

The Past, Present and Future of Corporate Purpose

Law Working Paper N° 713/2023

September 2023

Brian R. Cheffins

University of Cambridge and ECGI

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Abstract

Corporate purpose is currently hotly debated amidst much speculation that American public companies are forsaking shareholder centrality in favor of a wider set of priorities. Despite this speculation, systematic analysis of the future of corporate purpose is lacking. This paper correspondingly offers predictions on the trajectory of corporate purpose, drawing on past developments and present trends in so doing. A key reference point is a potential cyclical pattern, which implies public company executives will soon be prioritizing corporate “stakeholders” collectively rather than focusing primarily on shareholders. The history of corporate purpose can indeed be characterized quite plausibly in cyclical terms, with the most recent shareholder-friendly swing of the pendulum occurring in the 1980s due to a wave of hostile takeovers. The future, however, looks different. The 1980s takeover wave probably was a “critical juncture” that altered corporate purpose in a shareholder-oriented manner that is unlikely to change for the foreseeable future.

Keywords: corporate purpose, corporate law, stakeholders, corporate governance, critical junctures

JEL Classifications: G38, K22, L21

Brian R. Cheffins

S. J. Berwin Professor of Corporate Law
University of Cambridge, Faculty of Law
10 West Road
Cambridge, CB3 9DZ, United Kingdom
phone: +44 1223 330084
e-mail: brc21@cam.ac.uk

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(*Forthcoming, Delaware Journal of Corporate Law*)

Abstract

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^{*} S.J. Berwin Professor of Corporate Law, Faculty of Law, University of Cambridge. I am grateful for feedback from Dan Awrey, Christopher Bruner, Andrea Katz, Saura Masconale, Saula Omarova, Frank Partnoy, Laura Phillips Sawyer, Simone Sepe, Charles Whitehead and participants at a Center for the Philosophy of Freedom (University of Arizona) seminar and at law faculty workshops at Cornell, the University of Georgia and Washington University. The usual caveat applies.

I. INTRODUCTION

Debate regarding corporate purpose currently is “vibrant”¹ and “thriving.”² The debate is a long-running one, with conflicting visions extending back decades.³ The controversy has intensified, however, over the past few years.⁴ Concerns are growing that if those running America’s largest firms do not forsake prioritizing shareholder interests social and economic stability could be undermined and the fate of the planet could be jeopardized due to climate change.⁵ With politicians, business leaders, judges and academics all having their say, a venerable corporate law topic “has become one of the hottest public policy issues.”⁶

A by-product of debate thus far is a “very considerable body of scholarship on the corporate purpose and a corporation’s social responsibility.”⁷ Analysis of which interests directors charged with managing corporations should serve⁸ spans the law, finance and management literatures.⁹ Law review articles addressing corporate purpose typically consider the relevant corporate law doctrine in some detail, focusing primarily on the extent to which directors have scope to advance the interests of non-shareholder corporate constituencies (“stakeholders”) when these clash with the interests of the stockholders.¹⁰ The

¹ Robert Anderson, *A Property Theory of Corporate Law*, 2020 COLUM. BUS. L. REV. 1, 98 (2020).

² James Mackintosh, *AMC’s Traders Make a Mess of Corporate Theory*, WALL ST. J., June 9, 2021, B11.

³ Dalia T. Mitchell, *From Dodge to Ebay: The Elusive Corporate Purpose*, 13 VA. L. & BUS. REV. 155, 158 (2019); Amanda Wise, *Corporate Law and the Business Roundtable: Adding to the Debate on Shareholder Primacy vs. Stakeholder Theory*, 49 CAP. U. L. REV. 499, 500, 524 (2021).

⁴ Stephen M. Bainbridge, *A Critique of the American Law Institute’s Draft Restatement of the Corporate Objective*, 2 U. CHI. BUS. L. REV. 1, 3 (2023).

⁵ Christopher M. Bruner, *Corporate Governance Reform and the Sustainability Imperative*, 131 YALE L. J. 1217, 1221 (2022).

⁶ Edward B. Rock, *For Whom Is the Corporation Managed in 2020? The Debate over Corporate Purpose*, 76 BUS. LAW. 363, 363 (2021). See also Sarah C. Haan, *Is American Shareholder Activism a Social Movement?*, INT’L J. FIN. SERV. (forthcoming), 2, <https://ssrn.com/abstract=3974031>.

⁷ Stephen M. Bainbridge, *Making Sense of the Business Roundtable’s Reversal on Corporate Purpose*, 46 J. CORP. L. 285, 286 (2021). See also Sarah Kaplan, *The Promises and Perils of Corporate Purpose*, 8 STRATEGY SCI. 288, 288 (2023) (“an explosion of research on corporate responsibility”).

⁸ Asaf Raz, *A Purpose-Based Theory of Corporate Law*, 65 VILL. L. REV. 523, 534 (2020).

⁹ Anat Alon-Beck, *We Are All “Stakeholderists” Now: Looks Like The Debate Over The Purpose Of Corporations Might Be Settled*, FORBES.COM, March 28, 2022, <https://www.forbes.com/sites/anatalonbeck/2022/03/28/we-are-all-stakeholderists-now-looks-like-the-debate-over-the-purpose-of-corporations-might-be-settled/>.

¹⁰ For examples of law review articles canvassing the relevant legal doctrine in depth, see *infra* note 209 and related discussion.

pros and cons of corporate prioritizing of shareholders and stakeholders are also often canvassed. Likewise, a brief overview of the historical ebb and flow of debates regarding corporate purpose is usually offered to provide context.

Given the “very considerable body of scholarship” on corporate purpose, what is there left to say? Law professor Steven Bainbridge maintains the “policy arguments have been beaten to death” on a “subject to which every generation of scholars seems compelled to add their two cents.”¹¹ This article nevertheless makes an original contribution to the literature, doing so by drawing on past developments and present trends to address a topic where systematic analysis is lacking: the future of corporate purpose.

Such an exercise is timely because amidst the ongoing intense debate regarding corporate purpose, various observers have, largely as asides, argued that a changing of the guard could be occurring. Corporate law scholar Christopher Bruner has suggested “the shift toward stakeholderism that we witness today may signal a more enduring shift.”¹² His corporate law colleagues Grant Hayden and Matthew Bodie offer a more forceful prediction, saying “that shareholder primacy is losing its grip on the corporate world” and “(t)he next wave in corporate governance is coming.”¹³ Others concur. Law professor Lisa Fairfax has suggested that due to changes to corporate governance norms in corporate America “the stage may be set for finally moving the needle on stakeholderism.”¹⁴ When Wachtell, Lipton, Rosen & Katz, an elite corporate law firm, was offering advice to directors for 2020 it referred to “the latest iteration of corporate governance modernization: the advent of stakeholder governance.”¹⁵ The *Financial Times* has cited “the rise of stakeholder

¹¹ Stephen M. Bainbridge, *Corporate Purpose in a Populist Era*, 98 NEB. L. REV. 543, 547 (2020). See also Henry N. Butler & Fred S. McChesney, *Why They Give at the Office: Shareholder Welfare and Corporate Philanthropy in the Contractual Theory of the Corporation*, 84 CORNELL L. REV. 1195, 1195 (1999) (saying corporate social responsibility had been debated “ad nauseum”); Leo Strine, *Corporate Power is Corporate Purpose I: Evidence from My Hometown*, 33 OXF. REV. ECON. POLICY 176, 176 (2017) (“One of the most tired debates in American corporate law has been about the ends of corporate governance”).

¹² Bruner, *supra* note 5, 1221.

¹³ Grant M. Hayden & Matthew T. Bodie, *The Corporation Reborn: From Shareholder Primacy to Shared Governance*, 61 B.C. L. REV. 2419, 2422 (2020). In other writing, they are more cautious: Grant M. Hayden & Matthew T. Bodie, *Power, Primacy, and the Corporate Law Pivot*, 24 U. PA. J. BUS. L. 885, 895 (2022).

¹⁴ Lisa M. Fairfax, *Stakeholderism, Corporate Purpose, and Credible Commitment*, 108 VA. L. REV. 1163, 1241 (2022).

¹⁵ Martin Lipton, Steven A. Rosenblum, Karessa L. Cain & Kathleen I. Tatum, *Some Thoughts for Boards of Directors in 2020*, December 9, 2019, 1, <https://www.wlrk.com/files/2019/SomeThoughtsforBoardsOfDirectorsin2020.pdf>.

capitalism” as a trend “investors and corporate executives ignore...at their peril.”¹⁶ A *Forbes* columnist has likewise hailed “a paradigm shift in thinking about the purpose of corporate law, talent management and corporate culture.”¹⁷

The paucity of detailed analysis of corporate purpose’s future trajectory is at one level surprising since people “cannot avoid making predictions.”¹⁸ Decisions we make about how to conduct our lives inevitably implicate assumptions we make about the shape of the world to come.¹⁹ Law is no exception.²⁰ Lawyers and law firms are constantly offering what amount to predictions to clients regarding litigation prospects and the impact of business planning choices.²¹ Legal academics, however, tend to de-emphasize forecasting what will transpire in favor of explaining the current state of affairs, offering normative assessments of present-day arrangements and generating policy recommendations in turn.²² Academics following this template will implicitly be engaging in prognostication because “To make policy is to think about the future – usually trying to shape it for the better.”²³ Legal scholars nevertheless generally refrain from explicitly forecasting future trends, and this has typically been the case with corporate purpose. This article departs from the pattern, drawing heavily on past developments and present-day circumstances to predict the trajectory of corporate purpose.

¹⁶ Gillian Tett, *ESG Exposed as the World is Forced to Switch Priorities*, FIN. TIMES, FT Money, June 4, 2022, 6.

¹⁷ Alon-Beck, *supra* note 9. See also Alan R. Palmiter, *Capitalism, Heal Thyself*, unpublished working paper (2021), <https://ssrn.com/abstract=3940395> (arguing that even though corporations will continue to focus on profits capitalism is now operating in a more stakeholder-friendly manner because costs are increasingly being internalized due to improved feedback loops); Lynn LoPucki, *Ending Shareholder Wealth Maximization*, 56 U.C. DAVIS L. REV. 2017, 2017 (2023) (suggesting the notion that companies aim to maximize shareholder wealth is “in decline”).

¹⁸ ARTHUR DYEVE, *THE FUTURE OF LEGAL THEORY AND THE LAW SCHOOL OF THE FUTURE* 1 (2016).

¹⁹ *Id.*; NATE SILVER, *THE SIGNAL AND THE NOISE: WHY SO MANY PREDICTIONS FAIL – BUT SOME DON’T* 16 (2012).

²⁰ Rafe Athar Shaikha, Tirath Prasad Sahoo & Veena Anand, *Predicting Outcomes of Legal Cases Based on Legal Factors Using Classifiers*, 167 *PROCEDIA COMPUTER SCI.* 2393, 2394 (2020).

²¹ Daniel M. Katz, *Quantitative Legal Prediction--or--How I Learned to Stop Worrying and Start Preparing for the Data-Driven Future of the Legal Services Industry*, 62 *EMORY L.J.* 823, 912 (2013).

²² Jake M. Hofman, Amit Sharma, Duncan J. Watts, *Prediction and Explanation in Social Systems*, *SCIENCE*, February 3, 2017, 486, 486. See also Michael D. Ward, *Can We Predict Politics? Toward What End?*, 1 *J. GLOBAL SECURITY STUD.* 80, 81 (2016) (making the point about social scientists generally rather than legal academics specifically).

²³ Joshua Polchar, *Unboxing the Future: Finding the Futures Hidden in Plain Sight*, EUROPEAN UNION INSTIT. SECURITY STUD., Brief/19, August 2020, 1.

While corporate law academics have generally refrained from offering forthright and fully reasoned corporate purpose predictions, there have been exceptions. A 2013 article by the late Lynn Stout is one example. She acknowledged that making correct predictions was challenging,²⁴ but proceeded regardless. Stout predicted the demise of the dominant norm of “shareholder primacy”, which she defined as being in place when “the only legitimate purpose of the corporation was to maximize shareholder value.”²⁵ She maintained that “managerial capitalism”, where directors and executives of publicly traded companies “viewed themselves as stewards or trustees charged with guiding a vital social and economic institution in the interests of a wide range of beneficiaries,”²⁶ would soon regain its mid-20th century status as the dominant ethos in American boardrooms.²⁷

Henry Hansmann and Reinier Kraakman’s 2001 article “The End of History for Corporate Law”²⁸ stands out as the most prominent instance of corporate purpose prognostication. In this article, which has been cited over 3500 times according to Google Scholar, they maintained “(t)he triumph of the shareholder-oriented model of the corporation over its principal competitors is now assured.”²⁹ Hansmann and Kraakman maintained the “end of history” had global reach, saying “across developed market jurisdictions...continued convergence toward a single, standard model (‘SSM’) is likely.”³⁰ A necessary corollary was that shareholder primacy was destined to remain dominant in the United States, with “the normative appeal of the managerialist model” that prevailed in the mid-20th century having been “largely destroyed.”³¹ Hansmann and Kraakman, in a 2012 retrospective essay on their original 2001 article, proclaimed themselves vindicated, at least with respect to the United

²⁴ Lynn A. Stout, *On the Rise of Shareholder Primacy, Signs of Its Fall, and the Return of Managerialism (in the Closet)*, 36 SEATTLE U. L. REV. 1169, 1181 (2013).

²⁵ *Id.*, 1173.

²⁶ *Id.*, 1171.

²⁷ *Id.*, 1182.

²⁸ Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001).

²⁹ *Id.*, 468.

³⁰ *Id.*, 439.

³¹ *Id.*, 444.

States, saying “for all practical purposes the SSM has come to dominate discourse about corporate governance in the U.S.”³²

There is a corporate purpose counter-narrative with predictive implications that contradicts Hansmann and Kraakman’s end of history view. The underlying premise is that corporate purpose trends are cyclical in nature,³³ or, to deploy a different analogy, resemble a pendulum.³⁴ Assume corporate purpose trends in fact are cyclical or otherwise swing back and forth. With shareholder primacy currently being the dominant mode of analysis, it follows there will be a move at some point in the not-too-distant future to an arrangement where public company executives have and take advantage of substantial scope to prioritize stakeholders.³⁵ Law professor Robert Rhee, referencing the “stirring of a reassessment in corporate law of shareholder primacy,”³⁶ has indeed suggested “we should expect a reassessment of our understanding of corporations and their role in society in the legal academy where everything old is new again.”³⁷ The cycle away from shareholder primacy indeed may have already begun. Fund managers Panarchy Partners argue, for instance, “the pendulum has decisively swung in the direction of stakeholders.”³⁸

While there are some explicit advocates of a cyclical corporate purpose trajectory, legal scholars who have acknowledged prevailing views on corporate purpose have waxed and waned over time have generally tended not to stake out an explicitly cyclical position. They prefer instead to make a weaker claim that, as law professor Lyman Johnson has

³² Henry Hansmann & Reinier Kraakman, *Reflections on The End of History for Corporate Law* in *THE CONVERGENCE OF CORPORATE GOVERNANCE: PROMISE AND PROSPECTS* 32, 36 (Abdul A. Rasheed & Toru Yoshikawa, eds., 2012).

³³ C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-first Century*, 51 KANSAS L. REV. 77 (2002); David J. Berger, *In Search of Lost Time: What if Delaware Had Not Adopted Shareholder Primacy*, in *THE CORPORATE CONTRACT IN CHANGING TIMES: IS THE LAW KEEPING UP?* 48, 48 (Steven Davidoff Solomon & Randall Thomas, eds., 2019).

³⁴ Bruner, *supra* note 5, 1221; Jeffrey Pfeffer, *Shareholders First? Not so Fast*, HARV. BUS. REV., July-August 2009, 90, 91 (“The Pendulum Swings”); Kent Greenfield, *Sticking the Landing: Making the Most of the “Stakeholder Moment”*, 26 EUR. BUS. L. REV. 147, 149 (2015); Sam Hill, *The Nation’s Most Powerful CEOs Declared the Shareholder-or-Bust Era of Capitalism is Over. But is it?*, NEWSWEEK, August 23, 2019, <https://www.newsweek.com/business-roundtable-corporation-purpose-friedman-doctrine-1455975>.

³⁵ Berger, *supra* note 33, 27 (“it is entirely possible that the tides will turn again such that we may one day no longer be based upon a shareholder primacy system”).

³⁶ Robert J. Rhee, *The Neoliberal Corporate Purpose of Dodge v. Ford and Shareholder Primacy: A Historical Context 1919-2019*, 28 STAN. J. BUS. L. & FIN. 202, 250 (2023).

³⁷ *Id.*, 252.

³⁸ Panarchy Partners, *Is Davos Killing Shareholder Value?*, (July 7, 2020), <https://www.panarchypartners.com/post/is-davos-killing-shareholder-value>.

suggested, “periodically at least, the debate will be revisited, and disagreements aired.”³⁹ Or as legal scholar Ed Rock said in a 2021 analysis of the current state of the debate regarding corporate purpose, “Ultimately, the management debate will continue to evolve against the backdrop of each of the key features that have influenced it in the past.”⁴⁰ Even Harwell Wells, author of a 2002 article on corporate purpose entitled “The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-first Century,” only referred to “cycles” twice in the main body of the article and drew on his historical analysis merely to “revitalize the debate” on corporate purpose rather than to predict that corporate social responsibility would swing to the forefront after flagging during the 1980s and 1990s when shareholder centrality took centre stage.⁴¹

In contrast with the dominant approach in the corporate purpose literature, this article explicitly invokes the notion of a cycle to sharpen the analysis of whether displacement of the currently dominant shareholder primacy arrangement is imminent. The prediction offered here is that a stakeholder-friendly pendulum swing is unlikely. This is because shareholder-oriented corporate purpose has deep roots fortified by corporate law and because forces that could prompt a genuine corporate purpose shift away from shareholder primacy are probably insufficiently robust to dislodge the status quo.

Corporate law does not directly mandate shareholder primacy. Nevertheless, corporate law does vest shareholders with rights that afford them with leverage that can have a meaningful impact on managerial priorities. The implicit backing corporate law provides for shareholder centrality is reinforced because, as law professors Dorothy Lund and Elizabeth Pollman have said, “the shareholder primacy viewpoint has become enmeshed in our cultural and institutional understanding of good governance.”⁴² And Lund and Pollman deduce that a shareholder-oriented “corporate governance machine” is sufficiently influential to mean “stakeholderism is unlikely to dethrone shareholder primacy.”⁴³

What could disrupt the continued momentum in favor of shareholder primacy? Public company executives are unlikely to deliver a corporate purpose pivot on their own initiative.

³⁹ Lyman Johnson, *Why Corporate Purpose Will Always Matter*, 17 U. ST. THOMAS L.J. 862, 863 (2022).

⁴⁰ Rock, *supra* note 6, 385.

⁴¹ Wells, *supra* note 33, 125-26, 139-40.

⁴² Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2630 (2021).

⁴³ *Id.*, 2634.

Managers do welcome discretion, which focusing attentively on shareholder return circumscribes.⁴⁴ They also appear to be comfortable with deploying stakeholder-friendly rhetoric. For instance, the Business Roundtable, a trade association of chief executives of leading American corporations, issued in 2019 a 300-word “Statement on the Purpose of a Corporation” that stressed “a fundamental commitment to all of our stakeholders” and did not mention “shareholders” until the second-to-last paragraph.⁴⁵ There is substantial evidence indicating, however, that “expanding the freedom of corporate leaders” does not translate directly “to the benefit of the company’s stakeholders.”⁴⁶

While executives are unlikely to reorient corporate priorities fundamentally on their own initiative, there are two forces that could deliver a stakeholder-friendly corporate purpose swing. The first is “shareholders stakeholderism”,⁴⁷ where shareholders themselves use the leverage they have to nudge public company executives to exercise corporate power in a manner that sacrifices shareholder returns at least to some degree to offer advantages to other corporate constituencies. In 2018, there reputedly was “an inflection point” in debates about the nature of capitalism⁴⁸ when Larry Fink, head of BlackRock, an asset manager superpower with sizeable stakes in thousands of public companies, declared in a letter to chief executives that to “prosper over time, every company must not only deliver financial performance but also show how it makes a positive contribution to society ... [and] benefit all of their stakeholders.”⁴⁹ “ESG” investing, where investors integrate environmental, social, and governance criteria into investment analysis and which is now “a force to be reckoned with” and a “corporate governance watchword”, has sustained the momentum.⁵⁰

⁴⁴ Kelli A. Alces, *Balance and Team Production*, 38 SEATTLE U. L. REV. 187, 212 (2015).

⁴⁵ Business Roundtable, *Statement on the Purpose of a Corporation*, August 19, 2019, <https://opportunity.businessroundtable.org/wp-content/uploads/2019/12/BRT-Statement-on-the-Purpose-of-a-Corporation-with-Signatures.pdf>.

⁴⁶ Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 168 (2021). See also Kaplan, *supra* note 7, 289; STEPHEN M. BAINBRIDGE, *THE PROFIT MOTIVE: DEFENDING SHAREHOLDER VALUE MAXIMIZATION* 108-9 (2023).

⁴⁷ Alon-Beck, *supra* note 9.

⁴⁸ Andrew Ross Sorkin, *Top Investor Says CEOs Can Bridge Global Rifts*, N.Y. TIMES, January 17, 2019, B1.

⁴⁹ Gillian Tett, *Capitalism – A New Dawn?*, FIN. TIMES, September 7, 2018, Life & Arts, 1.

⁵⁰ Michal Baruz, Quinn Curtis & David Webber, *The Millennial Corporation: Strong Stakeholders, Weak Managers*, ECGI Working Paper in Law No. 687/2023, 7, 11; Elizabeth Pollman, *The Making and Meaning of ESG*, U. of Penn. Inst. for Law & Econ. Research Paper No. 22-23, 19-20, 22 (2022); Sharon Hannes, Adi Libson & Gideon Parchomovsky, *The ESG Gap*, Hebrew University of Jerusalem Legal Studies Research Paper Series No. 23-4, 11-14 (2023).

Speculation has ensued that the stock market has moved past strong prioritization of shareholder returns in favor of a more stakeholder-oriented conception of corporate activity.⁵¹ A change in investor preferences, particularly amongst a younger generation moving to the economic forefront with a reputation for substantial sensitivity to environmental and social issues, is a crucial pillar of what distinguished economists Oliver Hart and Luigi Zingales have labelled “the new corporate governance.”⁵²

Regulatory reform is the second force that could deliver corporate purpose change. Various legal academics have weighed in recently, urging policymakers to reorient corporate law to move stakeholders up the boardroom priority list.⁵³ An ambitious bill that Senator Elizabeth Warren introduced to Congress in 2018 that would have required companies with annual sales exceeding \$1 billion to obtain a federal charter with stakeholder-friendly corporate governance conditions attached progressed no further.⁵⁴ Still, during his successful 2020 presidential campaign Joe Biden said “It’s way past time we put an end to the era of shareholder capitalism”, as companies “have responsibility to their workers, their community, to their country.”⁵⁵

Though theoretically “shareholders stakeholderism” and public policy changes could set the stage for a fresh turn in the corporate purpose cycle, neither trend is likely to be sufficiently potent to alter fundamentally corporate purpose in corporate America. On the investor front, “(i)t is possible we have reached peak ESG.”⁵⁶ If share prices continue to decline following a rocky 2022, ESG concerns may well recede in importance for investors worried about their financial portfolio.⁵⁷ BlackRock indeed is now shying away from

⁵¹ Jacob M. Schlesinger, *DuPont’s Travails Shaped President-Elect’s Business Views*, WALL ST. J., Nov. 24, 2020, A1.

