Capitalism Stakeholderism

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ABSTRACT

Today's corporate governance debates are replete with discussion of how best to operationalize so-called stakeholder capitalism—that is, a version of capitalism that considers the interests of employees, communities, suppliers, and the environment alongside (if not before) a company's shareholders. So much focus has been dedicated to the question of capitalism's reform that few have questioned a key underlying premise of stakeholder capitalism: that is, that competitive capitalism does not serve these various constituencies and groups. This Essay presents a different view and argues that capitalism is, in fact, the ultimate form of stakeholderism. As such, the Essay urges that the best way to elevate the welfare of all stakeholders in a society is to maximally free markets, leaving the State with limited responsibilities in the marketplace—namely, to calibrate incentives for pro-social innovation, regulate evident market-failures, and occasionally provide for public goods.

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INTRODUCTION

For nearly 100 years, academics have debated the "purpose" of a corporation. Much of this scholarship has assumed that a company with a purpose is not supposed to be maximizing profits—that is, companies with a purpose pursue goals that elevate the welfare of groups other than their shareholders, such as employees, communities, suppliers, and the environment. In the 2020s, much attention has focused on operationalizing this idea—largely through corporate initiatives in pursuit of environmental, social, or governance goals, referred to as "ESG."

Indeed, so much attention is now trained on implementing ESG, it may be easy to overlook the evidence linking capitalism to human welfares. This Essay draws renewed attention to that important link and thus flips on its head the now popular phrase "stakeholder capitalism" to argue that capitalism is the ultimate stakeholderism.

As such, the basic claim of this Essay is relatively straightforward: the tools for operationalizing stakeholder capitalism are already made. Law and policy can facilitate better outcomes for stakeholders by freeing markets and thus enabling firms to respond to the incentives that arise from the relatively uninhibited opportunity for them to earn profit. Top-down efforts to improve the welfare of stakeholders by imposing new rules or norms on firms and markets are likely to introduce both greater centralization of the economy and opportunity for inefficient rent-seeking from the State and monopolized corporate power. To be sure, this is not the first piece of academic writing to champion free markets relative to economic planning.[1] But because those views are often caricatured, if not pilloried,

1. *See, e.g.*, ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776); FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM (1944); MILTON FRIEDMAN & ROSE D. FRIEDMAN, CAPITALISM AND FREEDOM (1962); THOMAS SOWELL, KNOWLEDGE AND DECISIONS (1980).

this Essay finds value in revisiting basic principles and, by putting them in current context of financialized ESG, shedding renewed light on their sensibility and importance.

To that end, this Essay proceeds in three parts. Part I briefly traces the history of the intellectual debates on corporate purpose in the 1930s and 1970s and then explains what is new today, in the early 2020s—namely, the finalization of ESG. In the interest of productively moving forward, the Essay underscores why the triumph of free markets is in fact a victory for the stakeholder movement. Supporting this conclusion, Part II synthesizes various data linking capitalism to human prosperity. When viewed together, the data suggests that capitalism, as opposed to the collectivism that undergirds corporate purpose, elevates *all* interests in society on an absolute basis. Part III then addresses the relationship between capitalism and democracy and in particular explains how our most foundational legal order—the Constitution—supports a free-market society as much to secure social stability as to provide the path for economic prosperity. The Essay briefly concludes with re-drawing the previously well-established lines between markets and the State. Capitalism does not exclude the State, but it limits it to addressing externalities, providing certain public goods, and establishing—through democratic processes—the "rules of the game."[2]

Before proceeding, a note about this Essay's method and approach is important to consider. This Essay is written to be a bridge. In particular, it aims to bridge the various disciplines participating in this debate—lawyers and the business scholars of management and finance. It also, importantly, intends to bridge these academic debates with financial practitioners and the general public. Accordingly, the Essay draws on both lengthy excerpts from relevant data sets and the work of economic growth researchers and other academic economists who have previously considered the intersection of capitalism, democracy, and prosperity.

I. THREE ROUNDS OF DEBATE ON AMERICAN CAPITALISM

Whether companies should have a purpose that is defined as something other than pursuing profits is now a thrice-debated question. By most accounts, Adolf Berle and Gardiner Means initiated this conversation in 1932 with their seminal work, *The Modern Corporation and Private Property*.[3] The debate, so to speak, then began in earnest when Berle engaged

2. Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, at 17.

3. ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

Merrick Dodd in the pages of the *Harvard Law Review*.[4] Professor Donald Schwartz quite elegantly summarized their positions:

> Dodd contended that the business corporation as an economic institution had a social-service as well as a profit-making function. . . . Berle, on the other hand, asked what could be the reasonably enforceable standard to replace profit maximization as a means of limiting and judging the actions of corporate managers.[5]

Berle himself would, though, later soften his position and espouse a corporate duty to provide "fair wages, security to employees, reasonable services to [the] public, and stabilization of business."[6] This viewpoint cannot be divorced from the politics of the times—the New Deal Era ushered in by President Franklin Delano Roosevelt's commitment to use government spending to show the people that "Happy Days Are Here Again."[7]

The issue of corporate purpose entered the limelight again in the 1970s when, on the nation's first-ever Earth Day, a prominent investment banker, Dan Lufkin, gave a speech at Harvard Business School, riffing off a phrase that had once been used by President Coolidge, "the chief business of the American people is business."[8] Lufkin used that pro-market play-on-words to announce a pro-stakeholder agenda that reformulated the corporate agenda—"the business of business is America"—thereby calling for a "reordering of business priorities" and a "redefinition . . . of the concept of profit—one that will access corporate gains and losses not only in terms of dollars but also in terms of social benefits realized or not realized."[9]

In some sense, the political climate of the early 1970s was similar to that which preceded Berle's work in 1932 and his debate with Dodd that followed. As one scholar contemporaneously recounted, the national

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4. A.A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932); A.A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932); E. Merrick Dodd, Jr., *Is Effective Enforcement of the Fiduciary Duties of Corporate Managers Practicable?*, 2 U. CHI. L. REV. 194 (1935).

5. Donald E. Schwartz, *The Public-Interest Proxy Contest: Reflections on Campaign GM*, 69 MICH. L. REV. 419, 467 (1971).

6. BERLE & MEANS, *supra* note 3, at 356.

7. *See* STEVE NEAL, HAPPY DAYS ARE HERE AGAIN: THE 1932 DEMOCRATIC CONVENTION, THE EMERGENCE OF FDR—AND HOW AMERICA WAS CHANGED FOREVER (2004) (describing Roosevelt's rise to prominence in the Democratic Party; 1932 presidential campaign, during which "Happy Days Are Here Again" was the theme song; and presidency).

8. Calvin Coolidge, President of the U.S., Address to the American Society of Newspaper Editors, Washington, D.C. (Jan. 17, 1925), https://www.presidency.ucsb.edu/documents/address-the-american-society-newspaper-editors-washington-dc [https://perma.cc/KZV9-ELN9].

9. Dan W. Lufkin, The Business of Business is America, Remarks at Harvard Business School (Apr. 22, 1970) (notes on file with author).

"temper" had grown "hotter" in the 1960s thanks to "war in Indochina," "discouraging reports on racism and domestic violence," "confrontations [in] the Pentagon," "seizures and shutdowns of universities," "and riots in the streets."[10] By 1970, some of those who had become dissatisfied with the government's handling of these problems "saw corporations to be the core of the problem."[11] "They analogized corporations to the [S]tate and saw them as the maker of economic policy."[12] The demands for companies to proxy for the State and solve social and environmental problems reached a nadir with Ralph Nader in 1971.

In that year, a group known as the "Campaign to Make General Motors Responsible"—or Campaign GM—seized upon the national attention to pollution to advance their goals for corporate social responsibility.[13] Although Ralph Nader was not officially affiliated with the group, he supported their goals and found their project to be politically expedient as it dovetailed with his overarching aims.[14] These proponents of corporate purpose went further than the 1930s intellectuals in trying to operationalize their ideas. Specifically, they sought to harness regulators' technocratic power.

Campaign GM sought to have a variety of shareholder proposals regarding safety, pollution, and minority hiring included in the GM proxy solicitation materials. Problematic for both campaign GM and the SEC, however, none of these issues were technically included as required additions to those materials under SEC Rule 14a-8.[15] Given the public sentiment of the early 1970s, the SEC apparently feared that rejecting the Campaign's demands wholesale (i.e., issuing a no action letter to GM) would make the agency seem biased or otherwise draw some unwanted public attention to it.[16] Milton Friedman's famous 1970 *New York Times* op-ed was a direct response to Nader and his GM Campaigners.[17] Friedman and Nader would continue to debate the merits of capitalism in the years that followed.[18]

10. Schwartz, *supra* note 5, at 421–22.

11. *Id.* at 422.

12. *Id.*

13. "On April 22, 1970, a month before the General Motors annual meeting, there was the nationwide observance of Earth Day. At an early stage in the campaign, President Nixon submitted a legislative proposal dealing with environmental pollution. . . . One result was that Campaign GM became identified in the press as a crusade against automobile pollution." *Id.* at 428 (internal citations omitted).

14. *Id.* at 425.

15. *See* 17 C.F.R. § 240.14a-8 (1969).

16. Schwartz, *supra* note 5, at 487. *See also* Henry G. Manne, *Shareholder Social Proposals Viewed by an Opponent*, 24 STAN. L. REV. 481, 488 (1972).

