Stakeholder Capitalism’s Greatest Challenge: Reshaping a Public Consensus To Govern a Global Economy

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By asking whether there is a viable 21st Century Stakeholder Governance model, this fourteenth Berle conference challenges all of us to think more like Adolf Berle himself: to confront the world as it is, to move beyond the trivial, and to address the deeper implications of corporate power for our world. To answer that question yes requires reshaping, to use Berle’s term, a “public consensus” throughout the global economy within which corporations and institutional investors now exert power, supporting not just stakeholder governance, but the balanced capitalism system associated with the New Deal in the United States, and social democracy in the wider OECD community. We call that system “New Deal capitalism,” because Berle viewed New Deal capitalism as creating a structure within which corporations could operate in a way good for all their stakeholders.

In 2023, the world faces problems directly related to, and often caused by, corporations and the large institutional investors who dominate their governance. The growth of the real economy and huge corporations has diminished the ability of any single nation to create a “public consensus” safely constraining corporate power. The influence of large institutional investors has grown exponentially and internationally, and has globalized corporate governance policies that make corporations more subject to the immediate demands of the stock market. These developments have helped create two fundamental problems threatening societies across the globe: inequality and climate change.
The traditional response by many corporate law scholars is that these are not corporate law problems. If society wants to reduce inequality, it can simply tax the haves and redistribute. If society wants to address climate change, it can adopt environmental regulations and energy taxes. Corporate law accepts that corporations must follow the law, so if the consequences of corporate activity are not socially optimal, then it is not corporate law itself— which simply allocates power between stockholders and corporate management and allows for the creation of artificial citizens — but other bodies of law that bear responsibility.

Blinkered thinking like that was alien to Berle. He risked addressing how the regulation of corporations mattered to society. He grappled with the distributional effects of corporate power, and the need for structures ensuring corporate power would be exercised consistent with the broader public interest. Berle was an architect and strong supporter of the New Deal policies protecting stakeholders and society from corporate overreaching and sharp practices. Berle was pleased that a “public consensus” comprised of formal laws and societal norms had been forged during his lifetime that channeled corporate conduct in a positive direction beneficial to the many, in stark contrast to the pre-New Deal period of American history. But Berle also recognized that even a nation as powerful as the post-WWII United States could not avoid an increasingly global
economy, and that corporate power was outgrowing purely domestic constraints. Berle thus supported the extension of New Deal values into the international economy.

Much has changed since Berle’s lifetime. The challenge that this conference poses — is there a viable system of stakeholder corporate governance — cannot be met without acknowledging that the different corporate law power dynamics of the 21st Century contribute to some of humanity’s deepest problems. Stakeholder governance is not viable absent the supportive structure of a “public consensus” Berle wrote about, and that public consensus must now be re-instilled, not just within the U.S., but across a global economy. Corporate power has outgrown any single nation’s reach, even one as powerful as the U.S. International understandings have given primacy to the interests of stockholders, not workers, communities of operation, or the environment. Regulatory arbitrage has put downward pressure on New Deal capitalism and stakeholder protection domestically and internationally. Restoring an effective public consensus requires constraining the huge investors whose emergence Berle predicted, and who have pushed corporations to obsess over stockholder returns and to subordinate other stakeholders. And it also requires confronting the reality that corporations do not passively follow rules of the game. Corporate law itself has helped corporations erode rules of the game protecting workers and the environment, to shift wealth
away from workers to investors, and to escape fair taxation, thus undermining the capacity of governments to address the serious externalities that corporate power has generated.

In this keynote essay, we seek to shed light on these issues that demand attention if we are to make progress toward an effective public consensus supportive of stakeholder governance. We proceed toward that end as follows.

First, we do a brisk high-level tour of changes since Berle’s lifetime that have affected the capacity of the U.S. to hold corporations accountable for treating all corporate stakeholders with respect. We then identify five issues of substantial social importance with a direct connection to corporate governance, to exemplify that corporate law is not a policy bystander, but a contributor, to the erosion of the public consensus favoring stakeholder governance and the New Deal capitalism Berle supported. We use those key issues to identify elements of domestic and international policy critical to reshaping a public consensus supportive of stakeholder governance, one that in Berle’s spirit might be deemed part of a 21st century global New Deal. We do so to encourage scholars and policymakers to think more innovatively about how corporate governance incentives might be improved to produce the socially beneficial outcomes stakeholder governance seeks to achieve, and at the least, ameliorate some of the poor incentives our current corporate governance approach creates.
Let’s start this journey.

