ESSAY

Stakeholderism Silo Busting

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The fields of antitrust, bankruptcy, corporate, and securities law are undergoing tumultuous debates. On one side in each field is the dominant view that each field should focus exclusively on a specific constituency—antitrust on consumers, bankruptcy on creditors, corporate law on shareholders, and securities regulation on financial investors. On the other side is a growing insurgency that seeks to broaden the focus to a larger set of stakeholders, including workers, the environment, and political communities. But these conversations have largely proceeded in parallel, with each debate unfolding within the framework and literature of a single field. Studying these debates together reveals deep commonalities and unlocks useful insights. It can also suggest new theoretical and policy directions while avoiding the dangers of a blinkered approach.

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INTRODUCTION

Separate fields of business law are undergoing tumultuous debates. The orthodox view that antitrust law should focus exclusively on consumer welfare is threatened by increasingly influential figures like Federal Trade Commission (FTC) Chairwoman Lina Khan and Professor Tim Wu, who urge a focus on preserving smaller companies and countering the threat of political domination by large firms.[1] The orthodox view that bankruptcy law should focus on creditor interests has drawn public outrage as parties and judges pursue it to its logical conclusion in cases of mass injury like those involving Purdue Pharma and Johnson & Johnson, pursuing maneuvers that protect financial

1 *See, e.g.*, Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 795–97 (2017); TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 135–39 (2018) [hereinafter TIM WU, THE CURSE OF BIGNESS]. Lina Khan is currently serving as the chairperson of the Federal Trade Commission, and Tim Wu is serving as a special assistant to the president for technology and competition policy.

creditors and investors and curtail litigation by victims of misconduct.[2] The orthodox view that corporate law should focus exclusively on shareholders' financial interests has been challenged by a growing group of business leaders, politicians, and academics.[3] And the orthodox view that securities regulation should focus on disclosures material only to investors may be nearing collapse, as the Securities and Exchange Commission (SEC) pushes forward on rules that compel companies to disclose information about climate change.[4] In each of these areas, there is a high-profile and consequential conversation underway about whether the field should focus on a single constituency or a broader range of stakeholders.

With few exceptions, participants in these conversations have treated them as separate conversation*s*, drawing on the logic and literature of each individual field. But there is value in conceiving of them as one broader conversation. The fields share a common history and have been shaped by common economic and political forces. The arguments in each space share important similarities. And considering the issues together can yield fresh insights and actionable proposals.

This Essay explores these possibilities. Part I briefly discusses the parallel histories of each field. Each field began as a muddle of competing policy objectives but was reformed by visionary leaders to focus on a single constituency. And recent changes in the broader economic and regulatory environment have fed robust challenges to each orthodoxy.

Part II explores the common structures and themes of the current debates. In each debate, one side argues that a field should focus on the interests of a single constituency (consumers, creditors, shareholders, or investors) often as reflected in a single metric (short-term prices, returns, or share prices). The other side

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2 *See, e.g.*, Mary Harris, *The Sacklers Get to Walk Away*, SLATE (Mar. 21, 2022), https://perma.cc/E3EK-JQBA.

3 *See, e.g.*, Business Roundtable, *Statement on the Purpose of Corporation* (Aug. 19, 2019), https://perma.cc/5EFP-FW6M (business group statement that firms should focus on groups other than shareholders); Accountable Capitalism Act, S. 3348, 115th Cong. § 5(c)(1)–(2) (2018) (legislative proposal by Senator Elizabeth Warren that would require large companies to consider stakeholder interests); 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 (2022) (describing the failure of shareholder primacy to create shared prosperity).

4 Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334, 21,346–21,412 (Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 201, 229, 232, 239 & 249).

supports "stakeholderism," arguing that the field should broaden its focus to consider the interests of other stakeholders, such as workers, the environment, or nearby communities. Advocates for stakeholderism note the potential of businesses to address important social problems or to create them if left unchecked; the apparent inability of the political system to generate better solutions; and the flexibility of business law to address problems. Advocates for single-constituency approaches make several claims: that improving outside areas of the law like labor law or environmental regulation would be more effective in meeting stakeholder needs than distorting business law; that stakeholderism would sacrifice business law's analytical and prescriptive clarity; that no one empowered by business law can be trusted to manage trade-offs across different groups of stakeholders; that any effort to help stakeholders would lead to perverse outcomes and evasion; and that single-constituency approaches will ultimately benefit stakeholders. Though these arguments are made across different areas of business law, they often land with different force in different fields. For example, while corporate CEOs may not be trusted to manage tradeoffs within corporate law between shareholders, workers, customers, and communities of operation, the judges and public servants who referee much of antitrust and bankruptcy law might have better incentives.

Part III sketches the value of considering these fields together, with a focus on identifying promising lines of research. The key insight is this: major problems require systemic solutions. Inequality and climate change are fundamental crises, and society is unlikely to solve them if each area of business law empowers, encourages, or requires corporations to fight solutions on behalf of some narrow special interest. While those who challenge the orthodoxy in each domain are closer to the right track, their siloed approaches also represent a failure of imagination. A blinkered view denies reformers the benefit of insights and mechanisms developed in parallel areas, and it can result in proposals in one area that would have unfortunate consequences in another. The current reform strategy of launching separate attacks on each area of doctrine is unlikely to lead to an effective overall system.

I. PARALLEL PASTS

This Part briefly explores the pasts of antitrust, bankruptcy, corporate, and securities law. As Part I.A reveals, the fields did not develop separately. Instead, they are each a part of a shared toolkit that policymakers have reconsidered at critical moments in response to developments in the economy. This pattern culminated in the current consensus mode of understanding each field—each with a narrow focus on achieving a particular vision of efficiency by advancing the concerns of one particular constituency—which was adopted in a period of limited government credibility, economic stagnation, and inflation. Part I.B discusses how the single-constituency consensuses had begun to erode in the years before the COVID-19 crisis. Part I.C suggests that the current moment may invite another reconsideration.

A. Shared Toolkit

Currently, antitrust, bankruptcy, corporate, and securities law each focus on a single separate constituency: consumers, creditors, shareholders, and investors, respectively. This Section suggests that these bodies of law developed together in response to a broad range of stakeholder concerns, and that only in the most recent iteration did these fields develop their single-constituency focus. The different fields were part of a shared toolkit that was rethought in various periods to achieve the goals of the era: building up basic infrastructure, taming large companies, responding to the Great Depression and World War II, and addressing stagnation and inflation.

1. Early origins.

A "corporation" is an artificial entity: its defining attributes, such as limited liability for investors, the legal distinction between the corporation's assets and investors' assets, and indefinite life require the government to grant an exemption from ordinary rules of contract and tort.[5] Originally, governments granted these benefits sparingly. Corporations were originally chartered individually to undertake specific work—enumerated

[5] *See, e.g.*, REINIER KRAAKMAN, JOHN ARMOUR, PAUL DAVIES, LUCA ENRIQUES, HENRY HANSMANN, GERARD HERTIG, KLAUS HOPT, HIDEKI KANDA, MARIANA PARGENDLER, WOLF-GEORG RINGE, EDWARD ROCK, THE ANATOMY OF CORPORATE LAW 7 (3d ed. 2017) (explaining how the outcomes dictated by corporate law "require dedicated legal doctrines to be effective in the sense that, absent such doctrines, they could not be replicated simply by contracting among a business's owners and their suppliers and customers"); Henry Hansmann, Reinier Kraakman & Richard Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1335, 1340 (2006) ("It would be practically impossible in most types of firm to create effective entity shielding without special rules of law.").

in their charters—that promoted public welfare.[6] This structure ensured that the advantages of the corporate form were available only to enterprises that served social purposes. By ensuring that corporations could pursue only a limited set of preapproved goals, the limitations on corporate charters also served to limit the size, activities, and scope of corporations, addressing concerns that would later be addressed through antitrust law.[7]

But this mechanism raised problems. Individual chartering created the potential for political capture, through which shareholders sought to corrupt legislatures to protect their enterprises and exclude potential entrants.[8] It also slowed the creation of new enterprises, making it difficult for organizational structures to keep pace with the growth of the U.S. economy.[9] Legislatures eventually relaxed some requirements, allowing companies to incorporate through a ministerial process and without special limitations in their corporate charters.[10]

2. Progressive era.

The rise of very large business enterprises necessitated a new approach. Antitrust, corporate, and disclosure law each developed as a check on the power wielded by business leaders.

Antitrust provided the most direct response. The Sherman Act[11] was motivated by a range of problems generated by big business. The possibility that businesses would use power to distort efficient outcomes and charge high prices to consumers was undoubtedly one motivation.[12] But the Act had the broader aim of

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6 Elizabeth Pollman, *The History and Revival of the Corporate Purpose Clause*, 99 TEX. L. REV. 1423, 1434–35 (2021); Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. ON REG. 499, 537 (2020).

7 Pollman, *supra* note 6, at 1433 ("[T]he specific nature of the purposes set out in the charter helped . . . ensur[e] that it did not fall into the hands of competitors or monopolists who would impact the price or availability of their local services."); Lipton, *supra* note 6, at 537–39.

8 ADAM WINKLER, WE THE CORPORATIONS 91–92 (2018); Pollman, *supra* note 6, at 1436.

9 Pollman, *supra* note 6, at 1436–47; Lipton, *supra* note 6, at 538.

10 Pollman, *supra* note 6, at 1436–41; Lipton, *supra* note 6, at 538–39.

11 15 U.S.C. §§ 1–8.

12 Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 175, 208 (2021) [hereinafter Paul, *Moral Economy*] (referencing legislative history showing that businesses' efforts to "advance the cost to the consumer" were one target of the first version of the bill); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 69–70 (1982) ("[T]he antitrust laws were passed primarily to further what may be

preventing economic domination more generally, creating space not only for consumers but also for small businesses to make decisions freely.[13] As the Supreme Court would later put it:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.[14]

The new legal tools were quickly put to use in breaking the power of Standard Oil[15] and American Tobacco.[16]

Corporate law also developed as a check on unaccountable economic power. The Michigan Supreme Court's 1919 decision in *Dodge v. Ford Motor Co.*[17] is normally taught as an early recognition of the principle that for-profit corporations must be run with the goal of delivering financial returns to shareholders.[18] But it can also be understood as imposing a constraint on the personal power of Henry Ford. Ford had asserted the right to hold corporate profits back from shareholders and had defended his decision by citing his idiosyncratic vision of boosting production, employment and wages, and deliveries to consumers.[19] By forcing Ford

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called a distributive goal, the goal of preventing unfair acquisitions of consumers' wealth by firms with market power.").

13 Paul, *Moral Economy*, *supra* note 12, at 247–48.

14 United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972); *see also* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958):

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

15 *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 76–82 (1910).

16 *See* United States v. Am. Tobacco Co., 221 U.S. 106, 184–88 (1911).

17 170 N.W. 668 (Mich. 1919).

18 *See* Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 VA. L. & BUS. REV. 163, 165, 174–76 (2008); Stephen M. Bainbridge, *Why We Should Keep Teaching* Dodge v. Ford Motor Co., 48 J. CORP. L. (forthcoming).

19 Mark J. Roe, Dodge v. Ford*: What Happened and Why?*, 74 VAND. L. REV. 1755, 1761 (2021); M. Todd Henderson, *The Story of* Dodge v. Ford Motor Company*: Everything*

to pay out a dividend to shareholders (and would-be competitors) the Dodge brothers, the Michigan Supreme Court ensured that "princes of industry" like Ford would be accountable to *someone*.[20]

There were also early efforts to impose disclosure requirements on large companies. Then-attorney Louis Brandeis's famous aphorism that "[s]unlight is . . . the best of disinfectants" dates to this period.[21] As Professor Ann Lipton has documented, many of these early proposals were meant to compel disclosures "intended for general consumption, including [by] consumers, employees, and regulators."[22] By compelling large companies to share information about their operations and profitability, reformers hoped to empower stakeholders to resist exploitation.[23] Although the ultimate regime focused more specifically on the needs of the investing public, the goal of helping other groups was an important factor in the drive toward its adoption.[24]

Bankruptcy law followed a somewhat different path. For its first century of existence, the United States was deeply conflicted about the very need for a uniform federal bankruptcy law.[25] Federal bankruptcy laws would be adopted in response to recessions as a kind of stabilization measure intended to address a crisis, then repealed shortly after.[26] The legislative situation stabilized with the adoption of the 1898 Bankruptcy Code.[27] And in the

Old Is New Again, *in* CORPORATE LAW STORIES 37, 63 (J. Mark Ramseyer, ed. 2009) ("Ford's testimony was too much for the trial court to bear. After all, if a firm as large and important to the American economy were permitted to pursue an overtly socialist strategy, the political impact and the effect on other firms could be enormous.").

20 This concern was a major driver of Professor Adolph Berle's initial support of shareholder primacy. *See* William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and* The Modern Corporation, 34 J. CORP. L. 99, 109, 120 (2008) ("Berle's article also evinces his deep distrust of managers and his belief that their power needed some form of significant, substantive constraint.").

21 *See* LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914). Brandeis was writing in praise of the Pujo Committee, a congressional effort to investigate the financial industry. *Id.*

22 Lipton, *supra* note 6, at 540.

23 *Id.* at 541–42.

24 *See id.* at 539–42.

25 *See* David A. Skeel, Jr., *The Genius of the 1898 Bankruptcy Act*, 15 BANKR. DEV. J. 321, 323–24 (1999) [hereinafter Skeel, *1898 Bankruptcy Act*]. The conflict largely mapped onto the struggle between the Federalists and the Jeffersonian Democrats about federal versus state power and commercial or financial interests versus agricultural interests. *See id.* at 324.

26 *Id.* at 323.

27 *Id.* at 336–38. Professor David Skeel attributed the longevity of the 1898 Act to its compromises, the contingencies of the electoral process, and the emergence of a bankruptcy bar that would advocate for its continuation. *Id.*

meantime, an elite bar of attorneys and financiers working through railroad failures developed the practices that would drive corporate reorganizations.[28]

3. The New Deal and postwar period.

The New Deal saw a comprehensive rethinking of the issues as the separate fields of business law were revised to meet the challenges of the Great Depression. Markets and traditional regulation had been discredited as the economy plunged into a deep crisis of collapsing employment and production, leading to a comprehensive rethinking of economic policy.[29] But ongoing uncertainty about the causes of and best cure for the depression forced policymakers to experiment across the different areas of business law.

Antitrust followed a particularly complicated path. At least initially, the policymakers behind the New Deal sought to coordinate the economy by promoting bigness.[30] The centerpiece of the early New Deal was the National Industrial Recovery Act of 1933.[31] The legislation essentially promoted cartels—both of big businesses and within labor—in the hope that a small number of leaders could meet with the government and come to sensible terms where uncoordinated market transactions had failed.[32]

This model of "corporatism"[33] eventually gave way to greater skepticism of business interests as prices increased and the economy lurched into another recession in 1937.[34] While increased prices could be a good thing in ending a deep recession,[35] achieving them by permitting businesses to exercise monopoly power

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28 *See id.* at 340; DAVID A. SKEEL, JR., DEBT'S DOMINION 48 (2001) [hereinafter SKEEL, DEBT'S DOMINION].

29 Bratton & Wachter, *supra* note 20, at 109–13.

30 *E.g.*, Spencer Weber Waller, *The Antitrust Legacy of Thurman Arnold*, 78 ST. JOHN'S L. REV. 569, 571 (2004) ("The first half of the New Deal focused on the National Industrial Recovery Act (NIRA), the Agricultural Adjustment Administration (AAA), and the promulgation of industry codes, which were the antithesis of the free market competition protected by the antitrust laws.").

31 48 Stat. 195 (1933), 15 U.S.C. §§ 701–712 (1934), *invalidated by* Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

32 Bratton & Wachter, *supra* note 20, at 114–16.

33 *Id.* at 111–13 (using the term "corporatism" "as a heuristic" for policies embraced by Adolf Berle, who advised President Franklin D. Roosevelt in the 1930s and for measures like the NIRA).

34 *See id.* at 117.