17. Friedman, *supra* note 2.

18. *See, e.g.*, Reagan Conservatives, *Milton Friedman on Ralph Nader and Car Safety Regulations*, YOUTUBE (May 20, 2017), https://youtu.be/-M90XvQD8eE (showing Friedman discussing his

The third round of this debate began amid similar social and political uncertainty and unrest. Starting in 2019, after years of widespread discontent with the political branches, public pressure began to build on business to do something more for society. This pressure intensified alongside the economic turmoil of 2020's COVID pandemic. Academics again entered the fray. In 2021, University of Oxford Professor Colin Mayer became the first and most vocal academic advocate for contemporary corporate purpose. Referring to the 2019 Business Roundtable Statement, Mayer asserted:

> In a matter of just 18 months from the beginning of 2019, many of the largest corporations have discarded the conventional Milton Friedman (1962; 1970) doctrine that there is one and only social purpose of business to increase profits so long as it stays within the rules of the game in favour of a view that corporate purpose should reflect the interests of stakeholders as well as shareholders.[19]

For Mayer, the prior movements had not gone far enough in appreciating that corporate purpose is about using corporate resources for proactively "solving problems, 'to produce profitable solutions to the problems of people and planet'" and refraining from profiting "from producing problems for people or planet."[20]

And Mayer was explicit about companies' responsibility to take on the role of government. Whereas "conventional capitalism" separated "the attainment of efficiency" from "distribution"—with the private sector responsible for the former and the government for the latter—in Mayer's reformulation of capitalism anchored around corporate purpose, companies would be charged with doing both in the interest of "achieving fairer opportunities and outcomes."[21]

Accordingly, Mayer's views would seem to go further that those put forward by scholars in prior decades, by placing even more onus on companies to transition to quasi-governmental bodies focused on allocative and distributive fairness, as well as climate change. This paper, along with several others of the corporate purpose genre, would become foundational for the corporate purpose debate that would follow in the early 2020s

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disagreements with and debates against Nader); *Debate Between Milton Friedman & Ralph Nader Moderated by Hugh Sidey, Government Regulation—Too Much or Too Little?*, *in* THE COLLECTED WORKS OF MILTON FRIEDMAN (Robert Leeson & Charles G. Palm eds., 2015) (debate held May 1979), https://miltonfriedman.hoover.org/internal/media/dispatcher/271117/full [https://perma.cc/4AHJ-3F62].

19. Colin Mayer, *The Future of the Corporation and the Economics of Purpose*, 58 J. MGMT. STUDS. 887, 888 (2021).

20. *Id.* at 897, 889.

21. *Id.* at 897.

among legal, finance, and management scholars.[22] And this time, action would mirror academics, as the financial system would start to mobilize toward ESG. Although "socially responsible investing" ("SRI") had been established since the 1960s, ESG on Wall Street is different in magnitude and kind.[23]

The financialization of ESG is best characterized by proactive decision-making by capital allocators to steer the economy toward projects or investments that they deem "ESG." In contrast to SRI, financialized ESG is not corporate donation or the boycotting of firms or nations that violate widely agreed international norms.[24] Rather, financialized ESG is hallmarked by affirmative steps by capital allocators to direct the flow of capital towards businesses (issuers) that espouse or propel certain ESG goals. In that respect, starting around 2020, some large asset managers began to create new ESG-specific funds for institutional investors to select from, thus reviving the active fund investment strategies that had languished since 2016.[25] Some passive funds also attempted to (re)brand themselves as committed to ESG.[26] The rapid growth of ESG screening and rating

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22. *See* ALEX EDMANS, GROW THE PIE: HOW GREAT COMPANIES DELIVER BOTH PURPOSE AND PROFIT (2020); Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?*, 99 TEX. L. REV. 1309 (2021). *But see* Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91 (2020).

23. For a history of ESG—the moniker and the practice—see Elizabeth Pollman, *The Making and Meaning of ESG*, U. PA. CAREY L. SCH. INST. FOR L. & ECON. (Oct. 2022) (working paper).

24. Modern SRI has deep roots in South Africa, where the Anti-Apartheid movement rallied investors around the world to pull their money out of South Africa. *See* Mona Naqvi, *Sustainability in South Africa: The Swing from SRI to ESG*, S&P GLOB. (July 23, 2019), https://www.spglobal.com/en/research-insights/articles/sustainability-in-south-africa-the-swing-from-sri-to-esg [https://perma.cc/MC57-W4LY]; *see also The Evolution of ESG Investing*, MSCI, https://www.msci.com/esg-101-what-is-esg/evolution-of-esg-investing#:~:text=The%20practice%20of%20ESG%20investing,the%20South%20African%20apartheid%20regime [https://perma.cc/R9L4-GYMD].

25. "The total US-domiciled assets under management using sustainable investing strategies grew from $12.0 trillion at the start of 2018 to $17.1 trillion at the start of 2020, an increase of 42 percent. This represents 33 percent, or one in three dollars, of the $51.4 trillion in total US assets under professional management." US SIF FOUND., REPORT ON US SUSTAINABLE AND IMPACT INVESTING TRENDS 2020 11 (2020), https://www.ussif.org/files/US%20SIF%20Trends%20Report%2020 20%20Executive%20Summary.pdf [https://perma.cc/3SCH-6J66].

26. *See* Detlef Glow, *Monday Morning Memo: ESG—From Greenwashing to Impactwashing?*, REFINITIV (Nov. 28, 2022), https://lipperalpha.refinitiv.com/2022/11/monday-morning-memo-esg-from-green-washing-to-impact-washing/ [https://perma.cc/8C4M-G676] ("[T]he wording on which ESG credentials are exactly used and how they are integrated in the overall portfolio management process was very vague. This led to greenwashing accusations as investors witnessed that some funds claimed to be ESG-related products but didn't deliver on the expectations of the investors."). ESG investing has also raised concern about violation of fiduciary duty and conflicts of interests. *See* Jed Rubenfeld & William P. Barr, *ESG Can't Square with Fiduciary Duty*, WALL ST. J. (Sept. 6, 2022), https://www.wsj.com/articles/esg-cant-square-with-fiduciary-duty-blackrock-vanguard-state-stree-the-big-three-violations-china-conflict-of-interest-investors-11662496552 [https://perma.cc/P23D-

tools enabled this trend in funding marketing and investing.[27] Newly created ESG ratings purported to help fund managers assess "a company's management of financially relevant ESG risks and opportunities" using "a rules-based methodology to identify industry leaders and laggards according to their exposure to ESG risks and how well they manage those risks relative to peers."[28]

Fund managers also took forward their ESG commitments through voting or voice in boardrooms. Perhaps most conspicuous in this regard was BlackRock's CEO, Larry Fink. Starting in 2020, Fink indicated that he would deploy BlackRock's resources to alleviate the problem of climate change, just as Mayer had pressed CEOs to do.

Fink announced in his 2020 letter to company CEOs:

> Climate change has become a defining factor in companies' long-term prospects. Last September, when millions of people took to the streets to demand action on climate change, many of them emphasized the significant and lasting impact that it will have on economic growth and prosperity—a risk that markets to date have been slower to reflect. But awareness is rapidly changing, and I believe we are on the edge of a fundamental reshaping of finance.
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> . . . .
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> While government must lead the way in this transition, companies and investors also have a meaningful role to play.
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> . . . .
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> Where we feel companies and boards are not producing effective sustainability disclosures or implementing frameworks for managing these issues, we will hold board members accountable. Given the groundwork we have already laid engaging on disclosure, and the growing investment risks surrounding sustainability, we will be increasingly disposed to vote against management and board directors when companies are not making sufficient progress on sustainability-

7TH8] (discussing the ongoing challenges by state officials to BlackRock's use of ESG factors in investment decision-making).

27. MSCI describes their ESG ratings as "[p]roviding institutional investors with a more robust ESG integration tool designed to support ESG risk mitigation and long term value creation." MSCI, *supra* note 24.

28. *ESG Ratings: What Is an MSCI ESG Rating?*, MSCI, https://www.msci.com/our-solutions/esg-investing/esg-ratings [https://perma.cc/BV9G-WCK4] (last visited Sept. 18, 2023). *But see* TIMOTHY M. DOYLE, AM. COUNCIL FOR CAP. FORMATION, RATINGS THAT DON'T RATE: THE SUBJECTIVE WORLD OF ESG RATINGS AGENCIES (2018), https://accfcorpgov.org/wp-content/uploads/2018/07/ACCF_RatingsESGReport.pdf [https://perma.cc/U5ND-D8GC].

related disclosures and the business practices and plans underlying them.[29]

Banks also became heavily involved in ESG, particularly to advance the "E." By spring of 2021, all of the United States' systemically important financial institutions had made formal public commitments to reaching net zero in their operations by 2050, in line with the Paris Agreement.[30] A review of their public filings and website marketing materials also demonstrated the banks' use of a variety of positive and negative screens and the conditioning of loan terms to favor what they determined to be green borrowers over brown ones.[31]

The second important feature of the 2020-era corporate purpose, which distinguished this round from the rest, was the fact that the financial *regulators* also espoused ESG. Whereas in the 1970s the SEC worried about the appearance of partiality surrounding Campaign GM, by 2020, the SEC was fully committed to operationalizing ESG. Most notably, in 2022, the SEC proposed a rule to require all public companies to disclose their scope 1, 2, and 3 emissions.[32] While some saw SEC intervention as an important step in ensuring public companies provided investors with climate impact information, others saw this as an unprecedented effort to dissuade companies from engaging in 'brown' practices and investors from dealing with fossil fuel producers and other heavy carbon emitters.[33]

These concerns were amplified as it became clear the SEC did not intend to stop with "E." Around the time the rule was announced, some Commissioners signaled that a climate disclosure proposal was likely to be only the first step in a larger effort that would include the creation of a

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29. Larry Fink, *Larry Fink's 2020 Letter to CEOs: A Fundamental Reshaping of Finance*, BLACKROCK (2020), https://www.blackrock.com/americas-offshore/en/larry-fink-ceo-letter [https://perma.cc/P795-D6KW].

30. *See* Sarah E. Light & Christina P. Skinner, *Banks and Climate Governance*, 121 COLUM. L. REV. 1895 (2021).

31. *Id.*

32. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249). For Scope 3, disclosure is required "if material or if the registrant has set a GHG emissions target or goal that includes Scope 3 emissions."

