Toward a Dynamic View of Corporate Purpose

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Abstract

Scholars debating the corporation's role in society generally advance the view that there is only one desirable orientation for corporations and their management. Specifically, proponents of a stakeholder governance model contend that focusing management on a broad set of corporate constituents maximizes overall welfare, while advocates of a shareholder-centric directive counter that prioritizing shareholders creates social welfare by rendering the firm most profitable. This Article offers another view: It suggests that the welfare-maximizing purpose for corporations could change depending on external economic conditions, which both of these positions assume away. Specifically, shareholder primacy is likely to promote welfare in a first-best world, where the government regulates corporate externalities, ensures competitive markets, and responds to inequality. Once these assumptions are relaxed, however, the case for stakeholder governance improves. The Article supports this theoretical insight with a detailed analysis of two historical periods in which the dominant view of corporate purpose in society changed dramatically. Specifically, it describes two corporate purpose "moments" of flux in the U.S.—one that occurred after the great stock market crash of 1929, and another following a period of economic stagflation in the 1970s —in which the pendulum swung from one governance model to the other, impacting scholarship, business practice, and law. These historical snapshots reveal that departures from a shareholder-oriented model have been preceded by extreme external economic conditions, consistent with the theoretical insight offered here. This analysis also sheds light on the present moment, in which inequality, corporate concentration, and environmental degradation have generated heated debates about the corporation's role in society once again.

Keywords: corporate law, corporate governance, corporate social responsibility, CSR, fiduciary duties, shareholder primacy, shareholder value maximization, ESG, stakeholders, law and economics, law and history

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Abstract

Scholars debating the corporation's role in society generally advance the view that there is only one desirable orientation for corporations and their management. Specifically, proponents of a stakeholder governance model contend that focusing management on a broad set of corporate constituents maximizes overall welfare, while advocates of a shareholder-centric directive counter that prioritizing shareholders creates social welfare by rendering the firm most profitable. This Article offers another view: It suggests that the welfare-maximizing purpose for corporations could change depending on external economic conditions, which both of these positions assume away. Specifically, shareholder primacy is likely to promote welfare in a first-best world, where the government regulates corporate externalities, ensures competitive markets, and responds to inequality. Once these assumptions are relaxed, however, the case for stakeholder governance improves.

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I. Introduction

What is the purpose of the corporation in society? Whose interests are corporate managers supposed to advance? How can corporate law and governance best promote social welfare? For the past fifty years, there has been one right answer to this important set of questions—corporations should maximize shareholder wealth, and the interests of a corporation's other stakeholders, including employees, communities, and consumers, should be subsumed to this narrow goal.[1] But over the past decade, dissenting voices have grown louder. In particular, academics,[2] policymakers,[3] and members of the business community[4] increasingly advocate for a broader vision of corporate purpose that would put stakeholders on equal footing to shareholders.[5]

A hard and fast reaction is that these dissenters have ignored lessons learned over the past fifty years.[6] Specifically, the dominant theory of the firm describes it as a nexus of contracts subject to agency costs.[7] According to this model, a shareholder-centered directive maximizes the value of the

[1] Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2576 (2021) [hereinafter Lund & Pollman, *Corporate Governance Machine*] ("Thus, by the end of the 1980s, the separation of ownership and control became 'the master problem,' and pursuing shareholder value was regularly identified as a core corporate objective"); Lynn Stout, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 30–31 (2012) ("By the end of the 20th century, a broad consensus had emerged in the Anglo-American business world that corporations should be governed according to the philosophy often called shareholder primacy."); Mariana Pargendler, *Controlling Shareholders in the Twenty-First Century: Complicating Corporate Governance Beyond Agency Costs*, 45 J. CORP. L. 953, 969 [hereinafter Pargendler, *Controlling Shareholders*] ("The prevailing view among economists and corporate law scholars (at least in the United States) has been that the exclusive goal of corporate law should be the mitigation of agency costs and the protection of shareholders."); Martin Gelter, *The Pension System and the Rise of Shareholder Primacy*, 43 SETON HALL L. REV. 909, 910 (2013) ("It is now widely accepted that the objective of corporate law and corporate governance should be to promote the wealth and welfare of shareholders.").

[2] See, e.g., Leo E. Strine, Jr., *Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy: A Reply to Professor Rock*, 76 BUS. LAW. 397 (2021); Colin Mayer, PROSPERITY 39 (2018); Kishanthi Parella, *Contractual Stakeholderism*, 102 B. U. L. REV. 865 (2022).

[3] *See, e.g.,* Elizabeth Warren, Accountable Capitalism Act, https://www.warren.senate.gov/download/accountable-capitalism-act-one-pager.

[4] *See, e.g.,* Martin Lipton, et. al, *It's Time to Adopt the New Paradigm*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 11, 2019), https://corpgov.law.harvard.edu/2019/02/11/its-time-to-adopt-the-new-paradigm/; BlackRock, Larry Fink's Annual Letter to CEOs, *A Sense of Purpose* (Jan. 2018); Business Roundtable, *Statement on the Purpose of a Corporation*, https://www.businessroundtable.org/purposeanniversary (last visited Sep. 10, 2022).

[5] Marcel Kahan & Edward Rock, *The Emergence of Welfarist Corporate Governance*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 18, 2023), https://corpgov.law.harvard.edu/2023/05/18/the-emergence-of-welfarist-corporate-governance/ ("[W]e are witnessing the emergence of a new paradigm: corporate governance welfarism.");

[6] *See*, *e.g.*, Lucian Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance,* 106 CORNELL L. REV. 91 (2020) [hereinafter Bebchuck & Tallarita, *Illusory Promise*]; Lucian A. Bebchuk, Kobi Kastiel, & Roberto Tallarita, *For Whom Corporate Leaders Bargain*, 94 SO. CAL. L. REV. 1467 (2021) [hereinafter Bebchuck, Kastiel & Tallarita, *Corporate Leaders*]; Lucian A. Bebchuk & Roberto Tallarita, *Will Corporations Deliver Value to All Stakeholders?*, 75 VAND. L. REV. 1031 (2022) [hereinafter Bebchuck & Tallarita, *Will Corporations Deliver*]; Michael R. Strain, *Milton Friedman Was Right About Shareholder Capitalism*, BLOOMBERG (Sep. 18, 2020), https://www.bloomberg.com/opinion/articles/2020-09-18/milton-friedman-was-right-about-shareholder-capitalism.

[7] Zohar Goshen & Richard Squire, *Principal Costs: A New Theory for Corporate Law and Governance*, 117 Colum. L. Rev. 767, 769 (2017) (describing the dominance of agency cost essentialism, which treat the reduction of managerial agency costs

firm; by contrast, a broader mandate would be difficult for management to implement and provide cover for bad behavior.[8] Not only that, shareholder wealth maximization is thought to "automatically" benefit other groups, too.[9] Consider, as an example, a factory that employs workers and manufactures products for consumers. The factory's shareholders will profit when the business sells high quality products that appeal to consumers, and consumer demand for those products increases the number of available jobs. In this classic example, corporations need not be concerned with negative externalities, which are the purview of government; nonetheless, the more profitable the factory, the more money will be available for extras, such as safe working conditions and the abatement of environmental harm.[10] Therefore, the profit maximizing goal assists not only the factory's equity investors, but also its other stakeholders.[11]

Simply put, shareholder primacy advocates contend that a shareholder-centric mandate will maximize firm value and also social welfare, which is unequivocally the goal of corporate law and governance.[12] The confidence underlying these conclusions is embodied in Henry Hansmann and Reinier Kraakman's article, "The End of History for Corporate Law," which stated in 2001 that "[t]here is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value."[13] And yet, before the agency model for corporate governance took hold of the academic and public consciousness, the dominant view of a corporation's purpose and role in society looked very different. In particular, from the 1940s to the late 1970s, serious academics and policymakers mostly adhered to the position that corporations had social obligations, and that corporate management were bound to consider the welfare of third parties that the corporation interacted with, alongside the company's shareholders. Interestingly, during this long period, dissenters advanced the *very same arguments* that underlie the agency cost model,[14] but their views lost out to the alternative perspective that encouraging corporations to pursue social welfare was the best way to maximize it.[15]

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via shareholder control as "the essential function of corporate law"); William W. Bratton Jr., *Nexus of Contracts Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407 (1989) (describing the dominance of the nexus of contracts theory of the firm and the agency model).

[8] *See* note 6 *supra*; Jonathan R. Macey, *ESG Investing: Why Here? Why Now?*, 19 BERKELEY BUS. L.J. 258 (2022), (describing the ESG movement as playing "into the hands of corporate managers who wish to avoid accountability").

[9] Bebchuk & Tallarita, *Illusory Promise*, *supra* note 6; *see also* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 38 (1991). For a critical perspective, see Leo Strine & Aneil Kovvali, *The Win-Win that Wasn't: Managing to the Stock Market's Negative Effects on American Workers and Other Corporate Stakeholders*, 1 U. CHI. BUS. L. REV. 307 (2022).

[10] *Id.*

[11] *See id.*; *see also* William W. Bratton & Michael L. Wachter, *Shareholders and Social Welfare*, 36 SEATTLE UNIV. L. REV. 489, 489 (2013) ("Shareholder value maximization is widely equated with social welfare maximization.").

[12] FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 38 (1991).

[13] Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439, 441 (2001).

[14] *See, e.g.,* HENRY G. MANNE & HENRY C. WALLICH, THE MODERN CORPORATION AND SOCIAL RESPONSIBILITY (1972); David L. Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1, 1 (1979); Demsetz, *Social Responsibility in the Enterprise Economy*, 10 SW. U. L. REV. 1, 11 (1978) ("The immodesty of those who desire to sit on corporate boards of directors as representatives of the public interest assure us that their control over the wealth of others will be turned to socially productive purposes. I wonder what those purposes are, but not whose self interest will be served.").

[15] *See e.g.,* Herman Krooss, EXECUTIVE OPINION: WHAT BUSINESS LEADERS SAID AND THOUGHT ON ECONOMIC ISSUES, 1920s-1960s at 52 (1970) ("the old concept that the owner of a business had a right to use his property as he pleased to maximize profits, has evolved into the belief that ownership carries certain binding social obligations.")

So, what changed? In considering this question, this Article examines two corporate purpose "moments"[16] of flux, or periods in which the public and academic perception of corporate purpose swung from one pole to the other. This has only happened twice in the past century—first, after the great stock market crash of 1929, and second, following a period of economic stagflation in the 1970s.[17] These moments not only shed light on our modern purpose crossroads, but also on the evolution of law.[18] Law and economics scholars generally embrace an "efficient evolution" narrative, in which inefficient results are extinguished and efficient arrangements persist.[19] Under this view, the embrace of shareholderism in the U.S. represents the efficient development of law in which one "dominant ideology" has crowded out other less efficient concepts and frameworks.[20] Additionally, according to this narrative, the recent push for stakeholder governance represents a misguided attempt to have corporate governance address allocational questions better left to government, with the risk of introducing heightened agency costs and other inefficiencies in the process.[21]

This Article proposes another view. It suggests that rather than converging on one maximally efficient norm for corporate governance, the legal and cultural acceptance of shareholder primacy has been shaped by external economic conditions, and specifically, countervailing government power[22]

[16] *Cf.* BRUCE ACKERMAN, WE THE PEOPLE (Harv. University Press 2013) (coining the term "constitutional moment" which occurs when institutions undergo or require profound change, usually in response to public and cultural pressure points).

[17] As Part II describes in greater detail, I selected these periods (and not earlier ones) because by the 1920s, corporations had taken their modern form in certain key respects. As such, the debates and conversations about the corporation's role in society tend to focus on the same key issues from this time on, making it particularly interesting to study why the leading view changed.

[18] Others have examined corporate purpose shifts to glean insights about the evolution of law and corporate governance. In particular, Harwell Wells' rich study of corporate social responsibility debates from 1930to 2002 reveals that each debate, despite being responsive to specific issues of its time, shared a common conceptual foundation—a disagreement about whether to impose a duty to shareholders vs. broader society. He suggests that these debates emerged as a response to "big business" and in an attempt to reform corporate power, and that this thread has persisted through modern conversations about corporate social responsibility. *See* Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L. REV 77 (2002). In addition, Curtis Milhaupt and Ronald Gilson have studied historical shifts in corporate governance conversations and argue that they are the product of changed views about the desirability of "capital market completeness" and "policy channeling," which is the government's use of the corporation for distributional ends. They argue that "disappointment" with corporate performance drives oscillations between these two conceptions of the corporation. Ronald J. Gilson & Curtis J. Milhaupt, *Shifting Influences on Corporate Governance: Capital Market Completeness and Policy Channeling,* (Colum. L. and Econ., Working Paper No. 634, 2021) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3695309.

[19] Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641 (1998) [hereinafter Roe, *Chaos and Evolution*] (criticizing the pure form of this evolution-to-efficiency view).

[20] Kraakman & Hansmann, *End of History*, *supra* note 13. Less optimistically, the focus on shareholders may have more to do with path dependence than efficient evolution. *See* Lund & Pollman, *Corporate Governance Machine*, *supra* note 1, at 2628.

[21] Bebchuk & Tallarita, *Illusory Promise*, *supra* note 6; Edward B. Rock, *For Whom Is the Corporation Managed in 2020? The Debate over Corporate Purpose*, 76 THE BUS. LAWYER 363 (2021); Matteo Gatti & Chrystin Ondersma, *Can A Broader Corporate Purpose Redress Inequality? The Stakeholder Approach Chimera*, 46 THE J. OF CORP. L. 1 (2020); Jeffrey N. Gordon, *Addressing Economic Insecurity: Why Social Insurance Is Better than Corporate Governance Reform*, CLS Blue Sky Blog (Aug. 21, 2019), https://clsbluesky.law.columbia.edu/2019/08/21/addressing-economic-insecurity-why-socialinsurance-is-better-than-corporate-governance-reform.

[22] *See* Brian R. Cheffins, *Corporate Governance and Countervailing Power,* BUS. L. (2019) (describing the interplay between countervailing government power and internal governance mechanisms, and how changes in each lever can respond to deficiencies in the other); John Kenneth Gailbraith, AMERICAN CAPITALISM (1952). Of course, countervailing government power is also shaped by the political environment, which in turn is influenced by cultural sentiment. *Cf.* MARK J. ROE, POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE: POLITICAL CONTEXT (2006) (exploring the political origins of corporate governance); Christopher Bruner, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD: THE POLITICAL FOUNDATIONS OF SHAREHOLDER POWER (2013) (arguing that "weaker regard for employees"

and the lack of societal inequality.[23] Through a detailed analysis of these two corporate purpose moments, this Article contends that extreme changes in external economic conditions set the stage for different theories of corporate purpose to thrive and influence the path of law in the U.S. Specifically, the stock market crash of 1929 following a period of rising inequality and increased corporate concentration ushered a shift away from a shareholder-oriented vision that prioritized profit-maximizing above all else, toward a model that directed management to serve as trustees for all of the corporation's constituencies.[24] In this moment where the public was keenly aware of the harm created by large corporations with substantial market power, as well as the problems that came from unequal corporate rent distribution and a lack of countervailing government regulation, the foundation was laid for stakeholder governance to capture the public consciousness and alter the path of law.[25]

This "management trustee" view persisted for over fifty years,[26] until the pendulum swung back to a shareholderist view in the 1980s. Laying the foundation for this return was a period of slow corporate growth and high inflation, as well as low inequality.[27] Not only that, before Reagan's election in 1980, many people believed that corporate activities were unduly subject to government constraints.[28] In other words, the economic conditions that precipitated the swing toward stakeholderism in the 30s no longer captured the attention of academics and policymakers. Instead, the view that corporations should pursue shareholder value—a position that had been deemed a loser only a few years earlier—now took hold across a population gripped with concern about managerial agency costs, slow corporate growth, and burdensome externality regulation. These ideas laid the foundation for a return to shareholderism, a shift that was locked in by the hostile takeover wave of the 1980s and that has shaped the path of corporate law and governance ever since.[29]

As this brief introduction suggests, shifts in the dominant view of corporate purpose in the U.S. have been precipitated by changes in external economic conditions, which rendered certain intellectual arguments more appealing than others. In particular, arguments for stakeholderism won the day when proponents could point to evidence of rampant corporate externalities and the government's inability to address them; by contrast, arguments for shareholderism gained momentum in the face of slow corporate growth and profitability.[30]

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results in "greater political pressure being brought to bear on corporate governance…and inhibiting exclusive focus on shareholders"). My Article focuses in on the first link in this chain—how the economic environment affects cultural and academic perception of corporate purpose—with full recognition that cultural sentiment can also affect the economic environment for corporations via a changed political and regulatory environment. Sections II.C and IV.C. discuss this interplay in further detail.

[23] Scholars have noted that concerns about inequality might "provide the impetus necessary to make us rethink the way we tax and spend." *See, e.g.*, Saul Levmore, *Inequality in the Twenty-First Century*, 113 MICH. L. REV. 833 (2015). This Article connects this insight to conversations about corporate purpose.

[24] *See* i*nfra* Section II.A.

[25] *Id.*

[26] Wells, *Cycles*, *supra* note 17.

[27] *See infra* Section II.B.

[28] *Id.*

[29] *Id.*; Lund & Pollman, *Corporate Governance Machine*, *supra* note 1. The *Corporate Governance Machine* described how mainstream corporate governance enshrines a focus on shareholders, and in so doing, inhibits a shift toward a stakeholder governance paradigm. Building on this analysis, this Article studies historical periods of purpose shift, and focuses on the factors that caused cultural sentiment to change, in ways that eventually affected legal and extra-legal corporate governance institutions.

[30] Note that changed conditions may have also precipitated changes to other areas of law, including antitrust, bankruptcy, and securities law. See Aneil Kovvali, *Stakeholderism Silo Busting*, U. Chi. L. Rev. (2022).

Are purpose shifts solely the product of unprincipled political and social forces, or could there be a deeper logic supporting a dynamic concept of purpose? My Article offers a theoretical account in support of the latter proposition—and specifically, that the argument for using corporate governance to mitigate social ills strengthens when externality regulation is inadequate, inequality is high, and corporate competition is weak. Simply put, the failure of government to regulate not only increases public appetite for stakeholder governance, but may also render it welfare enhancing, in a second-best sense.

Consider again, a hypothetical widget factory that pollutes as part of its production process. Assume that the private costs of manufacturing widgets are less than the social costs of environmental harm. As such, the factory produces more widgets than is socially beneficial. For various reasons, the government does not regulate pollution adequately, and the factory is allowed to continue its inefficient production.[31] How to respond to this problem? Of course, asking the factory's managers to consider and mitigate pollution creates well-known inefficiencies[32] and is unlikely to be as effective as a regulatory mandate.[33] But if regulatory reform is not available, or the costs of securing it are very high, an "inefficient" corporate governance rule may become the best way to achieve social good, if it is the least costly way to accomplish harm abatement.[34]

As this example reveals, external economic conditions affect the desirability of different governance models[35]—an insight that is generally absent from purpose debates. In particular, proponents of shareholder primacy generally assume a first-best world, in which government can and

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[31] In addition, assume a Coasian bargain is not possible because the transaction costs of achieving it are prohibitive. *See* Ronald Coase, *The Problem of Social Cost* (1960).

