Competing Views on the Economic Structure of Corporate Law

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This essay was written for the symposium issue celebrating the twenty-fifth anniversary of the publication by Frank Easterbrook and Daniel Fischel (“E&F”) of their influential book, *The Economic Structure of Corporate Law* ( “the E&F Book”).[[2]](#footnote-2) As other articles in this issue highlight, the book has had significant influence on the corporate field. This essay offers my personal perspective on this subject; I discuss the significance that EF’s writings have had over the years for my own work on the economics of corporate governance.

The E&F Book, and the prior articles that the Book integrated, are ones to which I have paid significant attention and studied carefully over many years. During the period in which the articles and the book were published, as well as in the many years since then, I have worked on developing and implementing an economic approach to the analysis of corporate governance issues. In the course of this multi-decade work, I carefully studied, paid close attention to, and often engaged with analyses and arguments that E&F put forward. Below I discuss these points in the context of five corporate research area to which E&F and myself contributed and offered opposing or at least substantially different approaches.[[3]](#footnote-3)

1. The Takeover Debates, or How I Got into Corporate Law

 I first encountered the work of E&F in 1981. I was a twenty-five-years old graduate student at Harvard, studying for an SJD (doctorate in law) and for a Ph.D. in Economics.[[4]](#footnote-4) My main interests lay in economic theory and in moral philosophy, and the research that I did up to that point was in those areas, including papers on the normative foundations of economic analysis of law, on social choice, on distributive justice, and on the jurisprudential significance of settlements.

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

 One day I ran into Victor in the corridor, and he called me into his office and handed me a draft of E&F’s paper on tender offer that was scheduled to be published in the *Harvard Law Review* later that year.[[5]](#footnote-5) In their paper, E&F argued that the goal of takeovers rules should be to facilitate takeovers to the fullest extent possible, even those at a low premium over the preceding stock market price, in order to enhance as much as possible the disciplinary force of takeover bids. Victor heard Frank present the paper, and he asked me to read the paper and let him know what I thought. When I told him over lunch my views on what E&F’s economic analysis did not take into account, he suggested to me that I write up a paper on the subject.

 I did, and I was fortunate that, even though the *Harvard Law Review* generally did not publish articles by students, they accepted my submission and published my article on the case for facilitating competing tender offers.[[6]](#footnote-6) My article explained that facilitating competing tender offers in the event that a bid is made would ensure that targets are allocated to the buyer that values them most highly, thereby benefitting both target shareholders and society; therefore, the analysis suggested, takeover laws should facilitate competing offers by providing time and allowing target managements to solicit such offers.

 I subsequently was also fortunate that E&F decided to write a paper engaging with my position,[[7]](#footnote-7) and that the *Stanford Law Review* invited me to participate in an exchange on the subject with E&F and Stanford Professor Ron Gilson. This provided me with an opportunity to publish an article replying to E&F’s critique and developing further my view on the value of auction in takeovers.[[8]](#footnote-8)

 This engagement with E&F led me to write a subsequent article analyzing how takeover regulations should seek to secure undistorted choice by target shareholders.[[9]](#footnote-9) This in turn resulted in my being asked to teach corporate courses after I joined the Harvard Law School faculty, and I started thinking about the corporate field more broadly. While this field was initially one of several in which I did research, over time it became my focus. E&F were a “but-for cause,” and I am thus indebted to them, for my entry into the field which eventually became my professional home.

Before proceeding, I should note that, even though E&F and I developed differ positions on the regulation of takeover bidders, we largely shared positions regarding the regulation of targets. Although we differed on whether target managements should be permitted to solicit competing bids, we all concluded that such managements should be precluded from blocking tender offers from reaching target shareholders. With US law moving in the direction of increasing permissibility of takeover defenses, my research on takeovers in the years since the publication of E&F Book focused on this subject. In this research I put forward the case against board veto on takeovers, identified the combination of staggered boards and poison pills as an especially problematic defense, and provided empirical evidence on the costs of entrenching arrangements.[[10]](#footnote-10) I believe that E&F are likely be supportive of the conclusions of this research.[[11]](#footnote-11)

1. The Debate on Contractual Freedom

In a 1990 well-known article on the corporate contract,[[12]](#footnote-12) and in their lead chapter of the E&F Book,[[13]](#footnote-13) E&F put forward canonical statements of a contractarian view of corporate law. Under this view, market forces operate to ensure that corporate charters are efficiently designed. This view carries important implications for corporate law policy and scholarship: corporate law should largely avoid mandatory rules, limiting itself to providing default provisions from which companies should generally be free to opt out; and corporate law scholars should be reluctant to propose or consider arrangements that differ from the ones already observed in the marketplace, and focus instead on understanding and explaining the reasons for the efficiency of market arrangements.

