized. Replacing shareholder primacy with interest, or welfare, or value matters little. While these concepts do not fully overlap, they are sufficiently close for the present purposes to be used interchangeably.[12] Whichever formula one adopts, they all connote a clear sense of prioritizing shareholders and treating other stakeholders as important and relevant yet only instrumentally, as means to the end of promoting shareholder interest. In contrast, a pluralistic approach to corporate purpose eschews prioritizing the interest of one constituency over those of others. Instead, it treats all stakeholders as equally deserving of consideration and calls for balancing and re-balancing their interests according to changing circumstances. In the context of the Covid-19 pandemic, for instance, employees and creditors (especially trade creditors) have gained prominence as particularly vulnerable as well as essential for firm survival and thus as deserving protection.

A few comments are in place here. First, it is always shareholder interest that is contrasted with the interests of other stakeholders. To my knowledge, there is no monistic approach that prioritizes a non-shareholder constituency over other stakeholder groups. What could be the reason? The familiar claim, that only shareholders are residual claimants in the business corporation while other stakeholders have fixed claims, protected by contract law and a panoply of bankruptcy doctrines (or no legal claims at all),[13] is just that - a claim. Proponents of stakeholderist approaches would argue, not without basis, that other stakeholders may also hold non-fixed, uncertain claims such that they are similarly vulnerable. A more realist explanation would link shareholders' residual-claimant status to the fact that in most cases, only shareholders elect the directors. It would defy nature and human

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[12] *See* STEPHEN M. BAINBRIDGE, THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE 8-10 (2008).

[13] *See* ROBERT CHARLES CLARK, CORPORATE LAW 18 (1986).

nature to expect directors to not pay special attention to the interests of those who appoint them. Empirical evidence indeed shows that in companies with significant employee stock ownership and thus voting power, corporate strategies reflect employees' mix of fixed and residual claims.[14] Separately, in a joint study with Renée Adams and Lilach Sagiv, we found that directors in fact contrast shareholders against all other stakeholders. Those who gave higher priority to employees were also more likely to prioritize consumers, the community, etc. more highly.[15]

Second, the monistic and the pluralistic approaches should be perceived as polar end-points of a continuous dimension. Seen this way, shareholderism and stakeholderism are therefore inverse concepts. By referring to high shareholderism one necessarily connotes lower stakeholderism and vice versa. One cannot avoid this tension by adopting some unobjectionable fair-weather corporate purpose - from combating a particular disease to promoting world peace.[16] Any strategy for achieving that purpose eventually boils down to people deciding over other people and what they care about.

More importantly, there could be a whole range of intermediate degrees of shareholderism that individuals and societies can endorse; there is no need to subscribe to the extreme position on either pole of the dimension. Empirical evidence

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[14] *See* Olubunmi Faleye, Vikas Mehrotra, & Randall Morck, *When Labor Has a Voice in Corporate Governance*, 41 J. FIN. & QUANTITATIVE ANALYSIS 486 (2006).

[15] *See* Renée B. Adams, Amir N. Licht & Lilach Sagiv, *Shareholders and Stakeholders: How Do Directors Decide?*, 32 STRATEGIC MGMT. J. 1331 (2011). To my knowledge, "shareholderism" was coined by these authors; "stakeholderism" was coined concurrently by these authors and by Andrew Keay, *Moving towards Stakeholderism-Constituency Statutes, Enlightened Shareholder Value, and More: Much Ado about Little*, 22 EUR. BUS. L. REV. 1 (2011).

[16] *Compare* Colin Mayer, Shareholderism Versus Stakeholderism – a Misconceived Contradiction. A Comment on 'The Illusory Promise of Stakeholder Governance' by Lucian Bebchuk and Roberto Tallarita, European Corporate Governance Institute - Law Working Paper No. 522/2020 (2020); Colin Mayer, *Ownership, Agency, and Trusteeship: An Assessment*, 36 OXFORD REV. ECON. POL'Y 223 (2020).

supports this point. In another joint study with Renée Adams,[17] we observe that shareholderism levels of directors from all around the world (on which more below) exhibit normal-like variation. Very few directors endorse strict shareholder primacy or complete stakeholderism. This is noteworthy because legal injunctions in some jurisdictions - most notably, Delaware - might lead one to expect a bimodal distribution. That this is not the case shows that directors map shareholder-stakeholder relations onto a continuum rather than dichotomous positions. Similarly, we further observe that national corporate laws, too, can be mapped onto a continuous shareholder-oriented/stakeholder-oriented scale and need not be pigeonholed into discrete categories.

Finally, management scholars, inspired by Donaldson and Preston's influential article, distinguish between descriptive, instrumental, and normative aspects of the shareholder-stakeholder question.[18] A descriptive analysis examines the approaches that prevail in firms in practice; an instrumental analysis examines causal relations between different shareholder/stakeholder orientations of firms and certain outcomes, such as profitability; a normative analysis examines the desirability or legitimacy of various shareholder/stakeholder orientations in light of different criteria, e.g., economic efficiency, moral theories of distributional justice, etc. Remarkably, legal scholars have virtually overlooked this important framework and have thus failed to employ it despite its usefulness for analytical tractability.[19] In analyzing legal aspects

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[17] Amir N. Licht & Renée B. Adams, Shareholders and Stakeholders around the World: The Role of Values, Culture, and Law in Directors' Decisions, working paper (2020).

[18] *See* Thomas Donaldson & Lee E. Preston, The Stakeholder Theory for the Corporation: Concepts, Evidence, Implications, 20 ACAD. MGMT. REV. 65 (1995).

[19] Following a Lexis search in mid-September 2020, I was able to locate only three references to Donaldson and Preston's article in law review articles. *See* Thomas W. Dunfee, *Corporate Governance in a Market with Morality*, 62 LAW & CONTEMP. PROB. 129 (1999); Amir N. Licht, *The Maximands of Corporate Governance: A Theory of Values and Cognitive Style*, 29 DEL. J. CORP. L. 649 (2004); James D. Nelson, *The Trouble with Corporate Conscience*, 71 VAND. L. REV. 1655 (2018).

of this issue, too, one could thus hold bifurcated views on the very same question, depending on the mode of analysis that one implements.

III. NATIONAL LEGAL SHAREHOLDERISM

A. Operationalizing Corporate Law and Corporate Purpose

Legal doctrine on the purpose of the corporation is strictly normative by definition. It sets rules of universal application on the subject with which all legal persons, natural and corporate, must comply. Aguilera, Desender, Bednar, and Lee thus observe:

> When it comes to firm governance, legal norms, mostly enforced by the courts and stock exchanges, are a key external mechanism delineating the rights and responsibilities of different interest groups within and around the firm. The legal system defines almost every dimension of the firm's governance structure such as the purpose of the business entity, who owns it, what its stakeholders can and cannot do, and ultimately how the power and resources are distributed within the firm.[20]

To take a concrete example, with regard to creditors one could ask whether they stand at arm's length vis-à-vis the company, and are thus protected only by contract and contract law, or do their interests constitute part of the company's own interest, and hence enjoy the protection of directors' duty of loyalty under fiduciary law (at least to the company, at least in common law jurisdictions)? In either case, what protection does the law afford to creditors on the verge of insolvency? Both monistic and pluralistic approaches recognize the importance of all stakeholder groups for the company's success, yet they differ with regard to the mode of handling their interdependencies. The monistic approach is hierarchical, as it prioritizes shareholders' interest over those of other constituencies. The latter's interest may be promoted but only instrumentally - as means to the end of promoting shareholder

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Compare Edward Rock, For Whom is the Corporation Managed in 2020?: The Debate over Corporate Purpose, WASH. U. L. REV. (forthcoming 2021) (arguing that the corporate purpose issue is treated differently in law, finance, management, and politics).