I. The Erosion of the Public Consensus Within Which Corporate Power Operates Since Berle’s Lifetime: A Hurried History of a Half Century of Corporate Governance and Economic Change

During the post-World War II era, Berle became more sanguine about corporate power because he grew more confident that corporations had to operate within a societal- and stakeholder-protective “public consensus.” This consensus, embodied not just in the iconic New Deal laws protecting workers, consumers, and investors, but in an ethos of common purpose and values arising out of the shared experiences of the Great Depression and a World War, encouraged corporate leaders to run their companies in ways good for their workers, communities of operations, and consumers. That public consensus involved widespread acceptance of New Deal capitalism and, in particular, the idea that capitalism needed to work for the many and that the national government must protect stakeholders like workers and consumers from corporate overreaching.

With New Deal capitalism central to the public consensus, Berle even found the positive in something he had once famously worried about: the separation of ownership and control. Because that public consensus held corporate leaders accountable for running companies in a manner that was fairer to all stakeholders, Berle viewed it as a strength of American corporate governance that stockholders
were dispersed and relatively non-influential, because corporate managers were less dangerous to that consensus than powerful stockholders.

In his later writings, however, Berle observed three emerging realities that threatened to destabilize the public consensus he supported. The first was that no nation, even one as powerful as our own, could function in the world economy in isolation, and that engagement and competitiveness in international markets were necessary. The second was that huge corporations had emerged whose influence had outgrown the control of any one nation. The third was that the proportion of shares controlled by institutional investors was growing, and that these investors had the potential to exercise far more power over companies than disaggregated human stockholders and thus to put far more pressure on companies to prefer their interests to that of other stakeholders.

Given that Berle died in 1971, a time when U.S. economic hegemony remained strong, Berle understandably underestimated a fourth factor that eventually helped destabilize the public consensus he embraced: which is that the United States would backpedal on its domestic and international commitment to New Deal capitalism. Although by Berle’s death, there was a movement on the far right, exemplified by economists like Milton Friedman and politicians like Barry Goldwater, to undo the New Deal and to return to 19th century laissez-faire policies, the mainstream economic policies of both parties (as exemplified by the
two-term Eisenhower and Nixon Administrations) were largely accepting of New Deal capitalism. This changed profoundly with the election of President Reagan in 1980, and the embrace by the U.S., domestically and internationally, of policies that, across many dimensions, elevated the pursuit of corporate profit for stockholders over regulating corporations in the interests of workers, other stakeholders, or the environment. This same movement encouraged corporations to stymie policies protective of stakeholders and the environment, and to shift responsibility for paying taxes away from business.

Since the Reagan Administration, Republican leaders have acted to undercut the ability of workers to unionize, erode the real value of minimum wage laws, trim other sources of economic security, denude environmental regulators of authority, and otherwise undermine the New Deal regulatory state. Internationally, U.S. policymakers, even during some Democratic administrations, used their influence with institutions like the IMF, World Bank, and WTO to push other nations to adopt laissez-faire economic policies and reduce stakeholder protections. Businesses and nations seeking market participation internationally were given guaranteed access, without corresponding obligations to treat workers, communities of operation, or the environment with respect.

This Reagan/Friedman economic movement did not operate in isolation from, but rather accelerated and acted in concert with, changes within the corporate
governance system. The comparative strength of stockholders compared to other corporate stakeholders changed in a way aligned with the moves to erode New Deal capitalism. The growth of institutional investors in the U.S. was itself facilitated by Reagan/Friedman economic policies that turned workers from pensioners into forced capitalists, and made them give over money each paycheck to mutual funds who controlled their savings. This steroidal injection of power into institutional investors was then used by them to demand manage-to-the-market corporate governance policies, making corporate managers more accountable for delivering returns to equity holders, even if that hurt other stakeholders.