⁵² Oliver Hart & Luigi Zingales, *The New Corporate Governance*, 1 U. CHI. BUS. L. REV. 195, 197 (2022). See also Hannes, Libson & Parchomovsky, *supra* note 50, 14-15; Barua, Curtis & Webber, *supra* note 50, 2, 20-21. Survey evidence indicates that gender and political preference are strong predictors of a willingness to forego investment returns to promote social interests. See Scott Hirst, Kobi Kastiel & Tamar Kricheli-Katz, *How Much Do Investors Care About Social Responsibility?*, ECGI Working Paper Series in Law, Working Paper No. 674/2023 43-46 (2023).

⁵³ See, for example, Bruner, *supra* note 5, 1228-29, 1253, 1263-64, 1275-77; Aneil Kovvali, *Countercyclical Corporate Governance*, 101 N.C. L. REV. 141 188-92 (2023).

⁵⁴ S. 3348, Accountable Capitalism Act, 115th Cong. (2018). See also *infra* notes 273, 446-447 and related discussion.

⁵⁵ N. Gregory Mankiw, *A Balancing Act Many CEOs Can’t Do*, N.Y. TIMES, July 26, 2020, 3.

⁵⁶ Stefan Stern, *Business Cannot Brush off ESG as a Mere PR Challenge*, FIN. TIMES, May 2, 2022, 18.

⁵⁷ *The Committee to Save the Planet*, ECONOMIST, June 11, 2022, 68; David Gelles & Hiroko Tabuchi, *How an Organized Republican Effort Punishes Companies for Climate Action*, N.Y. TIMES, May 27, 2022, <https://www.nytimes.com/2022/05/27/climate/republicans-blackrock-climate.html>.

referring to ESG due to concerns the term has become “weaponised” amidst criticism of asset managers accused of boycotting energy companies.⁵⁸

Corporate governance related changes are also unlikely to foster a move toward stakeholder centrality any time soon. Political lobbying targeting ESG is on the increase as a growing number of states consider adoption of legislation precluding state officials from considering ESG factors in relation to investments.⁵⁹ Moreover, corporate law in the U.S. is anchored in state law, and there appears to be little chance of a decisive stakeholder-friendly shift at state level due to a strong bias in favour of continuity.⁶⁰ Over the past century, federal reforms have yielded the most dramatic shifts to the corporate law landscape but these apparently only occur at “critical junctures” when there has been a stock market decline occurring over a sustained period associated with blameworthy business conduct.⁶¹ It is unclear when this combination will occur again, and, based on past federal corporate law critical junctures, when it does the corporate purpose issue is unlikely to be a theme of the ensuing reform package. Correspondingly, those advocating stakeholder-friendly change in the corporate context probably will need to shift their focus away from corporate law.

The article is organized as follows. Parts II and III provide essential context. With a cyclical analysis implying a stakeholder-friendly corporate purpose change is imminent, Part II surveys changes in approach to corporate purpose affecting the American public company since the 19th century and shows these can plausibly be characterized in cyclical terms. Part III offers a succinct analysis of the law currently governing corporate purpose, indicating that the absence of an explicit shareholder primacy directive leaves room for a stakeholder-oriented shift in boardroom priorities. Part IV considers why the sort of stakeholder-friendly pendulum swing a cyclical analysis of corporate purpose implies is imminent might soon be underway, if it is not already. Part V provides an analytical framework for assessing possible future corporate purpose trends, focusing on the notion that law “evolves” and a “critical junctures” model political scientists have developed as well as a possible cyclical pattern. Part VI canvasses the conditions that likely would need to be satisfied in order for there to be

⁵⁸ Henry Tricks, *The Demonisation of Larry Fink*, *ECONOMIST*, 1843 Magazine: Summer Stories, July 29, 2023, 4, 12.

⁵⁹ Julie Bykowitz & Angel Au-Yeung, *Conservatives Go After ESG Investing in “Woke” Battle*, *WALL ST. J.*, February 28, 2023, A5.

⁶⁰ Steven A. Bank & Brian R. Cheffins, *Corporate Law’s Critical Junctures*, 77 *BUS. LAW.* 1, 3 (2021).

⁶¹ *Id.*, 3, 15-16, 35, 46.

the full displacement of the current shareholder primacy regime a cyclical trajectory implies and argues that such a pattern is unlikely for the foreseeable future. Part VII concludes.

II. CORPORATE PURPOSE – A CYCLICAL HISTORICAL NARRATIVE

Debates over corporate purpose are long-standing. Some suggest that the topic has been contentious “since the beginning of the industrialist era,”⁶² “(f)or centuries,”⁶³ and even “as long as corporations have existed.”⁶⁴ Others trace the give and take merely to an early 1930s debate⁶⁵ between law professors Adolf Berle and E. Merrick Dodd.⁶⁶

This Part of the article offers a succinct historical summary of corporate purpose trends. We will see initially how the configuration of corporate law in the 19th century tilted corporate purpose in a public-regarding direction. We will then find out how early 20th century changes to share ownership put corporate purpose in the spotlight in a way that had not occurred previously. Next, the Berle-Dodd debate will be canvassed, with particular emphasis being placed on circularity with the positions these two academics staked out in their famous⁶⁷ exchange. After this, a “headline” version of corporate purpose chronology will be canvassed in a way that indicates a cyclical narrative is plausible. Finally, attention will be drawn to trends that complicate the narrative but do not fatally undermine a cyclical account of the history of corporate purpose.

⁶² Barnali Choudhury & Martin Petrin, *Corporate Governance That “Works for Everyone”: Promoting Public Policies Through Corporate Governance Mechanisms*, 18 J. CORP. LAW STUD., 381, 388 (2018). See also Lynne L. Dallas, *Is There Hope for Change? The Evolution of Conceptions of Good Corporate Governance*, 54 SAN DIEGO L. REV. 491, 507 (2017) (“(t)hroughout U.S. history”).

⁶³ Butler & McChesney, *supra* note 11, 1195.

⁶⁴ Christopher M. Bruner, *Center-Left Politics and Corporate Governance: What Is the Progressive Agenda?*, 2018 BYU L. REV. 267, 267 (2018). See also Rhee, *supra* note 36, 234 (“The question of corporate purpose dates back to the dawn of modern corporations”); Edward J. Waitzer & Douglas Sarro, *In Search Of Things Past And Future: Judicial Activism And Corporate Purpose*, 55 OSGOODE HALL L.J. 791, 792 (2018) (“perennial”); Holly J. Gregory, *Everything Old is New Again—Reconsidering the Social Purpose of the Corporation*, HARVARD CORP. GOV. FORUM, March 12, 2019, <https://corpgov.law.harvard.edu/2019/03/12/everything-old-is-new-again-reconsidering-the-social-purpose-of-the-corporation/> (“as old as the corporate form itself”).

⁶⁵ See, for example, Elliott J. Weiss, *Social Regulation of Business Activity: Reforming the Corporate Governance System to Resolve an Institutional Impasse*, 28 UCLA L. REV. 343, 344 (1981); Tom C. W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535, 1562 (2018); Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, *For Whom Corporate Leaders Bargain*, 94 S. CAL. L. REV. 1467, 1478-79 (2021).

⁶⁶ A.A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931); Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932); A. A. Berle Jr., *For Whom Corporate Managers are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932).

⁶⁷ Dalia Tsuk, *From Pluralism to Individualism: Berle and Means and 20th-Century American Legal Thought*, 30 LAW & SOC. INQUIRY 179, 205 (2005).

A. 19th Century Corporate Law and Corporate Purpose

Until the mid- to late nineteenth century, depending on the state involved, the only way to incorporate was to lobby a state government to pass a special law authorizing a corporation's creation.⁶⁸ A corporation's charter, which would be the product of negotiation between the incorporators and state legislators,⁶⁹ would specify the corporation's purpose, which often focused on the provision of local transportation or financial infrastructure (e.g. banks and insurance) perceived as serving the public.⁷⁰ Indeed, a North Carolina court suggested in an 1805 case "it seems difficult to conceive of a corporation established for merely private purposes."⁷¹

In the mid- and late-19th century most states enacted general incorporation laws where a corporation could be formed by way of a routine filing with a state official.⁷² Since under these general incorporation laws "private profit was no longer a 'reward' for public service, but a legitimate end in its own right"⁷³ it might be assumed the corporate purpose story could move quickly to one where corporate law provided a congenial setting for profit-driven firms.⁷⁴ In fact, because the introduction of general incorporation laws was fostered in substantial measure by resentment of the incorporation privileges legislators had been conferring on well-connected political favorites,⁷⁵ under the 19th century version of general incorporation laws the corporate vehicle was available very much "on terms".⁷⁶

⁶⁸ Eric Hilt, *History of American Corporate Governance: Law, Institutions, and Politics*, 6 ANNU. REV. FINANC. ECON. 1, 5 (2014).

⁶⁹ *Id.*

⁷⁰ Harwell Wells, *A Long View of Shareholder Power: From the Antebellum Corporation to the Twenty-First Century*, 67 FLA. L. REV. 1033, 1042-43 (2015); David B. Guenther, *Of Bodies Politic and Pecuniary: A Brief History of Corporate Purpose*, 9 MICH. BUS. & ENTREPRENEURIAL L. REV. 1, 6, 27, 33, 37, 39, 43, 46 (2019); Elizabeth Pollman, *The History and Revival of the Corporate Purpose Clause*, 99 TEX. L. REV. 1423, 1432-33 (2021).

⁷¹ *Trustees of the University of Carolina v. Foy*, 5 N.C. 58, 63 (N.C. 1805).

⁷² Guenther, note 70, 65-66.

⁷³ *Id.*, 65.

⁷⁴ Pollman, *supra* note 70, 1441.

⁷⁵ Naomi R. Lamoreaux & John Joseph Wallis, *Economic Crisis, General Laws, and the Mid-Nineteenth-Century Transformation of American Political Economy*, 41 J. EARLY REPUBLIC 403, 429 (2021).

⁷⁶ P.M. Vasudev, *Corporate Law and Its Efficiency: A Review of History*, 50 AM. J. LEGAL HIST. 237, 256 (2008-10). See also Robert C. Hockett, *When All Enterprise Was Social: The Public Benefit Origins of the Corporate Form* in THE CAMBRIDGE HANDBOOK OF SOCIAL ENTERPRISE LAW 85, 90-91 (Benjamin Means & Joseph W. Yockey, eds., 2018).

The precise restrictions 19th century general incorporation laws imposed varied considerably by state but examples of the “relatively stringent regulations”⁷⁷ included voting rules that curbed the power of the largest shareholders, borrowing limitations, share capital ceilings, restrictions on merger activity and the prohibition of ownership of stock in other corporations.⁷⁸ States abandoned many such restrictions in the late 19th and early 20th centuries, with the New Jersey Corporation Law of 1896 serving as an important catalyst for the reform of corporate law at state level.⁷⁹ The public interest considerations that had shaped corporate law throughout much of the 19th century⁸⁰ thus receded into the background.

B. Early 20th Century Corporate Ownership Patterns and Corporate Purpose

As the 19th century drew to a close, family control of even the largest industrial enterprises remained the norm in the United States; widely dispersed shareholdings and well-developed managerial hierarchies were rare.⁸¹ Lynn Stout has said of this arrangement, “The question of corporate purpose wasn’t really on the table, because the company’s purpose was whatever its controlling shareholder or shareholders wanted it to be.”⁸² In the opening decades of the 20th century, however, it became increasingly common for industrial and commercial firms to have publicly traded shares, sophisticated managerial hierarchies and key shareholders looking to exit or at least delegate control substantially to full-time executives.⁸³

With modern-style corporate executives moving to the forefront in America’s leading companies as the 20th century got underway, this raised the question, as Stout has said, “Who

⁷⁷ Eric Hilt, *Early American Corporations and the State* in CORPORATIONS AND AMERICAN DEMOCRACY 37, 54 (Naomi R. Lamoreaux & William J. Novak eds., 2017).

⁷⁸ Lamoreaux & Wallis, *supra* note 75, 429; Ron Harris & Naomi R. Lamoreaux, *Opening the Black Box of the Common-Law Legal Regime: Contrasts in the Development of Corporate Law in Britain and the United States in the Late Nineteenth and Early Twentieth Centuries*, 61 BUS. HIST. 1199, 1202 (2019).

⁷⁹ Laws N.J. 1896, ch. 185; Lamoreaux & Wallis, *supra* note 75, 431; Vasudev, *supra* note 76, 270-74; Brian R. Cheffins, Steven A. Bank & Harwell Wells, *Shareholder Protection Across Time*, 68 FLA. L. REV. 691, 760 (2016).

⁸⁰ Vasudev, *supra* note 76, 252.

⁸¹ Brian R. Cheffins, *Mergers and Corporate Ownership Structure: The United States and Germany at the Turn of the 20th Century*, 51 AM. J. COMP. L. 473, 475 (2003).

⁸² Lynn A. Stout, *The Problem of Corporate Purpose*, ISSUES GOVERNANCE STUD., June 2012, 1, 2.

⁸³ Brian R. Cheffins, *Law as Bedrock: The Foundations of an Economy Dominated by Widely Held Public Companies*, 23 OXF. J. LEGAL STUD. 1, 7-8 (2003).

or what should these professional corporate managers serve?”⁸⁴ The early case law jurisprudence on point was shareholder-friendly. In 1901 an Ohio court observed that “[t]he real object and purpose of a corporation for profit is to make a profit and to make dividends for the stockholders....”⁸⁵ This assessment aligned with a number of late 19th century cases where stakeholder-friendly steps corporations had taken were successfully challenged as being *ultra vires*.⁸⁶ Consistent with the jurisprudential trend, in 1919 in *Dodge v. Ford Motor Co.* the Michigan Supreme Court said “(a) business corporation is organized and carried on primarily for the profit of the stockholder”⁸⁷

Though contemporaries maintained *Dodge v. Ford Motor Co.* was simply restating an established principle of law, the case would become “the iconic citation” in the academic literature for the proposition that boards should prioritize shareholder interests.⁸⁸ Ironically, contrary to Lynn Stout’s assessment of corporate purpose and dominant shareholders, the Michigan Supreme Court ruling went against Henry Ford, Ford Motor Co.’s founder and “dominant force”.⁸⁹ The court held Ford breached duties owed to the company because he had used his control over the board to cut dividend payments so as to ensure the firm had ample funding to manufacture more cars to sell at cheaper prices, thereby benefitting both employees and consumers.

While early 20th century jurisprudence relating to corporate purpose was oriented around profits and shareholders, by the late 1920s those managing large public companies with increasingly diffuse share ownership were beginning to envisage a broader corporate mission. There was a growing sense that corporations had responsibilities to more than their stockholders⁹⁰ and a notion of the corporate executive as a public trustee began to take hold.⁹¹

⁸⁴ Stout, *supra* note 82, 2.

⁸⁵ *Arbuckle v. Woolson Spice Co.*, 1901 WL 708, at *2 (Ohio Cir. Dec. Jan. 12, 1901), cited by Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?*, 99 TEX. L. REV. 1309, 1323 (2021).

⁸⁶ The case law is canvassed in Bainbridge, *supra* note 7, 295-97. See also David Ciepley, *How America’s Corporations Lost their Public Purpose, and How it Might be (Partially) Restored*, 10(3) ACCOUNTING, ECON. L.: A CONVIVIVUM 1, 12 (2020), discussing *Miner v. Belle Isle Ice Co.* 53 N.W. 218 (Mich. 1892).

⁸⁷ *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919).

⁸⁸ BAINBRIDGE, *supra* note 46, 54-55 (contemporary opinion); Jonathan R. Macey, *Corporate Law as Myth*, 93 S. CAL. L. REV. 923, 948 (2020) (subsequent reception).

⁸⁹ *Dodge*, 170 N.W. at 683; *supra* note 82 and related discussion.

⁹⁰ JOSEPH W. MCGUIRE, BUSINESS AND SOCIETY 66 (1963).

⁹¹ WILLIAM FREDRICK, CORPORATION, BE GOOD: THE STORY OF CORPORATE SOCIAL RESPONSIBILITY 7-8, 36 (2006).

Gerald Swope and Owen D. Young, who served respectively as president and chair of the board of General Electric from 1922 to 1939, were in the vanguard here.⁹² A 1941 history of this widely held industrial giant described Swope and Young's approach to corporate responsibility as follows:

“They were almost the first to recognize a new conception of management's responsibilities – a conception of management, not as an agent of the owners (i.e. shareholders), but as a trustee of all groups vitally interested in industry – owners, employees, and the general public, including customers. It was their determination to guard the interests of all three groups.”⁹³

Such thinking would be invoked as corporate purpose became a topic of academic discourse in an early 1930s exchange between two corporate law scholars, Adolf Berle and E. Merrick Dodd. We canvass this well-known debate next.

C. The Berle-Dodd Debate

Adolf Berle, in a 1931 article in the *Harvard Law Review*, argued that in the corporate context “powers granted to...management...are necessarily and at all times exercisable only for the ratable benefit of all the shareholders.”⁹⁴ E. Merrick Dodd responded in the same journal in 1932 by acknowledging that it was “laudable” for stockholders to be afforded “needed protection against self-seeking managers” but also expressed support for the “view of the business corporation as an economic institution which has a social service as well as a profit-making function.”⁹⁵ Berle retorted shortly thereafter that in the absence of “a clear and reasonably enforceable scheme of responsibilities to someone” other than the shareholders, abandoning “emphasis on ‘the view that business corporations exist for the sole purpose of making profits for their stockholders’” amounted to handing “economic power...over, weakly, to the present administrators with a pious wish that something nice will come out of it all.”⁹⁶

⁹² BRIAN R. CHEFFINS, *THE PUBLIC COMPANY TRANSFORMED* 24-26 (2018).

⁹³ JOHN WINTHROP HAMMOND, *MEN AND VOLTS: THE STORY OF GENERAL ELECTRIC* 387 (1941). On ownership and control at GE, see CHEFFINS, *supra* note 92, 25.

⁹⁴ Berle, *Corporate*, *supra* note 66, 1049.

⁹⁵ Dodd, *supra* note 66, 1148.

⁹⁶ Berle, *For*, *supra* note 66, 1367, 1368.

The exchange of views between Berle and Dodd has been described as “groundbreaking”,⁹⁷ “the beginning point for discussions of corporate purpose,”⁹⁸ and “a lively debate”⁹⁹ between “two intellectual giants.”¹⁰⁰ The “great debate”¹⁰¹ will not be rehearsed in detail here. Instead, the analysis picks up on a point addressed in the previous sub-section and draws attention to intellectual reversals in which Berle and Dodd engaged that had a cyclical aspect that can be paralleled with broader corporate purpose trends.

The point from the previous sub-section that merits elaboration relates to the status of *Dodge v. Ford Motor Co.* Legal academics uneasy with directors prioritizing shareholder interests are aware that “nearly every corporate law book” cites the decision.¹⁰² They correspondingly seek to dismiss *Dodge* as a case law authority, arguing that it “ought to have become obscure and lost to the dust of time”¹⁰³ since what was said about corporate purpose was “dicta”,¹⁰⁴ with “the holding of the case (having) nothing to do with acting primarily for the profit of the shareholders.”¹⁰⁵

Dodd’s stakeholder-friendly reasoning was a “break from the traditional ideology exemplified in *Dodge v. Ford*.”¹⁰⁶ He himself did not brush off the case, however. Instead, he conceded in his 1932 paper that “lawyers have commonly assumed that the managers must conduct the institution with single-minded devotion to stockholder profit”¹⁰⁷ and cited *Dodge*

⁹⁷ Lin, *supra* note 65, 1563.

⁹⁸ Mitchell, *supra* note 3, 179. See also Charles R. Korsmo, 2018 Leet Symposium: *Fiduciary Duty, Corporate Goals, and Shareholder Activism: Introduction*, 69 CASE W. RES. L. REV. 843, 844 (2019) (“The Berle-Dodd debate presaged many if not most-of the issues that have constituted the corporate responsibility debate over the ensuing decades”).

⁹⁹ Stefano Zamagni, *It is Time to Move On From Milton Friedman’s View of the Corporation*, in MILTON FRIEDMAN 50 YEARS LATER 47, 48 (Luigi Zingales, Jana Kasperkevic & Asher Schechter eds., 2020).

¹⁰⁰ Panarchy Partners, *supra* note 38.

¹⁰¹ Zamagni, *supra* note 99, 48.

¹⁰² Antony Page, *Has Corporate Law Failed? Addressing Proposals for Reform*, 107 MICH. L. REV. 979, 987 (2009). On law review citation patterns over time, see Rhee, *supra* note 36, 222.

¹⁰³ Rhee, *supra* note 36, 204.

¹⁰⁴ Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163, 165 (2008); Judd F. Sneirson, *The History of Shareholder Primacy, from Adam Smith Through the Rise of Financialism*, in CAMBRIDGE HANDBOOK OF CORPORATE LAW, CORPORATE GOVERNANCE AND SUSTAINABILITY 73, 74-75 (Beate Sjøfjell & Christopher M. Bruner eds., 2019).

¹⁰⁵ Jeffrey M. Lipshaw, *The False Dichotomy of Corporate Governance Platitudes*, 46 J. CORP. L. 345, 367 (2021). See also Dalia T. Mitchell, *Shareholder Wealth Maximization: Variations on a Theme*, 24 U. PA. J. BUS. L. 700, 705, 707-8, 711-12 (2022).

¹⁰⁶ Daniel J. Morrissey, *Toward a New/Old Theory of Corporate Social Responsibility*, 40 SYRACUSE L. REV. 1005, 1013 (1989).

¹⁰⁷ Dodd, *supra* note 66, 1163.

as “a vigorous assertion of (the) view” “(t)he sole function of the corporation is...conceived to be the making of profit for its stockholder-members.”¹⁰⁸ And Dodd acknowledged in a 1935 article that “(p)rofit-making for absentee owners” was “the legal standard by which we measure (managers’) conduct until some other legal standard has been evolved.”¹⁰⁹

If Dodd knew the law was not on his side, what was the basis for his “groundbreaking” stakeholder-friendly corporate law theorizing?¹¹⁰ Dodd drew attention in his 1932 article to “a growing feeling” amongst “some of our business leaders” “that business has responsibilities to the community.”¹¹¹ In making this point Dodd quoted General Electric’s Young, “one of our leading business executives,” at considerable length.¹¹² Dodd also cited an argument advanced by Young’s colleague Swope that “organized industry should take the lead, recognizing its responsibility to its employees, to the public, and to its stockholders.”¹¹³

Dodd’s endorsement of shareholder-friendly jurisprudence subsequent to invoking pro-stakeholder rhetoric would be far from the last change of heart the protagonists in the Berle-Dodd debate underwent. The reversals are in a way surprising. With a “great debate” involving “intellectual giants” it might have been anticipated that Berle and Dodd would have stuck firmly to their guns. In fact, just as the relative influence of shareholder primacy and a broader conception of corporate purpose have seemed to swing back and forth like a pendulum over time, “the parties to the debate tended to change their positions.”¹¹⁴

¹⁰⁸ *Id.*, 1146. Dodd did also say, though, “Neither the language of the opinion nor the relief granted necessarily involves an unqualified acceptance of the maximum-profit-for-stockholders formula” – *id.* 1157, n. 31.

