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Russell Powell

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FALLOUT AND FIDUCIARY DUTY

Russell Powell*

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INTRODUCTION

The tremendous economic success of the corporate form in the United States of America has been attributed to factors including limited liability,¹ legal personhood,² transferability of ownership,³ continuous existence,⁴ access to capital,⁵ and the mechanisms of fiduciary duties.⁶ All of these are valorized and/or critiqued in a long legacy of corporate legal scholarship. The media has occasionally highlighted potentially problematic aspects of corporate structures and law in works such as the blockbuster movies *Wall Street* and *The Big Short* or documentaries like *The Corporation* and *Enron: Smartest Guys in the Room*. In more accessible popular media, shows such as *The Simpsons* and *South Park* have taken aim at corporate excess over the years. Even a 25-year-old video game franchise turned acclaimed Amazon Prime series, *Fallout*, has become an important entry in broadening popular critiques of the incentives created by corporate law.⁷

Although this article centers the treatment of fiduciary duty in *Fallout* as a serious critique, it will also consider negative corporate dynamics that are created by—or at least foreseeable under—current economic and legal norms. One purpose of this paper is to identify problems created by contemporary fiduciary duty rules, but I also intend to highlight other areas of law (such as antitrust, labor, free speech, etc.) that intersect with corporate law to magnify

1. See, e.g., Nicholas Murray Butler, President, Columbia Univ., Address at the 143rd Annual Banquet of the Chamber of Commerce of the State of New York: Politics and Business (Nov. 16, 1911) (asserting that “the limited liability corporation is the greatest single discovery of modern times,” including in terms of its “industrial” effects).

2. See, e.g., Asaf Raz, *Mandatory Arbitration and the Boundaries of Corporate Law*, 29 GEO. MASON L. REV. 223, 231, 263-64 (2021).

3. See, e.g., Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 441-9 (2003).

4. See, e.g., Andrew A. Schwartz, *The Perpetual Corporation*, 80 GEO. WASH. L. REV. 764 (2012).

5. See, e.g., Lucian A. Bebchuk, *Buying Troubled Assets*, 26 YALE J. ON REG. 343, 347 (2009).

6. See, e.g., Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 280 (1985) (arguing that Delaware’s corpus of settled fiduciary duty law reduces costs for firms incorporated there).

7. Will Shanklin, *Fallout’s 16 Emmy Nominations Show That Successful Gaming Adaptations Are No Longer a Fluke*, ENGADGET (July 17, 2024), <https://www.engadget.com/fallouts-16-emmy-nominations-show-that-successful-gaming-adaptations-are-no-longer-a-fluke-175555108.html>.

those problems. That these issues are rising into popular culture and public consciousness gives new hope that some of the proposed solutions might be achievable, something I would not have anticipated ten years ago. Section I will consider the world of *Fallout* and its connection to early 21st Century law in the United States. Section II will take a close look at the fiduciary duty discourse from the series in the context of corporate legal scholarship. Section III will then consider how to avoid the absurd extremes of corporate abuse portrayed in the *Fallout* universe. Section IV will examine additional legal issues that fiduciary duties may influence, including antitrust, election finance, labor, public benefits, tax, and internet regulation.

FALLOUT

Fallout is an imagined post-apocalyptic world with retrofuturistic elements, originally published as a computer game of the same name in 1997, with a variety of sequels and spinoffs.⁸ Set in an alternate timeline diverging from our own after World War II, *Fallout* features a stylized representation of 1950s American culture, albeit with more advanced technology. It is a world where utopian visions collide with the harsh reality of capitalist excess and global thermonuclear war.⁹ The setting includes irradiated wastelands, *Fallout* shelter “vaults,” mutated creatures, and factions vying for survival. In the original game, players explore post-apocalyptic Southern California, starting in the year 2161, as a “Vault Dweller” on a quest to find critical resources for their underground shelter home. The recent *Fallout* streaming series begins in pre-war Los Angeles, introducing characters who play critical roles in the events leading to the “Great War” of 2077, some of whom have echoes in the main timeline of the series in 2296.¹⁰

I was convinced to watch the series by my son, who is a fan of the game franchise. I found the stylized violence in the first few episodes to be excessive, but I was assured that it was a faithful representation of the game (which was not a suitable justification or endorsement in my mind). By the sixth of eight episodes, it became clear that the creators were engaged in a fairly serious critique of contemporary politics, economics, and law. In particular, there is a discussion of fiduciary duty in the episode that served as inspiration for this article and its title, which will be recounted later. Although this article

8. Christopher Cruz, *A Newbie's Guide to 'Fallout'*, ROLLING STONE (Apr. 12, 2024), <https://www.rollingstone.com/culture/rs-gaming/what-is-Fallout-1234999543/>.

9. Nina Metz, *'Fallout' Review: Walton Goggins as a Swaggering, Post-Apocalyptic Cowboy*, CHI. TRIB. (Apr. 24, 2024), <https://www.chicagotribune.com/2024/04/24/Fallout-tv-show-review-walton-goggins/>.

10. Lucy Mangan, *Fallout Review - an absolute blast of a TV show*, THE GUARDIAN (Apr. 11, 2024), <https://www.theguardian.com/tv-and-radio/2024/apr/11/prime-Fallout-review-an-absolute-blast-of-a-tv-show>; Jody Macgregor, *Fallout TV show review: The best Fallout since New Vegas*, PCGAMER (Apr. 10, 2024), <https://www.pcgamer.com/movies-tv/fallout-tv-show-review-the-best-fallout-anything-since-fallout-new-vegas/>.

considers that discussion, it also addresses other, parallel critiques of corporate power, and the broad structure of corporate capitalism in the United States.

A. Corporate Capitalism in Fallout

In the world of *Fallout*, late-stage corporate capitalism is depicted as an extreme, dystopian system, where corporate power is unchecked and dominates every aspect of life. The setting is a satirical and critical take on capitalism, showcasing a society ravaged by corporate greed and the relentless pursuit of profit at the expense of ethics and the populace's well-being.¹¹

In pre-war *Fallout*, corporations exert immense influence over the government and society, leading to a culture of consumerism and disregard for the environment and human life. This is exemplified by companies like Vault-Tec (builder of nuclear *Fallout* shelters), West-Tek (an arms manufacturer), REPCONN (an aerospace company), RobCo (a computer and robotics producer), and Big MT (a scientific research center and defense contractor), all of which symbolize the excesses of corporate power. For instance, Vault-Tec is revealed to plan unethical experiments on the inhabitants of their vaults. Perhaps even more disturbing, all these firms appear to conspire to prompt nuclear war.¹²

The term “late-stage capitalism” refers to the absurdities and excesses attributed to some contemporary free market economies, often highlighting the imperative for endless growth and the concentration of wealth in the hands of a few.¹³ In *Fallout*, this is taken to an extreme, where the pursuit of resources and technological advancement leads to a nuclear war—reflecting the ultimate consequence of such an unchecked system.¹⁴

The *Fallout* series uses this backdrop to critique unregulated capitalism that prioritizes profits over broader human well-being.¹⁵ Nuclear warheads symbolize the destructive capacity of unchecked capitalism. Late-stage corporate capitalism in *Fallout* serves as a cautionary tale about the dangers of allowing corporate interests to override ethical considerations and the common good, resulting in a post-apocalyptic world where the remnants of humanity struggle to survive in the ruins of their former society's excesses.

11. See, e.g., Eric Switzer, *The Politics of Amazon's Fallout Are So Explicit, Only a Gamer Could Miss Them*, GAMER (Apr. 12, 2024), <https://www.thegamer.com/the-politics-of-amazons-fallout-are-so-explicit-only-a-gamer-could-miss-them/>.

12. Melissa Sarnowski, *10 Worst Fallout Vaults You Definitely Don't Want to Live in*, SCREEN RANT (May 3, 2024), <https://screenrant.com/fallout-worst-vaults-experiments-series-franchise-history/>.

13. David Aviles, *We live in a time of 'late capitalism'. But what does that Mean? And what's so late about it?*, THE CONVERSATION (Dec. 7, 2022), <https://theconversation.com/we-live-in-a-time-of-late-capitalism-but-what-does-that-mean-and-whats-so-late-about-it-191422>.

14. Sean Morrison, *Why Does the World of Fallout Look Like It's Stuck in the '50s?*, SCREEN RANT (Apr. 22, 2024), <https://screenrant.com/fallout-world-1950s-setting-future-explained/#:~:text=It's%20based%20on%20what%20people,the%20future%20would%20look%20like&text=The%20main%20reason%20the%20world,fit%20into%20a%20retrofuturistic%20aesthetic.>

15. *Id.*

i. Monopoly Power

One critical vulnerability in the capitalism of *Fallout* (and perhaps our own), is the erosion of efficient markets as a consequence of monopoly power. In the world of *Fallout*, monopolies play a significant role in shaping the pre- and post-war landscapes. Before *Fallout*'s "Great War" (the nuclear conflict that turned the world into a wasteland), several corporations had consolidated entire industries and grown to immense sizes, wielding considerable influence over the American economy and government.¹⁶

For example, Red Rocket Corp became a monopoly on the East Coast by taking advantage of fusion power.¹⁷ They had locations across the country, partnered with other major brands like Nuka Cola—further extending their reach and control—and absorbed competitors. Similarly, Galaxy News Network, the largest media corporation before the war, crafted news stories to favor government and corporate interests to maximize profits.¹⁸

These monopolies not only controlled vast sectors of the economy, they also engaged in unethical business practices that disregarded ethical standards at the expense of consumers and the public good (which is perhaps the likely consequence of monopoly power in general). Their unchecked power allowed them to unduly influence policy and public opinion, leading to a society that prioritized technological advancement and consumerism over sustainability and overall efficiency.¹⁹

The monopolies in *Fallout* serve as a narrative device to critique the dangers of corporate dominance and its potential to erode social stability. They are a reflection of the series' broader themes of unchecked capitalism and its consequences. This is not such an extreme position given that even mainstream neoclassical economic theory views monopoly as a market failure that interferes with efficiency.²⁰

ii. Political Capture and Oligarchy

In the *Fallout* series, the role of oligarchy and political capture by corporations is a central theme that illustrates the dangers of concentrated power and influence.²¹ The pre-war United States in the *Fallout* universe was effectively an oligarchy, controlled by a small group of powerful corporations

16. Matthew Weideman, *Fallout: 10 Biggest Corporations Before the War*, GAMERANT (2024), <https://gamerant.com/fallout-biggest-corporations-before-war/>.

