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Reconstituting Corporate Power & Accountability

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Modern society faces a growing crisis of corporate impunity. While corporations generate immense value, they increasingly inflict harm at scales that dwarf those of traditional street crime. Decades of deregulation, unchecked corporate lobbying, and a judiciary actively dismantling the administrative state have created a dangerous accountability vacuum. And just as federal oversight is collapsing, the Supreme Court's expanding preemption doctrine is handcuffing state regulators. This Article proposes a paradigm shift: the revitalization of state criminal authority, a power largely shielded from federal interference. Upon securing a conviction or deferred prosecution agreement, states should mandate that the offending corporation conduct all future business within the state through a public benefit corporation. This innovative remedy moves beyond ineffective fines, leveraging the state's authority over corporate charters to fundamentally restructure corporate incentives and align the pursuit of profit with the public good.

Introduction

Modern society faces a paradox: While corporations can be useful engines of innovation and value creation, they increasingly operate as vectors for profound public harm beyond the reach of public regulation. The "economic and human tolls," experts note, "almost defy comprehension,"[1] with the scale of this harm on metrics like mortality now dwarfing that of all violent crime in the United States combined.[2] Even so, the

1. Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation*, 73 STAN. L. REV. 285, 362 (2021); *see also* Amy Kapczynski, *The Political Economy of Market Power in Pharmaceuticals*, 48 J. HEALTH POL., POL'Y & L. 215, 216–17 (2023).
2. Donald Braman & Theresa Gabaldon, *A Charter for Justice: Corporate Enforcement for the New Federalism*, 59 U.C. DAVIS L. REV. (forthcoming Nov. 2025) (manuscript at 2),

traditional mechanisms for ensuring corporate accountability, particularly at the federal level, are experiencing systemic failure. If states do not act to counter this trend, corporate enforcement may never recover.[3]

The challenge to corporate accountability has been painfully visible in the constellation of activities and ventures associated with Elon Musk, the wealthiest person alive.[4] He helms companies simultaneously built on government investment and opposed to government oversight.[5] Musk's brief tenure co-

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https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5260572 [https://perma.cc/HYQ2-R2K9] ("The lethality of the corporate purveyors of narcotics and tobacco outstrips that of violent criminals by an order of magnitude. Not to be outdone, the carbon majors appear willing to endanger a fair portion of human civilization in decades to come." (footnote omitted)).

3. *See* Nikolas Bowie, Comment, *Antidemocracy*, 135 HARV. L. REV. 160, 209 (2021) (detailing the Supreme Court's advancement of "the power of political minorities to suppress the spread of political equality and to reinforce hierarchies of assets and inheritance without fear of democratic accountability"); Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1788–91 (2020) (critiquing our contemporary legal framework in which the economy is insulated from democratic accountability and where legal thought is characterized by "the depoliticization and naturalization of market-mediated inequalities").

4. For a comparison of the net worths of the world's richest people, see *Bloomberg Billionaire Index*, BLOOMBERG (Oct. 3, 2025), https://www.bloomberg.com/billionaires/ [https://perma.cc/N448-AUNS].

5. *See* Desmond Butler, Trisha Thadani, Emmanuel Martinez, Aaron Gregg, Luis Melgar, Jonathan O'Connell & Dan Keating, *Elon Musk's Business Empire Is Built on $38 Billion in Government Funding*, WASH. POST (Feb. 26, 2025), https://www.washingtonpost.com/technology/interactive/2025/elon-musk-business-government-contracts-funding/ [https://perma.cc/VF3J-AXPV]; Bobby Allyn, *Elon Musk's DOGE Takes Aim at Agency hat Had Plans of Regulating X*, NPR (Feb. 12, 2025, at 05:00 ET), https://www.npr.org/2025/02/12/nx-s1-5293382/x-elon-musk-doge-cfpb [https://perma.cc/D78B-46K2]. *See generally* MARIANA MAZZUCATO, THE ENTREPRENEURIAL STATE: DEBUNKING PUBLIC VS. PRIVATE SECTOR MYTHS (5th ed.

leading the Department of Government Efficiency (DOGE) exemplifies the culmination of long-term trends that have created de facto immunity for politically connected corporate actors.[6] Placing an individual whose companies held billions in federal contracts and faced numerous federal investigations[7] in charge of reshaping regulatory agencies represents the apex of a series of feedback loops that diminish accountability and leave real public harm from the most profitable and politically influential corporations unchecked by weakening oversight systems.

Musk's DOGE stint is not quite the isolated phenomenon it seems to be. The anti-accountability web—from increased corporate influence over political and legal processes to weakened federal oversight through judicial doctrine and

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2024) (detailing the relationship between corporate value generation and government investment).

6. For background on differing theories of agency capture over time, see generally Jean-Jacques Laffont & Jean Tirole, *The Politics of Government Decision-Making: A Theory of Regulatory Capture*, 106 Q.J. ECON. 1089 (1991); Ernesto Dal Bó, *Regulatory Capture: A Review*, 22 OXFORD REV. ECON. POL'Y 203 (2006); and Justin Rex, *Agency Capture*, *in* HANDBOOK OF REGULATORY AUTHORITIES 362 (Martino Maggetti, Fabrizio Di Mascio & Alessandro Natalini eds., 2022). On de facto immunity, see Carrie Johnson, *Trump Agencies Drop Dozens of Biden-Era Cases against Crypto, Other Companies*, NPR (Mar. 4, 2025, at 05:00 ET), https://www.npr.org/2025/03/04/g-s1-51799/trump-corporate-bribery-investigations [https://perma.cc/GKW3-YV6F] and David M. Drucker, *Elon Musk 'Truly Is Untouchable Right Now,'* DISPATCH (Jan. 29, 2025), https://thedispatch.com/article/elon-musk-donald-trump-untouchable/ [https://perma.cc/2MVA-VPZT].

7. *See supra* note 5; Laurence Darmiento, *These Departments Investigating Elon Musk Have Been Cut by DOGE and the Trump Administration*, L.A. TIMES (Mar. 27, 2025, at 03:00 PT), https://www.latimes.com/business/story/2025-03-27/elon-musk-trump-doge-conflicts-of-interest [https://perma.cc/4PCU-ZAET].

executive action,[8] and the use of federal preemption to stifle state enforcement efforts[9]—has been spreading for years.

The fossil fuel industry's financial engagement in the 2024 election cycle—and the subsequent policy shifts that appear directly tied to that industry's political contributions—exemplify anti-accountability corporate influence. Consider, for example, Donald Trump's reported solicitation of campaign donations from oil executives during a meeting at Mar-a-Lago, allegedly in exchange for policies projected to yield substantial profits for the industry.[10] Following the election, a sweeping deregulatory agenda unfolded, demonstrably benefiting this sector. Within the first 100 days, an unprecedented 145 environmental rules were targeted for repeal or weakening,[11] and

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8. *See* ALEXANDER HERTEL-FERNANDEZ, STATE CAPTURE: HOW CONSERVATIVE ACTIVISTS, BIG BUSINESSES, AND WEALTHY DONORS RESHAPED THE AMERICAN STATES—AND THE NATION 11–14 (2019); SHELDON WHITEHOUSE & JENNIFER MUELLER, THE SCHEME: HOW THE RIGHT WING USED DARK MONEY TO CAPTURE THE SUPREME COURT 172–73 (2022).

9. *See, e.g.*, City of New York v. Chevron Corp., 993 F.3d 81, 85–86, 89, 91, 95 (2d Cir. 2021) (affirming dismissal of state-law tort claims seeking damages for global climate change effects, finding them preempted by federal common law as displaced by the Clean Air Act); *see also* Craig Konnoth, *Privatization's Preemptive Effects*, 134 HARV. L. REV. 1937, 1939 (2021) ("[R]ather than forthrightly use its power to pass statutes that preempt state law, the federal government, especially recently, has enabled, incentivized, and delegated power to private corporations to flout and displace state laws that the corporation might consider undesirable.").

10. Josh Dawsey & Maxine Joselow, *What Trump Promised Oil CEOs as He Asked Them to Steer $1 Billion to His Campaign*, WASH. POST (May 9, 2024), https://www.washingtonpost.com/politics/2024/05/09/trump-oil-industry-campaign-money/ [https://perma.cc/4XW3-GR2X].

11. Oliver Milman, *Trump Has Launched More Attacks on the Environment in 100 Days than His Entire First Term*, GUARDIAN (May 1, 2025, at 21:30 ET), https://www.theguardian.com/environment/2025/may/01/trump-air-climate-pollution-regulation-100-days [https://perma.cc/5PSX-JCXP]. For further details on some of these actions, including actions taken beyond the initial 100 days, see

proposed budget cuts to the Environmental Protection Agency (EPA) sought to reduce its inflation-adjusted funding to the lowest level since its inception in 1970.[12] The Big Beautiful Bill all but eliminated government support for wind and solar competitors of fossil fuel.[13]

Across multiple influential sectors, corporate financial power appears to shape, and in turn diminish, the regulatory and accountability landscape. Another example is the cryptocurrency industry, which also reportedly provided considerable financial support both to the Trump campaign leading up to the 2024 election and, more recently, directly to the Trump family.[14] Subsequently, the administration initiated

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Trump's Climate and Clean Energy Rollback Tracker, CLIMATE ACTION CAMPAIGN (Sep. 26, 2025), https://www.actonclimate.com/trump-tracker/ [https://perma.cc/XA48-X3PR].

12. Press Release, Env't Prot. Network, Proposed 55% Cut to EPA Is a Wrecking Ball that Endangers the Air We Breathe and the Water We Drink (May 2, 2025), https://www.environmentalprotectionnetwork.org/20250502_budget-cuts/ [https://perma.cc/F969-DTGR].

13. Spencer Kimball, *Trump Megabill Gives the Oil Industry Everything It Wants and Ends Key Support for Solar and Wind*, CNBC (July 3, 2025, at 15:04 ET), https://www.cnbc.com/2025/07/03/trump-one-big-beautiful-bill-oil-gas-coal-solar-wind-ira-tax-incentive-repeal.html [https://perma.cc/SE45-ATUU].

14. Multi-million-dollar contributions from major crypto exchanges (such as Blockchain.com) and figures (such as the Winklevoss twins) to a pro-Trump PAC and Trump's inaugural fund were likely aimed at reducing crypto regulations. *See* Kenneth P. Vogel & David Yaffe-Bellany, *Donor List Suggests Scale of Trump's Pay-for-Access Operation*, N.Y. TIMES (Aug. 11, 2025), https://www.nytimes.com/2025/08/02/us/politics/donor-list-suggests-scale-of-trumps-pay-for-access-operation.html [https://perma.cc/9NWQ-W7R2]. Trump's personal crypto ventures, like the $TRUMP meme coin, also served as vehicles for personal enrichment, with top coin holders offered direct presidential access (e.g., a private dinner). Will Bunch, Opinion, *Your Guide to Cryptogate, Trump's $4 Billion Corruption Scandal that's 10 Times Bigger than Watergate*, PHILA. INQUIRER (May 29, 2025, at 14:44 ET), https://www.inquirer.com/opinion/trump-cryptocurrency-scandal-corruption-billions-20250529.html [https://perma.cc/5UD9-P82L]; Ezra Klein, Opinion, *The Growing Scandal of $Trump*, N.Y. TIMES (May 28, 2025),

legislative, regulatory, and enforcement changes favorable to the crypto sector, including the dismissal of high-profile Securities and Exchange Commission (SEC) lawsuits against major firms and a scaling back of Department of Justice (DOJ) investigations into cryptocurrency fraud.[15] As The New York Times Editorial Board observed, "[t]he message seemed obvious enough: People who make Mr. Trump richer regularly receive favorable treatment from the government he runs."[16]

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https://www.nytimes.com/2025/05/28/opinion/ezra-klein-podcast-zeke-faux.html [https://perma.cc/A9U7-EF4J]. Following this financial support, the Trump administration rolled back crypto regulations and enforcement, dropping high-profile SEC lawsuits against firms like Coinbase and Kraken and pausing or dismissing investigations into companies that had supported the campaign or had business ties with Trump. David Yaffe-Bellany, *Under Trump, U.S. Increasingly Pulls Back from Crypto Crackdown*, N.Y. TIMES (Feb. 28, 2025), https://www.nytimes.com/2025/02/28/technology/crypto-sec-trump.html [https://perma.cc/8JP5-JEPN]; David Yaffe-Bellany, *At Crypto Summit, Trump Says U.S. Will Be 'the Bitcoin Superpower*,' N.Y. TIMES (Mar. 7, 2025), https://www.nytimes.com/2025/03/07/technology/trump-crypto-summit.html [https://perma.cc/2DZA-TV7W].