35 *Id.* at 115; *see* Tao Wu, *Understanding Deflation*, FED. RSRV. BANK OF S.F. (Apr. 2, 2004), https://perma.cc/XR37-AG83 ("When the economy is in a prolonged recession, a deflation can be even more costly than an inflation."); *see also* Gauti B. Eggertsson, *Was the*

was problematic: businesses exercise monopoly power by suppressing wages and production, instead of responding to increased prices by expanding investment and hiring.[36] Leaders also identified corporate titans as a threat to democracy. In a 1938 message to Congress, President Franklin D. Roosevelt criticized the emerging "concentration of private power" and linked it to the emergence of fascism abroad.[37] His appointed antitrust enforcer at the Department of Justice, Thurman Arnold, soon presided over a massive increase in activity in the department.[38]

President Roosevelt's 1938 address also specifically stressed that corporate law was not serving as the needed check on big business. Echoing the work of one of his leading advisors, Adolf Berle,[39] President Roosevelt urged that shareholders were unable to constrain big business because small individual shareholders were not empowered in dealing with management.[40] President Roosevelt decried problems of corporate law—concentrated ownership and "[c]lose financial control, through interlocking spheres of influence over channels of investment, and through the use of financial devices like holding companies and strategic minority interests"—as creating "close control of the business policies of enterprises which masquerade as independent units."[41] These cor-

New Deal Contractionary?, 102 AM. ECON. REV. 524, 525 (2012) (making the heterodox argument that "[t]he NIRA is helpful because it breaks the deflationary spiral, by helping firms and workers to prevent prices and wages from falling").

36 *Cf.* Franklin D. Roosevelt, *President's Message to Congress on Curbing Monopolies*, AM. PRESIDENCY PROJECT (Apr. 29, 1938), https://perma.cc/FZU9-MDWD ("Managed industrial prices mean fewer jobs.").

37 *Id.*; *see also* Daniel A. Crane, *Fascism and Monopoly*, 118 MICH. L. REV. 1315, 1321–22 (2020) ("Before American entry into the Second World War, American political leaders were already arguing that cartels and monopolies were propelling the rise of fascism."). These concerns would also help shape postwar views on antitrust policy. *See* TIM WU, THE CURSE OF BIGNESS, *supra* note 1, at 79–81.

38 Waller, *supra* note 30, at 581.

39 *See* ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 84–85 (1933).

40 Roosevelt, *supra* note 36:

> The danger of this centralization in a handful of huge corporations is not reduced or eliminated, as is sometimes urged, by the wide public distribution of their securities. The mere number of security-holders gives little clue to the size of their individual holdings or to their actual ability to have a voice in the management. In fact the concentration of stock ownership of corporations in the hands of a tiny minority of the population matches the concentration of corporate assets.

41 *Id.*

porate law arguments were thus based on concerns about maximizing production and employment and safeguarding democracy from concentrations of power.

The New Deal also saw the advent of modern securities regulation and the creation of the SEC. The legislation is generally thought to have an investor-focused mandate, with the goal of ensuring that traders received the high-quality information needed to make good investment decisions.[42] But the actual package of legislation had broader aims: for example, the SEC was charged with advancing the "public interest" as well as protecting investors under the Securities Exchange Act of 1934,[43] protecting utilities customers under the Public Utilities Holding Company Act of 1935,[44] and protecting creditors under the Trust Indenture Act of 1939.[45]

During the New Deal, bankruptcy law was also updated to give government officials (bankruptcy trustees and the SEC) significant power over reorganizations.[46] This power was sometimes used to advance the interests of the SEC's favored constituencies, frustrating senior creditors.[47] Instead of trusting that creditor

42 Yoon-Ho Alex Lee, *Beyond Agency Core Mission*, 68 ADMIN. L. REV. 551, 564–65 (2016).

43 Pub. L. No. 73-22, 48 Stat. 74 (codified at 15 U.S.C. § 78); *see id.* at §§ 7(a), 10(a)(4), 10(c), 12(b)(1), 14(a) (codified at 15 U.S.C. §§ 78g(a), 78j(a)(4), 78j(c), 78l(b)(1), 78n(a)); *see* Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Responsibility*, 112 HARV. L. REV. 1197, 1203–04, 1236 & n.202 (1999); Lee, *supra* note 42, at 565–66; Yoon-Ho Alex Lee, *The Efficiency Criterion for Securities Regulation: Investor Welfare or Total Surplus?*, 57 ARIZ. L. REV. 85, 93–95 (2015) [hereinafter Lee, *Efficiency Criterion*].

44 15 U.S.C. § 79 (2003), *repealed by* Energy Policy Act of 2005, 42 U.S.C. §§ 16451–16463. *See* Roberta S. Karmel, *Is the Public Utility Holding Company Act a Model for Breaking Up the Banks That Are Too-Big-to-Fail?*, 62 HASTINGS L.J. 821, 850–56 (2011) (describing the Public Utilities Holding Company Act (PUHCA)); *see also* Aneil Kovvali & Joshua C. Macey, *The Corporate Governance of Public Utilities*, 40 YALE J. ON REG. (forthcoming 2023) (manuscript at 44–45) [hereinafter Kovvali & Macey, *Public Utilities*] (describing some of PUHCA's implications for corporate governance).

45 15 U.S.C. §§ 77aaa–77bbbb. Among other things, the Trust Indenture Act prevents issuers from impairing debt instruments outside of bankruptcy, thus forcing more companies to work through distress in the bankruptcy process where the SEC can protect their interests. *See* SKEEL, DEBT'S DOMINION, *supra* note 28, at 121–22.

46 *Id.* at 119–23.

47 *See* ELIZABETH WARREN, CHAPTER 11: REORGANIZING AMERICAN BUSINESSES 8–9 (2008). This was not the only purpose or effect of the SEC's involvement in bankruptcy. The SEC would also intervene to protect the interests of dispersed small bondholders and equity holders who lacked adequate stakes to get involved and who faced a collective action problem in trying to organize. *See* Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47, 65–66 (1997) [hereinafter Posner, *Bankruptcy Reform*].

negotiations based on existing legal entitlements would produce optimal outcomes, the new package of regulation assumed that the government would need to intervene to protect the public.

The New Deal thus broadened the focus of business law fields, transforming them into tools for addressing the national economic crisis. On the whole, the fields came to rely somewhat less on private ordering by private actors and more on structures coordinated by regulators. Private actors continued to play an important role—for example, securities regulation mandated disclosure but generally left it to investors to decide whether a company was a worthwhile investment—but, to a greater extent than before, the government set the terms of engagement.[48] Because the government's broad goals included dispersing economic power and meeting the national economic emergency, the business law fields could not be kept focused on narrow aims.

4. Narrowing focus and the "end of history."

The various fields of business law underwent a significant realignment beginning in the 1970s, as each became focused more clearly on particular constituencies. There was plainly a common intellectual and political infrastructure behind the changes in the different fields, with much of it built at the University of Chicago. But the realignment of each field can also be understood as an attempt to bring a shared toolkit to bear on changes in the economy. Economic stagflation, in which the economy failed to grow and simultaneously suffered from an increase in price levels, had seriously undermined the government's credibility as a coordinator of economic activity while weakening its standard policy tools.[49] It also encouraged an emphasis on efficiency because wringing additional production out of existing economic resources would expand the economy and drive price levels down. Across the 1970s and 1980s, financial market innovation also served to reinforce and institutionalize many of these points of emphasis.

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[48] *See* Leo E. Strine, Jr., *Development on a Cracked Foundation: How the Incomplete Nature of New Deal Labor Reform Presaged its Ultimate Decline*, 57 HARV. J. ON LEGIS. 67, 73 (2020).

[49] For example, the standard policy prescription for high unemployment is low interest rates, while the standard policy prescription for high inflation is high interest rates. Under the leadership of Chairman Paul Volcker, the Federal Reserve chose to prioritize taming inflation, resulting in a profound recession. *See* Michael Bryan, *The Great Inflation*, FED. RSRV. HIST. (Nov. 22, 2013), https://perma.cc/RTJ2-EM3S.

Antitrust was an early battleground. University of Chicago Law School Professors Aaron Director and Edward Levi challenged the populist thinking that had shaped antitrust law and sought to focus it instead on consumer welfare and economic efficiency.[50] This general objective was fleshed out using the simplified framework of price theory.[51] The ideas were converted into a legal program by Professors Robert Bork[52] and Richard Posner,[53] who were largely successful in pressing it; both the Supreme Court[54] and the Department of Justice[55] accepted their framing of the objectives of antitrust. As a result, antitrust law came to focus on short-term impacts on consumer prices: if a practice tended to decrease consumer prices in the short run, it would likely withstand antitrust scrutiny.[56]

The effort to shift antitrust law's goal away from government constraint on the power of big business was likely aided by the experience of uncontrolled inflation, which encouraged policymakers to focus on the goal of controlling consumer prices.[57] It

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50 *See* Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378, 385–87 (2020) [hereinafter Paul, *Antitrust as Allocator*]; Wu, *supra* note 1, at 84–86.

51 *See, e.g.*, Christopher S. Yoo, *The Post-Chicago Antitrust Revolution: A Retrospective*, 168 U. PA. L. REV. 2145, 2153–56 (2020); Herbert Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 168 U. PA. L. REV. 1843, 1846–50 (2020) (discussing some of the simplifying assumptions of the Chicago School and its rejection of various advances in economic thought).

52 *See generally* ROBERT H. BORK, THE ANTITRUST PARADOX (1978) [hereinafter BORK, THE ANTITRUST PARADOX].

53 *See generally* RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976). There are some important distinctions between Bork's and Posner's thoughts. *See* Hovenkamp & Morton, *supra* note 51, at 1857–60.

54 *See* Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (observing that floor debates "suggest that Congress designed the Sherman Act as a 'consumer welfare prescription'" (quoting BORK, THE ANTITRUST PARADOX, *supra* note 52, at 66)); United States v. U.S. Gypsum Co., 438 U.S. 422, 441 n.16 (1978) (arguing that the determination of whether a practice is per se illegal should turn on whether it can "increase economic efficiency and render markets more, rather than less, competitive").

55 Yoo, *supra* note 51, at 2155–56 (discussing the 1984 revisions to the Department of Justice Merger Guidelines).

56 *See* Hovenkamp & Morton, *supra* note 51, at 1877–78; Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 219 (1993) (suggesting that a "predatory pricing" scheme in which firms offer low prices in the short term, drive out competitors, then raise prices in the long term would be "economically irrational" (quoting Liggett Grp., Inc. v. Williamson Tobacco Corp., 964 F.2d 335, 342 (4th Cir. 1992))).

57 *See, e.g.*, U.S. DEP'T OF JUST., REPORT ON THE ROBINSON-PATMAN ACT 149, 150–53 (1977) (suggesting that the Robinson-Patman Act was part of a New Deal package of reforms intended to prop up price levels and that its goals and assumptions were out of step with "the current national debate on how to reduce the rate of inflation and to stabilize the cost of living"). Concerns about inflation did not always carry the day at the Supreme Court, though the Court was plainly aware of them. *Compare* Pfizer, Inc. v. Gov't

may also have been aided by developments in financial markets. Investors had become increasingly skeptical of conglomerates and the general business strategy of simply getting bigger for the sake of bigness.[58] Conglomerates had come to be seen as unmanageable and unfocused, and the managers who proposed creating them were seen as attempting to entrench themselves.[59] The rise of shareholder activists like Carl Icahn meant that shareholders could channel their skepticism into action by vetoing proposed mergers and insisting on divestitures.[60] It seemed that financial markets were ready to police firms, ensuring that they would grow only to the extent that growth promoted efficiency and not for the purpose of promoting managers' power.[61] If financial markets checked the size of firms and disciplined the power of managers, there would be less need for antitrust law to do so.

Corporate and securities law experienced a similar revolution. Aaron Director's brother-in-law, University of Chicago economics Professor Milton Friedman, published a famous essay in 1970 asserting that corporations had only one obligation: to maximize profits.[62] Among the specific targets of his ire were calls for businesspeople "to refrain from increasing the price of the product in order to contribute to the social objective of preventing inflation, even though a price increase would be in the best interests

of India, 434 U.S. 308, 315 n.14 (1978) (noting that, if foreign plaintiffs could not bring antitrust suits for treble damages in U.S. courts, it would encourage illegal conspiracies, "raising worldwide prices and thus contributing to American inflation"), *with* Am. Fed. of Musicians of the U.S. & Can. v. Carroll, 391 U.S. 99, 119 (1968) (White, J., dissenting) ("[P]rice competition, a significant aid to satisfactory resource allocation and a deterrent to inflation, would be substantially diminished if industry-wide unions were free to dictate uniform prices through agreements with employers.").

58 *See* Gerald F. Davis, Kristina A. Diekmann & Catherine H. Tinsley, *The Decline and Fall of the Conglomerate Firm in the 1980s: The Deinstitutionalization of an Organizational Form*, 59 AM. SOCIO. REV. 547, 563 (1994); John C. Coffee, Jr., *Shareholders Versus Managers: The Strain in the Corporate Web*, 85 MICH. L. REV. 1, 34–35 (1986).

59 *See* Davis, Diekmann & Tinsley, *supra* note 58, at 563.

60 *See* Coffee, *supra* note 58, at 34; James Sterngold, *The Pawns Differ; Icahn Still Winning*, N.Y. TIMES (Feb. 6, 1985), https://perma.cc/6EW6-THBA. Of course, activists were not ideologically opposed to bigness. Carl Icahn used his stake in Tappan to veto an attempt by Tappan's weak managers to acquire another firm but proceeded to force a sale of the company to Electrolux. *Id.*; *see also* ICAHN: THE RESTLESS BILLIONAIRE (HBO 2022).

61 In essence, shareholders appeared to be ready to fulfill the purpose that Adolf Berle had once assigned them, of checking the power of the "princes of industry." Bratton & Wachter, *supra* note 20, at 107–08.

62 Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970), https://perma.cc/U6EM-2U5Z.

of the corporation."[63] A more complete economic framework for these claims was not long in coming. Economists like Professors Eugene Fama, Michael Jensen, and William Meckling suggested that the main problem of corporate law and governance was an agency problem: shareholders were the principals, managers were the agents, and the machinery of corporate law and governance existed to ensure that the agents would remain faithful to their principals.[64] Professors Frank Easterbrook and Daniel Fischel took up this idea, situating it within a contractarian conception of the corporation.[65] By adding the claim that the parties had bargained against the background expectation that managers should seek to maximize profits—a claim that they purported to derive from economic logic—these thinkers put the essential intellectual foundation of shareholder primacy in place.[66]

The core of Easterbrook and Fischel's idea was the claim that shareholders are the residual claimants of most corporations.[67] Shareholders are paid what remains after the corporation has complied with its regulatory obligations to the government and met its contractual obligations to creditors and workers. As a result, they internalize the consequences of corporate decisions. If they are given control over the corporation, they will push it to

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63 *Id.*; *see also* Raghuram Rajan, *50 Years Later, It's Time to Reassess*, *in* MILTON FRIEDMAN 50 YEARS LATER 19 (2020) ("Friedman was reacting to the Johnson administration exhorting corporations to stop raising prices in an attempt to combat inflation. Johnson thought that this was a national duty of corporations, and Friedman was doubly—or triply—incensed by this.").

64 *See, e.g.*, Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301, 312–15 (1983); Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288, 290–95 (1980); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 311 n.14, 312–13, 357 (1976).

65 *See* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 14 (1991).

66 *See id.* at 36:

> For most firms the expectation is that the residual risk bearers have contracted for a promise to maximize long-run profits of the firm, which in turn maximizes the value of their stock. . . . We suggest later on that this allocation of rights among the holders of fixed and variable claims serves an economic function.

67 *Id.* at 67–68:

> [S]hareholders are the residual claimants to the firm's income. Creditors have fixed claims, and employees generally negotiate compensation schedules in advance of performance. The gains and losses from abnormally good or bad performance are the lot of the shareholders, whose claims stand last in line. . . . They therefore have the right incentives to exercise discretion.

See also Eugene F. Fama & Michael C. Jensen, *Agency Problems and Residual Claims*, 26 J.L. & ECON. 327, 328 (1983) [hereinafter Fama & Jensen, *Agency Problems*].

make the decisions that create the most economic value.[68] At the same time, shareholders are also uniquely vulnerable to corporate misconduct. Because they are unable to specify in advance what managers should do to advance their interests, they cannot bargain for specific contractual protections in the way that creditors and workers do. And shareholders are relatively dispersed, lacking a large and concentrated stake in the enterprise that could motivate them to work together to advance their interests.[69] Because of these unique attributes—the alignment of their interests with value creation and their special vulnerability—all of the parties to the corporate contract ought to bargain to put shareholders in control. Stakeholders like workers and creditors were expected to surrender control to shareholders because the step would maximize efficiency. By maximizing the total value of the enterprise, the stakeholders would then maximize the amount they could claim by demanding higher wages or interest rates. The shareholder primacy theorists sought to ensure that corporate law would meet that expectation.[70]

While the intellectual infrastructure was important, it was financial market innovation that made this understanding a reality. The rise of new debt markets made it possible for raiders and acquirers to borrow enough money to finance purchases, then run the purchased companies with the single goal of maximizing their immediate returns.[71] New takeover defenses like the poison pill enabled corporate officers and directors to fend off these acquisitions.[72] Deciding whether the tactics were legitimate forced courts to choose between a shareholder-focused contractual conception of the corporation (under which defenses could be used only to drive up returns to shareholders) and a stakeholder-focused entity conception of the corporation (under which defenses could also be used to protect groups like workers and

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68 Fama & Jensen, *Agency Problems*, *supra* note 67, at 330–31; *see also* EASTERBROOK & FISCHEL, *supra* note 65, at 67–68.