33. LAWRENCE A. CUNNINGHAM, STEPHEN M. BAINBRIDGE, JONATHAN B. BERK, SANJAI BHAGAT, BERNARD S. BLACK, WILLIAM J. CARNEY, LAWRENCE A. CUNNINGHAM, DAVID J. DENIS, DIANE DENIS, CHARLES M. ELSON, JESSE M. FRIED, SEAN J. GRIFFITH, JONATHAN M. KARPOFF, F. SCOTT KIEFF, EDMUND W. KITCH, KATHERINE LITVAK, JULIA D. MAHONEY, PAUL G. MAHONEY, ADAM C. PRITCHARD, DALE A. OESTERLE, ROBERTA ROMANO, CHRISTINA P. SKINNER & TODD J. ZYWICKI, PROPOSAL ON CLIMATE-RELATED DISCLOSURES FOR INVESTORS (2022), https://www.sec.gov/comments/s7-10-22/s71022-20126528-287180.pdf [https://perma.cc/9X3P-QCR6].

"comprehensive ESG disclosure framework."[34] This left some wondering: if the SEC managed to implement a final climate disclosure rule that survives judicial review, what would stop them from writing rules on waste management, workplace diversity, labor conditions, or lobbying expenditures—rounding out their efforts to advance a host of reforms that they perceived to advance the goals underlying ESG?

These efforts were not isolated to the SEC. Other financial regulators responded to the Administration's priority to combat climate change. From the outset of his Administration, President Biden articulated a "whole-of-government" approach to tackling climate change and signaled an expectation that financial regulators would be front and center.[35] Through the Financial Stability Oversight Council ("FSOC"), the President, acting through the Treasury Secretary who helms the FSOC, directed financial regulatory agencies—even those that should be formally "independent'" from the presidency—to consider how climate change should be factoring into their policies and procedures.[36] Pursuant to the FSOC's leadership, financial regulators were asked to think about how to advance the administration's green goals through the use of their regulatory and supervisory tools.[37]

In response, in October 2021, the Office of the Comptroller of the Currency ("OCC"), which regulates all national banks, asked boards of directors of OCC-regulated banks to put more pressure on bank management to create new regimes for climate risk management and reporting.[38] It also issued supervisory guidance for banks in regard to their climate risk—which again could be seen as an effort in moral suasion to further discourage banks from dealing with carbon emitters (or, in the extreme,

34. Allison Herren Lee, Acting Chair, Sec. and Exch. Comm'n, A Climate for Change: Meeting Investor Demand for Climate and ESG Information at the SEC, Speech at the Center for American Progress, Washington, D.C. (March 15, 2021), https://www.sec.gov/news/speech/lee-climate-change [https://perma.cc/7A9Q-DLEK].

35. Press Release, The White House, Fact Sheet: President Biden Takes Executive Actions to Tackle the Climate Crisis at Home and Abroad, Create Jobs, and Restore Scientific Integrity Across Federal Government (Jan. 27, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/27/fact-sheet-president-biden-takes-executive-actions-to-tackle-the-climate-crisis-at-home-and-abroad-create-jobs-and-restore-scientific-integrity-across-federal-government/ [https://perma.cc/4VNA-6YDA].

36. FSOC, REPORT ON CLIMATE-RELATED FINANCIAL RISK (2021), https://home.treasury.gov/system/files/261/FSOC-Climate-Report.pdf [https://perma.cc/3RP2-48J4].

37. *Id.* at 5–9 Box A (listing specific recommendations).

38. Michael J. Hsu, Acting Comptroller of the Currency, Statement at the Financial Stability Oversight Council (Oct. 21, 2021), https://www.occ.gov/news-issuances/speeches/2021/pub-speech-2021-108.pdf [https://perma.cc/C3ZC-J638].

divesting from fossil fuels).[39] The central bank has also made changes in accordance with FSOC climate change directives.[40] The Federal Reserve now conducts a version of a climate scenario analysis on large banks[41] and is studying how its supervisory tools might more broadly apply in the context of climate change.[42] The Fed has also joined the Network for Greening the Financial System, which as John Cochrane has described it, plans to "mobilize mainstream finance to support the transition toward a sustainable economy."[43]

However, by the start of 2023, cracks in this iteration of the corporate purpose movement started to emerge. At the end of 2022, BlackRock's Larry Fink disavowed the firm's commitment to voting in favor of *all* ESG related shareholder proposals since many were, in his words, "too prescriptive."[44] Similarly, JP Morgan CEO Jamie Dimon told Congress that divesting from fossil fuels would be a "road to hell" for America (and, in another forum, announced candidly that "some investors don't give a s—

39. OFF. OF THE COMPTROLLER OF THE CURRENCY, PRINCIPLES FOR CLIMATE-RELATED FINANCIAL RISK MANAGEMENT FOR LARGE BANKS (2021), https://www.occ.gov/news-issuances/bulletins/2021/bulletin-2021-62a.pdf [https://perma.cc/4E6N-4HQX].

40. The bank regulators—the Fed, OCC, and FDIC—jointly finalized guidance for firms for managing their climate-related risks in October 2023. *See* BD. OF GOVERNORS OF THE FED. RESERVE SYS., FED. DEPOSIT INS. CORP., OFF. OF THE COMPTROLLER OF THE CURRENCY, PRINCIPLES FOR CLIMATE-RELATED FINANCIAL RISK MANAGEMENT FOR LARGE FINANCIAL INSTITUTIONS (2023), https://www.federalreserve.gov/supervisionreg/srletters/SR2309a1.pdf [https://perma.cc/24PS-JH26].

41. Press Release, Bd. of Governors of the Fed. Rsrv. Sys., Fed. Rsrv. Bd. Announces that Six of the Nation's Largest Banks Will Participate in a Pilot Climate Scenario Analysis Exercise Designed to Enhance the Ability of Supervisors and Firms to Measure and Manage Climate-Related Fin. Risks (Sept. 29, 2022), https://www.federalreserve.gov/newsevents/pressreleases/other20220929a.htm [https://perma.cc/D9KR-L7D7]; *see also* Press Release, Bd. of Governors of the Fed. Rsrv. Sys., Fed. Rsrv. Bd. Provides Additional Details on How Its Pilot Climate Scenario Analysis Exercise Will Be Conducted and the Info. on Risk Mgmt. Pracs. that Will Be Gathered Over the Course of the Exercise (Jan. 17, 2023), https://www.federalreserve.gov/newsevents/pressreleases/other20230117a.htm [https://perma.cc/G5DW-TF49].

42. *See* Christina Parajon Skinner, *Central Banks and Climate Change*, 74 VAND. L. REV. 1301 (2021).

43. John Cochrane, *Testimony on Financial Regulation and Climate Change*, THE GRUMPY ECON. (Mar. 18, 2021), https://johnhcochrane.blogspot.com/2021/03/testimony-on-financial-regulation-and.html [https://perma.cc/YW7N-GG4E].

44. *See* Brooke Masters, *BlackRock Warns It Will Vote Against More Climate Resolutions This Year*, FIN. TIMES (May 10, 2022), https://www.ft.com/content/4a538e2c-d4bb-4099-8f15-a28d0fefcea2 [https://perma.cc/WXP3-SLZ7].

t about ESG”).[45] In February 2023, Vanguard’s CEO Tim Buckley withdrew from the UN Net Zero Alliance for Asset Managers citing fear of being *compelled* to “reneg[e] on its fiduciary duties.”[46]

So, by this point (as of this writing, at the end of 2023), it seems that free markets will likely win again, at least in the United States. Nevertheless, given the cyclicality with which public and scholarly sentiment shifts away from and then again embraces classic shareholder wealth maximization (i.e., profit maximization within the firm), it seems worthwhile to reflect on the reasons why capitalism keeps prevailing. As the next Part will suggest, capitalism in America is preferred by society to any alternatives because it benefits stakeholders the most: it offers economic benefits, advancements, and key freedoms that other economic systems could never guarantee.

II. CAPITALISM’S PROSPERITY

Arguably, capitalism advances the welfare of all stakeholders in a society more so than any other system for organizing an economy. To ground this claim, some basic definition of capitalism is required. To that end, this Essay takes as a given that capitalism is a system for organizing a society that is embedded in, and protected by, five essential legal and institutional elements:

1. Private actors control the factors of production and generally decide how those factors of production are used;

2. The opportunity to make a profit incentivizes individuals to innovate and produce goods and services—put another way, innovation and production that are valuable to society are in turn valued by society and its price system and therefore financially rewarded;

3. Economic growth is an explicit goal of the society;

4. There are no State-imposed limits on upward economic mobility;

5. State intervention in economic life must be legally justified—which is to say that the State is restrained from intervening in private economic life by the institutions that protect the rule of law, namely, due process, private property, enforcement of contracts, and a strong and independent judiciary.

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45. David Blackmon, *Reality Is Setting In: Jamie Dimon’s Testimony Caps a Confrontational Energy Week*, FORBES (Sept. 22, 2022), https://www.forbes.com/sites/davidblackmon/2022/09/22/reality-is-setting-in-jamie-dimons-testimony-caps-a-confrontational-energy-week/?sh=459aef642820; Tyler Durden, *“This Is a F**king War”: Jamie Dimon Slams Biden Energy Policy, Says Investors “Don’t Give a Shit” About ESG*, ZERO HEDGE (Oct. 14, 2022), https://www.zerohedge.com/markets/fking-war-jamie-dimon-slams-biden-begging-saudis-oil-says-investors-dont-give-shit-about.

46. Terrence Keeley, *Vanguard’s CEO Bucks the ESG Orthodoxy*, WALL ST. J. (Feb. 26, 2023), https://www.wsj.com/articles/vanguards-ceo-bucks-the-esg-orthodoxy-tim-buckley-net-zero-emissions-united-nations-initiative-nzam-f6ae910d.

With this definition in mind, this Part first considers how capitalism in America and much of the Western world has returned manifold benefits to wide swaths of the global population.

A. Capitalism and the Human Condition

Capitalism must be considered in the context of human history. For most of human civilization, there was essentially no economic growth or wealth accumulation outside of an established and basically immutable aristocracy.[47] As Robert Gordon sets out, "the annual rate of growth in the Western world from AD 1 to AD 1820 was .06 percent per year or 6 percent *per century*."[48] Today in America, the most recent GDP report shows that our economy is growing at a rate of about 3 percent *per year*.[49] But the barometer of human flourishing is not fully captured by the numbers of economic growth—to fully appreciate what capitalism has done for humanity, one must unpack the data along several key dimensions.