¹⁰⁹ E. Merrick Dodd, Jr., *Is Effective Enforcement of the Fiduciary Duties of Corporate Managers Practicable?*, 2 U. CHI. L. REV. 194, 206 (1935); see also E. Merrick Dodd, *Book Review*, 9 U. CHI. L. REV. 538, 547 (1942) (reviewing MARSHALL E. DIMOCK & HAROLD K. HYDE, *BUREAUCRACY AND TRUSTEESHIP IN LARGE CORPORATIONS* (1940)).

¹¹⁰ Charles M. Elson & Nicholas J. Goossen, *E. Merrick Dodd and the Rise and Fall of Corporate Stakeholder Theory*, 72 BUS. LAW. 735, 744 (2017).

¹¹¹ Dodd, *supra* note 66, 1153.

¹¹² *Id.*, 1154-55.

¹¹³ *Id.*, 1155.

¹¹⁴ John C. Macintosh, *The Issues, Effects and Consequences of the Berle-Dodd Debate, 1931-1932*, 24 ACCTING., ORG. & SOC. 139, 144 (1999). See also Wells, *supra* note 33, 96 (noting there was “a final irony of the Berle-Dodd exchange: after their initial exchange, each subsequently changed his mind about the possibilities of legal reform for corporate social responsibility”); Gary von Stange, *Corporate Social Responsibility through Constituency Statutes: Legend or Lie?*, 11 HOFSTRA LAB. L. J. 461, 467 (1993) (“This debate continued for many years with both parties, at times, seemingly capitulating”). More optimistically, Berle and Dodd “managed to truly engage with one another and make progress in reaching a greater understanding of the other’s position” -- Alces, *supra* note 44, 190.

The fact that Berle executed a corporate purpose pivot is widely acknowledged.¹¹⁵ Dodd suggested in his 1932 article that because the views of “the nature of business as a purely private enterprise” were “changing”, “the considerations which may properly influence the conduct of those who direct (the corporation’s) activities” – primarily the law – could be properly modified too.¹¹⁶ In 1954, Berle acknowledged that consistent with Dodd’s prognosis “[t]he greatest leaders in the corporate field . . . forcefully argue that corporations are always citizens of the community in which they operate.”¹¹⁷ Berle mentioned as well that a majority of states had enacted laws authorizing corporations to make contributions to philanthropy and education.¹¹⁸ He correspondingly accepted that “(t)he argument has been settled . . . squarely in favor of Professor Dodd’s contention.”¹¹⁹ And in 1962 he reiterated the point, saying “Events and the corporate world pragmatically settled the argument in favor of Professor Dodd.”¹²⁰

Berle made this pivot even though Dodd had for his part conceded in 1935 that Berle’s assessment of how the law should be configured was correct. Dodd noted then that while corporate executives might like to think of themselves as trustees for the corporation rather than mere “attorneys for stockholders” the law failed to furnish them with any guidance on how to conduct that trusteeship.¹²¹ This meant, “as Mr. Berle tells us, the courts and the legal profession cannot relinquish the idea of treating managers as trustees for security holders without freeing the managers from substantial control of any kind.”¹²²

On one view, the Berle/Dodd debate “terminated” with Dodd’s 1935 concession to Berle.¹²³ Still, in 1942, likely mindful that federal securities law reforms in the mid-1930s had at least partially tilted the balance of power within corporations in favor of stockholders

¹¹⁵ See, for example, Tsuk, *supra* note 67, 206-8; Morrissey, *supra* note 106, 1014; Joseph L. Weiner, *The Berle-Dodd Dialogue on the Concept of the Corporation*, 64 COLUM. L. REV. 1458, 1464 (1964).

¹¹⁶ Dodd, *supra* note 66, 1163.

¹¹⁷ ADOLF A. BERLE, JR., *THE 20TH CENTURY CAPITALIST REVOLUTION* 167 (1954).

¹¹⁸ *Id.*, 168.

¹¹⁹ *Id.*, 169.

¹²⁰ Adolf A. Berle, *Modern Functions of the Corporate System*, 62 COLUM. L. REV. 433, 443 (1962).

¹²¹ Dodd, *Is Effective*, *supra* note 109, 206.

¹²² *Id.*

¹²³ J. Furman Lewis, *Toward a General Theory of Social Responsibility for Business*, 25 SW. L. J. 667, 682 (1971).

and away from management,¹²⁴ Dodd drove home how off-base he felt he had been originally. He said that in his 1932 article he had been “rash enough to suggest that our law of business corporations...might develop a broader view which would make the proposition that corporate managers are, to some extent, trustees for labor and for the consumer more than meaningless rhetoric.”¹²⁵

Despite Dodd’s concessions, Berle, as mentioned, accepted in 1954 that the argument between the two had ultimately been resolved in Dodd’s favor. There was, however, one final twist, namely Berle’s clarification of what he meant when he said this. In a 1959 collection of essays law professor Eugene Rostow referenced the “classic debate” between Berle and Dodd and said, “Professor Berle has now concluded that Professor Dodd was right in the first place.”¹²⁶ Berle, in a foreword in the same volume, objected. He said he was “not convinced” that what Dodd recommended was the “‘right’ disposition”.¹²⁷ Instead, all he had been saying was that Dodd’s assessment had ultimately matched up with “how social fact and judicial decisions turned out.”¹²⁸

D. A Corporate Purpose Cycle? The Nutshell Version

Sections A. to C. of this Part of the article have identified what can be characterized as the initial turns of a corporate purpose cycle. To recap, throughout much of the 19th century corporations had a strong public interest element, most directly when incorporation occurred by way of charters but also when general incorporation laws imposed substantial restrictions on companies formed. With explicit corporate law restrictions falling away, as the 20th century got underway a shareholder orientation fell into place, if somewhat by default. As E. Merrick Dodd said in 1942, US corporate law was “(t)raditionally based on the theory that the function of business managers is to maximize profits for the benefit of

¹²⁴ E. Merrick Dodd Jr., *Modern Corporation, Private Property, and Recent Federal Legislation*, 54 HARV. L. REV. 917, 931-35 (1941); William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation*, 34 J. CORP. L. 99, 133 (2008).

¹²⁵ Dodd, *Book*, *supra* note 109, 546.

¹²⁶ Eugene Rostow, *To Whom and For What Ends is Corporate Management Responsible?* in THE CORPORATION IN MODERN SOCIETY 46, 61 (Edward Mason, ed., 1959).

¹²⁷ Adolf A. Berle, *Foreword*, in THE CORPORATION, *supra* note 126, ix, xii.

¹²⁸ *Id.* Berle indicated he was correcting the views law professor Abram Chayes had expressed in a chapter in the 1959 volume: Abram Chayes, *The Modern Corporation and the Rule of Law* in THE CORPORATION, *supra* note 126, 25. In fact, as mentioned, Berle was critiquing a claim that Professor Rostow had made.

shareholders.”¹²⁹ Corporate executives nevertheless began discussing “responsibilities to the community” in the late 1920s in sufficiently earnest terms for Dodd to suggest in 1932 that such views should influence corporate law doctrine.¹³⁰

Adolf Berle’s 1954 concession to Dodd provides a spoiler alert as to what could be thought of as the next public interest/stakeholder-friendly turn of the cycle – an era when corporations were, to quote Berle again, “always citizens of the community in which they operate.”¹³¹ The challenges the Great Depression of the 1930s and World War II posed “stifled and slowed” a potential stakeholder-friendly shift in favor of corporate social responsibility.¹³² But a full turn of the cycle then arguably ensued: ostensibly “(i)n the 1950s and 1960s, the stakeholder was king,”¹³³ as “(c)apitalism was managed through the collective interests of business, labor, government, and society.”¹³⁴ In this era of “managerial capitalism” public company executives were thought to be exercising corporate power in a self-restrained, socially responsible manner that involved balancing the interests of key corporate constituencies rather than the prioritization of shareholders.¹³⁵

According to numerous observers, the most recent turn of the cycle – the one that ended the stakeholder-friendly managerial capitalism era and resulted in the dominance of shareholder primacy – began in 1970. That year the prominent economist Milton Friedman published an essay in the *New York Times* entitled “The Social Responsibility of Business Is to Increase Its Profits,” where he assailed the idea that America’s corporations had a self-standing mission to promote desirable social ends.¹³⁶ The essay, many suggest, was a corporate purpose game-changer.¹³⁷ As the same newspaper said in 2019 with respect to “the notion that the role of the corporation is to maximize profits at all costs” it “had held sway on Wall Street and in the boardroom for 50 years,” with Friedman being “the doctrine’s

¹²⁹ Dodd, *Book*, *supra* note 109, 546.

¹³⁰ *Supra* note 111-113 and related discussion.

¹³¹ *Supra* note 117 and accompanying text.

¹³² WILLIAM C. FREDERICK, *CORPORATION BE GOOD! THE STORY OF CORPORATE SOCIAL RESPONSIBILITY* 7 (2006). See also at 37.

¹³³ Pfeffer, *supra* note 34, 90.

¹³⁴ Rhee, *supra* note 36, 235.

¹³⁵ CHEFFINS, *supra* note 92, 64, 70-71.

¹³⁶ Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 32.

¹³⁷ Brian R. Cheffins, *Stop Blaming Milton Friedman!*, 98 WASH. U. L. REV. 1607, 1609, 1613-15 (2021).

most revered figure.”¹³⁸ And we now may be witnessing one more turn of the corporate purpose cycle, “a 180-degree turn from the Friedman profit-at-all-costs analysis” back to a stakeholder-friendly arrangement.¹³⁹

We will consider in Part VI of the article whether the hypothesized pivot away from shareholder centrality in corporate America is imminent. To provide context, we initially do a deeper dive into corporate purpose chronology. This will indicate that the nutshell version just offered is broadly correct but is too simplistic, which in turn suggests that whatever turn might be in prospect with corporate purpose will not be of the pure 180-degree variety.

E. Complicating the Narrative

The foregoing synopsis of corporate purpose cycles affecting publicly traded companies is a serviceable nutshell analysis of key trends. Closer examination, however, complicates the narrative without necessarily overturning it entirely. This point will be made here by offering three refinements of the headline version of corporate purpose history: 1) profits remained a crucial reference point during the stakeholder-friendly managerial capitalism era 2) despite Friedman’s 1970 essay, the social responsibilities of business featured prominently in corporate discourse throughout the 1970s and into the early 1980s 3) even after public company executives began to emphasize shareholder value maximization in the mid-1980s broader corporate purposes remained part of the corporate policymaking equation.

1. Profits as a Priority During the Managerial Capitalism Era

Law professor Donald Langevoort says of the received wisdom regarding the mid-20th managerial capitalism era and corporate purpose, “(t)he usual historical narrative posits that managerialism held sway for a few decades during the middle part of the last century, enabling managers to share some of the rents with employees, communities, and the government (‘benevolent managerialism’).”¹⁴⁰ Jack Coffee, another legal academic, has said of the era, “Because dispersed shareholders held little power, management was equally responsive to the interests of creditors, employees, and local communities—all of whom were

¹³⁸ David Gelles & David Yaffe-Bellany, *Feeling Heat, C.E.O.s Pledge New Priorities*, N.Y. TIMES, Aug. 20, 2019, at A1.

¹³⁹ Iain Martin, *When Bosses Discover Ethics, We All Suffer*, TIMES, February 3, 2022, 27.

¹⁴⁰ Donald C. Langevoort, *The Effects of Shareholder Primacy, Publicness, and Privatness on Corporate Cultures*, 43 SEATTLE U. L. REV. 377, 382 (2020).

likely in closer personal contact with management. Payout to shareholders remained a secondary concern....”¹⁴¹ Likewise, law professor Margaret Blair maintains “the view of the public toward corporations in the post World War II period until at least the 1970s, was that big corporations have responsibilities to the public as well as to their shareholders”, with these being to “provide safe and useful products and services for consumers (and) good, stable jobs and benefits for their workers.”¹⁴²

There is evidence from the managerial capitalism era that substantiates these assessments. Joseph McGuire, in a 1963 book on business and society, cited “the acceptance of the social responsibilities viewpoint by businessmen” that had resulted “in a tempered profit motive.”¹⁴³ Law professor John Hetherington said in 1969 of “the concept of the multi-responsibility of corporate management” that “declarations of this lofty ideal continue, and are numerous.”¹⁴⁴ In 1972 Kenneth Andrews of Harvard Business School noted that “(f)or the past 40 years, the enterprise system serving as the engine of the American economy has been increasingly modified by a doctrine of social responsibility.”¹⁴⁵

While corporate life in the decades immediately following World War II has been plausibly associated with broadly conceived stakeholder-friendly corporate purposes, profits did remain a top priority. Law professor David Morrissey suggests despite theories in this era “that corporations had responsibilities beyond their narrow economic interests,” “this broadened mission remained undefined and largely unanswered” other than in the form of “vague notions...of ‘corporate statesmanship’ and limited donations to conventional philanthropies.”¹⁴⁶ Harwell Wells, who has pressed the case for thinking about corporate purpose in terms of cycles,¹⁴⁷ maintains similarly that there is “little evidence to support a claim that managers of large public corporations in the 1950s actually governed their firms

¹⁴¹ John C. Coffee, *Preserving the Corporate Superego in a Time of Stress: An Essay on Ethics and Economics*, 33 OXF. REV. ECON. POLICY 221, 239 (2017).

¹⁴² Margaret Blair, *Two Years After the Business Roundtable Statement: Pointing in the Right Direction*, PROMARKET, September 13, 2021, <https://promarket.org/2021/09/13/business-roundtable-statement-right-direction-corporations-behaving-badly/>.

¹⁴³ MCGUIRE, *supra* note 90, 145.

¹⁴⁴ J. A. C. Hetherington, *Fact and Legal Theory: Shareholders, Managers, and Corporate Social Responsibility*, 21 STAN. L. REV. 248, 281 (1969).

¹⁴⁵ Kenneth R. Andrews, *Public Responsibility in the Private Corporation*, 20 J. INDUST. ECON. 135, 135 (1972).

¹⁴⁶ Morrissey, *supra* note 106, 1017.

¹⁴⁷ Wells, *supra* note 33.

for the benefit of multiple constituencies or cared less about profits than their predecessors or successors.”¹⁴⁸

There is evidence from the managerial capitalism era that corroborates such assessments. Law professor Bayless Manning maintained in 1958 that with the large, multidivisional companies that had come to dominate corporate America in effect their purpose clause said simply “make money”.¹⁴⁹ William Frederick, a business school academic, suggested in a 1960 analysis of the business community’s responsibility to society “there is not likely to be any escape from the very powerful motive of private gain and profit.”¹⁵⁰ Thornton Bradshaw, chief executive of oil company ARCO, maintained in a 1971 essay on corporate social responsibility, “investors...still judge my company by its return on investment, on its earnings per share, and on the growth and the anticipated growth of those earnings per share. The price of failure to obey this rule is extremely high”¹⁵¹ Economists Raghuram Rajan, Pietro Ramella and Luigi Zingales report in an analysis of letters the chair of the board or the chief executive officer (CEO) wrote accompanying the annual report public companies distributed to shareholders that “in the 1950s and 1960s, the primary goal expressed by corporations was to increase profits.”¹⁵²

2. Social Responsibilities of Business – a 1970s Heyday

While Milton Friedman’s 1970 *New York Times* essay has been characterized as a corporate purpose game-changer,¹⁵³ this overstates its nature and influence. Friedman, for instance, did not lobby public companies to adopt the sort of shareholder-first mentality that would prevail as the 20th century concluded.¹⁵⁴ Instead, his goal was much more modest – to discourage the then current generation of executives from focusing on “social responsibility”

¹⁴⁸ Harwell Wells, “*Corporation Law is Dead*”: *Heroic Managerialism, Legal Change, and the Puzzle of Corporation Law at the Height of the American Century*, 15 U. PA. J. BUS. L. 305, 330 (2013).

¹⁴⁹ Bayless Manning, *The American Stockholder*, 67 YALE L.J. 1477, 1489 (1958).

¹⁵⁰ William C. Frederick, *The Growing Concern Over Business Responsibility*, 2(4) CALIF. MGMT. REV., Summer 1960, 54, 61.

¹⁵¹ Thornton F. Bradshaw, *The Corporation Executive’s View of Social Responsibility*, FIN. ANALYSTS J., Sept.–Oct. 1971, at 30, 30.

¹⁵² Raghuram Rajan, Pietro Ramella & Luigi Zingales, *What Purpose Do Corporations Purport? Evidence from Letters to Shareholders*, Stigler Center for the Study of the Economy and the State, New Working Paper Series No. 314 32 (2022).

¹⁵³ *Supra* notes 137-138 and related discussion.

¹⁵⁴ Cheffins, *supra* note 137, 1639.

when they were running their firms.¹⁵⁵ The timing was hardly a coincidence. Large corporations were acutely politically vulnerable during an era of considerable social and political ferment.¹⁵⁶ In turn, those running such firms, seeking to improve public relations and forestall unwelcome government intervention, would have been tempted to take steps designed to assuage anti-war activists, environmentalists, civil rights leaders and consumer advocates that featured prominently when Friedman published his essay.¹⁵⁷

Also, while Friedman's 1970 essay attracted attention, its impact on contemporaries was muted. There were relatively few converts throughout the remainder of the decade.¹⁵⁸ The 1970s instead were, at least until the present day, the peak period for a corporate social responsibility mentality in American boardrooms. For instance, according to the chapter of a 2012 history of corporate responsibility covering 1973 to 1981, "The idea that a corporation's responsibilities extended to various constituencies or stakeholders flourished, and many businesses and trade organizations embraced a multi-constituency model of business in society."¹⁵⁹

There is ample evidence from the era that confirms this characterization of the 1970s as a stakeholder friendly decade. As of 1971, reportedly "comments similar to those of" General Electric's Owen Young cited above, "which were so noteworthy a generation or two ago, are now commonplace."¹⁶⁰ The CEO of Xerox, the photocopiers of which were well-known symbols of modern technology,¹⁶¹ told the *Harvard Business Review* in 1975 "the responsibility of the corporation today has to be much broader than just the responsibility of looking after the stockholders whether you're taking a short-or long-term view."¹⁶² The Business Roundtable indicated in a 1981 statement on corporate responsibility that "(m)ore than ever, managers are expected to serve the public interest as well as private profit."¹⁶³

¹⁵⁵ *Id.*, 1624.

¹⁵⁶ *Id.*, 1623.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*, 1625.

¹⁵⁹ ARCHIE B. CARROLL, KENNETH J. LIPARTITO, JAMES E. POST, PATRICIA H. WERHANE & KENNETH E. GOODPASTER, *CORPORATE RESPONSIBILITY: THE AMERICAN EXPERIENCE* 264 (2012).

¹⁶⁰ Lewis, *supra* note 123, 682; *supra* note 112 and accompanying text.

¹⁶¹ Steve Lohr & Carlos Tejada, *After Era That Made It a Verb, Xerox, in a Sale, Is Past Tense*, NY TIMES, Feb. 1, 2018, A1.

¹⁶² *The Corporation and its Obligations*, HARV. BUS. REV., May-June 1975, 127, 127.

¹⁶³ BUSINESS ROUNDTABLE, STATEMENT ON CORPORATE RESPONSIBILITY (1981).

Edward Herman, a finance professor, said in a study of corporate control and corporate power published the same year, “This is an age of ‘corporate responsibility’, at least in the sense of increased emphasis on responsible corporate behaviour as a means of solving social problems.”¹⁶⁴

To the extent that 1970s corporate America embraced “a multi-constituency model”, this was by no means entirely voluntary on the part of public company executives. America’s larger corporations were instead under considerable pressure to have priorities other than the bottom line. Law professor Phillip Blumberg explained in 1971 “the politicization of the corporation” on the basis of “(a)ngry confrontations or disruptions at shareholder meetings... picketing, sit-ins, demonstrations(,) boycotts...(b)ombings, sabotage(,) burnings...(and the) (o)rganizations of public interest groups...investigating the extent of corporate recognition of social and moral factors in business operations.”¹⁶⁵ A 1973 study entitled *Panic in the Boardroom* said America’s “corporate leaders must move in a new direction”¹⁶⁶ due to “(f)our basic demands of the public” of the corporation, namely “1....clean up environmental horrors....2....properly care for its employees...3....show proper regard for its customers and consumers...4....(improve) *the ‘quality of life’* in the United States...”¹⁶⁷ Securities and Exchange Commission (SEC) chair Harold Williams proclaimed in the late 1970s that publicly traded companies should balance the interests of all corporate participants, including employees, customers, suppliers and the government.¹⁶⁸ As late as 1983, law professor Richard Mangrum maintained few were “willing to allow corporations to stick to profit maximization,” citing as an example President Ronald Reagan and others “encouraging corporations to increase their charitable contributions and good works as part of their social responsibility.”¹⁶⁹

The stakeholder-friendly orientation of America’s public companies in the 1970s was subject to important limitations. During an economically troubled decade featuring high

¹⁶⁴ EDWARD S. HERMAN, *CORPORATE CONTROL, CORPORATE POWER: A TWENTIETH CENTURY FUND STUDY* 251 (1981).

¹⁶⁵ Phillip I. Blumberg, *The Politicization of the Corporation*, 26 BUS. LAW. 1551, 1554 (1971).

¹⁶⁶ WILLIAM G. CAPITMAN, *PANIC IN THE BOARDROOM: NEW SOCIAL REALITIES SHAKE OLD CORPORATE STRUCTURES* 17 (1973).

¹⁶⁷ *Id.* (italics in original).

¹⁶⁸ David S. Ruder, *Corporate Governance: An Analysis of Duties, Attacks, and Responses*, 4 DEL. J. CORP. L. 741, 742 (1979).

¹⁶⁹ Richard Collin Mangrum, *In Search of a Paradigm of Corporate Social Responsibility*, 17 CREIGHTON L. REV. 21, 42 (1983).

inflation, substantial unemployment and slow growth,¹⁷⁰ hard-pressed companies curtailed their socially responsible activities.¹⁷¹ Despite a highly publicized instance of public interest lobbying at General Motors' annual meeting in 1970, the chair of the automotive giant said in 1971 "In the end management must be responsive to the wishes of stockholders...."¹⁷² While Williams, again the SEC chair, talked about the need for executives to balance the interests of corporate constituencies, he also acknowledged it was "crucial to recognize that management's primary mission is economic" and said that "profits are a management's most fundamental responsibility."¹⁷³ Similarly, though Herman indicated corporate America was in "an age of 'corporate responsibility'" he also noted "The internal corporate standard is ultimate profitability."¹⁷⁴ Still, even if profits were by no means forgotten in boardrooms in the 1970s, Milton Friedman's 1970 *New York Times* article did not flip the corporate purpose switch decisively in favor of shareholders to the extent that many have hypothesized. The conversion would have to wait until the mid-1980s in a process discussed in the next subsection.

