

# Competing Views on the Economic Structure of Corporate Law

Law Working Paper N° 651/2022

July 2022

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Harvard Law School, NBER and ECGI

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## Abstract

Written for a symposium issue celebrating the thirty-year anniversary of the publication of *The Economic Structure of Corporate Law* by Frank Easterbrook and Daniel Fischel ("E&F"), this essay discusses the interaction of my research over the years with their writings. During the period in which the book and articles were written, and in the many years since then, I have paid close attention to E&F's writings in my research in the economics of corporate governance. Indeed, a significant part of my research in this field engaged closely with E&F's writing and reached conclusions that substantially differed from theirs. Below I discuss this engagement of my work with E&F's writings, and our respective approaches, in five corporate research areas: (i) takeover policy and rules; (ii) contractual freedom in corporate law; (iii) state competition in the provision of corporate law rules; (iv) efficiency and distribution in corporate law; and (v) corporate purpose.

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## COMPETING VIEWS ON THE ECONOMIC STRUCTURE OF CORPORATE LAW

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COMPETING VIEWS ON THE ECONOMIC  
STRUCTURE OF CORPORATE LAW

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## ABSTRACT

Written for a symposium issue celebrating the thirty-year anniversary of the publication of *The Economic Structure of Corporate Law* by Frank Easterbrook and Daniel Fischel (“E&F”), this essay discusses the interaction of my research over the years with their writings. During the period in which the book and articles were written, and in the many years since then, I have paid close attention to E&F’s writings in my research in the economics of corporate governance. Indeed, a significant part of my research in this field engaged closely with E&F’s writing and reached conclusions that substantially differed from theirs. Below I discuss this engagement of my work with E&F’s writings, and our respective approaches, in five corporate research areas: (i) takeover policy and rules; (ii) contractual freedom in corporate law; (iii) state competition in the provision of corporate law rules; (iv) efficiency and distribution in corporate law; and (v) corporate purpose.

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## I. INTRODUCTION

This Essay was written for the symposium issue of the University of Chicago Business Law Review celebrating the thirty-year anniversary of the publication of *The Economic Structure of Corporate Law* (“the E&F Book”) by Frank Easterbrook and Daniel Fischel (“E&F”).<sup>1</sup> As other articles in this issue highlight, the book has considerably influenced researchers in the corporate field. In this Essay I offer my personal perspective on this subject, discussing the role that E&F’s writings have had over the years for my own work.

During the four decades since the E&F writings started to appear, my work has largely focused on the economics of corporate governance. In the course of this work, I paid significant attention to E&F’s writings. Indeed, a significant part of my research in the economics of corporate governance focused on issues also considered by E&F, engaged with their analysis, and developed a different approach from theirs. Below I discuss these points in the context of five areas of corporate research that both E&F and I examined, offering substantially different conclusions.<sup>2</sup>

Section II discusses takeover policy and rules. Section III considers the role and limits of contractual freedom in corporate law. Section IV examines the related subject of competition among states in the provision of corporate law rules, and the freedom of companies to choose among the set of corporate state laws. Section V turns to the relationship between efficiency and distribution in corporate law. Section VI considers corporate purpose. Finally, Section VII concludes.

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<sup>1</sup> See FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (Harvard Univ. Press rpt., rev. ed., 1996).

<sup>2</sup> As the footnotes to this essay indicate, some of the research I discuss is co-authored with others. For simplicity of exposition, I do not include the names of co-authors in the text but only in the citation notes. The contribution of my co-authors was, of course, crucial to the development of the ideas in the research discussed in this essay.

## II. TAKEOVERS, OR HOW I GOT INTO CORPORATE LAW

I first encountered the work of E&F in 1981. I was a twenty-five-year-old graduate student at Harvard, studying for an SJD (doctorate in law) and for a Ph.D. in Economics.<sup>3</sup> My main interests then were in the field of economic theory and moral philosophy, and the research that I had conducted was in those areas, including papers on the normative foundations of the economic analysis of law, social choice, distributive justice, and the jurisprudential significance of settlements.