[32] *See supra* note 6; Aneesh Raghunandan & Shivaram Rajgopal, *Do Socially Responsible Firms Walk the Talk?* (2021) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3609056.

[33] *See* Bebchuk & Tallarita, *Illusory Promise*, *supra* note 6 (finding evidence suggesting that constituency statutes have not benefitted stakeholders); Luca Enriques, Henry Hansmann, Reinier Kraakman, & MARIANA PARGENDLER, THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH at 107 (Oxford Univ. Press, 3d ed. 2017) ("There is good reason to be cautious about the use of corporate law to tackle broad social problems.…When fiduciary duties are enlarged to encompass non- contractual constituencies, they are usually unenforceable by those constituencies. …[Not only that,] determining what general social welfare requires at any point in time is an insurmountable task even for directors— let alone for courts."). I am sympathetic to this argument; nonetheless, when corporate purpose changes, other aspects of governance generally shift as well to promote fidelity to the new goal, which could better enable management to address it (and stakeholders to enforce it). *See* Lund & Pollman, *Corporate Governance Machine*, *supra* note 1 (showing how the acceptance of shareholder primacy has influenced the path of corporate governance in the U.S. via law, culture, and institutions). Section IV.D discusses this observation in further detail.

[34] *See Anatomy at Corporate Law* at 93 (noting that regulators will sometimes resort to governance strategies to achieve broader societal objectives and that "such an approach may be necessitated when— owing to regulators' information gaps or to successful industry lobbying— more direct regulatory responses to externalities and other social problems are not feasible"); Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J. OF L., FIN., AND ACCT. 247, 249 (2017) ("If political change is hard to achieve, action at the corporate level is a reasonable substitute"); Roland Bénabou & Jean Tirole, *Individual and Corporate Social Responsibility*, 77 ECONONOMICA 1, 2 (2010) ("The state… has a comparative disadvantage in policing minor nuisances such as a lack of respect for employees or conspicuous consumption by executives, or in directing resources to very local needs").

[35] *See* Rock, *supra* note 20, at 368 (arguing that "[p]olitical dysfunction raises fundamental questions for the traditional view [of corporate purpose]. If the legislature will not enact reasonable environmental regulation to control carbon, and we face imminent and irreversible environmental degradation, perhaps corporate law and governance should do more to control climate change…? If "shareholder primacy" stands in the way of pursuing these worthwhile goals, perhaps it should be swept aside?"). Rock ultimately dismisses these impulses as the product of populist pressures and frustration with legislative action, with "regrettable results." Section III considers whether these arguments could instead be consistent with economic logic.

will costlessly regulate corporate harm, ensure competitive markets, and allow citizens opportunities to accumulate wealth and obtain services like health care and education.[36] But in reality, these conditions are not always met. And in a second-best world, social planners face a choice: would attempting to abate corporate harm and societal inequality via corporate governance be preferable to employing tax and regulation, which are also costly to deploy and may not be achievable?

This observation builds on scholarship in other fields—namely tax law—that demonstrate that inefficient legal rules can be rendered efficient when the enactment of the better rule is not possible or is very costly to achieve.[37] My analysis also relates to a rich literature in comparative corporate law, which has observed that differing institutional environments across jurisdictions may affect the optimality of various corporate governance arrangements.[38] My Article applies these broad insights to the corporate purpose debate that is once again gripping the U.S. and suggests that neither side has it quite right. My analysis suggests that when externality regulation is inadequate, corporate competition is low, and inequality is high, the inefficiencies created by a broader standard for fiduciary discretion could be dwarfed by the benefits that come from using corporate governance to abate corporate

[36] Pargendler, *Controlling Shareholders supra* note 1, at 971 ("traditional corporate governance analysis faces a "modularity trap" where excessive simplicity and rigidity in thinking detracts from our ability to better understand the world."); Ann Lipton, *Beyond Internal and External: A Taxonomy of Mechanisms for Regulating Corporate Conduct*, WISC. L. REV. 657, 659 (2020) (discussing how the current system describes corporate and securities law as "internal" to the corporation and other bodies of law, including antitrust and labor law, are conceptualized as "external").

[37] Zachary D. Liscow, *Redistribution for Realists*, 107 IOWA L. REV. 495 (2022) (arguing that because individuals prefer to redistribute through legal rules rather than tax, the tax system will lack the flexibility to redistribute income); Alex Raskolnikov, *Distributional Arguments, in Reverse*, 105 MINN. L. REV. 1583 (2020) (studying legal changes that had perverse distributive effects and noting that the tax system did not adjust to offset these effects); Zachary D. Liscow, *Reducing Inequality on the Cheap: When Legal Rule Design Should Incorporate Equity as Well as Efficiency*, 123 YALE L. J. 2478 (2014) (discussing the argument that wealth redistribution should take place through tax instead of inefficient legal rules and pointing out that this argument assumes away the inefficiencies that come from using the tax system to redistribute wealth); Lee Anne Fennell & Richard H. McAdams, *The Distributive Deficit in law and Economics*, 100 MINN. L. REV. 1051 (2016) (observing that law and economics scholars generally ignore the "political action costs" that are necessary to achieve welfare maximizing distributive results); *but see* David Weisbach, *Constrained Income Redistribution and Inequality: Legal Rules Compared to Taxes and Transfers* (U. Chi. Coase-Sandor Inst. for L. and Econ. Research Paper No. 969), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4328824 (arguing that political constraints strengthen the argument against using legal rules to redistribute income); Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994) (arguing that using tax to accomplish redistribution is preferable to using legal rules). For a related argument made in international trade law—that trade barriers may be the efficient path to distribution if domestic policy is incapable of achieving the desired result, *see* Timothy Meyer, *Saving the Political Consensus in Favor of Free Trade*, 70 VAND. L. REV.985 (2017); Gregory Shaffer, *Retooling Trade Agreements for Social Inclusion*, 1 U. IL. L. REV. (2019).

[38] *See*, *e.g.*, Dan Puchniak, *No Need for Asia to be Woke: Contextualizing Anglo-America's 'Discovery' of Corporate Purpose*, 4 RED 14 (2022); ROE, POLITICAL DETERMINANTS, *supra* note 21 (contending that corporate governance reflects the social and political realities of various countries); Christopher Bruner, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD (2013) (explaining that differences between the U.S. and UK corporate governance system can be understood by focusing on the robustness of a country's social welfare system); Mariana Pargendler, *Corporate Governance in Emerging Markets*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE (Jeffrey N. Gordon & Wolf-Geroge Ringe, eds., 2015) (describing the corporate governance of companies in emerging markets as a response to economic and political factors); Mariana Pargendler, *How Universal Is the Corporate Form? Reflections on the Dwindling of Corporate Attributes in Brazil*, 58 COLUM. J. OF TRANSNAT'L L. 1, 7 (2019) (discussing how changes in the corporate form in Brazil may be responsive to a weak institutional environment that fails to curb externalities through regulation); *see also* Dani Rodrik, *Second-Best Institutions*, 98 AM. ECON. REV. 101 (2008) (arguing that "appropriate institutions for developing countries are instead "second-best" institutions – those that take into account context-specific market and government failures that cannot be removed in short order.").

harm.[39] By contrast, when externality regulation and corporate competition are robust and inequality is low, concerns about efficient corporate growth and profitability, as well as management rent-seeking, likely outweigh these social concerns and suggest a shareholder-oriented mandate for corporate governance would be welfare enhancing.

Interestingly, the historical analysis reflects this logic to some degree: it appears that the cultural pressure on management to either benefit shareholders or society shifts in response to extreme changes in externality regulation, corporate concentration, and inequality. This external pressure provides a foundation for certain intellectual ideas about the corporation's role in society to rise in prominence, capturing the public imagination until external conditions change again. It bears repeating that it is not the persuasiveness of the arguments and their advocates, but instead, the conditions of the time, that lead to their eventual acceptance—and also potentially their normative desirability.

Nonetheless, the corporate purpose moments discussed here ultimately depart from economic logic in important ways. For one, in each example, by the time the purpose shift took hold, the justification for it had waned, in particular, because the regulatory environment had begun to change as well (for example, in the 70s, dissatisfaction with government regulation led to a deregulatory presidential administration as well as a purpose shift toward shareholder primacy). Likewise, after each pendulum swing, the dominant view remained sticky, leading to periods of relative stasis even as external economic conditions continued to change.

Therefore, when it comes to changes in the public's understanding of corporate purpose, it appears that external conditions play an important role, although other factors—including path dependence and political ideology—are certainly at work as well.[40] The presence of these factors limit the ability to make specific predictions based on external economic conditions; nonetheless, it suggests that when inequality, corporate concentration, and political dysfunction hit extremes, as they have in the past decade, calls for a shift toward a stakeholder governance model will increase. Moreover, the observation that external factors can change the welfare-creating orientation for corporate governance is an important counterweight to scholarship and advocacy that maintains that a return to past principles is necessarily inefficient, or that there is one right answer to the question of the proper role for corporations in society. Instead, the greater the departure from a first-best world, the stronger the rationale for a broader concept of purpose. At bottom, I hope that my central claim—that external economic conditions could affect welfare-enhancing orientation for corporate governance—will add nuance to this important debate that has had a dramatic impact on the path of corporate law and governance for decades.

This Article proceeds as follows. Part II considers two corporate purpose moments in which the dominant view of the corporation's role in society shifted dramatically. The historical analysis reveals a pattern: receptiveness toward stakeholder governance increased as inequality and corporate concentration grew and as countervailing power failed to constrain corporate externalities, only to fall away as the pursuit of corporate growth was perceived as more desirable than the abatement of harm via corporate governance. Part III sets forth my claim that features of a second-best world could change the welfare-enhancing orientation for corporations in society and supports that argument with

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[39] This insight is related to Aneil Kovvali, *Countercyclical Corporate Governance*, 101 N.C. L. REV. 141 (2022), which explores how shareholder primacy can push companies to make suboptimal choices in periods of economic crisis.

[40] *Cf.* Roe, *Chaos and Evolution*, *supra* note 1918 at 668 ("Although economic institutions that survive cannot be too inefficient, evolution-toward-efficiency…does not fully determine the institutions we observe.").

simple hypotheticals. Specifically, it argues that when externality regulation is inadequate, corporate competition is weak, and inequality is high, shareholder primacy theory is on its weakest footing—not just in terms of societal acceptance but also normative desirability. Part IV considers the implications of this analysis, including by reflecting on the corporate purpose conversation that is taking place today. In particular, it reveals that the current climate in the U.S., which features high corporate concentration and inequality, as well as political dysfunction, is likely contributing to our contemporary purpose crossroads. It concludes with implications for discussions about the evolution of corporate law and governance and raises open questions.

II. Corporate Purpose Moments

This Part describes two historic corporate purpose "moments"[41] in which the leading view of the corporation's role in society swung from one pole to another, affecting the path of law as well as the conduct of business. It first discusses the shift from a shareholder-oriented model to a stakeholder model that occurred after the stock market crash of 1929. It then considers how that stakeholder-oriented model fell out of favor after a period of economic stagflation in the 70s. At first blush, these periods of flux appear to be the product of unprincipled political or social forces.[42] But a closer look reveals a pattern—perceptions of adequate or inadequate countervailing power, as well as low or high social inequality, preceded both shifts.

Before diving into the historical analysis, a few caveats are warranted. First, I focus on the two most significant corporate purpose pendulum swings that have occurred in past century in the United States. I do not discuss shifts that occurred before the 20th century because it is especially difficult to draw analogies between the 19th century corporation and those that exist today. For example, early U.S. corporations came into existence via legislative charter, which required the specification of a public-oriented purpose,[43] a requirement that had all but disappeared by the early 1900s.[44] Likewise, by the turn of the century, most corporations were financed by diffuse investors and institutions, run by professional managers who were not large owners, and were subject to state law under enabling corporate codes.[45] Due to these similarities, debates about the corporation's role in society have focused on the same key issues for the past century, making it particularly interesting to examine why the leading view changed when it did.[46] Of course, there are also important differences between the legal and financial environment facing corporations at the turn of the 20th century and today. As will be discussed, these differences limit what modern readers can take away from these historical snapshots.

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41 *Cf.* Ackerman, *supra* note 23.

42 Scholars have made the case that politics affect corporate governance and corporate purpose, a premise I do not disagree with. *See* ROE, POLITICAL DETERMINANTS, *supra* note 21; Bruner, *supra* note 21; Rock, *supra* note 20. But rather than dwell on the political impetus for change, my Article focuses on the economic conditions that precipitate not just the shift in the political environment, but also the perception of corporations and their role in society.

43 *See* Elizabeth Pollman, *The History and Revival of the Corporate Purpose Clause*, 99 T. L. REV. 1423 (2021); MAX LERNER, AMERICA AS A CIVILIZATION (1957) ("The early American corporations were wards of the state, chartered only in rare cases, and supervised by the state in every phase of their operation."); A. A. Sommer, *Whom Should the Corporation Serve? The Debate Revisited Sixty Years Later,* 16 DEL. J. CORP. L. 33 (1991).

44 *See* Pollman, *History and Revival*, *supra* note 43.

45 *See* ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 110-11 (1932) [hereinafter Berle & Means, *Modern Corporation*] (explaining that "in the largest American corporations, a new condition has developed….(T)here are no dominant owners, and control is maintained in large measure apart from ownership").

46 *See* Wells, *Cycles*, *supra* note 17 at 78 ("Viewed in historical perspective, each new round of debate on corporate social responsibility seems merely to recapitulate earlier debates in a slightly altered form.").

Second, by focusing on these two moments, I do not mean to suggest that corporate purpose has been static at other times. Between the 1930s and 1970s, a stakeholder governance model predominated, but it evolved in nuance[47]; likewise, since the 1980s, the shareholder value norm has evolved and changed.[48] Given space and time limitations, I am not able to examine these more subtle shifts and the economic environment that preceded them. Instead, I focus on the two moments where the pendulum swung completely, away from shareholderism and then back again. Finally, when discussing the shift from one view to another, I do not mean to suggest that the "dominant" view was universally accepted. As the snapshots below reveal, during periods of stasis, prominent voices continued to favor the opposite position. However, these dissenters tended to be drowned out until the pendulum swung in their direction once again.

A. Moment 1: "Profit Maximization" to "Trustee Management"

This Section focuses on the late 1920s and early 1930s, when the dominant view of the corporation and its role in society shifted from profit-maximizing above all else to "trustee management," where corporate executives were thought to serve as trustees for the company's stakeholders, alongside its shareholders.

To set the stage for this shift, during the late 19th and early 20th century, the general belief was that "business managers have but one single objective—to maximize profits. The only constraint on this pursuit was the legal framework within which the firm operated."[49] During this period, America was a "society of economic scarcity. Hence, economic growth and the accumulation of aggregate wealth were primary national goals."[50] As a result, Adam Smith's admonition that allowing individual business owners to pursue their own "selfish interest" would promote the public good—i.e., create the greatest wealth in the nation—was widely accepted.[51] In line with this logic, corporations before the turn of the 19th century encountered little externality regulation—they were generally free to operate without concern for their employees, the safety of their products, and the natural environment.[52]

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47 See, e.g., Robert Hay & Ed Gray, *Social Responsibilities of Business Managers*, 17 ACAD. MGMT. J. 135 (1973) (describing three historical phases of corporate social responsibility during this period).

48 See, e.g., Dorothy S. Lund, *Enlightened Shareholder Value, Stakeholderism, and the Quest for Managerial Accountability*, RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD (Elizabeth Pollman & Robert Thompson, eds., 2021); Robert B. Thompson, *Anti-Primacy: Sharing Power in American Corporations*, 71 BUS. LAW. 381 (2016) (describing the two conceptions of shareholder primacy as well as the director primacy view).

49 Hay & Gray, *supra* note 47; Julia C. Ott, *"The Free and Open People's Market": Political Ideology and Retail Brokerage at the New York Stock Exchange, 1913–1933*, 96 J. AM. HIST. 44, 64 (2009) (noting that at this time in history, "the maximization of shareholders' returns was the most important consideration in corporate governance and economic policy."); Wells, *Corporate Governance*, *infra* note 61 at 1255 (noting that "the chief concern in corporation law was for the shareholders" during the 1920s); E. Merrick Dodd Jr., *For Whom are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1146-47 (1932) ("[I]t is undoubtedly the traditional view that a corporation is an association of stockholders formed for their private gain and to be managed by its board of directors solely with that end in view.").

50 Alfred D. Chandler Jr., THE VISIBLE HAND THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS (1993) (describing the slow growth characterizing the U.S. economy until the end of the 19th century).

51 Hay & Gray, *supra* note 47 (citing Adam Smith, WEALTH OF NATIONS (1776)).

52 Gilson & Milhaupt, *supra* note 17 at 21. This lax regulatory environment was precipitated by the shift toward general incorporation that occurred at the end of the 19th century. Before that time, states granted limited corporate charters that restricted corporate activities to those that met a public need. As corporate codes became more enabling, corporate activities faced little restriction, which eventually paved the way for a greater federal role in antitrust, labor, and environmental law. *See* Charles Yablon, *The Historical Race: Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880-1910*, 32 J. CORP. L. 323, 329 (2007); Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 VAND. L. REV.

But the U.S. economy was changing rapidly during this early period, as was the regulatory environment. In particular, by the early 1900s, the prototypical corporation was no longer the small family firm, but the large industrial enterprise with thousands of employees and diffuse stockholder investors.[53] In addition, industrial consolidation led to the control "of many sectors of the economy by relatively few large, integrated, industrial enterprises" by the 1910s.[54] By the 1920s, "the modern economy, dominated by large corporations, reached maturity."[55] Corporate concentration had likewise reached a high point.[56] And as a result of the democratization of corporate finance, control of corporations had passed from owners to professional managers, who presided over investments made by diffuse ordinary investors.[57] Simply put, by the 1920s, corporate and managerial power over productive assets, employment, and the economic lives of individuals had reached never-before-seen heights.

During this period of corporate growth and power, the public perception of corporations remained largely positive, despite the fact that gains were not shared equally.[58] Indeed, the early 1900s saw some of the starkest inequality in American history.[59] To take one datapoint, in 1918, 18% of the income in the U.S. went to the top 1%, a number that had only increased by 1928.[60] Nonetheless, most Americans saw the growth of the stock market as an opportunity for them to share in the gains.[61] Accordingly, the political mood generally favored corporate America. By 1928, Americans had elected

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639, 654 ("Around the turn of the nineteenth century, when state corporate law began to liberalize and become more enabling, the law increasingly turned to regulation outside the structure of the corporation to enforce responsibility on corporations and protect various stakeholders and the public.").