1. Leisure and Living

Capitalism has had a direct, positive impact on living standards and quality of life. The century between 1870 and 1970 has been referred to by some growth theorists as the "special century."[50] These economists have gathered data to show how capitalism, during this hundred-year period, made our lives easier and much more pleasant. Inventions like washing machines, ice boxes (and refrigerators), machinery, electricity, and automobiles dramatically changed the nature of everyday life.[51] In the first

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47. *See* Paul Bouscasse, Emi Nakamura & Jon Steinsson, *When Did Growth Begin? New Estimates of Productivity Growth in England from 1250 to 1870* 1 (Working Paper, 2023), https://eml.berkeley.edu/~jsteinsson/papers/malthus.pdf [https://perma.cc/W8W5-KC4E] ("[P]roductivity growth in England began in 1600. Between 1250 and 1600, we estimate that productivity growth was zero.").

48. ROBERT J. GORDON, THE RISE AND FALL OF AMERICAN GROWTH 2–3 (2016).

49. "Real gross domestic product (GDP) increased at an annual rate of 2.7 percent in the fourth quarter of 2022, after increasing 3.2 percent in the third quarter." BUREAU OF ECON. ANALYSIS, GROSS DOMESTIC PRODUCT (Feb. 23, 2023), https://www.bea.gov/data/gdp/gross-domestic-product#:~:text=Real%20gross%20domestic%20product%20(GDP,percent%20in%20the%20third%20quarter [https://perma.cc/FD4N-WQ96].

50. *See* GORDON, *supra* note 48, at 3.

51. Consider, as just one example, data from England and Wales: "In 1901, in a population in England and Wales of 32.5 million, 200,000 people were engaged in washing clothes. By 2011, with a population of 56.1 million just 35,000 people worked in the sector, most in launderettes or commercial laundries. A collision of technologies, indoor plumbing, electricity and the affordable automatic washing machine have all but put paid to large laundries and the drudgery of hand washing." IAN STEWART, DEBAPRATIM DE & ALEX COLE, DELOITTE LLP, TECHNOLOGY AND PEOPLE: THE GREAT JOB-CREATING MACHINE 6 (2015), https://www2.deloitte.com/uk/en/pages/finance/articles/technology-and-people.html [https://perma.cc/X7PU-4UX4].

few lines of his book, *The Rise and Fall of American Growth*, Gordon underscores his central point:

> The century of revolution in the United States after the Civil War was economic, not political, freeing households from an unremitting daily grind of painful manual labor, household drudgery, darkness, isolation, and early death . . . .[52]

Here, Gordon refers to innovations of this time period that made the quality of life much better—by, for example, creating gadgets and appliances to ease the burden of household work, opening opportunity for work outside the home, and the general freeing up of time so that people might engage in elective "time allocation."[53]

In short, the technological advancements ushered in by capitalist-driven innovation gave rise to leisure time—men and women could spend less time on household tasks and manual labor and use the time saved to pursue hobbies and intellectual endeavors (or simply just to rest).[54] As James Pethokoukis sums it up, "[t]he single greatest story of human achievement of the past 2,000 years is the dramatic rise in living standards of the past 200 years. It's an astounding ascent . . . [was] driven by innovative, entrepreneurial capitalism."[55]

2. Life Expectancy

While the special century featured innovation that made life far more pleasant, post-World War II capitalism furnished advancements that led to better health outcomes around the world. Researchers at the University of Oxford have found that at the beginning of the 19th century, "no country in the world had a life expectancy longer than 40 years."[56] Between 1960 and 2019, the global average life expectancy rose from 47.7 years to

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52. GORDON, *supra* note 48, at 1.

53. *See id.*

54. As Robert Whaples recounts: "In 1880 a typical male household head had very little leisure time—only about 1.8 hours per day over the course of a year. However . . . between 1880 and 1995 the amount of work per day fell nearly in half, allowing leisure time to more than triple." Robert Whaples, *Hours of Work in U.S. History*, ECON. HIST. ASS'N (Aug. 14, 2001), https://eh.net/encyclopedia/hours-of-work-in-u-s-history/#:~:text=In%201880%20a%20typical%20male,time%20to%20more%20than%20triple. [https://perma.cc/335N-PR83].

55. James Pethokoukis, *Don't Tell Bernie Sanders, but Capitalism Has Made Human Life Fantastically Better. Here's How*, AM. ENTER. INST. (Feb. 9, 2016), https://www.aei.org/economics/political-economy/dont-tell-bernie-sanders-but-capitalism-has-made-human-life-fantastically-better-heres-how/ [https://perma.cc/2TTG-QJMD].

56. Max Roser, *Twice as Long—Life Expectancy Around the World*, OUR WORLD IN DATA (Oct. 8, 2018), https://ourworldindata.org/life-expectancy-globally [https://perma.cc/G7TZ-SQBQ].

72.8.[57] These benefits are not isolated to America and the Western Capitalist world—they have been widely exported:

> The divided world of 1950 has been narrowing. Globally the life expectancy increased from less than 30 years to over 72 years; after two centuries of progress we can expect to live much more than twice as long as our ancestors. And this progress was not achieved in a few places. In every world region people today can expect to live more than twice as long.[58]

That the advances brought by capitalism are in fact narrowing health-based inequalities can be attributed to a number of different factors, such as the improvements in logistics for transporting medical equipment and medicine, Western pharmaceutical companies' decision to cross-subsidize medication in the interest of broadening access,[59] and the ability to store and thus transport food and food supplements for longer periods of time and across further distances.[60]

3. Health and Wellbeing

Improvements across multiple health and wellbeing metrics can be directly attributed to medical and technological advances driven by capitalism. For one, it is now vastly safer for mothers to give birth. Since the 19th century, maternal mortality in the developed world has decreased 100-fold:

> We see that in the 19th century about 500 to 1,000 mothers died for every 100,000 births. Every 100th to 200th birth led to the mother's death. Since women gave birth much more often than today maternal death was not uncommon. This changed over the last century and today most rich countries have a maternal mortality ratio below 10 deaths per 100,000 births—the countries with the lowest maternal mortality reached a level of around 1% of the death rate in the 19th century.[61]

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57. *Life Expectancy, 1960 to 2019*, OUR WORLD IN DATA, https://ourworldindata.org/grapher/life-expectancy?time=1960..2019&country=~OWID_WRL [https://perma.cc/G8VC-WRM4].

58. Roser, *supra* note 56.

59. EDMANS, *supra* note 22, at 93, 256–57.

60. "In 1991, close to 30 per cent of Africa's population was undernourished, compared with '5 per cent or less' of North America's population. By 2015, fewer than 20 per cent of Africans were undernourished. The absolute inequality between the poorer areas of the globe and the richer ones shrank considerably, even as undernourishment became rarer worldwide." Chelsea Follett, *Globalization Is Slashing Inequality—Here's How*, HUM. PROGRESS (Mar. 30, 2017), https://www.humanprogress.org/globalization-is-slashing-inequality-heres-how/ [https://perma.cc/79ZJ-TNZS].

61. Max Roser & Hannah Ritchie, *Maternal Mortality*, OUR WORLD IN DATA, https://ourworldindata.org/maternal-mortality [https://perma.cc/5HSE-AQ93].

Babies survive at much higher rates as well; capitalism is, in fact, *narrowing* the gap in infant mortality rates between rich and poor nations.

Back in 1800, a newborn baby could only expect a short life, no matter where in the world it was born. In 1950, newborns had the chance of a longer life if they were lucky enough to be born in the right place. In recent decades, all regions of the world made very substantial progress, and it were those regions that were worst-off in 1950 that achieved the biggest progress since then.[62]

Alone, the development of medicine or the passage of time (and increased sophistication of human beings) cannot explain these outcomes. Arguably, these outcomes depended on a capitalist system that would produce a certain quality of accessible technologies and practices. It also depended on capitalist systems that were embedded in political systems that supported free markets—i.e., free-market systems that included transparency and global competition. Consider a counterfactual:

> Despite the Soviet Union in 1986 having a population 14% larger than the United States, they had 73% more hospitals than the US (23,100 vs 6229), 69% more beds for patients, 48% more physicians and 99% more midwives. However, the average life expectancy was 64 and 73 for males and females in the Soviet Union compared to 71 and 78 for males and females in the United States.[63]

The nature of employment has also shifted with capitalism and significant improvements made. Technology has net added jobs to the global economy in the past hundred years.[64] It has also, in general, softened the nature of work that people undertake—"saving us from dull, repetitive, and dangerous work."[65] It has "boosted employment in knowledge-intensive sectors" and reduced the use of "humans being deployed as sources of muscle power."[66]

4. Inequality

Though capitalism is often maligned for its inability to address wealth inequality, these assertions are highly contestable based on the data available. For one, capitalism has reduced global poverty on an absolute basis to an astounding degree. "[T]he average income of Americans over

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62. Roser, *supra* note 56.

63. Josh Swan, *Capitalism and Its Impact on Global Living Standards*, U. OF BIRMINGHAM CITY REDI BLOG (Mar. 18, 2020), https://blog.bham.ac.uk/cityredi/capitalism-and-its-impact-on-global-living-standards/ [https://perma.cc/V3EU-UYG3].