17. *Id.*

18. Contemporary media corporations have arguably had similar consolidation and arguably platform conflict and hyperbole in order to maximize views and revenue.

19. *See* Weideman *supra* note 16.

20. *See, e.g.*, Eleanor M. Fox, *The Efficiency Paradox*, NYU LAW AND ECONOMICS RESEARCH PAPER NO. 09-26, 77, 77-88 (Robert Pitofsky ed., Oxford U. Press, 2008).

21. Although the game series predates the Citizens United case, many scholars argue that that case opened the floodgates allowing corporate money to completely disrupt and ultimately influence the outcomes of political campaigns. *See, e.g.*, Tim Law, *Citizens United Explained*, BRENNAN CTR. FOR JUST. (Dec. 12, 2019), <https://www.brennancenter.org/our-work/research-reports/citizens-united-explained>.

and wealthy individuals who exerted significant control over the government and society.

Corporate influence was so pervasive that the government ceded power to megacorporations like Vault-Tec, which became the largest corporation in the United States by 2076, valued at an estimated one trillion dollars (an amount that sounds comically low in the current world of public companies).²² These corporations actively shaped government policies to their advantage. The final episode of *Fallout* portrays the CEOs of the most powerful corporations acting as a secret cabal to control markets and government, encouraging the escalation of war to cement their interests. Some have speculated that this meeting and the shadowy figure watching from above were either controlled by or constituted “The Enclave.”²³

In *Fallout* lore, the Enclave, a secret organization with deep ties to the military-industrial complex, serves as a nexus for oligarchic rule and the connection between corporate interests and government.²⁴ By 2077, the Enclave had effective control over the U.S. as a government within the government, turning the once-thriving democracy into a functional oligarchy ruled by corporate interests and military leaders. In the resulting society, the rights of citizens were secondary to profits and interests of the elite.

The political capture of government by corporations led to a disregard for the environment, setting the stage for resource wars and eventual nuclear devastation. The remnants of these oligarchic structures still influence the post-war wasteland, with survivors and factions vying for control and resources amidst the ruins of the old world. The series uses this setting to explore themes of power, governance, and the human condition in a world where the old order has fallen, and new systems of control emerge. Even so, these new systems tend to reflect pre-war power dynamics. There is a feeling of inevitability and historical repetition in the series, with the phrase, “War never changes,” occurring in every game and the series, voiced by Ron Perlman since 1999. Those words are uttered by Vault-Tec executive, Barb, in the final meeting of the corporate leaders in the series to evoke this cyclical message.

iii. Weakened Labor Power

In the *Fallout* series, weakened labor power is a recurring theme that reflects broader societal decay and the consequences of corporate dominance. The series depicts a pre-war world where labor rights were severely undermined, leading to exploitation and poor working conditions.

Some of the most explicit examples of weakened labor power in *Fallout* go so far as to include institutionalized slavery. This is true even in the New

22. *Fallout: The Trap* (Prime Video Apr. 10, 2024).

23. See Charles Nicholas Raymond, *The Mystery Character In Fallout Season 1's Ending Hints At The Show's Real Villain*, SCREEN RANT (May 10, 2024), <https://screenrant.com/fallout-season-1-mystery-character-vault-tec-meeting-enclave-villain/>.

24. The Enclave is described as a conspiracy between key political and corporate leaders, resulting in a sort of shadow government or deep state.

California Republic (NCR), one of the most progressive factions in the post-war world. Wealthy landowners have significant sway over the NCR's policies, which leads to a marginalization of the working class and a reduction in their bargaining power. Even so, as one of the only groups attempting to reestablish democracy and rule of law, the NCR poses such a threat to the remnants of the corporate oligarchies, that its capital city, Shady Sands, is utterly destroyed by the vestiges of Vault-Tec. The narrative serves as a critique of systems that prioritize profit at the expense of worker rights.

iv. *Eroded Social Safety Net*

Erosion of the social safety net is a significant aspect of *Fallout's* dystopian setting. The pre-war scenes depict a world where the social safety net had been severely weakened. Social safety nets, which typically include programs like public education, unemployment benefits, universal healthcare, social security, and welfare, are designed to protect vulnerable citizens (especially children, those with disabilities, and the elderly). However, in pre-war *Fallout*, these programs were either non-existent or ineffective, leaving many without essential support. This abandonment of public services is evident in the widespread poverty, homelessness, and desperation seen throughout the series.

The narrative suggests that the government had become so intertwined with corporate interests that it failed to provide adequate social services. Instead, it funneled resources into military projects and corporate ventures, such as the development of advanced technologies and the construction of the Vaults. There is an explicit reference to the complete privatization of education as an example of this shift.

After the Great War, the remnants of the old world's social safety net are virtually non-existent. Survivors are left to fend for themselves in a harsh and unforgiving wasteland. The few institutions that do exist, such as the Brotherhood of Steel or the New California Republic, are often more concerned with their own agendas than with providing widespread humanitarian aid. The erosion of the social safety net in *Fallout* paints a grim picture of what could happen when the needs of the many are sacrificed for the desires of the few.

v. *Polarization of Wealth*

Wealth polarization in *Fallout* is a stark representation of the extreme disparities between the rich and the poor. In the pre-war world, wealth was concentrated in the hands of a few powerful corporations and their executives, while the majority of the population lived with diminishing resources and declining living standards.

The series highlights the opulence and excess of the wealthy elite in the pre-war world of Vault-Tec, big media, and luxurious Beverly Hills estates. Even after nuclear devastation, privileged residents of the vaults (including descendants of the original corporate managers) live in relative comfort and

safety compared to those forced to eke out a meager living in the irradiated wasteland described above. Members of other organized factions also have privilege and advantage in the new world as a consequence of power. The new world is characterized by a struggle for resources, where those with access to technology, weapons, and safe shelter hold significant power over those without.

The *Fallout* series uses this setting to explore the consequences of extreme wealth inequality and the societal tensions it creates. It serves as a critique of a system where the accumulation of wealth by a few leads to hardship and suffering for many others when wealth equals survival.

vi. “Enshittification”

I hesitated to address this issue on dignitary grounds, but it has become a cohesive description of certain negative elements created in the economy as a result of concentrated market power and algorithms. The term was coined by Cory Doctorow in late 2022.²⁵ It describes a pattern where online platforms start by offering high-quality services to attract users, then shift toward favoring business customers for profitability, and ultimately focus on maximizing profits for shareholders at the expense of both users and business customers. Platforms like TikTok, Amazon, and Twitter have been cited as key offenders. This pattern is presumed to be an inevitable consequence of the economic and legal incentives shaping corporate behavior (such as fiduciary duty). The dynamics of inflated prices for inferior goods and lack of choice are evident in the pre-war portrayal of *Fallout*.

Although these six examples of the excesses of capitalism (or put more positively, market failures) are not exhaustive and have independent bodies of scholarship exploring their particular dynamics, they may all be, to some extent, consequences of the foundational principle of fiduciary duty.

B. Fiduciary Duty in *Fallout*

In the *Fallout* series, fiduciary duty is portrayed as a concept that has been twisted and exploited by corporations to justify their actions, even when those actions have catastrophic consequences for humanity. The series satirizes the idea of fiduciary duty by showing how corporations like Vault-Tec use it as a shield to pursue profits at any cost, including the survival of human beings and the planet.

Vault-Tec, driven by a fiduciary responsibility to generate shareholder profits, exemplifies the pursuit of financial gain even if it results in the nuclear destruction of the world. This is a critique of the real-world legal obligation that binds corporations to act in the best interest of the corporation, often interpreted as maximizing profits for shareholders. In *Fallout*, this has been

25. Cory Doctorow, *The ‘Enshittification’ of TikTok*, WIRED (Jan. 23, 2023), <https://www.wired.com/story/tiktok-platforms-cory-doctorow/>.

taken to an extreme, where the survival of humanity is secondary to the financial interests of the company.

The series highlights the absurdity of maintaining fiduciary duty when the actions taken to fulfill that duty lead to the destruction of the very system that supports it. For example, promoting the fear of nuclear warfare or even contributing to its outbreak, as implied by the actions of Vault-Tec, renders the concept of fiduciary duty potentially meaningless if it leads to global destruction.²⁶

Fallout uses fiduciary duty to highlight the ethical bankruptcy that can occur when corporate interests are placed above all else. The resulting dystopian future shows how the remnants of these corporate actions haunt the survivors.²⁷ It serves as a cautionary tale about the potential dangers of a legal and economic system that prioritizes profits over everything.

In Episode 6 of *Fallout*, Cooper Howard, a prominent Western-genre actor becomes the face of Vault-Tec as its eponymous “Vault Boy” in a series of print and television ads for spaces in *Fallout* shelter vaults (conveniently arranged by his wife, Barb, a Vault-Tec executive). In a conversation with a fellow actor Charlie, who played native roles in some of those Westerns, the two friends have a surprisingly serious discussion about the role of corporate fiduciary duties in creating the dystopia they live in:²⁸

Cooper: Sorry you couldn’t make it to the party the other night, Charlie. Guess you had one of your meetings, huh? One of your Communist meetings? Come on, man. We watched people die together up north fighting against all that horseshit.

Charlie: Yeah, and for what?

Cooper: What do you mean, for what? For the American dream. We’re actors. We make movies, Charlie.

Charlie: Yeah, the American dream has me getting shot in the ass by you all day.