[53] *See* Berle & Means, *supra* note 45; Adam Winkler, *Corporate Law or the Law of Business?: Stakeholders and Corporate Governance at the End of History*, 67 J. OF L. AND CONTEMPORARY PROBLEMS 109 (2004). This trend was well underway at the dawn of the 20th century. Eric Hilt, *The Berle and Means Corporation in Historical Perspective*, 42 SEATTLE U. L. REV. 417, 420 (2019).

[54] Wells, *Cycles*, *supra* note 17.

[55] *Id.*

[56] *See* Nicholas N. Eberstadt, *What History Tells us about Corporate Responsibilities*, MANAGING CORPORATE SOCIAL RESPONSIBILITY (1977) at 21 ("The giant corporation came to dominate the economy. By the late nineteenth century, the two hundred largest manufacturing concerns added more to the GNP than the next hundred thousand largest. Some corporations virtually had the power of governments . . . . The monopolies, pools, and trusts which the captains of industry cultivated often successfully defied the laws of market pricing….").

[57] Chandler, *supra* note 50; Berle & Means, *supra* note 45; Eberstadt, *supra* note 56 at 21 ("This enormous concentrated economic power gravitated into the hands of a few, raising up a corporate ruling class with almost unlimited authority.").

[58] Eberstadt, *supra* note 56 at 21 (noting that during the 1920s, "while corporate profits and the cost of living soared, wages actually declined. The average worker was paid so poorly that the Bureau of Labor statistics concluded it was impossible for many workers to provide for their families.").

[59] Robert D. Plotnick, et. al, *The Twentieth Century Record of Inequality and Poverty in the United States*, UNIV. OF WASHINGTON CENTER FOR STUDIES IN DEMOGRAPHY AND ECOLOGY (Center for Studies in Demography and Ecology, Working Paper No. 98-01, 1998), https://csde.washington.edu/downloads/98-1.rtf#:~:text=Starting%20about%201920%20inequality%20began,32%20to%20about%2020%20percent ("From the turn of the century until World War I, inequality was higher than in the latter half of the century.")

[60] Matthew Johnston, *A History of Income Inequality in the United States*, INVESTOPEDIA (May 20, 2022), https://www.investopedia.com/articles/investing/110215/brief-history-income-inequality-united-states.asp

[61] Wells, *Cycles*, *supra* note 17 at 86; Harwell Wells, *The Birth of Corporate Governance*, 44 SEATTLE UNIV. L. REV. 1247, 1265 (2010) (noting that writers in the 20s "heralded ever-widening stock ownership as a salve for social problems because it promised to give ordinary Americans a stake in the nation's growing corporate economy"); Robert Brookings, INDUSTRIAL OWNERSHIP: ECONOMIC AND SOCIAL SIGNIFICANCE 9 (1925) (arguing that the rise of the individual shareholder would give management an increasing sense of responsibility toward shareholders and solve "the industrial problem"). There were of course forceful critics of corporations and their practices who were able to find political allies during this time. *See* MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE (1996). But the public mood largely favored corporations until the market crash of 1929.

Herbert Hoover who "fervently believed that real improvement in the country would come from private enterprise."[62] In particular, he, along with many others, saw giant and powerful corporations as capable of transforming society via "welfare capitalism," in which gains trickled down to benefit employees in the form of profit-sharing plans and pension arrangements.[63] These ideas set the stage for the trustee managerialism phase that was on the horizon.

This is not to say that there were no dissenters from this rosy view, nor were there no attempts to reign in corporate externalities and power. As corporations evolved from small family proprietorships to large industrial organizations, progressive and populist critics alike voiced the concern that increased managerial power and reduced oversight from owners would lead to opportunistic behavior by managers, as well as social harm.[64] Their concerns appeared to be borne out after the New York Life Insurance scandal of 1905, which uncovered rampant corruption in the insurance industry, as well as the Pujo Commission's investigations from 1912-13, which confirmed that Wall Street had ample influence across corporate America.[65] Progressive reformers also called attention to the harm that came from unbridled corporate concentration and pollution, leading to early and significant reforms, including the Sherman Antitrust Act of 1890, the Clayton Act of 1914, the Safety Appliance Act of 1893, and the Rivers and Harbors Act of 1899.[66] Nonetheless, these early efforts at controlling monopolies and protecting the environment were of only limited success, paving the way for more aggressive federal reform to take hold during the New Deal.[67]And yet, the dominant view of the corporation's role in society continued to favor profit-seeking within the constraints of law,[68] in part because hostility to growing corporate power was tempered by the promise of gain sharing by millions of first-time investors.[69]

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[62] Wells, *Cycles*, *supra* note 17. Coolidge, who preceded Hoover, shared this pro-business vision. *See* Calvin Coolidge, Speech to the Amherst College Alumni Association (Feb. 4, 1916), https://coolidgefoundation.org/resources/speech-to-the-amherst-college-alumni-association/ ("The man who builds a factory builds a temple, that the man who works there worships there, and to each is due, not scorn and blame, but reverence and praise.").

[63] Wells, *Cycles*, *supra* note 17 (citing STUART D. BRANDES, AMERICAN WELFARE CAPITALISM, 1880–1940 (1976)).

[64] WILLIAM W. COOK, A TREATISE ON STOCK AND STOCKHOLDERS, BONDS, MORTGAGES, AND GENERAL CORPORATION LAW 896 (3d ed. 1894) (voicing concern that corporate law changes were turning modern corporations into "instruments of fraud, speculation, plunder, and illegal gain"); LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY: AND HOW THE BANKERS USE IT 1-2, 12-15, 47 (1914) (arguing that the lack of oversight of corporate leaders would lead to market manipulation and increased inequality); Roe, STRONG MANAGERS, *supra* note 61 at 30 (describing how both progressives and populists "loathed Wall Street" and believed that individuals had to be protected against large institutions).

[65] Winkler, *supra* note 53 (describing these scandals and subsequent investigations and regulation by Congress); ROE, STRONG MANAGERS*, supra* note 61 at 30-31 (describing early Congressional investigations into the power and influence of bankers and insurance companies).

[66] Gilson & Milhaupt, *supra* note 17.

[67] Joseph T. Walsh, *The Fiduciary Foundation of Corporate Law*, 27 J. OF CORP. L. 333 (2002).

[68] This view affected legal obligation, generating the clearest articulation of a shareholder-oriented vision for corporate purpose in history. See *Dodge v. Ford Motor Company*, 204 Mich. 459, 170 N.W. 668 (Mich. 1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end.").

[69] Wells, *Corporate Governance*, *supra* note 61 at 1255 ("[Now] that ordinary Americans' wealth and security was…tied directly to their status as shareholders, [] the well-being of shareholders qua shareholders suddenly jumped in importance . . . . No longer was the fundamental problem in corporation law to be that corporations damaged competitors or the public; now the chief concern in corporation law was for the shareholders."); Ott, *supra* note 49.

The shift away from this vision finally occurred after 1929, when the great stock market crash ended a long period of prosperity in the U.S.[70] and made abundantly clear that the growth in corporate wealth and power would not necessarily benefit all. In particular, "speculation, deliberate underemployment, and drastic inequities caused a depression of unprecedented severity."[71] The hardships faced by American workers, 25% of which remained unemployed by 1932,[72] focused public attention on abusive practices by large corporations and their role in contributing to the crash and societal inequality.[73] They also precipitated a host of New Deal reforms in antitrust, banking, and securities regulation aimed at controlling corporate power and also protecting the public.[74]

Therefore, after the stock market crash, "the corporation [was] increasingly regarded as an institution, which, like the government, has social obligations to fulfill."[75] Again, this is not to say that these ideas were new: corporate reformers had advocated for a higher purpose for management since the turn of the century.[76] But their arguments failed to carry the day until the stock market crash allowed the pendulum to swing in their direction.

The transition in public opinion is captured by the famous scholarly debate between Adolf Berle and E. Merrick Dodd. In 1932—just three years after the great crash—Dodd, a Harvard law professor, authored "For Whom are Corporate Managers Trustees?"[77] Dodd began his article by articulating the classic legal standard: "it is undoubtedly the traditional view that a corporation is an association of stockholders formed for their private gain and to be managed by its board of directors solely with that end in view."[78] Dodd then noted that a different view had been gaining ground. He observed that "public opinion, which ultimately makes law, has made and is today making substantial strides in the direction of a view of the business corporation as an economic institution which has a social service

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[70] John Kenneth Gailbraith, THE GREAT CRASH, 1929 2 (2009) ("the twenties in America were a very good time. Production and employment were high and rising. Wages were not going up much, but prices were stable. Although many people were still very poor, more people were comfortably well-off…than ever before.").
[71] Eberstadt, *supra* note 56 at 22.
[72] *Id.*
[73] Bratton & Wachter, *supra* note 46 at 102 ("The consensus [in the wake of the Great Depression] was that emerging, modem corporate institutions were an integral part of the flawed system and thus part of the problem."); *see also* Christopher Havasy, *On the Legitimacy of Managerial Power in Corporate Governance*, 22-23 (describing the general view that corporations were not advancing the interests of ordinary citizens in the early 30s).
[74] As Louis Brandeis (the father of much of the New Deal legislation) put it when criticizing earlier reforms, "the primary purpose of the Money Trust legislation is not to prevent directors from injuring stockholders, but to prevent them from injuring the public." Brandeis, *supra* note 64 at 80.
[75] Eberstadt, *supra* note 56 at 22. *See also* William W. Bratton, *The Separation of Corporate Law and Social Welfare*, 74 WASH. AND LEE L. REV. 767, 771 (2017) (describing the wake of the depression where "managers emerged as quasi-public servants"); William W. Bratton, *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1476 (1989) (describing how dissenting views quieted after the 1930s "as the management-centered conception of large corporate entities took hold."); Henry Manne, *The Higher Criticism of the Modern Corporation*, 62 COLUM. L. REV. 399, 413-14 (1962) ("It has become commonplace in recent years for executives of large corporations to 'admit' that business has responsibilities extending beyond mere maximization of shareholders' income.… Included, for example, are such ideas as charging only a "fair" price for goods, considering the interests of local communities in plant location matters, contributing to a variety of charitable and educational institutions, testing quality control methods by the interests of consumers rather than by the profit maximization standard, and generally doing business with suppliers, the labor force, and dealers in an 'equitable' fashion rather than by arm's length, purely selfish bargaining."); David S. Ruder, *Public Obligations of Private Corporations*, 114 U. PA. L. REV. 209 (1965) ("Although some businessmen still cling to the notion that the business of the corporation is solely to make profits, their position is not a popular one.").
[76] *Id.*
[77] E. Merrick Dodd Jr., *For Whom are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932).
[78] *Id.*

as well as a profit-making function."[79] A contributing factor was the "concentration of control of industry in a relatively few hands" which had encouraged the belief that corporate management could indeed benefit workers, consumers, and society more broadly.[80]

How, though, could law encourage such a state of affairs? Dodd offered a novel legal solution—recognize directors of corporations as trustees, not for shareholders, but for their corporations.[81] As part of this, he voiced skepticism of proposals to enhance shareholder power, noting that the interests of shareholders and stakeholders were not always aligned.[82] Instead, he argued that giving ample power and discretion to directors as "agents" of the corporate person would allow these managers to "employ its funds in a manner appropriate to a person … with a sense of social responsibility…."[83] This view—that corporate law should allow management discretion to benefit corporate stakeholders, so that stakeholders could share in the benefits of the modern corporation—reflected the welfare capitalism school of thought that originated in prior years, as well as the corporatist attitudes that had taken hold in the wake of the Great Depression.[84]

Adolf Berle's famous response to Dodd, published in the next issue of the Harvard Law Review, agreed that the aim of corporate law was to advance social welfare but maintained that managers could not be trusted to benefit the public. Berle recognized that the impulse behind Dodd's position was management's unprecedented degree of control over productive assets and employment in the U.S.[85] But he viewed the idea that corporate managers would serve as trustees for all as naïve: "[t]he industrial 'control' does not now think of himself as a prince; he does not now assume responsibilities to the community; his bankers do not now undertake to recognize social claims; his lawyers do not advise him in terms of social responsibility. Nor is there any mechanism now in sight enforcing accomplishment of his theoretical function."[86] In an admonition that evokes the current purpose debate in the U.S., Berle cautioned that any evolution away from a shareholderist orientation for managers should not occur until there existed "a clear and reasonably enforceable scheme of responsibilities to someone else."[87] Freeing management from any meaningful constraint would in effect give them total control, because almost all corporate activity could be justified as benefitting stakeholders.[88]

Modern readers applaud Berle's response to Dodd as "clear-eyed" and prescient, in contrast to Dodd's naivety.[89] In the years that followed, however, Dodd emerged as the victor—so much so that in 1954, Berle conceded victory to Dodd in a series of speeches and articles.[90] For example, in a 1962 article, Berle explained, "[In t]he discussion I had with the late Professor E. Merrick Dodd ... I was

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[79] *Id.* at 1148.
[80] *Id.* at 1151-52.
[81] *Id.* at 1146.
[82] In particular, he opened his article with an attack on a recent Adolph Berle article that advocated for increased recognition that managers were trustees for shareholders. *Id.*; see also Bratton & Wachter, *supra* note 45 at 147-48.
[83] Dodd, *supra* note 77 at 1161.
[84] William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation*, 34 J. CORP. L. 99, 123 (2008).
[85] Adolph A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1367(1932).
[86] *Id.* at 1367.
[87] *Id.* For a modern version of this argument, see Bebchuck & Tallarita, *Illusory Promise*, *supra* note 6.
[88] Berle, *Trustees*, supra note 85 at 1367.
[89] *See, e.g.*, Leo E. Strine, Jr., *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).
[90] Bratton & Wachter, *supra* note 45 at 134.

afraid of corporate managements as social statesmen, … not because I objected to the job being done, but because I thought corporate managements were not especially qualified to do it…. Events and the corporate world pragmatically settled the argument in favor of Professor Dodd."[91]

As this discussion reveals, the dominant vision of corporate purpose following the great crash was aligned with Dodd's view of the world.[92] During this "trustee management"[93] or "managerial capitalism"[94] phase, corporate managers were viewed as responsible for maximizing stockholder wealth *and* creating and maintaining an equitable balance among stakeholder claims.[95] Ultimately, although the contours of the managerialism phase underwent subtle shifts during its reign, the general orientation would not change until the early 80s.[96] And these views influenced both business culture and the path of law.[97] In particular, the classic view of fiduciary duty—that corporate directors are bound to manage the corporation only for the benefit of its shareholders—was challenged during this period, as evidenced by Berle's acknowledgement that Dodd's point of view had been proven correct.[98]

A further example of the evolution in the legal environment concerns the debate over corporate charitable donations, which had traditionally been disfavored.[99] But after "[s]ocial and economic evolution in [] society … brought about a mutation in the public image of [] the business corporation"

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[91] Adolf F. Berle, *Modern Functions of the Corporate System*, 62 COLUM. L. REV. 433, 442-43 (1962). *See also* ADOLF A. BERLE, JR., THE 20TH CENTURY CAPITALIST REVOLUTION 83, 126 (1954) (advocating for legal changes that would free managers from their duties to shareholders and allow them to direct corporate wealth for public welfare). Interestingly, a few years after the great debate, Dodd accepted Berle's argument that shareholder control was necessary to avoid "freeing the managers from substantial control of any kind." E. Merrick Dodd, Jr., *Is Effective Enforcement of the Fiduciary Duties of Corporate Managers Practicable?*, 2 U. CHI. L. REV. 194, 206 (1935). Nonetheless, by the 50s, Berle recognized that Dodd's view had been born out by "social fact and judicial decisions." Adolf A. Berle, Foreword, in THE CORPORATION IN MODERN SOCIETY (Edward Mason, ed., 1959); *see also* Brian Cheffins, *The Past, Present, and Future of Corporate Purpose* DEL. J. CORP. LAW (forthcoming 2023).

[92] *See supra* note 74.

[93] The theoretical underpinnings of managerialism came from institutional economics, which saw management of large corporations as untethered from market forces and the desire to profit, and instead motivated by power and prestige. Gardiner Means, THE CORPORATE REVOLUTION IN AMERICA 72 (1962). These incentives were not deemed problematic, however, because management's desire for growth was thought to correspond with profit. See A. Chandler, *supra* note 50, at 484-500 (arguing that management's push for growth and the development of large profitable firms were closely related).

[94] Brian R. Cheffins, THE PUBLIC COMPANY TRANSFORMED 64 (2018).

[95] Hay & Gray, *supra* note 47; Wells, *Cycles*, *supra* note 17 at 111 (discussing how in the 50s and 60s, businessmen continued to discuss their firms "social responsibilities" and that by the mid-1960s, "it was conventional wisdom that public corporations owed some responsibility to society beyond making profits"); Gerald Davis, MANAGED BY THE MARKETS: HOW CORPORATE FINANCE RESHAPED AMERICA 74 (2009) (by the 1950s, "[s]hareholders had completed the descent into irrelevance"); Jeffrey Pfeffer, *Shareholders First? Not So Fast...*, HARV. BUS. REV. (2009) ("In the 1950s and 1960s, the stakeholder was king."); Lund & Pollman, *supra* note 1; Herman Krooss, EXECUTIVE OPINION: WHAT BUSINESS LEADERS SAID AND THOUGHT ON ECONOMIC ISSUES, 1920s-1960s at 52 (1970) ("the old concept that the owner of a business had a right to use his property as he pleased to maximize profits, has evolved into the belief that ownership carries certain binding social obligations."); see also note 74.

[96] Eberstadt, *supra* note 56; Hay & Gray, *supra* note 47; Lund & Pollman, *supra* note 1.

[97] *See* David J. Berger, *In Search of Lost Time: What If Delaware Had Not Adopted Shareholder Primacy?* (2017) (discussing the "world before shareholder primacy" and the consensus of business leaders that they needed to look out for their stakeholders, and how that view shaped business practice).

[98] *See* Berle, *supra* note 85.