69 *See* EASTERBROOK & FISCHEL, *supra* note 65, at 66–67.

70 Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2574 (2021).

71 *See* William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 274 (1992); John Armour, Jack B. Jacobs & Curtis J. Milhaupt, *The Evolution of Hostile Takeover Regimes in Developed and Emerging Markets: An Analytical Framework*, 52 HARV. INT'L L.J. 219, 240–41 (2011).

72 Allen, *supra* note 71, at 276; Armour et al., *supra* note 71, at 246.

creditors).[73] Delaware courts selected the former approach, committing directors and officers to focus exclusively on shareholder returns.[74] In 2001, Professors Henry Hansmann and Reinier Kraakman famously declared the debate over, with corporate law having reached its final state as a body of shareholder-serving rules.[75]

The law of corporate reorganizations also underwent significant changes during this period. Congress substantially updated the Bankruptcy Code in 1978. It may be an overstatement to suggest that the revision was part of a coordinated policy response to the economic troubles of the period. But it was motivated in part by an increase in bankruptcy filings,[76] and various features of the Code reflected the diagnoses and prescriptions that had motivated reforms in other areas of business law. For example, Congress declined to include special procedural protections for public-company bankruptcies and removed the SEC from its role as an advocate for unorganized groups.[77] Congress did not abandon its overall goal of cushioning the impact of a firm's financial failure on its stakeholders.[78] It simply embraced the ideology that

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73 Allen, *supra* note 71, at 264–66.

74 *See* eBay Domestic Holdings, Inc. v. Craig Newmark, 16 A.3d 1, 34 (Del Ch. 2010) ("Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders."); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 176 (Del. 1986) ("[W]hile concern for various corporate 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."). At the same time, Delaware courts have given directors and officers ample discretion in deciding how to pursue that goal, even in the context of an attempted acquisition. Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 124–25 (Del. Ch. 2011) (holding that a corporate board could defend against a bid on the ground that it deemed the price inadequate). That discretion is likely broad enough to permit directors and officers to take actions that benefit nonshareholder constituencies without fear of legal liability. *See* William Savitt & Aneil Kovvali, *On the Promise of Stakeholder Governance: A Response to Bebchuk & Tallarita*, 106 CORNELL L. REV. 1881, 1888–89 (2020).

75 *See* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 454 (2001). Courts also sought to drive corporate law issues out of securities regulation. James J. Park, *Reassessing the Distinction Between Corporate and Securities Law*, 64 UCLA L. Rev. 116, 127–28 (2017).

76 Posner, *Bankruptcy Reform*, *supra* note 47, at 68.

77 *Id.* at 116–18. The SEC does have new rulemaking powers that could be used to facilitate restructurings outside of bankruptcy. *See* Mark J. Roe, *The Trust Indenture Act of 1939 in Congress and the Courts in 2016: Bringing the SEC to the Table*, 129 HARV. L. REV. F. 360, 371–73 (2016).

78 Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 790–93 (1987) [hereinafter Warren, *Bankruptcy Policy*]; Jonathan C. Lipson, *The Shadow Bankruptcy System*, 89 B.U. L. REV. 1609, 1613–14 (2009) (noting that the Code's "overarching policy goal is to

market participants were far-sighted and sophisticated enough to negotiate deals that maximized value and generated fair returns for all concerned, without the need for extensive court adjudications or government intervention.[79] This ideology led naturally to an understanding that bankruptcy should focus on creditors' interests and deals.

This understanding was controversial. A group of "traditionalists" led by scholars like then-Professor Elizabeth Warren suggested that bankruptcy was responsive to a number of values and concerns, and that redistribution of value between and away from creditors was permissible both through specific Bankruptcy Code provisions and through the more general discretion of bankruptcy judges.[80] But they were largely overtaken by "proceduralists," led by Professors Thomas Jackson and Douglas Baird, who suggested that bankruptcy merely provided procedures that vindicated a "creditors' bargain," in which substantive entitlements from outside bankruptcy would be respected.[81] Developments in financial markets largely solidified their victory, as bankruptcy essentially became a forum for wrangling and dealmaking between private financial investors.[82] Deals struck between sophisticated private financial investors would obviously not be designed with the goal of creating benefits for environmental or social stakeholders. Instead, they would focus exclusively on the interests of financial creditors.

preserve going concerns and jobs, thus maximizing recoveries and preventing the collapse of otherwise viable businesses").

79 *Cf.* Lipson, *supra* note 78, at 1618 (suggesting that various creditors may have a short time horizon and feel "pressure to cash out sooner, even if this destroys long-term value").

80 Warren, *Bankruptcy Policy*, *supra* note 78, at 811–13 (offering a "dirty, complex, elastic, interconnected view of bankruptcy" that includes attention to various distributional values found in the Code).

81 Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857, 860 (1982) (arguing that the bankruptcy system should attempt to replicate the bargain that "one would expect the creditors to form among themselves were they able to negotiate such an agreement from an *ex ante* position" (emphasis in original)); *see also* Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815, 822–24 (1987) [hereinafter Baird, *Loss Distribution*]; THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 16–17 (1986).

82 *See, e.g.*, Douglas G. Baird, *The New Face of Chapter 11*, 12 AM. BANKR. INST. L. REV. 69, 75 (2004) (concluding that the Bankruptcy Code "has morphed into a branch of the law governing mergers and acquisitions"); *cf.* Anthony J. Casey, *Chapter 11's Renegotiation Framework and the Purpose of Corporate Bankruptcy*, 120 COLUM. L. REV. 1709, 1711 (2020) (arguing that the purpose of bankruptcy is to facilitate "a structured renegotiation that allows parties to preserve value in the face of hold-up threats").

As a result of these developments, antitrust, bankruptcy, corporate, and securities law crystalized around objectives focused on particular constituencies: consumer welfare for antitrust, financial creditors for bankruptcy, shareholders for corporate law, and investors for securities regulation. This single-constituency view became the dominant, consensus view in each field.

B. Cracks in the Consensus

Even before the outbreak of COVID-19, each single-constituency consensus came under sustained criticism, as business law failed to deliver broad-based prosperity. Though there were several trends and crises at play, a central theme was that shareholders had become increasingly unified, powerful, and well-capitalized.[83] To the extent that they were successful in capturing value for themselves, it was largely at the expense of other constituencies like workers, consumers, and creditors.[84] And when their business strategies failed, they were often able to avoid the devastation visited upon other groups.[85] Shareholder power thus called the shareholder primacy paradigm of corporate law into question and put pressure on the understandings that had driven antitrust, bankruptcy, and securities law.

At companies like Amazon and Uber, shareholders appeared to be willing to accept extraordinary sustained losses as the companies grew in size. The only rational explanation for their patience was a belief that the companies would eventually kill off rivals and make shareholders whole by charging consumers monopoly prices—a strategy largely inconsistent with the premises of the Chicago paradigm for antitrust.[86] The focus on consumer

83 The central drivers of this change were the centralization of ownership in the hands of index funds and a rise in an ecosystem of players, including shareholder activists and proxy advisory services, that ensured that shares would be voted in accordance with a unified shareholder-friendly agenda. *See* Lund & Pollman, *supra* note 70, at 2575–78.

84 *See, e.g.*, John Armour & Jeffrey N. Gordon, *Systemic Harms and Shareholder Value*, 6 J. LEGAL ANALYSIS 35, 40–44 (2014) (describing how the banking industry's pursuit of "high-risk, high-return strategies" driven by the goal of shareholder value maximization "ma[d]e both lenders and (would-be) borrowers worse off").

85 *See, e.g.*, Joshua Macey & Jackson Salovaara, *Bankruptcy as Bailout: Coal Company Insolvency and the Erosion of Federal Law*, 71 STAN. L. REV. 879, 906–35 (2019) (detailing how coal companies have avoided the costs arising from shareholder-value-driven decisions gone wrong "by strategically using bankruptcy to evade federal regulatory liabilities").

86 *Cf.* James J. Park, *From Managers to Markets: Valuation and Shareholder Wealth Maximization*, 47 J. CORP. L. 435, 440 (2022) ("Investors give companies with significant market power more leeway in demonstrating immediate profitability because they are

welfare, as measured by short-term prices, also became an increasingly bad fit for technology behemoths like Facebook, Google, and Twitter. The companies offered free products, but the data and attention they captured accorded them enormous power and profits.[87] The social implications of this concentration of power became clearer as the platforms became vectors for the spread of misinformation, propaganda, and hatred in connection with Brexit,[88] the 2016 U.S. presidential election,[89] and the QAnon[90] and antivaccination movements.[91]

Though it had troubling social implications, support for technology giants was at least a largely profitable bet for shareholders. By contrast, accounting scandals and the global financial crisis of 2008 were disasters for both society and shareholders. The developments put serious pressure on the idea that shareholders

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confident in their long-term prospects."); *id.* at 482 ("It is now common for companies with significant losses to go public at high valuations because shareholders believe in their long-term strategy. The stock market has given companies like Amazon years to implement long-term strategies to achieve market power without maximizing profits for many years.").

87 Of course, these companies sell space to advertisers and collect enormous fees while doing so. But focusing on their offerings to advertisers (a context in which they do face competition, including from each other) would seem to understate their power. That said, this issue does not necessarily require abandoning antitrust's focus on consumer welfare. There are other, more dynamic forms of consumer harm that can occur even when products are offered for free. *See* Fed. Trade Comm'n v. Facebook, 551 F. Supp. 3d 34, 54–55, 65 (D.D.C. Jan. 11, 2022) (finding that the FTC had sufficiently alleged harms "to the competitive process and to consumers" from Facebook's acquisitions, including "a decrease in service quality, lack of innovation, decreased privacy and data protection, excessive advertisements and decreased choice and control with regard to ads, and a general lack of consumer choice").

88 David D. Kirkpatrick, *Signs of Russian Meddling in Brexit Referendum*, N.Y. TIMES (Nov. 15, 2017), https://perma.cc/E6ZQ-67Q7 ("More than 150,000 Russian-language Twitter accounts posted tens of thousands of messages in English urging Britain to leave the European Union in the days before last year's referendum on the issue.").

89 Mike Isaac & Daisuke Wakabayashi, *Russian Influence Reached 126 Million Through Facebook Alone*, N.Y. TIMES (Oct. 30, 2017), https://www.nytimes.com/2017/10/30/technology/facebook-google-russia.html.

90 Craig Timberg & Elizabeth Dwoskin, *As Qanon Grew, Facebook and Twitter Missed Years of Warning Signs About the Conspiracy Theory's Violent Nature*, WASH. POST (Oct. 3, 2020), https://perma.cc/L3YS-JWD3 ("Qanon adherents . . . us[ed] the power of [ ] mainstream social media platforms to grow the movement into what many researchers consider the world's largest and most virulent online conspiracy theory.").

91 Sam Schechner, Jeff Horwitz & Emily Glazer, *How Facebook Hobbled Mark Zuckerberg's Bid to Get America Vaccinated*, WALL ST. J. (Sept. 17, 2021), https://perma.cc/A39T-2DB3 ("[I]nitial testing concluded that roughly 41% of comments on English-language vaccine-related posts risked discouraging vaccinations.").

were cognizant of the full range of consequences of corporate behavior when making capital allocation decisions.[92] Shareholder influence had supercharged incentives for executives, encouraging them to focus exclusively on driving up share prices. Because investors were unwilling or unable to discern problems and react accordingly, executives proceeded to drive up prices by playing accounting games and by piling on risk at socially dangerous levels. When the accounting frauds at Enron and WorldCom came to light, they arguably contributed to a significant recession.[93] When the risks run by major financial institutions materialized in 2008, the nation was plunged into a global financial crisis and a prolonged period of economic stagnation, in which harms were visited not only on shareholders but also on workers and would-be homeowners.[94]

The global financial crisis also clearly revealed the limits of the bankruptcy process. Regulators were forced to take extraordinary steps to deal with the risks generated by financial institutions, and Congress responded with a legislative carve-out from the ordinary process.[95] The government also subverted normal bankruptcy expectations within the automotive industry, injecting large amounts of liquidity in order to secure better outcomes for workers and parts suppliers.[96] Even outside of these extraordinary circumstances, the bankruptcy process developed new issues as unified and empowered shareholders demonstrated an

92 *Cf.* Armour & Gordon, *supra* note 84, at 44; Yair J. Listokin & Inho Andrew Mun, *Rethinking Corporate Law During a Financial Crisis*, 8 HARV. BUS. L. REV. 349, 362–66 (2018); Robert J. Rhee, *Fiduciary Exemption for Public Necessity: Shareholder Profit, Public Good, and the Hobson's Choice During a National Crisis*, 17 GEO. MASON L. REV. 661, 727 (2010).

93 *See* Carol Graham, Robert E. Litan & Sandip Sukhtankar, *Cooking the Books: The Cost to the Economy*, BROOKINGS INST. (Aug. 1, 2002), https://perma.cc/Z3KV-B9K5 ("While Enron in isolation had a limited effect on the stock market, the combined effect of the subsequent scandals has driven the market into a downward tailspin.").

94 To some extent, securities regulation did evolve during this period as Congress adopted measures intended to force companies to disclose socially useful information. *See* Steven A. Bank & George S. Georgiev, *Securities Disclosure as Soundbite: The Case of CEO Pay Ratios*, 60 B.C. L. REV. 1123, 1136–41 (2019) (describing the adoption of rules requiring disclosure of the ratio between CEO pay and median employee pay). But consequential disclosure proposals designed to help stakeholders have either been rejected by policymakers or by the courts. *See, e.g.*, Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 556 (D.C. Cir. 2015) (striking down rules on the disclosure of conflict minerals).

95 DAVID A. SKEEL, JR., THE NEW FINANCIAL DEAL: UNDERSTANDING THE DODD-FRANK ACT AND ITS (UNINTENDED) CONSEQUENCES 52–54 (2011).

96 Douglas G. Baird, *Lessons from the Automobile Reorganizations*, 4 J. LEGAL ANALYSIS 271, 273–74 (2012).

increased capacity and willingness to avoid losses by forcing them onto creditors.[97]

Throughout this period, the shareholder primacy paradigm in corporate law was a focus of continuous attacks. One of the deepest theoretical challenges came from Professors Margaret Blair and Lynn Stout, who suggested that the corporate structure was intended to solve the problem of creating good incentives when production occurs in teams.[98] On this account, corporate leaders should seek to mediate the claims of different corporate constituencies, providing a fair rate of return to everyone who had invested in the firm's success, instead of simply channeling the maximum possible value to financial claimants like shareholders and creditors.[99] Business developments, including increasingly concentrated shareholder power, also put pressure on the idea that shareholders were a uniquely vulnerable group that had to be protected by law.[100] As rising shareholder power contributed to the strength of new behemoths, encouraged risky corporate behavior, and prompted devastating crises, a serious debate about the structure of business law was underway.

C. A Constitutional Moment for Economic Regulation

The COVID-19 crisis and associated dislocations kicked these issues into higher gear by offering vivid illustrations of the limitations of single-constituency regimes. It seems likely that this is a kind of "constitutional moment" in which deep premises of economic regulation are being revisited and debated by the public at large.[101]

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97 *See* Jared A. Ellias & Robert J. Stark, *Bankruptcy Hardball*, 108 CALIF. L. REV. 745, 753–57 (2020). *See also generally* Vincent S.J. Buccola, *Sponsor Control: A New Paradigm for Corporate Reorganization*, 90 U. CHI. L. REV. 1 (2023)

98 Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247. 276–87 (1999).

99 *Id.*

100 *See* Kovvali & Strine, *supra* note 3, at 37–39.

101 *Cf.* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 6–7, 307 (1991) (describing a theory of "constitutional moments" in which society engages in unusually intense constitutional participation and deliberation). There are some parallels within the history of economic regulation: The 1912 presidential election was a referendum on robust economic regulation within the progressive era, the New Deal inaugurated a new regulatory regime, and the 1970s kicked off a new period of deregulation. The corporate scandals of the early twenty-first century also prompted some introspection, though the general trend was not disturbed. *See* David A. Westbrook, *Corporation Law After Enron: The Possibility of a Capitalist Reimagination*, 92 GEO. L.J. 61, 97–105 (2003) (using the Enron debacle as a jumping off point for reenvisioning corporate law).