[20] Ruth V. Aguilera *et al.*, *Connecting the Dots: Bringing External Corporate Governance into the Corporate Governance Puzzle*, 9 ACAD. MGMT ANNALS 483, 526 (2015).

interest. The pluralistic approach is more egalitarian. It legitimizes, or requires, a balancing of stakeholder interests against one another. Crucially, both approaches recognize that beside potential synergies between stakeholder groups that the corporation engenders, there could be tensions between the interests of stakeholder groups such that there may a need for legal regulation in conflict situations.

A common pastime in corporate purpose circles is to compare jurisdictions on the legal protections they afford to different stakeholders, or, more simply, to inquire whether they endorse shareholder primacy or a multiple-stakeholder approach - namely, how strongly shareholderist or stakeholderist they are.[21] This is a descriptive exercise. Inasmuch as comparing sizes could be meaningful or consequential, there must be a scale with which to make the comparison. Here, the plot thickens. Shareholderism is a complex phenomenon. Cross-jurisdictional variability on shareholderism could thus manifest itself and be analyzed along several different dimensions. For example, one may want to compare the intensity of shareholder protection. This, in turn, should raise questions about protection against what and against whom? Corporate insiders? Other stakeholders? Which ones? Separately, one could consider legal rights and protections of non-shareholder stakeholders, which in turn raises questions on how does one integrate such observations into comparable concepts. Next, there is the issue of quantification. If the comparative analysis is to exceed two or just a handful of jurisdictions there needs to be a methodology for grading or ranking them.

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[21] *See*, e.g., Michael Bradley *et al*., *The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads*, 62 LAW & CONTEMP. PROBS. 9 (1999); Martin Gelter, *Taming or Protecting the Modern Corporation? Shareholder-Stakeholder Debates in a Comparative Light*, 7 N.Y.U. J. LAW & BUS. 641 (2011); MATHIAS SIEMS, CONVERGENCE IN SHAREHOLDER LAW 52 (2008); Siems, *id*; Umakanth Varottil, *The Evolution of Corporate Law in Post-Colonial India: From Transplant to Autochthony*, 31 AM. U. INT'L L. REV. 253 (2016).

The exercise of quantifying "soft" human and social phenomena is known in the social sciences as operationalization. For a solid operationalization one must begin with a sound theory on the underlying phenomenon - for example, from psychology, consider personality at the individual level or culture at the societal level.[22] Such a theory conceptualizes the particular phenomenon and points to the factors that animate it. What makes these phenomena challenging is the fact that they comprise latent factors - namely, factors that are not themselves observable (consider narcissism as a personality trait or collectivism as a cultural orientation). Next, a methodology is developed for detecting and measuring observable markers of the latent factors. The outcome is a quantified representation of the latent factors - a dataset. Any operationalization of rich phenomena such as human personality or culture inevitably entails a massive loss of information, but if the resulting dataset that emerges from this highly reductionist process retains external validity one can utilize it for further analyses.[23]

A vast literature on comparative corporate law and governance grapples with the challenge of comparing the legal components of corporate governance systems. At first blush, the law, unlike psychological factors, is an observable social institution.[24] One can arguably glean its content from statutes, court decisions, scholarly works, and so forth. Nevertheless, central legal phenomena may be latent

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[22] On personality *see* ROBERT R. MCCRAE & PAUL T. COSTA, JR., PERSONALITY IN ADULTHOOD: A FIVE-FACTOR THEORY PERSPECTIVE (2d ed. 2003); on culture *see* GEERT HOFSTEDE, CULTURES CONSEQUENCES: COMPARING VALUES, BEHAVIORS, INSTITUTIONS, AND ORGANIZATIONS ACROSS NATIONS (2001); Shalom H. Schwartz, *National Culture as Value Orientations: Consequences of Value Differences and Cultural Distance*, in 2 HANDBOOK OF THE ECONOMICS OF ART AND CULTURE 547 (Victor A. Ginsburgh & David Throsby, eds 2014).

[23] For further background *see* Amir N. Licht, *The Mother of All Path Dependencies: Toward a Cross-Cultural Theory of Corporate Governance Systems*, 26 DEL. J. CORP. L. 147 (2001); Amir N. Licht, *Culture and Law in Corporate Governance*, in OXFORD HANDBOOK ON LAW AND CORPORATE GOVERNANCE (Jeff Gordon & Georg Ringe, eds., Oxford University Press, 2018).

[24] *See*, generally, Oliver E. Williamson, *The New Institutional Economics: Taking Stock, Looking Ahead*, 38 J. ECON. LIT. 595 (2000).

despite their being regulated by formal sources. Consider, for instance, "investor protection" or, closer to home, "shareholder primacy". Some jurisdictions may have explicit rules, in statute or in case law, that prescribe norms on shareholder primacy. In others, one may need to resort to scholarly analyses of opaque provisions. In any event, unlike tax rates, stockholding thresholds, or similar clearly-defined rules, such constructs require opearationalization in order to compare several jurisdictions.

A transformative development in comparative corporate governance took place with the groundbreaking project of La Porta, Lopez de Silanes, Shleifer, and Vishny (LLSV). Without reference to, and apparently unaware of, operationalization methodologies in other social sciences, LLSV presented the first operationalization of shareholder and creditor protection in the form of respective indices for 49 countries; countries' index scores were further linked to their legal origin/family affiliation.[25] Later, and with similar blissfulness, LLSV's approach to quantifying shareholder protection was also applied at the firm level.[26] The original approach, which was lacking in several respects, also by admission of its own authors, underwent methodological improvements as well as expansion to other legal fields and additional countries under the auspices of the World Bank.[27] Orchestrated by Mathias Siems, an

[25] *See* Rafael La Porta *et al*., *Law and Finance*, 106 J. POL. ECON. 1113 (1998); Rafael La Porta *et al*., *Legal Determinants of External Finance*, 52 J. FIN 1131 (1997). The publication of the latter article preceded that of the former, foundational article, which was first publicized in 1996.

[26] *See* Paul Gompers, Joy Ishii & Andrew Metrick, *Corporate Governance and Equity Prices*, 118 Q.J. ECON. 107 (2003).

[27] For a self-review, *see* Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *Law and Finance After a Decade of Research*, in 2A HANDBOOK OF THE ECONOMICS OF FINANCE 425 (George Constantinides, Milton Harris & Rene M. Stulz eds. 2014). This paper elaborates on Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285 (2008).

ambitious project dubbed "leximetrics" has sought to rectify some of LLSV's methodological shortcomings and to introduce a temporal dimension to the data.[28]

The critiques that have been leveled against LLSV's approach are beyond the present scope.[29] Their revolutionary insight and the basic premise of their project remain fundamentally sound and are shared by its critics as well - namely, that law can be operationalized notwithstanding its richness and complexity such that with due diligence, reliable metrics of legal factors can be produced and utilized.