[99] *See* Burt Prunty, *Love and the Business Corporation*, 46 VA. L. REV. 467, 467-76 (1960) (describing the traditional view that "stood in the path of [corporate charitable] activity": "that the very nature and purpose of any business corporation restrict its application of capital to the production of profit, and thus preclude all forms of altruism….").

the law began to bend to reflect the permissiveness (and indeed, desirability) of corporate philanthropy.[100] This changed view is reflected in *A.P. Smith Manufacturing Co. v. Barlow*, in which the New Jersey Supreme Court accepted in 1953 an extremely tenuous tie to shareholder interests—increased goodwill for the company—to justify donations by a fire hydrant manufacturer to Princeton University.[101] In so holding, the Court emphasized how the community benefitted from the donations and explained that corporate charity was necessary for the "vigor of . . . democratic institutions."[102] The court concluded: "just as the conditions prevailing when corporations were originally created required that they serve public as well as private interests, modern conditions require that corporations acknowledge and discharge social as well as private responsibilities as members of the communities within which they operate."[103] This growing wave of support for corporate philanthropy was further reflected by legislative changes authorizing charitable giving: "In 1928 there were five states with statutes which, to some extent, expressly authorized business corporations to make donations of funds… by 1959 the total number of states having statutory authority for corporate giving had swelled to forty-one."[104]

In sum, the cultural perception of the corporation's role in society affected the legal requirements corporations faced. It also altered the conduct of business. As an example, as society became preoccupied with the "urban crisis" in the 1960s and called on business to address poverty and inequality in cities, corporations took action to train workers and improve communities "at an immediate cost to the shareholder."[105] Under broad standards for fiduciary conduct, management could operate consistent with the societal consensus for business conduct.[106] However, when shareholder value maximization became ascendant two decades later, there was less practical leeway for such decisions.[107]

Ultimately, the academic and cultural acceptance of a stakeholder-oriented duty for corporate management led to real changes in how business leaders operated. But what brought about this acceptance? It bears repeating that we should not give too much credit to Dodd and other prominent champions of managerialism during this time. Although their arguments were novel in certain respects, the basic conflict between directing management to serve shareholders and a broader directive that would sweep in stakeholders had been bubbling around since the birth of the American republic.[108] It was not the persuasiveness of the advocacy, but the conditions of the time—the perceived power of corporations and their management, the perception of a lack of a working government that could

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[100] *Id.* at 468.
[101] *A.P. Smith Mfg. Co. v. Barlow*, 13 N.J. 145, 151 (1953).
[102] *Id.* at 154.
[103] *Id.*
[104] Prunty, *supra* note 99 at 468-69; *see also Theodora Holding Corp. v. Henderson*, 257 A.2d 398 (Del. Ch. 1969) ("Furthermore, contemporary courts recognize that unless corporations carry an increasing share of the burden of supporting charitable and educational causes that the business advantages now reposed in corporations by law may well prove to be unacceptable to the representatives of an aroused public. The recognized obligation of corporations towards philanthropic, educational and artistic causes is reflected in the statutory law of all of the states, other than the states of Arizona and Idaho.").
[105] Phillip Blumberg, *Corporate Social Responsibility and the Social Crisis*, 50 B.U. L. REV. 157, 160 (1970); Jules Cohn, *The Conscience of the Corporation: Business and Urban Affairs* 1967–1970 (1971) (surveying employment and training programs undertaken by 247 U.S. companies to "relieve urban problems" and provided examples of all of action taken without any direct financial gain for the companies involved).
[106] I*d.; see also* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 NYU L. REV. 733 (2005).
[107] *See* Lund & Pollman, supra note 1.
[108] *See*, *e.g.*, David B. Guenther, *Of Bodies Politic and Pecuniary: A Brief History of Corporate Purpose*, 9 MICH. BUS. & ENTREPRENEURIAL L. REV. 1 (2019); Christopher Havasy, *supra* note 73 (citing Adam Smith).

tackle social issues, and high societal inequality—that influenced the public's appetite for managerialism. In the wake of the stock market crash, which made clear to all that unregulated business could result in great harm, and that government was not necessarily up to the task of addressing it, the scholarly and public sentiment evolved to embrace a new model for corporate governance—one that would permit managers to focus on these issues—which remained in place for nearly a half century.

B. Moment 2: "Managerialism" to "Agency"

The sun began to set on the "trustee management" phase in the 1970s, a decade that featured a bevy of challenging economic conditions—slow economic growth, high unemployment and inflation, and stark corporate competition from abroad.[109] There was also a general perception of a national competitive decline in global markets, which led to increased attention on the performance of corporate managers.[110] The early 70s further witnessed the growth of the view that countervailing power in the form of labor protection and environmental regulation had become too burdensome for corporations, leading to the election of President Reagan in 1980, who advanced a deregulatory agenda.[111] Despite the sour economic picture, inequality was at a low point—indeed, the 50s and 60s were the decades of least economic inequality in U.S. history.[112]

This collection of economic factors laid the foundation for the second major purpose shift to take place. Again, the dominant view at the dawn of the 70s was that management should have ample discretion to pursue not just profit, but also to better the lives of stakeholders that interacted with the firm.[113] That is not to say that management always did this[114]—indeed, corporate reformers in the late 60s and 70s were steadfastly campaigning for policies that would convert this squishy mandate into an enforceable legal requirement. For example, in the early 70s, legal scholars as well as activists including Ralph Nader sought federal incorporation of large corporations that would mandate the imposition of "public-interest directors" on corporate boards.[115] During this time, dissenters also continued to advance the counter view—that business leaders should focus on business and leave social causes to charities or government.[116]

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[109] Berger, *supra* note 97 at 15; Bratton & Wachter *supra* note 45; Pargendler, *Corporate Governance*, *supra* note 38 at 1 (describing the 70s and 80s as a time of "economic malaise and fear of imminent decline in view of the then booming economic performance of Germany and Japan").

[110] Bratton & Wachter, *supra* note 45 at 144.

[111] Berger, *supra* note 97 at 15-16; *see also* Winkler, *supra* note 53 at 119 (discussing the major regulatory reforms of the 60s and 70s).

[112] Plotnick, *supra* note 59.

[113] *See* Wells, *Cycles*, *supra* note 17 at 111, citing MORRELL HEALD, THE SOCIAL RESPONSIBILITIES OF BUSINESS: COMPANY AND COMMUNITY, 1900–1960, at 299 (1970) (stating that in the 1950s and 1960s "[r]ecognition of the social dimensions and responsibilities of [corporations] . . . appeared, in every respect, a central feature of the evolution of modern business institutions and thought"); *see also* Winkler, *supra* note 53 at 122 ("By the early 1970s, more than eighty percent of Americans polled believed that business should provide special leadership in rebuilding inner cities, eliminating racial discrimination, and wiping out poverty.").

[114] *See also* Cheffins, *The Past, Present and Future*, *supra* 91 .

[115] CHRISTOPHER D. STONE, WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR (1976); RALPH NADER ET AL., TAMING THE GIANT CORPORATION (1976); *see also* Alfred F. Conard, *Reflections on Public Interest Directors*, 75 MICH. L. REV. 941 (1977) (discussing proposals to create "public interest director" positions on corporate boards); *see also* Bratton, *supra* note 75 at 773 (describing how in the 70s and 80s, "corporate social responsibility and constituent rights came to the forefront of corporate policy debates").

[116] *See* Manne, *supra* note 75 at 414-418 (criticizing the idea of corporate social responsibility); Theodore Levitt, *The Dangers of Social Responsibility*, 36 HARV. BUS. REV. 49 (1958) ("Business will have a much better chance of surviving if…long-run profit maximization is the one dominant objective in practice as well as in theory. Business should…should let government

The intellectual turning point is often credited to Milton Friedman and his famous New York Times magazine essay, "The Social Responsibility of Business is to Increase its Profits."[117] In that essay, Friedman emphasized that management were agents of the shareholder "owners."[118] When acting to pursue social causes counter to shareholder interests, that executive was spending someone else's money—in effect, imposing a tax on the owners and becoming an unelected civil servant.[119] Friedman further emphasized that managers—"expert[s] in running compan[ies]"—would be unlikely to be successful in discharging social responsibilities that they tackled.[120]

Friedman's essay did not receive wide-ranging acceptance immediately;[121] instead, corporate reformers weighed in with spirited critiques.[122] In the decade that followed, however, enthusiasm for Friedman's logic grew.[123] In particular, in 1976, two economists, Michael Jensen and William Meckling, formalized Friedman's theory in an influential article, "The Theory of the Firm: Managerial behavior, agency costs, and ownership structure."[124] That Article argued that "the relationship between the stockholders and the managers of a corporation fits the definition of a pure agency relationship"[125], which therefore provided a clear blueprint for corporate law and governance—minimize management agency costs—that seemed to track much of the protections that corporate law offered

take care of the general welfare so that business can take care of the more material aspects of welfare."); Eugene V. Rostow, *To Whom and for What Ends Is Corporate Management Responsible?*, *in* CORPORATION IN MODERN SOCIETY, 46 (1960) (arguing that if corporate funds are not used to maximize profits, the price mechanism will not efficiently allocate resources); MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133-34 (1962) "("If business-men do have a social responsibility other than making maximum profits for stockholders, how are they to know what it is?…Can they decide how great a burden they are justified in placing on themselves or their stockholders to serve that social interest? Is it tolerable that these public functions of taxation, expenditure, and control be exercised by the people who happen at the moment to be in charge of particular enterprises…?"); Wilber Katz, *Responsibility and the Modern Corporation*, 3 J. L. & ECON. 75 (1960) (offering a critical perspective of corporate social responsibility as a genuine motivating force for corporate management).

117 Milton Friedman, *A Friedman doctrine – The Social Responsibility Of Business Is to Increase Its Profits*, N.Y. TIMES (Sep. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html; *see also* Andrew Ross Sorkin, *A Free Market Manifesto That Changed the World, Reconsidered*, N.Y. TIMES (Sep. 14, 2020), https://www.nytimes.com/2020/09/11/business/dealbook/milton-friedman-doctrine-social-responsibility-of-business.html (suggesting that Friedman's manifesto inspired "greed is good"); Stout, *supra* note 1 ("So where did the idea that corporations exist only to maximize shareholder value come from?… In 1970, Nobel Prize winner Milton Friedman published a famous essay in the New York Times arguing that the only proper goal of business was to maximize profits for the company's owners….").

118 Friedman, *Social Responsibility of Business*, *supra* note 117.

119 *Id.*

120 *Id.*

121 Brian Cheffins, *Stop Blaming Milton Friedman!*, 98 WASH. U. L. REV. 1607, 1624 (2021) (" Friedman's essay did not have the immediate impact often hypothesized.").

122 For example, in *Taming the Giant Corporation*, Ralph Nader, Mark Green and Joel Seligman argued that Friedman misunderstood how the economy functioned. *See supra* note 115; *see also* Wells, *Cycles*, *supra* note 17 at 124 ("The Nader group dismissed his criticism by arguing that the real corporate economy was not the competitive marketplace Friedman seemed to presuppose"). Specifically, counter to Friedman, the authors believed that large corporations were not constrained by competitive markets and were instead privy to disproportionate power over the lives of their employees and the broader economy.

123 *See, e.g.,* HENRY G. MANNE & HENRY C. WALLICH, THE MODERN CORPORATION AND SOCIAL RESPONSIBILITY (1972); David L. Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1, 1 (1979); Demsetz, *Social Responsibility in the Enterprise Economy*, 10 SW. U. L. REV. 1, 11 (1978) ("The immodesty of those who desire to sit on corporate boards of directors as representatives of the public interest assure us that their control over the wealth of others will be turned to socially productive purposes. I wonder what those purposes are, but not whose self interest will be served.").

124 Jensen & Meckling, *supra* note 7.

125 *Id.* at 309.

incorporators.[126] Importantly, Jensen and Meckling's conception of the corporation as a "nexus of contracts" minimized the obligation of the corporation as a social entity.[127] These economic arguments were soon endorsed by legal scholars Daniel Fischel and Frank Easterbrook in a series of influential articles and eventually a book, all of which emphasized the contractual nature of corporate law and minimized any social obligation for firms and their management.[128] Building on Berle's concerns, these scholars further explored how managerial discretion created agency problems, which they defined as the master problem for corporate law and governance.[129]

In the midst of these rich academic discussions that echoed those that had come before, a further external catalyst set the stage for the swing in the purpose pendulum that followed: the hostile takeover wave of the 1980s, which "dramatically altered the U.S. economy."[130] Financed by new debt instruments, hostile acquirers ripped through the market, breaking up the giant conglomerates that had been assembled in the previous era.[131] No company was safe: by 1989, nearly 30% of the Fortune 500 had been targeted.[132]

This deal decade brought about public attention and criticism of takeover artists and their gains, as well as legal developments such as the poison pill and other constituency statutes.[133] It further catalyzed a rich literature in law and economics making sense of this acquisitive activity in light of the intellectual developments that came before. In particular, economists saw the takeover activity as proof of a "market for corporate control" that disciplined wayward management and brought about discipline and the efficient allocation of resources.[134] These scholars viewed the sales and spin-offs that followed acquisitions as a reaction to the era of managerialism that preceded it, during which managers had built inefficient conglomerate empires.[135] More concretely, Friedman's admonition that corporate management should focus only on their shareholders became a practical necessity where any stock price slack could mark their firm as a target.[136]

By the end of the decade, therefore, the view that management served as agents of their shareholders had fully replaced the trustee management concept in the eyes of corporate executives, along with academics and the broader public.[137] Not only that, the law began to bend as well, with

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126 Lund & Pollman, *supra* note 1 at 2604.
127 *Id.*
128 *Id*, at 2574 (citing Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1436 (1989); DANIEL FISCHEL, THE CORPORATE GOVERNANCE MOVEMENT (1982); Easterbrook & Fischel, *Economic Structure of Corporate Law*, *supra* note 9.
129 *Id.*
130 Andrei Shleifer & Robert W. Vishny, *The Takeover Wave of the 1980s*, 249 AM. ASS'N FOR THE ADVANCEMENT OF SCI. 745 (1990).
131 Andrei Shleifer & Robert W. Vishny, *Takeovers in the '60s and the '80s: Evidence and Implications*, 12 STRATEGIC MGMT. J. 51, 53 (1991) (describing how in the '80s, many takeovers were "bustup" takeovers or management buyouts that were followed by a sale of the company's assets).
132 Shleifer & Vishny, *Takeovers in the '60s and the '80s*, *supra* note 131; Michael C. Jensen, *Takeovers: Folklore and Science*, HARV. BUS. REV. (1984).
133 Wells, *Cycles supra* note 17; Shleifer & Vishny, *Takeovers in the '60s and the '80s*, *supra* note 130; THE 1980S TAKEOVER ERA AND LIPTON'S STOCKHOLDER RIGHTS PLAN, https://theliptonarchive.org/1980s/(last visited September 11, 2022).
134 *See* BRIAN CHEFFINS, THE PUBLIC COMPANY TRANSFORMED (2018) at 151; Lund & Pollman, *supra* note 1 at 2575.
135 Shleifer & Vishny, *Takeovers in the '60s and the '80s*, *supra* note 131; Jensen, *supra* note 132.
136 Shleifer & Vishny, *Takeovers in the '60s and the '80s*, *supra* note 131.
137 Lund & Pollman, *supra* note 1 at 2576 ("Thus, by the end of the 1980s, the separation of ownership and control became 'the master problem,' and pursuing shareholder value was regularly identified as a core corporate objective"); Bratton, *supra* note 75 at 773 (describing how in the wake of the 80s, "the shareholder vision won."); H.R. Subcomm. On Telecomms.,

courts reflecting the agency theory of the firm and the attenuating obligations of management. Before the 1980s, Delaware courts had not squarely addressed the issue of whether fiduciary duty required fidelity to shareholder interests only. After agency theory became ascendant, however, judicial decisions moved in a shareholder primacy direction.

The beginning of this evolution took place at the onset of the hostile takeover wave, when the Delaware Supreme Court considered in *Unocal v. Mesa Petroleum* whether a board facing a takeover bid could freely consider the interests of constituencies other than shareholders.[138] In applying heightened scrutiny to the director's decision, the court emphasized the "omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders"—thereby directly acknowledging the core agency problem at issue.[139] Ultimately, however, the court concluded that a board could consider "creditors, customers, employees, and perhaps even the community generally" when evaluating a takeover bid.[140] Only a year later, in 1986, the Delaware Supreme Court essentially reversed this ruling in *Revlon v. MacAndrews & Forbes Holdings*, ruling that "while concern for various constituencies is proper when addressing a takeover threat, that principle is limited by the requirement that there be some rationally related benefits accruing to the stockholders."[141]

This example shows how changes in the dominant view of corporate purpose can influence the legal environment for corporate managers. But fiduciary duty was not the only aspect of governance to change following the hostile takeover wave—extra-legal governance practices likewise evolved consistent with the agency model, generating a focus on "pay for performance," board independence, and accountability to the company's stock price.[142] These corporate governance "best practices" were

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Consumer Prot. & Fin. Of the Comm. On Energy & Com., 99th Cong., Corporate Takeovers: Public Policy Implications for the Economy and Corporate Governance 77 (Comm. Print 1987) ("While the corporate reformers of the 1970s urged that 'accountability' meant being a good corporate citizen answerable to society as a whole, observers might now suggest that 'accountability' in the 1980s means keeping stock prices high for stockholders….").

138 *Unocal v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

139 *Id.* at 954.

140 *Id.* at 955.

141 *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 179 (Del. 1986). Several decades later, the Delaware Court of Chancery offered even stronger support for a shareholder primacy mandate, stating in *eBay Domestic Holdings v. Newmark* that directors are duty bound to promote the value of the corporation and its stockholders. 16 A.3d 1, 35 (Del. Ch. 2010) ("Directors of a for-profit Delaware corporation cannot deploy a rights plan to defend a business strategy that openly eschews stockholder wealth maximization—at least not consistently with the directors' fiduciary duties under Delaware law."). *See also in re Trados Inc. S'holder Litig.*, 73 A.3d 17, 37 (Del. Ch. 2013) ("In terms of the standard of conduct, the duty of loyalty therefore mandates that directors maximize the value of the corporation over the long-term for the benefit of the providers of equity capital…"). Since then, agency theory has played a role in judicial decisions. *See, e.g., Bird v. Lida, Inc.*, 681 A.2d 399, 402–03 (Del. Ch. 1996) (citing Jensen & Meckling, *supra* note 7); *Blasius v. Atlas*, 564 A.2d 651, 659-660 (1998) ("a decision by the board to act for the primary purpose of preventing the effectiveness of a shareholder vote inevitably involves the question who, as between the principal and the agent, has authority with respect to a matter of internal corporate governance").

142 Lund & Pollman, *supra* note 1 at 2577; Lund, *Enlightened Shareholder Value, supra* note 48; Cheffins, *supra* note 134 at 369–705.

then entrenched by a new class of institutional investors.[143] And the overall result of this evolution was the near-universal acceptance of concepts that had been deemed losers only years before.[144]

Again, while many credit Friedman and other leading scholars for launching this shift,[145] it bears repeating that the ideas that they advanced were not new: the concept of agency costs created by the separation of ownership and control had been a preoccupation of Berle's, as well as economists leading back to Adam Smith.[146] The view that corporate management should focus on business and their shareholders, and leave social problems to others, was similarly not a new position, and had been taken up by academics for decades.[147] The success, therefore, of these arguments in catalyzing the purpose shift depended on something else.