At the time I had no knowledge about or interest in corporate law, and I had not even taken a course in it during the earlier period in which I was taking courses at Harvard Law School. But I had the good fortune of getting to know Victor Brudney, who was teaching corporate law and corporate finance at Harvard. I audited his course on theories of the firm, and he took a liking to me and would invite me to join him for lunch from time to time. He was skeptical of economic arguments against regulation he was encountering, and, given my economic training, he often asked me to discuss these arguments with him.

One day I ran into Victor in the corridor, and he called me into his office and handed me a draft of E&F's paper on tender offers that was scheduled to

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<sup>3</sup> E&F, then recently tenured professors at University of Chicago and Northwestern respectively, were young as well. At the symposium I drew a humorous reaction when I displayed photos of our earlier selves, and I am including them below for the possibility that they might elicit such a reaction from some readers:



Lucian Bebchuk



Frank Easterbrook



Daniel Fischel

be published in the *Harvard Law Review* later that year.<sup>4</sup> Having heard Frank present the paper, Victor asked me to read it and let him know what I thought. When I told him later that week my views about what E&F's economic analysis did not take into account, he suggested that I write a paper on the subject. I did, and I was fortunate that the *Harvard Law Review*, which generally did not publish articles by students, accepted my submission and published my article on the case for facilitating competing tender offers.<sup>5</sup>

In their paper, E&F argued that the goal of corporate takeover rules should be to facilitate takeovers by a first bidder to the fullest extent possible, even those offering a low premium over the stock market price.<sup>6</sup> In order to enhance the disciplinary force of takeover bids as much as possible, E&F reasoned, corporate takeover laws should focus on encouraging potential buyers to search for under-performing targets and make a bid.<sup>7</sup> By contrast, my article explained that facilitating competing tender offers in the event that a bid is made would ensure that targets are acquired by the buyer which values the assets most highly and is thus able to pay the highest price.<sup>8</sup> The analysis concluded that takeover laws should facilitate competing bids by providing sufficient time for making them and allowing target managements to solicit such bids.<sup>9</sup>

I was also fortunate that E&F subsequently decided to write a paper engaging with my position,<sup>10</sup> and that the *Stanford Law Review* invited me to participate in an exchange on the subject with them and Stanford Professor Ron Gilson. This provided me with an opportunity to publish an article

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<sup>4</sup> See Frank Easterbrook & Daniel Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981).

<sup>5</sup> See Lucian A. Bebchuk, *The Case for Facilitating Competing Tender Offers*, 95 HARV. L. REV. 1028 (1982).

<sup>6</sup> Easterbrook & Fischel, *supra* note 4.

<sup>7</sup> *Id.* at 1174–75.

<sup>8</sup> Bebchuk, *supra* note 5.

<sup>9</sup> *Id.* at 1051–54.

<sup>10</sup> See Frank Easterbrook & Daniel Fischel, *Auctions and Sunk Costs in Tender Offers*, 35 STAN. L. REV. 1 (1982).

replying to their critique of my first article and further developing my view on the value of auctions in takeovers.<sup>11</sup>

This engagement with E&F led me to write a subsequent article analyzing how takeover regulations should seek to ensure undistorted choices by target shareholders.<sup>12</sup> This in turn resulted in my being asked to teach corporate law courses after I joined the Harvard Law School faculty, and I consequently began to think about the corporate field more broadly. While this field was initially only one of several in which I did research, over time it became my focus. E&F were a “but-for cause,” and I am thus indebted to them for my entry into the field which eventually became my professional home.