Focusing our attention on corporate purpose, a common move in attempt to cut through the comparative thicket in light of the difficulties involved in operationalizing law with the leximetric approach, employs legal origin as a crude proxy for this factor. In this view, a common law affiliation proxies for legal endorsement of shareholder primacy, while a civil law affiliation - for a multiple-stakeholder-interest stance.[30] In most cases, however, such observations generalize from prominent examples that are treated as representative of their legal origin group.[31] Delaware and the United Kingdom are thus said to reflect common law

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[28] *See* Priya Lele & Mathias Siems, *Shareholder Protection: A Leximetric Approach*, 7 J. CORP. L. STUD. 17 (2007); Mathias Siems, *Shareholder Protection around the World ('Leximetric II')*, 33 DEL. J. CORP. L. 111 (2008). The term "leximetrics" was coined by Robert D. Cooter and Tom Ginsburg, Leximetrics: Why the Same Laws are Longer in Some Countries than Others, Univ. Ill. Law & Econ. Research Paper No. LE03-012 (2003).

[29] For reviews, *see*, e.g., Holger Spamann, *Empirical Comparative Law*, 11 ANN. REV. L. & SOC. SCI. 131 (2015); Mathias M. Siems, *Taxonomies and Leximetrics*, in THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 228 (Jeffrey N. Gordon & Wolf-Georg Ringe, eds. 2018); *see* also John Buchanan, Dominic Heesang Chai & Simon Deakin, *Empirical Analysis of Legal Institutions and Institutional Change: Multiple-Methods Approaches and Their Application to Corporate Governance Research*, 10 J. INSTITUTIONAL Econ. 1 (2014); Gerhard Schnyder, Mathias Siems & Ruth V. Aguilera, Twenty Years of 'Law and Finance': Time to Take Law Seriously, Centre for Business Research, University of Cambridge Working Paper No. 501 (2018).

[30] *See supra* note 21.

[31] But *see* Hao Liang & Luc Renneboog, *On the Foundations of Corporate Social Responsibility*, 72 J. FIN. 853 (2017). These authors use firm-level data on CSR activities to argue for a common-law/civil-law divide in firm practice. Unfortunately, limitations of their data sources (commercial data providers) make their inference tentative at best. *See* Amir N. Licht & Renée B. Adams, Shareholders and Stakeholders around the World: The Role of Values, Culture, and Law in Directors' Decisions, working paper (2020).

countries' approach and Germany is often used for demonstrating the approach in civil law countries.[32]

Perhaps unsurprisingly, this classification short-cut is not free of issues and even a cursory review refutes such a clear distinction. Thus, among common law jurisdictions, Delaware case law indeed endorses shareholder primacy,[33] and in the United Kingdom, Section 172 of the Companies Act 2006 requires directors to promote "the success of the company for the benefit of its members [i.e., shareholders] as a whole." The latter provision, however, also requires the directors to consider the interests of non-shareholder constituencies and upholds common law rules that, in certain circumstances, call on them to act in the interests of creditors. In contrast, Canada and India exhibit rather clear stakeholder orientations. In Canada, this is due to case law that was recently codified,[34] while in India, section 166 of the Companies Act of 2013 presents the most dedicated attempt to date to implement a formal pluralistic, stakeholder-oriented fiduciary duty. Uniformity is not to be found in the civil law group either. German corporate law famously vests the managing board with the responsibility "to manage the corporation as the good of the enterprise and its retinue and the common wealth of folk and realm demand."[35] In China, the 2005 revision of its corporate law requires companies to comply with "social

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[32] *See* Leo E. Strine, Jr., *The Soviet Constitution Problem in Comparative Corporate Law: Testing the Proposition that European Corporate Law is More Stockholder-Focused than U.S. Corporate* Law, 89 S. CAL. L. REV. 1239, 1241-42 (2016) (collecting sources).

[33] *See* Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939); eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 35 (Del. Ch. 2010); *see* also N. Am. Catholic Education v. Gheewalla, 930 A2d 92, 101 (Del. 2007).

[34] *See*, respectively, BCE Inc. v. 1976 Debentureholders, 2008 SCC 69, paras. 82-84 (Can.); Peoples Department Stores Inc. (Trustee of) v. Wise, 2004 SCC 68, para. 42 (Can.); Canada Business Corporations Act, R.S.C. 1985, C-44, s. 122(1.1).

[35] Section 70 of the 1937 *Aktiengesetz* (Ger.).

morality" and to "bear social responsibilities."[36] In Sweden, however, the objective of business corporations is to generate profits for shareholders.[37]

B. The Expert Poll

Against this backdrop, this section reviews a novel project to quantify national legal shareholderism - namely, the degree to which legal systems prescribe shareholder primacy versus stakeholder orientation as corporate purpose. The original impetus for developing this measure arose in a joint research project with Renée Adams on the ways in which board members and CEOs around the world address shareholder-stakeholder dilemmas (see Part IV below). The multi-national makeup of the sample in terms of both directors' and firms' countries of origin lends itself to testing hypotheses that combine individual-level as well as national/societal-level factors. Of particular interest is the role that legal factors might play in directors' decisions in these dilemmas. For example, one may wonder whether stronger legal protections to employees or creditors might encourage directors to promote shareholder interest more, on the theory that those stakeholders are already protected, or maybe less, on the theory that legal rules that protect stakeholders could play an expressive role as signals on the social importance of those stakeholders. Thanks to the LLSV legal operationalization project, there are now available several datasets on formal legal protections of shareholders, creditors, and employees.[38]

Quantitative measures of stakeholders' legal protections relate to corporate purpose only indirectly, however. What is missing is a direct measure of legal

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[36] Section 5 of the Company Law of the People's Republic of China.

[37] This widely-accepted doctrine derives from the Swedish Companies Act, 2005, Ch.3, section 3, requiring companies with a different objective to state this clearly in the articles of association.

[38] *See*, respectively, Simeon Djankov *et al*., *The Law and Economics of Self-Dealing*, 88 J. Fin. Econ. 430 (2008); Rafael La Porta *et al*., *Private Credit in 129 Countries*, 84 J. Fin. 299 (2007); Juan C. Botero *et al*., *The Regulation of Labor*, 119 Q. J. Econ. 1340 (2004). Expanded and updated datasets using the same methodologies are available from the World Bank's Doing Business database.

shareholderism for a non-trivial set of countries. We therefore set out to construct one ourselves. To assess the degree to which corporate laws endorse shareholder primacy we conducted a personal e-mail-based poll of corporate law professors in leading universities in our sample countries. We asked these experts to indicate this degree on a scale without numbered notches in order to avoid priming them about high or low degrees. We also asked respondents to classify this feature of the law using a dichotomous "pro-shareholders" versus "pro-stakeholders" classification. Finally, respondents were asked to indicate the main legal basis or authority for their classification, such as statute, case law, scholarly opinion, or other.