Within corporate law, the experience of the pandemic revealed a startling disconnect between the fortunes of shareholders and other constituencies. Stock prices reached new record highs at various points in the pandemic, even as hundreds of thousands of people died and tens of millions were unable to work.[102] Corporate law's focus on shareholder interests seemed increasingly misplaced given the divergence between shareholder goals and social needs.

The experience also revealed that many corporate leaders had built systems that lacked resilience and reliability. After decades of relentlessly optimizing for efficiency within a particular operating environment, many businesses in important fields were unable to function safely when that environment changed.[103] Many of these problems were exacerbated by increased concentration within important industries. Because antitrust law has largely failed to check industry consolidation, relatively few companies are responsible for supplying products that Americans demand, like meat.[104] To a startling extent, Americans faced empty shelves at supermarkets.[105] Americans also faced the results of labor monopsony.[106] Workers' productivity increased in real terms, while real wage growth remained low.[107] Antitrust law's relentless focus on consumer welfare, as measured by short term price impacts, seemed to have left the U.S. economy brittle and unfair.

Securities markets also lost credibility as Americans observed the disconnect between soaring financial market prices

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102 Kovvali & Strine, *supra* note 3, at 13–14.

103 *See* Aneil Kovvali, *Essential Businesses and Shareholder Value*, 2021 U. CHI. LEGAL F. 191, 198–201 [hereinafter Kovvali, *Essential Businesses*].

104 *See id.*; *cf.* Jonathan Kanter, *Assistant Attorney General Jonathan Kanter Delivers Remarks at the New York City Bar Association's Milton Handler Lecture*, U.S. DEP'T OF JUST. (May 18, 2022), https://perma.cc/6DVQ-XAK8 ("Our markets are suffering from a lack of resiliency. Among many other things, the consequences of the pandemic have revealed supply chain fragility. . . . These and other events demonstrate why competition is so important. Competitive markets create resiliency. Competitive markets are less susceptible to central points of failure.").

105 Peter S. Goodman & Niraj Chokshi, *How the World Ran Out of Everything*, N.Y. TIMES (June 1, 2021), https://www.nytimes.com/2021/06/01/business/coronavirus-global-shortages.html.

106 For discussions of the impact of labor monopsony, see ERIC A. POSNER, HOW ANTITRUST FAILED WORKERS 11–29 (2021) [hereinafter POSNER, ANTITRUST FAILED]; Ioana Marinescu & Herbert J. Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L.J. 1031, 1037–47 (2019); Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 549–73 (2018).

107 *See* Harry J. Holzer, *Tight Labor Markets and Wage Growth in the Current Economy*, BROOKINGS INST. (Apr. 13, 2022), https://perma.cc/3TKE-S9WU.

and deteriorating human and economic conditions.[108] Many responded to the air of unreality by pursuing get-rich-quick schemes. The behavior was most pronounced at the edges of securities regulation, where cryptocurrencies skyrocketed.[109] But the "meme stock" fad and the gamification of investment also led to surprising behavior in ordinary stocks, such as GameStop and AMC.[110] With investors increasingly focused on activities with little real economic value, securities regulation's focus on investor needs and preferences seemed unequal to the task of ensuring that securities markets fulfilled their role of allocating capital to productive uses.

While the bankruptcy system was not challenged by a wave of business failures as some had expected,[111] it did face a series of simultaneous threats to its legitimacy. In *In re Purdue Pharma, Ltd. Partnership*,[112] a bankruptcy court had been ready to shield the Sackler family from the threat of liability, even though the Sacklers themselves were not bankrupt and had profited from the spread of opioid addiction.[113] Soon after, Johnson & Johnson engaged in a series of unseemly maneuvers to gain access to the bankruptcy system and use it to resolve spiraling talc liabilities.[114] Though unsuccessful, the National Rifle Association sought to use the bankruptcy process to evade regulatory accountability.[115] Although companies had used the bankruptcy process to shield themselves from accountability before,[116] the sheer number of

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108 *See* Kovvali & Strine, *supra* note 3, at 14.

109 *See generally* James Fallows Tierney, *Investment Games*, 72 DUKE L.J. 353 (2022).

110 *See id. See generally* Jill E. Fisch, *GameStop and the Reemergence of the Retail Investor*, 102 B.U. L. REV. 1799 (2022).

111 *See, e.g.*, Benjamin Iverson, Jared A. Ellias & Mark Roe, *Estimating the Need for Additional Bankruptcy Judges in Light of the COVID-19 Pandemic*, 11 HARV. BUS. L. REV. 1, 17–18 (2020).

112 635 B.R. 26 (S.D.N.Y. 2021).

113 *See id.* at 108–09, 115 (holding that the Bankruptcy Code does not permit nonconsensual, nonderivative claims against nondebtors).

114 *See* Jared A. Ellias, *Upending the Traditional Chapter 11 Bargain*, HARV. L. SCH. BANKR. ROUNDTABLE (June 21, 2022), https://perma.cc/K94Z-UJPV.

115 *See In re* Nat'l Rifle Ass'n of Am., 628 B.R. 262, 283 (N.D. Tex. 2021) (holding that the National Rifle Association had "not filed [for bankruptcy] in good faith").

116 Macey & Salovaara, *supra* note 85, at 906–35 (2019) (arguing that coal companies had used the bankruptcy process to evade federal law); Vincent S.J. Buccola & Joshua C. Macey, *Claim Durability and Bankruptcy's Tort Problem*, 38 YALE J. ON REG. 766, 773–78, 783–84 (2021) (arguing that the bankruptcy process systematically disadvantages involuntary creditors like tort victims and proposing reforms).

high-profile cases was remarkable. This is not to say that the results were indefensible.[117] But bankruptcy's emphasis on serving the interests of financial creditors seemed to have reached an absurd end point.

The different fields of business law—antitrust, bankruptcy, corporate, and securities law—each seem to be facing a crisis of legitimacy, driven in large part by their focus on narrow single-constituency objectives. As a result, the debates about those criteria are now fully joined, and newly consequential. But it remains to be seen whether the current debates will lead to coordinated action across the shared policy toolkit.

II. Current Debates

This Part seeks to describe current debates in antitrust, bankruptcy, corporate, and securities law with the goal of illuminating their shared structure and concepts. Revealing these common features can help reveal the potential for useful cross-pollination among the fields. Part II.A explains the structure of the debates, showing that they unfold within a similar legal context. Parts II.B and II.C discuss the stakeholderist and orthodox arguments in each space.

A. Structure of the Debates

The different fields of business law play out across different institutional contexts. Antitrust, bankruptcy, and securities regulation are largely developed by public officials: federal judges give form to the broad concepts of antitrust[118] and bankruptcy law,[119] while administrative agencies subject to judicial oversight issue securities regulations.[120] By contrast, corporate law is normally seen as a domain of "private ordering," in which enabling

117 For example, there are important justifications for the handling of the *Purdue* case. All of Purdue's assets were to be channeled to a public benefit corporation. It is also unclear whether any claims against the Sacklers have real economic value, or whether the claims' value exceeds the amount that the Sacklers are set to contribute to the bankruptcy estate. Unless there is additional value to be collected, the bankruptcy system is arguably not well-equipped to advance the noneconomic objectives of further litigation against the Sacklers. But this is precisely the point: bankruptcy law's relentless focus on delivering economic value to creditors has caused it to overlook other important values, undermining its public legitimacy.

118 *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007) ("From the beginning the Court has treated the Sherman Act as a common-law statute.").

119 *See* Buccola & Macey, *supra* note 116, at 789 & n.101.

120 *See* Williams, *supra* note 43, at 1235–36.

statutes permit private parties to contract for the arrangements that they prefer.[121]

But the difference should not be overstated. Private decisions profoundly affect the application of antitrust, bankruptcy, and securities law. Antitrust essentially takes the (privately constructed) business firm as its unit of analysis and permits coordination within firms even as it suppresses coordination between firms.[122] Bankruptcy reflects entitlements created by private ordering[123] and often reflects governance arrangements set up prior to the bankruptcy.[124] Firms can opt out of securities regulation by remaining private[125] and can control whether items are material for disclosure by choosing to grow or shrink.[126] By contrast, there are limits to private ordering even in corporate law. For example, for-profit firms may not be able to opt out of director obligations intended to manage risk.[127] While the difference does affect the strength of various arguments for and against stakeholderism, it is a difference in degree rather than kind.

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121 *See* William W. Bratton & Simone M. Sepe, *Corporate Law and the Myth of Efficient Market Control*, 105 CORNELL L. REV. 675, 686 & n.33 (2020).

122 *See* Paul, *Antitrust as Allocator*, *supra* note 50, at 382–409 (describing the "firm exemption" to antitrust). *See generally* Sanjukta Paul, *Fissuring and the Firm Exemption*, 82 L. & CONTEMP. PROBS. 65 (2019).

123 *See* Baird, *Loss Distribution*, *supra* note 81, at 821–22 (summarizing the proceduralist view that outcomes in bankruptcy should reflect entitlements set outside of bankruptcy).

124 For example, the existing management of a company often continues to run the company in bankruptcy, albeit under supervision. *See* Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 978 (2017) (explaining that "the debtor's existing management team" is often installed to run the company in bankruptcy and "perform certain bankruptcy-related functions"). The preservation of preexisting governance structures in bankruptcy can have troubling implications. *See generally, e.g.*, Jared A. Ellias, Ehud Kamar & Kobi Kastiel, *The Rise of Bankruptcy Directors*, 95 S. CALIF. L. REV. (forthcoming) (describing the trend in which distressed companies appoint new directors to a board for the purpose of controlling decisions in bankruptcy).

125 *See* George S. Georgiev, *The Breakdown of the Public-Private Divide in Securities Law: Causes, Consequences, and Reforms*, 18 N.Y.U. J.L. & BUS. 221, 236, 277–78 (2021) [hereinafter Georgiev, *The Breakdown*] (noting that companies can avoid public-company status, often while attracting public capital).

126 *See* George S. Georgiev, *Too Big to Disclose: Firm Size and Materiality Blindspots in Securities Regulation*, 64 UCLA L. REV. 602, 606 (2017) [hereinafter Georgiev, *Too Big to Disclose*] ("Since the threshold for what is material increases as firms get bigger, at the very largest firms even matters that are significant and sizeable in absolute terms may be deemed immaterial and remain undisclosed. In other words, firms can become 'too big to disclose.'").

127 *See* Stone *ex rel.* AmSouth Bancorp. v. Ritter, 911 A.2d 362, 367–70 (Del. 2006) (holding that *Caremark* duties are based on the duty of loyalty, and therefore firms cannot opt out of exposing directors to liability if they fail to establish systems to monitor critical risks).

More fundamentally, there are key parallels in the substance of the debates. Each area of business law is based on some specific rule-like commands combined with a delegation of broad residual authority. In antitrust, statutes forbid certain practices, like interlocking directorates, in relatively clear terms[128] but delegate authority to judges to examine other practices by using open-ended terms.[129] In bankruptcy, statutes set out relatively specific requirements, such as a requirement that junior creditors cannot claim ahead of senior creditors without the senior creditors' consent[130] but then delegate broad equitable authority to bankruptcy judges to achieve an appropriate outcome.[131] In corporate law, a set of external legal commands sets out some specific requirements, but internal rules delegate broad authority to a board of directors to create and deliver value.[132] In securities regulation, statutes require specific disclosures but delegate authority to the SEC and to the managers of public companies to determine the content of those disclosures.[133]

For the most part, there seems to be agreement across fields that the standards that drive the use of residual authority should not trump rule-like commands.[134] Instead, the key debates focus on how residual authority should be exercised when there are no specific commands on point. One side of the debates (which might be fairly regarded as the majority view at this point) suggests that

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[128] 15 U.S.C. § 19.

[129] *See* 15 U.S.C. § 1 (forbidding "[e]very contract . . . in restraint of trade").

[130] 11 U.S.C. § 1129(b); *Jevic*, 137 S. Ct. at 979, 983 (emphasizing that priority rules must be respected in bankruptcy).

[131] 11 U.S.C. § 105(a).

[132] 8 DEL. C. § 141(a) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors.").

[133] *See* 15 U.S.C. § 77g(b) (discussing the SEC's authority to require disclosure in the public interest).

[134] *See, e.g.*, Macey & Salovaara, *supra* note 85, at 942 ("[C]ontinuation bias should not trump congressionally mandated obligations."). There may be some exceptions in antitrust and bankruptcy, where various statutory commands do not appear to be enforced with any real vigor due to a belief that they are inconsistent with the basic goals of the field. *See* Lynn M. LoPucki, *Chapter 11's Descent into Lawlessness*, 96 AM. BANKR. L.J. 247, 296–308 (2022); *cf. Brown & Williamson*, 509 U.S. at 220 (1993) ("[T]he Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws.").

Of course, one strand of stakeholderism does propose reforms to existing rules. For example, some of the suggested codetermination schemes would empower workers within corporate governance. The most realistic path toward that outcome is a federal mandate combined with a set of complementary regulatory reforms. *See* Leo E. Strine, Jr., Aneil Kovvali & Oluwatomi O. Williams, *Lifting Labor's Voice: A Principled Path Toward Greater Worker Voice and Power Within American Corporate Governance*, 106 MINN. L. REV. 1325, 1333 & n.22 (2022).

residual authority should be used exclusively to address a single criterion: consumer welfare for antitrust, creditor interests for bankruptcy, shareholder value for corporate law, and cost-justified investor protection for securities regulation.[135] The other side urges that these areas of law should be used to address a broader set of concerns.[136] As discussed below, several of the key arguments in these debates recur across the different fields of business law.

B. Shared Stakeholderist Arguments

Although many arguments have been offered for broadening the focus in each field to cover more than the single constituency, there are some common themes. This Section will canvas the most common arguments made in antitrust, corporate, securities, and bankruptcy law for considering a broad range of stakeholders. It will also show how the responses to each of these arguments can cross legal fields.

1. Businesses have the power to create dire problems unless they are constrained.

Much of the energy behind stakeholderism comes from a belief that businesses can cause enormous social harms unless they are properly constrained. In antitrust, there are concerns that large businesses can corrupt the political system,[137] reduce resilience in the pursuit of short-term efficiency and profit,[138] and concentrate unaccountable economic power.[139] In bankruptcy, there are concerns that businesses are using the system to avoid accountability for torts, environmental offenses, and labor offenses, thus making those offenses more likely going forward.[140] Within

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135 *See generally, e.g.*, Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. CORP. L. 65 (2019) [hereinafter Hovenkamp, *Consumer Welfare Imperiled?*]; Baird, *supra* note 81; Hansmann & Kraakman, *supra* note 75.

136 *See, e.g.*, Warren, *Bankruptcy Policy*, *supra* note 78, at 885–89; Lipton, *supra* note 6, at 525–26. *See also generally* Khan, *supra* note 1; COLIN MAYER, PROSPERITY: BETTER BUSINESS MAKES THE GREATER GOOD (2019).

137 *See, e.g.*, Zephyr Teachout & Lina M. Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 DUKE J. CONST. L. & PUB. POL'Y 37, 37 (2014) ("Ever-increasing corporate size and concentration undercut democratic self-governance by disproportionately influencing governmental actors.").

138 *See, e.g.*, Kovvali, *Essential Businesses*, *supra* note 103, at 204.

139 *See, e.g.*, Paul, *Moral Economy*, *supra* note 12, at 247, 250–51 (identifying curtailing "domination" as a core but underimplemented objective of the antitrust laws).

140 Macey & Salovaara, *supra* note 85, at 906–07; Buccola & Macey, *supra* note 116, at 773.

corporate law, commentators have criticized businesses' contributions to climate change and inequality.[141] And within securities regulation, commentators have expressed concern that capital is flowing toward socially destructive[142] or fundamentally risky[143] enterprises.