Cooper: You got five acres in Tarzana. I think you’re doing all right.

Charlie: It don’t matter, Coop. Vault-Tec’s the fucking devil, man.

Cooper: My wife works there. You really think Barb’s the devil?

Charlie: No, no, okay, I... I like Barb, okay? Do you know what “fiduciary responsibility” means?

Cooper: Fiduciary responsibility?

Charlie: Yeah.

Cooper: No, I have no fucking idea. I play a cowboy for a living.

Cooper: Okay. So, the U.S. government has outsourced the survival of the human race to Vault-Tec. Vault-Tec is a private corporation that has a

26. Jack King, *Fallout Recap: Under New Management*, VULTURE (Apr. 11, 2024), <https://www.vulture.com/article/fallout-recap-episode-6-the-trap.html>.

27. Kevin Fox Jr., *Fallout and the Post-Modern Television Post-Apocalypse*, PASTE (Apr. 19, 2024, 11:35 AM), <https://www.pastemagazine.com/tv/amazon-prime-video/Fallout-tv-series-ending-explained-spoilers-streaming-industry-corporations>.

28. Ross Bonaime, *‘Fallout’ Episode 6 Recap: Who Makes the Rules When the World Ends?*, COLLIDER (Apr. 12, 2024), <https://collider.com/fallout-episode-6-recap/>.

fiduciary responsibility to make money for its investors. And how does it make money? By selling vaults.

Cooper: That's called capitalism, Charlie.

Charlie: But they can't sell vaults if these peace negotiations go through. So, Vault-Tec has a fiduciary responsibility to make sure that it don't work out.

Cooper: Yeah. How they gonna do that?

Charlie: I don't know. You remember that movie we did with Johnny Morton... you were the sheriff, and I was some generic Indian?

Cooper: Come on, man, don't say that. Tallhand Mudlake could talk to horses. You played him with grace and with dignity. It was a great role for you.

Charlie: Morton played a rancher who owned half of Missouri. And what happens when the cattle ranchers have more power than the sheriff?

Cooper: The whole town burns down.

Charlie: The whole town burns down. Right. Vault-Tec is a trillion-dollar company that owns half of everything. And after ten years of war, the U.S. government is broker than a joke. The cattle ranchers are in charge, Coop.

Cooper: Oh, come on.

Charlie: Unless the people do something about it.

Cooper: I guess everything's a conspiracy, right? Come on, man, you sound like you're in a cult.

Charlie: And you're sitting here defending a system that's ready to set the world on fire, Cooper. Maybe you're the one in the cult. Look. You should come to a meeting. You should learn the truth about where your wife works. For her sake.²⁹

This conversation foreshadows the explicit decision by Vault-Tec and related dominant corporations to initiate nuclear devastation to maximize the returns on their investments in *Fallout* shelters and military hardware. So, the argument is that corporate fiduciary duties created perverse but legal incentives to destroy the world as it existed. This is obviously an argument *ad absurdum*, but its rhetorical power is that it struck viewers as a plausible scenario given the current extremes of corporate behavior by executives like Elon Musk, Peter Thiel, Jeff Bezos, Rupert Murdoch, Mark Andreessen, Ben Horowitz, Bill Ackman, and a host of others. Elon Musk's comments minimizing the impact of nuclear detonations, referring to the rebuilding of Hiroshima and Nagasaki sadly sounds as if it were taken directly from a *Fallout* script.³⁰

29. *Fallout Season 1, Episode 6 "The Trap" Transcript*, TVSHOWTRANSCRIPTS, <https://tvshowtranscripts.ourboard.org/viewtopic.php?t=68551> (last visited Oct. 7, 2024).

30. Alisha Rahaman Sarkar, *Elon Musk draws fire for playing down impact of atomic bombing of Japan: 'Not as scary as people think'*, THE INDEPENDENT (Aug. 13, 2024, 1:10 PM), <https://www.independent.co.uk/news/world/americas/elon-musk-japan-nuclear-attacks-b2595497.html> ("People were asking me in California, are you worried about a nuclear cloud coming from Japan? I am like no, that's crazy. It is actually, it is not even dangerous in Fukushima. I flew there and ate locally grown vegetables on TV to prove it... Hiroshima and Nagasaki were bombed but now they are full cities again.").

FIDUCIARY DUTY IN CORPORATE LAW

“Fiduciary duty” is often used to justify business excesses, but it has specific meanings in corporate law, governed primarily by state statutes and case law, though federal law has some interplay in securities regulation. All corporations presumptively have limited liability, and their ownership is represented by stock, which may be traded publicly if registration requirements are met. Corporations are governed by directors, who may also be owners or managers. Founders must file a charter or articles of incorporation with the state to create the corporate entity, which can exist indefinitely as long as it remains solvent.

Corporations have a variety of sizes and structures. Large, publicly traded corporations differ significantly from smaller ones, particularly in securities law and tax treatment. Public companies must register with the SEC before offering shares.³¹ Smaller businesses often elect to be treated as “S corps” to receive pass-through tax treatment, while larger corporations are “C corps” and are taxed at the entity level and upon distribution of dividends.³²

A major difference between large and small corporations is their governance and incentives. Large corporations often have outside directors (who are not owners or employees) and professional managers (who are not necessarily owners). Despite these differences, all corporations share the goal of producing profits, which has been highly effective in mobilizing capital and growing economies.

In discussions on corporate fiduciary duties, a central question is the core duty owed by a director to the corporation. A common answer is “to maximize shareholder wealth,” popularized by the 1919 case *Dodge v. Ford Motor Company*.³³ However, nearly all state statutes, following the Model Business Corporation Act (MBCA), require directors to act in good faith and *in the best interests of the corporation*—which may not align with maximization of shareholder wealth.³⁴ This principle is more nuanced and considers the broader implications of directors’ decisions.

Delaware has significant influence on corporate law across the U.S. Courts, and many jurisdictions rely on Delaware case law, even when it is in tension with local statutes or rules.³⁵ This widespread reliance on Delaware law shapes corporate behavior and suggests a psychological or social dynamic distinct from strict legal or economic reasoning. In general, Delaware courts

31. See, e.g., Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1735–36 (2006) (proposing director primacy as a modification of shareholder primacy).

32. *S Corporations*, INTERNAL REVENUE SERV. (Oct. 4, 2024), <https://www.irs.gov/businesses/small-businesses-self-employed/s-corporations>.

33. *Dodge v. Ford Motor Co.*, 204 Mich. 459 (1919).

34. MODEL BUS. CORP. ACT § 8.30(a) (1969) (AM. BAR ASS’N, amended 2016).

35. See *About Delaware’s General Corporation Law*, DELAWARE.GOV, <https://corplaw.delaware.gov/delawares-general-corporation-law/>.

defer to directors on decisions regarding what constitutes the best interest of the corporation.³⁶

A. Shareholder Primacy

The conventional model of the corporation in practice emphasizes shareholder wealth maximization and the separation of ownership and management.³⁷ Meer shareholders elect directors who hire managers, creating a structure where managers owe fiduciary duties only to shareholders. This model argues that if duties were owed to other parties, investors would be less willing to contribute capital due to potential profit diversions.³⁸ For example, closing an unproductive plant to increase share value, despite harm to workers and the community, reflects this tension.

The iconic *Dodge v. Ford* case illustrates shareholder exclusivity. Henry Ford's decision to reinvest profits into higher wages and lower prices was challenged by the Dodge brothers, who sought extraordinary dividends. The court sided with the Dodge brothers and reified the notion that directors must prioritize shareholder returns.³⁹ However, this is not the rule in most states, and the case is often used to frame discussions on fiduciary duties and the business judgment rule. Major frauds and business failures over the past twenty-five years, highlight the difficulty of holding managers accountable even with sophisticated laws and regulations.

There are a variety of competing "stakeholder" theories that advocate considering interests beyond shareholders.⁴⁰ However, the purpose of this paper is not primarily to advocate for these alternatives as a solution to the challenges potentially posed by fiduciary duties and shareholder primacy.

B. Current Guardrails Preventing Extremes of Shareholder Primacy

There is a spectrum of academic approaches to understanding fiduciary duties. As discussed earlier, some take the position that it is shareholder wealth maximization.⁴¹ Others acknowledge that while this may be true, boards are the ultimate arbiters of that calculus within the boundaries of specific state law

36. See, e.g., Yaron Nili, *Delaware in 2014: Increasing Deference to Directors' Decisions*, HARV. L. SCH. F. CORP. GOVERNANCE (Feb. 2, 2015), <https://corpgov.law.harvard.edu/2015/02/03/delaware-in-2014-increasing-deference-to-directors-decision/>.

37. See, e.g., Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 836 (2005).

38. See, e.g., Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1424–25 (1993).

39. See *Dodge*, 204 Mich. at 502–508.

40. See generally Kent Greenfield, *New Principles for Corporate Law*, 1 HASTINGS BUS. L.J. 89 (2005); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999); Marleen A. O'Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899 (1993); John R. Boatright, *Fiduciary Duties and the Shareholder-Management Relation: Or, What's So Special About Shareholders?*, 4 BUS. ETHICS. Q. 393 (1994); R. EDWARD FREEMAN, *STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH* (1984); PETER F. DRUCKER, *THE NEW SOCIETY: THE ANATOMY OF THE INDUSTRIAL ORDER* (1950).

41. See Bebchuk, *supra* note 37.

limitations.⁴² Some in the shareholder wealth maximization camp admit to the tension between long and short-term gains, with a preference for prioritizing long-term gains. The statutory rule in most states (typically in a so-called constituency statute) is that managers may consider the interests of stakeholders other than shareholders in determining what is in the best interests of the corporation (from the language of the Model Business Corporation Act or MBCA).⁴³ This is the case even for Delaware corporations, unless the corporation is in *Revlon* mode (when breakup or sale of the corporation is inevitable).⁴⁴ Only one state has ever adopted a mandatory stakeholder statute (Connecticut),⁴⁵ but it is generally considered to have been an unsuccessful experiment and was repealed in 2010.⁴⁶ However, the emergence of benefit corporations as a viable alternative in nearly every state does give corporate founders the flexibility to balance all identified stakeholders.⁴⁷ As a practical matter, the two clear alternatives in place today to moderate the excesses of shareholder primacy are the permissive stakeholder approach, which is the majority default rule, and versions of the benefit corporation.