We received usable responses from 57 professors.[39] The number of responses per country ranged from zero to five. Reports on the sources for the legal observations varied from none or a few words pointing to statutory provision to detailed overviews of several hundred words. Where we got more than one response, we compute the average score. Table 1 reports these scores. The scores are rounded to integer values to avoid a misplaced sense of precision. These are *perceived* levels of national legal shareholderism; they are rough but they are ready. While these scores offer a unique expert perspective on the question at hand, one should treat them with caution in light of the small sample and potential biases. At the same time, one must not be overly concerned about such biases. In opting for an expert poll methodology we were encouraged by the experience gained by the World Bank's World

[39] For their invaluable input, Adams and I are deeply grateful to Haitham Abu Karaki, Afra Afsharipour, Deirdre Ahern, Jesús Alfaro Aguila-Real, Diederik Bruloot, Blanaid Clarke, Carlos Alberto Alfonso Correa, Jorge Manuel Coutinho Abreu, Nicola Cucari, Andrea Dalmartello, Aline Darbellay, Pablo de Andrés Alonso, Diego Arturo Duprat, Luca Enriques, Diego Robles Farías, Martin Gelter, Say H. Goo, Jen Goto, Aleksandra Gregoric, Mathias Habersack, Jesper Lau Hansen, Genevieve Helleringer, Hana Horak, Tomislav Jaksic, Dionysia Katelouzou, Jun-Ki Kim, Hwa-Jin Kim, Kon-Sik Kim, Anne Lafarre, Soyla H. León Tovar, Shangshang Liang, Yu-Hsin Lin, Chien-Chung Lin, David G. Litt, Arjya B. Majumdar, Hanifa T. Massawe, Noel McGrath, Florian Möeslein, Anders Ørgaard, Candido Paz-Ares, Evanghelos Perakis, John Quinn, Hyeok Joon Rho, Jorge Miquel Rodríguez, Chen Ruoying, Maribel Saez Lacave, Ching-Ping Shao, Ok-Rial Song, Xin Tang, Darko Tipuric, Ulrich Torggler, Tobias H. Troeger, Christoph Van der Elst, Umakanth Varottil, Peter Watts, Maria Wyckaert, Toshiaki Yamanaka.

Governance Indicators project, which has developed aggregated indicators for the rule of law, control of corruption, etc. in some 200 countries.[40] Kaufmann, Kraay, and Mastruzzi, the authors of several rounds of this project, explain that ideological bias is not a major cause of concern in their data that derives from expert polls.[41] In the present context the responding professors come from diverse institutions such that there lesser concern about systematic bias and there is reason to believe that they share a common understanding of the underlying concepts.

A simple exploratory analysis of the national legal shareholderism scores suggests that they have external validity. To consider this point I computed two-tailed Pearson correlations between these scores and national scores for legal protection of shareholders, creditors, and employees.[42] National legal shareholderism correlates positively with shareholder protection ($r = 0.41$; t-stat = 2.32), positively with creditor protection ($r = 0.46$; t-stat = 2.75), and negatively with employment protection ($r = -0.56$; t-stat = -3.23). All the correlations are statistically significant at the 5% level. The similar sign for shareholder and creditor protection is not surprising when one recalls that already in their pioneering study, LLSV found that their indexes for these protections actually go hand in hand. Finally, bearing in mind the small size of the legal origin sub-samples, one may note that there is a difference between the average sharheolderism levels in common law and civil law countries (7.93 versus 6.30,

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[40] *See*, generally, Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *Measuring Governance Using Perceptions Data*, in THE HANDBOOK OF ECONOMIC CORRUPTION 114 (Susan Rose-Ackerman, ed. 2006); Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *The Worldwide Governance Indicators: Methodology and Analytical Issues*, 3 HAGUE J. RULE OF L. 220 (2011).

[41] *See* Daniel Kaufmann, Aart Kraay &Massimo Mastruzzi, *Growth and Governance: A Reply*, 69 J. POL. 555 (2007); Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *Governance Matters III: Governance Indicators for 1996, 1998, 2000, and 2002*, 18 WORLD BANK ECON. REV. 253 (2004).

[42] Data for these legal protections come from the anti-self-dealing index by Simeon Djankov *et al*., *The Law and Economics of Self-Dealing*, 88 J. Fin. Econ. 430 (2008) (shareholder protection); the 2012-2015 index of "only credit: strength of legal rights" from the World Bank's Doing Business database (creditor protection); and the 2016 index of employment protection legislation by the OECD (employment protection).

respectively), as one might expect. This difference may be substantial but it does not support an inference that common law and civil law jurisdictions are worlds apart with regard to corporate purpose. It is hoped that these scores will prove useful beyond their immediate purpose.[43]

IV. PERSONAL SHAREHOLDERISM

The corporate purpose discourse addresses corporations: which constituency do, or should, companies focus on?, which constituency is, or should be, the focal constituency of corporate law?, etc. Implicit in these discussions is the assumption that the corporate decision makers will act in line with those policies on the corporate purpose. These are primarily the directors and the top management team (TMT - i.e., the CEO and other top executives) who are involved in forming and implementing corporate strategy. Especially in regards with legal injunctions on the purpose of the corporation, one expects corporate leaders to devise strategies in compliance with such laws just as companies are expected to comply with the law in general. Fiduciary duties of these corporate captains back the company's duty to comply with applicable positive law with a personal duty to ensure that it does.[44] Simply put, if the law says "Thou shalt maximize shareholder value", companies and directors are assumed and expected to comply.

Reality is again more complex, however. As a preliminary matter, it is well-known that under the Business Judgment Rule, directors have ample discretion with regard to the ways in which the company can achieve its purpose, which may include bestowing benefits on non-shareholder stakeholders beyond their legal entitlements.

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[43] When referring to these scores, reference should be made to Amir N. Licht & Renée B. Adams, Shareholders and Stakeholders around the World: The Role of Values, Culture, and Law in Directors' Decisions, working paper (2020).

[44] *See*, e.g., for Delaware, the United Kingdom, and Canada, respectively, Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006); Cowan v. Scargill, [1985] Ch 270, 286 (U.K.); BCE Inc. v. 1976 Debentureholders, 2008 SCC 69, para. 38 (Can.).

That much was stated as trite law by Bowen LJ in *Hutton* already in 1883.[45] In addition, there is always a lingering concern that corporate leaders might make pro-stakeholder public statements but fail to follow suit on them in practice. Joseph Stiglitz thus questioned the ingenuity of the Business Roundtable's newly-found stakeholderist religion.[46] Bebchuk, Kastiel, and Tallarita argue that U.S. corporate leaders in fact used the power awarded to them by "constituency statutes" to obtain gains for shareholders, executives, and directors.[47]

These are familiar concerns that should not be taken lightly, but my focus here is different. Even assuming that directors and top managers sincerely strive to comply with the law in charting a strategic course for their companies, there is evidence that in doing so, they may adopt diverse lines of action in terms of striking a balance between conflicting interests of shareholders and stakeholders.

In the above-mentioned joint study with Adams and Sagiv, we asked directors and CEOs of Swedish public companies to indicate how they would vote on propositions for board decisions in a set of stylized scenarios that presented a conflict between shareholders and other stakeholders.[48] A unique feature of this experimental paradigm is that each scenario was based on a seminal court case. Each one thus reflected genuine disputes over real decisions, about which real directors were taken to court, and in which courts did not uniformly rule in favor of a particular stakeholder constituency. Crucially, in those situations the tension was inevitable, such that there was no long-term, win-win, pie-increasing, golden-rule, etc. line of

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[45] *See supra* the quote in text to note 4.

[46] *See* Joseph Stiglitz, *Can we Trust CEOs' Shock Conversion to Corporate Benevolence?*, The Guardian (Aug. 29, 2019), https://www.theguardian.com/business/2019/aug/29/can-we-trust-ceos-shock-conversion-to-corporate-benevolence?.

[47] *See* Lucian Bebchuk, Kobi Kastiel, & Roberto Tallarita, *For Whom Corporate Leaders Bargain*, S. CAL. L. REV. (forthcoming 2021).