Recall that in the decade preceding the shift, U.S. corporations were viewed as falling behind in competition with corporations in global markets for a bevy of reasons, including burdensome regulation.[148] A focus on corporate productivity and growth was therefore seen as more important than using corporate governance to tackle social concerns, especially in light of the fact that inequality was low and workers had gained substantial protections under law. Not only that, by the time of the takeover wave, fears of excessive corporate power had been subsumed by evidence of a robust market for corporate control in which no company, no matter how large, was safe. Pressure from a new class of institutional shareholders further reinforced the perception that management would not be able to achieve real social change.[149] As Milton Friedman put it, "whether he wants to or not, can [the socially responsible manager] get away with spending his stockholders, customers' or employees' money? Will not the stockholders fire him?"[150]

In this environment of heightened corporate competitiveness, as well as perceptions of adequate (and even overkill) externality regulation and low inequality, advocates of corporate social

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143 Lund & Pollman, *supra* note 1 at 2577; Bernard S. Black, *Agents Watching Agents: The Promise of Institutional Investor Voice*, 39 UCLA L. REV. 811, 813–14 (1992); John C. Coffee, Jr., *Liquidity Versus Control: The Institutional Investor as Corporate Monitor*, 91 COLUM. L. REV. 1277, 1291–93 (1991); Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Reevaluation of Governance Rights*, 113 COLUM. L. REV. 863, 865–69 (2013); Edward B. Rock, *Adapting to the New Shareholder-Centric Reality*, 161 U. PA. L. REV. 1907, 1922 (2013).

144 Lund & Pollman, *supra* note 1 at 2578 ("the result of this evolution is that shareholder wealth maximization became ingrained in the very notion of "mainstream" corporate governance"); Hansmann & Kraakman, *End of History*, *supra* note 13 at 439 ("There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.").

145 *See* note 110 *supra*; Bratton, *supra* note 75 at 1476 ("The managerialist consensus recently disappeared, due in part to the successful emergence of the new economic theory in the legal literature beginning around 1980.").

146 ADAM SMITH, THE WEALTH OF NATIONS 111-12 (P.F. Collier & Son 1909) (1776); *see also* Christopher Havasy, *On the Legitimacy of Managerial Power in Corporate Governance* at 17 (discussing Adam Smith and stating that "[w]hile current commentators often describe Berle and Means as discovering the problem of agency costs in corporate governance, their work is actually better described as a modern rediscovery of internal relational power questions that have plagued theorists since the birth of the corporate form.").

147 *See supra* note 116.

148 Note that this mood also led to the election of President Reagan, who campaigned and won on a deregulatory agenda, which led to the erosion of "countervailing power" during the 80s. Berger, *supra* note 97 at 14-15; *see also* Section II.C.

149 As Martin Gelter has explained, the expansion of institutional asset managers investing the retirement assets of ordinary Americans may have further contributed to the public's acceptance of shareholder primacy. *See* Gelter, *supra* note 1 at 912 (arguing that the shift to shareholder primacy in the 1980s was the product of the rise of the defined contribution benefit plan which rendered millions of Americans investors in the stock market and led to "an increasing importance of pro-shareholder policies to the middle class"). See also Bratton & Wachter, *supra* note 11 (explaining how by the 80s, shareholders were viewed as sophisticated parties that could weigh in on management strategy).

150 Friedman, *Social Responsibility of Business*, *supra* note 117.

responsibility were relegated to the fringe.[151] In their place, a focus on corporate efficiency, shareholder value, and profitability under the agency model of the firm took hold.

C. Summing Up

The historical snapshots described the two most significant corporate purpose pendulum swings in the past century, as well as the economic conditions that preceded them. They further charted a pattern: perceptions of weak externality regulation, heightened inequality, and low corporate competitiveness improved academic and public receptivity to a stakeholder model; by contrast, strong corporate competition, low inequality, and adequate externality regulation laid the groundwork for a return to a shareholder-oriented profit maximization standard.

Nonetheless, I recognize that there were many other factors at play during these periods that I am not able to address given space limitations; in particular, I devote limited attention to changes in the political environment and how they affected the legal environment facing corporations, a topic that has received the lion's share of scholarly attention.[152] Again, my goal is to better understand whether and how external forces impact academic and popular perceptions of corporate purpose. These changed perceptions of corporate purpose may then impact corporate conduct through political channels (i.e., through greater popular support for politicians and policies), or through non-political channels (i.e., through caselaw, business practices, and pressure from corporate stakeholders), the latter of which is my focus.

Although I omit a detailed description of the role that political forces play in shaping law and ideas, it is clear from these examples that the popular perception of corporations did affect the regulatory environment, in ways that seem to render the shift in purpose less desirable. For example, the 30s brought about the New Deal coalition, leading to the most comprehensive era of federal regulation in history and fundamentally altering the regulatory landscape for corporations and their management. Therefore, the same forces that led to a purpose swing also set the stage for substantial growth in countervailing power, although that power was tempered by a hostile Supreme Court.[153] By contrast, by the early 70s, public appetite for regulation had waned, laying the foundation for the shift back to a shareholder-oriented model, as well as the election of a President with a deregulatory agenda. By the 80s, protections for workers and environmental regulation had been substantially weakened, in the same moment that the shift toward the agency model had finally taken hold.[154] These examples are important counters to scholars who contend that the embrace of a stakeholder governance model will undermine regulatory change;[155] instead, it appears that purpose swings often occur in tandem with a changed regulatory environment. (The next Part discusses the desirability of these complementary movements).

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[151] Lund & Pollman, *supra* note 1 at 2578 (Critical perspectives received labels such as "progressive corporate law" and "stakeholderism.").

[152] See note XX *supra*.

[153] Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 1 (1991) (describing how the Lochner era Supreme Court struck down much New Deal regulation affecting business).

[154] Jefferson Decker, *Deregulation, Reagan-Style*, THE REGULATORY REVIEW (Mar. 13, 2019), https://www.theregreview.org/2019/03/13/decker-deregulation-reagan-style/; Bratton, *supra* note 75 at 774 ("Deregulation also started in the 1970s, and picked up speed after 1980.").

[155] *See* Bebchuk & Tallarita, *Illusory Promise*, *supra* note 6 (making the case that the pursuit of stakeholder governance will decrease the likelihood of externality regulation); *see also* Aneil Kovvali, *Stark Choices for Corporate Reform*, 123 COLUM. L. REV. 693 (2022) (challenging the view that stakeholder governance will frustrate regulatory change).

Before discussing further implications of my analysis, there is more that can be said to describe these periods of shift, and in particular, their commonalities. Interestingly, each purpose swing is followed by decades of relative purpose stasis before and after, even as the world changed a great deal. For example, after the 30s and before the second purpose swing in the 80s, the U.S. experienced a second World War, the growth of corporate oligopolies in the 50s, the Vietnam War, and periods of societal upheaval related to racism and environmental degradation, just to name a few of the major events capturing the public's attention during that half-century. These societal changes led to many rich conversations and debates about corporate responsibility, as well as subtle shifts in the dominant concept of purpose,[156] and yet, they were not enough to move the needle completely.

As these observations reveal, the dominant view of the corporation's role in society is slow to change, even as external conditions change dramatically. This reality makes it all the more interesting to focus on the rare moments in which a dramatic and persistent change in the public's perception of corporation's role in society occurred. The next Part delves into further lessons that we can glean from this analysis.

III. Corporate Purpose in a Second-Best World

The previous Part discussed two corporate purpose "moments" and charted a pattern in the external environment that preceded them. This Part considers whether extreme external conditions could warrant a shift away from a shareholderist orientation and concludes that they very well might. My analysis therefore challenges the dominant view of corporate purpose that took hold in the 80s. That position takes as given that corporate law and governance ought to maximize social welfare—that is, the interests of all stakeholders affected by the corporation's activities[157]—but maintains that "focusing principally on the maximization of shareholder returns is, in general, the best means by which corporate law can serve the broader goal of advancing overall social welfare."[158] The core of the economic logic supporting this claim is that advancing shareholder welfare will result in the most efficient operation of firms, rendering them most profitable and capable of benefitting others.[159]

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[156] *See generally* Wells, *Cycles*, *supra* note 17.

[157] As Luca Enriques, Henry Hansmann, Reinier Kraakman and Mariana Pargendler explain, "[a]s a normative matter…the appropriate goal of corporate law is to advance the aggregate welfare of all who are affected by a firm's activities, including the firm's shareholders, employees, suppliers, and customers, as well as third parties such as local communities and beneficiaries of the natural environment." *The Essential Elements of Corporate Law, What is Corporate Law?, in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH (Oxford Univ. Press, 3d ed. 2017); *see also* Hansmann & Kraakman, *End of History*, *supra* note 1; Liscow, *supra* note 34 at 2481 ("traditionally, economists have sought policies that maximize not wealth but rather "social welfare," the sum of individuals' utility").

[158] ENRIQUES ET. AL, ANATOMY OF CORPORATE LAW, *supra* note 157.

[159] *Id. See also* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW at 38 (Harvard Univ. Press, 1996) ("A successful firm provides jobs for workers and goods and services for consumers.…Other objectives, too, come with profit. Wealthy firms provide better working conditions and clean up their outfalls; high profits produce social wealth that strengthens the demand for cleanliness. Environmental concerns are luxury goods; wealthy societies purchase much cleaner and healthier environments than do poorer nations—in part because well-to-do citizens want cleaner air and water, and in part because they can afford to pay for it."); FRIEDRICH HAYEK, THE CORPORATION IN A DEMOCRATIC SOCIETY, IN WHOSE INTERESTS OUGHT IT AND WILL IT BE RUN?, *in* MANAGEMENT AND CORPORATIONS 1985, at 99 (1960) ("The traditional reconciliation of [shareholder and public] interests rested on the assumption that…aiming at long-run return, will also serve the public interest best."). For a critical perspective, *see* Strine & Kovvali, *Win-Win*, *supra* note 9.

A problem with this classic view is that it tends to operate without regard for other forces that dictate welfare in society.[160] Of course, economists supporting a shareholderist vision for the corporation have made assumptions about these conditions from the start. For example, in "The Social Responsibility of Business is to Increase its Profits," Milton Friedman hinted at the interconnected relationship between corporate governance and "external forces."[161] In particular, his argument that corporate management should focus on profit depended on the presence of government regulation that tackles "social" problems.[162] Likewise, in their defense of the shareholder welfare maximization norm, Frank Easterbrook and Daniel Fischel recognized that "political choices" about pollution, plant closings, bribery and other decisions that affect corporate stakeholders remained "in the background."[163] But rather than address this interconnectedness directly, these classic views punt on the ultimate question of how corporate governance should respond when government regulation is not controlling corporate externalities.[164]

Do these precepts hold in a second-best world, one in which external factors such as the regulation of corporate externalities are inadequate, rather than perfect? Put somewhat differently, if economists were designing a system of corporate governance in a second-best world, what would it look like? Would it continue to direct management to maximize shareholder profits, even if other parts of the system were unable to control corporate harm or respond to other societal challenges? In the paragraphs that follow, I explore hypotheticals that challenge this view based on three scenarios: 1) inadequate externality regulation, 2) high inequality, and 3) weak corporate competition.

Consider a hypothetical country, Westlandia. Westlandia's economy relies heavily on natural resources, including clean water and land. Over the past decade, the government has prioritized the interests of a subset of companies that operate polluting factories. Specifically, the government has granted these companies permits to operate, expand, and pollute in order to facilitate the growth of their industry.[165] As a result, the natural environment has suffered a decline—the air and water quality

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[160] *See* Rock, *supra* note 21 ("With other fields and regulations controlling these other problems, corporate managers face a constrained optimization problem: maximize the value of the company subject to side constraints imposed by regulation (and possibly social norms")); Pargendler, *Controlling Shareholders*, *supra* note 1 (referring to corporate governance's "modularity" approach where each field faces a constrained optimization problem, which reduces complexity but fails to account for real world interaction between legal regimes); *cf.* Liscow, *supra* note 34 at 2483 ("though a legal rule may be "efficient" viewed in isolation, it may not be efficient in the overall system of taxes and legal rules").

[161] Friedman, *Social Responsibility of Business*, *supra* note 117.

[162] *See* Alex Edmans, *What Stakeholder Capitalism Can Learn From Milton Friedman*, PROMARKET (Sep. 10, 2020) ("A second key assumption in Friedman's article is that governments are well-functioning.").

[163] *See* EASTERBROOK & FISCHEL, ECONOMIC STRUCTURE OF CORPORATE LAW, *supra* note 159 at 38.

[164] *Id.*; *see also* Friedman, *Social Responsibility of Business*, *supra* note 117; Engel, *supra* note 123 (offering a critical perspective on corporate social responsibility under the following assumptions: "a legislative process that is politically legitimate…, the measures coming out of the legislative process either accurately reflect the political will of the relevant constituencies…, [and] that, at least in the long run, even legislative inaction should be taken to reflect political consensus…that nothing should be done about a particular matter."). The modern realities of our political process—featuring capture of the political process by corporations and interest groups, gerrymandering, and other issues, challenge these assumptions. *See* Alex Tausanovitch & Danielle Root, *How Partisan Gerrymandering Limits Voting Rights*, CTR. FOR AM. PROGRESS (July 8, 2020); LUIGI ZINGALES, PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 124–151 (Daniel Carpenter & David Moss ed., Cambridge Univ. Press 2013); Tim Wu, *The Oppression of the Supermajority*, N.Y. TIMES (Mar. 5, 2019), https://www.nytimes.com/2019/03/05/opinion/oppression-majority.html.

[165] This example reveals how unrestricted corporate political spending—which is usually done in the pursuit of corporate rent-seeking—affects the analysis. *See*, *e.g.*, Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 228–33 (2012); JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY (2012) (explaining the concept of rent seeking and its inefficiencies); *see also* Leo E. Strine, *Fiduciary Blind Spot: The Failure of Institutional Investors to Prevent the Illegitimate Use of Working Americans' Savings for Corporate Political Spending*, 97 WASH. U. L. REV. 1007 (2020). The more unfettered

has fallen steadily, which has harmed other businesses and the welfare of the country's citizens. Let's assume that these regulatory choices have resulted in gains to the factory owners representing $50 million, and have resulted $100 million in harm to third parties.

In Westlandia, corporations operate under a shareholder wealth maximization standard for fiduciary conduct. This means that the factory owners are bound only to comply with existing legal requirements, and to otherwise seek to increase profit and shareholder wealth to the greatest extent possible.[166] As a result, they have no incentive to address these air and water quality issues, despite the fact that this outcome is clearly suboptimal, leading to a net societal loss of $50 million.[167]

Compare this outcome to that of Eastlandia, a country that is identical to Westlandia in all respects except for the orientation of corporate law and governance. Suppose that in Eastlandia, corporate management are told to consider the effects of the company's business on the environment and mitigate harm. In light of the amorphousness of this directive, some managers use this opportunity not to help the community or the business but to extract value for themselves, representing a loss to investors of $10 million.[168] Others attempt to mitigate environmental harm but do so poorly, resulting in further costs to investors totaling $5 million, without any corresponding gains to the environment.[169] However, the imposition of this norm also results in positive changes, and specifically, the mitigation of environmental harm in the amount of $30 million (at a cost to the companies' investors of $10 million).[170] In total, the gains to the factory investors are halved and total $25 million. But in the process, $30 million in harm has been averted – for a total of $5 million in societal gain.

One of the lessons of this hypothetical is that regulation via corporate governance is inefficient relative to the alternative in which social planners costlessly induce factory owners to internalize externalities via taxes or regulation.[171] In that alternative world (called Northlandia), only efficient

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corporations and their management are in bending the regulatory environment to their advantage, the weaker the argument for a governance model that obligates corporations to play by the rules and otherwise disregard third parties, as this example reveals. *See also* Leo E. Strine & Nicholas Walter, *Conservative Collision Course: The Tension between Conservative Corporate Law Theory and Citizens United*, 100 CORNELL L. REV. 335 (2015) (exploring how unregulated corporate political spending undermines classic corporate law theory).

166 This is the consensus view of the legal requirement in Delaware. *See* Lund & Pollman, *Corporate Governance Machine*, *supra* note 1; Strine, Jr., *Dangers of Denial*, *supra* note 89.

167 Indeed, Westlandia corporations will also have an incentive to lobby and spend in order to entrench this outcome or further shift gains to their shareholders.

168 The risk of self-dealing is a persistent concern for shareholder primacy propoenents. *See*, *e.g.*, Bebchuk & Tallarita, *Illusory Promise*, *supra* note 6; Bebchuck, Kastiel & Tallarita, *Corporate Leaders*, *supra* note 6; Bebchuck & Tallarita, *Will Corporations Deliver*, *supra* note 6.

169 See Friedman, *Social Responsibility of Business*, *supra* note 117 (citing expertise concerns about corporate management discharging social responsibilities).

170 The likelihood of these positive changes would increase if corporate governance evolved to promote fidelity to the broader goal, for example, by requiring the company's environmental performance to be disclosed and linking executive pay to that performance. *See* Lund, *Enlightened Shareholder Value*, *supra* note 48 (discussing how corporate governance can evolve to promote fidelity to a broad set of objectives).

171 Thomas D. Crocker & Alan Randall, *Two Reviews of: The Theory of Environmental Policy By William J. Baumol and Wallace E. Oates*, 52 LAND ECONOMICS 255 (1976). In support of this view, *see* Rock, *supra* note 21 ("[W]e should never forget that many of our problems require regulatory solutions and that we should not fool ourselves into thinking that tinkering with "corporate objective" can begin to substitute for regulation to control climate change, assure decent wages and working hours, and decent health care, as well as social insurance against the various downsides from competitive global markets."); Gordon, *supra* note 21; *cf.* Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994) (arguing using tax to accomplish redistribution is preferable to using legal rules).

factories would be permitted to operate, and those businesses that created harm in excess of the gains would be forced to close. In Northlandia, the case for a shareholder wealth maximization norm is clear. Under that norm, the companies that continued to find it profitable to operate would be directed to focus on profit and efficient growth, and the avoidance of management rent-seeking. They would therefore avoid the inefficiencies and deadweight loss incurred in Eastlandia. All in all, shareholders and society would be better off.

The problem is that the regulatory regimes of most countries—including the U.S.—looks more like that of Eastlandia or Westlandia than Northlandia.[172] As scholars have observed, the regulatory process in the U.S. is subject to many pathologies—partisan politics,[173] regulatory capture,[174] ossification,[175] and more. Not only that, the successful regulation of environmental externalities often depends on international cooperation, which is not easy to come by.[176] And as this example reveals, where externality regulation is suboptimal (or becomes suboptimal), and regulatory change is not possible to achieve or is very costly, the fiduciary standard could shift to offset some of the harm from this state of affairs.[177]

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[172] *See* Edmans, *supra* note 162 ("regulation is imperfect, and this is another reason why businesses should have a social responsibility."); Mariana Pargendler, *Corporate Law in the Global South: Heterodox Stakeholderism* (Eur. Corp. Governance Inst. – L. Working Paper No. 718/2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4495515 (explaining how the global north is beginning to resemble the global south in terms of regulatory dysfunction).