3. Stakeholder Countertrends in the Shareholder Primacy Era

While Milton Friedman's 1970s essay did little to reorient managerial priorities immediately in favor of shareholders, a wave of hostile takeovers during the mid- and late-1980s changed the equation.¹⁷⁵ For instance, when the *New York Times* sought to explain in 1984 a "renewed emphasis" on share prices, it focused primarily on the "unsavory prospect" of an unwelcome takeover bid occurring due to executives committing the "sin" of failing "to keep their stock price high enough to fend off attack."¹⁷⁶ This trend was accompanied by a

¹⁷⁰ CHEFFINS, *supra* note 92, 109-10.

¹⁷¹ *A Social Lapse*, WALL ST. J., January 17, 1975, 10; Robert I. Parket & Henry Eilbirt, *Social Responsibility: The Underlying Factors*, BUS. HORIZONS, August 1975, 5, 9; Paul F. Haas, *Social Responsibility: An Indicator of Market Power*, 35 REV. SOCIAL ECON. 185, 191-95 (1977).

¹⁷² THE CORPORATION IN A DEMOCRATIC SOCIETY 89, 89, 92 (Edward J. Bander, ed., 1975).

¹⁷³ Harold M. Williams, *Corporate Accountability and Corporate Power*, POWER AND ACCOUNTABILITY: THE CHANGING ROLE OF THE CORPORATE BOARD OF DIRECTORS 9, 22, 23 (1979).

¹⁷⁴ HERMAN, *supra* note 164, 256.

¹⁷⁵ Wells, *supra* note 70, 1089-91; Cheffins, *supra* note 137, 1631-32; A.A. Sommer, *It All Comes Down to Money: Face it: A Board's Main Goal is Corporate Profits*, BUS. LAW TODAY, Jan./Feb. 1999, 36, 36; Lawrence E. Mitchell, *The Board as a Path Toward Corporate Social Responsibility* in THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW 279, 300 (Doreen McBarnet, Aurora Voiculescu & Tom Campbell, eds., 2009).

¹⁷⁶ Leslie Wayne, *A Look at New Corporate Tactics*, N.Y. TIMES, Feb. 26, 1984, at F6. See also Rajan, Ramella & Zingales, *supra* note 152, 22 (reporting that with respect to letters board chairs and CEOs sent to shareholders "the presence of shareholder value as an objective is positively related to takeover pressure" starting in the 1980s and ending soon after).

terminological change, with corporate priorities increasingly being articulated by reference to shareholder value creation rather than merely profit generation.¹⁷⁷

Takeover activity declined sharply in the 1990s, but successful lobbying by institutional shareholders to get companies to strengthen links between executive compensation and shareholder returns substantially influenced managerial priorities in a pro-shareholder direction going forward.¹⁷⁸ The Business Roundtable swung around to a shareholder-oriented view of corporate purpose in 1997, saying “the paramount duty of management and of boards of directors is to the corporation’s stockholders” and maintaining “the interests of other stakeholders” were merely “relevant as a derivative of the duty to stockholders.”¹⁷⁹ Henry Hansmann and Reinier Kraakman followed up with their shareholder oriented “end of history” prediction in 2001¹⁸⁰ when shareholder primacy seemed “unchallengeable.”¹⁸¹

Hansmann and Kraakman’s prediction looked sound as the 21st century got underway. Law professors William Bratton and Michael Wachter suggested, for instance, in 2008 “shareholder primacy prevails today as the dominant view....”¹⁸² It even seemed to some that the prioritization of shareholders that took hold in corporate America in the mid-1980s had swept away all before it and left little room for balancing the interests of shareholders and non-shareholder constituencies. Lynn Stout said, for instance, in 2012:

“Some commentators continued to argue valiantly for a more stakeholder-friendly view of the public corporation, but they were increasingly dismissed as sentimental, sandals-wearing leftists whose hearts outweighed their heads. Shareholder primacy became widely viewed as the only intellectually respectable theory of corporate purpose, and ‘maximize shareholder value’ the only proper goal of boards of directors.”¹⁸³

¹⁷⁷ On the terminological change see Rajan, Ramella & Zingales, *supra* note 152, 1-2, 17-18, 32.

¹⁷⁸ Cheffins, *supra* note 137, 1631-36; Mitchell, *supra* note 175, 301-2; Jiwook Jung & Frank Dobbin, *Finance and Institutional Investors* in THE SOCIOLOGY OF FINANCE 52, 58-59, 67, 69 (Karin Knorr Cetina & Alex Preda, eds., 2012); Eduardo Porter, *Motivating Corporations to do Good*, N.Y. TIMES, July 16, 2014, B1.

¹⁷⁹ BUSINESS ROUNDTABLE, STATEMENT ON CORPORATE GOVERNANCE 3 (1997).

¹⁸⁰ *Supra* notes 28-31 and related discussion.

¹⁸¹ Antoine Rebérioux, *Does Shareholder Primacy Lead to a Decline in Managerial Accountability?*, 31 CAMBRIDGE J. ECON. 507, 507 (2007). See also Tett, *supra* note 49 (“entrenched”).

¹⁸² Bratton & Wachter, *supra* note 124, 100.

¹⁸³ Lynn A. Stout, *New Thinking on Shareholder Primacy*, 2 ACCOUNT. ECON. LAW 3 [xix] (2012).

Her frequent co-author Margaret Blair said similarly in 2015 that challenging shareholder primacy was “like swimming upstream against a strong current.”¹⁸⁴

In fact, as Bratton and Wachter noted when identifying the dominance of shareholder primacy, in comparison with opposing pro-stakeholder points of view, “the battle lines wax and wane.”¹⁸⁵ A stakeholder-oriented conception of the corporation indeed has been growing recently in popularity in academic circles,¹⁸⁶ and we will consider in Part VI whether it will move to the corporate purpose forefront soon. The point that will be made here is that, despite the shareholder-friendly era that commenced in American boardrooms in the mid-1980s, stakeholders were by no means written out of the corporate purpose equation.

The enactment of so-called “constituency” or “stakeholder” statutes¹⁸⁷ by a substantial majority¹⁸⁸ of states in the late 1980s was an early counter-trend to shareholder prioritization. The statutes were enacted in response to the hostile takeovers that were prevalent then, ostensibly to shield employees and local communities from the adverse effects of such transactions.¹⁸⁹ The standard approach with such statutes was to authorize directors legislatively to consider the interests of constituencies in addition to shareholders. This was usually done without any specific takeover-related limitation,¹⁹⁰ despite the primary intent being to enhance the discretion of boards to fend off unwelcome bids for control.¹⁹¹ It is very

¹⁸⁴ Margaret M. Blair, *What Must Corporate Directors Do? Maximizing Shareholder Value Versus Creating Value Through Team Production*, Center for Effective Public Management at Brookings, June 2015, 2.

¹⁸⁵ Bratton & Wachter, *supra* note 124, 100. See also Bernard S. Sharfman, *How the Strong Negotiating Position of Wall Street Employees Impacts the Corporate Governance of Financial Firms*, 5 VA. L. & BUS. REV. 349, 356 (2011) (“There is a broad but not universal consensus that shareholder primacy should be both the norm and default rule underlying the corporate governance of public firms”).

¹⁸⁶ LoPucki, *supra* note 17, 2022 (suggesting that most corporate law academics now reject shareholder wealth maximization as the proper objective of corporations).

¹⁸⁷ Steven M.H. Wallman, *The Proper Interpretation of Corporate Constituency Statutes and Formulation of Director Duties*, 21 STETSON L. REV. 163, 163 (1991); David Millon, *Enlightened Shareholder Value, Social Responsibility, and the Redefinition of Corporate Purpose Without Law*, Washington & Lee Public Legal Studies Research Paper Series 9 (2010).

¹⁸⁸ Gerald F. Davis & Tracy A. Thompson, *A Social Movement Perspective on Corporate Control*, 39 ADMIN. SCI. Q. 141, 150 (1994) (forty states at that point in time)

¹⁸⁹ Bebchuk, Kastiel & Tallarita, *supra* note 65, 1485-86; Lisa M. Fairfax, *The Rhetoric of Corporate Law: The Impact of Stakeholder Rhetoric on Corporate Norms*, 31 J. CORP. L. 675, 686 (2006).

¹⁹⁰ David Millon, *Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373, 1376 (1993); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 763 (2005); Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637, 654 (2006).

¹⁹¹ Charles Hansen, *Other Constituency Statutes: A Search for Perspective*, 46 BUS. LAW. 1355, 1356 (1991); John R. Boatright, *Fiduciary Duties and the Shareholder-Management Relation: Or, What's so Special about Shareholders?*, 4 BUS. ETH. Q. 393, 402 (1994).

much open to question whether boards ultimately used the discretion constituency statutes provided to create substantial benefits for stakeholders at shareholders' expense.¹⁹² Nevertheless, as various commentators have pointed out, such measures operated at cross-purposes to the dominant shareholder-first mentality coalescing at the time.¹⁹³

The prioritization of shareholders had the wind in its sails in 1990s with shares delivering stellar returns,¹⁹⁴ capped by a "dot.com" stock market frenzy as the decade drew to a close.¹⁹⁵ In the early 2000s, however, the stock market fell precipitously and corporate America was afflicted by a wave of scandals, most notably at energy company Enron and WorldCom, a telecommunications firm.¹⁹⁶ Various observers argued that the "dot.com" crash and the corporate skulduggery discredited the prioritization of stockholders and share prices that characterized the 1990s.¹⁹⁷ Some suggested a substantial reorientation of corporate priorities might even ensue.¹⁹⁸ *Business Week* said, for instance, in 2002, "The single-minded focus on 'shareholder value,' which measured performance on the sole basis of stock price, will diminish. Instead, companies will elevate the interests of employees, customers, and their communities."¹⁹⁹

The "dot.com" bear market and the corporate scandals of the 2000s did not in fact prompt a major corporate priority rethink. There is evidence suggesting that for CEOs of poorly performing publicly traded firms engaging in downsizing through employee layoffs did not offer protection from dismissal in the same way it had during the 1990s.²⁰⁰ Generally,

¹⁹² *Infra* notes 433-434 and related discussion.

¹⁹³ Fairfax, *supra* note 189, 689; Edward S. Adams & John H. Matheson, *A Statutory Model for Corporate Constituency Concerns*, 49 EMORY L.J. 1085, 1085 (2000); Adam Winkler, *Corporate Law or the Law of Business: Stakeholders and Corporate Governance at the End of History*, 67 LAW & CONTEMP. PROBS. 109, 123 (2004).

¹⁹⁴ Richard Waters, *Riding for a Fall*, FIN. TIMES, December 28, 1998, 15.

¹⁹⁵ CHEFFINS, *supra* note 92, 226-33.

¹⁹⁶ *Id.*, 233, 281-89.

¹⁹⁷ Michael Skapinker, *Unlikely Revolutionaries*, FIN. TIMES, November 20, 2002, 15; Thomas A. Kochan, *Addressing the Crisis in Confidence in Corporations: Root Causes, Victims, and Strategies for Reform*, 16 ACAD. MGMT. EXEC. 139, 139, 141 (2002); Jeff Madrick, *Are Corporate Scandals Just Greed, or a Predictable Result of a Theory?*, N.Y. TIMES, February 20, 2003, C2.

¹⁹⁸ H. Jeff Smith, *The Shareholders vs. Stakeholders Debate*, MIT SLOAN MGMT. REV., Summer 2002, 85, 85, 89 ("The stakeholder theory may have a slight edge...."); Neil Fligstein, *The End of (Shareholder Value) Ideology?*, 17 POLITICAL POWER & SOC. THEORY, 223, 226-28 (2005).

¹⁹⁹ John A. Byrne, *After Enron: The Ideal Corporation*, BUS. WK., August 26, 2002, 68.

²⁰⁰ Shoonchul Shin, Juyoung Lee & Pratima (Tima) Bansal, *From a Shareholder to Stakeholder Orientation: Evidence From the Analyses of CEO Dismissal in Large U.S. Firms*, 43 STRAT. MGMT. J. 1233 (2022).

however, corporate America continued to prioritize shareholders.²⁰¹ For instance, while the *Economist* said in 2005, “(c)ompanies at every opportunity now pay elaborate obeisance to the principles of corporate social responsibility”,²⁰² it noted that, as advocates of what is known as “CSR” disapprovingly acknowledged, “(f)irms are still mainly interested in making money.”²⁰³ A fresh potential corporate purpose game-changer, however, was on the way in the late 2000s.

The 2008 financial crisis featured a sharp if fairly brief decline in share prices and unpopular bailouts of financial firms the risky behavior of which apparently had put the US economy at considerable risk.²⁰⁴ Criticism of corporate prioritization of shareholder returns ensued,²⁰⁵ as did some predictions that a reorientation in favor of stakeholders was in prospect.²⁰⁶ It may have been the case that due to the financial crisis “doubts about the self-evidence of shareholder value began to bubble into the mainstream.”²⁰⁷ Nevertheless for at least a decade after the onset of the financial crisis, the clear consensus was that corporate purpose in America’s publicly traded companies was shareholder focused.²⁰⁸

III. CORPORATE PURPOSE – LAW AND NORMS

We have just seen that the status of corporate purpose in American public companies can be described in a cyclical fashion, with shareholder primacy setting the tone since the

²⁰¹ Bratton & Wachter, *supra* note 124, 100, 151; Fairfax, *supra* note 189, 677, 682; Matthew T. Bodie, *AOL Time Warner and the False God of Shareholder Primacy*, 31 J. CORP. L. 975, 980 (2006).

²⁰² *The Good Company*, *ECONOMIST*, January 22, 2005, 9.

²⁰³ *The Good Company*, *ECONOMIST*, January 22, 2005, A Survey of Corporate Responsibility, 3, 4.

²⁰⁴ CHEFFINS, *supra* note 92, 303-5.

²⁰⁵ Matthew T. Bodie, *The Post-Revolutionary Period in Corporate Law: Returning to the Theory of the Firm*, 35 SEATTLE U. L. REV. 1033, 1039 (2012); Mariana Pargendler, *The Corporate Governance Obsession*, 42 J. CORP. L. 359, 397-98 (2016); N. Craig Smith & David Rønnegard, *Shareholder Primacy, Corporate Social Responsibility, and the Role of Business Schools*, 134 J. BUS. ETHICS 463, 464 (2016).

²⁰⁶ Stout, *supra* note 24, discussed *supra* note 25 and accompanying text; Pfeffer, *supra* note 34, 91 (“the chances are pretty good that stakeholder interests will remain at the top of the list a bit longer this time”);.

²⁰⁷ Karen Ho, *In the Name of Shareholder Value: Origin Myths of Corporations and Their Ongoing Implications*, 43 SEATTLE U. L. REV. 609, 612 (2020).

²⁰⁸ Sneider, *supra* note 104, 76; Wise, *supra* note 3, 500 (“since about the 1970s” shareholder primacy “has consistently held the crown in the United States corporate world”); Christopher M. Bruner, *The Fiduciary Enterprise of Corporate Law*, 74 WASH. & LEE L. REV. 791, 804 (2017) (“There is no gainsaying the extraordinary power of shareholder-centrism as a dominant norm in corporate governance”); Lenore Palladino, *The Economic Argument for Stakeholder Corporations*, Roosevelt Institute Working Paper, 9 (2019) (“In the United States, business corporations operate according to a model of ‘shareholder primacy’”); Charles R.T. O’Kelley, *From Berle to Present: The Shifting Primacies of Corporation Theory* in THE OXFORD HANDBOOK OF THE CORPORATION 119, 119 (Thomas Clarke, Justin O’Brien & Charles R.T. O’Kelley eds., 2019) (“currently shareholder primacy explains the nature of the modern corporation”).

mid-1980s. A cyclical trajectory implies that a broader, stakeholder-oriented conception of corporate purpose will take hold in the not-too-distant future. Might, however, corporate law preclude a fresh turn? We consider this possibility in section A. A detailed analysis of the applicable law is unnecessary because the topic has already been canvassed extensively elsewhere²⁰⁹ and because a key point is clear: corporate law statutes do not directly instruct boards to prioritize shareholders.

The fact that corporate law does not give explicit corporate purpose instructions means, as section B indicates, that extra-legal factors may well dictate how public company executives think about corporate purpose going forward. Shareholder-friendly aspects of corporate law ultimately tend, however, to tilt matters in favor of shareholders. Part VI.B picks up on this point.

A. Corporate Purpose -- the Legal Terrain

Section 172(1) of the U.K. Companies Act 2006 imposes on company directors a duty to promote the success of the company, indicating in so doing that while regard should be had for designated corporate constituencies the primary beneficiaries are to be the shareholders.²¹⁰ According to some observers, the position is even more shareholder friendly in the U.S. Vivek Ramaswamy, a stakeholderism critic, has said “the law is clear: Corporate boards are obligated to act with the sole purpose of advancing the best interests of stockholders.”²¹¹ In fact, no state corporation code imposes an explicit duty on directors to prioritize shareholders

²⁰⁹ See, for example, Leo E. Strine, *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761 (2015); Joan MacLeod Heminway, *Shareholder Wealth Maximization as a Function of Statutes, Decisional Law, and Organic Documents*, 74 WASH. & LEE L. REV. 939 (2017); Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, 102 MINN. L. REV. 1951 (2018); Stephen M. Bainbridge, *Why We Should Keep Teaching Dodge v. Ford Motor Co.*, 48 J. CORP. L. 77 (2022).

²¹⁰ Companies Act 2006, c. 46, § 172 (U.K.). As is the case throughout the legislation, the provision refers to “members” of companies instead of shareholders.

²¹¹ Vivek Ramaswamy, *ESG and the “Long-Run Interests” Dodge*, WALL ST. J., Sept. 30, 2022, A17. See also BAINBRIDGE, *supra* note 46, 169 (“Shareholder value maximization is the law”).

or any other corporate constituency.²¹² This includes Delaware,²¹³ where a majority of larger publicly traded corporations are incorporated.²¹⁴

U.S. corporate law, in addition to lacking a direct statutory invocation to boards to serve shareholder interests, gives boards discretion in various ways to use their managerial authority in a stakeholder-friendly manner. As mentioned, a substantial majority of states have constituency statutes in place that explicitly empower boards to take stakeholder interests into account.²¹⁵ In addition, states pretty much universally include in their corporate statutes provisions that specifically authorize corporate charitable contributions,²¹⁶ and courts have since the 1950s interpreted broadly board discretion in this area.²¹⁷ Also salient is that courts apply the business judgment rule, meaning they will not second-guess decisions by directors who act on a good faith, informed basis and honestly believe actions they are taking are in their company's best interests.²¹⁸ Boards correspondingly have substantial scope to consider "altruistic factors" without being at risk of a breach of duty.²¹⁹

While corporate law affords directors considerable scope to advance stakeholders' interests, there are shareholder-related limits. According to the distinguished Delaware-based jurist Leo Strine, despite the business judgment rule, "if a fiduciary admits that he is treating

²¹² Stout, *supra* note 104, 169; Tamara Belinfanti & Lynn Stout, *Contested Visions: The Value of Systems Theory for Corporate Law*, 166 U. PA. L. REV. 579, 621 (2018); Christopher M. Bruner, *Conceptions of Corporate Purpose in Post-Crisis Financial Firms*, 36 SEATTLE U. L. REV. 527, 532, n. 17 (2013) (specifically contrasting the U.S. with the U.K.). The American Law Institute's 1993 Principles of Corporate Governance identify the objective of the corporation, but the relevant measure does not contemplate imposing any obligations on directors or corporate officers and has had very little impact on state law. See PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01 (AM. L. INST. 1994), discussed on this point by Bainbridge, *supra* note 4, 3-4, 11.

²¹³ Raz, *supra* note 8, 536; Fisch, *supra* note 190, 652; Virginia Harper Ho, *Enlightened Shareholder Value: Corporate Governance beyond the Shareholder-Stakeholder Divide*, 36 J. CORP. L. 59, 74 (2010); Jeff Schwartz, *De Facto Shareholder Primacy*, 79 MD. L. REV. 652, 669 (2020).

²¹⁴ John Armour, Bernard Black & Brian Cheffins, *Delaware's Balancing Act*, 87 IND. L.J. 1345, 1348 (2012).

²¹⁵ *Supra* note 188 and related discussion.

²¹⁶ David L. Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1, 14 (1979). See, for example, DEL. CODE ANN. tit. 8, § 122(9).

²¹⁷ A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581 (N.J. 1953), discussed by Winkler, *supra* note 193, 117.

²¹⁸ Stout, *supra* note 82, 5; Fairfax, *supra* note 189, 685; Andrew S. Gold, *A Decision Theory Approach to the Business Judgment Rule: Reflections on Disney, Good Faith, and Judicial Uncertainty*, 66 MD. L. REV. 398, 401 (2007).

²¹⁹ M.J. Pritchett, *Corporate Ethics and Corporate Governance: A Critique of the ALI Statement on Corporate Governance Section 2.01(b)*, 71 CALIF. L. REV. 994, 1003 (1983). See also Holger Spamann & Jacob Fischer, *Corporate Purpose: Theoretical and Empirical Foundations/Confusions*, ECGI Working Paper Series in Law No. 664/2022, 11 ("In corporate law, there is not a single case of managers or directors being held personally liable for furthering stakeholder interests over shareholder interests").

an interest other than stockholder wealth as an end in itself, rather than an instrument to stockholder wealth, he is committing a breach of fiduciary duty.”²²⁰ *Dodge v. Ford Motor Co.* was one of these “confession cases”,²²¹ with Henry Ford’s declaration that his supposed altruistic interest in helping workers and consumers trumped his regard for the stockholders precluding business judgment rule protection.²²² The result was the same in *eBay Domestic Holdings, Inc. v. Newmark*, where the Delaware Supreme Court rejected an argument that the founders of Craigslist, a web-based classified advertisement service, advanced that protecting the firm’s social values and community-centered culture justified the deployment of defensive techniques to thwart a takeover.²²³ Such uncommon facts aside, the absence of an explicit corporate purpose instruction and features of corporate law such as the business judgment rule afford boards considerable theoretical discretion to implement stakeholder-friendly policies.

B. Corporate Purpose Norms

Given the absence of an explicit statutory instruction and the vesting of boards with substantial discretion, arguably with respect to corporate purpose, US corporate law is characterized by “ambivalence”²²⁴ and “a lack of clarity.”²²⁵ The ambiguity implies shareholder centrism in American companies ultimately might be no more than an extra-legal phenomenon. Lynn Stout said, for instance, that the prioritization of shareholders is “an ideology, not a legal requirement or a practical necessity of modern business life.”²²⁶

²²⁰ Strine, *supra* note 209, 776-77. See also LoPucki, *supra* note 17, 2020, 2030.

²²¹ Lipshaw, *supra* note 105, 366; Strine, *supra* note 209 at 777; Edward B. Rock, *Easterbrook and Fischel on Corporate Purpose*, 1 U. CHI. BUS. L. REV. 377, 409 (2022).

²²² *Dodge*, 170 N.W. at 683; Leo E. Jr. Strine, *Our Continuing Struggle with the Idea That For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 148 (2012).

²²³ *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010), discussed by Rock, *supra* note 221, 409-10; Strine, *supra* note 222, 148-49; Jackson C. Esker, *Corporate Social Responsibility: Can a Corporation Be Responsible If Its Only Responsibility Is to the Shareholders?*, 106 IOWA L. REV. 1961, 1969 (2021).