[48] *See* Renée B. Adams, Amir N. Licht, & Lilach Sagiv, *Shareholders and Stakeholders: How Do Directors Decide?*, 32 STRATEGIC MGMT. J. 1331 (2011).

action that could appease all parties. For example, the scenario on shareholders-community tensions was based on the famous *Shlensky v. Wrigley* decision.[49] There, the company that owned the Chicago Cubs baseball club and operated its Wrigley Field stadium refused to approve installation of lights and night baseball games because Phillip Wrigley believed that baseball was a day-time sport and that night baseball might have a negative impact on the surrounding neighborhood. The court held for Wrigley notwithstanding lower attendance and financial losses. The respective vignette described a company operating a recreational center in an urban area facing a similar dilemma and asked respondents to indicate how they would vote on propositions that paralleled those in the original case. Other vignettes addressed tensions with other stakeholder groups.[50]

In addition to the case-based scenarios, another vignette featured a proposed board decision to select a statement on corporate purpose ("philosophy") for the company's website from among two versions: one highlighting shareholder value as an overarching goal and one that features a variety of sometimes conflicting stakeholder interests that should be constantly balanced.[51] Such purpose statements are not hypothetical anymore. France's 2019 PACTE Law now requires the management of French companies to state their *raison d'être* (namely, purpose) and to take into consideration social and environmental issues. Somewhat similarly, U.K. government regulations promulgated in 2018 require large companies, whether listed or non-listed, to include in their strategic reports a statement on how the directors

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[49] 237 NE 2d 776 (Ill. App. 1968).

[50] The respective cases are Dodge v. Ford Motor Co. 170 N.W. 668 (Mich. 1919) (consumers); Parke v Daily News Ltd (1962) Ch 927 (employees); Credit Lyonnais Bank Nederland, N.v. v. Pathe Communications Corp. 1991 WL 277613 (Del Ch. 1991) (creditors). The item on creditors was dropped from the analysis for technical reasons.

[51] That vignette was borrowed from Philip Tetlock, *Cognitive Biases and Organizational Correctives: Do Both Disease and Cure Depend on the Ideological Beholder?*, 45 ADMIN. SCI. Q. 293 (2000).

have considered stakeholders' interest in discharging their fiduciary duty under the Companies Act 2006.[52]

Several key findings stand out from that study. First, as noted, corporate leaders contrast shareholder interests with those of all other stakeholders, such that they exhibit a personal principled approach on such matters that ranges between two extreme end-points. We dubbed this approach "shareholderism" to denote its ideology-like quality. Second, directors' and CEOs' shareholderism levels exhibited robust correlations with their personal value preferences. Personal values are abstract desirable goals that serve as guiding principles in peoples' lives. They represent what most people consider important and worthy. Unlike traits and motives that may be unconscious, people are cognitively aware of their values in ways that enable thinking and communicating about them. Among other things, the dynamic structure of values is linked to political ideologies. These factors in turn explain value-laden behavior.[53] Directors exhibiting higher shareholderism on average had higher preferences for the values of power, achievement, and self-direction and weaker preferences for universalism - a value that expresses generalized care for others, including the environment. This value profile is consistent with an entrepreneurial spirit *à la* Joseph Schumpeter - namely, a motivation to seek material success through new and uncertain ventures.[54] Such an entrepreneurial spirit in turn is consistent with the paradigmatic role of shareholders in business companies as the entrepreneurial

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[52] *See* Companies (Miscellaneous Reporting) Regulations 2018, Regulation 414CZA (U.K.).

[53] *See*, generally, Shalom H. Schwartz, *Basic Individual Values: Sources and Consequences*, in HANDBOOK OF VALUE: PERSPECTIVES FROM ECONOMICS, NEUROSCIENCE, PHILOSOPHY, PSYCHOLOGY AND SOCIOLOGY 63 (Tobias Brosch & David Sander, eds 2016).

[54] *See* Amir N. Licht, *The Entrepreneurial Spirit and What the Law Can Do about It*, 28 COMPARATIVE LABOR L. & POLICY J. 817 (2007); *see* also Amir N. Licht, *Law for the Common Man: An Individual-Level Theory of Values, Expanded Rationality, and the Law*, 74 L. & CONTEMP. PROBLEMS 175 (2011); *see*, generally, JOSEPH A. SCHUMPETER, THE THEORY OF ECONOMIC DEVELOPMENT (1912, Translated by R. Opie, 1934. Reprint 1961).

constituency in business firms. In other words, directors with stronger entrepreneurial motivations are more likely to side with this entrepreneurial constituency.

Most notably, directors and CEOs exhibited a full range of shareholderism levels notwithstanding the Swedish corporate law doctrine that sees the purpose of business corporations as generating profits for shareholders.[55] Adams and I, in a separate study in a sample of some 900 directors originating from over fifty countries and serving on boards of firms from 23 countries, obtain similar results: directors' shareholderism levels linked similarly with the entrepreneurial value profile.[56] The multi-country setting allowed for controlling for national legal factors using conventional indexes of legal protections of shareholders, creditors, and employees and an index of national legal shareholderism discussed below. The results on the links between personal values and individual sharehodlerism were stable and robust to legal and other societal-level controls, indicating that this is a universal phenomenon.

Assuming that corporate leaders are generally aware of the legal environment even if not with all the doctrinal intricacies, these findings suggest that directors are able to rationalize to themselves virtually any strategic decision impinging on stakeholder interests that is consistent with their personal values and thus appears to them as the right thing to do, without perceiving it as defying applicable positive law. This seemingly subversive conjecture receives support from a survey of Australian directors by Malcolm Anderson and his colleagues.[57] Under Australian law, directors' fiduciary duty to act in good faith in the best interest of the corporation is

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[55] *See supra* text to note 37.

[56] *See* Amir N. Licht & Renée B. Adams, Shareholders and Stakeholders around the World: The Role of Values, Culture, and Law in Directors' Decisions, working paper (2020). We used a similar instrument in terms of the shareholder-stakeholder vignettes. The creditors item, however, was replaced with a scenario based on BCE Inc. v. 1976 Debentureholders, 2008 SCC 69, para. 38 (Can.). The results were not affected by its inclusion.

[57] *See* Malcolm Anderson *et al.*, Evaluating the Shareholder Primacy Theory: Evidence from a Survey of Australian Directors, University of Melbourne Legal Studies Research Paper No. 302 (2007).

generally regarded as connoting the interest of shareholders.[58] Nevertheless, these authors found that an overwhelming majority of directors (94.3 percent) believed that the law of directors' duties was broad enough to allow them to consider the interests of non-shareholder stakeholders. These authors surmise that "where the 'shareholder primacy' norm is influential, its influence does not stem from an understanding by directors that they are under a legal obligation to pursue shareholder-oriented strategies."[59] Unlike the studies with Adams and Sagiv, however, it is not clear if the Australian respondents were thinking about stakeholder-oriented strategies that are nonetheless also instrumentally beneficial for shareholders' interest (recall *Hutton*).

Taken together, the extant empirical evidence suggests that corporate leaders address shareholder-stakeholder-related strategic situations with a principled, motivated, ideological-like approach. Probably without conscious intentions to disregard applicable laws, especially laws that purport to regulate corporate purpose, these leaders may strive to implement strategies that are compatible with their personal conceptions of the desirable - namely, with their values - notwithstanding the law. To the extent that these findings prove stable in future research (which is highly warranted), this evidence suggests substantial limitations to policy-makers' ability to harness the law for effecting actual change in this area. To put things more bluntly, implementing legal reform with a view to changing corporate purpose might be an exercise in futility. And if that is indeed the case, much of the normative corporate purpose debate might be equally futile as well.