At the time that E&F put forward their contractarian views and in the years since then, I conducted research whose conclusions were substantially more skeptical of the arrangements produced by market forces and significantly less deferential to such arrangements. In 1989, I published an article on contractual freedom that focused on mid-stream problem;[[14]](#footnote-14) This article showed that, even if one were to assume that market forces ensured that companies go public with efficient charter provision, given the long life and changing circumstances of public companies, there are substantial reasons to worry that in mid-stream companies will not adopt efficient changes or adopt inefficient ones. These midstream problems, I explained, provide a basis for mandatory rules and cast doubt on the presumptive efficiency of the private arrangements observed in the marketplace.[[15]](#footnote-15)

As to IPO charter provisions, I provided reasons for doubting their presumptive optimality in an introductory essay that I contributed to the *Columbia Law Review* symposium on contractual freedom in which E&F published their corporate contract article and subsequent work.[[16]](#footnote-16) I subsequently sought to cast further doubt on the optimality of IPO charters in articles that sought to show that the antitakeover provisions and dual-class structures included in IPO structures could well be inefficient.[[17]](#footnote-17) I plan to return in future work to the subject of the optimality of IPO provisions and the desirable limits on such provisions. Of course, any such future work that I will do will engage, as any other work in this area should, with the pro-contractual arguments of E&F.

III. State Competition in Corporate Law

Related to E&F’s view on contractual freedom is their view on state competition. In the United States, state law is an important source of the rules governing companies, and companies may choose their state of incorporation and thereby the state corporate law that will govern them. E&F hold that, because of companies’ freedom to choose, and investors’ ability to price this choice when participating in the company’s IPO, market forces will push companies to make value-enhancing choice of their incorporation state and states competing for incorporation will have incentives to adopt value-enhancing state corporate law rules.[[18]](#footnote-18)

By contrast, at the time of E&F’s writing and in the years since then, I engaged in developing an account of state competition that identified the shortcoming of this competition. In particular, taking into account the mechanisms on which contractarians rely, my analysis showed that there is nonetheless an important set of corporate law issues with respect to which states seeking to attract incorporations have incentives to provide rules that favor managers rather than shareholders.[[19]](#footnote-19) I also supplemented this incentives analysis with empirical studies supporting it,[[20]](#footnote-20) with an account of the development of state takeover law that supported it,[[21]](#footnote-21) and with a history of the development of shareholder protection rules over time that shows how federal law had repeatedly to step in and provide such protections when state law failed to do so.[[22]](#footnote-22)

Although my analysis supports an important role for mandatory federal laws, I also sought to put on the table approaches that would address both the shortcoming of state competition and the concerns that contractarians like E&F have with respect to mandating federal rules from which companies cannot opt out.[[23]](#footnote-23) In particular, my research showed that, even if such contractarian concerns were to be fully accepted, an important role for federal law would be desirable: At a minimum, it would be desirable to (i) provide a federal incorporation option, and (ii) adopt a federal rule that enables public company shareholders to change the company’s incorporation (without bard veto on such reincorporation).[[24]](#footnote-24) Thus, on my view, even contractarians like E&F would not have a good basis for not accepting such an approach.