64. STEWART, DE & COLE, *supra* note 51 (key findings summary at URL).

65. *Id.*

66. *Id.*

the past two centuries went from $2,000 per person to $50,000."[67] And "[i]n the past 200 years, extreme poverty has collapsed from a whopping 94% of the entire world population to less than 10% today."[68] "Since the 1970s, the proportion of the world population living on a dollar a day has, adjusting for inflation, fallen by 80%."[69]

Capitalism has been shown to improve, rather than entrench, inequality in countries that opened their economies and freed their markets. Consider the premier example, China between 1950 and 2020. According to the UN, "[i]n China and India opening up the economy to the world accelerated growth, which in turn helped address human development challenges—reducing poverty, improving health outcomes and extending access to basic social services."[70] As retold by a UK official:

> Forced collectivisation killed millions of people and left 64% of the population in poverty. It was Deng Xiaoping who realised that something had to change. Asked why he was moving China closer towards capitalism, he said that 'It doesn't matter if a cat is black or white, so long as it catches mice.' . . . [W]hen the country finally began to embrace capitalism, the poverty rate swiftly fell to around 8%.[71]

Freeing markets not only ushered in the medical and convenience improvements noted above, it also democratized education and information in China and India. "In 1950, Americans spent nearly seven more years learning than Chinese students on average, and nearly eight more years leaning than Indians. By 2015, average years of schooling in the United States exceeded the Chinese average by only five years and the Indian average by about six years."[72] Also in China, "[i]n 2000, a little under 2 per cent of Chinese used the internet, compared to 43 per cent of Americans. That means a gap of 41 per cent. By 2015, that gap had shrunk to 24 per cent."[73]

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67. James Pethokoukis, *The Most Important Economic Chart in Western Civilization—and How It Happened*, AM. ENTER. INST. (Apr. 23, 2013), https://www.aei.org/economics/the-most-important-economic-chart-in-western-civilization-and-how-it-happened/ [https://perma.cc/XU7W-CGZZ].

68. Eugenie Joseph, *Capitalism Is Having an Identity Crisis—But It Is Still the Best System*, GUARDIAN (Feb. 3, 2019), https://www.theguardian.com/commentisfree/2019/feb/04/capitalism-is-having-an-identity-crisis-but-it-is-still-the-best-system [https://perma.cc/KE3Y-HPGS].

69. Sajid Javid, MP, In Defence of the C-Word: Why Capitalism Is a Force for Good, Address at the Legatum Institute, London (Nov. 16, 2015), https://www.gov.uk/government/speeches/in-defence-of-the-c-word-why-capitalism-is-a-force-for-good [https://perma.cc/UZ64-QMFH].

70. U.N. DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 2016: HUMAN DEVELOPMENT FOR EVERYONE 34 (2016).

71. Javid, *supra* note 69; *see also* GEORGE C.S. LIN, RED CAPITALISM IN SOUTH CHINA: GROWTH AND DEVELOPMENT OF THE PEARL RIVER DELTA 3 (1997).

72. Follett, *supra* note 60.

73. *Id.*

Generally speaking, capitalist countries—with accompanying democracies—tend to be socially mobile countries. To borrow Milton Friedman's perspective from *Capitalism and Freedom*:

> In a precapitalist world, the poor had no hope of upward mobility or of relief from the endless physical drudgery that barely kept them alive. Today, the poor in capitalist countries live like kings, thanks mostly to the freeing of labor and the ability to accumulate capital that makes that labor more productive and enriches even the poorest.
>
> When profit-seeking and innovation became acceptable behavior for the bourgeoisie, the horn of plenty brought forth its bounty, and even the poorest shared in that wealth.
>
> [C]ontrary to popular conception. . . capitalism leads to less inequality than alternative systems of organization and that the development of capitalism has greatly lessened the extent of inequality. . . if inequality is measured by differences in levels of living between the priveleged and other classes, such inequality may well be decidedly less in capitalist than in communist countries. . . .
>
> [A] major problem in interpreting evidence on the distribution of income is the need to distinguish two basically different kinds of inequality; temporary, short-run differences in income, and differences in long-run income status. Consider two societies that have the same distribution of annual income. In one there is great mobility and change so that the position of particular families in the income hierarchy varies widely from year to year. In the other, there is great rigidity so that each family stays in the same position year after year. Clearly in any meaningful sense, the second would be the more unequal society. The one kind of inequality is a sign of dynamic change, social mobility, equality of opportunity; the other, of a status society. The confusion of these two kinds of inequality is particularly important, precisely because competitive free-enterprise capitalism tends to substitute the one for the other.[74]

* * *

Could any of these human advancements have been achieved without individuals responding to incentives created by the opportunity for profit? Again, capitalism is a system that is designed to incentivize innovation and growth; and medical improvements and lifestyle comforts historically have arisen out of innovation and growth. Individuals profit from these products and services, but they are producing solutions to people's problems, ailments, and their chores.

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74. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 169, 171 (40th anniversary ed. 2002).

It seems unlikely that financial ESG can do better than the invisible hand. Consider a thought experiment concerning the "E."[75] Regulatory mandates or incentives for battery operated or electric cars, or to build wind turbines, *before* they are commercially viable may not lead to socially optimal outcomes. Is the regulatory state incentivizing the creation of infrastructure and hard assets that are not market ready, at the cost of squeezing out other research spending or investment that would create the market solutions that would roll out and get us to a greener outcome faster? There is a genuine debate to be had about whether the current iteration of green infrastructure is an improvement when full life use metrics are included, like the energy cost and consequences of mining for rare materials, for example.[76]

The crux of the inefficiency is that top-down approaches are unlikely to reckon with tradeoffs to the extent a purely market-oriented endeavor necessarily does. If a business is incentivized to build a plant that must be paid back over 10 years, the owners and managers of that business will care about certain trade-offs and the need to address real resource constraints, like long-term supplies and supply chains. But if regulators force markets to subsidize most of the factory's upfront cost, owners and managers care much less about these longer-term constraints. In the end, society might be left with orphaned assets and investments—bridges to nowhere—and significant environmental waste. Consider what will happen to today's generation of lithium batteries and solar panels when more efficient and less resource-intensive versions are designed.

The suggestion that corporate purpose is simply capitalism redux—an "enlightened" version of capitalism, or capitalism 2.0, is too much sleight of hand. The philosophy behind corporate purpose (especially in its stronger forms), rejects the notion that firms should be principally concerned with maximizing profit.[77] As such, corporate purpose, including when operationalized as some form of ESG, suspends the basic notion that individuals should be encouraged by the law to pursue their own individualist goals. It assumes that shareholders' utility is *not* maximized by the pecuniary value in their shares. Rather it qualifies capitalism with the view that companies should try to discern what is in the collective best interest of society and pursue those goals instead.

75. *See generally* FSOC, *supra* note 36 (a report focused on *climate*-related financial risk).

76. *See* Iris Crawford & Scott Odell, *Will Mining the Resources Needed for Clean Energy Cause Problems for the Environment?*, MIT CLIMATE PORTAL (July 21, 2022), https://climate.mit.edu/ask-mit/will-mining-resources-needed-clean-energy-cause-problems-environment [https://perma.cc/D53B-U4P7]; Laura J. Sonter, Marie C. Dade, James E. M. Watson & Rick K. Valenta, *Renewable Energy Production Will Exacerbate Mining Threats to Biodiversity*, 11 NATURE COMMC'NS, Sept. 1, 2020.

77. *See* Mayer, *supra* note 19 and accompanying text.

But recent events make it relatively evident that shareholders do not support such a system and investors do in fact care about their private profit.[78] This suggests that if the ESG trajectory continued in its current form, or more dramatic versions of corporate purpose instilled in the form of law, this crimping of market freedom would be accompanied by a market shrinking. A weaker form of capitalism would arguably fail in supplying the technological innovation that has contributed to the human prosperity at the rate and degree of ingenuity just discussed above. There would also be implications for the stability of the social order, which the next Section will discuss.

B. Capitalism Within a Democratic Order

Capitalism is not an accident of history. As alluded to above, free markets do not thrive and serve society in a political vacuum. Instead, this version of human-welfare-enhancing capitalism must be enmeshed in a democratic system that prioritizes individualism and economic rights. Precisely, as John Cogan and Kevin Warsh have argued, the rise in living standards and quality of life described in Part II.A is attributable to certain "foundational principles" that blanket American capitalism: "private property rights, the rule of law, free markets, and limited government."[79] Cogan and Warsh are referring to the fact that American capitalism grew out of the Enlightenment principles of the eighteenth century, which ideas were espoused by the Framers of the U.S. Constitution and then hardwired into American democracy.[80] Five of these ideas, addressed below, deserve special mention as the roots of American capitalist-democracy.

1. Individual Specialization

Capitalism reflects the astute observation that mankind is essentially cooperative. Capitalism's orientation around incentives thus reflects the reality of human capacity and—more important yet—the propensity to pursue one's individual interests to specialize which, in turn, allows society to reap benefits of comparative advantage. This principle has its intellectual foundations in Adam Smith's view that men have a tendency to "truck, barter, and exchange."[81]

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78. *See supra* notes 44–46 and accompanying text.

79. JOHN F. COGAN & KEVIN WARSH, HOOVER INST., REINVIGORATING ECONOMIC GOVERNANCE: ADVANCING A NEW FRAMEWORK FOR AMERICAN PROSPERITY 5 (2022), https://www.hoover.org/sites/default/files/research/docs/cogan-warsh_webreadypdf_220329.pdf [https://perma.cc/CEN4-TJWS] (arguing that societies that follow these principles "tend to achieve strong, sustained economic progress").

80. *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 26–27 (3rd ed. 2017).

81. ADAM SMITH, THE WEALTH OF NATIONS Book I, ch. 2 (1776).

> The difference of natural talents in different men is, in reality, much less than we are aware of; and the very different genius which appears to distinguish men of different professions, when grown up to maturity, is not upon many occasions so much the cause, as the effect of the division of labour. The difference between the most dissimilar characters, between a philosopher and a common street porter, for example, seems to arise not so much from nature, as from habit, custom, and education. When they first came into the world, and for the first six or eight years of their existence, they were perhaps very much alike, and neither their parents nor play-fellows could perceive any remarkable difference. About that age, or soon after, they come to be employed in very different occupations. The difference of talents comes then to be taken notice of, and widens by degrees, till at last the vanity of the philosopher is willing to acknowledge scarce any resemblance. But without the disposition to truck, barter, and exchange, every man must have procured to himself every necessary and convenience of life which he wanted . . . .
>
> Among men . . . the most dissimilar geniuses are of use to one another; the different produces of their respective talents, by the general disposition to truck, barter, and exchange, being brought, as it were, into a common stock, where every man may purchase whatever part of the produce of other's men's talents he has occasion for.[82]

So, from this view of the natural state of man, a few things follow. First, that there are tangible benefits to specialization—so other people will specialize in all the other things we need or want but cannot make for ourselves—and we, in turn, will be able to increase our consumption opportunities as a result of individuals' specialization. Second, the embrace of mankind's propensity to specialize is inherently egalitarian. A comparative advantage is earned by applying oneself to a skill or trade, based on one's natural talents—this manner of advantage is not the product of any innate superiority to others.