²²⁴ CHRISTOPHER M. BRUNER, *CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD: THE POLITICAL FOUNDATIONS OF SHAREHOLDER POWER* 42-44 (2013). See also David Millon, *Shareholder Primacy in the Classroom after the Financial Crisis*, 8 J. BUS. & TECH. L. 191, 194 (2013) (“ambivalent”).

²²⁵ BARNALI CHOUDHURY & MARTIN PETRIN, *CORPORATE DUTIES TO THE PUBLIC* 50 (2019). See also Johnson, *supra* note 39, 967 (“the law is far from crystal clear”); Heminway, *supra* note 209, 952 (“the lack of a coherent legal rule”), 970; Benedict Sheehy & Donald Feaver, *Anglo-American Directors' Legal Duties and CSR: Prohibited, Permitted or Prescribed*, 37 DALHOUSIE L.J. 345, 356 (2014); (“(t)he American law...is unclear”); Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J.L. FIN. & ACCTING. 247, 263 (2017) (“considerable confusion....(M)uddled state of affairs”).

²²⁶ LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* 3 (2012).

Numerous other commentators suggest similarly that shareholder centrism in corporate America takes the form of a market norm rather than a legal rule,²²⁷ with the underlying assumption being that norms substantially influence corporate purpose trends.²²⁸ A logical corollary is that the incumbent shareholder centrality norm could be displaced without major legal change, reorienting corporate purpose in the process.²²⁹ Arguably, the Business Roundtable moved matters in this direction when it issued its 2019 statement on corporate purpose that emphasized a “fundamental commitment” to stakeholders and said little about shareholders.²³⁰

There appears to be historical precedent for an upending of corporate purpose norms that shape managerial priorities. In 1981, as we have seen, the Business Roundtable was emphasizing that executives should “serve the public interest.”²³¹ There likewise were suggestions during this still stakeholder-friendly era that “(c)orporate altruistic action ha(d) reached...such proportions that the straining of existing legal norms (had) become inadequate for the guidance of business”²³² and that a “convergence of intuition, normative theory, and law brings us into reflective equilibrium: corporations can act (ought to be able to act) socially responsible, regardless of the economic consequences of their acts.”²³³

A shareholder centrality mentality, fostered by mid-1980s hostile takeovers, would in very short order displace such assessments. No specific legal changes underpinned the switch, which instead was market driven. Performance-related rivalry between asset managers was intensifying at the time, and selling shares in a target company at a substantial premium a takeover bidder was offering could provide a valuable competitive edge.²³⁴ Public company executives realized in this environment they could not take shareholder loyalty for granted and had to pay attention to their shareholder base in a way they had not previously if

²²⁷ On the prevalence of this view, see Macey, *supra* note 88, 950; Fisch, *supra* note 190, 650. For examples, see Smith & Rönnegard, *Shareholder*, *supra* note 205, 465; Bruner, *supra* note 212, 532; Ho, *supra* note 213, 70.

²²⁸ Fairfax, *supra* note 14, 1232.

²²⁹ Bruner, *supra* note 212, 532 (arguing that the shareholder wealth maximization norm should be displaced in favor of a norm focusing on sustainability of the corporate enterprise).

²³⁰ Fairfax, *supra* note 14, 1234-35; Business Roundtable, *supra* note 45.

²³¹ *Supra* note 163 and related discussion.

²³² Rodman M. Elfin, *The Current Need for a New Candid Legal Standard Recognizing Broad Corporate Social Responsibility*, 11 PAC. L. J. 235, 254 (1980).

²³³ Mangrum, *supra* note 169, 70.

²³⁴ CHEFFINS, *supra* note 92, 196.

they wanted to keep their jobs.²³⁵ As the *New York Times* said in 1985, “current corporate catchwords are ‘restructuring’ and ‘maximizing shareholder value.’ It turns out that the best defense against corporate raiders is to beat them at their own game of trying to drive up a stock price.”²³⁶

Could a similar extra-legal corporate purpose pivot in a stakeholder-friendly direction currently be underway? We have just seen that corporate law does not offer decisive guidance on corporate purpose, which leaves room for a stakeholder-friendly norm to gain hold in American boardrooms and reorient managerial priorities. We consider next evidence indicating this sort of switch could be occurring before canvassing in Part V potential corporate purpose trajectories. In Part VI we will return to corporate law, finding out in so doing that elements tilt against a fresh stakeholder-oriented turn of the corporate purpose cycle even absent a specific statutory direction. We need to consider first, however, why a corporate purpose turn of the wheel may be underway.

IV. WHY MIGHT A FRESH TURN OF THE CORPORATE PURPOSE CYCLE BE OCCURRING?

During the first two decades of the 21st century, there were circumstances that cast doubt on Henry Hansmann and Reinier Kraakman’s corporate purpose-related 2001 prediction of the shareholder-focused end of history of corporate law.²³⁷ Nevertheless, as the 2010s drew to a close, publicly traded firms were continuing to treat shareholders as their top priority.²³⁸ Perhaps, though, matters have changed sufficiently in the past few years to say that corporate purpose will soon clearly extend beyond the shareholders, if it does not already. We consider here reasons for this potential change of emphasis.

Reportedly, “stakeholderism” is now “all the rage,”²³⁹ implying “‘(s)takeholder capitalism’ is officially here,”²⁴⁰ and perhaps presaging an era of “welfarist corporate governance”.²⁴¹ This suggests that with respect to corporate purpose, “There is a new

²³⁵ *Id.*, 195.

²³⁶ Daniel F. Cuff, *The Rising Tide of Mergers*, NY TIMES, June 28, 1985, D1.

²³⁷ *Supra* notes 28-31, 196-199, 206-207 and related discussion.

²³⁸ *Supra* note 208 and accompanying text.

²³⁹ *The Perils of Stakeholderism*, ECONOMIST, September 19, 2020, 65; Jonathan Ford, *Stakeholderism is not a Magic Wand We Can Wave Over the Economy*, FIN. TIMES, March 9, 2020, 11 (“in vogue”).

²⁴⁰ Vivek Ramaswamy, *The “Stakeholders” vs. the People*, WALL ST. J., February 13, 2020, A17.

²⁴¹ Marcel Kahan and Edward B. Rock, *The Emergence of Welfarist Corporate Governance*, ECGI Working Paper Series in Law, No. 683/2023 (2023).

zeitgeist at work.”²⁴² More precisely, with corporations “increasingly laying claim to constituency-minded or social purposes” corporate purpose “is the hot topic in corporate governance”²⁴³ and “the new watchword.”²⁴⁴

To the extent there in fact is a new corporate purpose zeitgeist, COVID-19 has played an important role. The pandemic underscored society’s dependence on the corporate sector to satisfy society’s core needs while simultaneously heightening expectations that companies would promote the common interest rather than simply maximize profits.²⁴⁵ Companies, for their part, were reminded of the tight connection between business and society, with some suffering a swift, unprecedented decline in demand for their services on offer while others, perhaps partly due to having cut slack previously to increase profitability, struggled to fulfil orders due to pandemic related staff shortages and supply chain snarls.²⁴⁶

The COVID-19 pandemic also served as an exogenous shock that accelerated pro-stakeholder trends that might have otherwise left shareholder centrality largely undisturbed.²⁴⁷ For instance, while CEOs of numerous companies were already announcing ambitious plans to reduce their firms’ carbon footprint as the 2010s drew to a close,²⁴⁸ the pandemic accelerated the process by heightening substantially pre-existing concerns about climate change.²⁴⁹ The same may have occurred with racism due to a perception that the

²⁴² Peter J. Buckley, *The Social Purpose of the Modern Business Corporation*, 6 ANNALS CORP. GOV. 1, 60 (2021).

²⁴³ Fisch & Solomon, *supra* note 85, 1309. See also Matteo Gatti & Chrystin Ondersma, *Stakeholder Syndrome: Does Stakeholderism Derail Effective Protections for Weaker Constituencies?*, 100 N.C. L. REV. 167, 168 (2021).

²⁴⁴ Patrick Hosking, *Greed May be Dead, But Who Says the New Corporate Creed is any Better?*, TIMES, September 22, 2020, 37.

²⁴⁵ Kaplan, *supra* note 7, 288; Peter Ford, *A New Ethos for Capitalism? “Do the Right Thing”*, CHRIS. SCI. MONITOR, March 23, 2020, <https://www.csmonitor.com/layout/set/print/World/2020/0323/A-new-ethos-for-capitalism-Do-the-right-thing>; Lynn S. Paine, *Covid-19 Is Rewriting the Rules of Corporate Governance*, HBR.ORG, October 6, 2020, <https://hbr.org/2020/10/covid-19-is-rewriting-the-rules-of-corporate-governance>; Gertrude Amorkor Amarh, *The Search for the Corporate Objective: Observations from the COVID-19 Pandemic*, 33 INT’L. CO. & COMM. L. REV. 491, 498-99 (2022).

²⁴⁶ Blair, *supra* note 142; Paine, *supra* note 245; Martin Gelter & Julia M. Puauschunder, *COVID-19 and Comparative Corporate Governance*, 46 J. CORP. L. 557, 559-60, 578-79 (2021).

²⁴⁷ Gelter & Puauschunder, *supra* note 246, 559-60; Peer Zumbansen, *The Corporation in an Age of Divisiveness*, TLI Think/Paper 1/2023, 6, 37-38 (2023).

²⁴⁸ Rick Wartzman, *The Tricky Role of the CEO in a New Era of Social Responsibility*, WALL ST. J., online, December 12, 2019, <https://www.wsj.com/articles/the-tricky-role-of-the-ceo-in-a-new-era-of-social-responsibility-11576170755>.

²⁴⁹ Adil Mohommad & Evgenia Pugacheva, *Impact of COVID-19 on Attitudes to Climate Change and Support for Climate Policies*, International Monetary Fund Working Paper 22/23 (2022).

pandemic had an outsized adverse impact on African Americans.²⁵⁰ Employees and customers, especially younger ones,²⁵¹ increasingly prioritized social causes amidst the economic dislocation the pandemic fostered and were able to publicize their views readily via social media.²⁵² CEOs in turn found they had strong personal incentives to adopt stakeholder-friendly stances on issues of the day as opposed to emphasizing their firms' tight focus on the bottom line.²⁵³ For instance, the reigniting of the Black Lives Matter movement in the summer of 2020 in response to much condemned police behavior elicited "a virtual flood of statements" from major American corporations condemning racism and intolerance and pledging to work to eradicate racist policies and practices.²⁵⁴

But even if COVID-19 accentuated concerns about issues such as climate change and racism, why were corporations put on the spot? Why wouldn't those concerned about the climate, racial inequality and other social causes lobby lawmakers for regulatory change directly addressing such matters rather than focusing on the corporate sector? The driver was a belief companies could fill a vacuum ineffective government was leaving.²⁵⁵ There was a sense that public officials, riddled by gridlock, were not getting to grip with increasingly acute problems.²⁵⁶ Business leaders reputedly inspire more trust than politicians and

²⁵⁰ *How Black Lives Matter and the Pandemic Came Together*, FUTURE LEARN, <https://www.futurelearn.com/info/courses/dealing-with-loss-covid-19/0/steps/145846>; Madeleine Schachter, *Black Lives Matter and COVID-19: Lessons in Coincidence, Confluence, and Compassion*, 4 (3/4) INT'L. J. INFO. DIVERSITY & INCLUSION 81 (2020).

²⁵¹ Baruza, Curtis & Webber, *supra* note 50, 22-24; Martin, *supra* note 139 (consumers); *Columbia Law School Roundtable on the Future of Capitalism*, J. APP. CORP. FIN., Spring 2020, 42, 58 (employees).

²⁵² *From Handshake to Clenched Fist*, ECONOMIST, April 17, 2021, 55; James Mackintosh, *Shareholders Still Reign Supreme Despite CEOs' Promises to Society*, WALL ST. J., February 11, 2022, B1.

²⁵³ Baruza, Curtis & Webber, *supra* note 50, 3-4; *From Handshake*, *supra* note 252; Andrew Ross Sorkin, *Profits or Public Interest?*, N.Y. TIMES, September 19, 2019, F2.

²⁵⁴ Lisa M. Fairfax, *Racial Rhetoric or Reality? Cautious Optimism on the Link Between Corporate #BLM Speech and Behavior*, [2022] COLUM. BUS. L. REV. 118, 120.

²⁵⁵ *The Political CEO*, ECONOMIST, April 17, 2021, 12. See also Baruza, Curtis & Webber, *supra* note 50, 16 (summarizing the argument but saying it does not offer a full explanation for the pressure brought to bear on companies).

²⁵⁶ Hannes, Libson & Parchomovsky, *supra* note 50, 14; Mark J. Roe, *Corporate Purpose and Corporate Competition*, 99 WASH. U. L. REV. 223, 225 (2021).

companies are increasingly thought of as influential agents of social change.²⁵⁷ So, perhaps corporate America could ride to the rescue.²⁵⁸

One might have anticipated that as pressure mounted on the corporate sector to pivot away from shareholder centrality stockholders would have served as a bulwark against the trend. As we will see in Part VI, shareholders ultimately may perform this function. As the 2020s got underway, however, an influential subset of shareholders arguably were the leading proponents of stakeholder focused corporate objectives,²⁵⁹ these being “the Big Three”: the three largest U.S.-based asset managers, BlackRock, Vanguard and State Street.²⁶⁰ Larry Fink, BlackRock’s CEO, was particularly vocal, using an annual letter addressed to corporate leaders “to implore them to look beyond the bottom line and make a positive contribution to society.”²⁶¹ Vanguard and State Street executives also declared publicly, however, their support for stakeholder related causes.²⁶²

With “the Big Three” collectively owning approximately one-quarter of the shares of the companies in the S&P 500 index²⁶³ comprised of 500 of America’s leading public companies encompassing approximately 80 per cent of overall stock market capitalization,²⁶⁴ these asset managers are well-positioned to influence corporate executives on issues such as

²⁵⁷ Jeffrey Sonnenfeld, *People Trust Executives to Intervene in Social Issues*, ECONOMIST.COM, September 14, 2022, <https://www.economist.com/by-invitation/2022/09/14/people-trust-executives-to-intervene-in-social-issues-says-jeffrey-sonnenfeld> ; Ore Ogunbiyi, *Time to Take a Stand*, THE ECONOMIST -- THE WORLD AHEAD 2023, 118; Jennifer Fan, *Woke Capital Revisited*, SEATTLE UNIV. L. REV. 3-4 (forthcoming, 2023).

²⁵⁸ *What Companies Are For?*, ECONOMIST, August 24, 2019, 7.

²⁵⁹ Lipton, Rosenblum, Cain & Tatum, *supra* note 15, 1; Baruza, Curtis & Webber, *supra* note 50, 32. Cf. Bernard Sharfman, *How the ‘Market Share Opportunism’ of Investment Advisers is Harming Investors and Public Companies*, PROMARKET, April 18, 2023 (agreeing about which shareholders were taking the lead but arguing that this was being done to capture market share among investors rather than for altruistic reasons).

²⁶⁰ CHEFFINS, *supra* note 92, 376.

²⁶¹ David Gelles & Hiroko Tabuchi, *How an Organized Republican Effort Punishes Companies for Climate Action*, N.Y. TIMES, May 27, 2022, <https://www.nytimes.com/2022/05/27/climate/republicans-blackrock-climate.html> .

²⁶² Fairfax, *supra* note 14, 1172; BAINBRIDGE, *supra* note 46, 158. For examples, see Justin Baer, *Banker Has Long View on Change*, WALL ST. J., December 26, 2019, B5 (State Street); Vibeka Mair, *Vanguard Says its Patience With Firms on Client Change is “Running Short”*, RESPONSIBLE INVESTOR, March 3, 2021, <https://www.responsible-investor.com/vanguard-says-its-patience-with-firms-on-climate-change-is-running-short/> .

²⁶³ Wolf-Georg Ringe, *Investor-led Sustainability in Corporate Governance*, ECGI Working Paper Series in Law, 615/2021, 25-26 (2021).

²⁶⁴ S&P Dow Jones Indices, *S&P 500*, <https://www.spglobal.com/spdji/en/indices/equity/sp-500/#overview> .

climate change, racial justice and diversity in the boardroom.²⁶⁵ For instance, the Big Three played a pivotal role in a 2021 “milestone in climate-driven activism”²⁶⁶ involving oil giant Exxon, in which they collectively owned over 20% of the shares.²⁶⁷ Their backing was crucial when Engine No.1, an activist investment fund run by a former long-time BlackRock managing director that only owned 0.02% of Exxon’s shares,²⁶⁸ got three climate-conscious directors appointed to Exxon’s board.

Given the foregoing, it might well seem, as the *Wall Street Journal* has said, “Earning the perception of good corporate citizenship, in the form of environmental, social and governance bona fides, is no longer optional for the modern executive.”²⁶⁹ Moreover, to the extent public company executives do have discretion, they should by no means be intrinsically antagonistic toward recent corporate purpose trends. This is partly pragmatic. As the *Journal* has put it, with respect to executives adopting a stakeholder-oriented managerial stance, there is “more than a whiff of pre-emptive politics here.”²⁷⁰ Law professor Ed Rock has identified the underlying logic: “if corporate America does not reorient itself in a way that is more politically legitimate, mandatory legislation will not be far behind.”²⁷¹

The members of the Business Roundtable likely were mindful of the threat of fresh, unwelcome regulation when the Roundtable issued its 2019 “Statement on the Purpose of a Corporation” emphasizing “a fundamental commitment to all of our stakeholders.”²⁷²

²⁶⁵ See Dorothy S. Lund, *Asset Managers as Regulators*, 2-3, 33 (2022), <https://ssrn.com/abstract=3975847> (paralleling the Big Three with government regulators). On racial justice being a priority, see Ringe, *supra* note 263, 6.

²⁶⁶ Michael J. de la Merced, *How Exxon Lost a Board Battle With a Small Hedge Fund*, N.Y. TIMES, May 28, 2021, <https://www.nytimes.com/2021/05/28/business/energy-environment/exxon-engine-board.html> (quoting law professor Ed Rock). See also *Gadflies in the Boardroom*, ECONOMIST, June 12, 2021, 62 (“an awe-inspiring feat”, “supercool”).

²⁶⁷ Haan, *supra* note 6, 11; Justin Baer & Dawn Lim, *The Man Who Battled Exxon—and Won*, WALL ST. J., June 12, 2021, B1; Robert P. Bartlett & Ryan Bubb, *Corporate Social Responsibility through Shareholder Governance*, ECGI Working Paper Series in Law, Working Paper No. 682/2023, 56 (2023).

²⁶⁸ Vivek Ramaswamy, *BlackRock’s Climate Crusade Doublespeak*, WALL ST. J., February 7, 2022, A17.

²⁶⁹ Charley Grant, *It’s a Tricky Time to Be A CEO Without a Cause*, WALL ST. J., June 5, 2021, B4. See also Baruza, Curtis & Webber, *supra* note 50, 26-27; Matthew T. Bodie, *Labor Relations at the Woke Corporation*, NYU ANNUAL SURVEY OF AMERICAN LAW, forthcoming, <https://ssrn.com/abstract=4298588>, 7 (“when companies have failed to respond to the new corporate environment, they have often been forced to change course”).

²⁷⁰ *The Stakeholder CEOs*, WALL ST. J., August 20, 2019, A14.

²⁷¹ Rock, *supra* note 6, 389.

²⁷² Business Roundtable, *supra* note 45. See also Bainbridge, *supra* note 7, 316.

Elizabeth Warren, who had recently proposed legislation that would have required large American companies to apply for federal charters obliging the firms to adhere to various stakeholder friendly rules,²⁷³ was emerging at that point as a serious Democratic contender for the White House.²⁷⁴ Corporate executives, with some justification “(f)earing for the future of their societal ‘licence to operate,’” thus had politically driven incentives to promise “to do better, with a focus less on shareholders and more on the other constituents that their decisions affect.”²⁷⁵ Warren fell short in her bid for the presidency but the Democrats controlled the White House and Congress following the 2020 election.²⁷⁶ American chief executives, being aware of declared Democratic economic priorities, likely surmised it was sensible to stay on the good side of Democrat politicians and would have been aware that adopting stakeholder-friendly stances might well mark out valuable “political safe space” for their companies.²⁷⁷

Public company executives could well be sympathetic to a deprioritizing of shareholders in a reorientation of corporate priorities even absent the political dimension. In 1959, during the height of the immediate post-World War II managerial capitalism era when corporate executives were widely understood to have responsibilities extending well beyond shareholders,²⁷⁸ business law professor Frederick Kempin observed “It appears that management itself has not been adverse to this broader responsibility.”²⁷⁹ The situation could well be similar now, with senior executives likely welcoming “the opportunity of a break from shareholder pressures.”²⁸⁰ The *Financial Times* has explained the appeal of a broadly cast set of managerial priorities to executives as follows:

“Meeting financial targets consistently is tedious, but promising to improve the world sounds heroic. It goes down well with investors and appeals to employees who want

²⁷³ *Supra* note 54 and related discussion.

²⁷⁴ *Warrensworld*, *ECONOMIST*, October 26, 2019, 19.

²⁷⁵ Ford, *supra* note 239.

²⁷⁶ Katherine Gypson, *With Control of White House and Congress, Democrats Have 2 Years to Make Big Changes*, *VOX*, January 22, 2021, https://www.voanews.com/a/usa_us-politics_control-white-house-and-congress-democrats-have-2-years-make-big-changes/6201047.html .

²⁷⁷ *Down With Big Business, Again*, *WALL ST. J.*, April 15, 2021, A16.

²⁷⁸ *Supra* notes 133-135 and related discussion.

²⁷⁹ Frederick G. Kempin, *The Public Interest in the Corporation*, 64 *DICK. L. REV.* 357, 359 (1959).

²⁸⁰ Matteo Gatti & Chrystin Ondersma, *Can a Broader Corporate Purpose Redress Inequality? The Stakeholder Approach Chimera*, 46 *J. CORP. L.* 1, 8 (2020). See also BAINBRIDGE, *supra* note 46, 116.

to believe they work for an ethical outfit. Everyone gets a warm feeling from being told they are on a higher path.”²⁸¹

Broad managerial discretion unencumbered by shareholder prioritization is potentially attractive in other ways for corporate executives. Many appear to “have a deep-seated suspicion of shareholders,” believing investors lack sufficient knowledge and patience to back managerial strategies likely to improve corporate fortunes substantially but only over the long-term.²⁸² Moreover, all else being equal, executives would prefer not to have their compensation closely linked to shareholder returns. Such an arrangement is potentially undesirable for senior management because share prices can end up fluctuating substantially for reasons outside managerial control and because from an investment diversification perspective executives would understandably rather not have their pay closely linked to the performance of the firm in which they have tied up virtually all of their human capital.²⁸³ Still, when executive compensation was reorganized in the 1990s to combine a stronger link between pay and shareholder returns with a markedly more lucrative potential upside, “executives were only too happy to accept the generous stock compensation being offered.”²⁸⁴ Executive pay continues to feature share plans and stock options prominently.²⁸⁵ So long as overall pay does not decline appreciably, corporate executives have good reason to welcome stakeholder-friendly corporate governance that reduces the link between shareholder returns and managerial compensation.