There are several responses to this pessimistic claim. First, businesses are not all bad. Even seemingly destructive behavior, such as contributing to climate change, is largely a consequence of businesses providing consumers what they want.[144] If people acting in their capacity as consumers demand SUVs powered by gasoline, and people acting in their capacity as voters demand public policy that accommodates that preference, it is not obvious that supplying SUVs is a "bad" activity. Second, the framing of the claim may be misleading. If businesses are operating under the threat of competition, they may lack the power to make meaningful choices. If General Motors declined to make SUVs, then Ford, Chrysler, and others would simply make more.[145] Businesses that are responding to market imperatives may not be making choices or exercising power at all. A final and related argument concedes that businesses can engage in damaging conduct but suggests that business law reforms are unlikely to be helpful in correcting the problem.[146]

2. Businesses have the power to address important problems, and so they should.

A more optimistic argument claims that businesses have the power to solve problems, not just create them. Indeed, University

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141 *See, e.g.*, Leo E. Strine, Jr., *Who Bleeds When Wolves Bite?: A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System*, 126 YALE L.J. 1870, 1950–51 (2017); Lenore Palladino, *The Contribution of Shareholder Primacy to the Racial Wealth Gap* 14 (2020) (Roosevelt Inst. Working Paper) (on file with author); Christopher M. Bruner, *Corporate Governance Reform and the Sustainability Imperative*, 131 YALE L.J. 1217, 1221–23 (2022).

142 *See* Madison Condon, *Market Myopia's Climate Bubble*, 2022 UTAH L. REV. 63, 70–73 [hereinafter Condon, *Market Myopia*].

143 Tierney, *supra* note 109.

144 *Cf.* Molly Fleming, *Consumers Don't Want to Choose Between Sustainability and Convenience*, MKTG. WEEK (Feb. 26, 2020), https://perma.cc/RU69-VM4V (noting that consumers may have only a limited preference for sustainability).

145 *Cf.* Roberto Tallarita, *The Limits of Portfolio Primacy*, 76 VAND. L. REV. (forthcoming 2023).

146 *See, e.g.*, Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 81, 139–63 (2020); Matteo Gatti & Chrystin Ondersma, *Can a Broader Corporate Purpose Redress Inequality? The Stakeholder Approach Chimera*, 46 J. CORP. L. 1, 60–63 (2020).

of Oxford Professor Colin Mayer has suggested that the very "purpose of the corporation . . . [is] producing profitable solutions to problems of people and planet."[147] This suggests that businesses could be harnessed to address critical problems. Adjustments to antitrust law might make companies more likely to use market power to solve ecological and labor problems.[148] Bankruptcy law could be used to deliver jobs to ailing communities.[149] Corporate law could be used to reorient companies toward attacking climate change or inequality.[150] And securities regulation could be used to facilitate new forms of investor engagement that make companies more eager to solve problems.[151]

The arguments against the pessimistic claim apply with equal force to the optimistic claim.[152] The optimistic claim is also vulnerable to other criticisms. First, the adjustments that make it possible for companies to do good work could cause other problems. For example, monopolists may be more able to generate economic profits that they can share with workers or use to help the environment.[153] To the extent that these efforts are deemed socially helpful, they may support policy interventions that allow monopolists to thrive—and to create other forms of harm. Second, there is (often well-deserved) cynicism about businesses' behavior. Many businesses are eager to say that they are helping to solve problems while actually making superficial or trivial efforts.[154]

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147 MAYER, *supra* note 136, at 39.

148 *See, e.g.*, Amelia Miazad, *Prosocial Antitrust*, 73 HASTINGS L.J. 1555, 1611–15 (2022).

149 *See, e.g.*, Zachary Liscow, *Counter-Cyclical Bankruptcy Law: An Efficiency Argument for Employment-Preserving Bankruptcy Rules*, 116 COLUM. L. REV. 1461, 1468 (2016).

150 *See* Chris Brummer & Leo E. Strine, Jr., *Duty and Diversity*, 75 VAND. L. REV. 1, 90–91 (2022) (arguing that corporate law encourages corporate fiduciaries to adopt diversity, equity, and inclusion policies).

151 Condon, *Market Myopia*, *supra* note 142, at 115–21; George S. Georgiev, The SEC's Climate Disclosure Proposal: Critiquing the Critics 9–10 (Emory Legal Stud. Rsch. Paper No. 22-8, 2022) (on file with author) [hereinafter Georgiev, *The SEC's Climate Disclosure Proposal*].

152 *See supra* Part II.B.1.

153 Mark J. Roe, *Corporate Purpose and Corporate Competition*, 99 WASH. U. L. REV. 223, 231–32 (2021).

154 *See, e.g.*, Saul Levmore, *Least-Cost Altruists and ESG Firms*, 77 BUS. LAW. 713, 719–20 & n.16 (2022).

3. Because of its flexibility, business law can address important problems at lower cost.

Private innovation can make business law an attractive tool for addressing problems. Legislation and regulation generally impose rules that must be specified in some detail ex ante, while business law often relies on general standards that can be filled in ex post. As a result, business law can offer solutions that are more tailored to the circumstances at hand and that are responsive to changes in those circumstances.[155] Corporate directors who are instructed to exercise due care can use their unique knowledge to determine what due care requires in the context of each company in the face of evolving threats and concerns. Prescriptive regulations may not capture such nuances.

Critics may respond that business law is unlikely to offer genuine solutions to problems and that targeted regulation is ultimately required. While regulators may lack information or capacity, the private actors empowered by corporate law are not incentivized to achieve socially optimal outcomes.[156] Courts and regulators may also be unable to use the tools of antitrust, bankruptcy, or securities law to achieve valuable outcomes without legislative guidance.

4. The political system is unable to provide adequate solutions.

Much of the energy behind stakeholderism is based on the perceived failure of government regulation.[157] This directly supports stakeholderism because stakeholderism can offer a path to desired outcomes even though the political process is paralyzed. Business law is often framed in broad and flexible terms and is tended by relatively active and expert institutions. As a result, it is possible to imagine institutional investors pushing companies

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155 *See, e.g.*, Martin Lipton, *Professor Bebchuk's Errant Attack on Stakeholder Governance*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 4, 2020), https://perma.cc/P6RR-UPQV (contrasting Lipton's model of stakeholder governance with "new laws" that "are likely to sweep far too broadly and risk substantial destruction of corporate value").

156 *See* Bebchuk & Tallarita, *supra* note 146, at 139–58.

157 Anna Christie, *The Agency Costs of Sustainable Capitalism*, 55 U.C. DAVIS L. REV. 875, 895 (2021) ("[G]overnment action still remains woefully inadequate. This may justify a mandate for investor intervention."); Tim Wu, *The Goals of the Corporation and the Limits of Law*, CLS BLUE SKY BLOG (Sept. 3, 2019), https://perma.cc/4LQF-3ESM; *see, e.g.*, 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.").

to do better on climate change and institutions like the Delaware Chancery Court and the SEC accommodating them.

The argument also offers indirect support for stakeholderism because the standard approach to business law is perceived as exacerbating the problem of political paralysis. Large firms will inevitably develop political muscle, and firms that focus relentlessly on delivering financial returns to shareholders and creditors will deploy their lobbying muscle to prevent new regulations. In response, neo-Brandeisians have sought to reinvigorate antitrust to protect democracy.[158] Others have suggested revising corporate governance to help control the problems otherwise created by corporate political influence.[159] If stakeholderism makes regulation more likely or more effective, it can help solve the underlying problem of a sclerotic political system.[160]

Again, this argument can raise concerns. First, several commentators have suggested that stakeholderism makes it more difficult to obtain regulations through the political process.[161] If firms act as if they care about workers or the environment, they may drain away energy that would otherwise have gone toward new regulatory schemes that would have done more. Second, reworking business law is unlikely to provide a complete solution to difficult problems. For example, even if corporate governance were made more representative of worker interests, supportive regulations and reforms are likely to be needed to achieve good outcomes.[162] Third, reworking business law is unlikely to be costfree. Courts, agencies, and private parties may be able to take advantage of some of the inherent flexibility of business law to

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[158] *See* Teachout & Khan, *supra* note 137, at 70–72.

[159] *E.g.*, Jens Dammann & Horst Eidenmüeller, *Corporate Law and the Democratic State*, 2022 U. ILL. L. REV. 963, 970–72 (supporting proposals to require large corporations to empower employees to elect directors); *cf.* Lucian A. Bebchuk, Robert J. Jackson, Jr., James D. Nelson & Roberto Tallarita, *The Untenable Case for Keeping Investors in the Dark*, 10 HARV. BUS. L. REV. 1, 7–24 (2020) (defending proposals to require public companies to disclose political spending).

[160] *See* Aneil Kovvali, *Stark Choices for Corporate Reform*, 123 COLUM. L. REV. (forthcoming 2023) [hereinafter Kovvali, *Stark Choices*].

[161] *See, e.g.*, Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, *For Whom Corporate Leaders Bargain*, 94 S. CALIF. L. REV. 1467, 1471 (2021) ("[A]cceptance of stakeholderism . . . would raise illusory hopes that could deflect pressures to adopt laws and regulations protecting stakeholders."); Matteo Gatti & Chrystin Ondersma, *Stakeholder Syndrome: Does Stakeholderism Derail Effective Protections for Weaker Constituencies?*, 100 N.C. L. REV. 167, 177 (2021) ("[S]takeholderism is risky because corporations can deploy it strategically to defend the status quo and thwart regulation capable of improving workers' positions.").

[162] Strine et al., *supra* note 134, at 1376.

push a solution-oriented agenda. But such changes are likely to come at the cost of significant inefficiency and may compromise the institutional legitimacy of the law or the relevant institution.[163] Finally, the use of business law as a substitute for the political process raises propriety questions. If democratically responsive institutions have weighed the relevant issues and concluded that a trade-off is not worthwhile, it may be problematic for wealthy investors or less responsive institutions to force the trade-off to occur regardless.

C. Shared Single-Constituency Arguments

Although the debates differ across different fields, defenders of the law's focus on single constituencies often sound some common notes. Even on a single-constituency understanding, many areas of business law speak to various stakeholder concerns. Reforming business law to transfer additional value to stakeholders could be perilous. Private actors could structure their affairs to avoid those areas of business law entirely, and the law might exacerbate destructive agency problems without delivering real results for stakeholders. The use of business law to address stakeholder concerns could also reduce the likelihood of more effective external regulations.

1. Properly understood, the single criterion already addresses the problems that stakeholderists are concerned about to a satisfactory degree.

The dominant account of corporate law suggests that the law prioritizes shareholder interests because shareholders are "residual claimants" who can capture only the value that is left over after all other constituencies have claimed their shares.[164] Before shareholders can claim profits, customers must receive a product that they are willing to pay for, creditors and employees must be paid what they are contractually owed, and the company must either comply with laws protecting community members or must

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163 *See, e.g.*, Gatti & Ondersma, *Broader Corporate Purpose*, *supra* note 146, at 25 ("[C]onfusion and potential inefficiencies can easily become the new normal in a world with too many interests to protect.").

164 *See* EASTERBROOK & FISCHEL, *supra* note 65, at 67–68 ("[S]hareholders are the residual claimants to the firm's income. . . . The shareholders receive most of the marginal gains and incur most of the marginal costs. They therefore have the right incentives to exercise discretion.").

pay fines. In this model, maximizing shareholder value necessarily entails delivering value to all other groups. A manager that squeezes workers to the point where they are unmotivated or that commits environmental crimes and torts is unlikely to be serving the interests of shareholders. Caring about a broad range of stakeholders is likely to be a smart strategy even under the shareholder-value criterion.[165] A similar argument explains the focus on creditors in bankruptcy, as creditors serve as the residual claimants when a firm is insolvent, and creditor concerns likely encompass a broad range of potential harms.[166]

Similar kinds of claims appear elsewhere in business law. The logic justifying shareholder primacy also suggests that financial investors internalize a broad range of impacts from corporate decisions. Because diversified long-term investors are ultimately harmed by socially destructive corporate behavior,[167] a broad range of harms could reasonably be addressed by securities regulations focused on investor welfare.[168] Antitrust scholars defending the consumer-welfare standard have similarly insisted that it can readily incorporate dynamic considerations. While short-term prices have been an important focus of antitrust practice, consumer welfare is also affected by long-term prices and innovation.[169] These points suggest that the problem with antitrust practice is not that it is too narrowly focused on a particular end but merely that it is too focused on particular methods for measuring and advancing that end.

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165 Bebchuk & Tallarita, *supra* note 146, at 108–14 (discussing the concept of "instrumental stakeholderism," or a concern for stakeholders as part of a strategy for maximizing shareholder returns).

166 *See* N. Am. Cath. Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 101–02 (Del. 2007).

167 Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1, 44–45 (2020); *cf.* Scott Hirst, *The Case for Investor Ordering*, 8 HARV. BUS. L. REV. 227, 257–59 (2018) (arguing that investors internalize many but not all externalities).

168 *See, e.g.*, Michael D. Guttentag, *Protection from What? Investor Protection and the JOBS Act*, 13 U.C. DAVIS BUS. L.J. 207, 210, 227–29, 241 (2013) (stating that securities regulation seeks to protect investors from "the extraction of private benefits from the firm by firm insiders").

169 *See* Hovenkamp, *Consumer Welfare Imperiled?*, *supra* note 135, at 66–67; Leah Samuel & Fiona Scott Morton, *What Economists Mean When They Say "Consumer Welfare Standard"*, PROMARKET (Feb. 16, 2022), https://perma.cc/68AR-J4JE ("To academic economists, consumer welfare is the area under the demand curve and above the price paid. . . . Anything that factors into demand creates consumer welfare: those factors can include price, quality, innovation, privacy, etc."); Alden Abbott, *The Consumer Welfare Standard and Antitrust Enforcement: A Response*, PROMARKET (Mar. 14, 2022), https://perma.cc/LLZ2-KA54 ("[T]he consumer welfare standard—as actually employed—fully allows for such considerations as quality, innovation, and monopsony.").

But there are circumstances in which the dominant single-constituency criterion demands one approach while a broader perspective would complicate it. For example, a change of control in corporate law or a decision to liquidate instead of reorganize can force decision makers to prioritize one set of interests over others.[170] In those circumstances—which can be significant for creating good incentives—it matters what criterion decision makers are using.[171]

2. Because of the generally voluntary nature of business law, a different approach would lead only to perverse consequences.

Many traditionalists argue that reforms to business law will trigger destructive efforts at evasion. The argument is most pronounced in the contexts of securities regulation and bankruptcy. Opponents of securities law requirements routinely insist that the new requirements will cause firms to abandon public markets, reducing the options available to investors and acting as a drag on economic growth.[172] Similarly, bankruptcy scholars have suggested that efforts to change results within bankruptcy will simply cause creditors to exercise rights and negotiate deals outside of bankruptcy instead.[173]

The strength of the argument depends on the plausibility and cost of evasion. While securities regulation can be evaded by remaining private, remaining private also imposes real limitations on a firm's potential size and profitability. There has been an increase in the number of "unicorn" firms, or private companies worth over $1 billion. But they remain relatively rare, and most

170 For example, a change of control in corporate law or a decision to liquidate instead of reorganize in bankruptcy can force prioritization. *See* Allen, *supra* note 71, at 272–75 (noting that the takeover movement made it impossible to "paper[ ] over" the ways in which shareholders' financial interests were opposed to the interests of other constituencies).

171 Advocates for stakeholderism generally do not focus on this argument. Their strategic goal is to encourage the relevant decision makers to consider a broader range of stakeholder interests. It would be unhelpful to emphasize contexts in which the applicable legal rules preclude that consideration.

172 *See* Hester M. Peirce, *Inside Chicken: Remarks Before Fordham Journal of Corporate and Financial Law Conference: "Here to Stay: Wrestling with the Future of the Quickly Maturing SPAC Market"*, U.S. SEC & EXCH. COMM'N (Oct. 22, 2021), https://perma.cc/V9AH-7G3J.

173 *E.g.*, Baird, *Loss Distribution*, *supra* note 81, at 818 ("In a world in which workers enjoy a special priority only in bankruptcy, creditors will strive to resolve their differences outside of bankruptcy.").

investors and employees at such firms look forward to an eventual exit into the public markets.[174] As long as access to the public markets offers substantial value to investors, there is room for securities regulation to insist on other-regarding measures and disclosures.

Similarly, bankruptcy reorganization can offer substantial value to creditors, as vividly demonstrated by controversial efforts to bring matters into bankruptcy court. Faced with expensive, uncertain, and slow-burning litigation about its talc products, Johnson & Johnson recently deployed a "Texas Two-Step": It reincorporated in Texas and then split into a Good Co. and a Bad Co. through a divisive merger permitted under Texas corporate law. The split assigned the talc liabilities to the Bad Co., which was then put through a bankruptcy organization.[175] The maneuver gave the company access to streamlined bankruptcy procedures for fixing the amount of the talc liabilities while allowing the remaining entities to move forward without the threat of further liability. Because the financial investors in an enterprise like Johnson & Johnson stand to profit from access to bankruptcy machinery, there is likely to be some room for a bankruptcy judge to divert value to stakeholders before financial investors will seek to avoid the bankruptcy process.[176] Indeed, corporate reorganization remains a vibrant area of law even though bankruptcy judges are widely believed to transfer value from creditors to employees by continuing enterprises that ought to liquidate.[177] Because of the value of the legal regimes and the cost of evasion, it is likely that there will be meaningful space to prioritize stakeholders before firms make serious attempts to exit.