Before proceeding I should note that, even though E&F and I developed different positions on some important aspects of takeover rules, we largely shared positions regarding some other aspects of these rules. We all concluded that target managements should be precluded from blocking tender offers from reaching target shareholders. With US law moving in the direction of increasing acceptance of takeover defenses, my research on takeovers has focused on takeover defenses in the years since the publication of the E&F Book. This research put forward the case for opposing board veto on takeovers, identified the particularly problematic nature of the combination of staggered boards and poison pills, and provided empirical

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<sup>11</sup> See Lucian A. Bebchuk, *The Case for Facilitating Competing Tender Offers: A Reply and Extension*, 35 STAN. L. REV. 23 (1982).

<sup>12</sup> See Lucian Arye Bebchuk, *Toward Undistorted Choice and Equal Treatment in Corporate Takeovers*, 98 HARV. L. REV. 1693 (1985).

evidence on the costs of entrenching arrangements.<sup>13</sup> I believe that E&F are likely to be sympathetic to the conclusions of this research.<sup>14</sup>

### III. CONTRACTUAL FREEDOM

In a well-known 1989 article on the corporate contract,<sup>15</sup> and in the lead chapter of their book,<sup>16</sup> E&F put forward an influential statement of a contractarian view of corporate law. According to this view, market forces operate to ensure that corporate charters are efficiently designed.

This view has important implications for corporate law policy and scholarship. One key implication is that corporate law should largely avoid mandatory rules and should limit itself to providing default provisions from which companies should generally be free to opt out. Another significant im-

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<sup>13</sup> See Lucian Arye Bebchuk, *The Case Against Board Veto in Corporate Takeovers*, 69 U. CHI. L. REV. 973 (2002) (putting together the case for banning defensive tactics and addressing objections to it); Lucian Arye Bebchuk et al., *The Powerful Antitakeover Force of Staggered Boards: Further Findings and a Reply to Symposium Participants*, 55 STAN. L. REV. 885 (2002) (explaining and documenting the powerful antitakeover effects of combining staggered boards with poison pills); Lucian A. Bebchuk & Robert J. Jackson, Jr., *Toward a Constitutional Review of the Poison Pill*, 114 COLUM. L. REV. 1549 (2014) (explaining how federal law can be used to invalidate state law authorizing the use of poison pills); Lucian A. Bebchuk & Alma Cohen, *The Costs of Entrenched Boards*, 78 J. FIN. ECON. 409 (2005) (empirically investigating the value effects of staggered boards); Lucian Bebchuk et al., *What Matters in Corporate Governance?*, 22 REV. FIN. STUD. 783 (2009) (empirically analyzing the value effects of six types of entrenching positions); Lucian A. Bebchuk et al., *Learning and the Disappearing Association Between Governance and Returns*, 108 J. FIN. ECON. 323 (2013) (follow-up study on the value effects of entrenching provisions).

<sup>14</sup> The only caveat is that there is a tension between E&F's conclusion that takeover defenses are likely to be undesirable from an economic perspective and their general conclusion that state law rules, which have been moving in the direction of increasing permissibility of such defenses, should generally be regarded as presumptively efficient. E&F discuss this issue in EASTERBROOK & FISCHER, *supra* note 1, at 222–227.

<sup>15</sup> See Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416 (1989).

<sup>16</sup> See EASTERBROOK & FISCHER, *supra* note 1, ch. 1.

plication is that corporate law scholars should be reluctant to propose or consider arrangements that differ from those already observed in the marketplace and should focus instead on understanding and explaining the reasons for the efficiency of existing market arrangements.

At the time when E&F put forward their contractarian views, as well as in the many years since then, I conducted research whose conclusions were substantially more skeptical and less deferential to the arrangements produced by market forces. In 1989, I published an article on contractual freedom that focused on mid-stream problems.<sup>17</sup> This article showed that, even if market forces could ensure that companies would go public with efficient charter provisions, there are still substantial reasons to worry that companies will not adopt efficient mid-stream changes, or will adopt inefficient mid-stream changes, during the long life they often have after going public and the changes in circumstances they encounter. These midstream problems, I explained, cast doubt on the presumptive efficiency of the private arrangements observed in the marketplace in the absence of legal constraints, and provide a basis for mandatory rules.<sup>18</sup>

As to IPO charter provisions, I put forward reasons for doubting their presumptive optimality in the introductory essay that I contributed to the *Columbia Law Review* symposium on contractual freedom (in which E&F published their corporate contract article) as well as in my subsequent work.<sup>19</sup>

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<sup>17</sup> Lucian Arye Bebchuk, *Limiting Contractual Freedom in Corporate Law: The Desirable Constraints on Charter Amendments*, 102 HARV. L. REV. 1820 (1989).