To restrain corporate excesses and externalities, various movements have provided frameworks for evaluating corporate behavior, such as corporate social responsibility (CSR) and benefit corporations. These frameworks involve different groups evaluating, grading, and ranking corporations based on their commitment and effectiveness in CSR.⁴⁸

Benefit corporations, in particular, explicitly allow business entities to serve defined public goods, with organizations like B Lab certifying “B Corps” based on criteria beyond those allowed or required by state law.⁴⁹ Many benefit corporations have successfully integrated social and environmental goals into their business models. For example, Patagonia donates 1% of its annual sales to environmental causes, and TOMS operates on a one-for-one model,

42. See Bainbridge, *supra* note 38.

43. Model Business Corporation Act § 8.30 (as updated through Nov. 2023) (“(a) Each member of the board of directors, when discharging the duties of a director, shall act: (i) in good faith, and (ii) in a manner the director reasonably believes to be in the best interests of the corporation.” Note that this language does not tie the duty to the best interests of shareholders, but to the corporation broadly.).

44. See, e.g., William M. Lafferty, Lisa A. Schmidt & Donald J. Wolfe, Jr., *A Brief Introduction to the Fiduciary Duties of Directors Under Delaware Law*, 116 PENN STATE L. REV. 837 (2012).

45. See, e.g., Terry A. O’Neill, *Employees’ Duty of Loyalty and the Corporate Constituency Debate*, 25 CONN. L. REV. 681 (1993).

46. H.B. 5530, 2010 Gen. Assemb., (Conn. 2010.).

47. See Sandra Feldman, *Georgia and Alabama Enact Benefit Corporation Laws*, WOLTERS KLUWER (Jan. 7, 2021) <https://www.wolterskluwer.com/en/expert-insights/georgia-and-alabama-enact-benefit-corporation-laws>. As of 2021, 40 states had some of benefit corporation allowed by statute. *Id.*

48. ANN K. BUCHHOLTZ, JILL A. BROWN & KAREEM M. SHABANA, *Corporate Governance and Corporate Social Responsibility*, in THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY 327, 327-345 (Andrew Crane, et al. eds., Oxford University Press 2009).

49. See *About B Corps*, B LAB., <https://bcorporation.net/about-b-corps> (last updated Oct. 6, 2023).

donating a pair of shoes for every pair sold.⁵⁰ Benefit corporations are required to report annually on their social and environmental performance, which promotes transparency and accountability. This helps ensure they are meeting their stated goals.⁵¹ Even so, benefit corporations face challenges such as expanded reporting requirements and the need to balance profit with social goals.⁵²

CAN CORPORATE LAW STAVE OFF THE APOCALYPSE?

Law can create incentives, but incentives do not necessarily lead to behavioral change. This section examines current approaches intended to minimize the extremes of fiduciary duty.

A. Limitations on Law in Changing Fiduciary Duties of a Corporation

Fiduciary duties and corporate purpose provide insights into the limitations of legal reforms in changing behavior. While legal changes can modify incentives for owners and managers, entrenched decision-making habits and bureaucratic processes often limit the range of acceptable decisions. For example, we may assume that the primary motivator for corporate owners and managers is the accumulation of wealth. Fiduciary duties, as well as much of securities regulation, are intended to hold management accountable, addressing the agency problem created by those competing interests. Although Section III.B. will consider potential legal reforms, here I recount historical moves intended to blunt the extremes of the shareholder primacy model of fiduciary duty.

i. Shareholder Pressure

Although shareholders may expect maximized quarterly returns, some activist shareholders challenge this approach.⁵³ Shareholder activism can advocate for various approaches to shareholder primacy or address environmental and social concerns.⁵⁴ These efforts occasionally achieve their intended effect by spurring corporate change. Effective shareholder advocacy often involves informal appeals to management teams, which can lead to

50. *Benefit Corporations Are Growing in Popularity. Here Are 4 Advantages They Can Bring Your Organization*, BUS. SCH. U. NAVARRA (July 18, 2024), <https://www.iese.edu/insight/articles/benefit-corporations-profitability-impact/>.

51. Patricia McGowan & Kristen Brown, *Benefit Corporations: What Are the Advantages, Disadvantages, and Impact on Not-for-Profit Organizations?*, COHNREZNICK (Oct. 31, 2014), <https://www.cohnreznick.com/insights/benefit-corporations-what-are-advantages-disadvantages-and-impact-not-profit-organizations>.

52. *Id.*

53. *See, e.g.*, Anastasia O'Rourke, *A New Politics of Engagement: Shareholder Activism for Corporate Social Responsibility*, 12 BUS. STRATEGY & ENV'T 227 (2003).

54. *Id.*

changes without formal shareholder votes. Corporate leaders sometimes sympathize with shareholders' concerns about equity or sustainability goals.⁵⁵

Divestment Movements

Some forms of activism are promoted by stakeholders holding significant equity positions. For example, in the 1980s, students at many U.S. universities protested apartheid by demanding that endowment funds divest from companies doing business in South Africa.⁵⁶ Harvard, Columbia, Amherst, Smith, Wisconsin, and Tufts divested some or all of their holdings. Similar protest movements have arisen in the 2023-24 academic year as many students oppose investment in Israel as a response to the war in Gaza.⁵⁷ Despite corporate resistance to divestment from South Africa, Nelson Mandela credited the movement with weakening apartheid and creating conditions for a new constitution.⁵⁸

Similarly divestment from fossil fuel companies has been controversial, with institutional investors concerned about financial risks from a less diversified portfolio. However, proponents argue that fiduciary duty requires divestment due to the significant role of fossil fuels in climate change, which poses an existential threat to all economies and perhaps even human existence.⁵⁹ At this point, a number of universities (including my own, Seattle University) have divested from investments related to fossil fuels.⁶⁰ The long-term impact of this divestment strategy remains to be seen.

Socially Conscious Investing: Environmentalism and ESG

U.S. corporate leaders (in some cases as a result of shareholder and other pressures) increasingly recognize the urgency of environmental issues like climate change. A recent study found that nearly all senior executives at institutional investing firms prioritize environmental, social, and governance (ESG) issues.⁶¹ This shift suggests that sustainable thinking in corporate

55. I have advised socially conscious investment groups, pension funds, and religious communities using this strategy.

56. Paul Lansing, *The Divestment of United States Companies in South Africa and Apartheid*, 60 NEB. L. REV. 304, 307 (1981).

57. Adrian Florido, *Here are the divestment demands that student protestors are making*, NPR (Apr. 26, 2024), <https://www.npr.org/2024/04/26/1247561371/here-are-the-divestment-demands-that-student-protestors-are-making>.

58. See, e.g., Adele Simmons, *Outside Opinion: Skeptics Were Wrong: South Africa Divestment Worked*, CHI. TRIB. (Dec. 15, 2013), <https://www.chicagotribune.com/2013/12/15/outside-opinion-skeptics-were-wrong-south-africa-divestment-worked/>.

59. Surbhi Sarang, Note, *Combating Climate Change Through a Duty to Divest*, 49 COLUM. J.L. & SOC. PROBS. 295, 302 (2016).

60. Daisy Zavala Magaña, *Seattle University Becomes First WA College to Divest from Fossil Fuels*, SEATTLE TIMES (July 17, 2023), <https://www.seattletimes.com/seattle-news/education/seattle-university-becomes-first-wa-college-to-divest-from-fossil-fuels/#:~:text=Seattle%20University%20has%20withdrawn%20all,to%20divest%20from%20fossil%20fuels>.

61. Robert G. Eccles & Svetlana Klimenko, *The Investor Revolution*, HARV. BUS. REV. (May-June 2019), <https://hbr.org/2019/05/the-investor-revolution>.

contexts is becoming critical.⁶² In recent years, there has been a significant increase in funds allocated to businesses emphasizing sustainability and social issues. In early 2019, record funds were invested in ESG-focused businesses.⁶³ Adopting this model could increase funding for businesses contributing to the common good.⁶⁴ Although there is overlap with environmental activism, ESG addresses broader issues.

ii. Labor Pressure and Employee Ownership

Labor law provides formalized procedures through unions, but most U.S. employees are not unionized, limiting their power to influence corporate policies.⁶⁵ However, non-union employees have organized sickouts and work stoppages to protest corporate policies.⁶⁶ Aligning employee and shareholder interests has been one solution to this tension. The employee buyout of United Airlines and the Mondragon Corporation's acquisition processes serve as examples.

In 1994, United Airlines enacted an Employee Stock Ownership Program (ESOP), giving employees a controlling interest to resolve labor strife and financial challenges.⁶⁷ Despite initial success, United filed for bankruptcy in 2002 due to deteriorating union relationships and post-9/11 industry challenges.⁶⁸ While some see this failure as a flaw in employee ownership, others argue it was the structure, not the principle, that failed. Today, about 7,000 U.S. corporations have ESOPs, with approximately 2,000 of those firms being entirely owned by employees.⁶⁹

The Mondragon Corporation, a large multinational business in Spain, is structured as an employee-owned cooperative with governance and compensation rules benefiting employees.⁷⁰ Despite challenges, Mondragon

62. See, e.g., Alissa K. Amico, *Investing in the Environment*, HARV. L. SCH. F. CORP. GOVERNANCE (Feb. 18, 2019), <https://corpgov.law.harvard.edu/2019/02/18/investing-in-the-environment>.