[173] *See e.g.*, https://www.academia.edu/download/86174901/d9f4bccf976d3a4524271e97b21af4e7f888.pdf; Tyler Hughes & Deven Carlson, *Divided Government and Delay in the Legislative Process: Evidence From Important Bills, 1949-2010*, 43 AM. POL. RSCH. 771 (2015).

[174] *See e.g.*, Ronald A. Cass, *Regulatory Capture in Enforcement*, THE REGULATORY REVIEW (Jun. 29, 2016), https://www.theregreview.org/2016/06/29/cass-regulatory-capture-in-enforcement/; David Freeman Engstorm, *Corralling Capture*, 36 HARV. J. OF L. AND PUB. POL'Y 31 (2012); Luigi Zingales, *Preventing Economists' Capture*, CHI. BOOTH REV. (Jul. 1, 2014), https://www.chicagobooth.edu/review/preventing-economists-capture; DANIEL CARPENTER & DAVID MOSS, PREVENTING REGULATORY CAPTURE, Cambridge University Press (2014).

[175] *See e.g.*, Michael A. Livermore, *Reviving Environmental Protection: Preference-Directed Regulation and Regulatory Ossification*, 25 VA. ENV'T. L. J. 313 (2007); Victor B. Flatt, *Frozen in Time: The Ossification of Environmental Statutory Change and the Theatre of the (Administrative) Absurd*, 24 FORDHAM ENV'T L. REV. 125 (2017); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002).

[176] Oliver Hart & Luigi Zingales, *The New Corporate Governance*, 1 UNIV. OF CHI. BUS. L. REV. 195, 201 ("But what happens if the government has not regulated optimally, a particular concern when an externality is global, as with climate change, and coordination by many governments is required for optimal mitigation?").

[177] *See* Liscow, *supra* note 34 at 2481 ("In the classic trade-off between efficiency and equity in social welfare maximization, "distortions" to the wealth-maximizing outcome resulting from deviating from the "efficient" rule must be traded off against improvements in equity that result from the "distortion."); Luigi Zingales, *Friedman's Legacy: From Doctrine to Theorem*, PROMARKET (Oct. 13, 2020) ("If the government is unable to fully address [] externalities, should managers maximize profits? From a societal point of view, the answer is clearly "no."). In response, proponents of the classic approach might say one of two things. The first is that in the case of suboptimal externality regulation, the corporations should continue to wealth maximize and then allow shareholders to use their profits to address the problem. Hart & Zingales address this claim by pointing out that under most scenarios, "shareholders cannot easily replicate (or undo) the firm's decision. It would be very costly for individual shareholders to clean up the plastic waste produced by DuPont, [for example]…." *Id.* at 202-03. *See also* Hart & Zingales, *Companies Should Maximize*, *supra* note 34. The second is that rather than focus on corporate governance, advocates of externality regulation should look instead to reform the broken system. *See* Rock, *supra* note 21; Gordon, *supra* note 21; Sanjai Bhagat & R. Glenn Hubbard, *Should the Modern Corporation Maximize Shareholder Value?*, AM. ENTER. INST. ECON. PERSP. 6 (2020) (arguing that "externalities can lead to a departure from shareholder value maximization" but that these interventions should be accomplished by the government). I agree that government reform is preferred, but that the reality of it being accomplished must be accounted for. Moreover, we must account for the "costs of political action" necessary to accomplish such reforms when determining the best approach. Fennell & McAdams, *supra* note37 at 1062–63; *see also* Liscow, *supra* note 34 at 2482 (arguing that redistribution through regulation and taxation can be costly, just as redistribution through legal rules

Another way of describing the lessons in the above hypothetical is that social planners have a choice between accomplishing redistribution via corporate governance (i.e., expanding the breadth of fiduciary discretion to consider environmental harm, or using compensation arrangements to incentivize such consideration) and taxes and regulation (i.e., utilizing pollution tax and emissions limits, to take two examples). A large literature considers the inefficiencies that stem from a legal regime that allows fiduciaries to consider stakeholder interests and stops there.[178] The trouble is that the alternative of optimal regulation is not always so easy to come by, nor is it costless. In an important article, Lee Fennell and Richard McAdams explore the political impediments "that must be surmounted to achieve welfare-maximizing distributive results" using regulation and tax.[179] In other words, redistribution through corporate purpose may be costly, but so is the alternative. And therefore, as the above example revealed, the use of an "inefficient" legal rule can enhance social welfare if the use of taxation and regulation is more costly or not achievable.[180]

Externality regulation is not the only lever of interest—inequality could also change the calculus, although the connection between corporate governance and social welfare is less direct. Let's suppose that Westlandia is a very unequal society—the richest 1% of the population receives 20% of income. This stark inequality results in societal costs totaling $100 million.[181] Once again, the legal regime in Westlandia dictates that corporations have no obligation to address this problem and so they do not. By contrast, in Eastlandia (which also suffers from persistent inequality of the same magnitude), corporate leaders are told they have an affirmative obligation to respond. Some do so inexpertly and inefficiently, but even so, manage to use their discretion to shift corporate wealth from shareholders to workers. These changes reduce shareholder wealth by $15 million and create $10 million in worker gains, reducing social costs by $10 million in the process. In total, the shift in purpose would create $5 million in social welfare.

How might these changes manifest? They could take place voluntarily, pursuant to executive discretion; they could also come about via legal reform. For example, Senator Warren has proposed legislation that would require companies to let workers elect 40% of directors, which would make gain sharing more likely.[182] Such reform might be more likely to manifest in Eastlandia, where the purpose

is costly); Aneil Kovvali, *Stark Choices*, supra note 159 at 706 ("When offering a broad recommendation on the choices reformers should make, it is necessary to consider features of the real-world political process.").

[178] *See supra* note 3.

[179] Fennell & McAdams, *supra* note 37**Error! Bookmark not defined.**.

[180] *Cf.* Liscow, *supra* note 34 (making this argument with regard to redistribution via taxation vs. legal rules). Note that Oliver Hart and Luigi Zingales have made a similar argument that the shareholder wealth maximization norm is inefficient when there is imperfect externality regulation and competition. Hart & Zingales, *The New Corporate Governance*, *supra* note 180. . However, their focus is on reasons why *shareholders* may wish to depart from the shareholder wealth maximization norm; my article is less concerned with shareholder-driven stakeholderism, and instead seeks to understand why society more broadly might prefer a dynamic conception of purpose.

[181] There is ample research linking inequality to social costs in the form of higher crime rates, corruption, and weaker growth, to name just a few issues. *See e.g.*, Richard H. McAdams, *The Economic Costs of Inequality* (John M. Olin Program in L. and Econ. Working Paper No. 370, 2007), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1506&context=law_and_economics.

[182] Raffaella Sadun, *Worker Representation on Boards Won't Work Without Trust*, HARV. BUS. REV. (Aug. 17, 2018), https://hbr.org/2018/08/worker-representation-on-boards-wont-work-without-trust; *see also* Gary B. Gorton & Frank A. Schmid, *Class Struggle Inside the Firm: A Study of German Codetermination*, (NBER Working Paper No. 7945, 2000), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3884268 (studying German co-determination and finding that employees redirect surplus toward themselves when their representatives serve on the board).

orientation favors stakeholders.[183] Less ambitiously, Eastlandia firms may be subject to pressure from private parties to adopt governance mechanisms that would incentivize management to take stakeholder interests seriously. These could include executive compensation metrics tied to worker outcomes or enhanced disclosure requirements about worker satisfaction and benefits, to take two examples.

In either case, whether the product of legal reform or pressure from private parties, assume again that worker wages and benefits, as well as job opportunities, increase in Eastlandia, and that this shift in wealth leads to a reduction in the social costs of inequality that exceeds the costs to shareholders. As a result, Eastlandia citizens will be better off than those in Westlandia. Again, this is not to say that Eastlandia citizens exist in a first-best state of the world; it is only to say that in the absence of a progressive tax system and in the face of costly hurdles to reform it, corporate governance can be harnessed to promote social welfare by allowing fiduciaries leeway to protect workers and respond to inequality, even if such discretion leads to inefficiencies. Assuming that the redistributive benefit of using corporate governance to secure worker protections (accounting for any inefficiencies) exceeds the redistributive benefit of the tax (accounting for the political action costs and transaction costs associated with collecting it), the broader purpose would generate the better outcome.[184]

My final example involves corporate competition. Suppose Westlandia's economy features large monopolies that reap rents from consumers. Antitrust protection in Westlandia is weak or nonexistent. Under a shareholderist corporate governance regime, there would be no expectation of mitigating price-gouging and other abuses of market power, and these monopoly rents would accrue to investors and corporate management only.[185] Over time, this economic concentration decreases consumer welfare and leads to inefficiencies in production and growth.[186]

By contrast, recall that in Eastlandia, corporate management are directed to consider how their operations affect corporate stakeholders, including consumers. Assume that some monopolists therefore decide to shift a portion of their profits to consumers by improving the quality of their products and/or keeping prices lower than they would otherwise. Although compliance with a voluntary mandate seems far-fetched at first blush, corporations—and pharmaceutical companies in particular—have historically bent to public pressure to eschew their market power and offer lifesaving drugs at lower prices.[187] As with the other examples, aspects of the corporate governance regime might

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183 *Cf.* Lund & Pollman, *supra* note 1 (showing how shareholder primacy has affected the form and content of federal intervention into corporate governance.)

184 Liscow, *supra* note 34 at 2482 ("That is, redistribution through legal rules may be inefficient and costly, but so is redistribution through taxation. The most-cited economics article estimating the efficiency costs of taxation shows that about a third of each marginal dollar of taxes is lost as waste.").

185 *Cf.* Katz, *supra* note 116 at 76 ("A second ground for criticizing the goal of maximizing corporate profits has recently been given more emphasis. It is argued that under modern conditions of imperfect competition, vigorous management in the interest of stockholders would leave other groups without adequate protection.").

186 *See* Oliver Hart, *On Shareholder Unanimity in Large Market Economies*, 47 ECONOMETRICA 1057 (1979) (demonstrating that when markets are not competitive, shareholders (who are also consumers) may prefer a strategy other than profit maximization).

187 *See* Drew Armstrong & Bloomberg, *Pfizer says it will slash drug prices for the poorest nations*, FORTUNE (May 25, 2022, 3:38 AM), https://fortune.com/2022/05/25/pfizer-ceo-bourla-says-will-slash-drug-vaccine-prices-for-poorest-nations-but-devil-is-in-details; Richard M Scheffler & Vikram Pathania, *Medicines and vaccines for the world's poorest: Is there any prospect for public-private cooperation?*, 21 GLOB. HEALTH (2005); France 24, *Covid-19 vaccine firms pledge 3.5 billion doses for poorer nations* (May 21, 2021), https://www.france24.com/en/europe/20210521-covid-19-vaccine-firms-pledge-3-5-billion-doses-for-poorer-nations. Note that concentration makes "purpose pressure" more likely to succeed. Mark J. Roe, *Corporate Purpose*

also change, such as by incorporating consumer satisfaction as an aspect of executive pay.[188] In these ways, a broader corporate governance standard could create social welfare by increasing consumer welfare and improving the allocation of resources in the economy, so long as those benefits exceeded the increase in agency costs and other inefficiencies created in the process.[189]

To summarize, these hypotheticals suggest that the welfare-creating orientation for corporate purpose could change depending on external economic conditions.[190] In particular, weak externality regulation, high inequality, and low corporate competition not only increase the public receptiveness to a stakeholder model, but also the normative case for it.[191] More specifically, the inefficiencies and costs created by a broader standard for managerial discretion under a stakeholder model could be offset by the gains that come from the abatement of social harm in a second-best world. By contrast, the presence of robust corporate competition, low inequality, and adequate externality regulation suggest that corporate governance could enhance social welfare by directing management to pursue shareholder gains. The next Part discusses further implications of this analysis.

IV. Implications

Part II discussed two corporate purpose moments in the U.S. and the external conditions that preceded them, and Part III argued that these external economic conditions could change the welfare-enhancing orientation for corporate governance. This Part considers what lessons can be drawn from this analysis. It begins by applying these insights to the recent revival of debates over corporate purpose and then discusses broader implications about the evolution of corporate law and governance. It concludes with questions for future research.

A. Modern Purpose Debate in the U.S.

As Part II discussed, the dominant view of the role of corporations in society has continued to favor shareholders since the last pendulum swing in the 1980s. That is not to say that this shareholder-centric view has remained static since it captured the public consciousness fifty years ago—by contrast, shareholderism has broadened from a strict shareholder wealth maximization standard to one that

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and Corporate Competition (Eur. Corp. Governance Inst. – L. Working Paper No. 601, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3817788; Manne, *supra* note 75 at 417 (arguing that the only explanation for true corporate charity is that the corporation has achieved some monopoly power).

188 *See* Lund, *Enlightened Shareholder Value*, *supra* note 48 (describing how compensation metrics have begun to evolve to take consumer interests into account).

189 Zingales, *supra* note 13 ("Friedman himself recognizes that a monopolist maximizing shareholder value is not good for society. Yet, writing in 1970, at the peak of the US antitrust enforcement, Friedman was not overly concerned about monopolies. After 50 years of lax enforcement and a digital revolution that increased network externalities and created many digital monopolies, we cannot be so cavalier.") Bhagat & Hubbard, *supra* note 162 at 6 (arguing that a lack of competitive labor and product markets undermine shareholder value maximization); Roe, *Corporate Purpose and Corporate Competition*, supra note 191.

190 Of course, these hypotheticals employ many assumptions and tradeoffs that are difficult to estimate in the real world. The point of this exercise is not to say that social planners should attempt to estimate these costs and benefits and calibrate their policies accordingly—instead, it is to show, using simple examples, that a shift in the purpose of the corporation *could* create value based on which version of the second-best world we reside in.

191 Although these examples exhibit shift along each of these dimensions, in theory, they would not all need to be present in order for flux to take place. For example, a perception of nonexistent externality regulation leading to public harm could in theory lay the foundation for a shift in purpose.

sweeps in stakeholder interests as integral to long term value creation.[192] Nonetheless, even this "enlightened" view continues to prioritize shareholder value as the lodestar, and stakeholder value is relevant only to the extent it creates wealth for shareholders.[193] This requirement necessarily limits the range of action management can take in service of stakeholders[194] (indeed, for many, that is the point[195]).

Nonetheless, leading voices are again calling for a shift away from a shareholder-centric model, and toward a model that would give management broad discretion to pursue stakeholder interests regardless of whether they create shareholder value.[196] And there are signs that this view has captured the attention of the business community and the broader public. For example, in 2018, Larry Fink, the CEO of BlackRock, the largest institutional shareholder in the world, announced in his annual letter to CEOs that portfolio companies should "benefit all of their stakeholders, including shareholders, employees, customers and the communities in which they operate."[197] Subsequent letters reaffirmed this commitment and discussed governance initiatives that would further board diversity and reduce climate risk.[198]

This commitment from one of the world's largest shareholders in favor of stakeholder value rightly made headlines,[199] as did a similar statement from the Business Roundtable, an association of CEOs of large public companies. In 2019, the organization revised its statement of the purpose of the corporation to read: "companies should deliver long-term value to all of their stakeholders—

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[192] *See* Lund, *Enlightened Shareholder Value*, *supra* note 48 at 9; Lund & Pollman, *Corporate Governance Machine*, *supra* note 1 at 2567; Virginia Harper Ho, *"Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder-Stakeholder Divide*, 36 J. CORP. L. 59, 62 (2010) (discussing the modern view of attending to stakeholder interests "as a means of generating long-term shareholder wealth"). The analysis has expanded to include the interests of broadly diversified shareholders as well. *See, e.g.,* Jeffrey N. Gordon, *Systematic Stewardship*, 47 J. OF CORP. L. 627 (forthcoming).

[193] *Id.*

[194] Lund & Pollman, *Corporate Governance Machine*, *supra* note 1 at 2631-33 (discussing the limits of this view); Virginia Harper Ho, *The Limits of Enlightened Shareholder Activism*, INT'L J. OF FIN. SERV. (2022).

[195] *See*, *e.g.*, Bebchuk &Tallarita, *Illusory Promise*, *supra* note 6, (arguing that accountability to shareholders alone is necessary to avoid managerial self-dealing).

[196] Strine, Jr., *Restoration*, *supra* note 4 (embracing the benefit corporation model); Colin Mayer, PROSPERITY 39 (2018); Lipton et al., *supra* note 4; Parella, *supra* note 4.

[197] BlackRock, Larry Fink's Annual Letter to CEOs, *A Sense of Purpose*, *supra* note 4.. BlackRock has since clarified that this stakeholder focus is consistent with an enlightened shareholder value view. Larry Fink, *Larry Fink's 2022 Letter to CEOs: The Power of Capitalism* (2022), https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter ("In today's globally interconnected world, a company must create value for and be valued by its full range of stakeholders in order to deliver long-term value for its shareholders.").

[198] Larry Fink, *Larry Frink's 2020 Letter to CEOS: A Fundamental Reshaping of Finance* 2020, https://www.blackrock.com/corporate/investor-relations/2020-larry-fink-ceo-letter; Larry Fink, *Larry Fink's 2021 letter to CEOs* (2021), https://www.blackrock.com/us/individual/2021-larry-fink-ceo-letter. Other large institutional shareholders have echoed these concerns. *See* Michal Barzuza, Quinn Curtis & David H. Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CALIF. L. REV. 1243 (2020); Dorothy S. Lund, *Asset Managers as Regulators*, 171 UNIV. OF PA. L. REV. 77 (2022). *See also* Edelman Trust Barometer, *Special Report: Institutional Investors US Results*, at 14 (November 2018) (surveying 500 institutional investors and finding that 98 per cent indicated that "public companies are urgently obligated to address… societal issues to ensure the global business environment remains healthy and robust").