<sup>18</sup> For subsequent analyses of mid-stream problems that I carried out, see Lucian A. Bebchuk & Ehud Kamar, *Bundling and Entrenchment*, 123 HARV. L. REV. 1549 (2010); Lucian A. Bebchuk & Scott Hirst, *Private Ordering and the Proxy Access Debate*, 65 BUS. LAW. 329 (2010). My analysis of how shareholders might be unable to obtain value-enhancing charter amendments opposed by corporate leaders led me to propose enabling shareholders to initiate charter amendments, as well as to set corporate law defaults in ways that take these impediments into account. For the articles putting forward these proposals, see Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (2005); Lucian Arye Bebchuk & Assaf Hamdani, *Optimal Defaults for Corporate Law Evolution*, 96 NW. U. L. REV. 489 (2002).

<sup>19</sup> See generally Lucian Arye Bebchuk, *The Debate on Contractual Freedom in Corporate Law*, 89 COLUM. L. REV. 1395 (1989); Lucian Arye Bebchuk, *Asymmetric Information and the Choice of Corporate Governance Arrangements* (Harvard L. Sch. John M. Olin Ctr. L. & Econ. Paper No. 398, 2002), <https://perma.cc/2N7G-XNEX>.

My research also cast further doubt on the optimality of IPO charters in articles that showed that the anti-takeover provisions and dual-class structures included in IPO structures could well be inefficient.<sup>20</sup> In future work, I plan to return to the subject of the optimality of IPO provisions, and the desirable limits on such provisions. Of course, such future work would engage, as any work in this area should, with the contractual views that E&F forcefully put forward.

#### IV. STATE COMPETITION

Related to E&F's view on contractual freedom is their view on state competition. In the United States, state law is an important source of the rules governing companies, and companies are free to choose their state of incorporation. The question that naturally arises is whether the freedom of companies to pick the state corporate law that would govern them, and the incentives of some states to adopt rules that would attract incorporations, work to the benefit or detriment of shareholders.

E&F maintain that the freedom to choose a state of incorporation, and the competition among states over incorporation, operate to the benefit of shareholders.<sup>21</sup> E&F's reasoning here is similar to that which leads them to be strong supporters of contractual freedom with respect to the ability of companies to opt out of corporate law rules.

On the E&F view, investors are able to and likely price a company's choice of state of incorporation (as well as its choice of charter provisions) when deciding how much they would be willing to pay for shares when the company goes public. Consequently, E&F reason, market incentives will induce companies to make value-enhancing choices of their incorporation state,

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<sup>20</sup> See Lucian Arye Bebchuk, *Why Firms Adopt Antitakeover Arrangements*, 152 U. PA. L. REV. 713 (2003); Lucian A. Bebchuk & Kobi Kastiel, *The Untenable Case for Perpetual Dual-Class Stock*, 103 VA. L. REV. 585 (2017).

<sup>21</sup> See EASTERBROOK & FISCHER, *supra* note 1, ch. 8. Their analysis built on the earlier work by Ralph K. Winter, *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977), which argued that state competition largely represented a "race to the top." Roberto Romano also made significant contributions to the view that competition among states incentivizes the adoption of value-enhancing rules. See, e.g., ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* (1993).

as well as induce states seeking incorporation to adopt value-enhancing state corporate law rules. The logic of this position carries over to other settings in which companies “shop” among alternative governing rules by choosing an exchange (with its listing rules) on which to list shares or a jurisdiction (with its securities laws) in which to issue securities.