V. POTENTIAL CORPORATE PURPOSE TRAJECTORIES

To this point, a plausible case has been advanced that, in cyclical fashion, corporate purpose in corporate America is moving away from the shareholder centrality that took hold in the 1980s back towards the stakeholder-friendly arrangement that took shape immediately following World War II. As Part VI will discuss, it is in fact doubtful whether such a

²⁸¹ John Gapper, *Greenwashing is Tempting for CEOs Who Tell Stories*, FIN. TIMES, June 4, 2022, 9. See also James D. Cox & Randall S. Thomas, *A Revised Monitoring Model Confronts Today's Movement toward Managerialism*, 99 TEX. L. REV. 1275, 1305 (2021).

²⁸² Langevoort, *supra* note 140, 403.

²⁸³ Steven A. Bank, Brian R. Cheffins & Harwell Wells, *Executive Pay: What Worked?*, 42 J. CORP. L. 59, 68 (2016).

²⁸⁴ Steve Denning, *The Origin Of “The World's Dumbest Idea”: Milton Friedman*, FORBES.COM, June 26, 2013, available at <https://www.forbes.com/sites/stevedenning/2013/06/26/the-origin-of-the-worlds-dumbest-idea-milton-friedman/>. See also Bank, Cheffins & Wells, *supra* note 283, 68.

²⁸⁵ Fairfax, *supra* note 14, 1221; BAINBRIDGE, *supra* note 46, 75.

pendulum swing will occur. To provide context for this prediction, this part of the article will canvass potential corporate purpose trajectories.

Academics, including law professors, tend not to offer self-contained chronicles of how and why change occurs within their field.²⁸⁶ Such an exercise is necessary here, however, to assess the plausibility of the cyclical corporate purpose trajectory potentially underway. We will begin by identifying other potential trajectories so as to contrast them with a cyclical pattern. Possibilities we will focus on are that legally related concepts such as corporate purpose evolve steadily over time and that a generally stable equilibrium featuring incremental change can on occasion be substantially disrupted, setting the scene for an enduring change of direction.

A. An Evolutionary Trajectory

While legal academics typically refrain from analyzing systematically patterns of change in the legal realm, there is a general, if largely implicit, consensus that law, and legally related concepts, evolve. Law professor Karrigan Bork has made the point directly, saying “Law evolves. Law evolves to accommodate changes in societal goals, physical conditions, cultural norms, technology, and scientific understanding.”²⁸⁷ More generally, though, acceptance of the logic involved seems to be implicit second nature among legal scholars. Reputedly, “the idea that law ‘evolves’ is so deeply ingrained in Anglo-American legal thought that most lawyers are no longer even conscious of it as a metaphor.”²⁸⁸

Caveats are in order. As Bork acknowledges, “Not every theory of legal change builds on an evolutionary approach.”²⁸⁹ Controversy regarding the nature of evolutionary theories often associated with Charles Darwin is one reason. As Bork notes, “(i)n a biological context, evolution is a freighted term.”²⁹⁰ Hence, “while law scarcely stands still”

²⁸⁶ Bodie, *supra* note 205, 1035; Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1327 (2002). For an exception, see Brian R. Cheffins, *The Trajectory of (Corporate Law) Scholarship*, 63 CAMBRIDGE L.J. 456 (2004).

²⁸⁷ Karrigan S. Bork, *An Evolutionary Theory of Administrative Law*, 72 SMU L. REV. 81, 83 (2019).

²⁸⁸ E. Donald Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38, 38 (1985). See also J.B. Ruhl, *Fitness of Law: Using Complexity Theory to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy*, 49 VAND. L. REV. 1406, 1412 (1996) (“Legal theory has found evolutionary biology an intoxicating paradigm for explaining why and how law changes”).

²⁸⁹ Bork, *supra* note 287, 91.

²⁹⁰ *Id.*, 90.

and thus “must be evolving”, “not all change necessarily fits our conception of evolution in the Darwinian sense.”²⁹¹

Another caveat is that while it might be true “(l)aw does change, it does develop,”²⁹² “(p)owerful forces create inertia in our laws and statutes.”²⁹³ For instance, in the courts stare decisis can delay change because with persuasive case law precedents in place “courts will do in the next period what they did in the last.”²⁹⁴ Still, with society constantly changing, judges are “continually faced with new circumstances and new legal issues.”²⁹⁵ Moreover, as we will see next, inertia may merely affect how law evolves rather than nullifying entirely the relevance of the evolutionary metaphor.

B. Punctuated Equilibrium and Critical Junctures

Assuming law does evolve, the exact pace and rhythm of change in a particular legal field remains unspecified. Evolutionary theory, according to law professor Oona Hathaway, “provides two competing models”, one being “a process of slow and steady change and the other a process of long periods of stasis followed by brief periods of rapid change.”²⁹⁶ With respect to the latter trajectory, the assumption is that while “policymaking is generally characterized by stasis or incremental change, it is occasionally interrupted by tectonic shifts.”²⁹⁷

In the 1990s, political scientists imported the concept of “punctuated equilibrium” from evolutionary biology to conceptualize bold policymaking changes that were a poor fit with a prevailing “incrementalism” model, reasoning that “lurches, bursts, waves, and jumps are rather undignified and certainly unscientific concepts.”²⁹⁸ Law professor and former SEC

²⁹¹ Ruhl, *supra* note 288, 1408. For a forceful critique of the proposition that legal change can and should be analyzed by reference to biological theories of evolution, see M.B.W. Sinclair, *Evolution in Law: Second Thoughts*, 71 U. DET. MERCY L. REV. 31 (1993).

²⁹² Sinclair, *supra* note 291, 57.

²⁹³ Mirit Eyal-Cohen, *Unintended Legislative Inertia*, 55 GA. L. REV. 1193, 1195 (2021). See also Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789 (2002) (drawing attention to and analyzing “legal transition costs”).

²⁹⁴ Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149, 174 (2001).

²⁹⁵ Robin Feldman, *Historic Perspectives on Law & Science*, [2009] STAN. TECH. L. REV. 1, 15 (2009).

²⁹⁶ Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 616 (2001).

²⁹⁷ Peter Conti-Brown & Brian D. Feinstein, *The Contingent Origins of Financial Legislation*, 99 WASH. U. L. REV. 145, 157 (2021).

²⁹⁸ David F. Prindle, *Importing Concepts from Biology into Political Science: The Case of Punctuated Equilibrium*, 40 POLICY STUD. J. 21, 31 (2012).

Commissioner Joseph Grundfest followed in the political scientists' footsteps in the early 2000s when he drew upon evolutionary biology literature to claim there could be "no doubt that 'punctuated equilibrium' is a stunningly accurate description of the evolution of United States securities laws."²⁹⁹ His punctuated equilibrium analysis has subsequently been cited frequently in discussions of reform of corporate and securities law.³⁰⁰ Academics have also invoked "punctuated equilibrium" to help to account for legal change in other areas of law, including administrative law³⁰¹ and property law.³⁰²

When punctuated equilibrium logic has been invoked to account for policy developments there has been a tendency simply to assume sudden change happens and leave the precise causation mechanism unidentified.³⁰³ What is referred to as critical juncture theory can address this analytical gap. While the theory's academic pedigree can be traced back at least to the early 1990s,³⁰⁴ it has had a negligible impact on legal scholarship.³⁰⁵ In contrast, the critical junctures model has gained a firm foothold in the social sciences literature.³⁰⁶

An influential 2007 article on critical junctures by Giovanni Capoccia and Daniel Kelemen defined "critical junctures as relatively short periods of time during which there is a substantially heightened probability that agents' choices will affect the outcome of

²⁹⁹ Joseph A. Grundfest, *Punctuated Equilibria in the Evolution of United States Securities Regulation*, 8 STAN. J.L. BUS. & FIN. 1, 1 (2002), citing Niles Eldredge & Stephen Jay Gould, *Punctuated Equilibria: An Alternative to Phylactic Gradualism*, in *MODES IN PALEIOBIOLOGY* 82 (T.J. M. Schopf, ed., 1972); Stephen Jay Gould, *The Episodic Nature of Evolutionary Change*, reprinted in *THE PANDA'S THUMB* 179 (1982).

³⁰⁰ See, e.g., Larry E. Ribstein, *Bubble Laws*, 40 HOUS. L. REV. 77, 78, n. 3 (2003); James J. Park, *The Competing Paradigms of Securities Regulation*, 57 DUKE L.J. 625, 675, n. 199 (2007); David G. Yosifon, *The Public Choice Problem in Corporate Law: Corporate Social Responsibility after Citizens United*, 89 N.C. L. REV. 1197, 1238, n. 154 (2011); Tom C. W. Lin, *The New Financial Industry*, 65 ALA. L. REV. 567, 569, n. 6, 592, n. 154 (2014).

³⁰¹ Bork, *supra* note 287.

³⁰² Nestor M. Davidson & Rashmi Dyal-Chand, *Property in Crisis*, 78 FORDHAM L. REV. 1607, 1615-20, 1651-53, 1659 (2010)

³⁰³ Prindle, *supra* note 298, at 38.

³⁰⁴ Graham Odell, *Temporal Varieties of Critical Junctures*, unpublished working paper, 3 (2018), https://www.academia.edu/42088887/Temporal_Varieties_of_Critical_Junctures; RUTH BERINS COLLIER & DAVID COLLIER, *SHAPING THE POLITICAL ARENA: CRITICAL JUNCTURES, THE LABOR MOVEMENT, AND REGIME DYNAMICS IN LATIN AMERICA* (1991).

³⁰⁵ Bank & Cheffins, *supra* note 60, 11.

³⁰⁶ Hillel David Soifer, *The Causal Logic of Critical Junctures*, 45 COMP. POL. STUD. 1572, 1572 (2012); Laura García-Montoya & James Mahoney, *Critical Event Analysis in Case Study Research*, SOCIOLOGICAL METHODS & RES. (pre-print) 2-3 (2020), <https://journals.sagepub.com/doi/full/10.1177/0049124120926201>.

interest.”³⁰⁷ There are three key features of this definition. The first is that a critical juncture is associated with a period of time – a window of opportunity – when there is what Capoccia and Kelemen call “structural fluidity and heightened contingency”.³⁰⁸ The second relates to duration – the length of the time period where change is in the cards. Brevity is the key here. Terminology deployed includes “concentrated periods”³⁰⁹ and “trigger events”.³¹⁰

The third critical junctures feature is change that lasts. While critical junctures themselves should be relatively brief, there has to be a meaningful outcome that stands the test of time, “an enduring legacy”.³¹¹ To rephrase, junctures qualify as “critical” when “they generate path dependence.”³¹² This does not mean a critical juncture is necessary for transformational change. Substantial policy innovation can occur as part of a “concentrated” or an “extended” episode.³¹³ Only the former, however, is associated with a critical juncture.

C. Cyclical Patterns

To this point we have considered two evolution-related versions of change, one oriented around periodic, incremental adjustments and the other focusing on abrupt transitions. Both versions of events implicitly assume that what is to come differs from the past and the present. However, as Ralph Waldo Emerson, a prominent 19th century and essayist, observed “Wise men have remarked on patterns of alternation, of ebb and flow, in human history.”³¹⁴ Indeed, a “(c)yclical conception of social change is one of the oldest in

³⁰⁷ Giovanni Capoccia & R. Daniel Kelemen, *The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism*, 59 *WORLD POL.* 341, 348 (2007). On the article’s influential nature, see Bank & Cheffins, *supra* note 60, 10.

³⁰⁸ Capoccia & Kelemen, *supra* note 307, 352.

³⁰⁹ Michael Bernhard, *Chronic Instability and the Limits of Path Dependence*, 13 *PERSPECTIVES & POLITICS* 976, 978 (2015).

³¹⁰ John Hogan & David Doyle, *The Importance of Ideas: An A Priori Critical Juncture Framework*, 40 *CANADIAN J. POL. SCI.* 883, 885 (2007).

³¹¹ David Collier & Gerardo L. Munck, *Building Blocks and Methodological Challenges: A Framework for Studying Critical Junctures*, *QUALITATIVE & MULTI METHOD RES.*, Spring 2017, at 2, 2.

³¹² Bernhard, *supra* note 309, at 978. See also Eyal-Cohen, *supra* note 293, 1225.

³¹³ Collier & Munck, *supra* note 311, at 4. See also GREG BERMAN & AUBREY FOX, *GRADUAL: THE CASE FOR INCREMENTAL CHANGE IN A RADICAL AGE* (2023) (using case studies to show that incremental measures can produce major changes).

³¹⁴ Quoted in ARTHUR M. SCHLESINGER, *THE CYCLES OF AMERICAN HISTORY* 23 (1986).

the history of thought,”³¹⁵ with notable proponents including the ancient Greek philosopher Plato and his Renaissance counterpart Niccolò Machiavelli.³¹⁶

More recently, Arthur Schlesinger, a prominent 20th century historian and adviser to President John Kennedy,³¹⁷ characterized American politics in terms of swings back and forth between “public purpose” and “private interest”.³¹⁸ Stephen Skowronek, a pre-eminent presidency scholar,³¹⁹ has drawn heavily on cyclical theory when analyzing presidential leadership in terms of “political time”.³²⁰ With respect to legal scholarship, the Supreme Court’s approach to the U.S. Constitution’s separation of powers has been explained in terms of cycling between hard-edged rules and open-textured standards.³²¹ A similar pattern with rules and standards has been identified with antitrust law³²² and property law.³²³ It has also been suggested that regulation of financial markets tends to be cyclical, increasing after a crisis, loosening as market conditions improve and then increasing again after a fresh crisis that is at least partly attributable to the deregulation.³²⁴

Cyclical theory has been characterized as “pessimistic”.³²⁵ This is because of a deterministic element, in the form of apparent repetitive inevitability. Reputedly, “cyclical theory presents society as an organism (biological analogy), which is born, grows, matures, declines, and then dies to be reborn and go through many new cycles again.”³²⁶ This

³¹⁵ Pitirim A. Sorokin, *A Survey of the Cyclical Conceptions of Social and Historical Process*, 6 SOCIAL FORCES 28, 28-29 (1927).

³¹⁶ *Id.*, 32-33.

³¹⁷ Arthur M. Schlesinger, Jr.: *National Humanities Medal*, 1998, <https://www.neh.gov/about/awards/national-humanities-medals/arthur-m-schlesinger-jr>.

³¹⁸ SCHLESINGER, *supra* note 314, 28.

³¹⁹ Jordan T. Cash, *Book Review*, 9 AM. POL. THOUGHT 653, 653 (2020).

³²⁰ STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON* (2nd ed., 1997); STEPHEN SKOWRONEK, *PRESIDENTIAL LEADERSHIP IN POLITICAL TIME* (3rd ed., 2020).

³²¹ Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L. J. 346 (2016).

³²² Daniel A. Crane, *Rules versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49, 51-52 (2007).

³²³ Carol M. Rose, *Crystals and Mud in Property Law*, 40 STANFORD L. REV. 577, 590 (1988) (referring to a “shift back and forth”).

³²⁴ John C. Coffee, *The Political Economy of Dodd-Frank: Why Financial Reform Tends to be Frustrated and Systemic Risk Perpetuated*, 97 CORNELL L. REV. 1019, 1078-79 (2012); Brett McDonnell, *Dampening Financial Regulatory Cycles*, 65 FLA. L. REV. 1597, 1599, 1605-6 (2013).

³²⁵ Panos D. Bardis, *Synopsis of Theories of Social Change*, 37 SOCIAL SCI. 181, 185 (1962).

³²⁶ *Id.*

overstates what advocates of a cyclical trajectory espouse with respect to human endeavour. Schlesinger, for instance, says “there is no mathematical determinism in history....As the cycle is not automatic, neither is it self-enforcing. It takes people to make the cycle work.”³²⁷ Proponents of cyclical theory are thus not seeking to account for all social phenomena. Instead, the pitch is more modest: analysts should “pay somewhat greater attention to the repetitions, rhythms and cycles in social and historical processes.”³²⁸

Debate regarding corporate purpose has already anticipated the plea that cyclical trajectories deserve a hearing, with various analysts having characterized corporate purpose trends in cyclical terms.³²⁹ This article has for its part provided a chronology of corporate purpose debates oriented around a cyclical pattern,³³⁰ albeit acknowledging in so doing that under such a framework there are counter-trends that complicate the narrative.³³¹ We consider in the next part of the article how likely it is that the prediction cyclical theory offers in the corporate purpose context – an impending swing of the corporate purpose pendulum in favor of a stakeholder-friendly approach – will be borne out. As we will see, there is evidence that supports this characterization of corporate purpose trends. Nevertheless, on balance the legacy of a pivot in favor of shareholder centrality that occurred due to a takeover-focused 1980s corporate purpose critical juncture appears likely to endure for the foreseeable future.

VI. WHICH TRAJECTORY FOR CORPORATE PURPOSE?

Since the mid-1980s, shareholder centrality has been a feature of U.S. corporate governance.³³² There have been various claims made that this era could be drawing to a close, if it has not already.³³³ What in fact is next for corporate purpose? In this part of the article, we will address this question by reference to the trajectories Part V canvassed.

As section A of this Part discusses, a potential stakeholder-oriented corporate purpose switch can be characterized both in terms of a cyclical pattern and as a product of a critical

³²⁷ SCHLESINGER, *supra* note 314, 45.

³²⁸ Sorokin, *supra* note 315, 28.

³²⁹ *Supra* notes 37-41 and related discussion.

³³⁰ *Supra* notes 129-139 and accompanying text.

³³¹ *Supra* notes 140-208 and related discussion.

³³² *Supra* notes 41, 175-177, 208, 238 and accompanying text.

³³³ *Supra* notes 239-244 and related discussion.

juncture. The predominant theme in this Part, however, is that a decisive corporate purpose shift is unlikely, at least in the near future. Corporate law is an important consideration. As Part III of the article discussed, U.S. corporate statutes do not provide any specific binding instructions with respect to corporate purpose and case law offers executives minded to implement stakeholder-friendly policies considerable scope to do so. Nevertheless, as section B of this Part will point out, there are features of corporate law that do tilt in a shareholder-friendly direction that helps to underpin shareholder centrality.

Given that corporate law as currently configured does not provide a congenial setting for stakeholder-oriented corporate purpose, there are two basic ways in which a decisive move in a stakeholder-friendly direction can occur: 1) shareholders could adopt a pro-stakeholder mentality 2) corporate law could be reconfigured in a stakeholder-friendly manner. Section C canvasses both possibilities, indicating that neither is likely. Correspondingly, the legacy of what in retrospect was a 1980s shareholder-oriented corporate purpose critical juncture should be sustained for the foreseeable future.

A. A Stakeholder-Friendly Corporate Purpose Move -- Cyclical and Critical Juncture Perspectives

According to numerous commentators, “(t)he next wave in corporate governance is coming,”³³⁴ and it will be stakeholder-oriented.³³⁵ A way to characterize what could be happening is that corporate America is witnessing the most recent swing back in a cyclical corporate purpose narrative.³³⁶ We have already considered various reasons for stakeholder-friendly change, such as COVID, growing concerns about the climate and racial equity amongst employees, customers and investors, and a desire on the part of corporate executives to forestall the introduction of unwelcome new regulation.³³⁷ A point that merits elaboration here, however, is why corporate purpose is a topic where the trajectory plausibly will be cyclical.

Views of individuals concerning corporate purpose are likely to align with their take on broader topics, such as “the desirability of ‘free markets,’ whether society owes all employed people a wage they can live on, and the extent to which people are able, or willing,

³³⁴ *Supra* note 13 and related discussion

³³⁵ *Supra* notes 14-17, 239-244 and accompanying text.

³³⁶ *Supra* notes 33-38 and related discussion.

³³⁷ *Supra* notes 245-254 and accompanying text.

to acquire more skills and improve their situations.”³³⁸ Advocates of shareholder centrality will probably have, in comparison with the pro-stakeholder camp, greater faith in free markets and the ability of individuals to make beneficial self-adjustments and have greater doubts about what society owes working people, and vice versa. With such preconceptions locked in, potentially cogent pro-stockholder or pro-stakeholder evidence relevant to corporate purpose is unlikely to convince those currently committed to either side to abandon or even soften their position.³³⁹ Instead, with corporate purpose for most “You find your tribe early in your sentient life, and no amount of persuasion, argument, or data will move you.”³⁴⁰ Adolf Berle and E. Merrick Dodd did change their minds on corporate purpose.³⁴¹ Such doubling back should, however, be the exception rather than the rule.

The existence of well-entrenched corporate purpose camps simultaneously does much to explain why the headline cyclical narrative summarized in Part II.C of the article is rendered more complex by the countertrends in Part II.D and why a further swing of the pendulum could be in prospect. With respect to complicating the narrative, while shareholder centrality and the pro-stakeholder position could each claim dominance during particular periods, neither has ever commanded full agreement at any point over the past century.³⁴² Since views individuals hold concerning corporate purpose often remain fixed regardless of which conception of corporate purpose is dominant, there have always been strong advocates of the opposite position. Moreover, with committed supporters of the minority position likely trying to gain the upper hand by lobbying corporate purpose “swing voters”, there is always the possibility of another turn of the cycle. Supporters of a stakeholder-friendly approach to corporate purpose may well be in this position now, with their hand being quite a strong one.

³³⁸ Claire A. Hill, *An Identity Theory of the Short- and Long-Term Investor Debate*, 41 SEATTLE U. L. REV. 475, 481 (2018). See also Rhee, *supra* note 36, 225, contrasting shareholder primacy with other corporate law “rules”, saying it “is different because it invokes moral, philosophical, and economic considerations that have broad effect on the rest of society.”

³³⁹ Hill, *supra* note 338, 487.

³⁴⁰ Kent Greenfield, *The Rise of the Working Class Shareholder: An Application, an Extension, and a Challenge*, 99 B.U. L. REV. 303, 304 (2019). See also Bryce C. Tingle, *Two Stories About Shareholders*, 58 OSGOOD HALL L.J. 57, 59 (2021) (making the same point about academic camps that advocate shareholder activism and deference to boards). On why fresh, salient facts often fail to prompt people to change their mind, see Michael Skapinker, *The Power of Persuasion*, FIN. TIMES, July 23, 2022, Weekend, 9.

³⁴¹ *Supra* notes 114-128 and related discussion.

³⁴² William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 264 (1992).

For those unconvinced by the cyclical account of corporate purpose, Part V of the article provides a different way to characterize a potential present day pro-stakeholder corporate purpose move. Arguably, a corporate purpose critical juncture has begun that could be setting the stage for a transition to a stakeholder-friendly era. Law professor Lucian Bebchuk and co-authors of his indeed have indeed said “stakeholderism has returned to the center of the corporate governance discourse, and the debate seems to have reached a critical juncture.”³⁴³

Consistent with the general pattern with law professors, Bebchuk and his colleagues have invoked the term “critical juncture” informally as a synonym for an “inflection point,”³⁴⁴ rather than drawing upon the critical juncture model that has become popular in the social sciences.³⁴⁵ The model nevertheless can be invoked quite readily to make the case that a corporate purpose pivot is in the works. Arguably, with COVID and with climate concerns and racial equity moving up the agenda, there currently is the “structural fluidity and heightened contingency” that is required for a corporate purpose critical juncture that could result in a shift in a stakeholder-friendly direction. However, windows of opportunity do not necessarily yield the enduring legacy associated with critical junctures.³⁴⁶ Circumstances where a shock or crisis occurs and a critical juncture does not follow can be analogized to a missed opportunity.³⁴⁷ That could be the situation currently with corporate purpose.