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174 *See generally* Alexander I. Platt, *Unicorniphobia*, 12 HARV. BUS. L. REV. (forthcoming).

175 *See In re* LTL Mgmt., LLC, 637 B.R. 396, 400–04 (Bankr. D.N.J. 2022).

176 Having a large number of creditors with effective veto rights over a reorganization outside of bankruptcy could also have the effect of making a bankruptcy reorganization inevitable. This could happen as a result of a legal mandate, such as the Trust Indenture Act, 15 U.S.C. §§ 77aaa–77bbbb, or as a result of competing creditors having security interests in different important assets.

177 Liscow, *supra* note 149, at 1495–96 & n.142.

3. Trying to integrate more stakeholder interests would mean sacrificing analytical clarity and clear prescriptions.

Decision makers inevitably must make trade-offs between different constituencies. Single-constituency criteria offer a relatively simple answer to the problem: ignore benefits and harms to all but one constituency. For example, a decision to shutter a plant and fire its workers might help a company's shareholders while hurting the workers and the surrounding community. The standard shareholder-primacy account of corporate law would instruct the company's officers and directors to ignore impacts other than impacts on shareholders.[178] As a result, the directors are spared the difficult task of weighing effects on different groups.[179] Defenders of the traditional model thus have a powerful argument in their favor: In the absence of shareholder primacy, how could a corporate decision maker weigh the harm against the benefit?[180]

This argument recurs across different areas of business law. Within antitrust, different groups of stakeholders may have competing interests. While neo-Brandeisians have pointed out the benefits to stakeholders from a more vigorous approach to antitrust law and policy, it is not always clear how different stakeholder concerns should be weighed against each other.[181] For example, there are industries where a more relaxed approach may be socially beneficial: it is not obvious that society would be better off if coal or tobacco products were cheaper. Professor Amelia Miazad has urged that U.S. antitrust law should be more

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178 *See supra* Part I.A.4.

179 Directors attempting to weigh all stakeholder concerns would face a number of challenges. They would have to identify the full range of stakeholder impacts, measure or otherwise estimate the magnitude of the impacts, and find some way to make the impacts commensurable. A loss of shareholder profits may be relatively easy to identify, estimate, and state in dollar terms. But impacts on employees or surrounding communities may be more difficult to capture. *See* Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637, 669–70 (2006).

180 *See, e.g.*, Stephen Bainbridge, *Kindly Help Popularize the Bainbridge Hypothetical*, PROFESSORBAINBRIDGE.COM (Aug. 19, 2019), https://perma.cc/3NL7-9GW7.

181 Hovenkamp, *Consumer Welfare Imperiled?*, *supra* note 135, at 84 ("[T]he New Brandeis movement" argues that "antitrust policy has ignored [ ] values such as fairness or protection of small business. What is far less clear is exactly how these goals should be weighed and balanced against each other in the assessment of particular practices."); Herbert Hovenkamp, *Antitrust Balancing*, 12 N.Y.U. J.L. & BUS. 369, 382 (2016) ("[W]hatever the relative advantages or disadvantages of a consumer welfare test, the fact is that the consumer price test . . . is easier to administer than a general welfare test.").

tolerant of industry agreements to improve labor and environmental standards.[182] While a more vigorous approach to antitrust would make these agreements impossible—either by condemning them as per se violations as agreements not to compete or by breaking up the oligopolists who are in a position to make such agreements—it is not obvious that stakeholders would be better served by that outcome.[183]

Comparable issues have also been raised in securities regulation. As Professor Yoon-Ho Alex Lee has noted, analyzing the full range of benefits and harms from disclosure rules could challenge intuitions.[184] For example, if increased disclosure on executive compensation lowered the amount of compensation, the first-order impact would net out to zero. Shareholders would benefit from paying less, but executives would suffer from receiving less. An analyst examining an executive compensation disclosure proposal using an all-stakeholder approach would thus be exceedingly skeptical.[185]

Similarly, in bankruptcy law, many scholars have argued that the system should favor reorganizing businesses over liquidating them.[186] By keeping a business going even when selling it off for parts would generate higher returns for creditors, the system could effectively transfer wealth away from creditors and toward workers and communities of operation. But a bias toward

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182 Miazad, *supra* note 148, at 1611–15.

183 One way to reconcile these positions would be to claim that vigorous antitrust enforcement would unclog the political process. If oil producers were weaker and had less power over the political process, it might result in more meaningful greenhouse gas regulation, making collusion among oil producers to maintain high prices unnecessary. But it is not obvious that a plausible antitrust program would have this effect. A large number of geographically distributed "small" businesses producing oil may well have sufficient political clout to kill off meaningful regulation. Pessimism about the political process is also an important driver of prostakeholder arguments. *See supra* Part II.B.4.

184 *See* Lee, *Efficiency Criterion*, *supra* note 43, at 97.

185 Given the uncertain actual effects of executive compensation disclosure, it might have been helpful for analysts to have that skeptical approach. Unfortunately, the legal regime may not be keeping pace with these observations: the SEC generally faces greater legal risk when it justifies its disclosure rules using impacts on groups other than investors; as a result, it has sought to justify its proposed climate change disclosures based on impacts on investors. *See, e.g.*, Georgiev, *The SEC's Climate Disclosure Proposal*, *supra* note 151, at 2–3.

186 *See* Elizabeth Warren & Jay Lawrence Westbrook, *The Success of Chapter 11: A Challenge to the Critics*, 107 MICH. L. REV. 603, 625 (2009) (arguing that a preference for reorganization would be justified given positive externalities); *cf.* Liscow, *supra* note 149, at 1470 (remarking that preserving employment is particularly valuable during economic recessions).

reorganization could have negative effects on various stakeholders as well: coal companies appear to have used the bankruptcy process to shed billions of dollars of regulatory liabilities, and other firms are eager to follow their example.[187]

These issues should not be overstated. First, they are most pronounced within problem industries or problem environments. There are industries where business law's normal goal of increasing production is broadly inconsistent with social goals. For example, it is not clear that increased production of coal or tobacco or alcohol products actually creates social value. Trade-offs between different constituencies become more extreme in such industries: the interests of coal company shareholders and workers may diverge sharply from those of other constituencies. Certain environments can also exacerbate trade-offs. Layoffs may not be overly painful for workers if the overall labor market is robust and workers can readily find other jobs.[188] Outside of these conditions, trade-offs are likely to be less extreme, and decision makers will be able to make choices that advance the interests of multiple constituencies simultaneously.

Second, single-constituency criteria are not a complete solution for the problem of complexity. Even if a firm's managers are exclusively focused on a single criterion like shareholder wealth maximization, they will inevitably face difficult choices. Similarly, antitrust law's focus on consumers and consumer prices has not spared the field from complexity.[189] It is not obvious that those choices are easier, or will be made more competently, than the choices created by a stakeholderist criterion.

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187 Macey & Salovaara, *supra* note 85, at 904; *see supra* Part I.A.4.

188 Aneil Kovvali, *Countercyclical Corporate Governance*, 101 N.C. L. REV. 141 (forthcoming).

189 *See, e.g.*, Kanter, *supra* note 104:

> It should [ ] be clear at this point in our history that focusing on competition is a much more administrable standard than one that attempts to quantify consumer welfare effects. The consumer welfare standard was originally promised as a solution to the hard cases, but experience has demonstrated just the contrary. . . . Ironically, . . . Judge Bork . . . argued that even if some members of Congress intended to promote a broad range of values through the antitrust laws, we should focus on price and output effects because it makes antitrust easier to administer. We have seen first-hand, however, how unwieldy and difficult to administer attempting to calculate those effects can be. Cases have become sprawling exercises where companies promise billions in efficiencies and armies of consultants argue over newly-invented and often-untested models that they claim show a transparently problematic merger will benefit consumers.

Finally, and most fundamentally, a single-constituency approach does not actually solve the problem of trade-offs. If decision makers are told to focus exclusively on consumers, or shareholders, or creditors, or investors, that focus does not *eliminate* impacts on other groups. The approach simply pushes the question of trade-offs up one level: the makers of antitrust, bankruptcy, corporate, and securities law must decide whether instructing decision makers to focus on a single group is the best way to advance overall social goals. Will society obtain better results—for workers as well as shareholders—if the directors and officers of individual companies are told to focus exclusively on shareholder interests? At some point, *someone* must address the question of worker impacts.

4. There are no agents who can be trusted to manage the resulting trade-offs and complexity.

Within corporate law, allowing directors and officers to consider a broader range of stakeholder interests may entail giving them broader discretion that they can use in self-interested ways. There are good reasons to suspect that this broader discretion will be abused. Directors and officers have numerous incentives to maximize share prices, even if they are legally permitted to pursue other objectives.[190] As a result, granting them greater discretion to balance competing stakeholder interests may not cause them to reorient away from shareholders. It may simply create opportunities for self-dealing or waste.

Some commentators have sought to distinguish other areas of business law on these grounds. Bankruptcy judges, federal judges, and antitrust authorities may have more public-spirited motives and incentives, and as a result they may be more trustworthy receptacles for expanded discretion.[191] But public officials also have their own interests, including a desire to enhance their own power and prestige.[192] Bankruptcy judges may enjoy praise from members of the reorganization bar and may recognize that

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190 *See* Lund & Pollman, *supra* note 70, at 2613–15; Bebchuk & Tallarita, *supra* note 146, at 139–55; *see also* 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, 786–89 (2015).

191 *See* Warren, *Bankruptcy Policy*, *supra* note 78, at 805 ("Bankruptcy judges are impartial decision makers.").

192 *See* George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 12–13 (1971) (setting out a theory of regulatory capture).

the best way to get such praise is to go along with reorganizations and wave away legal restrictions.[193] Federal judges and administrative agencies also lack direct democratic accountability, making it troubling for them to engage in unconstrained weighing of stakeholder interests.

Even apart from value judgments, agents may lack the institutional capacity to make factual judgments.[194] A federal judge trying to decide an antitrust lawsuit may struggle to determine impacts on consumers alone. Expanding the scope of the inquiry to cover all potential stakeholders may make the task completely unmanageable.

Although the relevant agents do have meaningful limitations, many of these problems do not clearly support a single-constituency model. First, even a single-constituency model still places enormous trust in the relevant agents because they require substantial discretion to do their jobs effectively. For example, the business judgment rule shields most decisions by corporate directors and officers from meaningful scrutiny by courts.[195] In practice, this deference enables managers to divert value from shareholders to other constituencies, like workers.[196] But it is entirely justifiable under a shareholder-primacy account: if managers are subject to lawsuits every time a decision goes bad for shareholders, they will hold back on risky investments that create shareholder value.[197] The solution to the problem is to make agents more trustworthy so that they use their discretion in helpful ways, not to abandon the overall project.

Second, many of the problems involved in managing trade-offs or complexity can be addressed through procedure. If

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193 *E.g.*, LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS 180–81 (2008); *cf.* Posner, *Bankruptcy Reform*, *supra* note 47, at 80 (discussing bankruptcy judges' use of appointments as a tool of patronage for friends and allies).

194 Hovenkamp, *Consumer Welfare Imperiled?*, *supra* note 135, at 71 ("While application of any welfare test poses significant difficulties of measurement, in most close cases estimating consumer welfare effects is far easier than measuring general welfare effects that require a tradeoff.").

195 Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 770–71 (2005).

196 LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 24–32 (2012); Elhauge, *supra* note 195, at 776–83 ("[E]ven if shareholder profit-maximization were our only goal, fulfilling it would inevitably create considerable management discretion to sacrifice profits in the public interest.").

197 *See* Elhauge, *supra* note 195, at 782–83.

corporate managers find it difficult to determine how much shareholder value should be traded away to achieve other goals, then they can invite shareholder input, and if shareholders do not like the balances that managers are striking, then they can express their preferences through voting.[198] The SEC and the FTC can readily obtain additional input from affected stakeholders by soliciting input or consulting advisory panels, and courts hearing important antitrust and bankruptcy matters can obtain a broad range of input through amicus briefs.

Finally, even under a single-constituency model, agents must manage factual uncertainty. For example, even if they focus exclusively on creditor returns, bankruptcy judges must make predictions about the health of entire industries when deciding whether a firm will be viable after a reorganization.[199] Similarly, courts reviewing agency cost-benefit analyses must weigh a variety of impacts on different groups.[200] It is not obvious that they lack the institutional capacity to handle the factual complexity that a stakeholder model would entail.

It is also possible to convert this line of criticism into a source of ideas for reform. Many current stakeholderist proposals are intended to make institutions more trustworthy, such as by creating incentives for companies and boards to engage in prosocial behavior. Others are intended to shift from a less trustworthy process or institution to a more trustworthy process or institution.[201]

The criticism may also leave room for asymmetric cynicism: stakeholderist arguments may be more suspect when deployed to expand power or when errors are likely to be costly or irreversible. For example, skepticism may be appropriate when corporate board members use stakeholderist arguments to prevent an acquisition that would remove them.[202] By contrast, a more charitable understanding may be appropriate when corporate board members take a worker- or environment-friendly approach to

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198 *See* Savitt & Kovvali, *supra* note 74, at 1891–92.

199 This is not to say that they will always be right. *See, e.g.*, Macey & Salovaara, *supra* note 85, at 916 (describing a bankruptcy judge's reliance on assumptions about the prospects of the coal industry that later proved incorrect).

200 *See, e.g.*, Bus. Roundtable v. SEC, 647 F.3d 1144, 1148–56 (D.C. Cir. 2011).

201 Hart & Zingales, *supra* note 157, at 260–61 & n.24 (supporting a transition to shareholder voting); Samir D. Parikh, *Scarlet-Lettered Bankruptcy: A Public Benefit Proposal for Mass Tort Villains*, 117 NW. U. L. REV. 425 (2022) (advocating for reorganizing bankrupt mass-tort defendants as more trustworthy public-benefit corporations).

202 *Cf.* Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1149 (Del. 1989).

their operations.[203] Similarly, skepticism may be appropriate with respect to stakeholderist arguments for allowing mergers notwithstanding antitrust concerns, while a more charitable approach may be appropriate when stakeholderist arguments are advanced for breaking up a company with market power.[204] There may also be more room for experimentation in corporate law, which is flexible and can be updated relatively quickly in response to mistakes, than in other fields, which can require acts of Congress or wise Supreme Court decisions to correct.[205]

5. This is the responsibility of some other area of the law.

Advocates for a single-constituency model frequently insist that other constituencies should be protected by other bodies of law.[206] For example, instead of contorting antitrust, bankruptcy, corporate, or securities law to protect worker interests, policymakers should look to labor and employment law.

The assertion comes in three flavors, each of which has its own counterarguments. First, it may be that the theoretical ideal body of regulation would leave business law intact while altering external rules. This can be challenged directly—the ideal policy likely entails a mix of strategies, rather than a pure approach. Regulations boosting unions and improving workplace protections are likely to be *complements to* rather than *substitutes for*

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203 *But see* Bebchuk & Tallarita, *supra* note 146, at 160–61 (pointing out that considering stakeholder metrics in compensation may just be a cash grab).

204 *Compare* Miazad, *supra* note 148, at 1608–11 (arguing for a more permissive approach to antitrust based on stakeholder concerns), *with* Khan, *supra* note 1, at 739–44, *and* Wu, *supra* note 1, at 127–39 (arguing for a stricter approach to antitrust based on stakeholder concerns).

205 For a discussion of Delaware law's capacity to rapidly adjust to changes in circumstance, see Leo E. Strine, Jr., *The Story of* Blasius Industries v. Atlas Corp.*: Keeping the Electoral Path to Takeovers Clear*, *in* CORPORATE LAW STORIES 254–57 (J. Mark Ramseyer, ed. 2009) (chronicling changes in Delaware's review of antitakeover devices). For a brisk discussion of the Chicago School's treatment of potential errors in antitrust law, see Hovenkamp & Morton, *supra* note 51, at 1850 (describing "the Chicago default: if the conduct cannot be proven anticompetitive, the right answer is no enforcement" and its foundational assumptions that markets self-correct and governments err).

