Article

Toward a Dynamic View of Corporate Purpose

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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 United

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States—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.

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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 a single right answer to this important set of questions: Corporations should maximize shareholder wealth and not consider the interests of a corporation's other stakeholders—including employees, communities, and consumers—unless they affect the company's bottom line.[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

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1. *See* Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2576 (2021) ("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 A. Stout, *The Shareholder Value Myth*, CORNELL L. FAC. PUBL'NS 2 (Apr. 19, 2013), http://scholarship.law.cornell.edu/facpub/771 [https://perma.cc/JN6D-H6PA] ("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 (2020) ("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, 399 (2021) (advocating for the protection of corporate stakeholders and for alignment of "power and purpose dynamics" of corporate governance with "the outcomes we want for our society's well-being and equity"); COLIN MAYER, PROSPERITY: BETTER BUSINESS MAKES THE GREATER GOOD 39 (2018) (arguing that the strength of the corporation as an institution lies with its "power to commit to its purpose and to different parties to different degrees in the delivery of that purpose"); Kishanthi Parella, *Contractual Stakeholderism*, 102 B.U. L. REV. 865, 877–78 (2022) (advocating for a model of "contractual stakeholderism" where all contracting parties have a contractual duty to protect stakeholders).

3. *See, e.g.*, Accountable Capitalism Act, S. 3348, 115th Cong. (2018) (providing reforms to require corporate behavior advancing broad-based stakeholder interests).

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

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-

.harvard.edu/2019/02/11/its-time-to-adopt-the-new-paradigm [https://perma.cc/S5B3-DF9N] ("[S]takeholder governance and ESG are in the best interests of shareholders."); Larry Fink, *A Sense of Purpose*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 17, 2018), https://corpgov.law.harvard.edu/2018/01/17/a-sense-of-purpose [https://perma.cc/A5KV-GDUR] (advocating shareholder engagement with management to "build a better framework for serving all . . . stakeholders"); *Business Roundtable Statement on the Purpose of a Corporation: Two Year Anniversary*, BUS. ROUNDTABLE, https://www.businessroundtable.org/purposeanniversary [https://perma.cc/LHB2-FS27] ("The best modern CEOs have been running their companies [in a way which promotes long-term value for stakeholders] for a long time . . . .").

5. *See* 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 [https://perma.cc/9J9A-7Z32] (describing the recent rise of "corporate governance welfarism," and observing that "[a]t least on a rhetorical level, executives are embracing the notion that companies have a fundamental commitment to an expanded set of stakeholders").

6. *See, e.g.*, Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance,* 106 CORNELL L. REV. 91, 176 (2020) [hereinafter Bebchuk & Tallarita, *Illusory Promise*] (concluding that stakeholderism decreases the accountability of corporate leaders while failing to protect stakeholder interests); Lucian A. Bebchuk et al., *For Whom Corporate Leaders Bargain*, 94 S. CAL. L. REV. 1467, 1535 (2021) [hereinafter Bebchuk et al., *Corporate Leaders*] (finding that constituency statutes fail to sufficiently protect stakeholders and cautioning against the "superficial appeal of stakeholderism"); Lucian A. Bebchuk & Roberto Tallarita, *Will Corporations Deliver Value to All Stakeholders?*, 75 VAND. L. REV. 1031, 1086 (2022) [hereinafter Bebchuk & Tallarita, *Will Corporations Deliver*] (arguing that the Business Roundtable's 2019 statement of corporate purpose "was not planned or expected to bring about meaningful improvements in the treatment of stakeholders"); *cf.* Michael R. Strain, *Milton Friedman Was Right About Shareholder Capitalism*, BLOOMBERG (Sept. 18, 2020), https://www.bloomberg.com/opinion/articles/2020-09-18/milton-friedman-was-right-about-shareholder-capitalism [https://perma.cc/PE2D-SNNB] (arguing that shareholder capitalism already allows sufficient consideration of stakeholder interests).

7. Zohar Goshen & Richard Squire, *Principal Costs: A New Theory for Corporate Law and Governance*, 117 COLUM. L. REV. 767, 769 (2017) ("For the last forty years, the problem of agency costs has dominated the study of corporate law and governance. . . . Many scholars . . . treat the reduction of agency costs as the essential function of corporate law . . . ."); William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 409–17 (1989) (describing the "wide currency" of the "neoclassical" nexus

centered directive maximizes the value of the 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, the latter of which is unequivocally the goal of

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of contracts theory of the firm and the related "imperative of reducing agency costs").

8. *See* sources cited *supra* note 6; Jonathan R. Macey, *ESG Investing: Why Here? Why Now?*, 19 BERKELEY BUS. L.J. 258, 259 (2022) (describing the ESG movement as playing "conveniently into the hands of corporate managers who wish to avoid accountability").

9. FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 38 (1991) ("[M]aximizing profits for equity investors assists the other 'constituencies' automatically."). *But see* Aneil Kovvali & Leo E. Strine, Jr., *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, 337 (2022) (challenging previous scholars' failure to recognize the "real-world realities" that permit investors to shift costs to potential stakeholders).

10. *See* EASTERBROOK & FISCHEL, *supra* note 9, at 38; *see also* Bebchuk & Tallarita, *Illusory Promise*, *supra* note 6, at 167 ("If the economic pie produced by the corporate sector becomes smaller, all who benefit from slices of it (whether contractually, through tax revenues, or due to positive externalities) might end up worse off.").

11. *See id.* (listing some of the parties who stand to gain from maximizing corporate profit, including "employees, suppliers, local residents, and other stakeholders"); *see also* William W. Bratton & Michael L. Wachter, *Shareholders and Social Welfare*, 36 SEATTLE U. L. REV. 489, 489 (2013) ("Shareholder value maximization is widely equated with social welfare maximization.").

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.[14] Interestingly, during this long period, dissenters advanced the *very same arguments* that underlie the agency cost model,[15] but their views lost out to the alternative perspective that encouraging corporations to pursue social welfare was the best way to maximize it.[16]

12. *See, e.g.*, John Armour et al., *What Is Corporate Law* ("[T]he 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"), *in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 1, 22–23 (Reinier Kraakman et al. eds., 3d ed. 2017)).

13. Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439–41 (2001) (discussing the "broad normative consensus that shareholders alone are the parties to whom corporate managers should be accountable").

14. *See infra* Part I.

15. *See, e.g.*, HENRY G. MANNE & HENRY C. WALLICH, THE MODERN CORPORATION AND SOCIAL RESPONSIBILITY 18–20 (1972) ("The concept of corporate social responsibility is truly ideal for government officials who wish to claim credit for all public benefits and accept no responsibility for increased costs and long-run antisocial effects."); David L. Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1, 36–37 (1979) (arguing that "extra-profit" goals should be the purview of the political process, not corporate social responsibility); Harold 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.").

16. *See, e.g.*, HERMAN E. KROOSS, EXECUTIVE OPINION: WHAT BUSINESS LEADERS SAID AND THOUGHT ON ECONOMIC ISSUES, 1920S–1960S, at 52 (1970) (quoting David Rockefeller's statement that "The old concept that the owner of

So, what changed? In considering this question, this Article examines two corporate purpose "moments"[17] 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.[18] These moments not only shed light on our modern purpose crossroads, but also on the evolution of law.[19] Law and economics scholars generally embrace an "evolution-toward-efficiency" model, in which inefficient results are extinguished and efficient arrangements persist.[20] Under this view,

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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").

17. *Cf.* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 41 (1991) (coining the term "decisive moment" which occurs when institutions undergo or require profound change, usually in response to public and cultural pressure points). Discourse around Ackerman's work has adopted the term "constitutional moment." *See, e.g.*, Daniel Taylor Young, *How Do You Measure a Constitutional Moment? Using Algorithmic Topic Modeling to Evaluate Bruce Ackerman's Theory of Constitutional Change*, 122 YALE L.J. 1990 (2013).

18. As Part I describes in greater detail, I selected these periods (and not earlier ones) because corporations had taken their modern form by the 1920s in 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.

19. Others have examined corporate purpose shifts to glean insights about the evolution of law and corporate governance. In particular, Harwell Wells's rich study of corporate social responsibility debates from 1930 to 2002 reveals that these debates responded to specific issues of the time but also shared a common conceptual foundation—disagreement about the extent of corporate responsibility to society versus sharerholders. Wells further suggested that these debates emerged in response to "highly-concentrated corporate power, and that this thread persists in modern conversations about corporate social responsibility." C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L. REV 77, 79–80 (2002). Curtis Milhaupt and Ronald Gilson have likewise studied historical shifts in corporate governance conversations and argue that these shifts are the product of changed views about the desirability of "capital market completeness"—which promotes value maximization—and "policy channeling," which is the "instrumental use of the corporation for distributional or social ends." Ronald J. Gilson & Curtis J. Milhaupt, *Shifting Influences on Corporate Governance: Capital Market Completeness and Policy Channeling*, 12 HARV. BUS. L. REV. 1, 1–2 (2022). Gilson and Milhaupt argue that "disappointment" with corporate performance drives oscillations between these two conceptions of the corporation. *Id.* at 2.

20. For a discussion of the limitations of this model, see Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641, 641 (1996)

the embrace of shareholderism in the United States represents the efficient development of law in which one "dominant legal model" has crowded out other less efficient concepts and frameworks.[21] 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.[22]

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[23] and the lack of

("Although institutions that have survived cannot be too inefficient, evolution-toward-efficiency constrains but does not fully determine the institutions we observe.").

21. *See* Hansmann & Kraakman, *supra* note 13, at 468. In an alternate appraisal, the focus on shareholders may have more to do with path dependence than efficient evolution. Lund & Pollman, *supra* note 1, at 2628.

22. *See* Bebchuk & Tallarita, *Illusory Promise*, *supra* note 6, at 94, 101 (warning against pushes toward stakeholderism and instead advocating for increased governmental regulation of corporate activities); Edward B. Rock, *For Whom Is the Corporation Managed in 2020? The Debate over Corporate Purpose*, 76 BUS. LAW. 363, 394–95 (2021) (arguing that adjusting corporate purpose to include stakeholder interests cannot substitute for government regulation); Matteo Gatti & Chrystin Ondersma, *Can a Broader Corporate Purpose Redress Inequality? The Stakeholder Approach Chimera*, 46 J. CORP. L. 1, 73 (2020) (highlighting a lack of "meaningful rights and enforcement mechanisms" in stakeholderism); 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-social-insurance-is-better-than-corporate-governance-reform [https://perma.cc/M5N6-C3G8] (advocating for "government support for human capital development" to achieve "a more effective allocation of social resources designed to increase social wealth" than that which can be achieved via corporate governance reform).

23. *See* Brian R. Cheffins, *Corporate Governance and Countervailing Power*, 74 BUS. LAW. 1, 51–52 (2018–19) (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 GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER 2–5 (rev. ed. 1956) (coining the term "countervailing power"). 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, CORPORATE IMPACT 14 (2003) (exploring the political origins of corporate governance); CHRISTOPHER M. BRUNER, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD:

societal inequality.[24] 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 United States. 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.[25] 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.[26]

This "management trustee" view persisted for over fifty years,[27] until the pendulum swung back to a shareholderist view in the 1980s.[28] Laying the foundation for this return was a period of slow corporate growth and high inflation, as well as low inequality.[29] Not only that, before President Reagan's election in 1980, many people believed that corporate activities were unduly subject to government constraints.[30] In other words, the economic conditions that precipitated the swing toward

THE POLITICAL FOUNDATIONS OF SHAREHOLDER POWER 23 (2013) ("[W]eaker regard for the interests of employees [has tended to result in] greater political pressure being brought to bear on corporate governance to do so, inhibiting exclusive focus on shareholders . . . ."). My Article focuses 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. For a discussion of this interplay, see *infra* Parts I.C, III.C.

24. Scholars have noted that concerns about inequality might "provide the impetus necessary to make us rethink the way we tax and spend." Saul Levmore, *Inequality in the Twenty-First Century*, 113 MICH. L. REV. 833, 834 (2015). This Article connects this insight to conversations about corporate purpose.

25. *See infra* Part I.A.

26. *See infra* Part I.A.

27. *See* Wells, *supra* note 19, at 93–94 (discussing the management trustee era and its duration).

28. *See infra* Part I.A.

29. *See infra* Part I.B.