The Founding Generation, and the European thinkers that inspired them, were hyper-focused on equality of opportunity in this sense.[83] Adam Smith was himself an Enlightenment thinker; he wrote *Wealth of Nations* in 1776, not coincidentally, the same year as the American Revolution.[84] America's Founding Fathers were *also* Enlightenment thinkers; the Revolution (like the French Revolution) was a product of Enlightenment ideas around individual freedom and self-government.[85] From this foundation principle of individualism and the pursuit of comparative advantage, other

82. *Id.* at 32–34.
83. *See* BAILYN, *supra* note 80, at 307–08.
84. *See generally* SMITH, *supra* note 81.
85. *See* BAILYN, *supra* note 80, at 307–08.

pro-market principles would become more explicitly and intentionally woven into the fabric of American rule of law.

2. Private Property

Like the English, America has long had a strong tradition around respect for private property. Some such protections were, of course, directly expressed in the Constitution. The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."[86] This means that the state cannot take private property without due process—meaning, some kind of reasoned, and procedurally fair basis, as determined by courts of law. In other words, lawfully, there can be no arbitrary taking of property. This protection derives from an Enlightenment view, inspired by John Locke, that once private rights (like property) are vested, they are essentially unalienable.[87]

Somewhat relatedly, the Constitution provides individual protection for privately earned money.[88] Article I, Section 8, Clause 5 provides: "[The Congress shall have Power . . .] To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures."[89] The purpose of this provision is to prevent a would-be despotic president from printing money to finance his wars or other domestic diversions, because doing so would inflate the supply of money, effecting an arbitrary tax on spending.[90] Nor can presidents arbitrarily tax or borrow. Article 1, Section 8, Clause 1 provides that the "Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States" belongs exclusively to Congress, as does the power "To borrow Money on the credit of the United States . . . ."[91] Further, a president cannot spend money arbitrarily and without democratic assent: Article 1, Section 9 stipulates that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[92] Overall, presidents are constitutionally prohibited from taking private money, eroding its value, or spending it at his

86. U.S. CONST. amends. V, XIV. The Fourteenth Amendment "incorporated" (which means applies) the bill of rights against the states after the Civil War. It provides: "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

87. *See* JOHN LOCKE, *Chapter V, Of Property*, *in* SECOND TREATISE OF GOVERNMENT (1690) (accessible at https://english.hku.hk/staff/kjohnson/PDF/LockeJohnSECONDTREATISE1690.pdf [https://perma.cc/3WZT-WKPS]).

88. Christina Parajon Skinner, *Central Bank Digital Currency as New Public Money*, 172 U. PA. L. REV. (forthcoming 2024).

89. U.S. CONST. art. I, § 8, cl. 5.

90. Christina Parajon Skinner, *The Monetary Executive*, 91 GEO. WASH. L. REV. 164 (2023).

91. U.S. CONST. art. I, § 8, cl. 1, 2.

92. *Id.* art. I, § 9, cl. 7.

will. Given these limits on presidential power and the protections afforded to citizens' individual liberties, under the Constitution, the president would be a capitalist, not a king.

3. Limited Federal Government

The Framers of the Constitution also designed the Constitution to constrain the federal government. This was done "structurally," so to speak, by separating powers between the branches and installing a federalist system with state and federal government as two co-equal sovereigns. The Tenth Amendment ensures that the principle of subsidiarity applies in the governance of the nation: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[93] This means that the federal government is, as it often said, a government of enumerated power—it can only assume a role expressly assigned to it in the Constitution. All other matters are for the individual fifty states or the people directly.

Meanwhile, within the federal government, power is divvied up among the three branches: Congress, the Executive and the Judiciary in Article I, II, and III of the Constitution, respectively. As far as capitalism is concerned, these two features of federalism and the separation of power create a bulwark against the State's ability to control the factors of production. Generally speaking, just as Cogan and Warsh point out, it is much more difficult to achieve central economic planning in a federalist system where power is diffused.[94]

4. Independent Institutions

The Founding generation also had a deep commitment to the quality and integrity of institutions. And they expressed this in the Constitution most directly by creating an independent judiciary to enforce the rule of law. Today, essentially any government action that affects an individual's economic rights can be reviewed for aberration with the law by a federal court. And although judicial review was not at first embedded in the Constitution, the first Supreme Court confirmed it to be an important part of the American legal and political structure by the First Supreme Court. Specifically, in 1803, Chief Justice Marshall famously held that federal courts can determine legislative and executive acts unconstitutional in *Marbury*

93. *Id.* amend. X.

94. Cogan & Warsh, *supra* note 79, at 6 (citing JOHN YOO, HOOVER INST., SOCIALISM VS. THE AMERICAN CONSTITUTIONAL STRUCTURE: THE ADVANTAGES OF DECENTRALIZATION AND FEDERALISM (2020), https://www.hoover.org/research/socialism-vs-american-constitutional-structure-advantages-decentralization-and-federalism [https://perma.cc/2QFN-FUUC]).

v. Madison.[95] The independence of the judiciary, thereby established, helps to ensure that individuals' economic rights can be enforced under the law, a crucially important element of capitalism.

5. Freedom of Speech and Association

Finally, the Constitution firmly protects the freedom of speech and association in the First Amendment, which provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . . ."[96] These protections can also be seen to further the individualist pursuit of opportunity by granting freedom to associate with fellow thinkers, entrepreneurs, and doers and henceforth to draw inspiration and generate ideas. The Founders were part of an intellectual milieu of some of the great civil society thinkers—Alexander De Tocqueville perhaps most famously. De Tocqueville was highly impressed with civil society in America when he visited in 1831 and 1832—and based on what he observed, he came to highly value the association and thought it was the cornerstone of democracy.[97]

In particular, De Tocqueville observed in America that "the rigid and hierarchical world of feudalism had given way to a fluid and complex world of democratic capitalism."[98] In his words, "the work of the mind had become a source of power and wealth," and America "had opened a thousand new roads to fortune and gave any obscure adventurer the chance of wealth and power."[99] And in this vein, De Tocqueville remarked on individuals' propensity for self-reliance in the first instance (what we might call a private market solution) before looking to or relying on the state:

> The inhabitant of the United States learns from birth that he must rely on himself to combat the ills and trials of life; he is restless and defiant in his outlook toward the authority of society and appeals to its power only when he cannot do without it. [This] attitude (to self-govern) turns up again in all the affairs of social life. If some obstacle blocks the public road halting the circulation of traffic, the neighbors at once form a deliberative body; this improvised assembly produces an executive authority which remedies the trouble before anyone has

95. Marbury v. Madison, 5 U.S. 137, 177 (1803).

96. U.S. CONST. amend. I.

97. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Harvey C. Mansfield & Delba Withrop eds., Univ. of Chi. Press 2000) (1835).

98. Keith Whittington, *Revisiting Tocqueville's America*, 42 AM. BEHAV. SCIENTIST 21, 22 (1998).

99. *Id.*

> thought of the possibility of some previously constituted authority beyond that of those concerned.[100]

In summary, the desire to solve problems for the community without state intervention is inherent in the American capitalist democracy, which favors a small state and freedom to pursue prosperity.

* * *

Ultimately, capitalism is as much about economic prosperity as it is about social stability—democracy in America is inextricable from free-market capitalism, and the two are linked to the overall benefit of humankind. This reality inspired John Gordon to remark that "America's is an empire of wealth, an empire of economic success and of the ideas and practices that fostered that success."[101] To animate this point, Gordon drew a comparison to Argentina—a country similar at the start to the United States, endowed with a vast and varied territory, large and well-educated population, and abundant natural resources.[102] Yet the differences in prosperity of the two nations soon became stark. Gordon attributes the fork in the path of these two nations to their differing political approaches to market freedom:

> Argentine politics, inherited from Spain's control-from-the-top imperial system, has all too often destroyed wealth or, even more often, prevented rather than fostered its creation. But American politics had the great good fortune to be grounded in English traditions, especially the idea that the law, not the state, is supreme. The uniquely English concept of liberty—the idea that individuals have inherent rights, including property rights, that may not be arbitrarily abrogated—was also crucial.[103]

This is precisely why Cogan and Warsh conclude that strong economic governance—that is, a commitment to maintaining versions of the five rule-of-law principles advanced above—"underwrite[s]" liberty as much as it does economic success.[104] And so it would appear that stakeholder capitalism is no different than American capitalism; that capitalism is *for* stakeholders. Capitalism [stakeholderism]—is already operationalized in law, in the text of the Constitution and the norms and conventions that support it and follow from it.

100. DE TOCQUEVILLE, *supra* note 97, at 220.

101. JOHN STEELE GORDON, AN EMPIRE OF WEALTH: THE EPIC HISTORY OF AMERICAN ECONOMIC POWER xv (2004).

102. *Id.*

103. *Id.* at xiii.

104. Cogan & Warsh, *supra* note 79, at 2.

III. Capitalism Modified by ESG: What Would Milton Friedman Say?

Until this point, the Essay has drawn on empirical data, the research of other economists and historians, and legal rules to illustrate that capitalism benefits more people than alternative social systems—like communism, socialism, monarchy, dictatorship—and also that capitalism supports and is supported by democracy. From that vantage point, one is hard pressed to argue for capitalism's replacement. Given the extent to which Milton Friedman viewed the corporate-purpose departure from competitive capitalism as a direct threat to democracy, this Part attempts to put Milton Friedman in 'conversation' with advocates for ESG, while drawing out the discussion from above.