Is a decisive corporate purpose change in prospect, however the trajectory might be characterized? A reader might have quite reasonably inferred from Part III of the article that corporate law is unlikely to act as an impediment to change because of the absence of a specific corporate purpose direction to boards. As we will see next, however, there are shareholder-friendly facets of corporate law that could hinder a stakeholder-friendly corporate purpose shift.

B. Corporate Law and Corporate Purpose Revisited

³⁴³ Bebchuk, Kastiel & Tallarita, *supra* note 65, 1479; see also at 1473. See also Raz, *supra* note 8, 526 (“Today, the foundations of corporate law appear to be in flux, and not for the first time. The current landscape is largely reminiscent of the 1980s, when the ‘hostile takeover’ wave ignited a wide-ranging debate on the fundamental nature of the corporation and its purpose”).

³⁴⁴ This is the terminology two of the authors used in a different paper – Lucian A. Bebchuk & Roberto Tallarita, *The Perils and Questionable Promise of ESG-Based Compensation*, 48 J. CORP. L. 37, 43 (2022).

³⁴⁵ Bank & Cheffins, *supra* note 60, 11.

³⁴⁶ *Id.*, 15.

³⁴⁷ Odell, *supra* note 304, at 4; Soifer, *supra* note 306, at 1579-80.

As Part III of the article indicated, with respect to corporate purpose, “(f)or all its centrality, that companies are run for the benefit of shareholders is not really written down anywhere.”³⁴⁸ Moreover, courts afford considerable discretion to boards that are attentive and are not acting in a self-serving manner, which creates substantial scope for adoption of stakeholder-friendly policies.³⁴⁹ As we will see now, though, key features of U.S. corporate law do privilege shareholders in a way likely to hinder a stakeholder-friendly corporate purpose shift without entirely precluding the possibility of such a change.

There has been awareness since the current era of shareholder centrality commenced in the 1980s that corporate law was a contributing factor. Law professor Larry Mitchell argued in 1992 “(t)hat directors favor stockholders' interests above those of other constituents is a natural consequence of the existing legal order.”³⁵⁰ Former chief of the Delaware Supreme Court Leo Strine is a particularly forceful advocate of the view that the way corporate law is configured in the U.S. tilts managerial priorities in favor of shareholders. Delaware judges have a reputation for being director-friendly,³⁵¹ which connotes a lack of enthusiasm for special shareholder privileges. Nevertheless, Strine, writing in 2012 when he was Chancellor of the Delaware Court of Chancery, said

“The whole design of corporate law in the United States is built around the relationship between corporate managers and stockholders, not relationships with other constituencies. In the corporate republic, only stockholders get to vote and only stockholders get to sue to enforce directors' fiduciary duties (by way of a derivative action).”³⁵²

Strine elaborated on the significance of shareholder voting rights in a different paper, saying “only stockholders get to elect directors, vote on corporate transactions and charter amendments.”³⁵³

³⁴⁸ Sujeet Indap, “Shareholder Primacy” and Workers’ Rights are Back on the US Agenda, FIN. TIMES, September 25, 2018, 12; *supra* notes 212-214 and accompanying text.

³⁴⁹ *Supra* notes 218-219 and related discussion.

³⁵⁰ Lawrence E. Mitchell, *Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579, 594 (1992).

³⁵¹ Armour, Black & Cheffins, *supra* note 214, 1365-66.

³⁵² Strine, *supra* note 222, 153. On shareholders being the only corporate participants that can launch a derivative suit to pursue litigation on a solvent corporation’s behalf, see Fairfax, *supra* note 14, 1209; BRUNER, *supra* note 224, 60.

³⁵³ Leo E. Strine, *Can We Do Better by Ordinary Investors? A Pragmatic Reaction to the Dueling Ideological Mythologists of Corporate Law*, 114 COLUM. L. REV. 449, 453 (2014).

While with respect to corporate purpose “the power structure under...corporate law” is “important”, “it is not dispositive.”³⁵⁴ History indicates why. During the middle decades of the 20th century shareholders had the basic legal rights to vote and sue they currently have.³⁵⁵ During this managerialist era,³⁵⁶ however, where large companies were characterized by “virtually omnipotent management and an impotent shareholdership,”³⁵⁷ these features of corporate law were largely empty legal formalities that were substantially unused by “an apathetic bunch” of shareholders.³⁵⁸ Correspondingly, despite shareholder-friendly features of corporate law public company executives had considerable scope to take advantage of scope the business judgment rule affords to directors to run their firms in a stakeholder-friendly fashion.

Consider now the 1980s. That decade’s takeover wave changed the corporate purpose mindset in a shareholder-friendly direction,³⁵⁹ and this occurred without any direct bolstering of shareholder rights under corporate law. The pivot in favor of shareholder centrality would not have happened without a key shareholder-friendly legal feature: those controlling a majority of voting shares can choose the board. Nevertheless, the takeover wave of the 1980s was needed for the significance of shareholders’ voting power to be driven home in a way that reoriented corporate purpose.

Alfred Rappaport, a shareholder value pioneer amongst academics,³⁶⁰ said in 1990 it was “impossible to overstate how deeply” takeover activity had “changed the attitudes and practices of U.S. managers.”³⁶¹ Drawing on the trajectories canvassed in Part IV it could be said that with respect to takeovers in the 1980s corporate America experienced a corporate purpose critical juncture. In order for there to be a critical juncture there must be an “enduring legacy.”³⁶² That could not be taken for granted at the time, with hostile takeovers consigned to the corporate governance side-lines in the 1990s.³⁶³ Nevertheless, with highly

³⁵⁴ Lund & Pollman, *supra* note 42, 2581.

³⁵⁵ *Id.*; Wells, *supra* note 70, 1038, 1076.

³⁵⁶ *Supra* notes 26-27, 133-135 and related discussion.

³⁵⁷ Manning, *supra* note 149, 1485.

³⁵⁸ Peter B. Greenough, *Stockholders Lax as Voters*, BOSTON GLOBE, March 19, 1964, 20.

³⁵⁹ *Supra* notes 175-177, 234-236 and related discussion.

³⁶⁰ CHEFFINS, *supra* note 92, 188.

³⁶¹ Alfred Rappaport, *The Staying Power of the Corporation*, HARV. BUS. REV., Jan.-Feb. 1990, 96, 100.

³⁶² *Supra* note 311 and related discussion.

³⁶³ CHEFFINS, *supra* note 92, 235-36.

incentivized, potentially lucrative executive pay becoming increasingly prevalent, shareholder centrality became locked in³⁶⁴ and has endured to the present day.

While the corporate purpose switch that occurred in the 1980s had long-term effects, it is possible that the current shareholder centrality era is drawing to a close. If this is occurring, the trend would match up with a cyclical corporate purpose trajectory, with public company executives being solicitous of stakeholders in the manner they were in the managerial capitalism era. If not, then a critical juncture narrative oriented around the 1980s hostile takeover wave looks like the more plausible interpretation of the trajectory of corporate purpose. We succinctly assess next how likely it is that shareholder centrality has run out of road in corporate America, and will see that matters are unlikely to reach this point in the foreseeable future.

C. Might Shareholder Centrality Continue to Prevail?

Part IV of this article canvassed the trends underpinning a potential stakeholder-related corporate purpose shift in corporate America. We will consider here corporate governance dynamics that could deter a stakeholder-focused reorientation while at the same time acknowledging that if shareholders begin to prioritize stakeholders such a switch could well occur. The notion of pro-stakeholder shareholders is hardly fanciful. Ultimately, though, investors are unlikely to reorient managerial priorities in a sufficiently stakeholder-friendly manner to displace the shareholder centrality that has featured in publicly traded firms since the mid-1980s. It is similarly unlikely that corporate law changes will occur that move corporate purpose in a markedly pro-stakeholder direction. Ultimately, then, the takeover wave-induced corporate purpose switch that occurred in the mid-1980s appears to have been a public company critical juncture unlikely to be unwound soon.

1. Obstacles to a pro-Stakeholder Corporate Purpose Switch

There is much discussion currently of corporate executives reprioritizing in favor of corporate stakeholders.³⁶⁵ However, as legal scholars Stavros Gadinis and Chris Havasy have said, “Activists on the left wonder whether the hurried enlightenment of America’s corporate elite is genuine, or whether grand progressive gestures are (being) used to mask the lack of

³⁶⁴ *Supra* notes 178, 284 and accompanying text.

³⁶⁵ *Supra* notes 38, 51-52, 239-244 and related discussion.

any real reform.”³⁶⁶ There indeed is reason to doubt the extent to which present day public company executives will forsake shareholder interests to prioritize stakeholders in the absence of shareholder pressure to reorient managerial priorities or substantial corporate law change, such as giving stakeholders a say with respect to director selection.

Lynn Paine, a Harvard Business School professor who is a forceful critic of shareholder centrality,³⁶⁷ nevertheless acknowledges “few boards have a structured process for overseeing...commitments...(to) its non-shareholder stakeholders.”³⁶⁸ With CEOs who signed the stakeholder-friendly 2019 Business Roundtable statement on corporate purpose a vast majority apparently went ahead without consulting their boards, implying they did not believe a major policy change was occurring.³⁶⁹ COVID-19 has been cited as a corporate purpose game-changer,³⁷⁰ but during the opening weeks of the pandemic companies whose CEOs were signatories to the statement were, as compared to similar companies whose CEOs did not sign, more prone to announce employee layoffs or furloughs and were less likely to donate to relief efforts, to offer customer discounts and to shift production to pandemic-related goods.³⁷¹ When asked, executives of large American corporations said that the pandemic prompted them to bolster already existing stakeholder consultation procedures so as to provide management with input and to gauge reaction to pandemic-related company actions, but interview evidence did not indicate any sort of “swing of the pendulum back to an era of managerialism or socially benevolent companies.”³⁷²

As to why executives might continue to have a shareholder-centrality mindset despite much speculation regarding a stakeholder-focused corporate purpose reorientation, section B drew attention to potentially relevant shareholder-friendly features of corporate law. As

³⁶⁶ Stavros Gadinis & Chris Havasy, *The Quest for Legitimacy in Corporate Law* 16 (2022), available at <https://ssrn.com/abstract=4081543>.

³⁶⁷ Joseph Bower & Lynn Paine, *The Error at the Heart of Corporate Leadership*, HARV. BUS. REV., May-June 2017, 50.

³⁶⁸ Paine, *supra* note 245.

³⁶⁹ Bebchuk & Tallarita, *supra* note 46, 130-33.

³⁷⁰ *Supra* notes 245-254 and accompanying text.

³⁷¹ Jerry Useem, *Beware of Corporate Promises*, ATLANTIC, August 6, 2020, <https://www.theatlantic.com/ideas/archive/2020/08/companies-stand-solidarity-are-licensing-themselves-discriminate/614947/> (citing unpublished research by Tyler Wry, a professor at the Wharton business school at Penn). This pattern was consistent with the behavior of Business Roundtable firms before the issuance of the 2019 statement, as they had higher environmental and labor compliance violation rates than similarly situated non-signatories. See Aneesh Raghunandan & Shiva Rajgopal, *Do Socially Responsible Firms Walk the Talk?* (2021), <https://ssrn.com/abstract=3609056>.

³⁷² Stavros Gadinis & Amelia Miazad, *A Test of Stakeholder Capitalism*, 47 J. CORP. L. 47, 99 (2021).

mentioned, though, the fact that stakeholder-friendly managerial capitalism prevailed during the mid-20th century when these features were in place³⁷³ indicates more is involved. Executive pay is one consideration. During the mid-20th century performance-oriented executive compensation was very much an afterthought in publicly traded firms.³⁷⁴ The pattern changed dramatically in the 1990s, which helped to lock in shareholder centrality in publicly traded firms.³⁷⁵ Executive pay remains strongly biased in favor of shareholder-oriented incentives,³⁷⁶ which suggests executives will continue to focus closely on shareholder returns. As law professor Donald Langevoort has observed, “(t)he stock and options in which managers are paid naturally make them want high stock prices -- they are by no means indifferent to that which also produces shareholder wealth.”³⁷⁷ More pithily, as long as the current executive pay patterns persist, “expecting CEOs to refrain from favoring shareholders will remain wishful thinking.”³⁷⁸

Shareholder activism is another factor likely to keep management focusing on shareholder returns. Shareholder passivity was a hallmark of the managerial capitalism era.³⁷⁹ During the 1990s steady growth in the proportion of public company shares mutual funds and pension funds owned at the expense of retail investors fostered expectations of close shareholder monitoring of public company executives that went largely unfulfilled.³⁸⁰ Shareholder activism subsequently became increasingly potent, however, via a different route. In the 2000s, a subset of lightly regulated collective investment vehicles known as hedge funds began launching with considerable frequency campaigns to pressure executives of underperforming public companies to deliver shareholder-friendly change.³⁸¹ After a partial pause the 2008 financial crisis prompted, hedge fund activism featured sufficiently prominently in the 2010s to prompt public company executives concerned about potential

³⁷³ *Supra* note 355 and related discussion.

³⁷⁴ CHEFFINS, *supra* note 92, 75.

³⁷⁵ *Supra* notes 178, 284, 364 and accompanying text.

³⁷⁶ *Supra* note 285 and related discussion; Hannes, Libson & Parchomovsky, *supra* note 50, 18.

³⁷⁷ Langevoort, *supra* note 140, 403.

³⁷⁸ Wartzman, *supra* note 248.

³⁷⁹ *Supra* notes 357-358 and related discussion.

³⁸⁰ Brian R. Cheffins, *The Rise and Fall (?) of the Berle-Means Corporation*, 42 SEATTLE U. L. REV. 445, 479-80 (2019).

³⁸¹ Brian R. Cheffins & John Armour, *The Past, Present, and Future of Shareholder Activism by Hedge Funds*, 37 J. CORP. L. 51, 56, 75, 80-82, 89-90 (2011).

unwelcome interventions “to think like activists.”³⁸² Such circumstances will, so long as they persist, hinder any sort of wholesale transition to stakeholder capitalism.³⁸³ As law professor Stephen Bainbridge explains, “(b)oads that put stakeholder interests ahead of (or even on par with) shareholder interests thus are likely to face proxy contests and other forms of activism from activist hedge funds and their allies.”³⁸⁴

Law professors Dorothy Lund and Elizabeth Pollman have identified a more broadly based shareholder-related obstacle to a stakeholder-oriented corporate purpose switch, this being what they call “the corporate governance machine.”³⁸⁵ They maintain “(a) vast array of institutional players -- proxy advisors, stock exchanges, ratings agencies, institutional investors, and associations -- enshrine shareholder primacy in public markets.”³⁸⁶ BlackRock, Vanguard, and State Street, the three largest U.S.-based asset management firms due primarily to their dominance of a rapidly growing market for low cost investment funds that track stock market indices,³⁸⁷ feature prominently in Lund and Pollman’s shareholder-oriented corporate governance machine.³⁸⁸ Lund and Pollman argue that a legacy of this “machine” is “the co-optation of stakeholderism” on shareholder-friendly terms.³⁸⁹ Various other commentators suggest the “Big Three” of the asset management world are helping to reorient corporate America in a stakeholder friendly direction.³⁹⁰ As we will see next, however, recent trends suggest Lund and Pollman appear to be getting the better of the argument.

2. Pro-Stakeholder Shareholders?

³⁸² Cheffins, *supra* note 380, 488-89.

³⁸³ Esker, *supra* note 223, 1976. See, for example, Nadia Rawlinson, *The Era of Happy Tech Workers is Over*, N.Y. TIMES, Jan. 22, 2023, SR, 9 (citing activist investors as a key reason why tech companies that were laying off workers were “now optimizing more for profitability than for growth at all costs”).

³⁸⁴ Bainbridge, *supra* note 7, 315. For an example of this process in action, see David Streitfeld, *A C.E.O.’s Desire to Do Good Meets Hard Economic Reality*, N.Y. TIMES, February 13, 2023, A1 (describing activist hedge funds targeting Salesforce, whose co-founder and CEO had been an “advocate for a new model of capitalism” before Salesforce’s “stock wilted”).

³⁸⁵ Lund and Pollman, *supra* note 42.

³⁸⁶ *Id.*, 2565-66.

³⁸⁷ Cheffins, *supra* note 380, 490.

³⁸⁸ Lund and Pollman, *supra* note 42, 2590-91.

³⁸⁹ *Id.*, 2633.

³⁹⁰ *Supra* notes 259-262 and accompanying text.

Ostensibly, “(t)here is no debate that shareholders, as capital with entitlement to the financial residuals, always desire maximum profit.”³⁹¹ In fact, influential shareholders arguably could serve as the catalyst for a stakeholder-friendly reorientation of corporate purpose in corporate America.³⁹² When Wachtell, Lipton, Rosen & Katz provided directors with advice regarding 2020 and the firm referred to “the advent of stakeholder governance” it went on to say that “(p)erhaps remarkably, the key proponents of stakeholder governance....have been a subset of institutional shareholders, namely...BlackRock, State Street and Vanguard, as well as other shareholders with a long-term investment horizon.”³⁹³ Indeed, reputedly “institutional investors are ever more considered to be a force capable of playing a major role in favoring the shift towards ‘stakeholders’ capitalism.”³⁹⁴

ESG, recently “(o)ne of the hottest trends in finance”³⁹⁵ and now part of “the everyday lingo of investors, asset managers, corporate officers and directors,”³⁹⁶ has done much to underpin a shareholder-driven reorientation of corporate priorities in a stakeholder-friendly direction. According to one estimate, one-third of the assets major fund managers have under management are screened from an ESG perspective.³⁹⁷ ESG issues in turn reputedly “are becoming a must” for publicly traded firms,³⁹⁸ which means environmental and social matters are on the managerial agenda at shareholders’ behest.

Why has “shareholders stakeholderism”³⁹⁹ emerged? Part of the reason, identified by the *Wall Street Journal*, is the addressing of a risk confronting fund managers: “If they don’t act, they face the prospect of protests and loss of assets from clients most worried about

³⁹¹ Rhee, *supra* note 36, 253.

³⁹² Since such a change would be driven by shareholder preferences, arguably shareholder primacy would remain a key corporate governance norm despite the reorientation of corporate purpose away from creating value for shareholders.

³⁹³ Lipton, Rosenblum, Cain & Tatum, *supra* note 15, 1.

³⁹⁴ Giovanni Strampelli, *Can BlackRock Save the Planet? The Institutional Investors' Role in Stakeholder Capitalism*, 11 HARV. BUS. L. REV. ONLINE 1, 5 (2021).

³⁹⁵ *Three Letters That Won't Save the Planet*, ECONOMIST, July 23, 2022, 8; Hans Taparia, *One of the Hottest Trends in the World of Investing Is a Sham*, N.Y. TIMES, October 2, 2022, <https://www.nytimes.com/2022/09/29/opinion/esg-investing-responsibility.html>.

³⁹⁶ Pollman, *supra* note 50, 45.

³⁹⁷ *Id.*, 4. See also Jeff Sommer, *On Wall St., Socially Responsible Is Common Sense. In Congress, It's Political*, N.Y. TIMES, March 4, 2023, <https://www.nytimes.com/2023/03/04/business/esg-socially-responsible-investing.html> (citing estimates of ESG investing of \$8.4 trillion and \$17 trillion).

³⁹⁸ Roy Shapira, *Mission Critical ESG and the Scope of Director Oversight Duties*, [2022] COLUM. BUS. L. REV. 732, 734.

³⁹⁹ *Supra* note 47 and related discussion.

climate.”⁴⁰⁰ But moving in an ESG direction also has an immediate financial upside for asset managers, this being they charge considerably higher fees for ESG-related investment funds than for many non-ESG ones.⁴⁰¹ And there may additionally be a genuine sense of conviction amongst asset managers of the need for stakeholder-friendly change. Reputedly, with respect to climate, a 2019 trip to Alaska where Larry Fink unexpectedly encountered a smoke-filled lake caused his mind to “click” in favor of a climate-friendly stance.⁴⁰²

If a pro-stakeholder orientation takes hold amongst shareholders, the corporate law features canvassed in section B that have been fostering shareholder centrality in the absence of a legislative corporate purpose instruction potentially could begin to operate in a stakeholder-friendly manner. At present the most visible mechanism that could translate shareholder rights into pro-stakeholder outcomes involves proposals that shareholders can have put to a vote under Rule 14a-8 under the Securities and Exchange Act of 1934.⁴⁰³ Traditionally, proposals shareholders have made have focused on corporate governance, narrowly defined, but there has been a recent shift toward socially and environmentally oriented proposals.⁴⁰⁴ For instance, the number of climate-related proposals shareholders submitted under Rule 14a-8 jumped by more than 50% in 2023 as compared to 2021.⁴⁰⁵ Resolutions of this type rarely pass outright but a recent bump in the proportion of votes cast in favor should have fostered negotiated settlements where proposals are withdrawn in return for managerial pledges of change.⁴⁰⁶

Assuming investor support for a stakeholder-friendly agenda continues to grow, shareholder activism can take additional, more potent forms. We have already considered one possibility – proxy contests dictating who sits on boards. Again, in 2021 Engine No.1, with the backing of the Big Three asset managers, got three climate-conscious directors

⁴⁰⁰ James Mackintosh, *BlackRock Flexes Muscles on Climate*, WALL ST. J., January 21, 2020, B6. See also Hannes, Libson & Parchomovsky, *supra* note 50, 14-15.

⁴⁰¹ Taparia, *supra* note 395; *In Need of a Clean Up*, ECONOMIST, July 23, 2022, Special Report: ESG Investing, 3; Jason Zweig, “Responsible” Investing Comes at a Cost, WALL ST. J., February 4, 2023, B4.

⁴⁰² Gillian Tett, *Wall Street’s New Mantra: Green is Good*, FIN. TIMES, January 30, 2021, Life & Arts, 1.

⁴⁰³ Shareholder Proposals, 17 C.F.R. § 240.14a-8.

⁴⁰⁴ Kobi Kastiel & Yaron Nili, *The Giant Shadow of Corporate Gadflies*, 94 S. CAL. L. REV. 569, 583 (2021). For examples of climate-oriented proposals, see Ringe, *supra* note 263, 22-24.

⁴⁰⁵ Marlo Oaks & Todd Russ, *A Historic Breach of Fiduciary Duty*, WALL ST. J., May 16, 2023, A17.

⁴⁰⁶ *Id.*; Lund & Pollman, *supra* note 42, 2615; *From Handshake*, *supra* note 251.

appointed to Exxon's board.⁴⁰⁷ Regular board turnover of this sort should prompt directors concerned about retaining their board seats to move stakeholder interests up the priority list.