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[58] Section 181(1) of the Australian Corporations Act 2001 (Cth).

[59] Anderson *et al.*, *supra* note 57, at 11.

V. NATIONAL VERSUS PERSONAL SHAREHOLDERISM

In light of the preceding parts of this Chapter, this Part revisits the debate between Adolf Berle, Jr. and E. Merrick Dodd with a view to providing an alternative account of Berle's position and (further) exposing his greatness as well as his modesty. Along the way, I will argue that Dodd largely agreed with Berle. This Part then points to more recent writers, Victor Brudney and Leo Strine, Jr., and argues that like Berle, they acknowledge the divide between national and personal shareholderism, but unlike Berle, their writings suggest practical means for overcoming the conflicting views of Berle and Dodd.

A. The Good Adolf[60]

In the standard historiography of the seminal Berle-Dodd debate, commentators note that in the end, Berle conceded to Dodd.[61] At first blush, he did indeed. In 1954, Berle wrote what looks like a statement of complete capitulation:

> Twenty years ago, the writer had a controversy with the late Professor E. Merrick Dodd, of Harvard Law School, the writer holding that corporate powers were powers in trust for shareholders while Professor Dodd argued that these powers were held in trust for the entire community. The argument has been settled (at least for the time being) squarely in favor of Professor Dodd's contention.[62]

A few years later, however, Berle clarified that he did not intend to say that Dodd was "right all along" and wrote that "[i]t is one thing to agree that this is how social fact and judicial decisions turned out. It is another to admit this was the 'right'

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[60] Parts of this Section draw on Amir N. Licht, *The Maximands of Corporate Governance: A Theory of Values and Cognitive Style*, 29 DEL. J. CORP. L. 649, 690-698 (2004). Its title is borrowed from Leo E. Strine, Jr., *Made for This Moment: The Enduring Relevance of Adolf Berle's Belief in a Global New Deal*, 42 SEATTLE U. L. REV. 267, 268 (2019) (hereinafter *Made for this Moment*).

[61] *See*, recently, e.g., Elizabeth Pollman, *Quasi Governments and Inchoate Law: Berle's Vision of Limits on Corporate Power*, 42 SEATTLE U. L. REV. 617, 618-619 (2019); Dalia Tsuk Mitchell, *From* Dodge *to* eBay*: The Elusive Corporate Purpose*, 13 VA. L. & BUS. REV. 155, 186 (2019); *see* also Dalia Tsuk, *From Pluralism to Individualism: Berle and Means and 20th-Century American Legal Thought*, 30 LAW & SOC. INQUIRY 179 (2005); A.A. Sommer, Jr., *Whom Should the Corporation Serve? The Berle-Dodd Debate Revisited Sixty Years Later*, 16 DEL. J. CORP. L. 33 (1991); Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923 (1984).

[62] ADOLF A. BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION 169 (1954).

disposition; I am not convinced it was."[63] Then, in 1968, he backtracked even further: "Pragmatically, Professor Dodd won the debate. I was not convinced as a matter of doctrine that social responsibility should not be left to government but there was no doubt that the event conformed rather to his prediction than to mine."[64]

Berle's true conviction is well-known. In his 1931 article entitled *Corporate Powers as Powers in Trust*, Berle showed that the powers granted to corporations or corporate officers under contemporary law resemble equitable fiduciary duties akin to those that are owed by a trustee to a beneficiary.[65] "It is the thesis of this essay," Berle stated, "that all powers granted to a corporation or to the management of a corporation… are necessarily and at all times exercisable only for the ratable benefit of all the shareholders as their interest appears."[66] It was actually Dodd's 1932 article, *For Whom Are Corporate Managers Trustees?*, which framed the stakeholder debate.[67] Dodd accepted Berle's view that trust principles should govern managers' duties.[68] Citing *Dodge v. Ford*,[69] Dodd acknowledged that legal doctrine considered the sole function of the corporation to be the making of profit for its stockholders. Yet in the reformed economy, he prophesied (with abundant wishful thinking), there would be "modifications of the maximum-profit-for-the-stockholders-of-the-individual-company formula."[70]

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[63] Adolf A. Berle, Jr., *Foreword*, in THE CORPORATION IN MODERN SOCIETY xii (E. Mason ed. 1959), quoted in Sommer, *supra* note 61, at 37. Berle was referring to the decision in A.P. Smith Manufacturing Co. v. Barlow, 98 A.2d 581 (N.J. 1953).

[64] Adolf A. Berle, Jr., *Corporate Decision-Making and Social Control*, 24 BUS. LAW. 149, 150 (1968).

[65] Adolf A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931) (hereinafter *Powers in Trust*).

[66] *Id,* at 1049.

[67] E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932).

[68] *Id.*, at 1147.

[69] Dodge v. Ford Motor Co. 170 N.W. 668 (Mich. 1919).

[70] *Id.*, at 1151.

Berle was sympathetic to Dodd's normative position but in his response article, he lashed out at him for making a fallacious move from the normative to the descriptive. Desirable as it may be, social responsibility was not in fact pursued by corporations and corporate insiders. Nor could it be pursued. Berle was adamant that Dodd's idea of social responsibility as corporate purpose under law faces an insurmountable implementation problem:

> Now I submit that you can not [*sic*] abandon emphasis on 'the view that business corporations exist for the sole purpose of making profits for their shareholders' until such time as are to be prepared to offer.[71]

It deserves repeating that the key, according to Berle, is to have "a clear and reasonably enforceable scheme of responsibilities to someone else" - namely, multiple non-shareholder stakeholders. That was something that Dodd conveniently ignored and Berle thought was unimplementable. In tandem with this view, in their *Modern Corporation and Private Property*,[72] Berle and Gardiner Means wrote that "by surrendering control and responsibility over the active property, [shareholders] have surrendered the right that the corporation be operated in their sole interest. . . . They have placed the community in a position to demand that the modern corporation serve not alone the owners or the control but all society."[73] Later commentators thus criticized Berle for being "of two minds on the matter."[74] This critique is unfounded inasmuch as it ascribed to Berle conflicting views on desirable law. Berle and Means insisted that only "[w]hen a convincing system of community obligations is worked

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[71] Adolf A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1367 (1932).

[72] ADOLPH A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (rev. ed. 1932).

[73] *Id.*, at 355-56.

[74] William W. Bratton, *Berle and Means Reconsidered at the Century's Turn*, 26 IOWA J. CORP. L. 737, 761 (2001); *see* also Joseph L. Weiner, *The Berle-Dodd Dialogue on the Concept of the Corporation*, 64 COLUM. L. REV. 1458 (1964); Wilber G. Katz, *Responsibility and the Modern Corporation*, 3 J. L. & ECON. 75 (1960).

out and is generally accepted, the passive property rights of today must yield before the larger interests of society."[75] Until such system is devised, and since effective legal protection of all stakeholders through the accountability mechanism of trusteeship is infeasible, they thought, the law must focus on protecting stockholders:

> We might elect the relative certainty and safety of a trust relationship in favor of a particular group within the corporation, accompanied by a possible diminution of enterprise. Or, we may grant the controlling group free rein, with the corresponding danger of a corporate oligarchy coupled with the probability of an era of corporate plundering.[76]

Beyond demonstrating Berle's prescience of the implementation difficulties, his position in his dialogue with Dodd attests to his modesty in separating his personal views from what he perceived to be the only workable legal policy, namely, shareholder primacy. Although he was no stranger to economic analysis due to his work with Means, Berle was first and foremost a lawyer. It was therefore natural for him to conceptualize the problem in an analytical framework of trust law and fiduciary loyalty. In this framework, if one is to explicate a constituency-beneficiary in addition to the corporation itself - as Delaware law does (and in contrast to the English approach)[77] - there could be loyalty only to a single constituency, by analogy to a fiduciary's beneficiary. If the trust/fiduciary conception is taken seriously, other constituencies with potentially conflicting interests could not stand on an equal footing without immediately disabling the directors as their fiduciaries, and the company itself. Opting for a single objective - shareholders' interests - was to Berle an inevitable consequence of the adoption of the legal framework of fiduciary loyalty and accountability.