63. See Todd N. Bundrant, Ann Richardson Knox & Gabriela Sakamoto, *The Growth of ESG in Fund Finance and Other Financial Products in the United States*, MAYER BROWN (Jan. 27, 2021), <https://www.mayerbrown.com/en/insights/publications/2021/01/the-growth-of-esg-in-fund-finance-and-other-financial-products-in-the-united-states>.

64. See, e.g., George Serafeim, *Social-Impact Efforts That Create Real Value*, HARV. BUS. REV. (Oct. 2020).

65. See Heidi Shierholz, *The number of workers represented by a union held steady in 2019, while union membership fell*, ECON. POL'Y INST. (Jan. 22, 2020), <https://www.epi.org/publication/2019-union-membership-data/>.

66. See, e.g., Louise Matsakis, *Amazon Sick-Out Unites Tech and Warehouse Workers in Protest*, WIRED (Apr. 24, 2020, 12:17 PM), <https://www.wired.com/story/amazon-sick-out-tech-warehouse-workers-protest/>.

67. See, e.g., Jesus Sanchez, *United Airlines Deal Gives Workers 55% of Company*, L.A. TIMES (July 13, 1994, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1994-07-13-mn-15156-story.html>.

68. See, e.g., *United Airlines puts \$1.5bn bankruptcy filing in place*, THE GUARDIAN (Dec. 9, 2002), <https://www.theguardian.com/business/2002/dec/09/theairlineindustry.usnews>.

69. See *Learn About Employee Ownership*, EMPLOYEE-OWNED AMERICA, <https://employeeownedamerica.com/the-basics/>.

70. See Race Mathews, *The Mondragon Model: How a Basque Cooperative Defied Spain's Economic Crisis*, CONVERSATION (Oct. 18, 2012), <https://theconversation.com/the-mondragon-model-how-a-basque-cooperative-defied-spains-economic-crisis-10193>.

has demonstrated the durability and scalability of employee ownership. Its acquisition process extends employee ownership to subsidiaries, providing broad ownership rights and protections imposed by the parent company. This model represents positive cultural and value changes imposed from below.⁷¹

B. Meaningful Legal Changes to Corporate Fiduciary Duties

Scholars have proposed a variety of policies that might ameliorate the extremes of shareholder primacy in fiduciary duty. One approach would be to modify securities rules which currently require quarterly reporting (10-Q) and only require semiannual or annual reports for public companies (10-K).⁷² Some suggest limiting or banning stock buybacks, which have become the default approach for increasing share price when there are retained earnings.⁷³ As noted earlier, some advocate for some form of mandatory stakeholder approach. Some scholars have proposed adopting a structural solution like codetermination, which is required for large corporations in countries such as Germany.⁷⁴ These are not the only alternatives, but they do represent those most-commonly proposed.

i. *Dump Quarterly Reporting*

The transition from quarterly to annual reporting for public companies has long been a topic of debate. Many securities markets do not require quarterly earnings statements, which often lead companies to focus excessively on short-term profits rather than long-term goals. Executives feel pressure to deliver positive news each quarter, which can create perverse incentives to maximize short-term results at the expense of long-term corporate health.

Moving to annual reporting could mitigate this short-termism by allowing executives to shift their attention to longer horizons. Some economists believe that annual reporting would encourage executives to think more strategically about the company's future, ultimately benefiting shareholders. This is the norm in many securities markets.⁷⁵ However, uncertainty exists regarding whether this change would directly benefit shareholders of US-listed corporations. Shareholders' access to timely and accurate data remains crucial for informed decision-making, and there is some risk that less-frequent reporting could provide opportunities for management malfeasance. Even so,

71. See, e.g., Jill Bamburg, *Mondragon Through a Critical Lens*, MEDIUM (Oct. 3, 2017), <https://medium.com/fifty-by-fifty/mondragon-through-a-critical-lens-b29de8c6049>.

72. Emily Lambert, *Should Companies Report Annually Instead of Quarterly?*, CHI. BOOTH REV. (Feb. 08, 2019), <https://www.chicagobooth.edu/review/should-companies-report-annually-instead-quarterly>.

73. See, e.g., Rita McGrath, *The Case for Banning Stock Buybacks*, CNN (Feb. 26, 2019), <https://www.cnn.com/2019/02/26/perspectives/ban-stock-buybacks/index.html>.

74. See, e.g., Jens Dammann & Horst Eidenmueller, *Taming the Corporate Leviathan: Codetermination and the Democratic State*, HARV. L. SCH. F. CORP. GOVERNANCE (Sept. 28, 2020), <https://corpgov.law.harvard.edu/2020/09/28/taming-the-corporate-leviathan-codetermination-and-the-democratic-state/>.

75. Mike Zaccardi, *Global Corporate Earnings Reporting: Differences By Country*, SEETMARKET (Mar. 23, 2022), <https://www.seeitmarket.com/global-corporate-earnings-reporting-differences-by-country/>.

that risk might be outweighed by the potential stability created by focusing on longer-term results. A one-year horizon is still relatively short term, but it does stretch the window driving short-term stock prices and could help to blunt the extremes. Even semiannual reporting as in the European Union and the United Kingdom would likely be an improvement.⁷⁶

ii. Ban Stock Buybacks

Prior to 1982, stock buybacks were largely illegal, but since then, they have become a popular financial tool for corporations.⁷⁷ Banning or at least taxing corporate stock buybacks in the US could impact short-term decisions driven by shareholder wealth maximization. Stock buybacks, also known as share repurchases, involve a company purchasing its own outstanding shares from the current stockholders in the market. These buybacks have gained prominence as an alternative to dividends for returning capital to shareholders. However, they come with potential pitfalls that compromise long-term corporate health in the pursuit of short-term gains in the name of shareholder wealth maximization as part of fiduciary duties.

There are a number of potential problems. First, managers may use buybacks to inflate stock prices, benefiting themselves through stock-based compensation. Banning buybacks could discourage this practice, aligning corporate decisions more closely with best interests of the corporation, the core of the duty of loyalty.⁷⁸

A second potential problem with buybacks relates to timing. Companies often buy back shares when stock prices are high, which may not be the optimal time or in the best long-term interest of shareholders. A ban on buybacks might encourage companies to focus on fundamental value rather than short-term market fluctuations

A third potential problem is created by requiring excess leverage. Using revenue to payout to shareholders leaves corporations with less cash, so aggressive buybacks can lead to excessive debt, reducing a company's financial resilience and compromising shareholder value. Banning buybacks could prompt companies to maintain adequate liquidity buffers and invest in critical areas like talent, capital expenditures, mergers and acquisitions, and especially research and development (which has declined substantially over the past 20 years).⁷⁹ Corporate fiduciary duties ought to encourage companies to prioritize

76. Robert Posen, *The EU's New Reporting Rules—Creating An Informational Vacuum*, HARV. L. SCH. F. CORP. GOVERNANCE (Oct. 10, 2016), <https://corpgov.law.harvard.edu/2016/10/10/the-eus-new-reporting-rules-creating-an-informational-vacuum/>.

77. Charles P. Pierce, *There's A Reason Why Stock Buybacks Used to Be Illegal*, ESQUIRE (Mar. 5, 2024), <https://www.msn.com/en-us/money/markets/theres-a-reason-why-stock-buybacks-used-to-be-illegal/ar-BB1jnuzk>.

78. *Id.*

79. *See e.g.*, Anne Marie Knott, *Is R&D Getting Harder, or Are Companies Just Getting Worse At It?*, HARV. BUS. REV. (Mar. 21, 2017), <https://hbr.org/2017/03/is-rd-getting-harder-or-are-companies-just-getting-worse-at->

long-term value creation, strategic investments, and financial stability.⁸⁰ Such a shift could enhance corporate resilience and benefit shareholder wealth.⁸¹

iii. Mandatory Consideration of Other Stakeholders?

When corporate managers are required to consider stakeholders alongside shareholders in fulfilling their fiduciary duties, it might mitigate problems arising from externalized negative consequences. Currently, the focus on shareholder wealth maximization can lead to decisions that prioritize short-term gains without adequately accounting for broader impacts that may outweigh those gains. Although this creates an ethical problem (such as in the closing of plants or degrading environments), it also creates a serious economic problem by eroding overall efficiency.

By expanding the scope of fiduciary responsibility to include stakeholders such as employees, local communities, and the environment, managers would be compelled to weigh the interests among the constituencies. Consequently, they might be less likely to engage in practices that yield immediate financial benefits but result in substantial long-term harm. This shift toward stakeholder-oriented decision-making could enhance corporate sustainability, resilience, and overall societal well-being. However, it could also create new opportunities for self-interested misbehavior and would be extremely challenging to adjudicate within the current framework of fiduciary duty law.⁸²

iv. Structural Solutions Like Codetermination

Codetermination, the practice of including worker representatives on corporate boards, could address the excesses of the shareholder wealth maximization standard in the US. The model usually referred to is the system in Germany requiring that half of the supervisory board (analogous to a US board of directors) be elected by employees and labor organizations while only half is elected by shareholders. There has been deep opposition to this approach in the US.⁸³ However, by granting employees a formal role in decision-making, codetermination may ensure that diverse perspectives are

it#: ~ :text=To%20summarize%20where%20this%20leaves,because%20innovation%20has%20gotten%20ha
rder.

80. See, e.g., Zachary J. Gubler, *The Neoclassical View of Corporate Fiduciary Duty Law*, HARV. L. SCH. F. CORP. GOVERNANCE (Apr. 4, 2024), <https://corpgov.law.harvard.edu/2024/04/08/the-neoclassical-view-of-corporate-fiduciary-duty-law/>.