30. *See infra* Part I.B.

stakeholderism in the 1930s 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.[31] 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.[32]

As this brief introduction suggests, shifts in the dominant view of corporate purpose in the United States 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.[33]

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

31. *See* Wells, *supra* note 19, at 128–29 (discussing concerns about the relative lack of global competitiveness of American corporations).

32. *See infra* Part I.B; Lund & Pollman, *supra* note 1, at 2575 ("During the Deal Decade of the 1980s, terminology and concepts that might have remained in a dusty corner of the ivory tower were instead thrust into the limelight as a record number of unsolicited tender offers became proof of a market for corporate control and sharpened managers' focus on producing shareholder value lest they become a target." (internal quotation marks omitted)). 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.

33. 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*, 90 U. CHI. L. REV. 203, 207 (2023) (describing these changes).

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.[34] How to respond to this problem? Of course, asking the factory's managers to consider and mitigate pollution creates well-known inefficiencies[35] and is unlikely to be as effective as a regulatory mandate.[36] 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.[37]

34. In addition, assume a Coasian bargain is not possible because the transaction costs of achieving it are prohibitive. *See generally* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

35. *See* sources cited *supra* note 6.

36. *See* Aneesh Raghunandan & Shiva Rajgopal, *Do Socially Responsible Firms Walk the Talk?*, 67 J.L. & ECON. 767, 767 (2024) (presenting empirical evidence of an "underwhelming" relationship between corporations which publicly declare ESG commitment and their ESG records); Bebchuk & Tallarita, *Illusory Promise*, *supra* note 6, at 156–58 (finding evidence suggesting that constituency statutes have not benefitted stakeholders); Luca Enriques et al., *The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies* ("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 are there procedural constraints to enforceability (non-shareholders usually lack standing to sue), but even determining what general social welfare requires at any point in time is an insurmountable task even for directors—let alone for courts."), *in* THE ANATOMY OF CORPORATE LAW, *supra* note 12, at 107. 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, *supra* note 1, at 2575–78 (showing how the acceptance of shareholder primacy has influenced the path of corporate governance in the United States via law, culture, and extra-legal institutions); Cathy Hwang & Dorothy Lund, *Purpose and Nonprofit Enterprise*, COLUM. L. REV. (forthcoming 2025) (showing how stakeholder enforcement is possible in purpose-driven businesses). Section III.D discusses this observation in further detail.

37. *See* Enriques et al., *supra* note 36, at 93 (noting that regulators will sometimes resort to governance strategies to achieve broader societal objectives

As this example reveals, external economic conditions affect the desirability of different governance models[38]—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 will costlessly regulate corporate harm, ensure competitive markets, and allow citizens opportunities to accumulate wealth and obtain services like health care and education.[39] 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 demonstrates that inefficient legal rules can be rendered efficient when the enactment of the better rule

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and that "[s]uch 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.L. FIN. & 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 ECONOMICA 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.").

38. *See* Rock, *supra* note 22, at 368 ("Political 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." *Id.* at 363. Part II considers whether these arguments could instead be consistent with economic logic.

39. *See* Pargendler, *supra* note 1, at 971 ("[T]raditional corporate governance analysis faces a 'modularity trap' where excessive simplicity and rigidity in thinking detracts from our ability to better understand the world." (footnote omitted)); Ann M. Lipton, *Beyond Internal and External: A Taxonomy of Mechanisms for Regulating Corporate Conduct*, 2020 WIS. 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").

is not possible or is very costly to achieve.[40] 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.[41] My Article applies these broad insights to

40. *See, e.g.*, Zachary Liscow, *Redistribution for Realists*, 107 IOWA L. REV. 495, 512–28 (2022) [hereinafter Liscow, *Redistribution*] (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, 1647–50 (2021) (studying legal changes with perverse distributive effects and noting that the tax system did not adjust to offset these effects); Zachary Liscow, *Reducing Inequality on the Cheap: When Legal Rule Design Should Incorporate Equity as Well as Efficiency*, 123 YALE L.J. 2478, 2486–510 (2014) [hereinafter Liscow, *Reducing Inequality*] (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, 1111–15 (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 A. Weisbach, *Constrained Income Redistribution and Inequality: Legal Rules Compared to Taxes and Transfers* 25–33 (Univ. Chi. Coase-Sandor Inst. for L. and Econ., Research Paper No. 969, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4328824 [https://perma.cc/PG5X-5SJJ] (arguing that political constraints weigh 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, 669–77 (1994) (arguing that redistribution through income tax is more efficient than through legal rules because "the income tax system . . . can redistribute from all the rich to all the poor, whereas legal rules have substantially less redistributive potential"). 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, 1021–22 (2017).

41. *See*, *e.g.*, Dan Puchniak, *No Need for Asia to be Woke: Contextualizing Anglo-America's 'Discovery' of Corporate Purpose*, REVUE EUROPÉENNE DU DROIT, Summer 2022, at 14, 15–20 (discussing how there is no one model for corporate purpose given differing institutional and cultural arrangements); ROE, *supra* note 23, at 1–10, 63 (contending that corporate governance reflects the social and political realities of various countries); BRUNER, *supra* note 23, at 143–76 (explaining that differences between the U.S. and UK corporate governance systems can be understood by focusing on the robustness of each country's social welfare system); Mariana Pargendler, *Corporate Governance in Emerging Markets* (describing the corporate governance of companies in emerging markets as a response to economic and political factors), *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 735, 736 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2015) (ebook) [hereinafter Pargendler, *Corporate*

the corporate purpose debate that is once again gripping the United States and suggests that neither side has it quite right.[42] Specifically, 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 harm.[43] 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.[44]

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.[45] 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

Governance]; Mariana Pargendler, *How Universal Is the Corporate Form? Reflections on the Dwindling of Corporate Attributes in Brazil*, 58 COLUM. J. 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. PAPERS & PROC. 100, 100–01 (2008) (arguing that a "second-best mindset" may be efficient in developing countries due to high costs associated with institutional arrangements).

42. *See infra* Parts II–III.

43. *See infra* Part II; *cf.* Aneil Kovvali, *Countercyclical Corporate Governance*, 101 N.C. L. REV. 141, 147–72 (2022) (exploring how shareholder primacy can push companies to make suboptimal choices in periods of economic crisis).

44. *See infra* Part II.

45. *See infra* Part I.

the 1970s, 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.[46] The presence of these complicating factors limits our ability to make specific predictions based on external economic conditions.[47] Nonetheless, my analysis does suggest 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 change the starting point for 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 I 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 increases as inequality and corporate concentration grows and as countervailing power fails to constrain corporate externalities. This receptiveness falls away when market conditions suggest that the pursuit of corporate growth is more

46. *Cf.* Roe, *supra* note 20, at 668 ("Although economic institutions that survive cannot be too inefficient, evolution-toward-efficiency . . . does not fully determine the institutions we observe.").

47. *See generally* Afra Afsharipour & Martin Gelter, *Introduction* to COMPARATIVE CORPORATE GOVERNANCE 8–9 (Afra Afsharipour & Martin Gelter eds., 2021) (ebook) (highlighting contextual variables that complicate any theory of convergence of trends in corporate governance).

desirable than the abatement of harm via corporate governance. Part II 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 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 III 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 United States, 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.

I. CORPORATE PURPOSE MOMENTS

This Part describes two historic corporate purpose "moments"[48] 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 1970s. At first blush, these periods of flux appear to be the product of unprincipled political or social forces.[49] 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

48. *See* ACKERMAN, *supra* note 17 (using the term "decisive moment" to describe when institutions undergo profound change).

49. Scholars have demonstrated that politics affect corporate governance and corporate purpose. *See generally* Rock, *supra* note 22, at 363–67 (observing that political dysfunction and public frustration contributed to the modern purpose debate); ROE, *supra* note 23; BRUNER, *supra* note 23. 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.

twentieth century because it is especially difficult to draw analogies between the nineteenth 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,[50] a requirement that had all but disappeared by the early 1900s.[51] 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.[52] 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.[53] Of course, there are also important differences between the legal and financial environment facing corporations at the turn of the twentieth century and today. As will be discussed, these differences limit what modern readers can take away from these historical snapshots.

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;[54] likewise, since the

50. *See* Elizabeth Pollman, *The History and Revival of the Corporate Purpose Clause*, 99 TEX. L. REV. 1423, 1429–30 (2021) (discussing the corporate charter's purpose requirement); MAX LERNER, AMERICA AS A CIVILIZATION 285 (4th prtg. 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, Jr., *Whom Should the Corporation Serve? The Berle-Dodd Debate Revisited Sixty Years Later*, 16 DEL. J. CORP. L. 33, 36 (1991) ("[C]orporations were to serve a public purpose and as such were overseen closely by the state which sanctioned their organization.").

51. *See* Pollman, *supra* note 50, at 1425 ("The purpose clause of the corporate charter lost much of its specificity during the mid-to-late 1800s, and awareness of its public-tinged character declined.").

52. *See* ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 117 (reprt. 1933) ("[I]n 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.").

53. *See* Wells, *supra* note 19, at 78 ("Viewed in historical perspective, it is clear that each new round of debate on corporate social responsibility largely recapitulates the earlier debate in a slightly altered form.").

54. *See* 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).

1980s, the shareholder value norm has evolved and changed.[55] 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 nineteenth and early twentieth 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."[56] During this period, America was a "society of economic scarcity . . . economic growth and the

55. *See* Dorothy S. Lund, *Enlightened Shareholder Value, Stakeholderism, and the Quest for Managerial Accountability* (arguing that emphasis has shifted away from short-term stock price maximization towards "long-term value of the firm for the benefit of its shareholders"), *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 91, 92 (Elizabeth Pollman & Robert Thompson eds., 2021); *see also* Robert B. Thompson, *Anti-Primacy: Sharing Power in American Corporations*, 71 BUS. LAW. 381, 386–96 (2016) (describing two distinct conceptions of shareholder primacy).

56. Hay & Gray, *supra* note 54, at 135; *see also* 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 from 1913–33 "the maximization of shareholders' returns was the most important consideration in corporate governance and economic policy"); Harwell Wells, *The Birth of Corporate Governance*, 33 SEATTLE U. L. REV. 1247, 1266 (2010) (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.").

accumulation of aggregate wealth were primary national goals."[57] 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.[58] In line with this logic, corporations before the turn of the nineteenth 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.[59]

But the U.S. economy was changing rapidly during this early period, as was the regulatory environment.[60] 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.[61] In addition, industrial consolidation led to the control "of many sectors of the economy by relatively few large, integrated, industrial enterprises" by the 1910s.[62] By the 1920s, "the modern economy, dominated by large corporations, reached maturity."[63] Corporate

57. Hay & Gray, *supra* note 54, at 136. *See generally* ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 79–187 (15th prtg. 1999) (ebook) (describing the slow growth that characterized the U.S. economy until the end of the nineteenth century).

58. Hay & Gray, *supra* note 54, at 135–36.

59. *See id.* at 138–39. This lax regulatory environment was precipitated by the shift toward general incorporation that occurred at the end of the nineteenth century. *See* Charles M. Yablon, *The Historical Race: Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880–1910*, 32 J. CORP. L. 323, 332–34 (2007) (describing the shift to general incorporation statutes). Before that time, states granted limited corporate charters that restricted corporate activities to those that met a public need. *See* Pollman, *supra* note 50, at 1429–30 (discussing the corporate charter's purpose requirement). 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* Yablon, *supra*, at 329 (discussing the narrowing of corporate law through more vigorous enforcement of antitrust law); Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 VAND. L. REV. 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.").

60. *See* Pollman, *supra* note 50, at 1436–41 (discussing the move from special chartering to general incorporation).

61. BERLE & MEANS, *supra* note 52, at 2–3.

62. Wells, *supra* note 19, at 85.

63. *Id.*

concentration had likewise reached a high point.[64] 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.[65] 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.[66]

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.[67] Indeed, the early 1900s saw some of the starkest inequality in American history.[68] To take one datapoint, in 1918, 18% of the income in the United States went to the top 1%, a share that had only increased by 1928.[69] Nonetheless, most Americans saw the growth of the

64. *See* Nicholas N. Eberstadt, *What History Tells Us About Corporate Responsibility*, BUS. & SOC'Y REV., Autumn 1973, at 76, 80 ("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 . . . .").