15. *See supra* note 14. Executive Orders were issued to promote crypto growth, while the SEC's rescission of Staff Accounting Bulletin 121 was seen as a major boon to the crypto industry. *See* Exec. Order No. 14178, 90 Fed. Reg. 8647 (Jan. 23, 2025); Exec. Order No. 14233, 90 Fed. Reg. 11789 (Mar. 6, 2025); MacKenzie Sigalos, *SEC Revokes Unpopular Banking Rule that Blocked Wall Street Banks from Adopting Crypto*, CNBC (Jan. 24, 2025, at 16:34 ET), https://www.cnbc.com/2025/01/24/sec-revokes-unpopular-banking-rule-that-blocked-wall-street-banks-from-adopting-crypto.html [https://perma.cc/YKV2-A4PU].

16. The Editorial Board, Opinion, *A Comprehensive Accounting of Trump's Culture of Corruption*, N.Y. TIMES (June 7, 2025), https://www.nytimes.com/2025/06/07/opinion/trump-corruption.html [https://perma.cc/6653-TDHQ] (detailing numerous examples, including: the pausing of an SEC lawsuit against two major crypto investors after they invested heavily in Trump-related ventures; a $200 million airplane donation to the government from Qatar, where the Trump Organization has business deals; alleged efforts by the administration to force a merger of the PGA Tour and the Saudi-backed LIV golf circuit, which hosts events at Trump courses; favorable real estate

Other recent changes target not a single industry or issue but whole institutions with missions aimed at holding corporations and executives accountable for harming the public. This goes beyond industry-specific changes at the EPA and the SEC. Recently, the DOJ closed—not just minimized but outright shuttered—its Consumer Protection Branch.[17] For fifty years, that office took the lead in prosecutions relating to food, health, and consumer safety violations, relying on the expertise of the mandates of the Food and Drug Administration, the Federal Trade Commission, the Drug Enforcement Administration, and the Consumer Product Safety Commission.[18] Now that office is gone. Similarly (and similarly named), the Consumer Financial Protection Bureau (CFPB) has been the subject of massive layoffs, apparently in connection with DOGE's "efficiency" efforts.[19]

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treatment for Trump projects from the governments of Vietnam and Serbia; and the granting of a presidential pardon to the son of a million-dollar political donor).

17. Sarah N. Lynch, *US Justice Department Unit for Drug and Food Safety Cases Being Disbanded*, REUTERS (Apr. 25, 2025), https://www.reuters.com/business/healthcare-pharmaceuticals/us-justice-department-unit-drug-food-safety-cases-being-disbanded-2025-04-25/ [https://perma.cc/9EGR-ZJWZ]; David Dayen, *Justice Department Shutting Branch that Prosecutes Consumer Fraud Cases*, AM. PROSPECT (Apr. 24, 2025), https://prospect.org/justice/2025-04-24-justice-department-shuts-branch-that-prosecutes-consumer-fraud-cases/ [https://perma.cc/DH7R-8XG2].

18. *See* Gabriel H. Scannapieco, *What the Dissolution of DOJ's Consumer Protection Branch Means for Future Life Sciences and Consumer Protection Enforcement*, ARNALL GOLDEN GREGORY LLP (May 8, 2025), https://www.agg.com/news-insights/publications/what-the-dissolution-of-dojs-consumer-protection-branch-means-for-future-life-sciences-and-consumer-protection-enforcement/ [https://perma.cc/ZGZ7-PUKY].

19. *See* Jake Pearson, *Musk Adviser May Make as Much as $1 Million a Year While Helping to Dismantle Agency That Regulates Tesla and X*, PROPUBLICA (May 14, 2025, at 10:15 ET), https://www.propublica.org/article/doge-elon-musk-chris-young-cfpb-tesla-x [https://perma.cc/MPC2-EA9F].

Increasingly, across decades and presidential administrations, this state of affairs has resulted in deferred prosecution agreements and fines treated as mere costs of doing business, failing to address root causes and deter future misconduct.[20] We argue here that this environment of federal retreat, civil litigation limitations, and preemption challenges to state regulation creates an imperative and an opportunity for states to exercise their sovereign power to define, enforce, and develop remedies for criminal conduct within the states. Where many have called for prosecution of individuals within corporations,[21] we call for prosecution and reformation of the corporation itself.

States should exercise their authority to hold firms and executives accountable.[22] To be clear, this is not a call to create laws or aim prosecutions at any particular person. Rather, state attorneys general and district attorneys should prosecute corporations engaging in criminal conduct, and upon obtaining a conviction or deferred prosecution agreement, require the corporation to conduct all business in or with the state through a public benefit corporation with terms in the charter as specified

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20. *See* Recent Case, United States v. Fokker Services B.V.*, 818 F.3d 733 (D.C. Cir. 2016)*, 130 HARV. L. REV. 1048, 1048, 1051, 1054 (2017) (criticizing how federal courts have become "rubber stamp[s]" for prosecutorial settlements, transforming "the criminal corporate justice system into a regulatory regime run by prosecutors"); Cindy J. Cho, *Climate Prosecution as Climate Regulation*, 119 NW. U. L. REV. ONLINE, 323, 340 (2025).

21. *See, e.g.*, Cho, *supra* note 20, at 348–54; BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 255 (2014); JOHN C. COFFEE, JR., CORPORATE CRIME AND PUNISHMENT: THE CRISIS OF UNDERENFORCEMENT 9–11 (2020); Dorothy S. Lund & Natasha Sarin, *Corporate Crime and Punishment: An Empirical Study*, 100 TEXAS L. REV. 285, 294 (2021).

22. *See* Nikolas Bowie, *Corporate Personhood v. Corporate Statehood*, 132 HARV. L. REV. 2009, 2040 (2019) (book review) (noting that reforms "requiring corporations to expand their constituencies needn't take place in Washington or depend on a particular presidential candidate" but rather "could also start in states that charter corporations").

by the state. This utilizes the state's police power to prosecute and its authority over corporate charters to reform corporate misconduct. It also provides a framework for accountability that is more robust, effective, and constitutionally protected than weakened federal oversight, traditional civil litigation, or increasingly preempted state regulation.

The proposal carefully targets a reconstitution of corporate incentives away from harmful criminal conduct and toward conduct that benefits the public. And it achieves this within the complex legal landscape shaped by modern federalism doctrines and the recently gutted federal administrative state. To face increasingly catastrophic corporate misconduct, states must take on a revitalized role in ensuring that corporations—entities created by and operating under state law—are held accountable to the public their existence is intended to benefit. To be clear, in this Article we do not intend to identify any particular crime or violation of the law by any corporate (or individual) actor; rather, we recount the rise of corporate power and the decline of corporate accountability, and we propose a powerful remedy: state enforcement coupled with restructuring of criminal entities into public benefit corporations.

Our analysis proceeds as follows: Part I reviews the growth of systemic barriers—procedural, substantive, and political—that render traditional civil litigation and federal oversight increasingly ineffective against powerful corporate actors. Part II makes the case for state criminal law as a more potent and resilient tool, highlighting its jurisdictional strengths, its focus on culpability, and its relative insulation from federal preemption. Part III details the proposed remedy of mandatory public benefit incorporation, explaining its mechanism, rationale, and advantages over traditional penalties. Finally, we conclude by discussing the broader implications for corporate accountability, state power, and the future of federalism in an era of regulatory uncertainty.

I. The Erosion of Federal and Civil Accountability

The rise of corporate unaccountability is not a sudden phenomenon. It is the culmination of long-term trends, now sharply intensified by recent judicial pronouncements, assertive executive actions, and a demonstrable weakening of agency enforcement capabilities.[23] Understanding this historical trajectory is crucial for appreciating why state criminal law has become a necessary avenue for addressing large-scale corporate harm.

A. Historical Backdrop to The Present Crisis

Once upon a time, corporations were regarded as vehicles to accomplish state objectives in accord with public interests.[24] They nonetheless also were viewed with suspicion and held to account via strict chartering requirements backed by a hard-to-

23. *See* Luke P. Norris, *Judges and the Regulatory State: Trends of Resistance and Restraint*, LAW AND CONTEMP. PROBS., 2024, at 36–38; *see also, e.g.*, Elizabeth Blum & Chris Sellers, *Trump Administration Is on Track to Cut 1 in 3 EPA Staffers by the End of 2025, Slashing Agency's Ability to Keep Pollution Out of Air and Water*, SPACE.COM (Oct 17, 2025), https://www.space.com/science/climate-change/trump-administration-is-on-track-to-cut-1-in-3-epa-staffers-by-the-end-of-2025-slashing-agencys-ability-to-keep-pollution-out-of-air-and-water [https://perma.cc/6PX6-P3W5]; *Tracking Regulatory Changes in the Second Trump Administration*, BROOKINGS INST. (Oct. 22, 2025), https://www.brookings.edu/articles/tracking-regulatory-changes-in-the-second-trump-administration/ [https://perma.cc/8NM4-T9DF].

24. *See* Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767, 784 (2005); ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS 48 (2018) (noting that corporations "could only be formed by charter granted by the government, and the government would not grant one unless the corporation had a public purpose"); Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 WM. & MARY Q. 51, 55 (1993) ("Nowhere were corporations more alike than in the requirement, based on English precedent, that they serve a public purpose, which the acts of incorporation often specified.").

pronounce doctrine (*ultra vires*) that invalidated actions inconsistent with their carefully designed purposes and powers.[25] When it became obvious that those measures were not enough to limit the rapaciousness of the largest corporate actors, antitrust and other regulatory measures were put into play. Environmental and labor laws, as well as systems of financial regulation, were layered on to address corporate behavior.

Corporations have always had identifiable influence over government. But the late twentieth century witnessed the planting of crucial seeds for the current crisis in corporate accountability.

1. Expanding Corporate Rights and Limiting Regulation (c. 1975–2000)

While the modern administrative state was still relatively robust, advocates of greater corporate freedom and power laid the groundwork for foundational changes, often under the radar of broad public awareness. A pivotal shift began with the Supreme Court granting corporations constitutional rights previously associated primarily with individuals. Landmark Supreme Court decisions such as *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[26] which extended First Amendment protection to commercial speech,[27]

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25. *See* L.E. Talbot, *Critical Corporate Governance and the Demise of the* Ultra Vires *Doctrine*, 38 COMMON L. WORLD REV. 170, 171–72 (2009); WINKLER, *supra* note 24, at 49 (explaining that a corporate charter "was both the corporation's birth certificate and the corporation's rulebook" and that "a corporation could only lawfully act in ways permitted by the government-issued charter," while "[a]nything else was beyond the power of the corporation—what the law would later term *ultra vires*—and unenforceable").

26. 425 U.S. 748 (1976).

27. WINKLER, *supra* note 24, at 297 (contextualizing the Supreme Court's holding that the First Amendment affords protection "to the communication, to its source and to its recipients both," and the Court's observation that a consumer's "interest in the free flow of commercial information . . . may be as keen, if not keener by far, than [her] interest

and *First National Bank of Boston v. Bellotti*,[28] which affirmed the right of corporations to spend money to influence ballot initiatives,[29] fundamentally altered the balance of power between corporations and the public. Perhaps most consequentially, *Buckley v. Valeo*,[30] while dealing with individual campaign finance law, established the principle that spending money equates to protected speech,[31] a doctrine that would later be dramatically expanded to unleash corporate political spending and fuel the political feedback loop that undermines regulatory independence.[32] A new legal framework emerged: Corporations were not merely economic actors subject to regulation but rights-bearing entities capable of challenging regulations on constitutional grounds and influencing the political process that creates those regulations.[33]

At the same time, the Court began imposing subtle but important limits on regulatory power and corporate liability. For instance, *Marshall v. Barlow's, Inc.*[34] required warrants for Occupational Safety and Health Administration inspections, introducing procedural hurdles for workplace safety

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in the day's most urgent political debate," as part of a broader ongoing expansion of corporate rights (alteration in original) (internal quotation omitted)).

28. 435 U.S. 765 (1978).

29. *Id.* at 767, 776.

30. 424 U.S. 1 (1976).

31. *See id.* at 19.

32. *See infra* notes 53–55 and accompanying text.

33. *See* Elizabeth Pollman, *The Supreme Court and the Pro-Business Paradox*, 135 HARV. L. REV. 220, 225 (2021) (discussing the "paradox" of the Supreme Court simultaneously expanding corporate rights, such as free speech, while narrowing pathways to corporate liability); Bowie, *supra* note 3, at 162 (describing the modern Supreme Court as "the ultimate supplier of antidemocracy in this country[, controlling] how much democracy is allowed to exist everywhere in the United States").

34. 436 U.S. 307 (1978).

enforcement under the Fourth Amendment.[35] In the sphere of civil liability, *BMW of North America, Inc. v. Gore*[36] placed constitutional due process limits on punitive damages,[37] constraining a key tool for deterring corporate misconduct through private litigation. These decisions chipped away at the tools available for holding corporations accountable for the harms they caused.[38]

These early developments, often technical and seemingly disconnected, collectively began to alter the legal landscape. They expanded corporate power, introduced initial constraints on regulation and liability, and laid the groundwork for the political feedback loop and the more direct assaults on agency authority that would follow.