By contrast, at the time of E&F’s writing and in the years since then, I have engaged in developing an economic account of state competition that identified certain significant shortcomings in the contractarian account. In particular, taking into account the mechanisms on which contractarians rely, my analysis showed that states seeking to attract incorporations have incentives to provide rules that favor managers rather than shareholders with respect to an important set of corporate law issues.<sup>22</sup> I have supplemented this incentive analysis with support from several articles that provide empirical analysis of the subject,<sup>23</sup> an account of the development of state takeover law favoring management,<sup>24</sup> and a history of shareholder protection over time showing that federal law has repeatedly had to provide such protections when state law failed to do so.<sup>25</sup>

Although my analysis provides a basis for significant mandatory federal laws, my research also introduced approaches that could address both the shortcomings of state competition and the concerns that contractarians like E&F have about mandating federal rules from which companies cannot opt

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<sup>22</sup> See generally Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435 (1992); Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L. J. 553 (2002) [hereinafter *Vigorous Race or Leisurely Walk*] [hereinafter *Vigorous Race or Leisurely Walk*]; and Oren Bar-Gill, Michal Barzuza & Lucian Bebchuk, *The Market for Corporate Law*, 162 J. INST. & THEORETICAL ECON. 134 (2006).

<sup>23</sup> See generally Lucian Arye Bebchuk & Alma Cohen, *Firms’ Decisions Where to Incorporate*, 46 J. L. & ECON. 383 (2003). For a critical examination of prior empirical work that purported to show the efficiency of state competition, see generally Lucian Bebchuk et al., *Does the Evidence Favor State Competition in Corporate Law*, 90 CALIF. L. REV. 1775 (2002).

<sup>24</sup> Lucian Arye Bebchuk & Allen Ferrell, *Federalism and Takeover Law: The Race to Protect Managers from Takeovers*, 99 COLUM. L. REV. 1168 (1999).

<sup>25</sup> Lucian A. Bebchuk & Assaf Hamdani, *Federal Corporate Law: Lessons from History*, 106 COLUM. L. REV. 1793 (2006).

out.<sup>26</sup> In particular, my research has shown that, even if contractarian concerns were to be fully accepted, it would still be desirable to at least provide (i) a federal incorporation option, and (ii) a federal rule enabling public company shareholders to change the company's incorporation (without a board veto on such reincorporation).<sup>27</sup> Even contractarians like E&F, my research has suggested, would not have a good basis for rejecting such an approach.

## V. EFFICIENCY AND DISTRIBUTION

Various corporate law rules have been viewed as seeking to constrain corporate insiders from enhancing their own payoffs at the expense of public investors. However, E&F urged corporate governance scholars and lawmakers to pay little attention to the direct distributional consequences of corporate law rules. In their exchange with me on takeover policy, E&F argued that increasing premiums received by target shareholders (which facilitating competing offers would produce) should be irrelevant from a policy perspective; because investors tend to hold diversified portfolios with both potential bidders and potential targets, E&F reasoned, investors should be indifferent to the level of premiums.<sup>28</sup>

Furthermore, in a widely-cited article on corporate control transactions, which was integrated into the E&F Book, E&F criticized attempts to ensure

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<sup>26</sup> See EASTERBROOK & FISCHER, *supra* note 1, at 223 (“Federal Laws face less competition; it is harder to move to France than to Nevada.”).