A. A Weaker Union

One need only reflect on the experience of the past three years to see that capitalism modified by ESG also modifies or impacts democracy and governance.

1. Be Wary of the Unelected CEO

In his 1970 op-ed, Friedman made the point that requiring corporations to undertake social responsibilities—the ESG of that day—would place the unelected corporate CEO in the shoes of the elected representative in Congress. Friedman expressed three main concerns. The first was that CEOs should not substitute their judgment for elected representatives in Congress. Freidman suggested that when the corporate manager spends shareholder invested-money (i.e., corporate resources) on projects that are not purely maximizing profits but instead maximizing some other social or environmental goal, the corporate manager essentially acts like the government taxing authority.[105] Friedman questioned how decisions about how to use society's resources could be democratically legitimate if made by corporate managers who were, again, obviously not elected and therefore substituting their political preferences for those of the legislators: "[t]his is the basic reason why the doctrine of 'social responsibility' involves the acceptance of the socialist view that political mechanisms, not market mechanisms, are the appropriate way to determine the allocation of scarce resources to alternative uses."[106] Not only does such mode of governing turn representative government on its head, but it also fundamentally undermines the individualism that underpins democracy:

105. Friedman, *supra* note 2, at 3.
106. *Id.* at 4.

> In an ideal free market resting on private property, no individual can coerce any other, all cooperation is voluntary, all parties to such cooperation benefit or they need not participate. There are no "social" values, no "social" responsibilities in any sense other than the shared values and responsibilities of individuals … and of the various groups they voluntarily form.[107]

Friedman also cautioned against appeals to urgency and expedience. Today, some CEOs, vocal investors, and financial regulators urge or imply that the problem of climate change is too important to wait for action by Congress; rather, these special interests urge that the financial system should take on the responsibility for financing the transition.[108] The problem with this line of thinking is no less than it was when Friedman first penned his 1970 *New York Times* op-ed:

> Many a reader who has followed the argument this far may be tempted to remonstrate that it is all well and good to speak of government's having the responsibility to impose taxes and determine expenditures for such "social" purposes as controlling pollution or training the hard-core unemployed, but that the problems are too urgent to wait on the slow course of political processes, that the exercise

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107. *Id.* at 7.

108. In a 2020 Tweet, Apple CEO Tim Cook announced, "By 2030, Apple's entire business will be carbon neutral—from supply chain to the power you use in every device we make. The planet we share can't wait, and we want to be a ripple in the pond that creates a much larger change." Tim Cook (@tim_cook), TWITTER (July 21, 2020, 8:21 AM), https://twitter.com/tim_cook/status/1285550582200061952?s=20. A 2019 study from Accenture and the UN Global Compact called, "The Decade to Deliver: A Call to Business Action" surveyed 1,000 global executives on sustainability. A lead author of the study, Jessica Long, Accenture's Managing Director of Strategy and Sustainability, said, "The study is meant to be a call to action. Lots of good work is going on, and companies are making more commitments. But current activity and statements without action just won't get us to 2030." Andrew Winston, *What 1,000 CEOs Really Think About Climate Change and Inequality*, HARV. BUS. REV. (Sept. 24, 2019), https://hbr.org/2019/09/what-1000-ceos-really-think-about-climate-change-and-inequality [https://perma.cc/V54P-6GSH]. As early as 2009, David Runnalls, president and CEO of the International Institute for Sustainable Development, said, "The world urgently needs an international framework to address climate change, but cannot wait for political agreement. Effective actions must be taken now," and identified the private sector as the path to change. *IISD CEO Says World Can't Wait for Political Agreement on Climate: Sees Trade as Catalyst for Change*, INT'L INST. FOR SUSTAINABLE DEV. (Dec. 12, 2009), https://www.iisd.org/articles/press-release/iisd-ceo-says-world-cant-wait-political-agreement-climate-sees-trade [https://perma.cc/437W-2EVR]. Ingmar Rentzhog and Anette Nordvall, CEO and Chairwoman, respectively, of We Don't Have Time, took climate action into their own hands by creating a digital platform for organizing climate initiatives. They argue, "We don't have time to wait for politicians to act to save humanity from the climate threat. To solve the climate crisis in time, we need to find more and faster ways of effecting change . . . ." Ingmar Rentzhog & Anette Nordvall, *A Letter from the CEO and Chairwoman: "We Don't Have Time to Wait"*, MEDIUM (Feb. 9, 2019), https://medium.com/wedonthavetime/a-letter-from-the-ceo-and-chairwoman-we-dont-have-time-to-wait-fadfd50f3cb1 [https://perma.cc/VFA9-HTKF].

> of social responsibility by businessmen is a quicker and surer way to solve pressing current problems.[109]

Yet, the urgency of climate change is now often used to justify asset managers' and banks' efforts to use their institutions to drive forward a green transition irrespective of Congress's pace. According to the World Economic Forum, for example, asset managers should improve their ability to "price" climate risk to "ensure an orderly transition."[110]

This approach reduces the capital allocation to companies with the largest transition risk, which reduces financial risk to investors. It facilitates the repricing of climate risks, allowing capital markets to align with government policy. It also increases capital allocation to the companies that stand to gain from the climate transition and hence offers potential for improved returns.[111]

Meanwhile, the 5,361 global signatories of the UN Principles for Responsible Investment[112] agreed to take "actions for incorporating ESG issues into investment practice," including, among other things, to incorporate ESG issues into investment analysis and decision-making, as well as ownership policies and practices.[113]

Regulators are also unelected technocrats and often critiqued for wading into politically charged arenas.[114] The democratic deficit is even greater when the CEO—a wholly private individual—uses the power of his or her position to advance a particular economic agenda over which there is clearly no widespread national agreement.

Friedman's third main concern was the consolidation of economic and political power:

> The fundamental threat to freedom is power to coerce, be it in the hands of a monarch, a dictator, an oligarchy, or a momentary majority. The preservation of freedom requires the elimination of such concentration of power to the fullest possible extent and the dispersal and distribution of whatever power cannot be eliminated—a system of

109. Friedman, *supra* note 2, at 5.

110. Carl Hess, *How Better Metrics on Climate Risk Can Accelerate Progress to Net Zero*, WORLD ECON. F. (Sept. 23, 2022), https://www.weforum.org/agenda/2022/09/better-financial-metrics-climate-risk/ [https://perma.cc/A5FY-F8EC].

111. *Id.*

112. *Signatory Directory*, PRINCIPLES FOR RESPONSIBLE INV., https://www.unpri.org/signatories/signatory-resources/signatory-directory [https://perma.cc/G5EE-KHFT].

113. *What Are the Principles for Responsible Investment?*, PRINCIPLES FOR RESPONSIBLE INV. https://www.unpri.org/about-us/what-are-the-principles-for-responsible-investment [https://perma.cc/5CZY-3ZLH].

114. *See* Matthew Cole, *What's Wrong with Technocracy?*, BOS. REV. (Aug. 22, 2022), https://www.bostonreview.net/articles/whats-wrong-with-technocracy/ [https://perma.cc/A5G8-Q2ZG] (describing the growing frustrations felt by democratic citizens over the lack of accountability of unelected technocrat leaders in political decision-making).

> checks and balances. By removing the organization of economic activity from the control of political authority, the market eliminates this source of coercive power.[115]

That the largest asset managers and banks are in fact sufficiently powerful to steer the markets toward E or S agendas belies a concentration of power that seems antithetical to general political and economic freedom. Once capital allocators become aligned with political goals, and use their power to that end, individual choice gives way to central planning.

2. Watch for Pendulum Swings in Public Attitudes

While the risk of collapsing markets together with government was top of mind for Friedman, his writing also indicated some concern that corporate purpose would exacerbate fiscal profligacy. Rising federal debt, he urged, would eventually shift public sentiment away from anti-capitalist ideas.

In the preface to the 1982 version of his book *Capitalism and Freedom*, Friedman remarked on the "intellectual climate . . . a quarter of a century ago."[116] "Those of us who were deeply concerned about the danger to freedom and prosperity from the growth of government, from the triumph of welfare-state and Keynesian ideas, were a small beleaguered minority regarded as eccentrics by the great majority of our fellow intellectuals."[117] But in the preface to the 2002 edition, he would write of the "dramatic shift in the climate of opinion, manifested in the difference between the way this book was treated when it was first published in 1962" and the way that "same philosophy, was treated when it was published in 1980."[118] "That change in the climate of opinion developed while and partly because the role of government was exploding under the influence of initial welfare state and Keynesian views."[119] Friedman remarks,

> In 1956, . . . government spending in the United States . . . was equal to 26 percent of national income. . . [t]wenty-five years later . . . total spending had risen to 39 percent of national income and non-defense spending had more than doubled, amounting to 31 percent of national income. That change in the climate of opinion had its effect. It paved the way for the election of Margaret Thatcher in Britain and Ronald Reagan in the United States.[120]

115. FRIEDMAN, *supra* note 74, at 15.
116. *Id.* at XI.
117. *Id.*
118. *Id.* at VII.
119. *Id.*
120. *Id.*

The geopolitical situation in the 1980s also caused socialism to lose some of its 1960s feeling luster.