81. See, e.g., Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 Nw. U.L. REV. 547, 573 (2003).

82. See, e.g., Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91 (2020).

83. Jens Dammann & Horst Eidenmueller, *Codetermination: A Poor Fit for U.S. Corporations*, HARV. L. SCH. F. CORP. GOVERNANCE (Apr. 28, 2020), <https://corpgov.law.harvard.edu/2020/04/28/codetermination-a-poor-fit-for-u-s-corporations/>.

considered.⁸⁴ Worker representatives typically advocate for long-term sustainability, ethical practices, and social responsibility. Consequently, decisions become more robust, balancing gains for shareholders with broader societal impacts.⁸⁵ Codetermination may foster transparency, accountability, and a holistic view of corporate impact, promoting responsible decision-making, and minimizing externalized harm, all of which may actually improve shareholder returns.⁸⁶

Note that all of the proposals discussed so far assume that the duty of loyalty to act in the best interests of the corporation ought to prioritize the long-term best interests of shareholders rather than short-term stock gains.⁸⁷ This position may not be universally accepted, but it is increasingly noted in fiduciary duty cases, particularly in the pivotal jurisdiction of Delaware.⁸⁸

v. *Problems with Illegal Acts*

The previous sections have focused on the tension between perspectives and horizons that harm either long-term shareholder interests or the broader economy and overall social welfare. The question of corporate illegality is somewhat more nuanced as there are two forms illegality, gross offenses (with significant sanctions that certainly violate the duty of loyalty) and “illegality” (minor infractions that might not be presumed to violate the duty of loyalty). The second type might be considered a reasonable cost of doing business that could be approved in good faith, such as when delivery companies build the cost of parking tickets into their business model, which bears a resemblance to the efficient breach doctrine in contracts.⁸⁹ However, there is a significant challenge in drawing lines between the two.

Recent Delaware fiduciary duty opinions have been more critical of illegality in their good faith standard within duty of loyalty analysis.⁹⁰ The duty of good faith is a fundamental principle that applies to directors and officers of a corporation when they make decisions in their roles as corporate fiduciaries. The landmark *Caremark* decision focused on “conscious

84. Akhil Saxena, *The Case for Codetermination: Advantages of Worker Representation*, BROWN POL. REV. (Dec. 24, 2020), <https://brownpoliticalreview.org/2020/12/the-case-for-codetermination-advantages-of-worker-representation/>.

85. Pierre J. Allegaert, *Codetermination and ESG: Viable Alternatives to Shareholder Primacy?*, 52 N.Y.U.J. INT'L L. & POL. 641 (2020).

86. Ann M. Litpon, *Will the Real Shareholder Primacy Please Stand Up?*, 137 HARV. L. REV. 1584 (2024), <https://harvardlawreview.org/print/vol-137/will-the-real-shareholder-primacy-please-stand-up/> (reviewing Stephen M. Bainbridge, *The Profit Motive: Defending Shareholder Value Maximization* (2023)).

87. See Bainbridge, *supra* note 38.

88. See, e.g., *McRitchie v. Zuckerberg*, 315 A.3d 518, 562 (Del. Ch. 2024).

89. See, e.g., Doroty Lund & Natash Sarin, *The Cost of Doing Business: Corporate Crime and Punishment Post-Crisis*, COLUM. L. SCH.: THE COLUM. L. SCH. BLUE SKY BLOG (Mar. 18, 2020), <https://clsbluesky.law.columbia.edu/2020/03/18/the-cost-of-doing-business-corporate-crime-and-punishment-post-crisis/>.

90. See, e.g., *Lebanon Cty. Empl. Rtrmt. Fd. v. Collis*, No. 2021-1118-JTL, 2022 WL 17841215 (Del. Ch. Dec. 22, 2022).

disregard.”⁹¹ Under this standard, directors and officers must not act with a conscious regard for their responsibilities.

In *re Disney*,⁹² *Caremark* and the later *Stone v. Ritter*⁹³ (which explicitly moved this standard into good faith) identified three types of violations. The first standard that had been considered in most cases under *Caremark* and its related cases was “intentional neglect;” a violation may occur if a director or officer intentionally neglects their fiduciary duties.⁹⁴ The second standard is “purpose other than benefit.” However, the third standard is becoming increasingly important, “intentional violation of law.”⁹⁵ If a director or officer intentionally violates the law, it breaches the duty of good faith. Note that these are the standards for establishing a substantive breach of fiduciary duty and not the standard for overcoming the business judgment rule in litigation.⁹⁶

Deterring illegality is perhaps the most important aspect of the duties of good faith and loyalty. In the world of *Fallout*, advocates for the status quo of corporate governance would certainly argue that sanctioning fraud and starting a global thermonuclear war violate those duties as the actions would be illegal. However, perhaps we expect that duty to do too much heavy lifting as a check on self-interest.⁹⁷ Some of the best recent scholarship observes that even criminal prosecution has little ability to constrain corporate illegality.⁹⁸ To the extent that large corporations amass market power (leading to monopoly) and invest heavily in lobbying (leading to political capture), laws can be and are changed to cleanse transactions that would have been unlawful previously. Corporate money directed to the executive, legislative, and judicial branches (now even at the Supreme Court level)⁹⁹ creates opportunities to circumvent law, allowing shareholder wealth maximization to trump all else, regardless of the long-term impacts on society.

91. *In re Caremark Int'l Inc. Deriv. Litig.*, 698 A.2d 959 (Del. Ch. 1996).

92. *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27 (Del. 2006).

93. *Stone v. Ritter*, No. 93, 2006 (Del. Sup. Ct. 2006).

94. *Id.* at 369.

95. *Id.*

96. *In re Caremark*, *supra* note 91 at 971.

97. See, e.g., Dave Michaels, *For Big Companies, Felony Convictions Are a Mere Footnote*, WALL ST. J. (July 30, 2024), <https://www.wsj.com/us-news/law/corporate-criminal-convictions-lack-consequences-boeing-28e4e06c>.

98. See, e.g., Andrew Jennings & Kimberly D. Krawiec, *Vice Capital*, 15 U.C. IRVINE L. REV. ___ (forthcoming 2025); Andrew Jennings, *The Market for Corporate Criminals*, 40 YALE J. ON REGUL. 520, 534-36 (2023).

99. Regarding alleged corruption by Justice Clarence Thomas see, e.g., Eric Lutz, *The Clarence Thomas Saga Won't Stop*, VANITY FAIR (Aug. 6, 2024), <https://www.vanityfair.com/news/story/clarence-thomas-undisclosed-private-travel-supreme-court-reform>; regarding the recent Supreme Court case allowing forms of bribery, see Hasan Ali Kanu, *The Supreme Court Blesses a Form of Bribery*, THE AMERICAN PROSPECT (June 26, 2024), <https://prospect.org/justice/2024-06-26-supreme-court-blesses-form-bribery-snyder-v-us/>.

BEYOND FIDUCIARY DUTY

Although both *Fallout* and this article focus on potential problems created by fiduciary duty, it is worth noting possible connections between that corporate law issue and the variety of legal policy challenges fostered by it, such as monopoly, political capture, weakened labor, eroding social safety nets, wealth polarization, and enshittification.

A. Preventing Monopoly

The incentive to monopolize is related to fiduciary duty in that it allows businesses to extract additional profits, albeit at the expense of consumers and the broader economy. There are a number of approaches to curbing the power of monopolies, including refining antitrust statutes to better define and tackle anti-competitive behavior, enhancing the enforcement capabilities of the Federal Trade Commission, revising merger guidelines to prevent anti-competitive consolidations, fostering the growth of small businesses with supportive policies, among others.¹⁰⁰ Given the global reach of large corporations, antimonopoly policy relies to some extent on harmonizing regulations internationally, particularly with the European Union.¹⁰¹ Antitrust reforms strike a balance between promoting healthy competition and encouraging innovation and economic progress.¹⁰²

Among all of these issues addressed in Section IV, antitrust law is likely the most complex. There are important questions related to international harmonization and conflict, but perhaps the single most significant and potentially achievable measure might be to eliminate the monopoly power requirement in Section 2 of the Sherman Act.¹⁰³ This statute currently prohibits conduct by a firm that has monopoly power or conduct that would create a dangerous probability of monopoly power; however, conduct that would create or preserve significant market power is not covered, even if the conduct is anticompetitive, unjustified, and harmful to consumers or vulnerable suppliers, including workers.¹⁰⁴ Eliminating the monopoly power requirement is supported by current scholarship and could conceivably be adopted.¹⁰⁵ Notably, the Department of Justice and the Federal Trade Commission have both taken a more aggressive posture in challenging potentially monopolistic conduct and proposed mergers that might decrease competition and harm consumers.¹⁰⁶

100. See Bill Baer, *Improving Antitrust Law in America*, BROOKINGS (Oct. 1, 2020), <https://www.brookings.edu/articles/improving-antitrust-law-in-america/>.

101. Joseph P. Griffin, *Extraterritoriality in U.S. and E.U. Antitrust Enforcement*, 67 ANTITRUST L.J. 159, 180–81 (1999); Andrew Guzman, *The Case for International Antitrust*, 22 BERKELEY J. INT'L L. 355, 360 (2004).

102. Robert H. Bork, *The Goals of Antitrust Policy*, 57 AM. ECON. REV. 242, 253 (1967).

103. 15 U.S.C. § 2 (1890 as amended).

104. See John B. Kirkwood, *Tech Giant Exclusion*, 74 FLA. L. REV. 4, 7 (2022).

105. *Id.*

106. *Id.* at 53, 121.

B. Reducing Political Capture

Political capture is related to fiduciary duties because shaping laws and influencing governments allow corporations to decrease costs, such as taxes, or regulation, with the aim of increasing profits. These additional profits are often realized by securing government contracts, acquiring monopoly power, and employing a variety of other strategies.¹⁰⁷ However, as policy creates these opportunities for mischief, it might also remove them.¹⁰⁸ The clearest approach would be to statutorily limit corporate campaign contributions and enhance the transparency of political financing, thereby reducing the influence of wealthy donors and special interest groups.¹⁰⁹ Regulatory changes might include stricter enforcement of lobbying rules and the establishment of independent bodies to oversee electoral processes and government procurement, ensuring fair competition and preventing favoritism.¹¹⁰ On the judicial front, courts could adopt more stringent standards for reviewing potential conflicts of interest and ethical violations among public officials, while also safeguarding the legal mechanisms that allow for the challenging of corrupt practices.¹¹¹ Collectively, these changes would aim to create a more level playing field in politics, ensuring that public decision-making is guided by the interests of the electorate rather than the agendas of powerful corporations.