IV. The Debate on Efficiency and Distribution in Corporate Law

 Various corporate law rules have been viewed as seeking to constrain corporate insiders from treating themselves better at the expense of public investors. However, in a widely cited article on corporate control transactions, and in the E&F Book, E&F argued that such distributive or fairness principles should not be followed because doing so could well impede efficient choices by corporate insiders and thereby produce efficiency costs that would be detrimental to the interests of all corporate participants ex ante.[[25]](#footnote-25)

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

In one early article, I have shown that enabling bidders to treat shareholders differentially could well lead to value-reducing takeovers.[[26]](#footnote-26) In subsequent articles, I have shown how corporate controllers, and especially ones with disproportionate voting power, could well make an array of choices that would serve their private interests even though they would be value-reducing;[[27]](#footnote-27) and how the interest of managers in enhancing their payoffs might lead to the adoption of executive pay arrangements that would produce distorted incentives. [[28]](#footnote-28) All in all, although E&F and I agree on the importance of distributional rules on incentives, my research suggests that careful analysis of incentive issues often provides a basis for accepting, not rejecting, equal treatment requirements and other limitations on insider payoffs. In many corporate settings, such legal constraints could well be valuable not just for the protection of weaker parties but also for the sake of efficiency and value-maximization.

V. The Debate on Corporate Purpose

I have for long been critical of arguments that insulating incumbents from removal or shareholder intervention would benefit stakeholders, viewing them as likely to entrench incumbent without producing the purported benefits to stakeholders.[[29]](#footnote-29) But in the last three years I have devoted considerable time to engaging with the increasingly influential view of stakeholder governance (“stakeholderism”), which advocates encouraging and relying on corporate leaders to serve the interests of not just shareholders but also all stakeholders (such as employees, communities, customers, suppliers, and the environment).[[30]](#footnote-30) This recent line of research attempts to show that stakeholderism should not be expected to delve any material benefits to stakeholders, and indeed would be counterproductive by making corporate leaders less accountable and by introducing illusory hopes that could impede the adoption of reforms that would really address stakeholder concerns.

 Although the E&F Book does not devote much space to the subject of corporate purpose, which has not been at the time the book was published as central to ongoing debates as it is now, they made their views on the subject clear in the tight and forceful way that characterizes their book.[[31]](#footnote-31) Viewing the corporation as a privately produced nexus of contracts, E&F indicate that the question of corporate purpose is for corporation’s founders to determine. And to the extent that companies went public as for-profit corporations, E&F view any attempt to stir them in a stakeholderist direction as violating the promise made to investors. This E&F view has some “family resemblance” to that of Milton Friedman in his famous essay on the social responsibility of business.[[32]](#footnote-32)

Because both E&F and I are opposed to stakeholder governance, it might seem that the subject of corporate purpose is another one on which our views overlap. However, in current work,[[33]](#footnote-33) I explain that the “Chicago” approach to the subject substantially differs from the approach that I am seeking to advance. Although both approaches are critical to the claims of stakeholderism, they fundamentally differ in their premises, reasons, and implications. For the purpose of this essay, however, what might be most important to note that, in doing this current work, I find myself, once again, reexamining sections of the E&F Book and engaging with their views on the subject.

VI. Going Forward

Like many others in the corporate field, I have for long paid close attention to the views and analyses put forward in the E&F book and prior articles. In developing and implementing my economic framework for analyzing corporate law issues, I have mostly reached conclusion and positions different than theirs, though some significant areas of agreements do exist, but I always viewed it as necessary and important to engage with the analyses and points put forward in their writing. I expect to continue doing so in the coming years, and hope to have the opportunity to present another report on the subject in the fifty-years anniversary of the publication of the E&F Book.

1. † James Barr Ames Professor of Law, Economics, and Finance, and Director of the Program on Corporate Governance, Harvard Law School. For disclosure of other affiliations and activities, see http://www.law.harvard.edu/faculty/bebchuk/bio.shtml. I benefitted from the comments of and discussions with participants in the University of Chicago Symposium on the Economic Structure of Corporate Law. [↑](#footnote-ref-1)
2. See Frank H. Easterbrook & Daniel R. Fischel, The Economic Structure of Corporate Law (1996) (Harvard University Press). [↑](#footnote-ref-2)
3. As the footnotes to this essay indicate, some of the research I discuss is one that I co-authored with others. For simplicity of exposition in this short essay, I do not include the names of co-authors in the text but only in the citation notes. The contribution of my co-authors was, of course, critical, to the development of the ideas in the research discussed in this essay. [↑](#footnote-ref-3)
4. E&F, then recently tenured professors at University of Chicago and Northwestern respectively, were young as well…. At the symposium I drew a humorous reaction when I displayed photos of the early selves of the three of us, and I am pasting them below in case they might elicit such a reaction from some readers:

   [↑](#footnote-ref-4)
5. See Frank Easterbrook and Daniel Fischel, “The Proper Role of a Target’s Management in Reponing to a Tender offer,” 94 Harvard Law Review (1981). [↑](#footnote-ref-5)
6. See Lucian Bebchuk, “The Case for Facilitating Competing Tender Offers,” 95 *Harvard Law Review* 1028-1056 (1982). [↑](#footnote-ref-6)
7. See Frank Easterbrook and Daniel Fischel, “Auctions and Sunk Costs in Tender Offers, *Stanford Law Review* (1982). [↑](#footnote-ref-7)
8. See Lucian Bebchuk, “The Case for Facilitating Competing Tender Offers: A Reply and Extension,” 35 *Stanford Law Review* 23-50 (1982). [↑](#footnote-ref-8)
9. See Lucian Arye Bebchuk, Toward Undistorted Choice and Equal Treatment in Corporate Takeovers, 98 Harv. L. Rev. 1695 (1985). [↑](#footnote-ref-9)
10. See Lucian Arye Bebchuk, The Case Against Board Veto in Corporate Takeovers, 69 U. Chi. L. Rev. 973 (2002) (putting together the case for banning defensive tactics and addressing objections to it); Lucian Arye Bebchuk, John C. Coates IV & Guhan Subramanian, The Powerful Antitakeover Force of Staggered Boards: Further Findings and a Reply to Symposium Participants, 55 Stan. L. Rev. 885 (2002) (explaining and documenting the powerful antitakeover effects of combining staggered boards with poison pills); Lucian A. Bebchuk & Robert J. Jackson, Jr., Toward a Constitutional Review of the Poison Pill, 114 Colum. L. Rev. 1549 (2014) (explaining how federal law can be used to invalidate state law authorizing the use of poison pills); Lucian A. Bebchuk & Alma Cohen, The Costs of Entrenched Boards, 78 J. Fin. Econ. 409 (2005) (empirically investigating the value effects of staggered boards); Lucian Bebchuk, Alma Cohen & Allen Ferrell, What Matters in Corporate Governance?, 22 Rev. Fin. Stud. 783 (2009) (empirically analyzing the value effects of six types of entrenching positions); Lucian A. Bebchuk, Alma Cohen & Charles C.Y. Wang, Learning and the Disappearing Association Between Governance and Returns, 108 J. Fin. Econ. 323 (2013) (follow-up study on the value effects of entrenching provisions). [↑](#footnote-ref-10)
11. The only caveat is that there is a tension between E&F’s conclusion that takeover defenses are likely to be undesirable from an economic perspective and their general conclusion that state law rules, which have been moving in the direction of increasing permissibility of such defenses, should generally be regarded as presumptively efficient. E&F discuss this issue in Easterbrook and Fischel, supra note 1, at 222-227. [↑](#footnote-ref-11)
12. See Frank Easterbrook and Daniel Fischel, the Corporate Contract, Columbia Law Review (1989). [↑](#footnote-ref-12)
13. See Easterbrook and Fischel, supra note 1, Chapter 1. [↑](#footnote-ref-13)
14. Lucian Arye Bebchuk, Limiting Contractual Freedom in Corporate Law: The Desirable Constraints on Charter Amendments, 102 Harv. L. Rev. 1820 (1989) [↑](#footnote-ref-14)
15. For subsequent analysis that I did on mid-stream problems, see Lucian A. Bebchuk & Ehud Kamar, Bundling and Entrenchment, 123 Harv. L. Rev. 1551 (2010); and Lucian A. Bebchuk & Scott Hirst, Private Ordering and the Proxy Access Debate, 65 Bus. Law. 329 (2010). My analysis of how shareholders might be unable to obtain value-enhancing charter amendments opposed by corporate leaders led me to propose enabling shareholders to initiate charter amendments, as well as to set corporate law defaults in ways that take these impediments into account. For the articles putting forward these proposals, see Bebchuk, The Case for Increasing Shareholder Power, 118 *Harvard Law Review 833 (*2005); Lucian Arye Bebchuk & Assaf Hamdani, Optimal Defaults for Corporate Law Evolution, 96 Nw. U. L. Rev. 489 (2002). [↑](#footnote-ref-15)