65. *See* CHANDLER, *supra* note 57, at 372 (noting how salaried managers working in multiunit enterprises were replacing owner-managers in key sectors of the economy); BERLE & MEANS, *supra* note 52, at 89 ("The separation of ownership and control has become virtually complete. The bulk of owners have in fact almost no control over the enterprise, while those in control hold only a negligible proportion of the total ownership.").

66. *See* CHANDLER, *supra* note 57, at 372 (observing that the managerial class of the 1920s held significant economic influence); Eberstadt, *supra* note 64, at 80 ("[T]his enormous concentrated economic power gravitated into the hands of a few, raising up a corporate ruling class with almost unlimited authority.").

67. *See, e.g.*, Wells, *supra* note 19, at 86 (discussing the optimism surrounding the corporation's role in creating wealth and enhancing social functions, noting "[t]he large corporation also won new legitimacy in the eyes of the public").

68. *See* Eberstadt, *supra* note 64, at 80 (noting that during the 1920s, "[w]hile 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"); *see also* Robert D. Plotnick et. al, *Inequality, Poverty, and the Fisc in Twentieth-Century America*, 21 J. POST KEYNESIAN ECON. 51, 57 (1998) ("From the turn of the century until World War I, inequality was higher than in the latter half of the century.").

69. *See* Thomas Piketty & Emmanual Saez, *Income Inequality in the United States, 1913–1998*, 118 Q.J. ECON. 1, 12 (2003) ("The share of total income received by the top 1 percent was about 18 percent before World War I.").

stock market as an opportunity for them to share in the gains.[70] Accordingly, the political mood generally favored corporate America.[71] By 1928, Americans had elected Herbert Hoover who "fervently believed that real improvement in the country would come from private enterprise."[72] 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.[73] 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 zero 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.[74]

70. *See* Wells, *supra* note 56, at 1265–66 (noting that the 1920s "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 S. BROOKINGS, INDUSTRIAL OWNERSHIP: ITS ECONOMIC AND SOCIAL SIGNIFICANCE 9, 14 (1925) (discussing this dynamic during the early twentieth century). 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, at xv (1994). However, the public mood largely favored corporations until the market crash of 1929. *See* JOHN KENNETH GALBRAITH, THE GREAT CRASH 1929, at 1–4 (2009) (discussing how citizens generally embraced corporate America in the 1920s until the stock market crash of 1929).

71. *See supra* note 67 and accompanying text.

72. Wells, *supra* note 19, at 86. 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 [https://perma.cc/5HNH-77YT] ("[T]he 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.").

73. *See* Wells, *supra* note 19, at 86 (citing STUART D. BRANDES, AMERICAN WELFARE CAPITALISM, 1880–1940 (1976) (describing how President Hoover hoped that large corporations would take over many of the social-welfare functions once performed by government through employment agreements, profit-sharing plans, and generous pension schemes, via "welfare capitalism")).

74. *See, e.g.*, 2 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.

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.[75] 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.[76] 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.[77] And yet, the dominant view of the corporation's role in society continued to favor profit-seeking within the constraints of law,[78] in part because hostility to growing corporate power was tempered by the promise of gain sharing by millions of first-time investors.[79]

BRANDEIS, OTHER PEOPLE'S MONEY: AND HOW THE BANKERS USE IT 1–2, 12–15, 47 (Frederick A. Stokes Co. 1914) (1913) (arguing that the lack of oversight of corporate leaders would lead to market manipulation and increased inequality); ROE, *supra* note 70, at 30 (describing how both progressives and populists "loath[ed] Wall Street" and believed that individuals had to be protected against large institutions).

75. *See* Adam Winkler, *Corporate Law or the Law of Business?: Stakeholders and Corporate Governance at the End of History*, 67 J.L. & CONTEMP. PROBS. 109, 113 (2004) (describing these scandals and subsequent investigations and regulation by Congress); ROE, *supra* note 70, at 30–31 (describing early Congressional investigations into the power and influence of bankers and insurance companies).

76. *See* Gilson & Milhaupt, *supra* note 19, at 16 (elaborating on how the government sought to address corporate externalities by enacting a series of federal regulations aimed at overseeing competition, ensuring worker safety, and curbing pollution).

77. *See* Joseph T. Walsh, *The Fiduciary Foundation of Corporate Law*, 27 J. CORP. L. 333, 335 (2002) ("Early government efforts at controlling monopolies and holding companies under anti-trust law were of limited success, as we know, and the 1929 market collapse and the ensuing depression of the 1930s renewed concern about unbridled corporate conduct.").

78. This view affected fiduciary obligation, generating the clearest articulation of a shareholder-oriented vision for corporate purpose in history. *See* Dodge v. Ford Motor Co., 170 N.W. 668, 684 (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.").

79. *See* Wells, *supra* note 56, at 1266 ("[Now] that ordinary Americans' wealth and security was . . . tied directly to their status as shareholders, [] the

The shift away from this vision finally occurred after 1929, when the great stock market crash ended a long period of prosperity in the United States[80] and made abundantly clear that the growth in corporate wealth and power would not necessarily benefit all.[81] In particular, "[s]peculation, deliberate underemployment, and drastic economic inequities caused a depression of unprecedented severity."[82] The hardships faced by American workers, twenty-five percent of which remained unemployed by 1932,[83] focused public attention on abusive practices by large corporations and their role in contributing to the crash and societal inequality.[84] The severe recession also precipitated a host of New Deal reforms in antitrust, banking, and securities regulation aimed at controlling corporate power and protecting the public.[85]

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 56, at 44 (highlighting how the general public's embrace of profit-seeking ambitions during the 1920s redefined "the corporation as a democracy of shareholders, the United States as a nation of stock owners, and the stock market as both an analogue and an instrument of political democracy and economic justice").

80. *See* GALBRAITH, *supra* note 70, at 2 ("[T]he 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.").

81. *See* Eberstadt, *supra* note 64, at 80 (observing that eventually the public began to believe that the expansion of corporate power made "corporation-promoted social welfare unrealizable" for the general public).

82. *Id.* at 81.

83. *Id.* ("By 1932, one of every four workers was unemployed, and the GNP had declined by half.").

84. William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation*, 34 J. CORP. L. 99, 102 (2008) ("The consensus [in the wake of the Great Depression] was that emerging, modern corporate institutions were an integral part of the flawed system and thus part of the problem."); *see also* Christopher S. Havasy, Power, Democracy, and Legitimacy in Corporate Governance 22–23 (unpublished manuscript) (on file with the Minnesota Law Review) (describing the general view that corporations were not advancing the interests of ordinary citizens in the early 1930s).

85. As Louis Brandeis (the father of much of the New Deal legislation) put it when criticizing earlier reforms, "the primary purpose of Money Trust legislation is not to prevent directors from injuring stockholders; but to prevent their injuring the public through the intertwined control of the banks." BRANDEIS, *supra* note 74, at 80.

Therefore, after the stock market crash, "the corporation [was] increasingly . . . regarded as an institution which, like the government, has social obligations to fulfill."[86] 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.[87] But these arguments failed to carry the day until the stock market crash swung the pendulum 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?*[88] Dodd began his article by articulating the classic legal standard: "[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."[89] 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

86. Eberstadt, *supra* note 64, at 81; *see also* William W. Bratton, *The Separation of Corporate Law and Social Welfare*, 74 WASH. & LEE L. REV. 767, 771 (2017) [hereinafter Bratton, *Corporate Law and Social Welfare*] (describing the wake of the depression where "managers emerged as quasi-public servants"); William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1476 (1989) [hereinafter Bratton, *Theory of the Firm*] (describing how dissenting views quieted after the 1930s "as the management-centered conception of large corporate entities took hold"); Henry G. 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, 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.").

87. *See, e.g.*, Eberstadt, *supra* note 6464, at 81 (describing efforts, largely unsuccessful, by the Progressive and Populist movements to reform corporate conduct in the late nineteenth and early twentieth centuries).

88. Dodd, *supra* note 56.

89. *Id.* at 1146–47.

as an economic institution which has a social service as well as a profit-making function."[90] A contributing factor was the "[c]oncentration 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.[91]

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.[92] He also voiced skepticism of proposals to enhance shareholder power, noting that the interests of shareholders and stakeholders were not always aligned.[93] 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."[94] 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.[95]

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.[96] Berle

90. *Id.* at 1148.

91. *Id.* at 1151–52.

92. *See id.* at 1145–46.

93. In particular, Dodd opened his article with an attack on Adolph Berle's argument for increased recognition that managers were trustees for shareholders. *See id.* at 1147–48 (expressing "sympathy with Mr. Berle's efforts to establish a legal control which will more effectually prevent corporate managers from diverting profit into their own pockets from those of stockholder," but then arguing it is nonetheless "undesirable, even with the laudable purpose of giving stockholders much-needed protection against self-seeking managers, to give increased emphasis at the present time to the view that business corporations exist for the sole purpose of making profits for their stockholders"); *see also* Bratton & Wachter, *supra* note 84, at 146–48 (summarizing Dodd's critique of Berle's shareholder primacy thesis).

94. Dodd, *supra* note 56, at 1161.

95. *See* Bratton & Wachter, *supra* note 84, at 110–11 (discussing that Dodd embraced "corporatism" and the "New Capitalism").

96. *See* A.A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1372 (1932) (arguing unchecked "social-economic absolutism of corporate administrators, even if benevolent, might be unsafe").

recognized that the impulse behind Dodd's position was management's unprecedented degree of control over productive assets and employment in the United States.[97] But he viewed the idea that corporate managers would serve as trustees for all as naïve:

> The 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.[98]

In an admonition that evokes the current purpose debate in the United States, 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."[99] Freeing management from any meaningful constraint would in effect give them total control because almost all corporate activity could be justified as benefitting stakeholders.[100]

Modern readers applaud Berle's response to Dodd as "clear-eyed" and prescient, in contrast to Dodd's naivety.[101] In the years that followed, however, Dodd was viewed as the victor—so much so that in 1954, Berle conceded victory to Dodd in a series of speeches and articles.[102] For example, in a 1962 article, Berle explained:

> [In t]he discussion I had with the late Professor E. Merrick Dodd . . . . I was 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.[103]

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97. *See id.* at 1366–67.

98. *Id.* at 1367.

99. *Id.* For a modern version of this argument, see Bebchuck & Tallarita, *Illusory Promise*, *supra* note 6, at 94–102.

100. *See* Berle, *supra* note 96, at 1367 ("When the fiduciary obligation of the corporate management and 'control' to stockholders is weakened or eliminated, the management and 'control' become for all practical purposes absolute.").

101. *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, 761 (2015) ("Adolf Berle stands as one example of someone who confronted the world as it was and advanced ideas to improve it.").

102. *See* Bratton & Wachter, *supra* note 84, at 134 ("Time had proven Dodd the winner . . . .").

103. Adolf A. Berle, *Modern Functions of the Corporate System*, 62 COLUM. L. REV. 433, 442–43 (1962); *see also* ADOLF A. BERLE, JR., THE 20TH CENTURY

As this discussion reveals, the dominant vision of corporate purpose following the great crash was aligned with Dodd's view of the world.[104] During this "trustee management"[105] or "managerial capitalism" phase, corporate managers were viewed as responsible for maximizing stockholder wealth *and* creating and maintaining an equitable balance among stakeholder claims.[106]

CAPITALIST REVOLUTION 83, 126, 169–73 (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 1950s, Berle recognized that Dodd's view had been borne out by "social fact and judicial decisions." Adolf A. Berle, Jr., *Foreword* to THE CORPORATION IN MODERN SOCIETY, at xii (Edward S. Mason ed., 1959); *see also* Brian R. Cheffins, *The Past, Present, and Future of Corporate Purpose* 18 (Eur. Corp. Governance Inst., Working Paper No. 713, 2023) ("Despite Dodd's concessions, Berle . . . accepted in 1954 that the argument between the two had ultimately been resolved in Dodd's favor.").

104. *See* sources cited *supra* note 84.

105. The theoretical underpinnings of managerial capitalism 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. *See* GARDINER C. MEANS, THE CORPORATE REVOLUTION IN AMERICA: ECONOMIC REALITY VS. ECONOMIC THEORY 63 (1962) (arguing that profits do not determine professional corporate managers' incentives as they would in a small firm where ownership and control are combined). These incentives were not deemed problematic, however, because management's desire for growth was thought to correspond with profit. *See* CHANDLER, *supra* note 57, at 474.