A number of scholars using both theoretical and empirical tools conclude that the single greatest factor that has allowed for the spike in corporate political power is the landmark 2010 United States Supreme Court case, *Citizens United v. FEC*.¹¹² Political contributions to candidates by individuals are capped and a matter of public record. Prior to *Citizens United*, the Federal Election Commission had regulatory authority to limit corporate spending on elections within certain parameters. In a bare majority, *Citizens United* asserted that corporations have a First Amendment free speech right to spend an unlimited amount of money on elections so long as they are not coordinating with a candidate or party.¹¹³ This holding has resulted in huge increases in direct political spending over the past fourteen years.¹¹⁴ However, a massive amount of money does not go directly to candidates or parties, but

107. Michael Hadani, Jonathan P. Doh & Marguerite A. Schneider, *Corporate Political Activity and Regulatory Capture: How Some Companies Blunt the Knife of Socially Oriented Investor Activism*, 44 J. MGMT. 2064 (2018) (first published online in 2016).

108. Jennifer Arlen, *Countering Capture: A Political Theory of Corporate Criminal Liability*, 47 J. CORP. L. 861, 867-868 (2021-22).

109. Benton T. Hart, *Rethinking Political Party Contribution Limits: A Roadmap to Reform*, 63 LOY. L. REV. 257, 258 (2017).

110. Craig Holman & William Luneburg, *Lobbying and Transparency: A Comparative Analysis of Regulatory Reform*, 1 INTEREST GROUPS & ADVOC. 75, 101 (2012).

111. PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT, (Daniel Carpenter & David A. Moss eds., 2014).

112. 558 U.S. 310 (2010).

113. See, e.g., Georgia Lyon, *How Does the Citizens United Decision Still Affect Us in 2024?*, CLC (Jan. 15, 2024), <https://campaignlegal.org/update/how-does-citizens-united-decision-still-affect-us-2024>.

114. *Id.*

to Political Action Committees (PACs). Prior to 2010, those contributions were capped.¹¹⁵

Relying on *Citizens United*, the D.C. Circuit Court of Appeals in *Speechnow.org v. FEC* determined that contributions by individuals, including corporations, could not be capped.¹¹⁶ Using the so-called dark money tactic of directing contributions through non-profit organizations, corporations and high-net-worth individuals can contribute to PACs with no required disclosure.¹¹⁷ The massive amount of money spent on elections in the United States creates the appearance that we effectively countenance bribery on a massive scale. This acceptance of corruption has been further endorsed by a recent Supreme Court case finding that payments to public officials as a sort of gratuity after receiving their desired outcome does not constitute sanctionable bribery.¹¹⁸

Although there are certainly salient First Amendment issues related to corporate speech, there are doctrinal and theoretical approaches to those issues that the Supreme Court should utilize to overturn *Citizens United*.¹¹⁹ As a pragmatic matter, injecting massive corporate profits into political discourse has magnified corporate political power, arguably compromising democratic decision-making by citizens. In my view, this may be the single most important step in curbing distortions created by fiduciary duty.¹²⁰

C. Strengthening Labor

Labor power has decreased over the past forty years, partly due to increasing corporate opposition to unions, which has pushed Congress, the Executive, and courts to weaken existing protections.¹²¹ Efforts to fortify labor rights might include laws that strengthen collective bargaining rights, mandate equitable pay, and enforce stricter workplace safety standards.¹²² Regulatory agencies could be empowered to provide more rigorous oversight and penalize unfair labor practices, ensuring compliance with labor laws; however, recent Supreme Court decisions have significantly curtailed agency enforcement power.¹²³ Ultimately, the Supreme Court would probably have to restore or at least clarify agency authority, as well as interpret labor statutes more broadly to favor workers' rights.

115. *Id.*

116. *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686 (2010) (en banc).

117. *Id.* at 694.

118. *See Snyder v. United States*, 144 S. Ct. 1947 (2024).

119. *See, e.g.*, Robert Weismann, *Let the People Speak: The Case for a Constitutional Amendment to Remove Corporate Speech from the Ambit of the First Amendment*, 83 TEMP. L. REV. 979 (2011).

120. *See, e.g.*, Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118 (2010).

121. Tali Kristal, *The Capitalist Machine: Computerization, Workers' Power, and the Decline in Labor's Share Within U.S. Industries*, 78 AM. SOCIO. REV. 361 (2013).

122. David Weil, *Enforcing Labour Standards in Fissured Workplaces: The U.S. Experience*, 22 ECON. & LAB. REL. REV. 33 (2023).

123. *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024).

Although there are a number of large public corporations with employees advocating for unionization, including Starbucks, Tesla, and others, managers have a recent record of opposing those efforts in part because they would raise costs attributed to labor, at least in the short term. While many labor law experts would advocate for the overturning of the landmark case, *Labor Board v. Mackay Radio & Telegraph Co.*,¹²⁴ even a liberal bench is unlikely to reverse an 84-year-old precedent from the Franklin D. Roosevelt era Supreme Court.¹²⁵ However, a more modest goal such as the reinstating of the Joy Silk Doctrine (which is currently advocated by the General Counsel of the National Labor Relations Board (NLRB)) might be a significant step toward bolstering labor.¹²⁶

The Joy Silk Doctrine was a policy of the NLRB that was in effect from 1949 to 1966. It required employers to recognize and bargain with a union if the union provided evidence that a majority of workers wanted to unionize, unless the employer had a “good faith doubt” about the union’s majority support.¹²⁷ If the employer committed unfair labor practices, it was presumed that the workers wanted to join the union. The doctrine was replaced in 1969 by the Gissel Doctrine following the Supreme Court case, *NLRB v. Gissel Packing Co., Inc.*¹²⁸ Recently, there have been discussions about reinstating parts of the Joy Silk Doctrine, which would make it easier for workers to unionize.¹²⁹ Many large corporations would oppose this shift, which may indicate that it would help to correct the power imbalance between them and employees.

D. Supporting Social Safety Nets

Social safety nets cost money, and countries with universal healthcare, free education, and extensive welfare systems tend to have higher taxes.¹³⁰

124. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

125. *See, e.g.*, Thomas C. Kohler & Julius G. Getman, *The Story of NLRB V. Mackay Radio & Telegraph Co.: The High Cost of Solidarity*, BOSTON COLLEGE L. SCHOOL RESEARCH PAPER NO. 103 (Laura J. Cooper & Catherine L. Fisk, eds., Foundation Press, 2005), <https://ssrn.com/abstract=924589>.

126. *See, e.g.*, Steven M. Swirsky & Neresa A. De Biasi, *NLRB General Counsel Pushes to Skip Union Elections by Reinstating Joy Silk Doctrine*, NAT’L L. REV. (Apr. 20, 2022), <https://natlawreview.com/article/nlrb-general-counsel-pushes-to-skip-union-elections-reinstating-joy-silk-doctrine>.

127. Kristin Toussaint, *The Joy Silk Doctrine: How a Small Change to Labor Law Could Have Huge Benefits for Organizing Workers*, FAST CO. (Feb. 11, 2022), <https://www.fastcompany.com/90720656/the-joy-silk-doctrine-how-a-small-change-to-labor-law-that-could-have-huge-benefits-for-organizing-workers>.

128. Thomas M. Stanek & Zachary V. Zagger, *NLRB Adopts New Union-Friendly Recognition Standard*, OGLETREE DEAKINS (Aug. 26, 2023), <https://ogletree.com/insights-resources/blog-posts/nlrb-adopts-new-union-friendly-recognition-standard/>.

129. John W. Alden, Christopher M. Caiaccio & Andrew T. Williamson, *Recognition Without an Election: NLRB Tweaks and Resurrects Joy Silk*, KILPATRICK (Aug. 25, 2023), <http://ktslaw.com/en/insights/alert/2023/8/recognition%20without%20an%20election%20nlrb%20tweaks%20and%20resurrects%20joy%20silk>.

130. Daniel Bunn, Sean Bray & Joost Haddinga, *Insights into the Tax Systems of Scandinavian Countries*, TAX FOUND. (Apr. 20, 2023), <https://taxfoundation.org/blog/scandinavian-social-programs-taxes-2023/>.

Lowering those tax costs for corporations would increase net revenue. However, perhaps more than any of these areas, robust social safety nets may benefit corporate profits by promoting healthier, better-trained workers as well as wealthier consumers.¹³¹ This idea creates a likely collective action problem, as corporate leaders might focus on the short-term revenue impact of taxes, rather than long-term productivity and sustainability. Congress could extend healthcare, increase unemployment benefits, and provide a more robust welfare system, but this would be particularly challenging in the current political and legal climate in which Congress and courts regularly attempt to overturn or invalidate government support for healthcare, education, and other similar types of benefits.¹³²

There are a variety of programs common in major industrialized countries, such as access to inexpensive or free higher education, broad housing assistance and long-term unemployment benefits. However, it is healthcare that is the source of most individual bankruptcies and a massive drain on the U.S. economy compared to other similar industrialized countries.¹³³ The system of insurance, paperwork and multiple layers of bureaucracy has had a profoundly destructive effect on U.S. healthcare costs and outcomes.¹³⁴

There are a variety of approaches to providing universal healthcare. Some involve requiring modest insurance policies vetted by the government, but this element of the Affordable Care Act¹³⁵ was determined to be unconstitutional.¹³⁶ Others use a single-payer system, which has its own challenges.¹³⁷ The goals of any universal healthcare system in the U.S. must address lowering costs for services and drugs. Reducing paperwork and bureaucratic labor costs at the provider, practice, and insurance levels could help to achieve this. With prescription drugs in particular, a single national negotiation for drug prices could at least drop prices to the levels that are offered in other countries.¹³⁸ Although the current healthcare system in the

131. Jiayi Bao, *Social Safety Nets and New Venture Performance: The Role of Employee Access to Paid Family Leave Benefits*, 43 STRATEGIC MGMT. J. (May 29, 2022), <https://onlinelibrary.wiley.com/doi/abs/10.1002/smj.3430>.