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[75] BERLE & MEANS, *supra* note 72, at 356.

[76] *See id., id*.

[77] *Compare* Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939) (parallel duty of loyalty to the company and to stockholders); Greenhalgh v. Arderne Cinemas [1951] Ch. 286, 291 (C.A.) (duty of loyalty to the company as a whole).

As it happens, and perhaps surprisingly to some, Berle and Dodd were in agreement on the crucial policy issue - that for designing a legal regime on the purpose of the corporation, law makers may be compelled to resort to the second-best because the first-best is practically unachievable. With a clear-eyed understanding of this constraint, Berle wrote that "as lawyers, we had best be protecting the interests we know, being no less swift to provide for the new interests as they successively appear."[78] Dodd largely agreed with Berle's analysis in this regard. He didn't fault Berle for resorting to trust models for legal regulation of corporate purpose. To the contrary, Dodd believed that legislative intervention is necessary for implementing a stakeholder-oriented approach:

> That judicial control, which, as [Berle and Means] indicate, has proved inadequate to enforce the traditional claims of investors, would not unaided be able to establish and enforce claims of other classes which have no legal traditions to support them may be taken for granted. It is legislation which has created the business corporation as a device for private ownership of enterprise by investors. … If corporations generally are to be conducted in such manner as to give due regard to the interests of all classes in society, including wage earners and consumers as well as investors and management, it is primarily through legislation that the change can be brought about.[79]

Berle's "concession" to Dodd in the 1950s and his later backtracking from it are better understood in this light. He acknowledged that the *Barlow* court and public commentators were speaking of corporate purpose that promotes the interests of multiple stakeholders. He also thought of it as a desirable state of affairs. In the present terminology, in his heart and values, Berle was a devout stakeholderist personally. He just thought that it was doctrinally mistaken; that is, he was a staunch shareholderist at the national legal level. Berle might have been of two minds, but those minds addressed different levels of analysis. One is led to think that Berle

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[78] Adolf A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1372 (1932).

[79] E. Merrick Dodd, *The Modern Corporation and Private Property*, 81 U. PA. L. REV. 782, 785 (1933); *see* also E. Merrick Dodd, *Is Effective Enforcement of the Fiduciary Duties of Corporate Managers Practicable?*, 2 U. CHI. L. REV. 194, 199, 202 (1934).

believed that a matter of doctrine, a multiple-stakeholder corporate purpose is purely utopian. Tellingly, he titled the relevant chapter of his book "Corporate Capitalism and the City of God".[80] Unlike Dodd, however, Berle did not stop at the doctrinal impasse that he had recognized. Effectuating his stakeholderist convictions, Berle became FDR's trusted aide in designing New Deal reforms outside of core corporate law with a view to protecting employees, consumers, and general societal interests.[81]

B. The Venerable Victor

Decades after both Berle and Dodd identified the need for legislative reform in order to bypass the impenetrable hurdle that the fiduciary/trust model posed to implementing a stakeholderist corporate purpose, Victor Brudney defined criteria for "a convincing system of community obligations" that Berle and Means insisted on.

Writing in 1997, Brudney noted that the current board structure cannot utilize directors' fiduciary duties for creditor protection because it makes "the same persons arbiters for conflicting interests with accountability to none."[82] He noted the familiar point that "it is hard to see why directors should become [creditors'] fiduciaries, and it is impossible to see how directors can at one time be fiduciaries for both (or all) constituencies."[83] Echoing Berle's requirement for "a system of community obligations" that is framed "with clarity and force", Brudney set conditions for properly considering the conflicting interests of all the constituencies involved:

> [I]t may be necessary and appropriate for the corporate decision-making body (the board and management) to reconcile the interests of the competing claims of stockholders and creditors (and other stakeholders) in maximizing the enterprise's value. If so, *that body should by law* (1) be so instructed, and furnished with

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[80] *Id.*, at 164.

[81] *See* Strine, *Made for this Moment*, *supra* note 60.

[82] Victor Brudney, *Contract and Fiduciary Duty in Corporate Law*, 38 B.C. L. REV 595, 645-646 (1997).

[83] *Id.*

> appropriate criteria for decision, and (2) *be constituted of appropriately weighted representatives of each class of claimants*.[84]

Brudney's idea for a way out of the impasse thus called for a double-barreled reform of the board. Condition (1) insists on conduct rules that have already been shown to be unworkable. Moreover, if one takes seriously the above-mentioned evidence on directors' handling of shareholder-stakeholder dilemmas, setting "appropriate criteria for decision" would be an exercise in futility. It is not clear why Brudney wanted that condition.

In any event, the significant progress is embodied in condition (2). This is a call for a structural reform under which non-shareholder stakeholders - in principle, any type of claimants - get to be represented on the board. Putting aside the thorny issue of how would each class of claimants be weighted (e.g., what is the "claim" of salaried employees? How does one factor in their legitimate non-fixed expectations?), Brudney has identified board composition rules as a means for affecting corporate purpose in addition to conduct rules. This is the key component and the one holding the greatest promise for adjusting strategic decisions in favor of other stakeholders' interests.

Board composition regulation has become the regulatory vehicle of choice in recent times. Requiring that independent directors fill a certain ratio of board seats is a prominent example for composition rules that buttress traditional conduct rules on the fiduciary duty to exercise independent judgment, in good faith, and without considering ulterior considerations. Staffing the board with representatives of certain stakeholders utilizes this tool for affecting strategy formation on the purpose of the

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[84] *Id*., at 645 (emphasis added).

corporation.[85] Here, too, the evidence from the Swedish study with Adams and Sagiv is pertinent. Employee representative directors, who are appointed by work councils in large Swedish companies, indeed exhibit higher stakeholderism levels in general. However, when the special allegiance to employees is not triggered, all board members on average would side with shareholders.

C. The Honorable Leo

While keeping a day job as a dispenser of justice in Delaware (and a number of teaching positions along the Eastern Seaboard to boot), former Chief Justice Strine also has published extra-judicially a series of articles, in which he developed a blueprint for reform with a view to adjusting the objective of American business corporations to be more considerate of employees and other stakeholders. The yield is voluminous and cannot be surveyed here.[86] Instead, I review major features of Strine's approach against a backdrop of this Chapter's framework.

Impressionistically, Strine may be characterized as a 21st-Century Berle. He has in fact acknowledged an intellectual and ideological lineage to Berle's heritage.[87] Metaphorically, Strine's approach may be described as Berle 2.0. His approach and policy recommendations are compatible with Berle's, yet he enhances and advances them to a level that Berle has failed to reach. Substantively, Strine's approach resembles Berle's in that he, too, recognizes and respects the difference between national legal shareholderism as applicable law and personal stakeholderism as a motivated, ideology-like stance on the purpose of the corporation.