206 Christie, *supra* note 157, at 894; Hansmann & Kraakman, *supra* note 75, at 442 ("[T]he most efficacious legal mechanisms for protecting the interests of nonshareholder constituencies . . . lie outside of corporate law."); Armour & Gordon, *supra* note 84, at 44 ("The consensus view is that the appropriate techniques for controlling externalities are themselves *external* to firms: that is, they do not involve any modification to internal corporate governance commitments." (emphasis in original)); Posner, *Bankruptcy Reform*, *supra* note 47, at 54 (suggesting that "unemployment insurance, job-training programs, and other elements of the welfare system" are able "to soften the transition more effectively than reorganization law does").

internal governance reforms at corporations that encourage worker voice,[207] improved protection of workers and pensions in bankruptcy,[208] efforts to combat labor monopsony through antitrust,[209] and enhanced securities disclosure on worker and human capital issues.[210] It can also be challenged as impractical. Even if the ideal reforms would take place outside of business law, reforms outside of business law may not be politically feasible.[211]

Second, the processes for making and updating business law may be a poor fit for the type of judgments that are required. For example, many scholars have objected to the SEC's efforts to use securities law to address climate change, suggesting that the issue ought to be addressed by an environmental statute duly enacted by Congress.[212] In this type of argument, the congressional legislative process is seen as having unique institutional advantages in collecting and weighing factual evidence as well as in finding legitimate resolutions of competing concerns. By contrast, business law is developed in other ways. Antitrust and bankruptcy law largely develop through common law judicial decisionmaking, and securities law is based on administrative judgments with a heavy judicial overlay. Both processes may lack the informational and legitimacy advantages of a more democratic approach. Corporate law is largely based on state law. This can raise its own democratic legitimacy problems, as Delaware effectively makes corporate law for the entire country.[213] And the competition between states for corporate charters can create pressures that force corporate law in particular directions.[214] The disadvantages

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207 Strine et al., *supra* note 134, at 1333–37.

208 Liscow, *supra* note 149, at 1483–89.

209 POSNER, ANTITRUST FAILED, *supra* note 106, at 74–75.

210 George S. Georgiev, *The Human Capital Management Movement in U.S. Corporate Law*, 95 TUL. L. REV. 639, 713–27 (2021) [hereinafter Georgiev, *Human Capital Management*]; Georgiev, *Too Big to Disclose*, *supra* note 126, at 639–42.

211 *See supra* Part II.B.4.

212 *See, e.g.*, Andrew N. Vollmer, *Does the SEC Have Legal Authority to Adopt Climate-Change Disclosure Rules?*, MERCATUS CTR., GEORGE MASON UNIV. (Aug. 2021), https://perma.cc/3F39-CY7V; *cf.* James D. Cox, *Will It Float?: The Legitimacy of the SEC's Authority for Climate Risk Disclosures*, CLS BLUE SKY BLOG (Mar. 29, 2022), https://perma.cc/G3DT-9FFH ("[A]gencies like the SEC are having to respond to the challenge [of climate change] without the political salience that comes with an approving Congress.").

213 *See* Lund & Pollman, *supra* note 70, at 2579.

214 Scholars have extensively debated whether this entails a race to the top or a race to the bottom. The race-to-the-top view suggests that companies seek out states that provide an efficient package of laws in an effort to attract investor dollars. The race-to-the-bottom view suggests that managers seek out states that will entrench and enrich them

of business law processes may be acceptable when business law sticks to its lane, but intolerable when business law is used to resolve broader and more fundamental social questions.

But it is not always clear how serious the disadvantages are. State laws on environmental or labor issues can reverberate beyond their borders and drive competitive dynamics similar to the competition for corporate charters.[215] The institutional and legitimacy problems that affect the making of business law can also affect other bodies of law. Whether environmental law is made by a Congress that appears unresponsive to the preferences of Americans, an Environmental Protection Agency that is relatively insulated from democratic accountability, or a Supreme Court prepared to make policy on a relatively ad hoc basis, it is not clear that it is being made in a better way than through business law.

6. Using business law in this way could reduce the likelihood of more meaningful external reforms.

A final set of arguments concerns the political process. Numerous commentators have suggested that efforts to reform business law could make other reforms less likely.[216] If antitrust, bankruptcy, corporate, or securities law is remade to address concerns about workers or the environment, it might make Congress or other institutions less likely to adopt reforms on those topics that would be even more effective.

This claim depends upon contestable assumptions about the nature of the political process.[217] It assumes that there is a fixed budget for reform, so that reforming business law necessarily entails sacrificing other potential changes. It assumes that reformers are naive in their expectations, so that they might sacrifice a

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personally. For some examples from the literature, see ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 14–24 (1993) (supporting the race-to-the-top view); Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553, 605–07 (2002) (expressing skepticism).

[215] *See, e.g.*, David A. Dana, *One Green America: Continuities and Discontinuities in Environmental Federalism in the United States*, 24 FORDHAM ENV'T L. REV. 103, 116–18 (2012); Coral Davenport, Lisa Friedman & Brad Plumer, *California to Ban the Sale of New Gasoline Cars*, N.Y. TIMES (Aug. 24, 2022), https://www.nytimes.com/2022/08/24/climate/california-gas-cars-emissions.html ("Not only is California the largest auto market in the United States, but more than a dozen other states typically follow California's lead when setting their own auto emissions standards.").

[216] *See, e.g.*, Bebchuk & Tallarita, *supra* note 146, at 168–73.

[217] *Cf.* Kovvali, *Stark Choices*, *supra* note 160, at 3 n.1 (collecting examples).

strong external reform to achieve a relatively weak internal reform. And it assumes that business law reforms cannot promote or encourage external reforms. Each of these assumptions is open to serious question: there is no obvious force that compels a choice between different classes of reforms, reformers have sensible expectations and are unlikely to trade away valuable reforms for weaker ones, and business law reforms can set the stage for external changes.

III. FUTURE DIRECTIONS

The discussion to this point has suggested that antitrust, bankruptcy, corporate, and securities law share a history as tools to advance a range of stakeholder interests and that current debates across those areas share important features and arguments. This Part sketches potential future directions for the fields and suggests that understanding their commonalities can unlock new ideas. Part III.A examines theoretical insights. Part III.B turns to practical applications.

A. Theory

Considering these debates together can unlock useful theoretical insights and approaches. This Section sketches three paths for inquiry, identifying some early and suggestive works along each line. This Section does not aim to exhaustively catalog every potential approach or all of the insights along each path. Instead, it has the more modest goal of demonstrating some of the value of considering the fields together.

1. Systemic analysis of actual regimes.

A first approach seeks to describe actual systems of economic regulation, both historically and across jurisdictions. For example, Professor Mark Roe has sought to shed light on the interaction of different fields of business law across different systems.[218] In Europe, relatively concentrated product markets have allowed firms to generate real economic profits, which in turn have made

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[218] *See generally* Ronald J. Gilson & Mark J. Roe, *Understanding the Japanese Keiretsu: Overlaps Between Corporate Governance and Industrial Organization*, 102 YALE L.J. 871 (1993); Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063 (2001).

it possible for firms to distribute value to stakeholders like workers.[219] Although stakeholderism might otherwise lead to the expropriation of value from financial investors, relatively underdeveloped financial markets have made European firms dependent on a small number of powerful financial institutions. These financial institutions are well positioned to monitor firm behavior and exert formal and informal pressure on managers, regardless of whether corporate law gives them strong governance rights. They are also well positioned to work through firms' financial distress. While examining the interaction of different components of business law is one example of this type of analysis, scholars of political economy have sought to understand economic systems using different terms and tools.[220]

The core of this line of analysis is a recognition that the general pattern is not convergence toward one set of arrangements. U.S. business law has focused on one set of problems and developed a particular set of solutions. But that set of preoccupations and arrangements is as much a function of historical and political contingencies as inexorable and universal forces.[221] For example, historical U.S. figures like Presidents Thomas Jefferson and Andrew Jackson, along with modern U.S. figures like Governors Greg Abbott and Ron DeSantis, have had a variety of idiosyncratic personal, political, and regional motivations for opposing

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219 Roe, *supra* note 218, at 2065–68 (suggesting that stakeholderism makes more sense in a concentrated market); *cf.* Oliver D. Hart, *On Shareholder Unanimity in Large Stock Market Economies*, 47 ECONOMETRICA 1057, 1076 (1979) (connecting competitive conditions to shareholder preferences).

220 For example, some capitalist systems can be described as "liberal market economies," "where firms make decisions and take actions based on market information, such as prices, interest rates, and unemployment levels, and relate to other actors through formal contracting," while other capitalist systems can be described as "coordinated market economies . . . that make decisions and take actions based on what would otherwise be considered as 'insider' information gained through closer collaborations and relationships between firms and their stakeholders." César F. Rosado Marzán, *Quasi Tripartism*, 90 U. CHI. L. REV. (forthcoming 2023).

221 *See* Gilson & Roe, *supra* note 218, at 873:

> The American system may be the product of an evolutionary process, but its development has been affected by features of our politics, some of which are fundamental to democracy, some peculiar to American democracy. Nothing in that process assures the American system's productive superiority to systems that evolved under different conditions.

See also MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE 1–145 (1996).

the power of financial institutions.[222] But their positions have contributed to a system of decentralized shareholder control that is highly dependent on governance rights. Understanding different systems can shed light on the true forces and trade-offs at work.[223]

2. General-equilibrium models for the economy.

A second approach would seek to make sense of disparate fields by broadening analysis. Some recent works have taken tentative steps in this direction. Professors William Bratton and Simone Sepe have suggested moving from partial-equilibrium models, which isolate and consider one market at a time, to general-equilibrium models, which sweep in all markets simultaneously.[224] Bratton and Sepe primarily use this mode of analysis to examine the allocation of authority between shareholders and managers, concluding that gaps in real-world markets may make shareholder control inefficient for some firms.[225] But broadening the analysis to encompass groups like workers, consumers and creditors[226] might allow for conclusions that go beyond corporate governance and that include antitrust and bankruptcy.

3. Allocation of coordination rights.

A third and related approach would focus specifically on the coordination of economic activity. Professor Ronald Coase inaugurated the modern study of the theory of the firm by focusing on the way that economic activity could be coordinated within firms by hierarchical mechanisms or outside of firms through

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[222] *Cf.* Skeel, *1898 Bankruptcy Act*, *supra* note 25, at 324 (discussing Jeffersonian distrust of financiers based in Northern urban areas); Kovvali, *Stark Choices*, *supra* note 160 (discussing current conservative opposition to environmental, social, and governance (ESG) agendas).

[223] *See, e.g.*, Strine et al., *supra* note 134, at 1363 (noting that the codetermination system of corporate governance works together with other features of economic regulation).

[224] *See* Bratton & Sepe, *supra* note 121, at 695–99.

[225] *Id.* at 722–37.

[226] For some examples of expansions, see Hart, *supra* note 219, at 1057–58 (remarking that shareholders will not agree on the proper objectives of a firm if the firm does not face competitive product markets and that firm decisions affect the prices shareholders will pay in their capacity as consumers); Zohar Goshen & Doron Levit, *Agents of Inequality: Common Ownership and the Decline of the American Worker*, 72 DUKE L.J. 1, 29–39 (2022) (examining how corporate-governance arrangements can affect wage and employment levels).

arms-length market transactions made by price mechanisms.[227] The question of how economic activity should be coordinated, and for whose benefit, pervades each field of business law.

Coase's insights suggest natural limits to the efficient size of firms,[228] a point with clear implications for antitrust policy. Professor Sanjukta Paul has complicated this analysis, urging that antitrust law has taken a normative position on the proper allocation of coordination rights: vertical coordination within large firms for the benefit of shareholders is permitted, while horizontal coordination between small firms is not.[229] This leads to odd asymmetries: individual drivers running their own small businesses cannot coordinate on prices and terms for their own benefit, while Uber can coordinate their activities for the benefit of its shareholders.

But the analysis also raises broader questions about how economic activity is coordinated, and for whose benefit. Antitrust, bankruptcy, corporate, and securities law each supply answers within their particular domains: each facilitates coordination by some constituencies while discouraging it among others. Reshuffling or eliminating those commitments might unlock substantial value,[230] or at least permit value to be distributed in different and more socially beneficial ways.

B. Practice

Examining stakeholderism across different areas of business law could also improve actual policies and doctrine. This Section canvasses some possible applications.

227 *See* RONALD H. COASE, *The Nature of the Firm*, *in* THE FIRM, THE MARKET, AND THE LAW 35–37 (1988).

228 *Id.* at 44 ("[A] firm will tend to expand until the costs of organizing an extra transaction within the firm become equal to the costs of carrying out the same transaction by means of an exchange on the open market or the costs of organizing in another firm.").

229 *See* Paul, *Antitrust as Allocator*, *supra* note 50, at 384–95; Paul, *Fissuring*, *supra* note 122, at 67–78; Sanjukta Paul, *On Firms*, 90 U. CHI. L. REV. (forthcoming 2023).

230 For example, Professors Anthony Casey and M. Todd Henderson have noted that "governance" can be produced within firms through internal mechanisms or outside firms through contractual arrangements. They have suggested relaxing legal barriers to allow private actors to find the arrangements that work best for them. Anthony J. Casey & M. Todd Henderson, *The Boundaries of "Team" Production of Corporate Governance*, 38 SEATTLE UNIV. L. REV. 365, 388–89 (2015).

1. Developing common techniques and answers.

Stakeholderism across different areas of business law can raise some common questions. Recognizing that commonality can facilitate the development of common answers, along with common methodological tools. Valuation and the mix of moral and economic motivations offer two salient examples.

a) Valuation. Stakeholderism and related efforts on environmental, social, and governance (ESG) issues necessarily require difficult trade-offs across the interests of different stakeholders. But there has been no clear consensus among reformers about how these trade-offs should be made.[231]

This lack of guidance has limited the potential scope of ESG and stakeholderism. Though it is a thriving movement, it lives primarily in legal shadows where difficult trade-offs can be elided or obscured. For example, within corporate law, managers have broad authority to make decisions on ordinary business matters. As a practical matter, managers are free to trade off a variety of stakeholder interests in making these decisions; if they are challenged, they can generally assert that they are advancing long-term shareholder value by prioritizing other stakeholders in the short term, and these justifications are shielded from serious judicial scrutiny by the business judgment rule.[232] A manager who treats employees, customers, creditors, suppliers, or surrounding communities well in the ordinary course of business can normally assert that the resulting goodwill will eventually increase share prices, and courts will not second guess them.[233] Advocates for ESG and stakeholderism can take advantage of this hands-off judicial approach to encourage managers to consider more than shareholder value.

But the law takes a hands-off approach in only some areas. A variety of important business decisions are subject to more exacting judicial scrutiny. For example, courts will meaningfully review managerial decisions in the takeover context to ensure that managers are maximizing shareholder value.[234] If courts are to require managers to consider a broader set of interests in this context, they will need to find and apply some sensible alternative

[231] *See* Bebchuk & Tallarita, *supra* note 146, at 121.

[232] Allen, *supra* note 71, at 276; Elhauge, *supra* note 195, at 776–83.

[233] *See* Elhauge, *supra* note 195, at 778–89; *see also* Stout, *supra* note 196, at 24–32.

[234] *See, e.g.*, Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 43–45 (Del. 1994).

to the shareholder-value criterion.[235] And without reform to the legal regime surrounding takeovers, the stakeholderism revolution in corporate law will remain unfinished.[236]

The problem extends beyond the law that applies to purely for-profit corporations and will inevitably lead to serious conflicts in a number of fields. Managers at public-benefit corporations are supposed to balance profit against other objectives.[237] As the public-benefit corporation structure becomes more prevalent, managers will surely be accused in court of getting the balance wrong.[238] Judges will have to either leave managers unaccountable to anyone—an unattractive prospect[239]—or find some way of evaluating the claims. Bankruptcy judges are increasingly encountering ESG-inspired arguments and structures.[240] If they are to deal with these issues in a stakeholder-friendly way, they would need an alternative to the creditor-value criterion that has dominated the discussion. Antitrust authorities and judges are increasingly being asked to consider a range of interests and concerns, either as a reason for enhancing scrutiny[241] or relaxing it.[242] Though

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235 Of course, courts could take a hands-off approach even in this context. But it is unlikely that freeing managers from accountability to anyone will lead to more stakeholder-friendly decisions. *Cf.* Bebchuk & Tallarita, *supra* note 146, at 164–73.