106. *See* BRIAN R. CHEFFINS, THE PUBLIC COMPANY TRANSFORMED 64 (2019) ("Amidst considerable corporate success, the dominant image of public company leadership during the managerial capitalism era was the executives were exercising corporate power in a self-restrained and socially responsible manner."); Hay & Gray, *supra* note 5454, at 136 ("[C]orporate managers were responsible not simply for maximizing stockholder wealth but also for maintaining an equitable balance among the competing claims of customers, employees, suppliers, creditors, and the community, as well as the stockholders. In this view, the manager was seen as a trustee for the various contributor groups to the firm rather than simply an agent of the owners."); Wells, *supra* note 19, at 111 (discussing how in the 1950s and 1960s, businessmen continued to discuss their firms' "social responsibilities" and that "[b]y the mid-1960s, it was conventional wisdom that public corporations owed some responsibility to society beyond making profits"); GERALD F. DAVIS, MANAGED BY THE MARKETS: HOW FINANCE RESHAPED AMERICA 74 (2009) (explaining that by the 1950s, "[s]hareholders had completed the descent into irrelevance"); Jeffrey Pfeffer, *Shareholders First? Not So Fast. . .*, HARV. BUS. REV., July–Aug. 2009, at 90, 90 ("In the 1950s and 1960s, the stakeholder was king."); Lund & Pollman, *supra* note 1, at 2612 (noting that during the era of managerial capitalism, "corporate

Ultimately, although the contours of the managerial capitalism phase underwent subtle shifts during its reign, the general orientation would not change until the early 1980s.[107] And these views influenced both business culture and the path of law.[108] 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.[109]

A further example of the evolution in the legal environment concerns the debate over corporate charitable donations, which had traditionally been disfavored.[110] But after "[s]ocial and economic evolution in . . . society . . . brought about a mutation in the public image of . . . the business corporation," the law began to bend to reflect the permissiveness (and indeed, desirability) of corporate philanthropy.[111] This changed view is reflected in *A. P. Smith Manufacturing Co. v. Barlow*, in which the Supreme Court of New Jersey 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.[112] 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

charitable giving became accepted practice and corporate managers acknowledged that businesses had social obligations"); KROOSS, *supra* note 16, at 52 ("[T]he 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.").

107. Eberstadt, *supra* note 64; Hay & Gray, *supra* note 54. *See* Lund & Pollman, *supra* note 1, at 2613 (observing that the 1980s represented an inflection point for corporate purpose).

108. *See* David J. Berger, *In Search of Lost Time: What if Delaware Had Not Adopted Shareholder Primacy?* (discussing the "world before shareholder primacy" where the consensus of business leaders was that they needed to look out for their stakeholders, and how that view shaped business practice), *in* THE CORPORATE CONTRACT IN CHANGING TIMES: IS THE LAW KEEPING UP? 48, 53–57 (Steven Davidoff Solomon & Randall Stuart Thomas eds., 2019).

109. *See* Berle, *supra* note 96, at 1365–66.

110. *See* Bert S. Prunty, Jr., *Love and the Business Corporation*, 46 VA. L. REV. 467, 467–68 (1960) (describing the traditional view that "stood in the path of [corporate charitable] activity" including 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 . . . .").

111. *Id.* at 468.

112. A. P. Smith Mfg. Co. v. Barlow, 98 A.2d 581, 582, 585 (N.J. 1953).

institutions."[113] The court concluded: "[J]ust 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."[114] 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 . . . . [B]y 1959 the total number of states having statutory authority for corporate giving had swelled to forty-one."[115]

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."[116] Under broad standards for fiduciary conduct, management could operate consistent with the societal consensus for business conduct.[117] However, when shareholder value maximization became ascendant two decades later, there was less practical leeway for such decisions.[118]

Ultimately, the academic and cultural acceptance of a stakeholder-oriented duty for corporate management led to real

113. *Id.* at 586.

114. *Id.*

115. Prunty, *supra* note 110, at 468–69; *see also* Theodora Holding Corp. v. Henderson, 257 A.2d 398, 404 (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.").

116. Phillip I. Blumberg, *Corporate Responsibility and the Social Crisis*, 50 B.U. L. REV. 157, 160 (1970). *See generally* JULES COHN, THE CONSCIENCE OF THE CORPORATIONS: BUSINESS AND URBAN AFFAIRS, 1967–1970, at 1–2 (1971) (surveying employment and training programs undertaken by 247 U.S. companies to "relieve urban problems" and providing examples of action taken without any direct financial gain for the companies involved).

117. Blumberg, *supra* note 116, at 158 (summarizing the leeway that the business judgment rule provided to corporate management).

118. *See* Lund & Pollman, *supra* note 1, at 2576.

changes in how business leaders operated.[119] 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.[120] 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 tackle social issues, and high societal inequality—that influenced the public's appetite for managerialism. The stock market crash 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. As such, in its wake, 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.[121] 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.[122] The early 1970s further witnessed the growth of the view that countervailing power in the

119. *Id.*

120. *See, e.g.*, David B. Guenther, *Of Bodies Politic and Pecuniary: A Brief History of Corporate Purpose*, 9 MICH. BUS. & ENTREPRENEURIAL L. REV. 1, 5 (2019); Havasy, *supra* note 84, at 18.

121. Berger, *supra* note 108, at 56, 57–58 (noting that the corporate purpose debate of the 1970s "occurred in the context of multiple, fundamental changes to the U.S. economy"); Bratton & Wachter *supra* note 11, at 496–97 ("Views on [the managerialist approach] changed in the 1970s in the face of stagflation, a failing stock market, and a perception of national competitive decline in global markets."); Pargendler, *Corporate Governance*, *supra* note 41, at 735 (describing the 1970s and 1980s as a time of "economic malaise and fear of imminent decline in view of the then booming economic performance of Germany and Japan").

122. Bratton & Wachter, *supra* note 84, at 144–45 (discussing how poor economic conditions "problematized the productive and financial performance of corporate managers").

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.[123] Despite the sour economic picture, inequality was at a low point—indeed, the 1950s and 1960s were the decades of least economic inequality in U.S. history.[124]

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 1970s 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.[125] That is not to say that management always did this—indeed, corporate reformers in the late 1960s and 1970s were steadfastly campaigning for policies that would convert this squishy mandate into an enforceable legal requirement. For example, in the early 1970s, 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.[126] 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.[127]

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123. Berger, *supra* note 108, at 56–58 (describing the decline in union influence and regulatory and antitrust enforcement under the Reagan administration); *see also* Winkler, *supra* note 7575, at 119–22 (discussing the major regulatory reforms of the 1960s and 1970s).

124. Plotnick et al., *supra* note 68, at 54.

125. *See* 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"); Winkler, *supra* note 75, 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.").

126. CHRISTOPHER D. STONE, WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR 152–83 (1976) (proposing a system of "general public directors" and "special public directors" to represent stakeholder interests on corporate boards); RALPH NADER ET AL., TAMING THE GIANT CORPORATION 121–28 (1976) (advocating for a federal corporate chartering law that would specify director oversight of a broad range of stakeholder interests); *see also* Alfred F. Conard, *Reflections on Public Interest Directors*, 75 MICH. L. REV. 941, 941–42 n.4 (1977) (discussing proposals to create "public interest director" positions on corporate boards).

127. *See* Manne, *supra* note 86, at 414–16 (arguing that corporate managers are not situated to make or enforce decisions regarding the public good);

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*.[128] In that essay, Friedman emphasized that management were agents of the shareholder "owners."[129] 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.[130] Friedman further emphasized that managers—"expert[s] in running [companies]"—would be unlikely to be successful in discharging social responsibilities that they tackled.[131]

Theodore Levitt, *The Dangers of Social Responsibility*, HARV. BUS. REV., Sept.–Oct. 1958, at 41, 49 ("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 . . . . [L]et government 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?* (arguing that if corporate funds are not used to maximize profits, the price mechanism will not efficiently allocate resources), *in* THE CORPORATION IN MODERN SOCIETY, *supra* note 103, at 48; MILTON FRIEDMAN, CAPITALISM & FREEDOM 133–34 (1962) ("If businessmen 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 . . . ?"). *See generally* Wilber G. Katz, *Responsibility and the Modern Corporation*, 3 J.L. & ECON. 75 (1960) (arguing that there is insufficient evidence to conclude that corporate management's decisions are motivated by "social responsibility").

128. Milton Friedman, *A Friedman Doctrine-- The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, § SM, at 17, https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html [https://perma.cc/GK33-GW5X]; *see also* Andrew Ross Sorkin, *A Free Market Manifesto That Changed the World, Reconsidered*, N.Y. TIMES (Sept. 14, 2020), https://www.nytimes.com/2020/09/11/business/dealbook/milton-friedman-doctrine-social-responsibility-of-business.html [https://perma.cc/TPU4-BGBH] (suggesting that Friedman's manifesto inspired the "greed is good" mentality underpinning shareholder primacy); Stout, *supra* note 1, at 3 ("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 . . . .").

129. Friedman, *supra* note 128.

130. *Id.*

131. *Id.*

Friedman's essay did not receive wide-ranging acceptance immediately;[132] instead, corporate reformers weighed in with spirited critiques.[133] In the decade that followed, however, enthusiasm for Friedman's logic grew.[134] 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*.[135] The article argued that "the relationship between the stockholders and the managers of a corporation fit the definition of a pure agency relationship"[136] which therefore provided a clear blueprint for corporate law and governance—minimize management agency costs.[137] Importantly, Jensen and Meckling's conception of the corporation as a "nexus of contracts" minimized the obligation of the corporation as a social entity.[138] 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

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

133. For example, in *Taming the Giant Corporation*, Ralph Nader, Mark Green and Joel Seligman argued that Friedman misunderstood how the economy functioned. *See* NADER ET AL., *supra* note 126, at 259; *see also* Wells, *supra* note 19, at 124 ("The Nader group dismissed his criticism by arguing that the real corporate economy was not the competitive marketplace Friedman seemed to presuppose . . . ." (footnote omitted)). Specifically, Friedman's opponents argued that the size and resulting social, political, and economic power of large corporations meant they were not subject to the same competitive conditions as small corporations. *Id.*

134. *See, e.g.*, MANNE & WALLICH, *supra* note 15, at 97 (1972); David L. Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1, 30 (1979) ("[I]t is persuasively argued that corporate managements, at least as now structured, are altogether ill-suited to the job of distributing society's riches."); Harold 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.").

135. *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

136. *Id.* at 309.

137. *See* Goshen & Squire, *supra* note 7, at 769.

138. Jensen & Meckling, *supra* note 135, at 310–12.

firms and their management.[139] 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.[140]

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."[141] Financed by new debt instruments, hostile acquirers ripped through the market, breaking up the giant conglomerates that had been assembled in the previous era.[142] No company was safe: By 1989, nearly thirty percent of the Fortune 500 had been targeted.[143]

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 constituency statutes.[144] It

139. Lund & Pollman, *supra* note 1, at 2623; Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1429–30 (1989) ("The corporation's choice of governance mechanisms does not create substantial third-party effects . . . . Investors, employees, and others can participate or go elsewhere."); Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1273 (1982) ("A corporation . . . is nothing more than a legal fiction that serves as a nexus for a mass of contracts . . . . Since it is a legal fiction, a corporation is incapable of having social or moral obligations. . . ."); EASTERBROOK & FISCHEL, *supra* note 9, at 38 ("[A] manager told to serve two masters (a little for the equity holders, a little for the community) has been freed of both and is answerable to neither . . . . Agency costs rise and social wealth falls.").

140. *See, e.g.*, Fischel, *supra* note 139, at 1262–63 (noting that agency costs are inherent in the corporate form and discussing governance solutions for minimizing the resulting costs).

141. Andrei Shleifer & Robert W. Vishny, *The Takeover Wave of the 1980s*, 249 AM. ASS'N FOR ADVANCEMENT SCI. 745, 745 (1990).

142. Andrei Shleifer & Robert W. Vishny, *Takeovers in the '60s and the '80s: Evidence and Implications*, 12 STRATEGIC MGMT. J. (SPECIAL ISSUE) 51, 53 (1991) (describing how in the 1980s, many takeovers were "bustup" takeovers or management buyouts that were followed by a sale of the company's assets).