2. Erecting Legal and Political Barriers to Accountability (2000–2020)

The doctrinal shifts initiated in the late 20th century gained more momentum in the 2000s and 2010s. Federal agencies' basic authority became suspect. While landmark cases like *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[39] and *Auer v. Robbins*[40] from the preceding era had initially signaled significant judicial deference to agency expertise,[41] the new

35. *Id.* at 316, 324.

36. 517 U.S. 559 (1996).

37. *See id.* at 562–63, 585.

38. *See* Bowie, *supra* note 3, at 161–62, 196–98 (analyzing *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), as a decision where the Court applied property owners' "right to exclude" in a manner that threatens to make it "financially impossible for governments to protect people who want to democratize their workplaces" through antidiscrimination and antiretaliation laws).

39. 467 U.S. 837 (1984).

40. 519 U.S. 452 (1997).

41. *See Chevron*, 467 U.S. at 865; *Auer*, 519 U.S. at 457–58, 461. To be clear, neither *Chevron* nor any of the following major regulatory rulings by the Court strengthened any regulation.

millennium revealed signs of judicial skepticism towards broad agency authority. Decisions such as *FDA v. Brown & Williamson Tobacco Corp.*[42] reflected a growing judicial willingness to question agency interpretations of ambiguous regulatory statutes they are charged with enforcing, particularly for regulations with economic or political import.[43] And language in cases like *Whitman v. American Trucking Associations, Inc.*[44] hinted at nondelegation concerns if statutory guidance to agencies was deemed insufficient.[45] These challenges to agency authority marked an important turn. By the end of this period, in *Kisor v. Wilkie*,[46] the Court empowered judicial assertiveness and narrowed *Auer* deference, further constraining agency power.[47]

The judiciary also reshaped the landscape of civil litigation, putting obstacles in the way of plaintiffs seeking to hold corporations accountable. The Supreme Court established a heightened "plausibility" pleading standard in federal court through its decisions in *Bell Atlantic Corp. v. Twombly*[48] and *Ashcroft v. Iqbal*.[49] These rulings made it substantially more difficult for plaintiffs to survive motions to dismiss, particularly in complex cases against corporate defendants where evidence of wrongdoing often lies exclusively within the corporation's control.

Simultaneously, the avenues for collective redress were sharply curtailed by the Court's expansive interpretation and enforcement of the Federal Arbitration Act. *Circuit City Stores,*

42. 529 U.S. 120 (2000).
43. *See id.* at 125–26.
44. 531 U.S. 457 (2001).
45. *See id.* at 468.
46. 139 S. Ct. 2400 (2019).
47. *See id.* at 2415–16.
48. 550 U.S. 544 (2007).
49. 556 U.S. 662 (2009).

Inc. v. Adams[50] ensured the Act's broad application to employment contracts.[51] Later decisions upheld the enforceability of class action waivers embedded within mandatory arbitration clauses.[52] This channeled vast numbers of consumer and employment disputes out of the courts and into individual arbitration, diminishing the deterrent effect of class action lawsuits and making it economically unviable for many individuals to pursue claims against large corporations.

Relatedly, *Citizens United v. Federal Election Commission*[53] dramatically reshaped campaign finance law, striking down restrictions on independent political expenditures by corporations.[54] This decision, building on *Buckley*, supercharged the ability of corporations to influence elections and policy debates through vast spending.[55] This fueled the political

50. 532 U.S. 105 (2001).

51. *See id.* at 109. Furthermore, the Court's decisions have disrupted state regulation of arbitration. *See* Note, *State Courts and the Federalization of Arbitration Law*, 134 HARV. L. REV. 1184, 1184 (2021) (describing the Supreme Court's "string of sweeping preemption decisions" that have "disabled many efforts at state regulation of arbitration").

52. *See, e.g.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1619, 1632 (2018).

53. 558 U.S. 310 (2010).

54. *See id.* at 336–37, 339, 365.

55. Corporate wealth extraction not only funds direct corporate expenditures but also funds imbalances in private wealth and large-scale dark-money campaign financing. Other countries restrict this kind of spending, but *Citizens United* spelled the end of any effective curbs in the United States. *See* Marina Pino & Julia Fishman, *Fifteen Years Later,* Citizens United *Defined the 2024 Election*, BRENNAN CTR. FOR JUST. (Jan. 14, 2025), https://www.brennancenter.org/our-work/research-reports/fifteen-years-later-citizens-united-defined-2024-election [https://perma.cc/2834-E6VK] ("*Citizens United* reshaped political campaigns in profound ways, giving corporations and billionaire-funded super PACs a central role in U.S. elections and making untraceable dark money a major force in politics."); Tom Moore, *The Corporate Power Reset that Makes* Citizens United *Irrelevant*, CTR. FOR AM. PROGRESS (Sep. 15, 2025), https://www.americanprogress.org/article/the-corporate-power-reset-that-makes-citizens-united-irrelevant/ [https://perma.cc/EES9-BJJS] (explaining that the

feedback loop, increasing opportunities for regulatory capture and the election of officials less inclined towards the systems of corporate oversight the public had taken for granted for decades.[56]

The developments of the 2000s and 2010s made it harder for agencies and individuals to prevent corporate harm and easier for corporations to influence legislators and regulators. These new rules compounded the earlier expansion of corporate rights and limitations on liability, making it increasingly challenging to hold corporations accountable through traditional federal regulatory and civil litigation pathways.

3. Federal Retreat and the Current Accountability Crisis (Present)

Recent years have witnessed the culmination and acceleration of these trends, leading to a state of profound federal retreat and a dangerous accountability vacuum. The mechanisms for holding corporations accountable at the federal level, whether regulatory or civil, have been weakened or dismantled.

Citizens United decision "tossed aside a century of tight regulation over corporate political spending and threw open the floodgates for the unlimited super PAC spending and undisclosed dark money that dominate the U.S. political system today" and observing that "[t]he reported independent expenditures of outside groups exploded by more than 28-fold from 2008 to 2024 (from $144 million to $4.21 billion)").

56. *See* Michael J. Klarman, *The Supreme Court, 2019 Term—Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 208–11 (2020) (describing the Court's campaign finance decisions as having "done incalculable damage to the American political system on the basis of contrived rationales" and having created a system where the policy preferences of the wealthy dominate); Note, *Eliminating the FEC: The Best Hope for Campaign Finance Regulation?*, 131 HARV. L. REV. 1421, 1423 (2018) (criticizing the Federal Election Commission as suffering from "flaws identified decades ago: agency capture, enforcement failure, deadlocked commission votes, and partisan loyalty").

The long-term campaign against agency deference reached another apex with the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*,[57] which explicitly overruled the *Chevron* doctrine.[58] *Loper Bright* shifts interpretive power over statutory ambiguities from expert agencies to generalist courts, making regulations more vulnerable to judicial invalidation.[59]

In 2022, scrutiny of implied delegations of important agency rulemaking power also expanded. The Court in *West Virginia v. EPA*[60] formally identified the Major Questions Doctrine (MQD), requiring "clear congressional authorization" for agency actions of major economic or political import, and forcefully applied it to strike down a major climate regulation.[61] Its inherent ambiguity and broad application by the Court create uncertainty for agencies and give corporations a powerful tool to challenge major regulatory initiatives.

Regulatory enforcement mechanisms also face direct attack. *SEC v. Jarkesy*,[62] while decided on narrow Seventh Amendment grounds, mandated jury trials for certain SEC civil penalty actions, moving them from administrative forums to slower, more burdensome federal court proceedings.[63] This, with recent decisions allowing preemptive challenges to agency structure,[64] significantly hampers agency enforcement.

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57. 144 S. Ct. 2244 (2024).

58. *Id.* at 2273.

59. *See* Mila Sohoni, *Chevron's Legacy*, 138 HARV. L. REV. F. 66, 82 (2025) (describing *Loper Bright* as a form of "regime change").

60. 142 S. Ct. 2587 (2022).

61. *See id.* at 2609, 2614–16 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)); Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 267 (2022) (arguing that the Court transformed the major questions doctrine "into a new clear statement rule" that requires clear congressional authorization for major agency actions).

62. 144 S. Ct. 2117 (2024).

63. *Id.* at 2126, 2139.

64. *See, e.g.*, Axon Enter., Inc. v. FTC, 143 S. Ct. 890, 897, 906 (2023).

Executive actions—in particular those ratified by the Court—have further diminished agency independence. For example, in *Trump v. Wilcox*,[65] the Court, pending lower court fact-finding, allowed the President to remove without cause the heads of two independent agencies.[66] Decried by dissenting justices as "nothing short of extraordinary,"[67] the *Wilcox* ruling dramatically increases the risk of political entanglements and regulatory capture. The Court's reasoning, referencing the vesting of executive power in the President and the precedent set in *Seila Law LLC v. Consumer Financial Protection Bureau*,[68] signaled broader presidential removal powers, confirming the fears of proponents of agency independence.[69]

Given leeway by the Court, the executive branch has recently sought to dismantle regulatory structures. Of course, agency heads and Presidents have for years come under fire for insufficient enforcement against corporations and executives.[70]

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65. 145 S. Ct. 1415 (2025).

66. *Id.* at 1415.

67. *Id.* at 1418 (Kagan, J., dissenting).

68. *See id.* at 1415 (majority opinion) (citing Seila Law LLC v. Consumer Financial Protection Bureau, 140 S. Ct. 2183, 2198–200 (2020)).

69. *See* Paul Blumenthal, *Did the Supreme Court Already Accept Donald Trump's Autocratic Vision of the Presidency? Trump Thinks So.*, CONST. ACCOUNTABILITY CTR. (Mar. 1, 2025), https://www.theusconstitution.org/news/did-the-supreme-court-already-accept-donald-trumps-autocratic-vision-of-the-presidency-trump-thinks-so/ [https://perma.cc/R77K-VC69].

70. *See* GARRETT, *supra* note 21, at 252–54, 259, 273; SAMUEL W. BUELL, CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE 173 (2016); JESSE EISINGER, THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES 56–58 (2017); COFFEE, JR., *supra* note 21, at 9–11; *see also, e.g.*, Michael Pollan, *Why Did the Obamas Fail to Take on Corporate Agriculture?*, N.Y. TIMES MAG. (Oct. 5, 2016), https://www.nytimes.com/interactive/2016/10/09/magazine/obama-administration-big-food-policy.html [https://perma.cc/KY2A-M2TG]; Michael F. Cannon, *Obama Administration Is Illegally Diverting Billions to Insurance Companies*, CATO INST. (Oct. 6, 2016), https://www.cato.org/commentary/obama-administration-illegally-

Even efforts to respond to those criticisms have done little to check the general trend of permissiveness and entanglement.[71] Still, initiatives like DOGE, led by figures like Musk who were benefiting from government contracts and facing government investigations, have magnified this trend. DOGE aimed to rapidly rescind regulations, bypass standard procedures, and exert political control over agencies. With this, the political feedback loop became a whirlwind, creating at least the appearance of de facto immunity for politically connected actors.[72]

In this context, expansive use of federal preemption doctrines creates a paralyzing double bind. Federal agencies lack the capacity or will to regulate effectively, while states' attempts to fill the gap through non-criminal means are often struck down as preempted by the very federal framework that is failing. This confluence of judicial hostility to regulation, aggressive executive deregulation, and the successful deployment of doctrines like MQD and preemption has severely degraded federal oversight and civil accountability mechanisms.[73]

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diverting-billions-insurance-companies [https://perma.cc/TSJ8-C33S]; *Bush Administration Stalls Major Corporate Reform to Please Donors*, PUB. CITIZEN (Oct. 27, 2004), https://www.citizen.org/news/bush-administration-stalls-major-corporate-reform-to-please-donors/ [https://perma.cc/Y8MN-82D5]; *U.S./Indonesia: Bush Backtracks on Corporate Responsibility*, HUM. RTS. WATCH (Aug. 7, 2002, at 20:00 ET), https://www.hrw.org/news/2002/08/07/us/indonesia-bush-backtracks-corporate-responsibility [https://perma.cc/9YJ8-N6BN].

71. *See, e.g.*, Kevin P. Turner, *A Promise Yet Unfulfilled: The Yates Memo's Impact on Individual Accountability for Corporate Wrongdoing Eight Years On*, SETON HALL L.: STUDENT WORKS (2025), https://scholarship.shu.edu/cgi/viewcontent.cgi?article=2492&context=student_scholarship [https://perma.cc/7RKG-CLAC].

72. *See* Drucker, *supra* note 6.