<sup>27</sup> See generally Lucian Arye Bebchuk & Allen Ferrell, *A New Approach to Takeover Law and Regulatory Competition*, 87 VA. L. REV. 111 (2001) (suggesting such an approach with respect to takeover law); Lucian Arye Bebchuk & Assaf Hamdani, *supra* note 22 (suggesting such an approach with respect to corporate law in general). For responses engaging with these proposals by authors who share E&F's contractual perspectives, see Stephen T. Choi & Andrew T. Guzman, *Choice and Federal Intervention in Corporate Law*, 87 VA. L. REV. 961 (2001); and Jonathan Macey, *Displacing Delaware: Can the Feds Do a Better Job than the States in Regulating Takeovers?*, 57 BUS. LAW. 1025 (2002). For our replies to these two contractarian critiques, see Lucian Arye Bebchuk & Allen Ferrell, *Federal Intervention to Enhance Shareholder Choice*, 87 VA. L. REV. 993 (2001); and Lucian Arye Bebchuk & Allen Ferrell, *On Takeover Law and Regulatory Competition*, 57 BUS. LAW. 1047 (2002).

<sup>28</sup> Easterbrook & Fischel, *Auctions and Sunk Costs in Tender Offers*, *supra* note 10, at 8–9 (1982)

that gains from corporate actions are distributed equally or in some other way regarded as fair.<sup>29</sup> Seeking such outcomes, E&F warned, could well impede efficient choices by corporate insiders and thereby produce efficiency costs that would be detrimental to the interests of all corporate participants *ex ante*.<sup>30</sup>

However, my research has shown that ensuring that insiders do not get an excessive fraction of the pie is often grounded in solid economic, incentive reasons. In particular, my analysis of various standard corporate settings indicated that failing to limit the fraction of payoffs captured by insiders in such settings would produce distorted incentives, such as incentives to take actions that would reduce the total pie but enable insiders to capture a larger slice. Thus, in such settings, insisting on a certain distribution of the pie not only does *not* clash with efficiency goals, but might better serve them.

In one early article, I showed that enabling bidders to treat shareholders differentially could well lead to value-reducing takeovers.<sup>31</sup> In subsequent articles, I have shown how corporate controllers, especially those with disproportionate voting power, could well make various choices that would serve their private interests while being value-reducing;<sup>32</sup> I have also shown how the interest of managers in enhancing their payoffs might lead to the adoption of executive pay arrangements that would produce distorted incentives.<sup>33</sup> All in all, although E&F and I agree on the importance of taking

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<sup>29</sup> See Frank Easterbrook & Daniel Fischel, *Corporate Control Transactions*, 91 YALE L. J. 698 (1982); EASTERBROOK & FISCHEL, *supra* note 1, ch. 5.

<sup>30</sup> See generally *id.*

<sup>31</sup> Bebchuk, *The Case for Facilitating Competing Tender Offers*, *supra* note 5.

<sup>32</sup> See Lucian Bebchuk et al., *Stock Pyramids, Cross-Ownership, and Dual Class Equity: The Creation and Agency Costs of Separating Control from Cash Flow Rights*, in CONCENTRATED CORPORATE OWNERSHIP 445 (Randall Morck ed., 2000); Lucian Arye Bebchuk, *Efficient and Inefficient Sales of Corporate Control*, 109 Q. J. ECON. 957 (1994); Lucian A. Bebchuk & Kobi Kastiel, *The Untenable Case for Perpetual Dual-Class Stock*, 103 VA. L. REV. 585 (2017); Lucian A. Bebchuk & Kobi Kastiel, *The Perils of Small-Minority Controllers*, 107 GEO. L.J. 1453 (2019).

<sup>33</sup> See generally LUCIAN BEBCHUK & JESSE FRIED, *PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION* pt. III (2004); Lucian A. Bebchuk & Jesse M. Fried, *Paying for Long-Term Performance*, 158 U. PA. L. REV. 1915 (2010).

incentive effects into account, my research indicates that careful analysis of incentive issues often supports accepting, not rejecting, equal treatment requirements and other limitations on insider payoffs. In many corporate settings, such legal constraints could well be desirable not only for the protection of weaker parties, but also for the sake of efficiency and value maximization.