These trends moved with less rapidity outside the U.S., but they did move. Institutional investors are stronger everywhere and growing in influence, and large U.S. institutional investors are among the largest stockholders in many foreign markets and are using their influence to spread American manage-to-the-market corporate governance policies such as annual say-on-pay votes. Union and worker influence is down everywhere.

The natural result of giving stockholders way more power and cutting the power of workers ensued: the share of corporate profits that went to the American workers most responsible for their creation went sharply down, while returns to stockholders and management went sharply up. Inequality correspondingly soared. The same trends have operated beyond our shores. Worker share is down
internationally. Inequality is up, with the gap between the haves and the many growing everywhere.

The last half century has also undermined the idea that stockholders are residual risk-bearers who cannot win unless others’ fair expectations are first met. Climate change has been fueled by a discrete set of corporations from the wealthy nations of the world, whose stockholders have benefited tremendously from their activities. Stockholders investing in these corporations during this period have been paid multiples of their original investment and have no responsibility to give it back to ameliorate the harm the corporations have caused. Corporate activity in other areas, such as plastics pollution and drug and tobacco addiction, reveals the emptiness of the residual claimant model in the real world, where stockholders can take all the time, and where the residual costs are often borne by others affected by corporate conduct.

The implications of these and other changes since Berle’s death are profound and make more challenging the larger question key to any viable form of stakeholder corporate governance: globalizing New Deal capitalism and a public consensus for holding businesses accountable for making money the right way.

Without purporting to be exhaustive, we distill down from these developments five corporate law policy areas that must be addressed to move in this direction:
• The powerlessness of workers in comparison to institutional investors and the corrosive effects of this imbalance on inequality, fairness, and social stability;

• The realities of corporate externalities such as climate change and their implications for the residual claimant concept and corporate accountability;

• Corporate law’s facilitation of tax avoidance, and thus in the undermining of governmental capacity to address issues like climate change, poverty, and consumer harm;

• The mismatch between the capacity and reach of the regulatory structures and social consensus that constrains corporate power and the scope of the markets in which corporations exert power; and

• The tolerance of corporate law for the unconstrained use of corporate power for political purposes, and the negative effect this has on the ability of government to implement stakeholder-protective policies.

II. How Corporate Law Scholarship and Policy Might Help Restore A 21st Century Public Consensus Supportive of Stakeholder Governance

To create an effective “public consensus” supportive of stakeholder governance and the exercise of corporate power consistent with the broader interests of humanity, these five key issues must be at the forefront of corporate law scholarly research and policy development.

First, corporate law must address the decline in gain sharing with the constituency most responsible for capitalism’s success — workers. Within domestic corporate law, that could mean requiring boards of all large companies —
public or private — to have workforce committees charged with considering the company’s policies for worker compensation and benefits, training, safety, and respect; its policies toward living wages, unions, and outsourcing; and its policies that address the treatment of its contracted workforce. To move toward more worker voice in the unique American context, these committees could be encouraged to experiment with EU-style works’ councils and other forms of worker voice. Public disclosure by large companies about the compensation of their workforce — direct and contracted — and other important metrics relevant to worker welfare should be required. This would put upward pressure on worker treatment and hold boards accountable for how they treat their workforce.

These moves would also move the U.S. into closer conformity with its OECD allies, which commonly require companies to have works’ councils and even worker-representatives on boards, and better shape a “public consensus” toward the fair treatment of workers in the global economy. If this system of disclosure also covered all aspects of corporate workforces, domestic and international, it would also encourage rising standards for worker fair treatment in all global markets.

Critical to this effort is joint action by the U.S. and OECD to include protection for workers in all trade agreements, so that regionally appropriate minimum wages and the protection of workers’ safety and right to organize are the
price of inclusion. Continuous pressure must be exerted on all economic fronts to ensure that fair worker protection and other constraints on the ability of business to exploit other stakeholders, communities of operation, and the environment exist in every sphere in which corporate power is exercised, and that international convergence is on the enlightened New Deal model, not the antediluvian 19th century one. It is legitimate and proper that the minimum wage in Africa or South America not be identical to that in Canada, Japan, Norway, or the U.S.; it is another thing to argue that there should be no minimum wage in those regions nor upward convergence toward better wages and working conditions in every global region.