[199] *See*, *e.g.*, Andrew Ross Sorkin, *BlackRock's Message: Contribute to Society, or Risk Losing Our Support*, N.Y. TIMES (Jan. 15, 2018), https://www.nytimes.com/2018/01/15/business/dealbook/blackrock-laurence-fink-letter.html; Peter Horst, *BlackRock CEO Tells Companies To Contribute To Society. Here's Where to Start*, FORBES (Jan. 16, 2018), https://www.forbes.com/sites/peterhorst/2018/01/16/blackrock-ceo-tells-companies-to-contribute-to-society-heres-where-to-start/?sh=1abf5ba0971d.

customers, employees, suppliers, the communities in which they operate, and shareholders."[200] Shortly thereafter, the 2020 World Economic Forum convened in Davos under the theme of "Stakeholders for a Cohesive and Sustainable World."[201] At this meeting, the group published a manifesto urging companies to adopt the following stakeholder-oriented purpose: "The purpose of a company is to engage all its stakeholders in shared and sustained value creation. In creating such value, a company serves not only its shareholders, but all its stakeholders – employees, customers, suppliers, local communities and society at large."[202] Prominent lawyers advising business leaders, and most notably, Martin Lipton, have further chimed in with an embrace of stakeholder capitalism.[203]

This "rapidly growing support"[204] for stakeholder capitalism has since generated a rich body of scholarship from leading voices in corporate law and finance considering whether a shift away from shareholderism is warranted,[205] and assessing recent developments including the growing popularity of ESG investing[206] and the benefit corporation.[207] My analysis suggests that economic conditions explain the revival of the purpose conversation that is gripping academics, the business community, and the broader public.[208] In particular, the external economic factors discussed above—corporate concentration, inequality, and the absence of adequate externality regulation—are currently at extreme

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200 *Statement on the Purpose of a Corporation*, BUSINESS ROUNDTABLE, https://www.businessroundtable.org/purposeanniversary. The previous version of the statement read "The paramount of duty of management and boards of directors is to the corporation's stockholders." *See* THOMAS A. KOCHAN, SHAPING THE FUTURE OF WORK, (Business Expert Press 2016).

201 Walter Spak & Jessica Lynd, *The Rise of Stakeholder Capitalism*, WHITE & CASE (Sep. 1, 2021), https://www.whitecase.com/insight-our-thinking/rise-stakeholder-capitalism

202 Klaus Schwab, *Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution,* WORLD ECONOMIC FORUM (Dec. 2, 2019), https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/

203 *See*, *e.g.*, Lipton, et al., *supra* note 4; Martin Lipton, *Stakeholder Capitalism and ESG as Tools for Sustainable Long-term Value Creation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 11, 2022), https://corpgov.law.harvard.edu/2022/06/11/stakeholder-capitalism-and-esg-as-tools-for-sustainable-long-term-value-creation/; Martin Lipton, *The Friedman Essay and the True Purpose of the Business Corporation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sep. 17, 2020), https://corpgov.law.harvard.edu/2020/09/17/the-friedman-essay-and-the-true-purpose-of-the-business-corporation/.

204 Tallartia & Bebchuk, *Illusory Promise*, *supra* note 6.

205 *Compare* Bebchuk & Tallarita, *Illusory Promise*, *supra* note 6; Bebchuk, Kastiel & Tallarita, *Corporate Leaders*, *supra* note 6; Bebchuk & Tallarita, *Will Corporations Deliver*, *supra* note 6; George P. Shultz et al., *Cheated by Collectivism*, HOOVER INSTITUTION (Aug. 4, 2020), https://www.hoover.org/research/cheated-collectivism; *with* Colin Mayer, *Shareholderism versus Stakeholderism – A Misconceived Contradiction. A Comment on "The Illusory Promise of Stakeholder Governance" by Lucian Bebchuk and Roberto Tallarita* (Eur. Corp. Governance Inst. – L. Working Paper No. 522, 2020), https://ecgi.global/sites/default/files/working_papers/documents/mayerfinal.pdf; Barzuza, Curtis & Webber, *supra* note 198; Dina Medland & Alison Taylor, *The Illusion of Reasoning*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sep. 6, 2020), https://corpgov.law.harvard.edu/2020/09/06/the-illusion-of-reasoning/; Hart & Zingales, *Companies Should Maximize*, *supra* note 34. For a survey of stakeholderist literature in recent times, as well as evidence of a "developing norm of corporate responsibility" across the globe, *see* Cynthia A. Williams, Corporate Social Responsibility and Corporate Governance, in THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 44–52 (Jeffrey N. Gordon & Wolf-Georg Ringe eds. 2018).

206 Elizabeth Pollman, *The Making and Meaning of ESG* (Eur. Corp. Governance Inst. – L. Working Paper No. 659, 2022), https://ecgi.global/sites/default/files/working_papers/documents/themakingandmeaningofesgecgi.pdf; Lund & Pollman, *Corporate Governance Machine*, *supra* note 1 at 2567 (charting the rise of the ESG movement); Quinn Curtis, Jill Fisch, Adriana Z. Robertnson, *Do ESG Funds Deliver on Their Promises?*, 120 MICH. L. REV. 939 (2021).

207 Strine, Jr. *Restoration*, *supra* note 4 at 55-58; Ofer Eldar, *Designing Business Forms to Pursue Social Goals*, 106 VA. L. REV. 937, 989–1000 (2020).

208 *Cf.* Elizabeth Pollman, *The Supreme Court and the Pro-Business Paradox*, 135 HARV. L. REV. 220 (2021) (arguing that pro-business jurisprudence from the Supreme Court increases pressure on internal law and governance to embrace stakeholder interests).

points, which explains the increased appetite for governance system that privileges stakeholders. More provocatively, it suggests a departure from the first-best world that shareholder primacy theory rests upon and strengthens the normative case for a move to stakeholder governance.

First, since the 1980s, corporate concentration in the U.S. has been steadily rising.[209] To estimate this growth, Spencer Kwon, Yueran Ma, and Kaspar Zimmerman collected data on the size distribution of all U.S. corporate businesses for 100 years.[210] Their results show that the shares of production assets that accrue to the top 1% and .1% of business in the U.S. have grown steadily since the 1980s.[211] Moreover, researchers have shown that market concentration has enabled steadily increasing corporate markups over marginal costs—such markups went from about 18% in 1980 to a whopping 67% in 2014.[212]

The growth of giant corporations with power over productive assets and employment in the U.S. has contributed to a renaissance in antitrust legal scholarship and policy;[213] it has also put pressure on the internal workings of the corporation. A paper by an influential think tank explains, "[t]oday's markets are highly concentrated, and it is within this economic structure that stakeholder capitalism makes its case for better corporate behavior."[214] Indeed, this view echoes the corporate social responsibility movement that came about during the 1920s, another era of extreme corporate concentration in the U.S.[215]

Second, inequality in the U.S. is also at a high point, and has grown enormously since the 80s.[216] The growth of wealth concentration is almost entirely due to the rise in the top .1 percent of wealth

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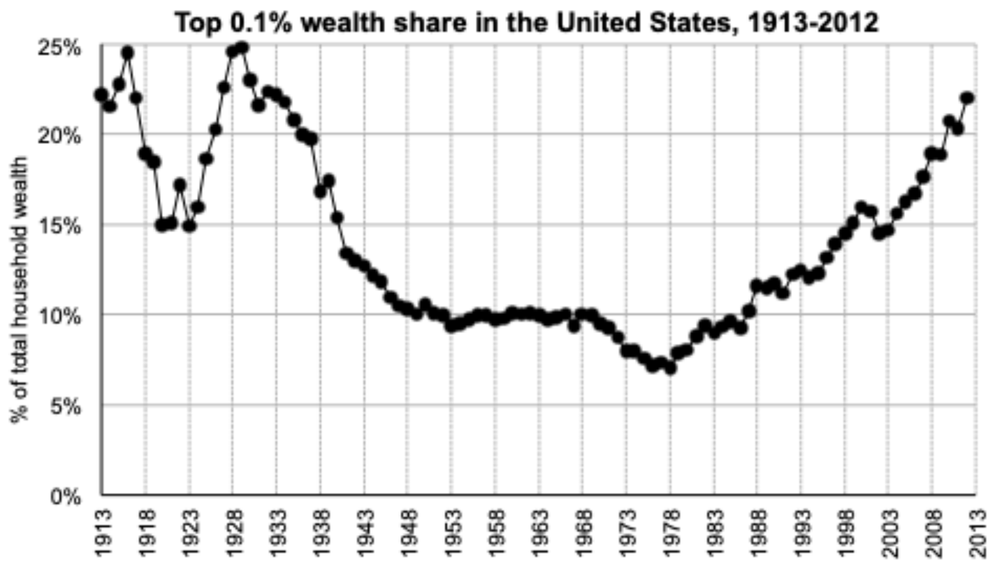
209 Kwon et al., *100 Years of Rising Corporate Concentration* (SAFE Working Paper No. 359), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3936799; *see also* Roe, *Corporate Purpose and Corporate Concentration*, *supra* note 187 at 15-16; David Autor et al., *The Fall of the Labor Share and the Rise of Superstar Firms*, 135 Q. J. OF ECON. 645 (2020) (documenting the rise of "superstar" firms since the 1980s).
210 *Id.*
211 *Id.*
212 Karthik Ramanna, *Corporations Are Already Plenty Powerful. Stakeholder Capitalism Could Make Them More So*, PROMARKET (Sep. 17, 2020), https://www.promarket.org/2020/09/17/corporations-are-already-plenty-powerful-stakeholder-capitalism-could-make-them-more-so/.
213 See, e.g., Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L. J. 710 (2017); Lina M. Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235 (2017); Lina M. Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655 (2020); JONATHAN B. BAKER, THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY (2019); Eric A. Posner & E. Glen Weyl, RADICAL MARKETS: UPROOTING CAPITALISM AND DEMOCRACY FOR A JUST SOCIETY (2018); JONATHAN TEPPER & DENISE HEARN, THE MYTH OF CAPITALISM: MONOPOLIES AND THE DEATH OF COMPETITION (2019); TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018); Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 456 (2018) (advocating for the use of antitrust law to combat labor market power and increase worker welfare). For a survey of this wave of scholarship, *see* A. Douglas Melamed, *Antitrust Law and It's Critics*, 83 ANTITRUST L. J. 269 (2020).
214 Denise Hearn & Michelle Meagher, *Stakeholder Capitalism's Next Frontier: Pro- or Anti-monopoly?*, AM. ECON. LIBERTIES PROJECT (April 27, 2022), https://www.economicliberties.us/our-work/stakeholder-capitalisms-next-frontier/; *see also* Roe, *supra* note 187 (describing concentration as a contributing factor for purpose pressure and ESG).
215 *See* Section II.A *supra*.
216 *See* Emanuel Saez & Gabriel Zachman, *Wealth Inequality in the U.S. Since 1913: Evidence from the Capitalized Income Tax Data* (NAT'L BUREAU ECON. RES., Working Paper No. 20625, Oct. 2014). Wage stagnation has played a major role in this gap. *See* Lawrence Mishel, Elise Gould & Josh Bivens, *Wage Stagnation in Nine Charts*, ECON. POL'Y INST. (Jan. 6, 2015); Katherine Schaefer, *6 Facts About Economic Inequality in the U.S.*, PEW RES. CTR. (Feb. 7, 2020), https://www.pewresearch.org/fact-tank/2020/02/07/6-facts-abouteconomic-inequality-in-the-us/; Drew DeSilver, *For Most U.S. Workers, Real Wages Have Barely Budged in Decades*, PEW RES. CTR. (Aug. 7, 2018), *see also* Strine, Jr., *Restoration*, *supra* note 4.

share, which rose from 7% in 1979 to 22% in 2012—"a level almost as high as in 1929."[217] By contrast, while the bottom 90% wealth share increased until the mid-80s, it has steadily declined ever since.[218] The figure below, taken from Emanuel Saez and Gabriel Zuchman's influential study surveying income tax returns over the past century, depicts the share of total household wealth held by the .1 percent richest households, and provides a powerful image of this rapid accumulation in wealth.[219]



This figure depicts the share of total household wealth held by the 0.1% richest families, as estimated by capitalizing income tax returns. In 2012, the top 0.1% includes about 160,000 families with net wealth above $20.6 million. Source: Appendix Table B1.

Moreover, rising inequality is often cited by scholars and policymakers seeking a shift in corporate purpose.[220] Consider, as just one example, the Accountable Capitalism Act's mandate of a federal charter for corporations that would direct them to "consider the interests of all corporate stakeholders, not just shareholders."[221] The release introducing the draft legislation opens by painting a picture of rising inequality: it describes how since the 80s, wages have stagnated for workers, despite their rising productivity; not only that, the gap in wealth between the richest Americans (who are often investors) and the poorest has widened significantly.[222] This, sponsoring-Senator Warren concludes, warrants a new "plan to empower workers and transform corporate America so it produces broad-based growth that gets workers the wages they deserve."[223]

Third and finally, although externality regulation is more difficult to quantify and measure, there are signs that suggest inadequacy. In particular, scholars have blamed ossification,[224] partisanship,[225] and corporate capture of the political process[226] for legislative inaction and policies tailored to special

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[217] Saez & Zachman, *supra* note 216 at 1.
[218] *Id.*
[219] *Id.*
[220] *See* Strine, Jr. *Restoration*, *supra* note 4.
[221] Warren Democrats, *Empowering Workers Through Accountable Capitalism*, https://elizabethwarren.com/plans/accountable-capitalism.
[222] *Id.* As Edward Rock points out, this rhetoric is not limited to liberal politicians. *See* Rock, *supra* note 21 at 366 (quoting Marco Rubio report).
[223] *Id.*
[224] *See supra* note 175.
[225] *See supra* note 173.
[226] *See supra* note 174.

interests, rather than the public good. Legal developments have further increased corporate influence in politics[227] and hamstrung government agencies from issuing and enforcing rules,[228] threatening to further limit the government's ability to respond to climate change and other pressing issues.[229]

Regardless of whether scholars are right or wrong about the optimality of government regulation at this very moment,[230] the important point is that the public has taken a dim view of the government's ability to control global problems: "Many have ceased to believe in the possibility of legislation to address societal issues such as climate change, redistribution, stagnant wages, etc."[231] Polls of Americans routinely find that "government should do more on climate."[232] Polling data similarly suggests that Americans believe the government should do more to tackle inequality and support unions.[233] Overall, public trust in government has continued to decline, nearing historic lows in 2022.[234]

The perception of government inadequacy to tackle social problems is at the core of purpose shift advocacy. For example, Larry Fink's 2018 CEO letter opened with the following observation: "We [] see many governments failing to prepare for the future…. As a result, society increasingly is turning to the private sector and asking that companies respond to broader societal challenges."[235]

All in all, this collection of extreme economic conditions and the perception that they cannot be easily changed has fostered an environment in which corporations are again thrust into the limelight, with many questioning their role in society. I do not claim that these conditions are enough to bring about a total shift to stakeholderism—my historical analysis indicates that although extreme economic conditions are a necessary precursor for a shift, they are not sufficient.[236] Nonetheless, these conditions may impact the normative desirability of such a shift. Simply put, in light of stark inequality, the

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[227] *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

[228] *See West Virginia v. EPA,* 597 U.S. ___ (2022); Casey Crownhart, *The US Supreme Court just gutted the EPA's power to regulate emissions*, MIT TECH. REV. (Jun. 30, 2022), https://www.technologyreview.com/2022/06/30/1055272/supreme-court-climate-policy-epa/.

[229] *See* Crownhart, *supra* note 228.

[230] The opposite view--that corporate regulation is too burdensome—has fierce proponents as well. *See*, *e.g.*, John Kitching, Mark Hart & Nick Wilson, *Burden or Benefit? Regulation as a dynamic influence on small business performance*, 33 INT'L SMALL BUS. J. 130, 130-31 (2013) ("The conventional view of business lobby groups, politicians, academics and the media is that regulation – or more pejoratively, 'red tape' – is a burden, cost or constraint on businesses. Small businesses are believed to suffer disproportionately from such burdens due to resource constraints.").

[231] Rock, *supra* note 21 at 4; Macey & Harris, *supra* note 8 ("The emergence of ESG investing and governance demonstrates a consensus that government lacks credibility and is not viewed by rational citizens as a likely source of solutions to these broad problems.").

[232] Alec Tyson & Brian Kennedy, *Two-Thirds of Americans Think Government Should Do More on Climate*, PEW RSCH. CTR. (June. 23, 2020), https://www.pewresearch.org/science/2020/06/23/two-thirds-of-americans-think-government-should-do-more-on-climate/.

[233] Joseph Zeballos-Roig, *A growing number of Americans believe the government should tackle economic inequality instead of illegal immigration*, BUS. INSIDER INDIA (Jan. 10, 2020), https://www.businessinsider.in/stock-market/news/a-growing-number-of-americans-believe-the-government-should-tackle-economic-inequality-instead-of-illegal-immigration-new-poll-finds/articleshow/73194336.cms; Megan Brenan, *Approval of Labor Unions at Highest Point Since 1965*, GALLUP (Sep. 2, 2021), https://news.gallup.com/poll/354455/approval-labor-unions-highest-point-1965.aspx.

[234] Pew Research Center, *Public Trust in Government: 1958-2022*, Jun. 6, 2022, https://www.pewresearch.org/politics/2022/06/06/public-trust-in-government-1958-2022/; *see also* Megan Brenan, *Americans' trust in Government Remains Low*, GALLUP (Sep. 30, 2021), https://news.gallup.com/poll/355124/americans-trust-government-remains-low.aspx.

[235] BlackRock, Larry Fink's Annual Letter to CEOs, *A Sense of Purpose*, *supra* note 4.

[236] For a predictive model for corporate governance change, *see* Steven Bank & Brian Cheffins, *Corporate Law's Critical Junctures*, 77 BUS. L. (2021).

government's failure to respond to pressing social problems, and high corporate concentration, the case for using stakeholder governance to engage in redistribution is stronger than it was fifty years ago. Note, however, how tenuous this conclusion is. If these economic conditions also lead to changes in the regulatory environment that render it better able to control corporate harm and respond to inequality, the case for a shift to a stakeholder governance model weakens considerably. And the historical examples suggest that pressure for stakeholderism can also generate pressure for regulatory action—contrary to what many scholars predict.[237] This last point reveals how difficult it is to calibrate a purpose shift in response to external conditions. As the historical examples reveal, external conditions are often changing, and yet the dominant corporate governance model tends to be sticky in the face of change.

Despite these practical difficulties, the observation that external factors can change the welfare-creating orientation for corporate governance is not irrelevant; if anything, it reveals how badly the classic purpose debate and its emphasis on a single right answer misses the mark. As such, it is my hope that policymakers and scholars will more often consider external economic conditions when determining how best to orient corporations and their management. The next Section connects these observations to broader conversations about the evolution of corporate law and governance.

B. Revisiting the End of History for Corporate Law

Although this paper has focused on corporate governance in the United States, there exists an important literature exploring governance differences across nations, that for a time embraced the view that convergence on a shareholder-focused model was likely.[238] Indeed, this position was so widespread that in 2001, Reinier Kraakman and Henry Hansmann announced that the "normative consensus that corporate managers should act exclusively in the economic interests of shareholders" was the "end of history" for corporate law.[239] This statement represented their total embrace of the view that shareholder primacy was maximally efficient, and that competitive pressures would render stakeholder-oriented models obsolete over time.[240]

Yet in the twenty years that followed the article's publication, the premise has not been borne out: indeed, there continues to be ample diversity in legal requirements facing managers across nations.[241]

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[237] Bebchuk & Tallarita, *supra* note 6.