143. *Id.*; *see also* Michael C. Jensen, *Takeovers: Folklore and Science*, HARV. BUS. REV., Nov.–Dec. 1984, at 109, 109 ("From 1981 to 1983, the number of large U.S. corporate acquisitions grew at a rate roughly double that of the 1970s and even exceeded the one realized during the famous merger wave of the 1960s.").

144. *See, e.g.*, Wells, *supra* note 19, at 128 (discussing corporate-constituency statutes and other anti-takeover measures adopted in response to takeover bids); *The 1980s Takeover Era and Lipton's Stockholder Rights Plan*, LIPTON ARCHIVE, https://theliptonarchive.org/1980s [https://perma.cc/GM2Y-6ZXY] (critiquing the hostile takeover wave as destructively short-sighted and discussing the shareholder rights plan as an effective anti-takeover mechanism).

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.[145] 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.[146] 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.

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, academics, and the broader public.[147] Not only that, the law began to bend as well, with 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.

145. *See* CHEFFINS, *supra* note 106, at 151 ("[T]he market for corporate control was a potent form of managerial discipline."); Lund & Pollman, *supra* note 1, at 2575 (noting that takeover threats "sharpened managers' focus on producing shareholder value").

146. Shleifer & Vishny, *supra* note 142, at 53 (noting evidence that 1980s takeover targets were "poor performers"); Jensen, *supra* note 143, at 119 (discussing the "significantly positive abnormal returns" produced by corporate spinoffs).

147. 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." (footnote omitted)); Bratton, *Corporate Law and Social Welfare*, *supra* note 86, at 773 (describing how in the wake of the 1980s, "the shareholder vision won"); CHAIRMAN OF THE SUBCOMM. ON TELECOMMS., CONSUMER PROT. & FIN. OF THE H. 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 shareholders . . . .").

The beginning of this evolution took place at the onset of the hostile takeover wave, when the Delaware Supreme Court considered in *Unocal Corp. v. Mesa Petroleum Co.* whether a board facing a takeover bid could freely consider the interests of constituencies other than shareholders.[148] 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.[149] Ultimately, however, the court concluded that a board could consider "creditors, customers, employees, and perhaps even the community generally" when evaluating a takeover bid.[150] Only a year later, in 1986, the Delaware Supreme Court essentially reversed this ruling in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, stating 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 benefit accruing to the stockholders."[151]

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—extralegal 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

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

149. *Id.* at 954.

150. *Id.* at 955.

151. 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. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 35 (Del. Ch. 2010); *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 continued to play a role in judicial decisions. *See, e.g.*, Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 659–60 (Del. Ch. 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."); Bird v. Lida, Inc., 681 A.2d 399, 402–03 (Del. Ch. 1996).

price.[152] These corporate governance "best practices" were then entrenched by a new class of institutional investors.[153] And the overall result of this evolution was the near-universal acceptance of concepts that had been deemed losers only years before.[154]

Again, while many credit Friedman and other leading scholars for launching this shift,[155] 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.[156] 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

152. Lund & Pollman, *supra* note 1, at 2577 (noting the emergence of governance practices meant to align shareholder and management incentives); Lund, *supra* note 55, at 91; CHEFFINS, *supra* note 106, at 369–75 ("Roughly three-fifths of the annual pay of a typical CEO of a large public corporation is currently equity-based . . . .").

153. Lund & Pollman, *supra* note 1, at 2577 ("The rise of investing through intermediaries amplified the potential for shareholder influence as stock ownership became increasingly concentrated in a small number of mutual funds and other institutions."); Bernard S. Black, *Agents Watching Agents: The Promise of Institutional Investor Voice*, 39 UCLA L. REV. 811, 834–39 (1992) (discussing the influence of institutional investors in corporate governance); John C. Coffee, Jr., *Liquidity Versus Control: The Institutional Investor as Corporate Monitor*, 91 COLUM. L. REV. 1277, 1291–93 (1991) (noting the increase of U.S. equity ownership by institutional investors); Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 917 (2013) (discussing the influence of institutional investors in corporate governance); Edward B. Rock, *Adapting to the New Shareholder-Centric Reality*, 161 U. PA. L. REV. 1907, 1922 (2013) (discussing how concentrated institutional ownership has contributed to the transformation of corporate governance among large publicly held firms).

154. Lund & Pollman, *supra* note 1, at 2578 ("[T]he result of this evolution is that shareholder wealth maximization became ingrained in the very notion of 'mainstream' corporate governance."); Hansmann & Kraakman, *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.").

155. *See supra* note 128; Bratton, *Theory of the Firm*, *supra* note 86, 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.").

156. ADAM SMITH, THE WEALTH OF NATIONS 111–12 (P.F. Collier & Son 1909) (1776); *see also* Havasy, *supra* note 84, at 17 ("While 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.").

taken up by academics for decades.[157] Therefore, the success of these arguments in catalyzing a 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.[158] 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.[159] 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.[160] Pressure from a new class of institutional shareholders further reinforced the perception that management would not be able to achieve real social change.[161] 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?"[162]

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 responsibility were relegated to the fringe.[163] In their

157. *See supra* note 127.

158. Note that this mood also led to the election of President Reagan, who campaigned and won on a deregulatory agenda that led to the erosion of "countervailing power" during the 1980s. Berger, *supra* note 108, at 57; *see also* discussion *infra* Part I.C (summarizing the shifts in attitudes toward corporate regulation).

159. *See supra* Part I.B (discussing the shift to shareholderist views in the 1980s).

160. *See supra* note 143 and accompanying text.

161. 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 911–12 (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").

162. Friedman, *supra* note 128.

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

place, a focus on corporate efficiency, shareholder value, and profitability under the agency model of the firm took hold.[164]

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 governance model. By contrast, strong corporate competition, low inequality, and adequate externality regulation laid the groundwork for a return to a shareholder-oriented directive.

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.[165] 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 1930s 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.[166] Therefore, the same forces that led to a purpose swing also set the stage for substantial growth in countervailing power,

164. *See supra* notes 128–34 and accompanying text (discussing the adoption of Friedman's theory).

165. See *supra* note 49.

166. *See supra* note 77 and accompanying text.

although that power was tempered by a hostile Supreme Court.[167] By contrast, by the early 1970s, 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.[168] By the 1980s, 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.[169] These examples are important counters to scholars who contend that the embrace of a stakeholder governance model will undermine regulatory change;[170] 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.

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 1930s and before the second purpose swing in the 1980s, the United States experienced a second World War, the growth of corporate oligopolies in the 1950s, 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,[171] and yet, they were not enough to move the needle completely.

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167. 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).

168. *See supra* Part I.B (discussing the election of Ronald Reagan who advanced a deregulatory platform).

169. Jefferson Decker, *Deregulation, Reagan-Style*, REGUL. REV. (Mar. 13, 2019), https://www.theregreview.org/2019/03/13/decker-deregulation-reagan-style [https://perma.cc/Q7JY-CRVZ]; Bratton, *Corporate Law and Social Welfare*, *supra* note 86, at 774 ("Deregulation also started in the 1970s, and picked up speed after 1980.").

170. *See* Bebchuk & Tallarita, *Illusory Promise*, *supra* note 6, at 168 (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, 693 (2023) (challenging the view that stakeholder governance will frustrate regulatory change).

171. *See generally* Wells, *supra* note 19.

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.

II. 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 1980s. 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[172]—while maintaining 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."[173] 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.[174]

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172. As John Armour, 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." John Armour et al., *What is Corporate Law*, *in* THE ANATOMY OF CORPORATE LAW, *supra* note 36, at 22–23; *see also* Hansmann & Kraakman, *supra* note 13; Liscow, *Reducing Inequality*, *supra* note 40, at 2481 ("[T]raditionally, economists have sought policies that maximize not wealth but rather 'social welfare,' the sum of individuals' utility . . . .").

173. Armour et al., *supra* note 172, at 23.

174. *Id.*; *see also* EASTERBROOK & FISCHEL, *supra* note 9, at 38 ("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*

A problem with this classic view is that it tends to operate without regard for other forces that dictate welfare in society.[175] 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."[176] In particular, his argument that corporate management should focus on profit depended on the presence of government regulation that tackles "social" problems.[177] 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.[178] 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.[179]

Corporation in a Democratic Society: In Whose Interests Ought It to and Will It Be Run? ("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."), *in* MANAGEMENT AND CORPORATIONS 1985 (Melvin Anshen & George Leland Bach eds., 1960), *reprinted in* ESSAYS ON LIBERALISM AND THE ECONOMY 236 (Paul Lewis ed., 2022). For a critical perspective, see Kovvali & Strine, *supra* note 9.

175. *See* Rock, *supra* note 22, at 368 ("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 and ethical norms)."); Pargendler, *supra* note 1, at 971 (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, *Reducing Inequality*, *supra* note 40, at 2483 ("[T]hough a legal rule may be 'efficient' viewed in isolation, it may not be efficient in the overall system of taxes and legal rules.").

176. Friedman, *supra* note 128.

177. *Id.*; *see* Alex Edmans, *What Stakeholder Capitalism Can Learn From Milton Friedman*, PROMARKET (Sept. 10, 2020), https://www.promarket.org/2020/09/10/what-stakeholder-capitalism-can-learn-from-milton-friedman [https://perma.cc/NL74-K3M6] ("A second key assumption in Friedman's article is that governments are well-functioning.").

178. *See* EASTERBROOK & FISCHEL, *supra* note 9, at 38.

179. *Id.*; *see also* Engel, *supra* note 134, at 2 (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

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 called 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.[180] As a result,

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 the political process—featuring capture 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), https://www.americanprogress.org/article/partisan-gerrymandering-limits-voting-rights [https://perma.cc/CV7D-ZFXM] (discussing the prevalence of gerrymandering across the country); Luigi Zingales, *Preventing Economists' Capture* (discussing the threat of industry capture), *in* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 124–51 (Daniel Carpenter & David A. Moss eds., 2014); Tim Wu, *The Oppression of the Supermajority*, N.Y. TIMES (Mar. 5, 2019), https://www.nytimes.com/2019/03/
|05/opinion/oppression-majority.html [https://perma.cc/PGZ9-YMAZ] (discussing how Congress ignores widely popular policy initiatives).

180. 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) (detailing corporate lobbying and rent-seeking); JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY (2012) (explaining the concept of rent seeking and its inefficiencies); *see also* Leo E. Strine, Jr., *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) (showing how corporate lobbying leads to rent-seeking that undermines the interests of working Americans). The more unfettered corporations and their management are in bending the regulatory environment to their advantage, the weaker the argument for a governance model

the natural environment has suffered a decline—the air and water quality have 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 in $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.[181] 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.[182]

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.[183] Others attempt to mitigate environmental harm but do so poorly, resulting in further costs to

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that obligates corporations to play by the rules and otherwise disregard third parties, as this example reveals. *See also* Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and* Citizens United, 100 CORNELL L. REV. 335, 363–65 (2015) (exploring how unregulated corporate political spending undermines classic corporate law theory).

181. This is the consensus view of the legal requirement in Delaware. *See* Lund & Pollman, *supra* note 1, at 2579 ("Since the Deal Decade of the 1980s, statements in Delaware case law and by prominent judges have suggested that directors must make stockholder welfare their sole end . . . ."); Strine, *supra* note 101, at 774 (discussing Delaware's requirement that fiduciaries make stockholder welfare their sole end goal).

182. 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.

183. The risk of self-dealing is a persistent concern for shareholder primacy proponents. *See, e.g.*, Bebchuk & Tallarita, *Illusory Promise*, *supra* note 6, at 92 (raising concerns that embraces of stakeholderism will lead to management expropriation from stockholders); Bebchuk et al., *Corporate Leaders*, *supra* note 6, at 1468 (finding that corporate leaders used their increased discretion to pursue private benefits).

investors totaling $5 million, without any corresponding gains to the environment.[184] 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).[185] 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.[186] In that alternative world (called Northlandia), only efficient 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 that of the United States—looks more like that of Eastlandia or Westlandia than Northlandia.[187] As scholars

184. See Friedman, *supra* note 128 (expressing concerns about corporate managers' lack of expertise in discharging social responsibilities).

185. 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, *supra* note 55, at 93 (discussing how corporate governance can evolve to promote fidelity to a broad set of objectives).

186. *See* Rock, *supra* note 22, at 394–95 ("[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 22 (arguing that social welfare regulation is more desirable than shifting corporate objectives); *cf.* Kaplow & Shavell, *supra* note 40 (arguing that tax policy is a more efficient tool for redistribution than legal rules).