73. *See* Norris, *supra* note 23, at 38 ("The picture that emerges from these developments of the past several decades is one of the Supreme Court and some lower court judges collaterally undermining regulatory governance by hamstringing core actors in the regulatory system as they

B. DOGE and the Corporate Free-for-All

Weakened regulatory structures, judicially created barriers to civil litigation, and amplified corporate political influence have created an environment where accountability mechanisms are severely compromised. The Trump administration, particularly during its second term, has fostered what could be described as a corporate free-for-all where political connections and influence across the administration's anti-regulatory agenda appear to offer real advantages, not the least of which is insulation from oversight. Elon Musk, with his vast wealth and control over critical industries, became the prime exemplar of this trend. His initial appointment to co-lead DOGE, an entity he reportedly conceived with a sweeping mandate to overhaul the federal bureaucracy,[74] placed him at an unprecedented nexus of conflict. As a Special Government Employee (SGE), Musk bypassed typical divestment and disclosure requirements, positioning himself as an individual whose companies held billions in federal contracts and faced numerous federal investigations to spearhead an initiative tasked with cutting budgets and reshaping those same regulatory agencies—the proverbial fox guarding the henhouse.[75]

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seek to perform their functions."); Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1707 (2021) (arguing that the problem is not merely that the Court has drifted right but that it is institutionally armed with "weapons to oppose any progressive movement that seeks power to overcome legacies of economic and racial division").

74. *See How Musk Built DOGE: Timeline and Key Takeaways*, N.Y. TIMES (Feb. 28, 2025), https://www.nytimes.com/2025/02/28/us/politics/musk-doge-timeline-takeaways.html [https://perma.cc/C4W8-KKLL].

75. *See* Craig Holman, *Ethics Rules, or Lack Thereof, that Apply to "Special Government Employees" (SGE) and Elon Musk, in Particular*, PUB. CITIZEN, https://www.citizen.org/article/ethics-rules-or-lack-thereof-that-apply-to-special-government-employees-sge-and-elon-musk-in-particular/ [https://perma.cc/W6LK-W9PP]; Darmiento, *supra* note 7.

DOGE's operations under Musk rapidly confirmed fears of systemic conflicts and the shielding of corporate actors. DOGE personnel, including Musk allies, gained extensive, poorly monitored access to sensitive data within agencies like the National Labor Relations Board and the Treasury, even as these agencies were involved in cases concerning Musk's companies.[76] This access raised alarms about possible misuse for competitive or legal advantage.[77] Coinciding with DOGE's tenure, a series of actions appeared to directly benefit Musk's interests or neutralize regulators: the firing of Inspectors General and the Director of the Office of Government Ethics, attempts to disrupt NLRB operations, the quiet dismissal of a DOJ lawsuit against SpaceX, and favorable shifts in FAA and FCC rules.[78] This created a chilling effect on regulators facing an entity with the power to dismantle them, directed by a conflicted corporate titan. The subsequent, and very public, implosion of his relationship with the administration—triggered by his criticism

76. Jenna McLaughlin, *5 Takeaways About NPR's Reporting on the Whistleblower Report About DOGE at the NLRB*, NPR (Apr. 15, 2025, at 05:00 ET), https://www.npr.org/2025/04/15/nx-s1-5355895/doge-musk-nlrb-takeaways-security [https://perma.cc/N25K-XZ64]; Ed Pilkington, *Elon Musk's DOGE Team Granted 'Full Access' to Federal Payment System*, GUARDIAN (Feb. 2, 2025, at 13:13 ET), https://www.theguardian.com/technology/2025/feb/02/elon-musk-doge-access-federal-payment-system [https://perma.cc/Z369-A7TN]; Darmiento, *supra* note 7.

77. *See* McLaughlin, *supra* note 76.

78. *See* Justin Doubleday, *Trump Fires Top Government Ethics, Whistleblower Officials*, FED. NEWS NETWORK (Feb. 10, 2025, at 18:05 ET), https://federalnewsnetwork.com/agency-oversight/2025/02/trump-fires-top-government-ethics-whistleblower-officials/ [https://perma.cc/5QSL-K759]; McLaughlin, *supra* note 76; Luc Cohen, *US Says It Will Drop Immigration Case Against SpaceX*, REUTERS (Feb. 20, 2025, at 20:38 ET), https://www.reuters.com/legal/us-says-it-will-drop-immigration-case-against-spacex-2025-02-21/ [https://perma.cc/FNC8-6MLU]; Eric Lipton, *Musk Is Positioned to Profit Off Billions in New Government Contracts*, N.Y. TIMES (Mar. 23, 2025), https://www.nytimes.com/2025/03/23/us/politics/spacex-contracts-musk-doge-trump.html [https://perma.cc/54EJ-SBV5].

of a major tax bill[79]—starkly illustrates that such access is a feature of a plutocratic order: It is purely transactional and contingent on personal allegiance, rather than being rooted in any democratic mandate or accountability to the public.

Beyond direct conflicts, DOGE's activities signaled a broader assault on accountability. The entity amassed vast troves of sensitive personal and scientific data from agencies like the Treasury and the Office of Personnel Management,[80] with little transparency regarding its purpose.[81] This raised serious concerns about data mishandling, profiling American citizens, and Musk gaining access to sensitive information about competitors.[82]

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79. *Trump Administration Reviewed SpaceX Contracts After Musk Fallout, Found Firm Too Critical to Drop: Report*, ECON. TIMES (July 20, 2025, at 07:02 IT), https://economictimes.indiatimes.com/news/international/global-trends/trump-administration-ordered-review-of-spacex-government-contracts-following-trump-musk-fallout-report/articleshow/122792484.cms [https://perma.cc/M8GB-8XDU].

80. *See* LEADERSHIP CONF. ON CIV. & HUM. RTS., DOGE AND GOVERNMENT DATA PRIVACY 1, 3 (2025), https://civilrights.org/wp-content/uploads/2025/03/DOGE-and-Government-Data-Privacy-FINAL.pdf [https://perma.cc/6X47-WDU8]; Eric Katz, *DOGE Can Maintain Access to Federal Personnel Data, Court Rules*, GOV'T EXEC. (Aug. 12, 2025), https://www.govexec.com/management/2025/08/doge-can-maintain-access-federal-personnel-data-court-rules/407396/ [https://perma.cc/TQN9-N684].

81. *See* LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, *supra* note 80, at 7; Stephen Fowler & Jenna McLaughlin, *DOGE Says It Needs to Know the Government's Most Sensitive Data, but Can't Say Why*, NPR (Mar. 26, 2025, at 09:00 ET), https://www.npr.org/2025/03/26/nx-s1-5339842/doge-data-access-privacy-act-social-security-treasury-opm-lawsuit [https://perma.cc/TXG8-7NYL].

82. Stephen Fowler & Jenna McLaughlin, *Top House Democrat Says DOGE Data Access at NLRB May Be "Technological Malfeasance,"* NPR (Apr. 15, 2025, at 16:48 ET), https://www.npr.org/2025/03/11/nx-s1-5305054/doge-elon-musk-security-data-information-privacy [https://perma.cc/7G2P-5CAX]; Laurel Wamsley, *The Government Already Knows a Lot About You. DOGE Is Trying to Access All of It*, NPR (Mar. 11, 2025, at 05:00 ET),

DOGE initiated aggressive research cuts,[83] exemplified by the targeting of climate science at organizations such as the National Science Foundation, which threatened to undermine innovation, preparedness, and efforts to hold industries like fossil fuel producers accountable.[84] DOGE's influence was also evident in the closure or defunding of consumer protection bodies, such as the CFPB and the DOJ's Consumer Protection Branch, thus further reducing avenues for corporate accountability.[85]

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https://www.npr.org/2025/03/11/nx-s1-5305054/doge-elon-musk-security-data-information-privacy [https://perma.cc/D7BA-NFLH]; Minority Press Release, U.S. Comm. on Banking, Hous., and Urb. Affs., Warren Questions Secretary Lutnick on DOGE Access to Confidential Commerce Data of Musk's Business Competitors (Feb. 24, 2025), https://www.banking.senate.gov/newsroom/minority/warren-questions-secretary-lutnick-doge-access-confidential-commerce-data-musks-business-competitors [https://perma.cc/576D-DZAW].

83. Cristin Dorgelo & Jacob Liebenluft, *DOGE Interference in Federal Grantmaking Adds Burden, Uncertainty, and Risk*, CTR. ON BUDGET & POL'Y PRIORITIES (May 28, 2025), https://www.cbpp.org/research/federal-budget/doge-interference-in-federal-grantmaking-adds-burden-uncertainty-and-risk [https://perma.cc/26RM-48LE].

84. *See, e.g.*, Katie Millard, *OSU Researcher: $700K Grant Canceled When DOGE Misunderstood Use of 'Climate,'* NBC4I (May 27, 2025, at 06:06 ET), https://www.nbc4i.com/news/local-news/ohio-state-university/osu-researcher-700k-grant-canceled-when-doge-misunderstood-use-of-climate/ [https://perma.cc/FH67-GCPF]; Gabrielle Canon, *US Climate Research Agency Braces for 'Efficiency' Cuts: 'They Will Gut the Work,'* GUARDIAN (Feb. 26, 2025, at 07:00 ET), https://www.theguardian.com/us-news/2025/feb/26/us-climate-research-agency-noaa-cuts [https://perma.cc/5B6B-GDDK]; Nina Lakhani, *'A Disaster for All of Us': US Scientists Describe Impact of Trump Cuts*, GUARDIAN (July 20, 2025, at 07:00 ET), https://www.theguardian.com/us-news/2025/jul/20/science-trump-funding-cuts-layoffs [https://perma.cc/XY2K-8BWN].

85. *See* Chris Megerian, *Nearly 90% of Consumer Financial Protection Bureau Cut as Trump's Government Downsizing Continues*, FED. NEWS NETWORK (Apr. 17, 2025, at 19:56 ET), https://federalnewsnetwork.com/workforce/2025/04/layoffs-hit-consumer-financial-protection-bureau-as-trumps-government-downsizing-continues/ [https://perma.cc/KEJ7-Z9QF]; Michael Kaplan, Weijia Jiang & Madeleine May, *In Chaos of Mass DOGE Firings, a Grieving Husband*

Musk of course made huge financial contributions to the Trump campaign preceding his DOGE appointment.[86] This was apparently one half of a transaction in which Musk received political access and deregulatory power. And while Musk's role with DOGE might appear extreme, it also exemplifies the culmination of decades-long trends: the empowerment of corporations, systematic deregulation, and the amplification of money in politics, creating a system vulnerable to capture by concentrated private interests.[87] His ability to direct an initiative poised to weaken the very agencies investigating his business interests, and those of other powerful industries, underscores a profound breakdown in traditional checks and balances. It is an illustrative example of the present corporate free-for-all: oversight that is either deeply intertwined with private financial might or dismantled entirely, leaving a dangerous accountability vacuum for the most powerful interests in our society.

The subsequent public feud between President Trump and Musk, triggered by policy disagreements and prompting presidential threats to terminate government contracts,[88]

Fights to Save Consumer Agency, CBS NEWS (May 12, 2025, at 09:44 ET), https://www.cbsnews.com/news/doge-consumer-financial-protection-bureau-cfpb-lawsuit/ [https://perma.cc/TJ3D-34S4]; Lynch, *supra* note 17.

86. Trisha Thadani, Clara Ence Morse & Maeve Reston, *Elon Musk Donated $288 Million in 2024 Election, Final Tally Shows*, WASH. POST (Jan. 31, 2025), https://www.washingtonpost.com/politics/2025/01/31/elon-musk-trump-donor-2024-election/ [https://perma.cc/55NX-B6GL].

87. *See* WHITEHOUSE & MUELLER, *supra* note 8, at 16–17, 44–57, 97; RICHARD L. HASEN, PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS 5–7, 10 (2016).

88. Michelle L. Price, *In Escalating Public Feud, Trump Threatens to Cut Musk's Government Contracts*, PBS NEWS (June 5, 2025, at 15:50 ET), https://www.pbs.org/newshour/politics/in-escalating-public-feud-trump-threatens-to-cut-musks-government-contracts [https://perma.cc/SD4X-A9ZU].

powerfully underscores the instability of such arrangements. This cycle is a hallmark of plutocratic infighting: Alliances are temporary, driven by self-interest, and quickly abandoned.[89] Musk's brief empowerment and dramatic dismissal starkly exemplify the culmination of decades-long trends. His initial ability to direct an initiative to weaken the agencies investigating his interests highlights a profound breakdown in checks and balances, while his rapid fall from grace reveals the instability of an accountability framework built on an inherently antidemocratic model of governance. Without some real pushback, Musk's adventure, although halted for now, may be a beachhead for corporate captures to come.