[238] *See* Afra Afsharipour & Martin Gelter, *Research Handbook on Comparative Corporate Governance: Introduction* 8-9 (Eur. Corp. Governance Inst. – L. Working Paper No. 552, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3725679 (surveying the comparative corporate governance literature and its early consensus of convergence around a shareholderist model).

[239] Hansmann & Kraakman, *End of History*, *supra* note 13.

[240] *Id.*

[241] *See* Strine, Jr., *Restoration*, *supra* note 4. (discussing European Social democratic nations and their relative emphasis on workers); Tim Wu, *The Goals of the Corporation and the Limits of the Law*, The CLS Blue Sky Blog (Sep. 3, 2019), https://clsbluesky.law.columbia.edu/2019/09/03/the-goals-of-the-corporation-and-the-limits-of-the-law/ ("[H]istory has not been kind to the Kraakman-Hansmann thesis. Its main factual assertion has proven wrong, given the rise of a corporatist model in China and its persistence in other countries, like Brazil. And the idea that there is no normative competition to the model is also obviously wrong, unless one is disposed just to ignore the growing body of dissent."); Afsharipour & Gelter, *supra* note 238 at 10-11 ("In some areas, we see increasing convergence along the lines predicted by Hansmann and Kraakman… In other areas, we appear to see convergence, but in a different direction. Most strikingly, during the past years there have been increasing concerns about sustainability and a greater push toward a corporate purpose that deviates from shareholder wealth maximization. ESG issues have very much come to the forefront of the debate in both developed and developing economies."); Pargendler, *Heterodox, supra* note 176.

More importantly, as the previous Section discussed, there is a growing lack of consensus about the optimality of a shareholder-centric model within the U.S.[242]

This Article's core claim—that external economic characteristics affect the desirability of shareholder primacy—suggests that this failure of domestic convergence should be expected. This insight builds on the comparative corporate governance literature, in which scholars have argued that because of institutional differences across jurisdictions, "it is not obvious that a single model will be optimal for all countries."[243] Although my analysis does not address these rich comparative corporate law conversations, which feature complexities well beyond the scope of this paper, it further suggests that jurisdictions that have maintained a stakeholder model (or elements of it, as in Germany[244]), are not necessarily "converg[ing] on inefficient rules."[245] As many voices weighing in on the comparative question have emphasized, external economic circumstances challenge the orthodoxy of a single right answer.[246] Moreover, these insights suggest that governance dynamism should be expected—in the U.S. and elsewhere—and even preferred as economic circumstances change over time.

C. Evolution of Corporate Law and Governance

Beyond these normative points, there is a descriptive observation about how legal change takes place over time. Hansmann and Kraakman's paper provides an example of the classical law and economics view of legal change, which is that efficient laws tend to survive, whereas inefficient laws are likely to be extinguished.[247] In corporate law, this evolution is supported by competitive pressure, either from states competing for corporate charters or across global markets, as the pendulum swing in the 80s demonstrated.[248] Under this narrative, efficient governance structures allow firms to access equity capital at a lower cost and abandon inefficient arrangements more quickly, providing a competitive advantage and increasing the chances of their survival.[249]

Like the classic law and economics defense of shareholder primacy (and indeed, the theory of evolution it is based on), this theory of efficient evolution focuses on firm-specific gains, rather than system-wide efficiency that results in maximized social welfare. That is not to say that the efficient operation of firms does not matter for social welfare—indeed, a chief goal of corporate governance is to promote the efficient allocation of resources, which benefits all, and as the classic defense of shareholder primacy maintains, wealthy firms can and do share benefits with stakeholders. In other words, there is often harmony between a governance regime that promotes firm-specific gains and social welfare. However, as the simple hypotheticals in the previous Section revealed, in a second-best world, the calculus could change. Specifically, in that world, the inefficient corporate governance rule could become welfare-enhancing if the institutional environment failed to mitigate corporate harm, and the costs of using governance to abate that harm were less than the costs of regulatory reform.

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242 *See* Section III.B *supra*; *see also* Pargendler, *Controlling Shareholders*, *supra* note 1 ("At least since the global financial crisis of 2008, corporate governance has been increasingly used to advance goals other than shareholder protection.").

243 Afsharipour & Gelter, *supra* note 238 at 10-11.

244 See Gorton, supra n. XX.

245 Hansmann & Kraakman, *End of History*, *supra* note 13 at 1.

246 *See* Afsharipour & Gelter *supra* note 238 at 10-11 (citing articles making this claim); Pargendler, supra notes XX, see also note 29 *supra*.

247 Roe, *Chaos and Evolution*, *supra* note 18.

248 *See*, *e.g.*, Hansmann & Kraakman, *End of History*, *supra* note 13 at 14 (describing how a shareholder-focused model "is likely to win the competitive struggle" with other firms, "confining other governance models to older firms and mature product markets").

249 *Id.*

The analysis in Part II further suggested that public and academic receptiveness to stakeholder governance models increase when economic conditions suggest a stark departure from the first-best world. Could it be that the ebbs and flows in public will could serve to moderate the evolution of corporate governance, in a way that improves aggregate welfare? In other words, perhaps the efficient evolution of corporate governance leads to a shareholder-focused model, as Kraakman and Hansmann would predict, unless the external economic environment becomes very dysfunctional. When societal inequality and corporate harm are not properly controlled, public appetite for governance change could help bring about the abatement of that harm in a way that improves overall welfare. If this is the case, perhaps the goal for corporate governance scholars should not be to eschew stakeholderism altogether, but to consider how to better calibrate the pendulum.

This modified framing of what an efficient evolution of corporate governance could look like is in tension with another competing theory, which is that swings in the purpose pendulum are essentially politically determined. For example, Jonathan Macey has attributed the popularity of the ESG investing movement to the rise of libertarianism, in which people have turned to private parties to achieve their political goals.[250] Likewise, Edward Rock has attributed the current debate over corporate purpose to political dysfunction, "with regrettable results."[251] The implication in both of these arguments is that political winds have bent corporate governance in a way that is inefficient and undesirable.

The fact that corporate managers are subject to political pressure is without question an important driver of policy; nonetheless, my analysis suggests that attributing these swings to political whim may be incomplete, and that there can be logic to a departure from a shareholder primacy system in a second-best world. In that imperfect world, the right answer ultimately depends on resolving tradeoffs between a relatively less efficient governance regime and the effectiveness of using corporate governance to abate corporate harm and societal inequality.

However, I want to emphasize again that in my historical examples, I am not charting an efficient evolution of law. In particular, the dominant view of the corporation in society appears to be quite sticky,[252] leading to long periods of stasis even as economic conditions change a great deal.[253] More important, it appears that the same external forces that led to a swing in the corporate purpose pendulum also alter the external environment that corporations face. For example, in the 30s, a purpose swing toward stakeholderism occurred in tandem with New Deal regulation,[254] when economic logic would suggest a move in the other direction. And in the 80s, the swing toward shareholder primacy occurred alongside sweeping industry deregulation. Therefore, in each historical example, by the time the pendulum swing took place, the economic rationale for it had weakened.

As this historical analysis reveals, public will affects not only the dominant orientation for corporate purpose, but also the regulatory environment, and in ways that can obviate the need for a

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[250] Macey & Harris, *supra* note 8; *see also* ROE, POLITICAL DETERMINANTS, *supra* note 22 (describing the configuration of current ownership and corporate governance characteristics as politically determined).
[251] Rock, *supra* note 21.
[252] Lund & Pollman, *Corporate Governance Machine*, *supra* note 1 (discussing the stickiness of the shareholder primacy norm).
[253] This suggests path dependence may also be at work. *See* Roe, *Chaos and Evolution*, *supra* note 18; Lund & Pollman, *Corporate Governance Machine*, *supra* note 1.
[254] This example is an important counter to the argument that embracing stakeholderism will undermine the government's ability to regulate corporate activities. See Bebchuk & Tallarita, *supra* note 6.

purpose shift. Nonetheless, complementary movement between corporate purpose and the regulatory environment is not guaranteed, especially in periods of extreme and intractable government dysfunction. And when strong public will for corporate harm abatement is not able to move the regulatory needle, the case for stakeholderism rises considerably. In light of the state of regulatory dysfunction in modern times, scholars would do well to consider how swings in the purpose pendulum could respond to these deficiencies. The next Section begins this project.

D. Future Paths

This Article advanced the theory that corporate law and governance can operate as a second-best response to a failure of externality regulation by incorporating a stakeholder perspective. It further studied two historical snapshots that showed that corporate purpose is capable of shifting in response to external economic conditions, but also that these shifts do not occur as precisely as economists might like. Together, this analysis raises important questions about implementation of my theory. First, how can we know when regulation has failed such that a shift in purpose would help promote social welfare? Second, could a purpose shift (and in particular, a move toward stakeholderism) really mitigate corporate externalities? Third and relatedly, would a dynamic theory of corporate purpose undermine the stability of corporate law? Complete answers to these questions would fill their own article; as a result, this Section begins to answer them while also outlining thoughts for future research.

As the historical examples reveal, cultural sentiment in favor of a broad or narrow vision for corporate purpose shifts based on perceptions of the adequacy of externality regulation. And yet, there is no objective gauge that can tell us whether externalities are being optimally controlled. So, how can those who believe in a dynamic concept of purpose determine that a shift to a stakeholder model is warranted?

Students of basic public economics learn that government regulation of externalities is often imperfect: regulation contains gaps, can be gamed by regulated parties, and may fail to keep pace with changing technological or social needs. Moreover, government regulators can be captured by industry, which occurs when the regulator serves the regulated party's interest, rather than that of the public. As a result of these deficiencies, government can engage in "inadequate actions and unreasonable inactions"—both of which constitute government failure.[255]

These principles provide a starting point for determining when government has failed in its regulatory agenda. In particular, the likelihood of government failure rises along with corporate influence in politics, which suggests that regulators might be bending to the wishes of the regulated industry, rather than society more broadly.[256] It also increases with the existence of partisan gridlock, which suggests that beneficial rules (and rules that the public broadly supports) might not be enacted due to political hurdles.[257] To take just one example, although a majority of Americans support data privacy laws, no comprehensive federal law has been passed,[258] and only five states have been able to

[255] Barack Orbach, *What is Government Failure*?, 30 YALE J. REG. ONLINE 44 (2012). Interesting, leading conservative thinkers generally start from the premise that government is likely to fail in its regulatory efforts, but to justify a hands off regulatory approach. Id. at 44.
[256] See supra notes X-X.
[257] Tim Wu, *The Oppression of the Supermajority*, N.Y.T. (March 5, 2019).
[258] Chris Mills Rodrigo, *Majority of Americans Support National Privacy Standards*, The Hill (September 16, 2021).

pass their own laws.[259] The presence of outsized corporate money in political elections as well as extreme political impasse in Congress and elsewhere both suggest that the reason for this absence is not necessarily the desirability of leaving data privacy rules to the marketplace.

But this discussion also raises another question—even if government has failed to regulate corporate harm, who is to say that a shift to a stakeholder model governance would increase social welfare? Looking back at history, one finds both good and bad examples. As for the former, workers in aggregate did very well (in terms of their labor share, or the fraction of economic output that accrues to them as compensation) in the 50s and 60s, when management had leeway to consider their interests; since 1991, employee labor share has fallen steadily.[260] Zooming in on specific companies provides more context for these figures. Consider the case of IBM, which prided itself on taking care of its employees pursuant to its stated value of "respect for the individual."[261] For more than seven decades and through the Great Depression, the company never laid off workers, and the company's CEO Thomas Watson Jr. continually emphasized his philosophy of putting people above profits, which led to the decision to offer health insurance, pensions, and paid vacations to workers, before such benefits were commonplace.[262] By the 80s and 90s, as shareholder value thinking became ascendant, IBM shed many of these benefits and eventually laid off workers for the first time in the early 90s.[263]

The impact of stakeholder governance on environmental harm is less clear cut, especially when viewed through a historical lens. Although the 50s and 60s may have been the heyday for the American worker, it was also the golden age of pesticides, environmental chemicals, and oil spills. Indeed, critics of pollution eventually moved the needle only with the participation of government, which formed the EPA in 1972.[264]

Nonetheless, there are key differences between the 50s and 60s and modern times with respect to environmental harm and pollution. Importantly, during that earlier period, the scope and significance of environmental harm was less well-understood by both the business community and the broader public. Today, by contrast, the public is keenly aware of the harms that come from corporate pollution and environmental degradation, although disagreement exists on what to do about it. Perhaps a more important difference between that period and now, however, is the extent of regulatory dysfunction. Indeed, the 70s was the last period to see the enactment of major environmental legislation, which may have obviated the need for corporate governance to tackle the issue.[265] By contrast, despite the growing awareness of climate change due to greenhouse gas emissions and the strong popular support for regulation in modern times, no new major environmental statutes have been passed in thirty years.[266] Administrative law expert Michael Livermore has described the current state of environmental regulatory ossification as follows: "Scientific knowledge has been

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[259] National Conference of State Legislatures, *State Laws Related to Digital Privacy* (June 7, 2022), https://www.ncsl.org/technology-and-communication/state-laws-related-to-digital-privacy.
[260] U.S. Bureau of Labor Statistics, *Estimating the U.S. Labor Share* (February 2017), https://www.bls.gov/opub/mlr/2017/article/estimating-the-us-labor-share.htm; Zohar Goshen & Doron Levit, *Agents of Inequality: Common Ownership and the Decline of the American Worker*, 72 DUKE L. J. 1 (2022).
[261] QUINN MILLS, THE IBM LESSON (1988).
[262] *Id.*
[263] See Dan Bobkoff, *IBML When Corporations Took Care of their Employees*, MARKETPLACE (June 13, 2016), https://www.marketplace.org/2016/06/13/profit-ibm/.
[264] Michael Livermore, *Reviving Environmental Protection: Preference-Directed Regulation and Regulatory Ossification*, 25 VA. ENVIRON. L. REV. 311 (2007).
[265] *Id.*
[266] In 1990, Congress passed the Clean Air Act, which sought to respond to the problem of acid rain. *Id.* at 22.

incorporated at a slow pace, regulatory loopholes have not been filled, and 'win-win' changes to the regulatory apparatus have not been made…. The fact that such reforms remain on the table, waiting to be picked up, is strong evidence that something is wrong with the regulatory process. Agencies, Congress, and the courts all share responsibility for these failures…."[267]

Even with evidence of regulatory inadequacy, the question of whether stakeholder governance would improve things still remains. Rather than put my faith in corporate management to voluntarily change course in a societally beneficial manner, it is my expectation that a purpose shift would also bring about changes to corporate governance, as it has in the past.[268] For example, in jurisdictions where stakeholder models predominate, aspects of law have evolved to solidify management's focus on these other groups, leading to genuine gains for those stakeholders.[269] In the U.S., one could imagine changes to executive compensation, the composition of the board of directors, and in shareholder voting to accommodate a broader mandate for corporate management.

What about the interplay between governance by corporations and governance by governments? Would the embrace of stakeholderism undermine the likelihood that government will eventually address these issues? As the historical analysis indicates, a shift to a stakeholder governance model does not necessarily reduce the public will for externality regulation; by contrast, these shifts appear to travel together. For example, recent pressure to focus on stakeholders has not worsened the regulatory dynamic; if anything, it has improved it. Consider how in 2021, Nestle publicly supported EU regulation that would require greater disclosure efforts by food companies to improve the nutritional value and sustainability of their food products.[270] Why would a profit-seeking company do this? When companies are forced to improve their own practices due to pressure from stakeholders, it increases their appetite for regulation that would bind competitors in the same way.[271]

But this analysis leads to another question about the desirability of a dynamic concept of purpose. One of the principal advantages of corporate law is that it is stable, which allows corporate planners to plan their affairs. Is it fair to change the arrangement on shareholders and other stakeholders mid-stream? For example, if shareholders invested in Apple under the expectation that the fiduciaries would focus solely on maximizing their profits, and then learned that the mandate had shifted to focus greater managerial attention on Apple employees and the environment, would this alienate shareholders and chill future equity investment, harming the economy in the process?

The increased understanding of the convergence between shareholder and stakeholder interests somewhat ameliorates this concern. As others have written, a focus on stakeholders can

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[267] *Id.*

[268] *See* Lund & Pollman, *Corporate Governance Machine*, *supra* note 1 (showing how the acceptance of shareholder primacy has influenced the path of corporate governance in the U.S. via law, culture, and institutions).

[269] *See*, *e.g.*, Gorton & Schmid, *supra* note 186 (showing that German co-determination leads to redistribution of the firm's surplus toward employees). Note, however, that gains for one group of stakeholders can lead to harms for others. Indeed, German co-determination may have contributed to the VW cheating scandal, in which shareholders and workers were aligned in cheating regulatory rules designed to reduce carbon dioxide emissions. See Charles Elson et al., *The Bug at Volkswagen: Lessons in Co-Determination, Ownership, and Board Structure*, 27 J. OF APPLIED CORP. FIN. 36 (2015).

[270] *Nestle Contribution to the EU Code of Conduct for Responsible Business & Marketing Practices* (July 2021), https://www.nestle.com/sites/default/files/2021-06/nestle-contribution-eu-code-of-conduct-july-2021.pdf.

271. *See also* Dorothy Lund, *Corporate Finance for Social Good*, 121 COLUM. L. REV. 1617 (2020) ("By forcing a company to reduce pollution, the bond removes an incentive for the company to lobby against regulation that would impose the same requirement on rivals. Indeed, the power company might now lobby in favor of regulation.").

improve profitability by reducing risk and improving employee productivity and morale.[272] Nonetheless, a shift to a stakeholder governance model does anticipate that corporate management would have the discretion to make choices that benefit stakeholders at shareholders' expense. This reality poses the risk of chilling investment ex ante. But the benefit would be the potential reduction of socially costly corporate activities. In a first-best world, shareholders would not expect to profit from corporate activities that create higher social costs than benefits; a purpose shift would bring that expectation closer to home in a second-best world.

V. Conclusion

Over the past century, scholars have debated the proper role of corporations in society, arguing either that corporations should concern themselves with profit maximation and little else, or that management should be obligated to consider how the company's operations affect all of its constituencies. As these debates have taken place, the dominant view of corporate purpose has swung from one pole to the other, affecting both the conduct of business and the path of law. Although many attribute these shifts to the persuasiveness of scholarly arguments or changed political sentiment, this Article instead argues that external economic conditions facing corporations and society brought them about. Moreover, this Article contends that the welfare-enhancing orientation for corporations and their management could change based on external conditions, including countervailing power and social inequality. In other words, it suggests that the conventional view of corporate purpose—that there is a single right orientation for corporations—is incomplete, and the case for a move to a stakeholder model increases as corporations face fewer regulatory restraints and inequality persists. These insights bear on the current corporate purpose crossroads in the U.S. and suggest that getting to the right answer requires consideration of external economic factors, which have hit extreme points once again.

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[272] See Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1405-06 (2020); Jeffrey Gordon, supra n X.

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