187. *See* Edmans, *supra* note 177 ("[R]egulation is imperfect, and this is another reason why businesses should have a social responsibility."); Mariana Pargendler, *Corporate Law in the Global South: Heterodox Stakeholderism*, 47

have observed, the regulatory process in the United States is subject to many pathologies—partisan politics,[188] regulatory capture,[189] ossification,[190] and more. Not only that, the successful regulation of environmental externalities often depends on international cooperation, which is not easy to come by.[191] 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.[192]

SEATTLE U. L. REV. 535, 541 (2024) ("Problems of state capacity to curb externalities and address inequality help explain . . . the resurgence of stakeholder approaches in the Global North . . . .").

188. *See, e.g.*, Tyler Hughes & Deven Carlson, *Divided Government and Delay in the Legislative Process: Evidence from Important Bills, 1949-2010*, 43 AM. POL. RSCH. 771, 773 (2015) (noting how partisan polarization negatively impacts the passage of legislation).

189. *See, e.g.*, Ronald A. Cass, *Regulatory Capture in Enforcement*, REGUL. REV. (June 29, 2016), https://www.theregreview.org/2016/06/29/cass-regulatory-capture-in-enforcement [https://perma.cc/9J2N-RHP3] (detailing the risk of regulatory capture of federal enforcement agencies such as the Securities and Exchange Commission); David Freeman Engstrom, *Corralling Capture*, 36 HARV. J.L. & PUB. POL'Y 31, 36 (2013) (calling attention to the impact of agency capture on the "micro-levels of agency decisionmaking"); Luigi Zingales, *Preventing Economists' Capture*, CHI. BOOTH REV. (July 1, 2014), https://www.chicagobooth.edu/review/preventing-economists-capture [https://perma.cc/ES2C-D7FG] (arguing that economists are susceptible to capture for the same reasons as regulators). *See generally* PREVENTING REGULATORY CAPTURE, *supra* note 179.

190. *See, e.g.*, Michael A. Livermore, *Reviving Environmental Protection: Preference-Directed Regulation and Regulatory Ossification*, 25 VA. ENV'T L.J. 311, 314 (2007) (describing the extent of regulatory ossification in environmental law); 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, 126 (2013) (same); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1528 (2002) (describing the ossification of labor law).

191. *See* Oliver Hart & Luigi Zingales, *The New Corporate Governance*, 1 U. 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?"); Max Bearak, *Trump Orders a U.S. Exit from the World's Main Climate Pact*, N.Y. TIMES (Jan. 29, 2025) https://www.nytimes.com/2025/01/20/climate/trump-paris-agreement-climate.html [https://perma.cc/A63U-YCW2] (providing a recent example of a breakdown in international cooperation on regulating environmental externalities).

192. *See* Liscow, *Reducing Inequality*, *supra* note 40, 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

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) or 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.[193] 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

'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), https://www.promarket.org/2020/10/13/milton-friedman-legacy-doctrine-theorem [https://perma.cc/65XY-N9MG] ("If the government is unable to fully address the 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]. . . ." Hart & Zingales, *supra* note 191, at 203. The second is that rather than focus on corporate governance, advocates of externality regulation should look instead to reform the broken system. *See supra* note 186; Sanjai Bhagat & Glenn Hubbard, *Should the Modern Corporation Maximize Shareholder Value?*, AM. ENTER. INST. ECON. PERSPS. 6 (Sept. 2020), https://www.aei.org/wp-content/uploads/2020/09/Should-the-Modern-Corporation-Maximize-Shareholder-Value.pdf?x85095 [https://perma.cc/EF6N-F7UC] (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 preferable, but difficult to achieve. Moreover, one must account for the "costs of political action" necessary to accomplish such reforms when determining the best approach. *See* Fennell & McAdams, *supra* note 40, at 1088 (describing how seemingly inefficient solutions may become optimal in the face of high "costs of political action"); *see also* Liscow, *Reducing Inequality*, *supra* note 40, at 2482 (arguing that redistribution through regulation and taxation can be costly, just as redistribution through legal rules is costly); Kovvali, *supra* note 170, 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.").

193. *See supra* note 6 and accompanying text.

tax.[194] 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 taxation and regulation is more costly or not achievable.[195]

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.[196] 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 legislative reform. For example, Senator Elizabeth Warren has proposed legislation that would require companies to let workers elect forty percent of directors, which would

194. Fennell & McAdams, *supra* note 40, at 1052–53.

195. *See* Liscow, *Redistribution*, *supra* note 40, at 498–99 (arguing that economic gains from efficient legal rules are not properly redistributed through taxation because of popular and political resistance to taxation). 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. *See* Hart & Zingales, *supra* note 191, at 200–04. 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.

196. 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, *Economic Costs of Inequality* (John M. Olin Program in L. & Econ., Working Paper No. 370, 2007), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1506&context=law_and_economics [https://perma.cc/C79A-GSZH].

make gain sharing more likely.[197] Such reform might be more likely to manifest in Eastlandia, where the purpose orientation favors stakeholders.[198] 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.[199] 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 of 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

197. 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 [https://perma.cc/G769-NXTE] (describing Senator Warren's plan for worker representation on corporate boards); *see also* Gary Gorton & Frank Schmid, *Class Struggle Inside the Firm: A Study of German Codetermination* (Nat'l Bureau of Econ. Rsch., Working Paper No. 7945, 2000), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3884268 [https://perma.cc/TLA2-M6VC] (studying German co-determination and finding that employees redirect surplus toward themselves when their representatives serve on the board).

198. *Cf.* Lund & Pollman, *supra* note 1, at 2582 ("In the twenty-first century, since shareholder primacy has permeated the cultural and political discourse, federal intervention tends to protect shareholders, increasing their power and focusing management attention on their interests.").

199. *See id.* at 2575 (discussing the impact of shareholder pressure on boards and executives).

with collecting it), the broader purpose would generate the better outcome.[200]

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.[201] Over time, this economic concentration decreases consumer welfare and leads to inefficiencies in production and growth.[202]

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.[203] As

200. *See* Liscow, *Reducing Inequality*, *supra* note 40, at 2482 ("[R]edistribution 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.").

201. *Cf*. Katz, *supra* note 127, 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.").

202. *See generally* Oliver D. Hart, *On Shareholder Unanimity in Large Stock 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).

203. *See, e.g.*, Drew Armstrong & Bloomberg, *Pfizer Says It Will Slash Drug Prices for the Poorest Nations. But the Devil Is in the Details*, FORTUNE (May 25, 2022), https://fortune.com/2022/05/25/pfizer-ceo-bourla-says-will-slash-drug-vaccine-prices-for-poorest-nations-but-devil-is-in-details [https://perma.cc/SU4K-8MVB]; *Covid-19 Vaccine Firms Pledge 3.5 Billion Doses for Poorer Nations*, FRANCE 24 (May 21, 2021), https://www.france24.com/en/europe/20210521-covid-19-vaccine-firms-pledge-3-5-billion-doses-for-poorer-nations [https://perma.cc/4F6R-MRU2]. Note that corporate concentration makes "purpose pressure" more likely to succeed. *See, e.g.*, Mark J. Roe, *Corporate Purpose and Corporate Competition* (Eur. Corp. Governance Inst., Working Paper No.

with the other examples, aspects of the corporate governance regime might also change, such as by incorporating consumer satisfaction as an aspect of executive pay.[204] 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.[205]

To summarize, these hypotheticals suggest that the welfare-creating orientation for corporate purpose could change depending on external economic conditions.[206] In particular, weak externality regulation, high inequality, and low corporate competition not only increase the public's receptiveness to a stakeholder model, but also the normative case for it.[207] 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

601/2021, 2021) ("[D]eclining corporate competition and rising corporate profits create a lush field for social conflict inside the firm and the polity for shareholders and stakeholders each to seek a share of those profits."); Manne, *supra* note 86, at 417 (arguing that the only explanation for true corporate charity is that the corporation has achieved monopoly power).

204. *See* Lund, *supra* note 55, at 93 (describing how compensation metrics have begun to evolve to take consumer interests into account).

205. *See* Zingales, *supra* note 192 ("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 192, at 5–6 (arguing that a lack of competitive labor and product markets undermine shareholder value maximization).

206. 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.

207. 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.

directing management to pursue shareholder gains. The next Part discusses further implications of this analysis.

III. IMPLICATIONS

Part I discussed two corporate purpose moments in the United States and the external conditions that preceded them, and Part II 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 UNITED STATES

As Part I discussed, the dominant view of the role of corporations in society has continued to favor shareholders since the last pendulum swing in the 1980s.[208] 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 sweeps in stakeholder interests as integral to long term value creation.[209] 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.[210] This requirement

208. *See supra* Part I.

209. *See* Lund, *supra* note 55, at 92 (discussing the expansion of shareholder primacy to an "enlightened" view); 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. CORP. L. 627, 629 (2022) (proposing a framework for large institutional investors that would focus on stewardship of systematic risk).

210. *See supra* note 209.

necessarily limits the range of action management can take in service of stakeholders[211] (indeed, for many, that is the point).[212]

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.[213] 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."[214] Subsequent letters reaffirmed this commitment and discussed governance initiatives that would further board diversity and reduce climate risk.[215]

211. *See* Lund & Pollman, *supra* note 1, at 2631–33 ("[T]ying the consideration of stakeholder welfare to long-term shareholder value limits the acceptable rationales and favors activity that can be reduced to measurable metrics tied to risk or financial value."); Virginia Harper Ho, *The Limits of Enlightened Shareholder Activism*, INT'L J. FOR FIN. SERVS. 4 (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3988772 [https://perma.cc/SE64-KUFJ] (explaining the limits of an enlightened shareholder value view).

212. *See supra* note 6 and accompanying text.

213. *See supra* notes 2–5 and accompanying text.

214. *E.g.*, Fink, *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*, BLACKROCK (2022), https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter [https://perma.cc/M9EC-CFK2] ("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.").

215. *See, e.g.*, Larry Fink, *Larry Fink's 2020 Letter to CEOs: A Fundamental Reshaping of Finance*, BLACKROCK (2020), https://www.blackrock.com/corporate/investor-relations/2020-larry-fink-ceo-letter [https://perma.cc/T83N-7DRJ] (advocating for the consideration of all stakeholders); Larry Fink, *Larry Fink's 2021 Letter to CEOs*, BLACKROCK (2021), https://www.blackrock.com/us/individual/2021-larry-fink-ceo-letter [https://perma.cc/UMH5-ST59] (reiterating that CEOs should consider all stakeholders). Other large institutional shareholders have echoed these concerns. *See* Michal Barzuza et al., *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243 (2020) (showing how index fund managers have been vocal advocates of ESG issues); Dorothy S. Lund, *Asset Managers as Regulators*, 171 U. PA. L. REV. 77 (2022) (arguing that asset managers have played a regulatory role on certain environmental and social issues); *see also Special Report: Institutional Investors*, EDELMAN TRUST BAROMETER 14 (2018),

This commitment from one of the world's largest shareholders in favor of stakeholder value rightly made headlines,[216] 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: "[C]ompanies should deliver long-term value to all of their stakeholders—customers, employees, suppliers, the communities in which they operate, and shareholders."[217] Shortly thereafter, the 2020 World Economic Forum convened in Davos under the theme of "Stakeholders for a Cohesive and Sustainable World."[218] 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."[219] Prominent lawyers advising business leaders

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https://www.edelman.com/sites/g/files/aatuss191/files/2018-11/Edelman_Trust_Baromter_Institutional_Investor_US_Results_0.pdf [https://perma.cc/9EQ7-QJFG] (surveying 500 institutional investors and finding that ninety-eight percent indicated that "public companies are urgently obligated to address . . . societal issues to ensure the global business environment remains healthy and robust").

216. *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 [https://perma.cc/YP7V-2EK5]; 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 [https://perma.cc/SB99-ACJP].

217. *Business Roundtable Statement on the Purpose of a Corporation*, BUS. ROUNDTABLE, https://www.businessroundtable.org/purposeanniversary [https://perma.cc/X5VG-GLGC]. The previous version of the statement read "The paramount duty of management and of boards of directors is to the corporation's stockholders." *Statement on Corporate Governance*, BUS. ROUNDTABLE (Sept. 1997), https://cdn.theconversation.com/static_files/files/693/Statement_on_Corporate_Governance_Business-Roundtable-1997%281%29.pdf [https://perma.cc/DKR3-LST9].