II. A Potent Alternative for Accountability: State Criminal Enforcement

A. The Rationale for State Criminal Enforcement

The systematic weakening of federal regulatory oversight and the obstruction of civil litigation have created an accountability vacuum for corporate misconduct. This situation has created an imperative for state action, without which substantial public harms and risks will continue to proliferate, unaddressed.[90]

State criminal law, rooted in fundamental state powers, offers a uniquely promising tool in this challenging landscape. Several distinctive features of the current crisis recommend a

89. *See generally* PETER TURCHIN, END TIMES: ELITES, COUNTER-ELITES, AND THE PATH OF POLITICAL DISINTEGRATION (2023) (defining plutocracy, finding that the United States fits the definition, and arguing that plutocracies produce competition and infighting among elites).

90. On the risks posed by unfettered corporate conduct, see generally DAVID MICHAELS, THE TRIUMPH OF DOUBT: DARK MONEY AND THE SCIENCE OF DECEPTION (2020); JENNIFER JACQUET, THE PLAYBOOK: HOW TO DENY SCIENCE, SELL LIES, AND MAKE A KILLING IN THE CORPORATE WORLD (2022).

turn from civil and federal regulatory enforcement to state criminal enforcement.

First, unlike civil damages or regulatory fines, which are too often treated by corporations as predictable costs of doing business and thus fail to deter profitable misconduct effectively,[91] criminal sanctions carry greater moral weight. They also allow the state to impose transformative remedies, including punishments that promise deterrence[92] as well as—and perhaps more important for this argument—concrete opportunities to restructure harmful corporations for the benefit of the public.[93]

Second, criminal law is specifically designed to protect public health, safety, and welfare, allowing the state to confront widespread negative externalities such as environmental damage or public health crises by acknowledging the collective injury, a task often challenging for civil litigation. Through criminal investigations and, where warranted, sanctions and remedies, the state acts on behalf of the public to directly confront conduct that generates harm not just to individuals, but to the people as represented by their government, featuring the collective nature of the injury in a way that individual or fragmented civil suits cannot or do not.

Third, criminal prosecution publicly condemns conduct violating societal norms of fairness, safety, and honesty. This expressive function reaffirms societal values and signals that profit-seeking at public expense is unacceptable, particularly in our era of outsized corporate influence. This contrasts sharply with the often opaque and morally ambiguous outcomes

91. *See* Cho, *supra* note 20.

92. *Id.* at 347–48, 354.

93. *See* Braman & Gabaldon, *supra* note 2, at 11–13.

associated with regulatory settlements and civil suits settled confidentially.[94]

The turn to state criminal law is thus justified by its power to provide more effective deterrence, its capacity to address large-scale public harm, and its unique role in affirming public values—features of federal oversight and civil litigation rendered increasingly impotent or absent.

B. State Power Resilient to Preemption

The core authority of states to enforce their own criminal laws remains largely intact and uniquely resilient both to recent decisions gutting federal regulatory power and to preemption doctrines.[95] This power derives from the states' fundamental police powers reserved under the Tenth Amendment to protect public health, safety, welfare, and morals.[96] Moreover, the "effects doctrine" allows states to extend criminal jurisdiction to out-of-state conduct that generates serious risks or harms within the state.[97] Consequently, a state may prosecute for conduct occurring outside its borders if the prohibited result

94. For an analysis of the features of regulatory settlements, including their insusceptibility to judicial review, see generally Matthew C. Turk, *Regulation by Settlement*, 66 U. KAN. L. REV. 259 (2017). For discussion on the costs and benefits of private settlements, see generally David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995) and Laurie Kratky Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283 (1999).

95. *See* discussion of those doctrinal developments *supra* notes 9, 73 and accompanying text.

96. *See* U.S. CONST. amend. X ("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.").

97. *See* Strassheim v. Daily, 221 U.S. 280, 285 (1911) ("Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting [the defendant] within its power.").

occurs within the state and the actor possessed the requisite culpable mental state.[98]

Indeed, the presumption against federal preemption of state law is at its zenith concerning traditional state police powers, particularly criminal law enforcement.[99] Courts require a "clear and manifest purpose of Congress" to displace state criminal statutes.[100] The principle of dual sovereignty further adds to this resilience, generally permitting both federal and state authorities to prosecute the same conduct under their respective laws without violating double jeopardy.[101]

The fundamental architecture of American federalism explains this dynamic. The Constitution reserves to the states a primary and traditional police power to define and punish criminal conduct affecting their communities.[102] This inherent

98. Darryl K. Brown, *Extraterritorial State Criminal Law, Post*-Dobbs, 113 J. CRIM. L. & CRIMINOLOGY 853, 866–67 & 866 n.56 (2024) (discussing MODEL PENAL CODE § 1.03(1)(a) and the requirement for out-of-state conduct to cause in-state results).

99. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991) (recognizing the traditional police power of the states to provide for the public health, safety, and morals); William Partlett, *Criminal Law and Cooperative Federalism*, 56 AM. CRIM. L. REV. 1663, 1669 (2019).

100. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (establishing the "clear and manifest purpose of Congress" standard for preemption in fields of traditional state regulation); *see also* Bond v. United States, 572 U.S. 844, 848, 858 (2014) (emphasizing that "our constitutional structure leaves local criminal activity primarily to the States" and warning against interpretations of federal statutes that would effect a radical reordering of the relative balance between federal and state power without explicit congressional language).

101. *See* Gamble v. United States, 139 S. Ct. 1960, 1963–64 (2019); Bartkus v. Illinois, 359 U.S. 121, 132–36 (1959). Note that *Gamble* covers a constitutionally protected right, gun possession, that is voided by criminal conduct. *See Gamble*, 139 S. Ct. at 1964. By contrast, most criminal corporate conduct does not entail any constitutionally protected right.

102. *See* Erin C. Blondel, *The Structure of Criminal Federalism*, 98 NOTRE DAME L. REV. 1037, 1044–45 (2022) ("[T]he police power is broader than legislative authority. It is responsible for providing basic public

authority distinguishes state criminal prosecutions from many state civil or state regulatory schemes that are more frequently subject to preemption challenges.[103] State criminal prosecutions are laser-focused on adjudicating specific, identifiable culpable acts (the *actus reus*) committed with the requisite culpable mental state (the *mens rea*) of specific defendants.[104] The prosecution is anchored to past or ongoing wrongful conduct by a specific criminal actor with a strong territorial nexus to the prosecuting state, addressing harms and wrongs inflicted by that specific actor on the state and its residents.[105]

The nature of criminal sanctions, even when they have forward-looking aims, reinforces their legitimacy within the federalist structure. The imposition of remedies as part of a criminal sentence—designed to punish the offender, deter

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safety, a job *only* the states possess."); Partlett, *supra* note 99, at 1669–70. Professor Partlett observes:

> In the criminal context, this exception to the general rule [of preemption] has meant that the federal government's regulation of street crime has not preempted, but instead overlapped, with state law. The Court has explained that "we start with the assumption that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress."

Id. (quoting *Rice*, 331 U.S. at 230).

103. *See* Blondel, *supra* note 102, at 1061–62 ("Criminal preemption rarely receives separate scholarly study, but is a story of remarkable federal restraint. Congress basically does not do it.").

104. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 83 (9th ed. 2022) (defining *actus reus* and *mens rea*); *see also* Braman & Gabaldon, *supra* note 2, at 8–9. Professors Braman and Gabaldon note:

> [I]n both the theory and practice of criminal law, culpable forms of physical harm, taking of or damage to property, and deception are not simply losses for which a victim might be compensated . . . rather, the criminal law specifies that, when inflicted on others with a culpable mental state, these kinds of harms are more deeply blameworthy and require more vigorous public redress.

Id.

105. *See supra* notes 97–98 and accompanying text.

future misconduct by that offender and others, and to rehabilitate that offender—is a well-established exercise of state power. A remedy such as mandatory public benefit rechartering for a convicted corporation, while shaping that entity's future conduct to prevent recurrence of harm, is imposed *as a consequence of proven criminal liability*. It is a specific condition tied to a specific wrongdoer, rather than a generally applicable rule for an entire industry, a tailored rehabilitative sanction targeting particular criminal conduct by a particular criminal actor.[106] In this context, the federal system has historically shown great deference to the states' choices in how they structure their criminal justice systems and the types of sanctions they impose for violations of their own criminal laws.[107]

This relative resilience—rooted in judicial doctrine (the strong presumption against preemption for criminal matters, the "effects doctrine,"[108] and "dual sovereignty"[109] doctrine)—

106. *See* Braman & Gabaldon, *supra* note 2, at 11–13.

107. *See* Blondel, *supra* note 102, at 1111 ("The federal government has never challenged that role; instead, it has developed its own system that capitalizes on its supplemental role.").

108. State v. Jack, 125 P.3d 311, 319 (Alaska 2005) (explaining that "[t]he effects doctrine recognizes that a state may exercise extraterritorial jurisdiction over conduct outside the state that has or is intended to have a substantial effect within the state so long as the exercise of jurisdiction does not conflict with federal law and is otherwise reasonable," regardless of the defendant's citizenship or conduct while in another state); *see also* Strassheim v. Daily, 221 U.S. 280, 285 (1911) ("Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power.")

109. *See* Gamble v. United States, 139 S. Ct. 1960, 1964 (2019) (finding that, pursuant to the dual sovereignty doctrine, the Double Jeopardy Clause does not prohibit federal prosecution for gun possession by a felon after state prosecution for the same conduct); Bartkus v. Illinois, 359 U.S. 121, 121–22, 132–36 (1959) (finding the same regarding state prosecution for bank robbery after federal prosecution for the same conduct); Heath v. Alabama, 474 U.S. 82, 88–90 (1985) (affirming that the Double Jeopardy Clause does not bar prosecutions

makes state criminal jurisdiction a vital alternative when federal mechanisms fail and other state-led efforts are blocked. Despite decades of rollbacks in federal oversight, states can still seek accountability through their own justice systems, applying their own criminal laws, with a reduced threat of invalidation. Ironically, the otherwise corporate-friendly "New Federalism"[110] popularized in the 1990s and embraced by the current Supreme Court underscores this core state criminal authority over corporate conduct.[111] State criminal justice's unique attributes—its focus on culpability and societal condemnation—may provide not only secure legal terrain but perhaps also the only effective protection for the public against corporate harm at scale.

C. The Broad Applicability of State Criminal Law to Corporate Misconduct

The enduring power of state criminal jurisdiction is matched by its substantive breadth. State criminal codes prohibit a wide range of corporate conduct that endangers or harms the public, providing states with the necessary legal tools to intervene even when federal or civil mechanisms prove inadequate. The applicability extends across various domains of corporate activity.

Several hypothetical scenarios based on recurring patterns of alleged misconduct illustrate the point:

Consider first fraudulent misrepresentation coupled with consumer endangerment. Imagine Driven Motors, Inc., an artificial intelligence company whose executives knowingly

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by two different states for the same conduct and noting that the same principle applies to federal and state prosecutions).

110. For a description of New Federalism and its themes, see Richard W. Garnett, *The New Federalism, The Spending Power, and Federal Criminal Law*, 89 CORN. L. REV. 1, 11–22 (2003).

111. *See* Note, *Federalism Rebalancing and the Roberts Court: A Departure from Historical Patterns*, 138 HARV. L. REV. 1385, 1392–94 (2025).

misrepresent their autonomous vehicle software's safety capabilities to state regulators and consumers across multiple states.[112] Internal emails reveal that engineers repeatedly warned executives about critical safety failures, but marketing materials distributed to consumers claimed "superhuman accident prevention."[113] When Driven Motors' software causes multiple crashes resulting in injuries and deaths, federal agencies take years to act due to resource constraints and jurisdictional coordination challenges.[114] In such circumstances, state fraud

112. This pattern of corporate knowledge coupled with false public representations would mirror the precedent established in *State v. Ford Motor Company*, where internal cost-benefit analyses showed Ford knew of Pinto fuel tank dangers while continuing sales. *See* Michael Hartz, *1980: Indiana Prosecutor Charges Ford with Reckless Homicide Following Deadly Pinto Crash*, WRTVABC (Feb. 4, 2022, at 17:41 ET), https://www.wrtv.com/lifestyle/history/1980-indiana-prosecutor-charges-ford-with-reckless-homicide-following-deadly-pinto-crash [https://perma.cc/Z5VB-Z8S9] (chronicling corporate homicide prosecution where internal documents showed Ford's knowledge of fuel tank dangers); Paul J. Becker, Arthur J. Jipson & Alan S. Bruce, State of Indiana v. Ford Motor Company *Revisited*, 26 AM. J. CRIM. JUST. 181, 199 (2002) (noting that "the ability of local legal actors to compel corporations to be accountable to local and state concerns is a promising aspect of the Pinto case that has gone overlooked and underanalyzed").