The climate of opinion received a further boost in the same direction when the Berlin Wall fell in 1989 and the Soviet Union collapsed in 1992. That brought to a dramatic end an experiment of some seventy years between two alternative ways of organizing an economy: top-down versus bottom-up; central planning and control versus private markets; more colloquially, socialism versus capitalism.[121]

As a result, even though socialism had taken hold in the postwar years in many Western countries, by 1985, "the pressure" was "toward giving markets a greater role and government a smaller one."[122]

Arguably, the situation is not very different from today. Exploding fiscal deficits, high inflation, and a president keen on extra-constitutional modes of spending is slowly shifting the public mood away from ESG. As one *Wall Street Journal* opinion piece noted in February 2023, "[i]n a mere two years [President Biden] has midwifed the biggest expansion of government since the 1960s. That's the real news in Wednesday's annual budget and economic forecast from the Congressional Budget Office, and the bill for this blowout has only begun to come due."[123] Citing the CBO forecast, the writer highlighted the fact that "[r]evenues last year hit 19.6% of GDP, far above the 17.4% average over the last 50 years, and a share of the economy reached only in 1944, 1945 and 2000."[124] This data prompted the polemic conclusion that "[i]f you're a socialist who wants politicians to control more of the means of production, Joe Biden is your man."[125] Meanwhile, Russia's invasion of Ukraine, combined with increasingly visible human rights abuses in China, are reminding the public about the ugliness of authoritarian government.

It is probably no coincidence that in this fiscal and political environment there is bubbling discontent with Wall Street's ESG programs. As noted, once vocal proponents of ESG-inspired investment and divestment are now backing down.[126]

3. Prepare for Widespread Polarization

Friedman, Cogan, and Warsh all commented on the value of decentralization and subsidiarity in maintaining sound economic governance—

121. *Id.* at VIII.

122. *Id.*

123. Editorial Board, *Biden's Federal Budget Blowout*, WALL ST. J. (Feb. 15, 2023), https://www.wsj.com/articles/joe-biden-government-expansion-cbo-budget-forecast-f1302d10.

124. *Id.*

125. *Id.*

126. *See supra* notes 44–46.

that is, a well-functioning capitalist system embedded in democracy.[127] But this also means that such a system will naturally activate to block efforts at economic centralization and top-down planning with the effect of polarizing the nation as a whole. Certainly, this has been the case with various states' response to ESG.

By this point, numerous states have divested their pension funds or other state-allocated resources from those firms that tilted heavily toward financialized ESG.[128] Four states enacted legislation barring the state from conducting business with financial institutions that embraced ESG.[129] According to these legislatures, such "policies explicitly limit commercial engagement with an entire energy sector based on subjective environmental and social policies,"[130] and "produced an opaque and perverse system in which some financial companies no longer make decisions in the best interest of their shareholders or their clients, but instead use their financial clout to push a social and political agenda shrouded in secrecy."[131]

Other states, like Utah, reacted publicly to rating agencies that had downgraded the state's debt for allegedly poor ESG. In a letter to S&P, Utah's elected officials complained that:

> S&P's ESG credit indicators politicize what should be a purely financial decision. This politicization has manifested itself in the capital markets where, for example, banks are pressured to cut off capital to the oil, gas, coal, and firearms industries. ESG is a political rating and should be characterized as such.[132]

Further, the letter advocated that:

> No financial firm should substitute its political judgments for objective financial analysis, especially on matters that are unrelated to the underlying businesses, assets, and cash flows it evaluates. This is especially true of a properly regulated independent entity like S&P that is charged with providing objective clarity and insight. The use of

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127. FRIEDMAN, *supra* note 74, at 3; Cogan & Warsh, *supra* note 79, at 6.

128. Florida, Louisiana, Arizona, Missouri, South Carolina, Arkansas, Utah, and West Virginia all announced divestment from BlackRock. Matthew Goldstein & Maureen Farrell, *BlackRock's Pitch for Socially Conscious Investing Antagonizes All Sides*, N.Y. TIMES (Dec. 23, 2022), https://www.nytimes.com/2022/12/23/business/blackrock-esg-investing.html.

129. *See* W. VA. CODE § 12-1C-1-7 (2022); TEX. GOV'T CODE ANN. § 2274 (West 2021); OKLA. STAT. tit. 74, §12001 (2022); KY. REV. STAT. ANN. § 41.474 (West 2022).

130. Jacob Hupart, *West Virginia Penalizes Major Companies for Embracing ESG Principles*, JD SUPRA: MINTZ (July 29, 2022), https://www.jdsupra.com/legalnews/west-virginia-penalizes-major-companies-6740634/ [https://perma.cc/6EAB-8HRJ].

131. Andrew Freedman, *BlackRock, UBS and 348 ESG Funds "Banned" in Texas*, AXIOS (Aug. 25, 2022), https://www.axios.com/2022/08/25/texas-bans-blackrock-ubs-esg-backlash.

132. Letter from Governor Spencer J. Cox and colleagues to Douglas L. Peterson & Martina L. Cheung 2 (Apr. 21, 2022), https://treasurer.utah.gov/wp-content/uploads/04-21-22-Utah-Letter_SP-Global_ESG-Indicators.pdf [https://perma.cc/99ME-FF9R].

> ESG-related quantitative metrics and analytical frameworks confounds the distinction between subjective normative judgments and objective financial assessments. It is therefore unconscionable for S&P to weigh in on indeterminate and normative questions.[133]

The nation has always been divided among political positions and made efforts to celebrate that diversity of viewpoint. Still, it is arguably less than ideal to have heighted divineness among states, which stands only to further politicize economic policy on national and local levels.

4. Moral Dilemmas are Inevitable

Finally, the questions of democracy and capitalism that attend ESG cannot be remarked upon without mention of intractable moral dilemma. Specifically, perhaps the principal problem with ESG in democracy is the trade-offs it invites. The case of investment in China may well be the case-in-point. Take solar as just one example. For decades firms have heavily invested in Chinese solar panels and dubbed those investments as pro-ESG.

Solar is on track to provide the majority of the world's energy needs by 2050.[134] And, since the 1990s, China has made major efforts to control the inputs for solar panels and create what Ambassador Kelley Currie has referred to as a solar energy monopoly.[135] But, as Ambassador Currie pointed out, China's solar panels are "dirty"—meaning, their production is associated with environmental and human rights abuses.[136] By passively investing in ESG finds, average investors may be unwittingly financing "E" and the expense of "S" in the case of solar and perhaps others.

The opaque trade-offs between the E and the S and G are a byproduct of a system that substitutes CEO and asset manager judgment for those of Congress, as discussed above.

B. Re-Limiting the State

Nothing in this Essay should be taken to mean that many if not most people do not care about the environment, social justice issues, or good governance in firms. Certainly, they do. But absent a democratic process, it is impossible for firms to enact the will of the majority, to reconcile and

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133. *Id.*

134. Emiliano Bellini, *Solar May Cover 75% of Global Electricity Demand by 2050*, PV MAG. (Apr. 13, 2021), https://www.pv-magazine.com/2021/04/13/solar-may-cover-75-of-global-electricity-demand-by-2050/ [https://perma.cc/G4YQ-F4E2].

135. Kelley Currie is the former U.S. Ambassador-at-Large to the UN for Global Women's Issues. She delivered these remarks during a guest lecture in the author's class in September 2023. As Currie explained, solar panels depend on polysilicon, which is produced in a region of China associated with what a number of countries have labeled as a genocide of the Uyghur people.

136. *Id.*

adjudicate trade-offs, and avoid introducing opportunity for rent-seeking and cronyism. Rather, as Part I explained, better to let markets provide prosperity and confine the State to its historic police-power role. That free-market position is often misquoted as advocating for unfettered capitalism; but the opposite may well be true. Free-market capitalists believe that the State can and must establish "the rules of the game."[137]

Thus, the State has a legitimate and important role in creating laws (through the democratic process) that curb corruption and misconduct in the form of market, consumer, or investor abuse.[138] It also has a role to play in checking concentration and monopoly abuse.[139] Certainly, the State must ensure that companies are not working at cross-purposes to national or economic security or otherwise undermining the United States' strategic interests. And finally, the State has long enjoyed a role in identifying market failures and tailoring regulation to address those market failures where the private sector cannot.[140] Likewise, the State must occasionally—though certainly not always—supplement the market's production of certain public goods.[141]

Ultimately, there is ample evidence that the private sector will produce solutions to the problems that society most cares about because it will reward those solutions through the price system (i.e., profit). To the extent the government wants to spur this innovation there is a limited role to play: setting incentives to which the market can respond. Within the ESG moniker, climate and the environment are broadly regarded as the most pressing, uncertain, and existential risk. If the government agrees that the financial system should play a role, rather than pressuring regulators and CEOs, far better to create the right incentives through a carbon tax, as one example, or broader tax relief structures for successful green innovation.

CONCLUSION

In 2024, America nears completion of its third round of debating whether capitalism should be modified or replaced with some version of corporate purpose. And each time, capitalism has prevailed. This Essay

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137. Friedman, *supra* note 2, at 7. Friedman also stated that "government is essential both as a forum for determining the 'rules of the game' and as an umpire to interpret and enforce the rules decided on." FRIEDMAN, *supra* note 74, at 15.

138. *See* Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1-2, 28 U.S.C. §§ 509-10; Securities Act, 15 U.S.C. §§ 77a-mm; Securities Exchange Act, 15 U.S.C. §§ 78a et seq.

139. *See* Sherman Act, 15 U.S.C. §§ 1-7; Federal Trade Commission Act, 15 U.S.C. §§ 41-58; Clayton Act, 15 U.S.C. §§ 12-27, 29 U.S.C. §§ 52-33.

140. *See* Joseph E. Stiglitz, *Government Failure vs. Market Failure: Principles of Regulation*, *in* GOVERNMENT AND MARKETS: TOWARD A NEW THEORY OF REGULATION 13, 18 (Edward J. Balleisen & David A. Moss eds. 2009).

141. *See* Jonathan Anomaly, *Public Goods and Government Action*, 14 POL. PHIL. & ECON. 109, 110 (2015).

has urged that the American people *choose* capitalism every time the question is debated because it delivers to them economic prosperity and political freedom. The enduring successes of capitalism should be celebrated, not bemoaned, by those that champion the rights and interests of employees, suppliers, communities, and the environment—after all, capitalism is in the business of producing profitable solutions for society; firms do not profit from malaise. From this vantage point, the Essay has collected and synthesized data on capitalism and growth and juxtaposed that data with reflections on capitalism and democracy to mount a twenty-first century defense of capitalism in the face of continued efforts to operationalize some version of ESG.