16. See generally Lucian Arye Bebchuk, The Debate on Contractual Freedom in Corporate Law, 89 Colum. L. Rev. 1395, (1989); Lucian Arye Bebchuk, Asymmetric Information and the Choice of Corporate Governance Arrangements, Harvard Law School Olin Paper No. 398 (2002), at https://papers.ssrn.com/abstract=327842. [↑](#footnote-ref-16)
17. See Lucian Arye Bebchuk, Why Firms Adopt Antitakeover Arrangements, 152 U. Pa. L. Rev. 713 (2003); Lucian A. Bebchuk and Kobi Kastiel, “The Untenable Case for Perpetual Dual-Class Stock,” 101 *Virginia Law Review* 585 (2017). [↑](#footnote-ref-17)
18. See Easterbrook and Fischel, supra note 1, chapter 8. Their analysis built on the earlier work by Ralph Winter, **State** Law, Shareholder Protection, and the Theory of the Corporation. Journal of Legal Studies (1977), who argued that state competition largely represented a “race to the top.” Roberto Romano also made significant contributions to view that competition among states incentivizes the adoption of value-enhancing rules. See, e.g., Roberta Romano, the Genuis of American Corporate Law (1993). [↑](#footnote-ref-18)
19. See generally Lucian Arye Bebchuk, Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law, 105 Harv. L. Rev. 1435 (1992); Lucian Arye Bebchuk & Assaf Hamdani, Vigorous Race or Leisurely Walk: Reconsidering the Competition Over Corporate Charters, 112 Yale L.J. 553 (2002) [hereinafter Vigorous Race or Leisurely Walk]; and Oren Bar-Gill, Michal Barzuza & Lucian Bebchuk, The Market for Corporate Law, 162 J. Inst. & Theoretical Econ. 134 (2006). [↑](#footnote-ref-19)
20. See generally Lucian Arye Bebchuk & Alma Cohen, Firms’ Decisions Where to Incorporate, 46 J.L. & Econ. 383 (2003). For a critical examination of prior empirical work that purported to show the efficiency of state competition, see generally Lucian Bebchuk, Alma Cohen & Allen Ferrell, Does the Evidence Favor State Competition in Corporate Law?, 90 Calif. L. Rev. 1775 (2002). [↑](#footnote-ref-20)
21. See generally Lucian Arye Bebchuk & Allen Ferrell, Federalism and Takeover Law: The Race to Protect Managers from Takeovers, 99 Colum. L. Rev. 1168 (1999). [↑](#footnote-ref-21)
22. Lucian A. Bebchuk and Assaf Hamdani, “Federal Corporate Law: Lessons from History,” *Columbia Law Review*, Vol. 106, 2006, pp.1793-1839. [↑](#footnote-ref-22)
23. See Easterbrook and Fischel, supra note 1, at 223 (“Federal Laws face less competition; it is harder to move to France than to Nevada.”). [↑](#footnote-ref-23)
24. See generally Lucian Arye Bebchuk & Allen Ferrell, A New Approach to Takeover Law and Regulatory Competition, 87 Va. L. Rev. 111 (2001) (suggesting such an approach with respect to takeover law); Lucian Arye Bebchuk & Assaf Hamdani, Vigorous Race or Leisurely Walk: Reconsidering the Competition Over Corporate Charters, 112 Yale L.J. 553 (2002) (suggesting such an approach with respect to corporate law in general). For responses engaging with these proposals by authors who share E&F’s contractual perspectives, see generally Stephen Choi & Andrew Guzman, Choice and Federal Intervention in Corporate Law, 87 Va. L. Rev. 961 (2001); Jonathan Macey, Displacing Delaware: Can the Feds Do a Better Job Than the States in Regulating Takeovers?, 57 Bus. Law. 1025 (2002). For our replies to these two critiques, see generally Lucian Arye Bebchuk & Alan Ferrell, Federal Intervention to Enhance Shareholder Choice, 87 Va. L. Rev. 993 (2001); and Lucian Arye Bebchuk & Alan Ferrell, On Takeover Law and Regulatory Competition, 57 Bus. Law. 1047 (2002). [↑](#footnote-ref-24)