113. As a similar example, consider the Peanut Corporation of America prosecution, where internal emails showed executives knew of contamination risks while shipping products marked as safe. *See* Moni Basu, *28 Years for Salmonella: Peanut Exec Gets Groundbreaking Sentence*, CNN (Sep. 22, 2015, at 12:21 ET), https://www.cnn.com/2015/09/21/us/salmonella-peanut-exec-sentenced [https://perma.cc/H8DY-WDU2] (describing prosecution where internal emails showed "Just ship it" despite contamination knowledge); Press Release, U.S. Dep't of Just., Former Peanut Company President Receives Largest Criminal Sentence in Food Safety Case; Two Others Also Sentenced for Their Roles in Salmonella-Tainted Peanut Product Outbreak (Sep. 21, 2015), https://www.justice.gov/archives/opa/pr/former-peanut-company-president-receives-largest-criminal-sentence-food-safety-case-two [https://perma.cc/K7NF-YMUC].

114. *See* Mike Spector & Dan Levine, *Exclusive: Tesla Faces U.S. Criminal Probe over Self-Driving Claims*, REUTERS (Oct. 27, 2022, at 12:38 CT),

statutes criminalize making knowingly false statements for gain,[115] and reckless endangerment statutes penalize conduct that recklessly places others in danger of death or serious bodily injury[116]—both direct and efficient avenues for prosecution based on the specific harm to a specific state's residents.

Environmental crimes and public health endangerment present another clear application. Imagine that Polluting Pharma, Inc. systematically falsifies environmental compliance reports submitted to state agencies while illegally discharging carcinogenic compounds into groundwater serving three counties. Company documents show executives knew the discharges exceeded permitted levels by 300% and posed severe health risks, but they continued operations to meet quarterly profit targets.[117] When federal EPA oversight fails due to budget

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https://www.reuters.com/legal/exclusive-tesla-faces-us-criminal-probe-over-self-driving-claims-sources-2022-10-26/ [https://perma.cc/DT8W-FEK6]; Mike Spector & Chris Prentice, *Exclusive: In Tesla Autopilot Probe, US Prosecutors Focus on Securities, Wire Fraud*, REUTERS (May 8, 2024, at 15:49 CT), https://www.reuters.com/business/autos-transportation/tesla-autopilot-probe-us-prosecutors-focus-securities-wire-fraud-2024-05-08/ [https://perma.cc/43B5-72CU].

115. For example, New York Penal Law §§ 190.60 and 190.65 establish criminal liability for schemes to defraud through false or fraudulent pretenses (punishable as a Class A misdemeanor and Class E felony, respectively). N.Y. PENAL LAW §§ 190.60, 190.65 (McKinney 2025).

116. *See, e.g.*, 18 PA. CONS. STAT. § 2705 (2025).

117. *Cf. AG Shapiro Charges Mariner East Developer with Environmental Crimes*, FOX56 (Oct. 6, 2021, at 12:59 ET), https://fox56.com/news/local/ag-shapiro-charges-mariner-east-developer-with-environmental-crimes [https://perma.cc/7XZD-QND5] (detailing Pennsylvania's charges against Energy Transfer, L.P., which faced 48 criminal counts for systematically failing to file required environmental reports while contaminating groundwater across 17 counties). Similarly, New Jersey successfully prosecuted a water system utility executive for falsifying mandatory testing data to hide carcinogenic contamination 25 times above legal limits, resulting in three years imprisonment. Daniel Kelley, *New Jersey Former Water Official Gets Prison for Falsifying Tests*, REUTERS (Dec. 12, 2014, at 16:30 CT), https://www.reuters.com/article/world/uk/new-jersey-

cuts and political interference, state environmental crime statutes—prohibiting illegal discharge,[118] fraudulent reporting to state agencies,[119] and reckless endangerment of public health[120]—enable prosecution focused on the direct harm to state waters and residents.

Securities fraud targeting state pension funds offers a third scenario where state enforcement proves essential. Suppose Power Players, Inc. systematically inflates reserve estimates, deflates known environmental risks, and conceals cost overruns in SEC filings and investor presentations, specifically targeting state pension funds and retirees. Internal communications reveal executives knew their projections were impossible to meet but proceeded to secure hundreds of millions from state-resident investors. When federal securities enforcement stalls due to regulatory capture, state laws criminalizing fraudulent schemes targeting state residents and theft by deception provide clear prosecutorial pathways, particularly given the concentrated harm to state pension beneficiaries.[121] The concentrated harm to

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former-water-official-gets-prison-for-falsifying-tests-idUSKBN0JQ294/ [https://perma.cc/FNN5-LUEK].

118. *See, e.g.*, TEX. WATER CODE ANN. § 7.152 (establishing "knowing endangerment" liability when corporate discharges create imminent danger of death or serious bodily injury).

119. *See, e.g.*, *id.* § 7.149 (criminalizing intentionally making false material statements in environmental compliance reports).

120. *See supra* note 116 and accompanying text.

121. *Cf.* Press Release, Off. of Minn. Att'y Gen. Keith Ellison, Attorney General Ellison Sues Two Contractors for Fraud; Urges Anyone Defrauded by Them to Contact His Office (Oct. 14, 2025), https://www.ag.state.mn.us/Office/Communications/2025/10/14_Contractors.asp [https://perma.cc/TP75-FN8W]; Press Release, N.J. Off. of the Att'y Gen., Middlesex County Couple Indicted in Alleged Multimillion-Dollar Ponzi Scheme (Apr. 24, 2025), https://www.njoag.gov/middlesex-county-couple-indicted-in-alleged-multimillion-dollar-ponzi-scheme/ [https://perma.cc/224G-MBNS]. Although many states maintain dedicated securities fraud prosecution units, the collapse of federal

state pension beneficiaries—public employees whose retirement security depends on these funds—provides particularly strong grounds for state prosecution, leveraging what securities law scholars identify as states' key advantages in policing localized frauds involving specific victim populations.[122]

These hypothetical scenarios demonstrate that state criminal law extends far beyond traditional street crime to encompass sophisticated corporate misconduct spanning fraud, environmental damage, securities violations, labor exploitation, and public corruption. Each example shows how state statutes can address corporate conduct that generates substantial public harm within state borders, providing crucial enforcement mechanisms when federal oversight fails and civil remedies prove inadequate.

D. Addressing Causation and Other Challenges in Criminal Law: Empowering the Jury

One practical challenge that arises in holding corporations accountable for harming the public involves proving causation beyond a reasonable doubt, particularly for diffuse or latent injuries like those stemming from widespread pollution or complex financial schemes.[123] Those unfamiliar with criminal

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enforcement suggests states should substantially increase the funding of and collaboration among these units.

122. *Cf.* Andrew K. Jennings, *State Securities Enforcement*, 47 BYU L. REV. 67, 67–69, 71–72, 76, 127–31 (2021) (documenting that state securities regulators bring over twice the civil and administrative enforcement actions than the SEC brings and describing the states as "the nation's residual securities enforcers, policing local misconduct that federal authorities or private plaintiffs largely do not," with advantages in "detection granularity and institutional decentralization" for policing localized frauds involving specific victim populations such as state pension beneficiaries).

123. *See* Edward K. Cheng, *Reconceptualizing the Burden of Proof*, 122 YALE L.J. 1254, 1263, 1276 (2013) (explaining the mathematical and practical difficulty reflected in classical characterizations of burdens of proof when multiple elements must be proven together, a common feature

causation doctrine might think that the high standard of proof, combined with the ability of wealthy corporate defendants to deploy sophisticated legal and expert resources, makes criminal prosecution unworkable for many corporate harms where establishing a direct causal link to specific victims is difficult—a hurdle often fatal in civil tort litigation.[124] However, established principles within criminal law, particularly modern approaches to causation, provide a more viable framework because they empower the jury to make critical determinations, providing insulation from corporate influence.[125]

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in complex corporate cases); Heidi Li Feldman, *Science and Uncertainty in Mass Exposure Litigation*, 74 TEXAS L. REV. 1, 2–3, 25, 30, 41 (1995) (describing how factors such as the long delay between exposure to a company's product and the manifestation of injury create scientific uncertainty about causation, making it almost impossible for plaintiffs to prove causation under traditional tort rules); Albert C. Lin, *Beyond Tort: Compensating Victims of Environmental Toxic Injury*, 78 S. CAL. L. REV. 1439, 1441–42 (2005) (describing similar factors in the context of environmental pollution and injury); Megan Edwards, Katrina Fischer Kuh & Frederick A. McDonald, *Scientific Gerrymandering and Bifurcation*, 29 N.Y.U. ENV'T L.J. 171, 208–10 (2021) (arguing that corporate defendants actively create causal uncertainty by funding biased research or selectively presenting data, thereby using scientific doubt as a legal defense against accountability); Eileen Skinnider, Effect, Issues and Challenges for Victims of Crimes that Have a Significant Impact on the Environment 1–2, 4 (Mar. 2013) (unpublished manuscript), https://www.unodc.org/documents/commissions/CCPCJ/CCPCJ_Sessions/CCPCJ_22/PNI_Workshop/Paper_ICCLR_CJP_PNI-Workshop.pdf [https://perma.cc/N3ZL-4Q48] (highlighting the complexity of victimization in environmental crimes regarding timing, geographical spread, and impact).

124. *See, e.g.*, City of New York v. Exxon Mobil Corp., 226 N.Y.S.3d 863, 867–68, 879 (N.Y. Sup. Ct. 2025) (dismissing consumer fraud suit for failure to prove that greenwashing caused residents to form misunderstandings about fossil fuel's link to climate change).

125. *See* David Arkush & Donald Braman, *Climate Homicide: Prosecuting Big Oil for Climate Deaths*, 48 HARV. ENV'T L. REV. 45, 78–85 (2024) (describing the general suitability of modern criminal causation doctrine for corporate enforcement against fossil fuel companies).

Modern criminal causation standards, following the Model Penal Code approach explicitly adopted in many states and influential in the rest, frequently treat factual causation ("but-for" causation) as a preliminary question and focus legal analysis on proximate cause—whether the harm was a reasonably foreseeable consequence of the defendant's culpable conduct.[126] This standard is arguably well-suited to corporate contexts.

The determinations of foreseeability and proximate cause under this framework are often treated as questions of fact reserved for the jury.[127] Unlike in many civil contexts where judges might dismiss cases pretrial based on complex expert affidavits or intricate legal arguments about intervening causes—arguments that well-resourced corporate defendants excel at generating[128]—the criminal proximate cause standard often ensures that the core question of causal linkage reaches a jury composed of community members.[129] Juries, on this

126. Michael Moore, *Causation in the Law*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta & Uri Nodelman eds., 2024), https://plato.stanford.edu/entries/causation-law/ [https://perma.cc/75JG-LHKZ] (describing factual causation as the "minimalist requirement" of posing the counterfactual question: "[B]ut for the defendant's action, would the victim have been harmed as she was?").

127. DRESSLER, *supra* note 104, at 193 ("[P]roximate causation factors developed by the common law are replaced with a single standard, which expressly invites the jury to reach a commonsense, or just, result.").

128. *See* Note, *Causation in Environmental Law: Lessons from Toxic Torts*, 128 HARV. L. REV. 2256, 2260 (2015) (noting that in some civil contexts "the injured party cannot obtain a remedy from any of the actors simply because each of them could point at the others to prevent any showing of causation"); MICHAELS, *supra* note 90, at 252; Edwards et al., *supra* note 123, at 208–09.

129. Courts in jurisdictions with modern codes routinely employ this standard. *See, e.g.*, Johnson v. State, 224 P.3d 105, 110 (Alaska 2010) ("The Model Penal Code couches the relationship between liability and unforeseen consequences in terms of culpability, not causation."); *id.* at 111 ("As the drafters [of the Model Penal Code] rightly concluded, the need for flexibility is great. We cannot fashion a rule detailing precisely

account, are the rightful arbiters of blame in contexts where multiple agents may give rise to a harm or risk.[130] Modern criminal causation doctrine thus empowers the jury to apply common sense and community standards to the evidence, acting as a democratic check against the ability of powerful defendants to evade responsibility in the way civil causation doctrine allows. Indeed, many states do not require proof that the defendant's conduct was the sole cause of harm, but rather a "substantial factor" or a "proximate cause" that *contributes to* or *accelerates* a harm.[131] Instead of considering the corporate action in isolation from all other contributing factors, in the criminal context the focus shifts to the link between the defendant's culpable mental state, the conduct at issue, and the resulting harm or risk.

Criminal prosecution offers another advantage in that statutes criminalizing *reckless endangerment* or the conscious creation of a *risk of widespread injury* focus on the blameworthiness of the conduct itself.[132] Under such statutes, proving that corporate actors consciously disregarded a substantial and unjustifiable risk may be sufficient for liability, even if no specific victims can be identified or if the potential

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which consequences are too remote to preclude criminal liability—that will be left to the fact finder.").