Another possibility would be for shareholders to press companies to deploy stakeholder metrics in executive pay schemes. The logic involved would be that incorporating social goals into compensation should increase managerial attention to, and focus on, such goals.⁴⁰⁸ A growing proportion of publicly traded companies are in fact tying executive pay to the achievement of ESG targets, but thus far incentives to enhance shareholder returns dwarf ESG-related incentives and ESG metrics that are deployed focus on a narrow range of variables relevant to stakeholders.⁴⁰⁹

Shareholder lobbying could perhaps reorient executive pay further in a stakeholder-oriented direction. The Dodd-Frank Act of 2010 gives shareholders in publicly traded firms the right to vote on executive pay policy at least once every three years.⁴¹⁰ With such resolutions shareholder dissent from what companies have proposed has historically been rare,⁴¹¹ but a genuine commitment to stakeholder-oriented goals amongst stockholders could foster change. Cross-country evidence indeed indicates that the operation of say-on-pay tends to increase the sensitivity of CEO pay to ESG performance.⁴¹²

While it is possible to identify ways that shareholders could move publicly traded companies in a stakeholder-friendly direction, if “the advent of stakeholder governance” indeed is dependent on shareholders, on balance, a cyclical stakeholder-friendly corporate purpose trajectory is unlikely for the foreseeable future. For instance, powerful institutional investors appear to be having second thoughts about “shareholders stakeholderism”. While BlackRock and Vanguard have both expressed support for ESG initiatives they have also indicated that their fiduciary duty to maximize risk-adjusted returns for clients acts as a

⁴⁰⁷ *Supra* notes 266-268 and related discussion.

⁴⁰⁸ Fairfax, *supra* note 14, 1221. See also sources cited by Bebchuk & Tallarita, *supra* note 344, 6-8.

⁴⁰⁹ Bebchuk & Tallarita, *supra* note 344, 16, 19-26; David I. Walker, *The Economic (In)Significance of Executive Pay ESG Incentives*, 27 STAN. J.L. BUS. & FIN. 318, 320-21 (2022).

⁴¹⁰ Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203, 124 Stat. 1376, § 951(c).

⁴¹¹ Jill Fisch, Darius Palia & Steven Davidoff Solomon, *Is Say on Pay All about Pay? The Impact of Firm Performance*, 8 HARV. BUS. L. REV. 101, 102 (2018).

⁴¹² Mary Ellen Carter, Andrea Pawliczek & Rhong Zong, *Say on ESG: The Adoption of Say-on-Pay Laws and Firm ESG Performance*, unpublished working paper (2022), <https://ssrn.com/abstract=4125441>. On an additional option available to individual shareholders seeking to ensure boards address ESG issues, see Shapira, *supra* note 398 (discussing the possibility of shareholders bringing suits when directors breach duty of care-related “oversight” duties).

significant check on what they can and will do on the ESG front.⁴¹³ Moreover, total shareholder support for ESG-oriented shareholder proposals in US public companies fell from 36% of votes cast in 2021 to 23% in 2023.⁴¹⁴ BlackRock was ahead of the curve, with its votes cast in favor of such proposals falling sharply from 43% in 2021 to 24% the following year.⁴¹⁵ BlackRock explained that many of the more recent proposals were too prescriptive in nature and evidenced little concern for the disruption companies would face if adopted.⁴¹⁶

Private investors deciding where to put their money also could be engaging in a reprioritization that cuts against a shareholder-driven pro-stakeholder corporate purpose reorientation. The S&P 500 index dropped 19% in 2022, its biggest decline since 2008, and “any time the stock market falls, investors are likely to rethink nearly everything.”⁴¹⁷ An ESG pause could be at the top of the agenda. With stock market returns going in reverse investors may be less inclined to ignore comparatively high fees ESG funds charge.⁴¹⁸ If the higher fees were associated with better risk-adjusted returns that would change matters. The available evidence suggests, however, that ESG-oriented investment funds underperform compared to counterparts lacking an ESG focus.⁴¹⁹

There is also growing confusion about what qualifies as ESG-friendly,⁴²⁰ exemplified by the war in Ukraine transforming arms’ manufacturers from ESG pariahs to valued defenders of democracy.⁴²¹ Inconsistency reputedly is a common feature with ESG

⁴¹³ *Supra* notes 260, 262 and related discussion; Gelles & Tabuchi, *supra* note 57; Harriet Agnew, Adrienne Klasa & Simon Munday, *ESG’s Moment of Reckoning*, FIN. TIMES, June 7, 2022, 19; Terrence Keeley, *Vanguard’s CEO Bucks the ESG Orthodoxy*, WALL ST. J., February 27, 2023, A17.

⁴¹⁴ Brooke Masters, *BlackRock Cuts Back Support for Climate and Social Proposals*, FIN. TIMES, July 7, 2022, 7; Patrick Temple-West & Attracta Mooney, *US Investor Deal Ebbs on Green and Social Activism*, FIN. TIMES, June 14, 2023, 10.

⁴¹⁵ Masters, *supra* note 414; *BlackRock and a Hard Place*, ECONOMIST, October 1, 2022, 63.

⁴¹⁶ Masters, *supra* note 414.

⁴¹⁷ Ron Lieber, *The Rush to ESG, With or Without Elon Musk*, N.Y. TIMES, June 18, 2022, <https://www.nytimes.com/2022/06/18/your-money/esg-investing-stocks-elon-musk.html>; Akane Otani, *Stocks Log Worst Year Since 2008*, WALL ST. J., December 31, 2022, A1 (discussing stock market performance in 2022).

⁴¹⁸ *Supra* note 401 and accompanying text.

⁴¹⁹ Sanjai Bhagat, *An Inconvenient Truth About ESG Investing*, HBR.ORG, March 31, 2021, <https://hbr.org/2022/03/an-inconvenient-truth-about-esg-investing>; Andy Kessler, *The Many Reasons ESG Is a Loser*, WALL ST. J., July 11, 2022, A15; Terrence R. Keeley, *ESG Does Neither Much Good nor Very Well*, WALL ST. J., Sept. 13, 2022, A15.

⁴²⁰ Pollman, *supra* note 50, 33.

⁴²¹ *In Need of a Clean Up*, *supra* note 401.

ratings,⁴²² a point a representative of an investment fund financing the growth of sustainable social enterprises underscored when he said “(t)he idea of measuring ESG is like trying to find a measurement for your favourite child.”⁴²³ Such criticism has prompted speculation that ESG is “an ineffective movement due for a reckoning.”⁴²⁴ ESG is very unlikely to disappear.⁴²⁵ Still, if “peak ESG” has been reached,⁴²⁶ this may well foreclose a shareholder-led reorientation of corporate purpose in favor of stakeholders.

3. Corporate Law Reform

Assume shareholders are in fact unlikely to initiate on their own a stakeholder-friendly swing of the corporate purpose pendulum. Public company executives will likely be similarly reticent.⁴²⁷ This implies that for those who desire corporate purpose change, “(i)t’s time to think more deeply about what politics can do.”⁴²⁸ Ultimately, however, it is unlikely sufficiently ambitious corporate law reforms will be enacted in the foreseeable future to reorient corporate America in a stakeholder-friendly fashion.

A 2022 SEC proposal to introduce rules requiring public companies to report on climate change risks might, if implemented in its current form, put the climate on board agendas to a somewhat greater extent but there is a serious risk the proposal as currently configured is unconstitutional.⁴²⁹ As for statutory change, corporate law is state based in the U.S., with companies incorporating under the laws of one of the 50 states as opposed to a federal statute.⁴³⁰ The typical pattern with corporate law reform at the state level is gradual,

⁴²² Pollman, *supra* note 50, 34; Philip Pilkington, *ESG is on its Way Out — Now That Investors Have Been Forced to Wise Up*, N.Y. POST, July 3, 2023, <https://nypost.com/2023/07/03/esg-is-on-its-way-out-now-that-investors-have-been-forced-to-wise-up/>.

⁴²³ *In Need of a Clean Up*, *supra* note 401, quoting John Gilligan of Big Issue Invest: <https://www.bigissue.com/invest/>.

⁴²⁴ Pollman, *supra* note 50, 40.

⁴²⁵ *The Tenacity of ESG*, ECONOMIST, November 19, 2022, 74.

⁴²⁶ *Supra* note 56 and related discussion.

⁴²⁷ *Supra* notes 46, 376-384 and accompanying text.

⁴²⁸ Sanford M. Jacoby, *Shareholder Primacy and Labor*, unpublished working paper, 17 (2022), <https://ssrn.com/abstract=4047194/>. See, though, Baruza, Curtis & Webber, *supra* note 50, 10 (“social demand will continue to drive change even without reforms to existing law”).

⁴²⁹ Securities and Exchange Commission, *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, <https://www.sec.gov/rules/proposed/2022/33-11042.pdf>. On the potential impact on board agendas, see Phil Gramm & Hester Pierce, *The SEC Seeks to Supplant the Market*, WALL ST. J., January 20, 2023, A15. On constitutionality, see Bernard S. Sharfman & James R. Copland, *The SEC Can’t Transform Itself Into a Climate-Change Enforcer*, WALL ST. J., Sept. 15, 2022, A19.

⁴³⁰ Bank & Cheffins, *supra* note 60, 15.

interstitial adjustment.⁴³¹ That does not auger well for a major shift in a stakeholder-oriented direction.

We have already canvassed a major exception to the pattern of gradual state law change directly pertinent to corporate purpose: the widespread adoption of corporate constituency statutes in response to the 1980s takeover wave that explicitly authorized boards to consider non-shareholder interests.⁴³² Studies conducted in the 1990s, however, showed that this legislation did little to alter shareholder centrality.⁴³³ More recent research on corporate acquisitions confirms the pattern, indicating that with target companies where corporate constituency statutes were in force the directors did little explicitly to protect stakeholders when the deals were struck.⁴³⁴

Leading explanations for the modest impact of constituency statutes are that they merely gave directors discretion to take constituency interests into account rather than mandating this step,⁴³⁵ and that non-shareholders lack a cause of action based on the statutes.⁴³⁶ Trends in Canada cast doubt, however, on the significance of enforcement procedures. Canada's most influential corporate law statute, the Canada Business Corporations Act,⁴³⁷ provides boards with constituency statute-style discretion to consider a wide variety of non-shareholder constituencies and gives the judiciary discretion to permit any stakeholder to enforce directors' duties by way of a derivative suit.⁴³⁸ Canadian corporations nevertheless apparently prioritize shareholders in the manner that would be

⁴³¹ *Id.*, 35-38.

⁴³² *Supra* notes 189, 191 and related discussion.

⁴³³ Anant K. Sundaram & Andrew C. Inkpen, *The Corporate Objective Revisited*, 15 ORG. SCI. 350, 352 (2004) (summarizing the literature).

⁴³⁴ Bebhuk, Kastiel & Tallarita, *supra* note 65; Lucian A. Bebhuk, Kobi Kastiel & Roberto Tallarita, *Stakeholder Capitalism in the Time of COVID*, 40 YALE J. REG. 60, 116 (2023).

⁴³⁵ Hayden & Bodie, *Corporation*, *supra* note 13, 2442; Bainbridge, *supra* note 209, 47; Richard Marens & Andrew Wicks, *Getting Real: Stakeholder Theory, Managerial Practice, and the General Irrelevance of Fiduciary Duties Owed to Shareholders*, 9 BUS. ETH. Q. 273, 283-84 (1999).

⁴³⁶ Wai Shun Wilson Leung, *The Inadequacy of Shareholder Primacy: A Proposed Corporate Regime That Recognizes Non-Shareholder Interests*, 30 COLUM. J.L. & SOC. PROBS. 587, 617 (1997); D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 290 (1998); Leo E. Strine, *Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy: A Reply to Professor Rock* 51 (2020), <https://ssrn.com/abstract=3749654>.

⁴³⁷ Canada Business Corporations Act, R.S.C. 1985, c. C-44; MARK GILLEN, *CORPORATIONS AND PARTNERSHIPS IN CANADA* 46 (3rd ed., 2018).

⁴³⁸ On board discretion to consider a wide variety of stakeholder interests, see Canada Business Corporations Act, § 122(1.1). On standing, see § 238, defining "complainant" to include "any other person who, in the discretion of a court, is a proper person to make an application under this Part"; GILLEN, *supra* note 437, 103-4.

anticipated if directors' duties equated the interests of their companies with those of the shareholders.⁴³⁹ This suggests it is unlikely that amending litigation standing rules in favor of stakeholders would change managerial priorities to a significant degree.⁴⁴⁰ A more radical rewrite of corporate law would therefore probably be required to shift corporate priorities.

In American corporate law scholarship the exclusive shareholder franchise is largely taken for granted.⁴⁴¹ Nevertheless, the most obvious type of corporate law reform likely to foster meaningful corporate purpose change would be to give non-shareholder constituencies the right to select at least some directors.⁴⁴² Massachusetts corporate law has explicitly authorized corporations to have employee representatives on boards since 1919.⁴⁴³ Federal law reform would likely be needed, however, to go beyond this sort of permissive approach and require stakeholder representation on boards. No state will want to take the lead in mandating such an arrangement due to justifiable concerns of a mass exodus of corporations taking advantage of the scope that American firms have to choose to incorporate under the laws of any state in the union.⁴⁴⁴

Federally mandated stakeholder-oriented board representation is not a fanciful notion. In the late 2010s, three U.S. senators issued separate proposals to enact federal legislation compelling large corporations to provide for substantial stakeholder – more precisely employee – representation on their boards.⁴⁴⁵ Senator Elizabeth Warren's Accountable

⁴³⁹ Bryce C. Tingle & Eldon Spackman, *Do Corporate Fiduciary Duties Matter?*, 4 ANNALS CORP. GOV. 272, 304-16 (2019); Camden Hutchison, *To Whom Are Directors Duties Owed? Evidence from Canadian M&A Transactions*, MCGILL L.J. (forthcoming, 2023), available at <https://ssrn.com/abstract=4149644>; Barnali Choudhury & Martin Petrin, *Stuck in Neutral? Reforming Corporate Purpose and Fiduciary Duties*, CAN. BUS. L.J. 20-22, 41 (forthcoming), https://digitalcommons.osgoode.yorku.ca/all_papers/370/.

⁴⁴⁰ On this point, see also Fairfax, *supra* note 14, 1210-11.

⁴⁴¹ Grant M. Hayden & Matthew T. Bodie, *Codetermination in Theory and Practice*, 73 FLA. L. REV. 321, 323 (2021). See also Hayden & Bodie, *Power*, *supra* note 13, 901; Jens Dammann & Horst Eidenmuller, *Corporate Law and the Democratic State*, [2022] U. ILL. L. REV. 963, 965 (2022) (acknowledging, though, the consensus might be beginning to fray).

⁴⁴² Spamann & Fischer, *supra* note 219, 14, noting, though, that it cannot be taken for granted such a change would have a significant impact (at 19).

⁴⁴³ Ewan McGaughey, *Democracy in America at Work: The History of Labor's Vote in Corporate Governance*, 42 SEATTLE U. L. REV. 697, 718 (2019), discussing MASS. GEN. LAWS ch. 156, § 23.

⁴⁴⁴ Clyde W. Summers, *Codetermination in the United States: A Projection of Problems and Potentials*, 4 J. COMP. CORP. L. & SEC. REG. 155, 157 (1982). See also Bank, Cheffins & Wells, *supra* note 79, 693 (drawing attention to the choice between states available to those running companies).

⁴⁴⁵ See Hayden & Bodie, *supra* note 441, 330, discussing proposals by Senators Tammy Baldwin, Bernie Sanders and Elizabeth Warren. For more details on the Sanders proposal, see Rock, *supra* note 6, 366; *Corporate Accountability and Democracy*, available at <https://berniesanders.com/issues/corporate-accountability-and-democracy/>.

Capitalism Act, put forward in 2018, was probably the best known.⁴⁴⁶ The bill provided that any company with annual revenue over \$1 billion would need to obtain and retain a federal charter and stipulated that such firms had to ensure that their employees elected no less than two-fifths of their directors and that their boards balanced the interests of shareholders with those of other stakeholders.⁴⁴⁷

These federally oriented proposals to restructure boards in a stakeholder-friendly manner remain proposals for now.⁴⁴⁸ The topic may well remain on the reform agenda for some time,⁴⁴⁹ but past patterns indicate statutory change along such lines is unlikely. Federal reforms substantially impacting corporate law have been restricted largely to three legislative “critical junctures” arising from a combination of a prolonged stock market slump and substantial public antipathy toward business:⁴⁵⁰ the introduction of federal securities law in the 1930s,⁴⁵¹ the Sarbanes-Oxley Act of 2002⁴⁵² and the Dodd-Frank Act of 2010.⁴⁵³ Such conditions are propitious for a federal corporate law-related intervention because incumbent financial and business interests normally well-positioned to fend off unwelcome proposals for thoroughgoing reform will be on the defensive.⁴⁵⁴ The combination, however, is quite rare, with painful “bear” markets in the early 1920s and 1970s not qualifying because share price declines were not associated in a meaningful way with business misconduct.⁴⁵⁵ Moreover, none of the critical junctures that yielded federally-oriented corporate law changes involved stakeholder-friendly initiatives.⁴⁵⁶ Past patterns therefore indicate that the enactment of

⁴⁴⁶ For media coverage, see for example, Matthew Yglesias, *Elizabeth Warren Has a Plan to Save Capitalism*, VOX, August 15, 2018, <https://www.vox.com/2018/8/15/17683022/elizabeth-warren-accountable-capitalism-corporations>; Ralph Gomroy, *Elizabeth Warren’s Accountable Capitalism Act Isn’t Radical – it’s a Return to the Roots of American Economic Prosperity*, THE HILL, September 11, 2018, <https://thehill.com/blogs/congress-blog/economy-budget/405997-elizabeth-warrens-accountable-capitalism-act-isnt-radical>; Samuel Hammond, *Elizabeth Warren’s Corporate Catastrophe*, NATIONAL REV., August 20, 2018, <https://www.nationalreview.com/2018/08/elizabeth-warren-accountable-capitalism-act-terrible-idea/>.

⁴⁴⁷ Accountable Capitalism Act, S. 3348, 115th Cong. §§ 2(2)(A), 5(c)(1), 6(b) (2018).

⁴⁴⁸ Hayden & Bodie, *supra* note 441, 330.

⁴⁴⁹ Dammann & Eidenmuller, *supra* note 441, 965-66.

⁴⁵⁰ Bank and Cheffins, *supra* note 60, 16-27.

⁴⁵¹ Securities Act of 1933, 48 Stat. 74; Securities Exchange Act of 1934, 48 Stat. 881.

⁴⁵² Pub. L. 107-204, 116 Stat. 745.

⁴⁵³ Pub. L. 115-203, 124 Stat. 1376

⁴⁵⁴ Bank and Cheffins, *supra* note 60, 3, 8, 44.

⁴⁵⁵ *Id.*, 29-33.

⁴⁵⁶ For summaries of the reforms, see *id.*, 19-21, 25-26.

federal legislation that would foster a decisive corporate purpose shift in American corporations is highly unlikely.

VII. CONCLUSION

Corporate purpose is currently “the talk of the town.”⁴⁵⁷ There is much discussion of the possibility that the shareholder centrality that has characterized US corporate governance since the late 20th century has been displaced, or soon will be, by stakeholder-oriented managerial priorities. Amidst this extensive commentary, explicit, thorough analysis of the future trajectory of corporate purpose has very much been the exception to the rule. This article has made an original contribution to the voluminous literature on corporate purpose by drawing on past trends and present circumstances to identify potential future corporate purpose paths.

When the trajectory of corporate purpose has been analysed previously, the focus has generally been on a cyclical pattern. There have been, under this view, pendulum swings back and forth between shareholder- and stakeholder-oriented managerial priorities. To the extent that the past can serve as a guide for the future, this take on corporate purpose implies that a stakeholder-friendly focus is likely to feature soon as the shareholder centrality that has shaped American corporate governance for the past four decades wanes. This characterization dovetails with substantial present-day speculation that corporate America is abandoning a myopic focus on shareholder value in favor of a more holistic sense of corporate purpose.

This article has cast doubt on the foregoing cyclically-oriented account involving a shift toward stakeholder capitalism. With respect to past patterns, the narrative is noisier than it might appear. Shareholders featured more prominently than might have been expected during the stakeholder-friendly mid-20th century managerial capitalism era. Stakeholders, moreover, have never been reduced to a mere afterthought during the current era of shareholder centrality in the manner that is sometimes assumed.

Turning to the present day and the future, a wholesale switch in corporate priorities in favor of stakeholders seems unlikely. Corporate law does offer directors substantial scope to make stakeholder-friendly moves but also has a distinctly pro-shareholder tilt, most prominently with respect to the selection of directors. There have been some indications that

⁴⁵⁷ Spamann & Fischer, *supra* note 219, 1.

shareholders themselves will nudge corporations in a pro-stakeholder direction, but this process in isolation is unlikely to yield a thorough-going alteration of corporate priorities. With respect to law reform, it appears that a reallocation of the power to select directors will need to occur in order for there to be meaningful stakeholder-friendly change. That is unlikely to happen, however, either at the state or the federal level.

The fact that a full-scale switch to stakeholder capitalism is a dim prospect at present provides a platform for reassessing historical corporate purpose patterns. Perhaps corporate purpose trends occurring up to the late 20th century could be characterized satisfactorily in cyclical terms. Regardless, the pattern appears to have ended for the foreseeable future. During the 1980s, there was a corporate purpose critical juncture brought on by a wave of hostile takeovers that featured during that decade. The hostile takeover would be substantially marginalized from then onwards. Still, there was a shareholder-oriented enduring legacy of the sort associated with critical junctures. Growing concerns about the climate, equality and racial justice have recently buffeted the American corporation, which has also been sideswiped by COVID. Nevertheless, the shareholder centrality resulting from the 1980s corporate purpose critical juncture seems likely to endure. At least with respect to the United States, Henry Hansmann and Reinier Kraakman's end of history prediction with respect to corporate purpose looks correct.⁴⁵⁸

To the extent that the foregoing assessment of the trajectory of corporate purpose is correct, the news will be disappointing for many of those disillusioned with the current state of capitalism and worried about democracy. Serious doubts exist about the ability of politicians to address the myriad challenges that face society currently,⁴⁵⁹ and a stakeholder-based reorientation of corporate purpose is a tempting fix. As we have seen, however, a stakeholder-friendly swing of the corporate purpose pendulum is unlikely, whether prompted by shareholders or by changes to corporate law. Those convinced that reform must happen therefore need to focus on public officials to secure the changes to capitalism they believe are necessary, and they should look beyond corporate law in so doing.⁴⁶⁰

⁴⁵⁸ *Supra* notes 28-32 and accompanying text. For a contrary view, see Bartlett & Bubb, *supra* note 267, 58-59.

⁴⁵⁹ *Supra* notes 256-257 and related discussion.

⁴⁶⁰ Kaplan, *supra* note 7, 290; Bernard S. Sharfman, *The Illusion of Success: A Critique of Engine No. 1's Proxy Fight at ExxonMobil*, 12 HARV. BUS. L. REV. ONLINE, art. 3, 2021, at 1, 19-21. Focusing on public officials rather than corporations also might be normatively desirable. See John Friess, *ESG's Democratic Deficit: Why Corporate Governance Cannot Protect Stakeholders*, unpublished working paper, (2022), <https://ssrn.com/abstract=4136714>. A case in favor of direct regulation can also be made by arguing that a pro-

stakeholder corporate purpose switch will not deliver meaningful benefits for stakeholders. See Gatti & Ondersma, *supra* note 243.

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