25. See generally Frank Easterbrook and Daniel Fischel, Corporate Control transaction, *Yale Law Journal* (1981); Easterbrook and Fischel, supra note 1, Chapter 5. [↑](#footnote-ref-25)
26. See, e.g., Lucian A. Bebchuk, “The Case for Increasing Shareholder Power,” 118 *Harvard Law Review* 833 (2005). [↑](#footnote-ref-26)
27. See Lucian Bebchuk Reiner Kraakman, and George Triantis, “Stock Pyramids, Cross-Ownership, and Dual Class Equity: The Creation and Agency Costs of Separating Control from Cash Flow Rights,” *Concentrated Corporate Ownership,* R. Morck, ed., 2000, pp.445-460; Lucian Bebchuk, “Efficient and Inefficient Sales of Corporate Control,” *Quarterly Journal of Economics,* Vol. 109, 1994, pp.957-993; Lucian A. Bebchuk and Kobi Kastiel, “The Untenable Case for Perpetual Dual-Class Stock,” *Virginia Law Review*,Vol. 101, 2017, pp.585-631; Lucian A. Bebchuk and Kobi Kastiel, “The Perils of Small-Minority Controllers,” *Georgetown Law Journal,* Vol. 107, 2019, pp.1453-1514. [↑](#footnote-ref-27)
28. See generally Lucian Bebchuk & Jesse Fried, Pay Without Performance: The Unfulfilled Promise of Executive Compensation (2004), Part III; Lucian A. Bebchuk & Jesse M. Fried, Paying for Long-Term Performance, 158 U. Pa. L. Rev. 1915 (2010). [↑](#footnote-ref-28)
29. For analysis of this issue in such early articles, see Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 Harv. L. Rev. 833, 908–13 (2005); and Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 Va. L. Rev. 675, 729–32 (2007). [↑](#footnote-ref-29)
30. See generally Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 Cornell L. Rev. 91 (2020); Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, *For Whom Corporate Leaders Bargain*, 94 S. Cal. L. Rev. 1467 (2022); Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, *Stakeholder Capitalism in the Time of Covid*, 40 Yale J. on Reg. (forthcoming 2023), https://ssrn.com/abstract=4026803; Lucian A. Bebchuk and Roberto Tallarita, “Will Corporations Deliver Value to All Stakeholders?” 75 *Vanderbilt Law Review* (forthcoming 2022), [https://ssrn.com/abstract=3899421](https://urldefense.proofpoint.com/v2/url?u=https-3A__ssrn.com_abstract-3D3899421&d=DwMFaQ&c=WO-RGvefibhHBZq3fL85hQ&r=N6qStalIOJ_SM6O3qY6JesfyaKunQab_Y5hEAg0TgZ0&m=4c1V--NH0t3aUCIffMZ4JTwSiiUi3x9fw-KuKyF8xFv5Kb5CwbhZM-d-5cHMzgT0&s=lMjH7rgFvIPlKQOIbrVXdPMBbBgnFh6i6cO6DjvjYEU&e=); Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, *Does Enlightened Shareholder Value Add Value?*, 77 Bus. Law. (forthcoming 2022), https://ssrn.com/abstract=4065731; and Lucian A. Bebchuk & Roberto Tallarita, *The Perils and Questionable Promise of ESG-Based Compensation*, 48 J. Corp. L. (forthcoming 2022), https://ssrn.com/abstract=4048003. [↑](#footnote-ref-30)
31. See Easterbrook and Fischel, supra note 1, at 35-39 (discussing the “maximands” that corporations should pursue). [↑](#footnote-ref-31)
32. In comments at the symposium, Frank Easterbrook and Daniel Fischel expressed different views on the extent to which their position has similar spirit to the position put forward by Milton Friedman. [↑](#footnote-ref-32)
33. See Bebchuk, Three Conceptions of Capitalism, Working Draft, May 2022. [↑](#footnote-ref-33)