130. *See, e.g.*, People v. Sanchez, 29 P.3d 209, 211–12 (Cal. 2001) (upholding jury verdict and holding that, in a shooting during which multiple persons fired weapons and it was not determined who fired the shot that killed a bystander, there was no bar to finding that the defendant contributed to the death by contributing to the shooting); People v. Kemp, 310 P.2d 680, 681, 683, 685 (Cal. App. 1957) (upholding jury verdict and holding that multiple potential causes of death during a drag race does not bar finding that the defendant contributed to the death by participating in the race).

131. Ward v. State, 233 S.E.2d 175, 177 (Ga. 1977) ("[E]ven if [the defendant's] act did not directly cause [the victim's] death . . . the jury was authorized to find that this act either materially contributed to the death . . . or materially accelerated it.").

132. *See* R. A. Duff, *Criminalizing Endangerment*, 65 LA. L. REV. 941, 952 (2005).

harm was ultimately averted.[133] This risk-focused approach allows criminal law to intervene based on dangerously irresponsible past corporate behavior *before* mass harm occurs.[134] Prosecution thus offers a viable path for assigning responsibility for large-scale corporate harms and risks, particularly when contrasted with the often insurmountable or influence-prone causation hurdles faced in civil litigation addressing similar diffuse or latent injuries.

III. Compulsory Public Benefit Incorporation

The traditional tools of corporate criminal enforcement—fines, compliance programs,[135] and occasional executive prosecutions—have proven largely ineffective in deterring large-scale corporate harm or altering the fundamental incentive structures that produce it.[136] Fines become costs of doing business, compliance programs can be superficial, and the "too big to jail" phenomenon persists.[137] Dissolution is rare due to

133. *See id.* at 952–53.

134. Some states, for example, criminalize "risking widespread harm" or "risking catastrophe," though such statutes are arguably underutilized in the prosecution of criminal corporate conduct. *See, e.g.*, Aaron Regunberg, Donald Braman & David Arkush, *Causing or Risking Climate Catastrophe*, N.Y.U. ENV'T L.J.: ENV'T L. REV. SYNDICATE (Jan. 2, 2025), https://nyuelj.org/2025/01/causing-or-risking-climate-catastrophe [https://perma.cc/5PP6-E3W2] (discussing the Pennsylvania criminal code's "risking catastrophe" provision).

135. For a discussion of the secretive nature of compliance programs involving corporate monitorship, which operate within "a regulatory vacuum" with little oversight, see Veronica Root Martinez, *Public Reporting of Monitorship Outcomes*, 136 HARV. L. REV. 757, 786–89 (2023).

136. *See* GARRETT, *supra* note 21, at 16–18; BUELL, *supra* note 70, at xiv–xvi; COFFEE, JR., *supra* note 21, at 57–58, 62–63; MICHAELS, *supra* note 90, at 113–14, 164; Lund & Sarin, *supra* note 21, at 291–92; Turner, *supra* note 71, at 4, 8–9.

137. *See* GARRETT, *supra* note 21, at 18; Recent Case, *supra* note 20, at 1055 (asserting that "the D.C. Circuit's seeming foreclosure to judicial review of a DPA's terms intensifies concerns about maintaining the rule of law in corporate prosecutions").

concerns about destroying economic value. This remedial gap scales up not only with the financial and political power of a corporation but also with the potential for harm at scale. And this, in turn, highlights the growing need for innovative approaches that can hold corporations accountable, address the root causes of their misconduct, and preserve legitimate value creation. Mandatory incorporation of a state-chartered public benefit subsidiary emerges as a promising solution, leveraging corporate law's flexibility within the framework of criminal enforcement and taking advantage of the long-standing view expressed by the Supreme Court that "[n]o principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations."[138]

A. The Public Benefit Remedy: Mechanism and Rationale

The proposed remedy involves leveraging a state criminal prosecution (resulting in a conviction or, more likely, a plea agreement or deferred prosecution agreement (DPA)) to require a corporation found criminally liable for causing harm within the state to conduct all its future business operations within that state through a newly formed or restructured subsidiary chartered as a public benefit corporation (PBC). The critical identifying characteristics of the PBC are as follows.[139] The PBC must be managed so as to consider the interests of shareholders. In addition, it must be managed so as to consider the best interests of other traditional stakeholders.[140] In some states, notably not including Delaware, it must be managed so as to

138. CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 89 (1987).

139. For background on the creation and merits of the PBC business form, see generally Michael B. Dorff, *Why Public Benefit Corporations?*, 42 DEL. J. CORP. L. 77 (2017) and Theresa Gabaldon & Donald Braman, Why This, Not That, Why Now? Convergence and Disambiguation in the Name of Public Benefit (Sep. 25, 2025) (unpublished manuscript) (on file with authors).

140. Gabaldon & Braman, *supra* note 139, at 9–10.

consider its effects on the environment.[141] A Delaware PBC must specifically choose a public benefit; in other jurisdictions specific public benefits may be identified.[142] Reporting generally is necessary with respect to the achievement of the PBC's "public" benefit, and enforcement devices may be specified in the charter.[143]

Under our proposal, the PBC subsidiary remedy is triggered by a finding or admission of criminal liability for offenses causing substantial public harm within the prosecuting state. As a condition of the resolution, the parent corporation must establish or convert a subsidiary specifically for its operations within that state.[144] This subsidiary must be chartered under a state's PBC laws. While chartering the subsidiary under the prosecuting state's own PBC statute offers the most direct oversight, negotiated settlements could allow for chartering in another jurisdiction with a robust and well-developed PBC framework (such as Delaware), provided the charter includes specific, enforceable commitments relevant to the prosecuting state's interests, and effective cross-jurisdictional monitoring and enforcement mechanisms are established in the settlement agreement. Regardless of the chartering state, the specific public benefit purpose(s) in the charter would be negotiated as part of the criminal resolution, directly tailored to address the criminal harm. The charter would also include specific, measurable commitments, reporting requirements, and enforcement mechanisms (e.g., independent monitors, specific rights for the prosecuting state's Attorney General, and stakeholder provisions) to prompt compliance.

141. *Id.* at 11.

142. *Id.*

143. *See* Dorff, *supra* note 139, at 105, 107.

144. Significantly, establishing a PBC subsidiary is something that can be accomplished without a shareholder vote. *See* Braman & Gabaldon, *supra* note 2, at 11–13.

The flexibility regarding the chartering jurisdiction allows for practical considerations, such as utilizing established PBC case law or streamlining compliance for corporations facing action in multiple states, while still ensuring the core accountability goals of the prosecuting state are met through carefully negotiated charter terms and enforcement provisions. It may also address arguments that a state implementing the PBC remedy is discriminating against interstate commerce by refusing to allow other states' entities to do business within the state.[145]

This approach rests on several key rationales directly addressing the failures outlined in Part I and leveraging the strengths of state criminal law highlighted in Part II. It addresses root causes by targeting internal governance and incentive structures, embedding a legally binding public benefit purpose alongside profit and directly counteracting the pressures that may have led to the criminal conduct—a structural change rarely achieved through federal DPAs or civil settlements. It aims for value preservation by reforming the business's conduct rather than destroying the business itself, making it more politically and economically sensible than dissolution. It allows for tailored accountability, with the public benefit purpose specifically addressing the harm caused (e.g., environmental remediation, consumer transparency, product safety). It leverages corporate law flexibility, using the PBC framework and the charter to embed enforceable commitments.

Critically, by mandating in-state operations through a public benefit structure (whether chartered in the prosecuting state or another suitable jurisdiction via agreement), the remedy respects federalism, allows the harmed state to impose a tailored solution, and operates within the state's relatively robust criminal jurisdiction, avoiding the federal preemption challenges

145. Gabaldon & Braman, *supra* note 139, at 4–5.

that often invalidate state civil regulatory efforts. It also offers flexibility between federal and multiple state enforcement mechanisms—if one path to accountability is closed, whether because of political interference or priorities that do not align with the interests of a given jurisdiction, other paths may provide a solution. Federal corporate criminal prosecutions have declined substantially, with 2024 marking the lowest number of criminal prosecutions in three decades.[146] The increasing use of DPAs and non-prosecution agreements (NPAs) points to the same conclusion. Even as the total number of corporate prosecutions falls, a larger share of them are resolved without conviction, despite the distressingly high re-offense rates among large corporations that receive such agreements.[147] And while not all states are committed to corporate enforcement, many are. States, for example, led the legal response to the opioid crisis, including settlements garnering billions for victims.[148] State

146. RICK CLAYPOOL, PUB. CITIZEN, DURING BIDEN'S FINAL YEAR, PROSECUTIONS OF CORPORATE CRIMINALS FELL TO A RECORD LOW 3 (2025), https://www.citizen.org/article/biden-doj-2024-corporate-crime-report/ [https://perma.cc/9LKY-Q45S]; *see also* Todd Haugh & Mason McCartney, *DPA Discounts*, 61 AM. CRIM. L. REV. 35, 36 (2024) (describing the emergence of non-prosecution and deferred prosecution agreements as "critical law enforcement tool[s]" used in lieu of prosecution). State Attorneys General have also been stating publicly that they feel the need to step up as federal enforcement falters. *See infra* note 149.

147. *See* Haugh & McCartney, *supra* note 146, at 36.

148. *See, e.g.*, Press Release, Colo. Off. of the Att'y Gen., Attorney General Phil Weiser Helps Secure $7.4 Billion from Purdue Pharma and the Sackler Family for Fueling Opioid Crisis (Jan. 23, 2025), https://coag.gov/press-releases/weiser-purdue-pharma-sackler-opioid-1-23-25/ [https://perma.cc/S473-GP4X]. Well beyond Purdue Pharma, the states' efforts forced settlements from "Indivior, Amneal Pharmaceuticals, Hikma Pharmaceuticals, Teva Pharmaceuticals, Johnson & Johnson, Mallinckrodt, Allergan, Endo, McKesson, Cardinal Health, and Amerisource Bergen," as well as "CVS, Walgreens, . . . Walmart," and "McKinsey & Company and the marketing firm Publicis Health." Press Release, Off. of the N.Y. State Att'y Gen., Attorney General James Secures $7.4 Billion from Purdue Pharma and the Sackler Family for Fueling the Opioid Crisis (Jan. 23, 2025),

Attorneys General have publicly noted that they will need to fill the "enforcement vacuum" at the federal level.[149] Perhaps the clearest evidence has emerged with respect to state investigations into civil—and potentially criminal—conduct by the fossil fuel industry giving rise to the escalating climate crisis, with multiple states bringing cases over objections and legal opposition from the Department of Justice.[150]

B. Penalties, Purpose, and Incentives

Traditional fines, even substantial ones, often function merely as a calculable cost of doing business within the dominant shareholder value maximization framework.[151] As long as the expected profit from misconduct (factoring in the probability and size of a possible fine) exceeds the cost, the fine fails as a deterrent (and generally will not result in any financial penalty for breach of management's fiduciary duty).[152] It penalizes an

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https://ag.ny.gov/press-release/2025/attorney-general-james-secures-74-billion-purdue-pharma-and-sackler-family [https://perma.cc/3PG2-22M9].

149. *See, e.g.*, Michael A. Mora, *'States Must Fill Enforcement Vacuum': Oregon Attorney General Sues Coinbase*, LAW.COM (Apr. 18, 2025, at 12:24 CT), https://www.law.com/nationallawjournal/2025/04/18/states-must-fill-enforcement-vacuum-oregon-attorney-general-sues-coinbase/ [https://perma.cc/88RA-YW4X].

150. The Trump administration filed complaints against New York, Vermont, Hawaii, and Michigan challenging state climate superfund laws and lawsuits targeting fossil fuel companies. Press Release, U.S. Dep't of Just., Justice Department Files Complaints Against Hawaii, Michigan, New York and Vermont Over Unconstitutional State Climate Actions (May 1, 2025), https://www.justice.gov/opa/pr/justice-department-files-complaints-against-hawaii-michigan-new-york-and-vermont-over [https://perma.cc/9P6V-SQ3Z].

151. Lund & Sarin, *supra* note 21, at 341 ("[F]or the largest firms, even sky-high penalties are likely viewed as just another cost of doing business—more of a pinprick than a meaningful deterrent.").