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[85] For a discussion of using board composition regulation for affecting corporate strategy *see* Amir N. Licht, *State Intervention in Corporate Governance: National Interest and Board Composition*, 13 THEORETICAL INQUIRIES IN L. 597 (2012).

[86] Strine began publishing on this subject (in addition to other subjects) as a Vice Chancellor in 2007. Leo E. Strine, Jr., *Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance*, 33 J. Corp. L. 1 (2007).

[87] *See* Leo E. Strine, Jr., *Made for This Moment: The Enduring Relevance of Adolf Berle's Belief in a Global New Deal*, 42 SEATTLE U. L. REV. 267 (2019).

Like Berle, Strine the author exhibits undivided loyalty to Delaware doctrine on directors' fiduciary duties and their accountability to the corporation and stockholders only. As to this he has developed a position that is unbending and inveterate. Authors who have questioned this principle or tried to erode it - e.g., by suggesting that the Business Judgment Rule could accommodate a multiple-stakeholder corporate purpose - have been treated with an attitude of uncompromising rigidity.[88] Famously now, he writes:

> Despite attempts to muddy the doctrinal waters, a clear-eyed look at the law of corporations in Delaware reveals that, within the limits of their discretion, directors must make stockholder welfare their sole end, and that other interests may be taken into consideration only as a means of promoting stockholder welfare.[89]

More recently, Strine, Smith, and Steel proposed to leverage the duty of oversight under *Caremark*[90] to create a legal mechanism that directors could employ should they wish to promote EESG interests (namely, employees plus the standard ESG components: environment, social, governance).[91] The interesting feature in this proposal in the present context is that it pushes the doctrinal envelope in order to squeeze in the new mechanism yet keeps it intact; it does not requite directors to promote EESG interest beyond applicable law nor challenge shareholder primacy.

Strine exceeds Berle, however, with his "Comprehensive Proposal to Help American Workers, Restore Fair Gainsharing between Employees and Shareholders, and Increase American Competitiveness by Reorienting Our Corporate Governance

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[88] *See*, e.g., Leo E. Strine Jr., *Corporate Power is Corporate Purpose I: Evidence from My Hometown*, in 33 OXFORD REV. ECON. POL'Y 176 (2017); Leo E. Strine Jr., *Corporate Power is Corporate Purpose II: An Encouragement for Future Consideration from Professors Johnson and Millon*, 74 WASH. & LEE L. REV. 1165 (2017).

[89] 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, 768 (2015); *see* also Leo E. Strine, Jr., *Our Continuing Struggle with the Idea That For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135 (2012).

[90] In re Caremark International Inc. Derivative Litigation, 698 A.2d 959 (Del. Ch. 1996).

[91] *See* 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, Faculty Scholarship at Penn Law 2196 (2020).

System toward Sustainable Long-Term Growth and Encouraging Investments in America's Future".[92] This is an ambitious reform proposal with many elements. Of interest here is the part that proposes to require all societally-important companies to have board level committees charged with ensuring fair treatment of employees and to utilize European-style works' councils for consultation about important worker matters. Like Brudney, Strine opts for structural measures in lieu of (unworkable) conduct rules. In that he goes beyond where Berle was willing to tread. Unlike Brudney, however, this proposal eschews regulation of board composition as it stops short of European-style appointment of labor representatives to the board. Even ambitious proposals had better be somewhat realistic.

Requiring U.S. boards to form employee-affairs committee charged with a duty to consider their interests could be a measured step that may have palpable consequences even without "hard" regulation of employee entitlements. Elsewhere I have proposed a workable doctrinal mechanism for considering the interests of multiple stakeholders in a fiduciary loyalty framework that is based on analogizing from the duty of impartiality.[93] This mechanism is appropriate for doctrinally stakeholderist jurisdictions but could also be harnessed by shareholderist jurisdictions like Delaware. Its workability comes at a steep price, since that mechanism cannot offer substantive protection, but it is not entirely ineffective. A purely procedural

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[92] *See* Leo E. Strine, Jr., Toward Fair and Sustainable Capitalism: A Comprehensive Proposal to Help American Workers, Restore Fair Gainsharing between Employees and Shareholders, and Increase American Competitiveness by Reorienting Our Corporate Governance System toward Sustainable Long-Term Growth and Encouraging Investments in America's Future, U of Penn, Inst for Law & Econ Research Paper No. 19-39 (2019); Leo E. Strine, Jr. & Kirby M. Smith, *Toward Fair Gainsharing and a Quality Workplace for Employees: How a Reconceived Compensation Committee Might Help Make Corporations More Responsible Employers and Restore Faith in American Capitalism*, BUS. LAW. (forthcoming winter 2020-21); *see* also Leo E. Strine Jr., *Securing Our Nation's Economic Future: A Sensible, Nonpartisan Agenda to Increase Long-Term Investment and Job Creation in The United States*, 71 BUS. LAW. 1081 (2016).

[93] *See* Amir N. Licht, *Stakeholder Impartiality: A New Classic Approach for the Objectives of the Corporation*, in FIDUCIARY OBLIGATIONS IN BUSINESS (Arthur Laby & Jacob Hale Russell, eds, forthcoming 2020).

duty to consider, backed by secondary duties to document the process and disclose material information about such deliberations, could engender change in the desired direction. Strine's proposal is in line with this view, although issues of enforcement remain to be resolved. Specifically, what right should employees *qua* employees have, if at all, to enforce these "consideration entitlements"?[94]

VI. CONCLUSION

Corporate purpose, or the objective of the corporation, concerns the core question of corporate law and corporate governance. It relates, pardon my French, to the *raison d'être* of the company - the very reason for its existence and operation. It is a complex, multi-faceted concept with far-reaching implications for modern life. As we now know, the question of corporate purpose is intimately linked to values and culture, which inevitably makes it a fundamentally political question. This Chapter offers three perspectives on this subject. The first one takes corporate law seriously and, using an operationalization exercise, shows how countries vary on formal legal endorsement of shareholder- or stakeholder-oriented corporate purpose. The second perspective focuses on the personal level and reviews research that shows that law on corporate purpose might not matter much, if at all. The third perspective attempts to reconcile the tension between the two levels of analysis by considering the work of three prominent lawyers who have grappled with this challenge. It is hoped that these three views of the cathedral will help forming a better picture of it.

[94] *See*, *id.*, for a discussion and a proposal for a limited derivative standing for non-shareholder stakeholders.

Table 1 - National Legal Shareholderism

Country	Legal Origin[a]	Shareholderism Class[b]	Shareholderism Score[c]
Argentina	0	1	2
Australia	1	1	9
Austria	0	0	3
Belgium	0	1	6
Canada	1	0	7
China	0	1	7
Croatia	0	0	6
Denmark	0	1	9
France	0	0	5
Germany	0	0	4
Greece	0	1	8
Hong Kong	1	1	9
India	1	1	5
Ireland	1	1	7
Israel	1	1	8
Italy	0	0	6
Japan	0	1	8
Jordan	0	1	8
Korea, South	0	1	8
Mexico	0	1	8
Netherlands	0	0	4
New Zealand	1	1	8
Portugal	0	0	5
Spain	0	1	9
Sweden	0	1	7
Switzerland	0	1	8
Taiwan	0	1	8
Tanzania	1	1	8
United Kingdom	1	1	9
United States	1	1	10

a - 0 = civil law; 1 = common law
b - 0 = stakeholder-oriented; 1 = shareholder-oriented
c - Higher scores indicate higher legal shareholderism.

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