218. Jessica Lynd, *The Rise of Stakeholder Capitalism*, WHITE & CASE (Sept. 1, 2021), https://www.whitecase.com/insight-our-thinking/rise-stakeholder-capitalism [https://perma.cc/KDX7-XMJJ].

219. Klaus Schwab, *Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution*, WORLD ECON. F. (Dec. 2, 2019), https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution [https://perma.cc/5L7B-2EBQ].

have further chimed in with an embrace of stakeholder capitalism.[220]

This "rapidly growing support"[221] 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,[222] and assessing recent developments including the growing popularity of ESG

220. *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 [https://perma.cc/P9KJ-UEWV]; Martin Lipton, *The Friedman Essay and the True Purpose of the Business Corporation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 17, 2020), https://corpgov.law.harvard.edu/2020/09/17/the-friedman-essay-and-the-true-purpose-of-the-business-corporation [https://perma.cc/CME7-P5DB].

221. Bebchuk & Tallarita, *Illusory Promise*, *supra* note 6, at 106–07 ("[S]takeholderism has been on the rise, especially in terms of its acceptance by corporate executives, management advisors, and policy thought leaders.").

222. *Compare* Bebchuk & Tallarita, *Illusory Promise*, *supra* note 6, at 101 (arguing that stakeholderism can decrease corporate accountability), *and* Bebchuk et al., *Corporate Leaders*, *supra* note 6, at 1535 (warning against the superficial appeal of stakeholderism), *and* Bebchuk & Tallarita, *Will Corporations Deliver*, *supra* note 6, at 1086 ("Reliance on the discretion of corporate leaders to serve stakeholders, as supporters of stakeholder governance advocate, would be an ineffective and counterproductive approach to the protection of stakeholders."), *and* George P. Shultz et al., *Cheated by Collectivism*, HOOVER DIG., Aug. 4, 2020, at 17 (arguing businesses do good when benefiting shareholders), *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., Working Paper No. 522/2020, 2020), *and* Barzuza et al., *supra* note 215 (arguing that investors in funds are increasingly investing based on their values), *and* Dina Medland & Alison Taylor, *The Illusion of Reasoning*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 6, 2020), https://corpgov.law.harvard.edu/2020/09/06/the-illusion-of-reasoning [https://perma.cc/CX2W-APYV] (attacking the logical and evidentiary bases of Bebchuk and Tallarita's critique of stakeholderism), *and* Hart & Zingales, *supra* note 37 at 247–49 (arguing that stakeholderism can lead to greater overall wellbeing (as opposed to purely financial gain) for shareholders). 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, *supra* note 41, at 634, 635.

investing[223] and the benefit corporation.[224] My analysis suggests that economic conditions explain the revival of the purpose conversation that is gripping academics, the business community, and the broader public.[225] In particular, the external economic factors discussed above—corporate concentration, inequality, and the absence of adequate externality regulation—are currently at extreme points, which explains the increased appetite for a 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.

Consider the following datapoints. First, since the 1980s, corporate concentration in the United States has been steadily rising.[226] 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.[227] Their results show that the shares of production assets that accrue to the top 1% and 0.1% of businesses in the United States have grown

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223. Elizabeth Pollman, *The Making and Meaning of ESG*, 14 HARV. BUS. L. REV. 403, 403 (2024) ("ESG is one of the most notable trends in corporate governance, management, and investment of the past two decades. It is at the center of the largest and most contentious debates in contemporary corporate and securities law."); Lund & Pollman, *supra* note 1, at 2567 (charting the rise of the ESG movement); Quinn Curtis et al., *Do ESG Mutual Funds Deliver on Their Promises?*, 120 MICH. L. REV. 393, 393 (2021) (discussing the rise of ESG investing).

224. Strine, *supra* note 2, at 415 ("[T]he founders of the nonprofit organization B Lab created a new form of corporation, the Benefit Corporation ('B Corps'), specifically designed to encourage corporations to serve a positive social purpose, to avoid externalities that harmed society, and to govern themselves in a manner that was fair to all stakeholders."); Ofer Eldar, *Designing Business Forms to Pursue Social Goals*, 106 VA. L. REV. 937, 989–1000 (2020) (charting the rise of benefit corporations).

225. *Cf*. Elizabeth Pollman, *The Supreme Court and the Pro-Business Paradox*, 135 HARV. L. REV. 220, 225 (2021) (arguing that pro-business jurisprudence from the Supreme Court increases pressure on internal law and governance to embrace stakeholder interests).

226. Kwon et al., *100 Years of Rising Corporate Concentration* 1 (Sustainable Architecture for Fin. in Eur., Working Paper No. 359, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3936799 [https://perma.cc/SLB3-AWNX]; *see also* Roe, *supra* note 203, at 15–16 ("In many industries, fewer firms compete today than did decades ago."); David Autor et al., *The Fall of the Labor Share and the Rise of Superstar Firms*, 135 Q.J. ECON. 645, 645 (2020) (documenting the rise of "superstar" firms since the 1980s).

227. Kwon et al., *supra* note 226, at 1.

steadily since the 1980s.[228] 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.[229]

The growth of giant corporations with power over productive assets and employment in the United States has contributed to a renaissance in antitrust legal scholarship and policy.[230] 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."[231] Indeed, this view echoes the corporate social responsibility movement that came about during the 1920s, another era of extreme corporate concentration in the United States.[232]

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228. *Id.* at 69–70.

229. Karthik Ramanna, *Corporations Are Already Plenty Powerful. Stakeholder Capitalism Could Make Them More So*, PROMARKET (Sept. 17, 2020), https://www.promarket.org/2020/09/17/corporations-are-already-plenty-powerful-stakeholder-capitalism-could-make-them-more-so [https://perma.cc/UZJ9-TLAR].

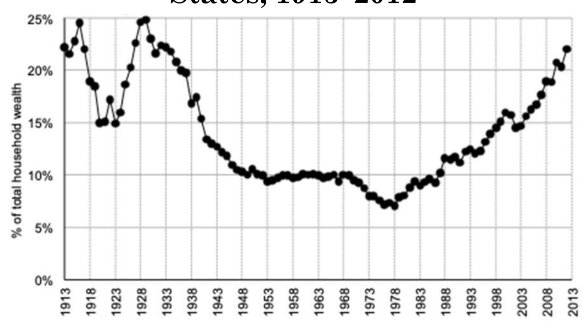
230. *See, e.g.*, Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017); Lina M. Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235 (2017); Lina M. Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655 (2020) (reviewing TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018)); 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 et al., *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536 (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 Its Critics*, 83 ANTITRUST L.J. 269 (2020).

231. Denise Hearn & Michelle Meagher, *Stakeholder Capitalism's Next Frontier: Pro- or Anti-Monopoly?*, AM. ECON. LIBERTIES PROJECT 6 (Apr. 2022), https://www.economicliberties.us/wp-content/uploads/2022/04/Stakeholder-Capitalism_Report-1.pdf [https://perma.cc/T9GS-2J9R]; *see also* Roe, *supra* note 203, at 2 (describing concentration as contributing to purpose and ESG pressure).

232. *See supra* Part I.A.

Second, inequality in the United States is also at a high point and has grown enormously since the 1980s.[233] The growth of wealth concentration is almost entirely due to the rise in the top 0.1% of wealth share, which rose from 7% in 1979 to 22% in 2012—"a level almost as high as in 1929."[234] By contrast, while the bottom 90% wealth share increased until the mid-80s, it has steadily declined ever since.[235] The figure below, taken from Emmanuel Saez and Gabriel Zucman's influential study surveying income tax returns over the past century, depicts the share of total household wealth held by the 0.1% richest households, and provides a powerful image of this rapid accumulation in wealth.[236]

Figure 1: Top 0.1% Wealth Share in the United States, 1913–2012[237]



233. *See* Emanuel Saez & Gabriel Zucman, *Wealth Inequality in the U.S. Since 1913: Evidence from Capitalized Income Tax Data*, 131 Q.J. ECON. 519, 519 (2016) (describing a decline in wealth for the bottom ninety percent since the mid-1980s). Wage stagnation has played a major role in this gap. *See* Lawrence Mishel et al., *Wage Stagnation in Nine Charts*, ECON. POL'Y INST. 3 (Jan. 6, 2015), https://files.epi.org/2013/wage-stagnation-in-nine-charts.pdf [https://perma.cc/W4J5-U8VU] (discussing how real wages have dropped since the Great Recession); Katherine Schaeffer, *6 Facts About Economic Inequality in the U.S.*, PEW RSCH. CTR. (Feb. 7, 2020), https://www.pewresearch.org/short-reads/2020/02/07/6-facts-about-economic-inequality-in-the-u-s [https://perma.cc/7N2L-R6T6]; Drew DeSilver, *For Most U.S. Workers, Real Wages Have Barely Budged in Decades*, PEW RSCH. CTR. (Aug. 7, 2018), https://www.pewresearch.org/short-reads/2018/08/07/for-most-us-workers-real-wages-have-barely-budged-for-decades [https://perma.cc/C93Y-EQ3V].

234. Saez & Zucman, *supra* note 233, at 519.

235. *Id.*

236. *Id.* at 521.

237. 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. *Id.*

This extreme inequality is often cited by scholars and policymakers seeking a shift in corporate purpose. 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."[238] The release introducing the draft legislation opens by painting a picture of rising inequality: It describes how wages have stagnated for workers since the 1980s, 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.[239] This landscape, 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."[240]

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,[241] partisanship,[242] and corporate capture of the political process[243] for legislative inaction and policies tailored to special interests, rather than the public good. Legal developments have further increased corporate influence in politics[244] and hamstrung government agencies from issuing and enforcing rules,[245]

238. *Empowering Workers Through Accountable Capitalism*, WARREN FOR SENATE, https://elizabethwarren.com/plans/accountable-capitalism [https://perma.cc/N65U-6ZZX].

239. *Id.* As Edward Rock points out, this rhetoric is not limited to liberal politicians. *See* Rock, *supra* note 22, at 366 (quoting a Marco Rubio report).

240. *Empowering Workers Through Accountable Capitalism*, *supra* note 238.

241. *See* Estlund, *supra* note 190, at 1530 ("The ineffectuality of American labor law, and the shrinking scope of collective representation and collective bargaining, is partly traceable to the law's 'ossification.'").

242. *See* Hughes & Carlson *supra* note 188, at 773 (describing how partisanship delays the policy making process).

243. *See* Cass, *supra* note 189 ("The 'regulatory capture' thesis is that in exercising this discretion, officials too often take steps that benefit well-placed entities and individuals.").

244. *See* Citizens United v. FEC, 558 U.S. 310 (2010) (holding that corporate political spending constitutes speech deserving of constitutional protection).

245. *See* West Virginia v. EPA, 142 S. Ct. 2587 (2022) (invoking the "major questions" doctrine to limit the EPA's ability to regulate carbon emissions); *see also* Casey Crownhart, *The US Supreme Court Just Gutted the EPA's Power to Regulate Emissions*, MIT TECH. REV. (June 30, 2022), https://www.technologyreview.com/2022/06/30/1055272/supreme-court-climate-policy-epa [https://perma.cc/P6NG-43LR] ("The decision [in *West Virginia v. EPA*] will limit the

threatening to further limit the government's ability to respond to climate change and other pressing issues.[246]

Regardless of whether scholars are right or wrong about the optimality of government regulation at this very moment,[247] 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."[248] Polls of Americans routinely find that "government should do more on climate."[249] Polling data similarly suggests that Americans believe the government should do more to tackle inequality and support unions.[250] Overall, public trust in government has continued to decline, nearing historic lows in 2023.[251]

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ability of agencies like the EPA to take action on climate without backing from Congress.").

246. Crownhart, *supra* note 245.

247. The opposite view—that corporate regulation is too burdensome—has fierce proponents as well. *See, e.g.*, John Kitching et al., *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.").

248. Rock, *supra* note 22, at 367; Macey, *supra* note 8, at 258 ("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.").

249. 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 [https://perma.cc/VB8T-YJ9V].