152. Darlene R. Wong, *Stigma: A More Efficient Alternative to Fines in Deterring Corporate Misconduct*, 3 CAL. CRIM. L. REV., Oct. 2000, at 1, https://lawcat.berkeley.edu/record/1117145?v=pdf [https://perma.cc/V9W6-N7SF] (arguing that fines may serve as "predictable business expenses that can be weighed against the cost of

outcome without fundamentally changing the internal calculus that produced the harm.[153] The PBC remedy, conversely, directly intervenes in that calculus by embedding a mandatory public benefit purpose other than profit into the subsidiary's legal charter, altering the fiduciary duties of its directors and officers operating within the state.[154]

The extreme sanction of dissolution or state de-chartering, while theoretically available, is rarely employed against large corporations due to legitimate concerns about destroying the economic and social value these entities often create (the "too big to jail" problem).[155] This reluctance stems from the collateral damage that aggressive federal enforcement can inflict, as seen when the demise of firms like Arthur Andersen destroyed tens of thousands of jobs held by innocent employees.[156] The fear of squandering the significant social and economic value that corporations create and damaging the livelihoods of blameless workers makes prosecutors reluctant to pursue such value-destroying remedies.[157] This leaves a gap where serious criminal conduct by valuable enterprises goes without a proportionate structural remedy. PBC restructuring offers a constructive alternative, aiming to preserve the corporation's value-generating capacity while reforming its harmful aspects by changing its operating mandate within the state. In short, it offers a path to rehabilitation rather than elimination.

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changing a product or process to make it safer"); THERESA A. GABALDON & CHRISTOPHER L. SAGERS, BUSINESS ORGANIZATIONS 515–16 (3d ed. 2023) (stating general rule).

153. *See* Greg Pogarsky, *General Deterrence: Review with Commentary on Decision-Making*, *in* THE CAMBRIDGE HANDBOOK OF COMPLIANCE, 193, 194 (Benjamin van Rooij & D. Daniel Sokol eds., 2021) (discussing the calculus of deterrence theory).

154. Braman & Gabaldon, *supra* note 2, at 58.

155. *See* GARRETT, *supra* note 21, at 1–2.

156. BUELL, *supra* note 70, at 114–15; GARRETT, *supra* note 21, at 86.

157. Braman & Gabaldon, *supra* note 2, at 31–32.

Externally imposed compliance programs, frequently mandated under federal DPAs or NPAs, often prove superficial.[158] They represent an external fix layered onto an internal corporate structure still fundamentally driven by profit maximization above other concerns. If the core corporate culture and incentive structure remain unchanged, compliance can become an easily circumvented box-checking exercise. The PBC remedy, by contrast, represents an internal governance reform. Embedding the public benefit purpose within the corporate charter itself creates a deeper, more intrinsic motivation for compliance, backed by legally enforceable fiduciary duties and specific enforcement mechanisms tailored in the settlement.[159]

Ultimately, the superiority of the PBC remedy lies in its direct confrontation with the root problem identified throughout this analysis: the divergence between narrowly defined corporate profit motives and broader public welfare. Traditional penalties often fail because they do not fundamentally alter the corporation's perceived purpose. The PBC restructuring remedy directly adjusts incentives, forcing the corporation's in-state operations to internalize considerations previously treated as "externalities."[160] It leverages the power of corporate law itself to achieve the goals of criminal accountability and future harm prevention.

C. Illustrative Examples: Feasibility and Application

While mandatory PBC conversion via criminal sentencing is relatively new as a criminal remedy, existing examples demonstrate its feasibility, and its application can be envisioned across the types of misconduct highlighted in Part II.C. The

158. Haugh & McCartney, *supra* note 146, at 53.

159. For a more complete discussion of the enforcement of fiduciary duties, see generally Gabaldon & Braman, *supra* note 139.

160. With respect to the internal/external divide, see Braman & Gabaldon, *supra* note 2, at 24.

voluntary adoption of PBC status by large companies like Danone S.A. and Patagonia proves that operating under a dual-purpose mandate is commercially viable.[161] The proposed (though ultimately blocked on other grounds) restructuring of Purdue Pharma into Knoa Pharma provides a blueprint for a compelled conversion, demonstrating how detailed operational requirements such as Risk Evaluation Mitigation Strategies (REMS) and supply chain oversight, reporting mandates, and independent monitoring can be embedded in a PBC structure to address specific harms.[162]

Applying this remedy hypothetically to the scenarios from Part II.C illustrates its potential:

For Driven Motors, Inc., which exaggerated safety claims,[163] a PBC rechartering could be mandated following criminal findings related to fraud or endangerment. Its charter could require specific public benefits such as: (1) implementing industry-leading transparency in reporting product capabilities, limitations, and incident data to state consumers and regulators; (2) funding independent research within the state on the relevant technology's safety implications; and (3) adhering to enhanced safety protocols or testing standards exceeding federal minimums for products sold or operated in state, subject to state verification.

161. *See id.* at 39–42.

162. *Id.* at 43–44.

163. To give credit where credit is due, this hypothetical is loosely based on the cases discussed *supra* notes 112–13 as well as concerns with the initial safety of Tesla's autopilot feature. *See* David Shepardson, *US Probes Tesla Recall of 2 Million Vehicles over Autopilot*, REUTERS (Apr. 26, 2024, at 13:32 CT), https://www.reuters.com/business/autos-transportation/us-probes-tesla-recall-2-million-vehicles-over-autopilot-citing-concerns-2024-04-26/ [https://perma.cc/MA97-9Z2U].

For Polluting Pharma, Inc., which falsified reports and contaminated state waterways,[164] criminal conviction under state environmental laws could trigger the mandatory formation of a PBC subsidiary for conducting business with or within the state. Its charter could mandate benefits including: (1) achieving specific, verifiable reductions in pollutant discharges within the state below regulatory limits and on an accelerated timeline; (2) funding the complete remediation of the contaminated state resources under a state-approved plan; and (3) implementing and publicly reporting data from a transparent, independently audited environmental monitoring system for its state operations.

For Power Players, Inc., whose fraudulent inflation of assets and concealment of risks specifically harmed state pension funds,[165] a criminal resolution would mandate that its operations within the state be conducted by a PBC subsidiary. The charter could specify public benefits such as: (1) implementing radical financial transparency for all state-based investment solicitations, including biannual, independently audited reports on asset valuations and risk assessments, provided directly to the state pension board; (2) allocating a percentage of its in-state profits to an independently administered investor education and compensation fund for state residents; and (3) requiring that any financial projections shared with state entities be certified by an independent monitor approved by the State Attorney General's office.

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164. This hypothetical was loosely inspired by the cases discussed *supra* note 117 as well as the scandal surrounding Volkswagen's falsification of data relating to its sale of polluting vehicles. *See* Mark Dziak, *Volkswagen Emissions Scandal ("Dieselgate")*, EBSCO (2023), https://www.ebsco.com/research-starters/business-and-management/volkswagen-emissions-scandal-dieselgate [https://perma.cc/X4G6-DA54].

165. *See* hypothetical discussed *supra* text accompanying note 121.

The point here is that the remedy can be tailored, using the PBC charter negotiated under the leverage of a criminal resolution, to embed specific, measurable, and enforceable corrective purposes directly addressing the criminal harm within the state.

D. A Targeted Reclaiming of State Authority Over Corporate Purpose

Proposing mandatory PBC restructuring as a criminal remedy grounds the intervention firmly within the state's traditional police powers and distinguishes it from broad attempts to redefine corporate purpose for all entities. This approach does not represent a radical overhaul of corporate law generally. Instead, it constitutes a highly targeted reclamation and adaptation of the state's foundational authority over the corporate form, applicable only in specific circumstances where a corporation's actions have crossed the line into criminal conduct within the state. For the vast majority of corporations operating lawfully, this remedy holds no direct implications other than a more level field for competition.

This targeted intervention is justified by the state's inherent authority to grant and condition corporate privileges. Historically, corporate charters often included explicit public purposes, reflecting the understanding that corporations were creations of the state intended, at least in part, to serve public ends.[166] The modern dominance of the shareholder primacy norm, which often treats broader societal harms as mere externalities, is a relatively recent and contested development.[167]

166. *See* Avi-Yonah, *supra* note 24 (explaining that only corporations "vested with a public purpose" would receive the blessing of the English monarch); WINKLER, *supra* note 24, at 28–29.

167. *See generally* ARTHUR CECIL PIGOU, THE ECONOMICS OF WELFARE (1920) (providing an early, influential discussion of the term); JONATHAN GRUBER, PUBLIC FINANCE AND PUBLIC POLICY (7th ed. 2022) (detailing modern conceptions of the term).

The PBC movement itself signifies a statutory recognition in many states that corporate purpose can legitimately encompass more than just profit maximization.

When a corporation abuses its state-granted privileges by engaging in criminal activity that inflicts substantial harm on a state's residents or environment, the state acts within its well-established authority to redefine the terms of that specific corporation's operation within its jurisdiction.[168] Mandating operation through a PBC subsidiary is a way to condition the continued privilege of doing business locally upon adherence to norms that prevent the recurrence of criminal harm. It uses the state's power over corporate formation and governance not to micromanage all businesses but specifically to reform convicted criminal actors.

This remedy strategically bridges the often-artificial divide between "internal" corporate governance and "external" regulation. It leverages the tools of corporate law—the charter, fiduciary duties, and governance structures—to achieve the objectives of criminal law: accountability for past wrongs, deterrence of future misconduct, and protection of the public. By embedding a specific, harm-remediating public benefit purpose into the charter of the subsidiary operating within the state, the remedy compels the internalization of considerations previously externalized by the criminal conduct. It mandates that the pursuit of profit within that state, by that specific subsidiary, must be balanced against the public interest that was criminally violated. This represents a focused recalibration of corporate purpose for specific offenders imposed by the state as a

168. *See* Elizabeth Pollman, *The History and Revival of the Corporate Purpose Clause*, 99 TEXAS L. REV. 1423, 1423 (2021) ("[T]hroughout history, the sovereign state has firmly held the reins on the legal statement of corporate purpose by determining it as a matter of special grant or by requiring its articulation in the constitutional document establishing the corporation.").

consequence of proven criminal behavior, ensuring that the entity's future operations support the broader public welfare that ultimately justifies the corporate form itself, without imposing new burdens on law-abiding enterprises.

Conclusion

It is indeed time for "an actual movement with real people to ensure that corporations remain democratically accountable."[169] The stark paradox of modern corporate power—entities chartered by the state to serve the public through innovation while also risking or inflicting profound harm on the public and our democracy—demands a radical rethinking of how we pursue this mandate. Decades of accelerating federal retreat, coupled with judicial and political forces that have systematically fortified corporate impunity, have underwritten a crisis in which corporations increasingly damage the public, our democracy, and our planet at a scale that dwarfs the harms of traditional criminal conduct. The ascendance of politically aggressive corporate actors and industries, exemplified by figures like Elon Musk and the fossil fuel and cryptocurrency sectors but extending throughout the corporate world, has laid bare a perilous accountability vacuum, where financial might actively subverts regulatory and legal constraints. Faced with this systematic dismantling, traditional civil litigation and federal enforcement have proven critically deficient, hamstrung by procedural impediments, resource scarcity, political interference, and the crippling effects of federal preemption.

Against this backdrop of failing oversight, this Article champions the revitalization of state criminal law as a uniquely potent and resilient instrument for holding corporations to account. State criminal enforcement—with its inherent stigmatic power, the capacity to redress diffuse public injuries,

169. Bowie, *supra* note 22, at 2040.

an expressive role in affirming societal norms, and crucial insulation from federal preemption—offers a robust alternative route to corporate accountability where other avenues have collapsed. The extensive reach of existing state criminal statutes across a spectrum of harmful corporate misconduct, from sophisticated fraud and environmental degradation to systemic economic exploitation, provides a solid legal bedrock for decisive action. Moreover, well-established doctrines of criminal causation and culpable risk creation empower juries to assign responsibility, even amidst the complexities of diffuse corporate wrongdoing and harm.

To transform public blame into true corporate accountability, we advance an innovative remedy: the mandatory chartering of a public benefit corporation for those corporations found to have engaged in criminal conduct within the state. This mechanism transcends the mere transactional cost of fines or the superficiality of imposed compliance. By embedding a specific, harm-remediating public benefit purpose directly into the chartered DNA of the corporation itself, this criminal enforcement mechanism fundamentally reforms core corporate incentives and fiduciary duties to reflect the welfare-enhancing justification of the corporate form itself. This targeted reclamation of state authority over the corporate form, reserved for criminal corporate actors, strategically employs corporate law to achieve the broader mandate of just enforcement: exacting accountability, deterring future misconduct, and safeguarding the public interest.

The systematic erosion of federal oversight has created a dangerous vacuum, but it has also created an opportunity. This moment calls for a bold reimagining of corporate accountability, one that revives the state's foundational role in shaping corporate purpose. The path forward lies not in waiting for a defunct federal system to be rebuilt, but in activating the latent power of state criminal law. By coupling prosecution with the

transformative remedy of public benefit restructuring, states can pilot a new model of corporate governance—one where the privilege of generating profit is inextricably linked to the duty of public service. This is more than a stopgap measure; it is a chance to build a more resilient and just framework for the future, ensuring that the power of the corporation is once again harnessed for the public good.