Second, to support effective stakeholder governance more generally, the U.S. could take important steps to encourage more consideration of all stakeholders in corporate governance, and thus promote international convergence toward a stakeholder governance model. Examples of feasible action would be leveraging federal and state procurement systems to give a leg up to state-chartered public benefit corporations (“PBCs”) that were certified as meeting responsible stakeholder protection standards that could be set by the Department of Commerce. Forty states now authorize PBCs, demonstrating the bipartisan appeal of having corporations focusing on making money the right way. With encouragement from
the contracting system, and a credible, efficient one-stop certification process by the Department of Commerce, a useful incentive would be created.

Another corporate law obstacle to stakeholder governance must be overcome. For generations, the U.S. has relied on disclosure from companies with publicly traded stock to give Americans information about how corporations behave. But, federal securities law has facilitated the emergence of large private companies, many of which are larger than the typical public company, and the number of companies publicly listed in the United States is down considerably. The failure to require large private companies to disclose meaningful information to the public is discordant with policy in much of the OECD, where disclosure relevant to stakeholders is triggered by size of business operation, and creates an incentive for corporations wishing to engage in profit-seeking through behavior injurious to workers and society to “go dark” by going private. This regulatory arbitrage creates a biased playing field and diminishes corporate accountability to stakeholders.

To restore a public consensus holding all powerful corporations accountable for behaving in a socially responsible manner, comparable information about stakeholder treatment must be expected from all large corporations. And U.S. policymakers should work with the other OECD nations — where disclosure of this kind is more common — to converge toward common standards of core
disclosure about corporate treatment of key stakeholders and the environment, and to thus create pressure for competition to occur on the right lines — innovation and quality — rather than through the poor treatment of workers, communities, and the environment. Enhanced disclosure about how corporations make money in all regions of their operations, and about their treatment of the workers and communities responsible for profit creation in those regions, can promote the emergence of a global public consensus holding corporations more accountable and help close a widening equality gap.

Third, stakeholder governance cannot be effective without the ability of governments to address key social problems, and to redress corporate externalities like climate change, plastics pollution, and consumer harm. Corporate law has facilitated the systematic erosion of government tax bases, and left governments without the capacity to, for example, educate their citizens and address the huge challenge, not just of preventing further climate change, but of protecting vulnerable populations from the enormous harm posed by human-caused warming. Why doesn’t corporate law itself have a responsibility to consider appropriate limits on the use of wholly owned subsidiaries set up solely to erode fair taxation by the nations in which the parent corporation’s substantive business operations have transpired — such as the creation and actual use of its proprietary intellectual property? Likewise, the world’s wealthiest people exploit the ability to split
themselves into exponential numbers of corporate entities to place their wealth as far beyond the reach of taxing authorities as possible. As corporations and billionaires erode the tax bases of governments using corporate structures, they shift the support of government to the less wealthy and reduce state capacity to regulate in the public interest. Corporate law has made this possible.

Here again, disclosure could be part of the answer. The public should know when corporations are absolved for paying taxes otherwise required of human citizens. Through threats to relocate, corporations have continually undermined the tax bases of states and local governments — and especially the public education system. Requiring corporations to file a public annual tax subsidy report identifying the extent of subsidies received, whether the corporation has honored promises it made in connection with those subsidies, and whether the corporation has sought subsidies by threatening to relocate or close its operations might dampen the enthusiasm corporations have for playing states and communities against each other in auctions that shift value to stockholders at the expense of American taxpayers. Such disclosure would also make explicit when corporate success has been facilitated — as it often has been — by subsidies from ordinary taxpayers, rather than being entirely the result of private investment.

Internationally, the corrosive effect of using the corporate form and domicile arbitrage to escape fair taxation, undermine stakeholder protection and social
safety nets, and fuel inequality must be a priority of our nation’s foreign policy. Corporations must be subject to taxation in a manner that tracks where they conduct their substantive operations. The parking of IP in nations having nothing to do with its creation should not be a legitimate use of the corporate form. Developing nations must also benefit from fairer corporate taxation regimes, and not just the chartering nations of big multinationals, especially given the greater threats they face from climate change and the further they are from prosperity. Only by this means will inequality and corporate externalities be reduced.