250. Joseph Zeballos-Roig, *A Growing Number of Americans Believe the Government Should Tackle Economic Inequality Instead of Illegal Immigration*, BUS. INSIDER (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 [https://perma.cc/FQY9-3DS9]; Megan Brenan, *Approval of Labor Unions at Highest Point Since 1965*, GALLUP (Sept. 2, 2021), https://news.gallup.com/poll/354455/approval-labor-unions-highest-point-1965.aspx [https://perma.cc/9U6F-V93K].

251. *Public Trust in Government: 1958-2024*, PEW RSCH. CTR. (June 24, 2024), https://www.pewresearch.org/politics/2024/06/24/public-trust-in-government-1958-2024 [https://perma.cc/Y8X8-Q792]; *see also* Megan Brenan, *Americans' Trust in Government Remains Low*, GALLUP (Sept. 2, 2021), https://

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."[252]

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.[253] 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.[254] Nonetheless, these conditions increase the normative desirability of such a shift. Simply put, in light of stark inequality, the 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.[255] This last point reveals how difficult it is to calibrate a purpose shift in response to external conditions. As my historical examples reveal, external conditions are often changing, and yet the

news.gallup.com/poll/355124/americans-trust-government-remains-low.aspx [https://perma.cc/2CT7-HLYX].

252. Fink, *supra* note 4.

253. *Id.*

254. For a predictive model for corporate governance change, see Steven Bank & Brian Cheffins, *Corporate Law's Critical Junctures*, 77 BUS. LAW. 1, 1 (2021–22) ("The model indicates that a combination of a lengthy period of depressed share prices and a perception that business wrongdoing was integrally related to the slump are required to create the window of opportunity for significant and enduring reform.").

255. *See* Bebchuk & Tallarita, *Illusory Promise*, *supra* note 6, at 168 (arguing that the belief that corporations are addressing externalities would impede necessary policy reforms).

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.[256] Indeed, this position was so widespread that in 2001, Reinier Kraakman and Henry Hansmann announced that "[t]here is today a broad normative consensus that shareholders alone are the parties to whom corporate managers should be accountable," declared as the "end of history" for corporate law.[257] 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.[258]

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.[259] More importantly, as the previous Section

256. *See* Afsharipour & Gelter, *supra* note 47, at 8–9 (surveying the comparative corporate governance literature and its early consensus of convergence around a shareholderist model).

257. Hansmann & Kraakman, *supra* note 13, at 441.

258. *Id.* at 449.

259. *See, e.g*, Strine, *supra* note 2, at 434 (discussing European social democratic nations and their relative emphasis on worker welfare); Tim Wu, *The Goals of the Corporation and the Limits of the Law*, CLS BLUE SKY BLOG (Sept. 3, 2019), https://clsbluesky.law.columbia.edu/2019/09/03/the-goals-of-the-corporation-and-the-limits-of-the-law [https://perma.cc/XD6H-7NXH] ("[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

discussed, there is a growing lack of consensus about the optimality of a shareholder-centric model within the United States.[260]

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 "it is not obvious that a single model will be optimal for all countries" because of institutional differences across jurisdictions.[261] Although my analysis does not address these rich comparative corporate law conversations, which feature complexities well beyond the scope of this Article, it further suggests that jurisdictions that have maintained a stakeholder model (or elements of it, as in Germany[262]), are not necessarily "converg[ing] on an inefficient rule."[263] As voices weighing in on the comparative question have emphasized, external economic circumstances challenge the orthodoxy of a single right answer.[264] Moreover, these insights suggest that governance dynamism should be expected—in the United States and elsewhere—and even preferred as economic circumstances change over time.

C. Evolution of Corporate Law and Governance

Beyond these normative points, my analysis offers a novel observation about how legal change takes place over time. Hansmann and Kraakman's paper provides an example of the

and its persistence in other countries, like Brazil. And the idea that there is no normative competition to the model is also obviously wrong."); Afsharipour & Gelter, *supra* note 47, 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, *supra* note 187, at 537 (detailing how the Global South has embraced aspects of stakeholderism).

260. *See supra* Part III.A; *see also* Pargendler, *supra* note 1, at 970 ("At least since the global financial crisis of 2008, corporate governance has been increasingly used to advance goals other than shareholder protection.").

261. Afsharipour & Gelter, *supra* note 47, at 10.

262. *See* Gorton & Schmid, *supra* note 197, at 31 (explaining how the German system of codetermination aligns stakeholder and shareholder interests).

263. Hansmann & Kraakman, *supra* note 13, at 466.

264. *See* Afsharipour & Gelter, *supra* note 47, at 10–11 (citing articles making this claim); Pargendler, *supra* note 1, at 956.

classical law and economics view of legal change, which is that efficient laws tend to survive, whereas inefficient laws are likely to be extinguished.[265] 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 1980s demonstrated.[266] 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.[267]

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.[268] In other words, there is often harmony between a governance regime that promotes firm-specific gains and social welfare.[269] However, as the simple hypotheticals in the previous Part 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.

The analysis in Part I further suggested that public and academic receptiveness to stakeholder governance models increase when economic conditions suggest a stark departure from a first-best world. Could it be that these ebbs and flows in public

265. *See* Roe, *supra* note 20, at 641 ("[E]conomic evolution selects out for extinction very inefficient results, and efficient results survive.").

266. *See*, *e.g.*, Hansmann & Kraakman, *supra* note 13, at 457 (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").

267. *Id.* at 442 (arguing that a shareholder-centric governance model is most efficient).

268. *See id.* at 441 (arguing that holding corporate managers accountable to shareholder interests will produce the best results for social welfare).

269. *See id.*

opinion moderate the evolution of corporate governance, in a way that is welfare-enhancing? 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 is welfare-enhancing. If this is the case, perhaps corporate governance scholars should not eschew stakeholderism altogether, but 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.[270] Likewise, Edward Rock has attributed the current debate over corporate purpose to political dysfunction, "with regrettable results."[271] 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 corporate purpose;[272] 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

270. Macey, *supra* note 8, at 263 ("The current privately driven ESG movement is . . . highly libertarian—it assumes that the government's current failings will continue . . . ."); *see also* ROE, *supra* note 23, at 1 (describing the current configuration of ownership and corporate governance characteristics as politically determined).

271. Rock, *supra* note 22, at 363.

272. ROE, *supra* note 23, at 1 (discussing how political forces influence corporate governance).

to be quite sticky,[273] leading to long periods of stasis even as economic conditions change a great deal.[274] 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 1930s, a purpose swing toward stakeholderism occurred in tandem with New Deal regulation,[275] when economic logic would suggest a move in the other direction. And in the 1980s, 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.

Therefore, my historical analysis reveals that 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 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. 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

273. Lund & Pollman, *supra* note 1, at 2615 (discussing the stickiness of the shareholder primacy norm).

274. This suggests path dependence may also be at work. *See* Roe, *supra* note 20, at 643–44 (discussing how past adaptations persist beyond the conditions that made them efficient). *See generally* Lund & Pollman, *supra* note 1,(analyzing the factors that contribute to the "stickiness" of the shareholderist corporate governance model in the United States).

275. 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, *Illusory Promise*, *supra* note 6, at 94 (making this argument).

precisely as economists might like. Together, this analysis raises important questions about implementation. 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 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.[276]

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.[277] 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

276. *See supra*, notes 241–43 and accompanying text; *see also* Barak Orbach, *What Is Government Failure?*, 30 YALE J. REG. ONLINE 44, 56 (2013). Interestingly, leading conservative thinkers generally start from the premise that government is likely to fail in its regulatory efforts but use this position to justify a hands-off regulatory approach. *Id.* at 44.

277. *See* Cass, *supra* note 189 (discussing industry influence over its own regulation); Zingales, *supra* note 189 ("Regulatory capture is so pervasive precisely because it is driven by standard economic incentives, which push even the most well-intentioned regulators to cater to the interest of the regulated.").

political hurdles.[278] To take just one example, although a majority of Americans support data privacy laws, no comprehensive federal law has been passed,[279] and only nineteen states have been able to pass their own laws.[280] 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 of 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 1950s and 1960s, when management had leeway to consider their interests; since 1991, employee labor share has fallen steadily.[281] 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."[282] 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

278. Wu, *supra* note 179 (discussing how popular policies are stifled by the need for large bipartisan majorities to enact them).

279. Chris Mills Rodrigo, *Majority of Americans Support National Privacy Standards*, THE HILL (Sept. 16, 2021) https://thehill.com/policy/technology/572607-majority-of-americans-support-national-data-privacy-standards-poll [https://perma.cc/E9H5-VZ2C].

280. Philip N. Yannella & Tim Dickens, *New State Privacy Laws Creating Complicated Patchwork of Privacy Obligations*, REUTERS (June 7, 2024), https://www.reuters.com/legal/legalindustry/new-state-privacy-laws-creating-complicated-patchwork-privacy-obligations-2024-06-07 [https://perma.cc/5JF4-S259].

281. *Estimating the U.S. Labor Share*, U.S. BUREAU OF LAB. STAT. (Feb. 2017), https://www.bls.gov/opub/mlr/2017/article/estimating-the-us-labor-share.htm [https://perma.cc/UL7V-DVZ7]; Zohar Goshen & Doron Levit, *Agents of Inequality: Common Ownership and the Decline of the American Worker*, 72 DUKE L.J. 1, 3 (2022) (charting wage stagnation and attributing it to the rise of common ownership of corporations).

282. D. QUINN MILLS, THE IBM LESSON (1988); Dan Bobkoff, *IBM: When Corporations Took Care of their Employees*, MARKETPLACE (June 13, 2016), https://www.marketplace.org/2016/06/13/profit-ibm [https://perma.cc/S5V6-YC3X].

to offer health insurance, pensions, and paid vacations to workers, before such benefits were commonplace.[283] By the 1980s and 1990s, as shareholder value thinking became ascendant, IBM shed many of these benefits and eventually laid off workers for the first time in the early 1990s.[284]

The impact of stakeholder governance on environmental harm is less clear cut, especially when viewed through a historical lens. Although the 1950s and 1960s 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.[285]

Nonetheless, there are key differences between the 1950s and 1960s 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. Administrative law expert Michael Livermore has described the current state of environmental regulatory ossification as follows:

> Scientific knowledge has been 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 . . . .[286]

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 beneficial manner, it is my expectation that a purpose shift would also bring about changes to

283. *Id.*

284. *Id.*

285. *See* Michael A. Livermore, *Reviving Environmental Protection: Preference-Directed Regulation and Regulatory Ossification*, 25 VA. ENV'T L.J. 311, 324 (2007) (discussing the creation of the EPA).

286. *Id.* at 338–39.

corporate governance, as it has in the past.[287] 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.[288] In the United States, 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 an embrace of stakeholderism undermine the likelihood that government will 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.[289] 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.[290]

287. *See* Lund & Pollman, *supra* note 1, at 2565–67 (showing how the acceptance of shareholder primacy has influenced the path of corporate governance in the United States via law, culture, and extra-legal institutions).

288. *See, e.g.*, Gorton & Schmid, *supra* note 197, at 31 (showing that German co-determination leads to redistribution of the firm's surplus toward employees). Note, however, one stakeholder group's gain can harm others. Indeed, German co-determination may have been a contributing factor in the VW cheating scandal, in which shareholders and workers were aligned in cheating regulatory rules designed to reduce carbon dioxide emissions. *See* Charles M. Elson et al., *The Bug at Volkswagen: Lessons in Co-Determination, Ownership, and Board Structure*, J. APPLIED CORP. FIN., Fall 2015, at 36, 40.

289. *Nestle Contribution to the EU Code of Conduct for Responsible Business & Marketing Practices*, NESTLE (July 2021), https://www.nestle.com/sites/default/files/2021-06/nestle-contribution-eu-code-of-conduct-july-2021.pdf [https://perma.cc/66TC-SME3].

290. *See* Dorothy S. Lund, *Corporate Finance for Social Good*, 121 COLUM. L. REV. 1617, 1624 (2021) ("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.").

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 midstream? 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 improve profitability by reducing risk and improving employee productivity and morale.[291] 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.

CONCLUSION

Over the past century, scholars have debated the proper role of corporations in society, arguing that corporations should concern themselves with profit maximation and little else, or in the alternative, 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

291. *See* Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1410 (2020) ("ESG serves shareholders' interests . . . because it helps companies identify and manage social risks to their business.").

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 United States and suggest that getting to the right answer requires consideration of external economic factors, which have hit extreme points once again.