## VI. CORPORATE PURPOSE

I have long been critical of arguments that insulating incumbents from removal or shareholder intervention would benefit stakeholders, viewing such insulation as likely to entrench incumbents without producing the purported benefits to stakeholders.<sup>34</sup> However, in the last three years I have devoted considerable time to engaging with the increasingly influential view of stakeholder governance (“stakeholderism”), which advocates encouraging and relying on corporate leaders to serve the interests not only of shareholders but also all stakeholders (such as employees, communities, customers, suppliers, and the environment).<sup>35</sup> This recent line of my research has sought to show that stakeholderism should not be expected to produce any material benefits to stakeholders. In fact, my work has suggested, stakeholderism would prove counterproductive by making corporate leaders less accountable and by introducing illusory hopes that could well impede the adoption of reforms that would actually address stakeholder concerns.

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<sup>34</sup> For analysis of this issue in such early articles, see Bebchuk, *The Case for Increasing Shareholder Power*, *supra* note 18, at 908–13; and Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 729–32 (2007).

<sup>35</sup> See generally Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91 (2020); Lucian A. Bebchuk et al., *For Whom Corporate Leaders Bargain*, 94 S. CAL. L. REV. 1467 (2021); Lucian A. Bebchuk et al., *Stakeholder Capitalism in the Time of Covid*, 40 YALE J. REG. (forthcoming 2023), <https://perma.cc/E5US-KZZP>; Lucian A. Bebchuk & Roberto Tallarita, *Will Corporations Deliver Value to All Stakeholders?*, 75 VAND. L. REV. 1031 (2022); Lucian A. Bebchuk et al., *Does Enlightened Shareholder Value Add Value?*, 77 BUS. LAW. (forthcoming 2022), <https://perma.cc/L9RA-257M>; and Lucian A. Bebchuk & Roberto Tallarita, *The Perils and Questionable Promise of ESG-Based Compensation*, J. CORP. L. (forthcoming 2022), <https://perma.cc/P5ZM-YCZV>.

Although the E&F Book did not devote much space to the subject of corporate purpose, which was less central to the ongoing debates when the book was published than it is now, E&F made their views on the subject clear in the firm and forceful manner that characterized their book.<sup>36</sup> Viewing the corporation as a privately-produced nexus of contracts, E&F maintained that the question of corporate purpose is for the corporation's founders to determine. And to the extent that companies went public as for-profit corporations, E&F viewed any attempt to stir such companies in a stakeholderist direction as violating the promise made to investors. This E&F view has some "family resemblance" to that of Milton Friedman in his famous essay on the social responsibility of business.<sup>37</sup>

Because both E&F and I are opposed to stakeholder governance, it might seem that the subject of corporate purpose is one on which our views overlap. However, in current work,<sup>38</sup> I explain that the "Chicago" approach to the subject substantially differs from mine. Although both approaches are critical of the claims of stakeholderism, the two approaches fundamentally differ in their premises, reasons, and implications. For the purpose of this Essay, however, what might be most important to note is that this current work draws me once again to reexamine sections of the E&F Book and engage with their views.

## VII. GOING FORWARD

Like many others in the corporate governance field, I have long paid close attention to E&F's corporate law writings. The issues that they considered were closely related to a significant part of the research that I have conducted over time in the economics of corporate governance. This part of my research arrived at conclusions and positions that mostly differ from theirs, albeit with some significant areas of agreement. However, in analyzing issues they considered, I have always found it important to engage with their views and conclusions. I expect to continue doing so in the coming years, and

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<sup>36</sup> See EASTERBROOK & FISCHER, *supra* note 1, at 35–39 (discussing the "maximands" that corporations should pursue).

<sup>37</sup> See Milton Friedman, *A Friedman Doctrine-- The Social Responsibility of Business is to Maximize Its Profits*, N.Y. TIMES MAGAZINE, Sept. 13, 1970, at 17.

<sup>38</sup> See Lucian Arye Bebchuk, *Three Conceptions of Capitalism* (May 2022) (unpublished manuscript) (on file with author).

hope to have the opportunity to present another report on the subject in the fifty-year anniversary of the publication of *The Economic Structure of Corporate Law*.

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