Another problem exists that even scholars who favor stockholder primacy acknowledge — which is that corporations have been able to escape full responsibility for vast consumer harm because they use the shield of limited liability to frustrate fair compensation. Rather than bear the costs of potential accountability to tort claimants who might prove they have been harmed by corporate conduct, enormously profitable corporations form insolvent subsidiaries for the sole purpose of shirking future liabilities, and seek to leave the healthy parent and its “residual claimant” stockholders free from any responsibility to future claimants. If we are starting to sound familiar, it is for a reason. Corporate citizenship is a privilege that exposes society and stakeholders to dangers. The transformation by a parent corporation of itself into a proliferating number of wholly owned “subcitizens” challenges the idea that stockholders are residual
claimants, and in a world of global competition, allows for rent-seeking and the avoidance of fair responsibility along many dimensions. Corporate law facilitates these dysfunctions; corporate law thus has a responsibility to address them.

Turning to a greyer area. What about corporate behavior that may not violate the law of a nation in which the corporation is operating — and may be encouraged by that nation — but that violates commonly accepted norms in the U.S. and longstanding internationally recognized human and civil rights? Think of American companies that have been pressured by oppressive regimes to turn over data about their customers that might be used to imprison or harass them, and to stifle their executives’ free speech. This is an area where norms and other forms of softer law that Berle saw as essential come to the fore. One promising avenue to reduce these pressures is to expand trade within the OECD bloc and to increasingly require nations that wish to benefit from participation in an international market system to respect the basic norms — the public consensus — expected in terms of the rights of workers and human beings in general. The enlistment of private for-profit businesses as an arm of a police state is inconsistent with the premises on which organizations like the WTO are based. The opportunity to share in the benefits of reciprocal commerce must come with the obligation to respect internationally recognized rights of the human stakeholders affected by that commerce. Soft law in the form of governance codes like the U.N. Principles for
Responsible Investing and the G20/OECD Principles of Corporate Governance, and support by institutional investors for corporate resistance to complicity in human and civil rights violations are critical to making progress.

Finally, the notion that corporations passively exist within a public consensus and rules of positive law, and thus those external protections should be relied upon to protect the stakeholders, ignores the fact that corporate money, and thus power, dominates our political system. Corporate law polices conflicts of interest using tools like required participation by independent directors in decision-making, stockholder approval, and disclosure. The plain facts demonstrate the need to require the use of these tools to constrain corporate political influence, as the overwhelming weight of corporate political spending opposes protections for workers, consumers, and the environment, and fair corporate taxation.

Internationally, model governance codes promulgated by organizations including the IMF, World Bank, and OECD should converge to make corporate lobbying and political donations part of required public disclosure, and to pressure independent directors and institutional investors to police these expenditures for consistency with stakeholder interests and established human and civil rights principles. More generally, these codes should hold corporate boards and institutional investors accountable for curbing abuses of corporate power harming stakeholders and the environment.
We do not use this keynote essay to set forth all the answers, nor do we expect even those who generally share our values and view of the problems to agree with all our suggestions. What we do hope is that our examination of the things that matter most about the effects of our corporate governance system will encourage thinking of the kind that Adolf Berle did. It is easier to obsess about minutia than to tackle what really matters. But if corporate law is to be a force for good, and not fuel irreversible harm, then it must address the big issues and stop pretending that those issues are for others to grapple with. If our answers are not the right ones, then don’t just nay-say, say what will work. The momentous impact of corporate conduct from generations ago is affecting our planet in dangerous ways, and so is the unfairness and divisiveness that comes with growing inequality. The impact of more and more of us now, acting on each other and the planet through corporate power, will be even more substantial. If we don’t take commensurate action to address the use of that power and to channel it in a fair and sustainable direction, all of our descendants will be the residual claimants of our excesses and inequities.

And if you think we believe that what it takes to reshape a public consensus supportive of stakeholder governance is a U.S. commitment to forging a global New Deal, well you understand us . . . and Berle himself.