236 Takeovers can have unique impacts on corporate stakeholders, leading to serious disruptions to companies' prior commitments to groups like workers. *Cf.* Bebchuk & Tallarita, *supra* note 146, at 105; John C. Coffee, Jr., *The Uncertain Case for Takeover Reform: An Essay on Stockholders, Stakeholders and Bust-Ups*, 1988 WIS. L. REV. 435, 447–50 (1988). The market for corporate control is also a critical mechanism for disciplining managers. If managers must accede to takeovers that increase shareholder value, they will have a powerful incentive to maximize shareholder value outside the takeover context in order to fend off would-be acquirers.

237 *See* 8 DEL. C. §§ 362, 365 (providing for the "public benefit corporation" form).

238 *See* 8 DEL. C. § 367 (providing for derivative suits at public-benefit corporations).

239 *See* Jill E. Fisch & Steven Davidoff Solomon, The "Value" of a Public Benefit Corporation 13–14 (Eur. Corp. Governance Inst., Law Working Paper No. 585/2021, 2021) ("[A]lthough PBCs are theoretically constrained by the requirement that they articulate a social purpose, we find that the largest PBCs frequently articulate a social purpose that is vague and unmeasurable."); Levmore, *supra* note 154, at 719–20 & n.16 (2022) (noting that B-Corps simply declare themselves part of a category without any real monitoring of trade-offs).

240 *E.g.*, Parikh, *supra* note 201, at 37.

241 Teachout & Khan, *supra* note 137, at 71–72; Wu, *supra* note 1, at 127–39.

242 Miazad, *supra* note 148, at 1611–15; MAURICE E. STUCKE & ARIEL EZRACHI, COMPETITION OVERDOSE: HOW FREE MARKET MYTHOLOGY TRANSFORMED US FROM CITIZEN KINGS TO MARKET SERVANTS 132–45 (2020); Paul, *On Firms*, *supra* note 229 (hypothesizing that allowing coordination by and between small or democratic organizations may have benefits); *cf.* Laura Alexander & Steven C. Salop, Antitrust Worker Protections: The Rule of Reason Does Not Allow Counting of Out-of-Market Benefits (Aug. 10, 2022)

these arguments entail criticism of the consumer welfare criterion, implementing them in a rational way would require a new alternative criterion. And regulators have weighed interventions in securities markets designed to advance stakeholder-facing agendas.[243] To do this work, they would need sensible ways of valuing stakeholder benefits and costs and trading them off against each other.

In each of these domains, the existing orthodoxy offers a single monetizable criterion tied to the interests of a single constituency, and that criterion has been elaborated into detailed methodologies through decades of regulation, litigation, and academic work. If ESG is to gain real traction in these spaces, it must offer plausible alternative approaches to valuing impacts that would allow decision makers to manage trade-offs. Recognizing that these are ultimately the same question can facilitate progress by enabling regulatory and doctrinal sharing across different domains.

b) Mixing moral and economic motives. Courts have been forced to grapple with a variety of situations in which actors are driven by both economic and moral motivations. While economic regulation is commonplace, the government may lack authority to intervene and regulate where moral motivations are at play.

The Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*,[244] offers a high-profile example. In the case, a for-profit, closely held corporation argued that it could not be forced to pay for employee health insurance that would cover various forms of reproductive care, education, and counseling because the care violated its religious beliefs.[245] In holding that Hobby Lobby's refusal was protected by the Religious Freedom Restoration Act,[246] the Court explained that "modern corporate law does not

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(Georgetown Univ. L. Ctr. Draft), https://perma.cc/NZ5P-KHVX (observing that anticompetitive conduct that harms a group of suppliers is prohibited even if it generates benefits for other groups).

[243] *See, e.g.*, Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334, 21,346–21,412 (climate change rule); Pay Ratio Disclosure, 17 C.F.R. § 299.402(u) (2021) (median pay rule); Conflict Minerals, 17 C.F.R. § 240.13p-1 (2021) (conflict mineral rule). Trump Administration efforts to curtail ESG efforts by institutional investors are also stakeholder-facing. *See* Financial Factors in Selecting Plan Investments, 29 C.F.R. § 2509.95-1 (2021) ("[T]he fiduciary must act for the *exclusive purpose* of providing benefits to the participants and beneficiaries." (emphasis added)).

[244] 573 U.S. 682 (2014).

[245] *Id.* at 702–04.

[246] 42 U.S.C. §§ 2000bb–2000bb-4, invalidated in part by City of Boerne v. Flores, 521 U.S. 507 (1997).

require for-profit corporations to pursue profit at the expense of everything else."[247] The Court stated that the corporation's religious beliefs were sincere, and it suggested that the mechanisms of corporate law had aggregated the moral beliefs of the corporation's shareholders in a legitimate way.[248] Although a large publicly held corporation might not be able to credibly claim that it had a specific religious belief, the Court concluded that a closely held corporation raised different issues.[249]

Moral motivations have also come into play in antitrust law.[250] The Sherman Act has been interpreted to exempt noncommercial[251] and political[252] activities. As a result, boycotts intended to advance moral or religious objectives should be exempt from scrutiny under the antitrust laws. But courts have sometimes struggled to apply the distinction in cases involving mixed motives, leading to unconvincing results and scholarly controversy.[253]

Securities law appears set to enter similar controversies. Professor Sean Griffith has suggested that securities law's compelled-disclosure regime can withstand First Amendment scrutiny only to the extent that it has the clear and uncontroversial goal of protecting investors.[254] Griffith argues that the deep controversy around aspects of the SEC's proposed climate change disclosures thus make them vulnerable to challenge under the First Amendment.[255] The courts have already proven willing to use First Amendment concepts to pare back SEC rules,[256] and a new fight is clearly brewing.

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[247] *Id.* at 711–12.

[248] *Id.* at 717–19, 725; *see also* Pollman, *supra* note 6, at 1446.

[249] *Burwell*, 573 U.S. at 717.

[250] *See generally* Miazad, *supra* note 148.

[251] *Id.* at 1586; Sally F. Rogers, Note, *Sherman Act Liability for a Religiously Motivated Boycott*, 17 VAL. U. L. REV. 515, 526 (1983).

[252] *See* E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 140–41 (1961).

[253] *See* Miazad, *supra* note 148, at 1587–89; Paul G. Mahoney, Note, *A Market Power Test for Noncommercial Boycotts*, 93 YALE L.J. 523, 524–31 (1984).

[254] Sean J. Griffith, What's "Controversial" About ESG? A Theory of Compelled Commercial Speech Under the First Amendment 26–45 (Fordham L. Legal Stud., Rsch. Paper No. 4118755, 2022); *see also* Elizabeth Pollman, *The Supreme Court and the Pro-Business Paradox*, 135 HARV. L. REV. 220, 251 (2021) ("[W]hat corporate and securities law experts frame as 'disclosure' regulation might become 'compelled speech' as a matter of constitutional scrutiny.").

[255] Griffith, *supra* note 253 at 56–71.

[256] Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 530 (D.C. Cir. 2015).

Bankruptcy has also had to struggle with mixed motivations as it works through high profile bankruptcies of not-for-profit organizations like the National Rifle Association, the Boy Scouts of America, and various Roman Catholic dioceses.[257] Such bankruptcies necessarily involve courts in questions about whether organizations and the assets they control can remain committed to a moral or stakeholder-focused purpose, even when creditors could claim more if they were committed to financial value. The rise of public benefit corporations suggests the inevitability of other bankruptcy proceedings that will further test intuitions.

Although they arise in different contexts, considering the questions together might help suggest some common approaches. For example, the Supreme Court in *Hobby Lobby* suggested that there was a connection between an organization's form and its capacity to develop a sincere noneconomic belief: a closely held corporation with only a few religiously committed shareholders could credibly claim to have a religious belief about reproductive care, but a publicly traded corporation with many dispersed shareholders might struggle to make such a showing.[258] The same logic suggests real questions about applying First Amendment free speech principles to the mandatory disclosure regime governing publicly traded companies. ExxonMobil does not have sincere beliefs about climate change or its impacts because Exxon has thousands of shareholders who cannot realistically be expected to reach a deep agreement on the scientific or moral issues involved. As a result, Exxon's principles would not be offended if it was required to report on carbon emissions because there are no principles to offend.

2. Developing strategies.

Greater attention to the way that stakeholderism plays out across the full landscape of business law mechanisms can help policymakers find the right tools to address particular problems. For example, remaking the law of bankruptcy or the antitrust principles applicable to merger reviews would affect particular

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[257] *See* Tim Mak, *Judge Dismisses NRA Bankruptcy Case, Heightening Risk for Dissolution of Group*, NPR (May 11, 2021), https://perma.cc/CE3G-DP3K; Cara Kelly, *Judge Approves Major Parts of Boy Scouts' Bankruptcy Exit Plan; Pieces Remain Unresolved*, USA TODAY (July 30, 2022), https://perma.cc/2N5X-S9QF. *See generally* Marie T. Reilly, *Catholic Dioceses in Bankruptcy*, 49 SETON HALL L. REV. 871 (2019).

[258] *Burwell*, 573 U.S. at 717.

events at the end of the life of a corporation. By contrast, reshaping corporate governance or securities disclosures has the potential to affect ordinary-course decisions throughout the corporation's life. As a result, policymakers attempting to *respond* to a crisis might consider reforming the bankruptcy system to be more attentive to relevant interests,[259] while policymakers attempting to encourage corporations to *prepare* for a crisis might consider reforming corporate governance.[260]

Consideration of the full landscape can also facilitate useful cross-pollination, in which policymakers use stakeholderist solutions and insights from one area to solve problems in another. For example, Professor Rory Van Loo has drawn on insights from corporate governance to suggest that antitrust enforcers should be less reluctant to force firms with market power to break up.[261] Shareholders often benefit from smaller firm sizes and encourage firms to break themselves up voluntarily.[262] More broadly, policymakers might use organizational law solutions to deal with the problems created by market power in particular areas.[263] Corporate governance insights and mechanisms can also be used in bankruptcy. For example, Professor Samir Parikh has suggested that bankrupt firms that have suffered serious reputational damage might reorganize as public benefit corporations.[264] This would help the companies avoid a repeat of their prior bad behavior and help increase the companies' value by cleansing them of the taint of their prior activities.

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259 *See, e.g.*, Liscow, *supra* note 149, at 1470–71.

260 *See, e.g.*, Kovvali, *Essential Businesses*, *supra* note 103, at 218–31.

261 Rory Van Loo, *In Defense of Breakups: Administering a "Radical" Remedy*, 105 CORNELL L. REV. 1955, 1990–94 (2020) (adding to the corporate law literature suggesting that breakups may have fewer unintended consequences than previously believed).

262 Some recent examples of firms voluntarily breaking themselves up include Kellogg and General Electric. *See* Annie Gasparro, *Kellogg Splitting Into Three Companies as It Shifts Focus to Global Snacks*, WALL ST. J. (June 21, 2022), https://www.wsj.com/articles/kellogg-to-separate-into-three-businesses-11655810600; Thomas Gryta, *'The End of the GE We Knew': Breakup Turns a Page in Modern Business History*, WALL ST. J. (Nov. 9, 2021), https://www.wsj.com/articles/the-end-of-the-ge-we-knew-breakup-turns-a-page-in-modern-business-history-11636509385.

263 For example, internal governance mechanisms at regulated utilities might be remade so that the companies focus on customer interests instead of shareholder interests. *See* Kovvali & Macey, *Public Utilities*, *supra* note 44. Antitrust law already permits labor unions to exercise market power but seeks to channel that power by requiring that they take a not-for-profit form. *See* Aneil Kovvali & Jonathan R. Macey, *Toward a Tender Offer Market for Labor Representation*, 64 B.C. L. REV. 2111 (2022); 15 U.S.C. § 17.

264 Parikh, *supra* note 201, at 34–45 (proposing the use of public-benefit-corporation structure within bankruptcy).

Policymakers might also consider mixed strategies to solve broader problems. An "all of the above" approach to the problem of climate change might entail relaxing antitrust enforcement in key areas to permit higher environmental standards and higher prices for fossil fuels while dialing up enforcement in other areas to encourage clean innovation;[265] reforming bankruptcy processes to ensure that polluters cannot avoid environmental and labor standards and to tamp down the normal bias toward continuing operations;[266] invigorating socially driven shareholder activism,[267] defending and encouraging efforts by index funds to address climate change,[268] and reforming governance at key companies like electrical utilities;[269] and expanding securities disclosures to promote rational pricing of climate risks and encourage investors to protect their economic interests.[270]

An "all of the above" strategy to empower workers might similarly cut across different areas of business law. The government might tamp down on labor monopsony through antitrust enforcement[271] while facilitating labor organizing by allowing coordination by small firms;[272] reform bankruptcy to encourage restructuring over liquidation where it is an efficient way to promote employment;[273] reform corporate governance to encourage worker representation[274] and to encourage firms to hire during recessions;[275] and expand securities disclosures on matters relevant

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[265] Miazad, *supra* note 148, at 1614; Sarah E. Light, *The Law of the Corporation as Environmental Law*, 71 STAN. L. REV. 137, 171–80 (2019).

[266] Macey & Salovaara, *supra* note 85, at 944–51; Light, *supra* note 264 at 190–200.

[267] Christie, *supra* note 157, at 921–34.

[268] Condon, *Externalities*, *supra* note 167, 18–42.

[269] Kovvali & Macey, *Public Utilities*, *supra* note 44.

[270] Condon, *Market Myopia*, *supra* note 142, at 115–22; Georgiev, *The Breakdown*, *supra* note 125, at 284–86, 294–303.

[271] POSNER, ANTITRUST FAILED, *supra* note 106, at 74–75; Naidu et al., *supra* note 106, at 574–85; Marinescu & Hovenkamp, *supra* note 106, at 1048–52.

[272] *See* Sanjukta Paul, *A Democratic Vision for Antitrust*, DISSENT (2022), https://perma.cc/4BZM-7TAQ ("[U]nion organizing in fractured, unstable markets poses significant challenges of its own. Fortunately, antitrust reforms can help address those challenges by accommodating coordination among smaller enterprises—a practice that was once conventional and was likely intended by the original antitrust statutes.").

[273] Liscow, *supra* note 149, at 1483–89.

[274] Strine, Kovvali & Williams, *supra* note 134, at 1380–94; Leo E. Strine, Jr., Kirby M. Smith & Reilly S. Steel, Caremark *and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective* Caremark *and EESG Strategy*, 106 IOWA L. REV. 1885, 1910–21 (2021).

[275] Kovvali, *Countercyclical Corporate Governance*, *supra* note 188.

to workers.[276] By considering business law together, as a system, policymakers can devise comprehensive proposals that are more likely to meet the needs of the moment.

3. Avoiding unintended consequences.

Examining stakeholderism across different business law areas can also help policymakers anticipate and avoid problems. For example, dialing up antitrust enforcement in response to stakeholder concerns could undermine efforts to encourage corporate governance to be more responsive to stakeholders.[277] Fundamentally, stakeholder governance is about deploying corporate power and wealth to advance the interests of a broad range of constituencies. But firms operating in perfectly competitive markets have little power and little capacity to generate excess wealth.[278] When confronted with firms with market power, policymakers may need to choose between introducing stakeholder-favoring governance[279] and introducing competition.

Similarly, importing European-style codetermination arrangements may not be effective in improving worker conditions unless other aspects of European markets and economic regulation that empower workers are also imported.[280] Understanding business law as an interconnected system can help policymakers identify all of the necessary components of a reform.

CONCLUSION

Antitrust, bankruptcy, corporate, and securities law are currently understood to have separate aims that are each tightly

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[276] Georgiev, *Too Big to Disclose*, *supra* note 126, at 662–68; Georgiev, *Human Capital Management*, *supra* note 210 at 713–27.

[277] Park, *From Managers to Markets*, *supra* note 86, at 485 n.318:

> If companies with market power can do more to consider the interests of stakeholders, it could be problematic to break-up those companies and replace them with smaller companies that will vigorously compete with each other. Such competition would have benefits such as lower prices for consumers and lessen the political power of large companies, but it would also mean that the resulting smaller companies would need to constantly focus on delivering short-term results.

[278] As Peter Thiel memorably put it, "competition is for losers." Peter Thiel, *Competition Is for Losers*, WALL ST. J. (Sept. 12, 2014), https://perma.cc/WUZ9-M74Z.

[279] *See* Kovvali & Macey, *Public Utilities*, *supra* note 44.

[280] *Cf.* Strine et al., *supra* note 134, at 1380–94 (noting that adopting a European-style codetermination regime is unlikely to produce desired effects without complementary external reforms).

focused on a single constituency. But they are all simply components of a common policy toolkit. That toolkit has historically been used to address a variety of stakeholder interests against the backdrop of changing economic circumstances. As theorists and practitioners debate the fields' present and plot their future, it is essential to draw on commonalities and relationships between the fields.