132. Jonathon Weisman, *From Cradle to Grave, Democrats Move to Expand Social Safety Net*, N.Y. TIMES (Sept. 6, 2021), <https://www.nytimes.com/2021/09/06/us/politics/democrats-biden-social-safety-net.html>.

133. *See, e.g., Medical Debt Burden in the United States*, CONSUMER FIN. PROT. BUREAU (Feb. 2022), https://files.consumerfinance.gov/f/documents/cfpb_medical-debt-burden-in-the-united-states_report_2022-03.pdf.

134. *Id.* at 46.

135. 42 U.S.C. § 157.

136. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

137. Linda J. Blumberg & John Holahan, *The Pros and Cons of Single-Payer Health Plans*, URBAN INST. (Mar. 12, 2019), <https://www.urban.org/research/publication/pros-and-cons-single-payer-health-plans>.

138. *See, e.g., Yan Sun, Zheng Zhu, Jiawei Zhang, Peien Han, Yu Qi, Xiaoyang Wang & Li Yang, Impacts of National Drug Price Negotiation on Expenditure, Volume, and Availability of Targeted Anti-Cancer Drugs in China: An Interrupted Time Series Analysis*, 19 INT'L J. ENV'T RSCH. PUB. HEALTH 4578 (Apr. 11, 2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9025142/>.

U.S. creates massive profits for drug and insurance companies, it is woefully inefficient and unsustainable.¹³⁹

E. Promoting Wealth Equity

Wealth stratification has increased dramatically since the 1960s. The ratio of CEO to average worker salary climbed from 21:1 in 1965¹⁴⁰ to 344:1 in 2022.¹⁴¹ A small percentage of people hold a massive percentage of the country's wealth, and a handful of super-billionaires now function somewhat like the robber barons of the Gilded Age or Russian Oligarchs.¹⁴² Fiduciary duty gave these entrepreneurs both the incentive and the cover to concentrate their wealth.¹⁴³ The clearest statutory step would be to return to more progressive tax laws, both for income and estates.¹⁴⁴ A wealth tax might also prove to be a powerful tool for promoting equity.¹⁴⁵ Increasing minimum wages may also ameliorate current wealth extremes.¹⁴⁶ In terms of regulation, the Internal Revenue Service could be better supported to enforce existing rules, and the Securities and Exchange Commission could require increased transparency in corporate compensation.¹⁴⁷ Again, the Supreme Court's steps toward eroding the tools of the administrative state make these efforts more challenging.¹⁴⁸

Although minimum wage laws likely play a role in promoting income equity, the largest factor is almost certainly the tax system. Many state taxes, especially sales tax, tend to be regressive. At the national level, the U.S. continues to have a progressive tax system, but the highest marginal rates have dropped precipitously over the past 50 years.¹⁴⁹ Although I have previously

139. See, e.g., Jennifer DeVoe, *The Unsustainable US Health Care System: A Blueprint for Change*, 6 ANNALS OF FAM. MED. 263 (2008).

140. Lawrence Mishel & Jori Kandra, *CEO Pay has Skyrocketed 1,322 % since 1978*, ECON. POL'Y INST. (Aug. 10, 2021), <https://www.epi.org/publication/ceo-pay-in-2020/>.

141. *Aggregated CEO-to-worker compensation ratio for the 350 largest publicly owned companies in the United States from 1965 to 2022*, STATISTA (July 5, 2024), <https://www.statista.com/statistics/261463/ceo-to-worker-compensation-ratio-of-top-firms-in-the-us/>.

142. See, e.g., Nick Hanauer, *The Top 1% of Americans Have Taken \$50 Trillion From the Bottom 90%—And That's Made the U.S. Less Secure*, TIME (Sept. 14, 2020), <https://time.com/5888024/50-trillion-income-inequality-america/>.

143. Gregory Scott Crespi, *Rethinking Corporate Fiduciary Duties: The Inefficiency of the Shareholder Primacy Norm*, 55 SMU L. REV. 141 (2002).

144. Joseph Stiglitz, *Reforming Taxation to Promote Growth and Equity*, ROOSEVELT INST. (May 28, 2014), <https://rooseveltinstitute.org/publications/reforming-taxation-to-promote-growth-and-equity/>.

145. Tien Van Nguyen & Hang Khieu, *Does a Global Wealth Tax Reduce Inequality? When Piketty Meets Mankiw*, 74 RSCH. IN ECON. 119 (2020).

146. Benjamin S. Litwin, *Determining the Effect of the Minimum Wage on Income Ineq.*, THE CUPOLA (2015), https://cupola.gettysburg.edu/student_scholarship/300/.

147. Joshua D. Blank & Ari Glogower, *The Tax Info. Gap at the Top*, 108 IOWA L. REV. 1597 (2023).

148. See, e.g., *Loper Bright*, 144 S. Ct. 2244.

149. See, e.g., James R. Repetti, *The Appropriate Roles for Equity and Efficiency in a Progressive Individual Income Tax*, 23 FLA. TAX REV. 522 (2020).

written about wealth taxes and consider them a reasonable option,¹⁵⁰ adjustments to the income tax system are far more likely to be achievable.¹⁵¹

The two most common recommendations for encouraging equity through taxation are increasing the marginal rate for high-income households (say over \$500,000 in annual income)¹⁵² and to restore the child tax credit.¹⁵³ The first would increase revenue without pushing poorer families into poverty (something that could happen with some flat tax proposals).¹⁵⁴ The second would lower child poverty as it has been demonstrated to do in the past.¹⁵⁵ It is an embarrassment that younger generations have less wealth than their parents did at their age, eroding the middle class while vast amounts of wealth are concentrated in the hands of a few.

F. Discouraging Enshittification

Enshittification has been a challenging dynamic to address in terms of policy, partly because it is viewed as a recent phenomenon and partly because it tends to arise in online environments that are more difficult to regulate. Obviously, extracting greater revenue for inferior services can benefit shareholders and is justified in terms of fiduciary duty. To combat the phenomenon, legal reforms need to enhance consumer protection and perhaps expand internet regulation. For example, companies might be held accountable for maintaining certain quality standards and transparency in changes to their terms of service to prevent capture leading to overall decreases in quality and service. Federal agencies could be tasked with monitoring and penalizing practices that lead to a decline in product quality or user experience, but this would be challenging in the current deregulatory posture of Supreme Court jurisprudence.¹⁵⁶

It is likely that bolstering antitrust as described earlier would weaken the ability of corporations to manipulate consumers and leave them with no alternatives. Consumer protection measures could also discourage the practice. As a consideration, implementing robust data protection laws to

150. Russell Powell, *Zakat: Drawing Insights for Legal Theory and Econ. Pol'y from Islamic Juris.*, 7 PITTSBURGH TAX REV. 43 (2009).

151. Note that recent popular proposals to tax unrealized capital gain on the ultra-wealthy might serve as an alternative to wealth taxes.

152. *See, e.g.*, Howard Gleckman, *Biden's Budget Would Raise Taxes on High-Income Households, Cut Them for Many Others*, TAX POL'Y CTR. (Mar. 23, 2023), <https://www.taxpolicycenter.org/taxvox/bidens-budget-would-raise-taxes-high-income-households-cut-them-many-others>.

153. Kelly Phillips, *After Months in Limbo, Child Tax Credit Bill Fails to Advance in the Senate*, FORBES (Aug. 2, 2024, 8:26 AM), <https://www.forbes.com/sites/kellyphillipsrb/2024/08/02/after-months-in-limbo-child-tax-credit-bill-fails-to-advance-in-the-senate/>.

154. *See* Greg Iacurci, *Biden's Proposed 39.6% Top Tax Rate Would Apply at These Income Levels*, CNBC (June 1, 2021, 2:22 PM), <https://www.cnbc.com/2021/06/01/bidens-proposed-39point6percent-top-tax-rate-would-apply-at-these-income-levels.html>.

155. *See* Phillips, *supra* note 153.

156. *See, e.g.*, Christopher Walker, *What Loper Bright Enterprises v. Raimondo Means for the Future of Chevron Deference*, YALE J. REGUL. (June 28, 2024), <https://www.yalejreg.com/nc/what-loper-bright-enterprises-v-raimondo-means-for-the-future-of-chevron-deference/>.

safeguard consumer privacy could limit the extent to which companies can exploit user data for profit. Prohibiting deceptive advertising, fake reviews, and misleading search results could help to ensure that consumers receive accurate information and are not misled by false claims. Enhancing user rights, such as the right to access, correct, and delete personal data might give consumers more control over their online presence, thus potentially weakening the ability of businesses to successfully deploy enshittification tactics.

CONCLUSION

This is the most fun I have ever had doing research for an academic paper. The conversations I had with students were incredibly deep and illuminating. I was shocked that many presumed that corporate greed is likely to result in the sort of dystopian, apocalyptic hellscape described in *Fallout*, whether through environmental collapse or global conflict. This project gave us all a little bit of hope that there are potentially achievable legal reforms that make that future less likely.

This article is not intended to propose ideal solutions to the harms arguably created by corporate fiduciary duties; nor is it a fatalistic endorsement of the inevitability of the dystopia of *Fallout*. The very fact that popular media is engaging these issues of law and policy and that young people, like my son, wonder how things might be better, gives me great hope that communities can understand, engage, and transform structures that, though well-intended, could be profoundly destructive when taken to extremes in a world with inadequate regulation, transparency, and accountability. Like the *Fallout* series, this article is intended to sound a warning call to prevent dystopia, and it is directed particularly toward those who are attuned to the current zeitgeist of dissatisfaction with existing structures that preference those with privilege.

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