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TABLE OF CONTENTS

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THE RHETORIC OF ACTIVIST SHAREHOLDER STEWARDS

DIONYSIA KATELOUZOU*

The corporate governance role of institutional investors has long been stressed and culminated in recent emphasis on shareholder stewardship, the new buzzword in corporate circles. Today, it is becoming widely accepted that institutional shareholders not only have rights that can be used actively to monitor and engage with investee companies to improve corporate governance and performance but also responsibilities to their clients, their beneficiaries, their investee companies and society to meet sustainability goals. This Article advances the thesis that the model of shareholder stewardship as originally aspired and expected by the first-generation UK Stewardship Code (2010/12) is mainly about firm-specific, micro-level stewardship, rather than the market-level-style of stewardship associated with large passive asset managers, such as index funds, or the indirect-style of stewardship mostly exercised by asset owners. The main argument advanced in this Article is that while the ideal, firm-specific shareholder steward was never there in the first place, and already is largely vanishing, a special breed of activist investors with long-term horizons and dedicated, firm-specific monitoring capacities have the abilities and incentives to undertake the model of shareholder

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stewardship aspired to by the first-generation UK Stewardship Code. The question then arises as the extent to which these so-called "activist shareholder stewards" can play the role of "stewardship arbitrageurs" or "stewardship intermediaries" and advance an "enlightened" form of firm-specific shareholder stewardship and accountability to serve "shared value". To empirically address this question, this Article applies natural language processing (NLP) to explore the rhetoric of activist signatories to the first generation UK Stewardship Code, as revealed by their disclosure statements. The results show that there is a differentiated understanding of shareholder stewardship among the activist signatories to the UK Stewardship Code, but there is a small but potentially important breed of "enlightened" activist stewards that are ready to take on—and succeed at—micro-level shareholder stewardship. The findings have important implications for institutional investors and policymakers alike.

INTRODUCTION

"So hard it is to show the various meanings and imperfections of words when we have nothing else but words to do it with."
Attributed to John Locke

The COVID-19 pandemic—and the response to it—has impacted businesses worldwide and has revealed a series of short-term, medium-term, and long-term corporate governance risks.[1] Along with increasing calls for sustainability, social equality, biodiversity, and climate risk management, "stewardship" has in recent years emerged as the new buzzword in investment management circles.[2] But the language used by investors to express stewardship practices varies significantly. For some, stewardship is nearly synonymous with voting: it is a matter of *shareholder engagement* with company management and is aimed at maximizing long-term value.[3] Others expand the long lamented notion of shareholder ownership to include *ac-*

1. *See, e.g.*, Lynn S. Paine, *Covid-19 is Rewriting the Rules of Corporate Governance*, HARV. BUS. REV. (Oct. 6, 2020), https://hbr.org/2020/10/covid-19-is-rewriting-the-rules-of-corporate-governance (noting that the Covid-19 environment "is characterized by an increasingly complex set of pressures and demands from various stakeholder groups, heightened expectations for societal engagement and corporate citizenship, and radical uncertainty about the future").

2. For instance, in 2016, BlackRock, the largest U.S. asset manager, published its first annual report on "stewardship" activities, including voting and engagement. Since then, BlackRock has repeatedly stressed its commitment to stewardship and has developed tailored global stewardship principles and market-level stewardship and voting guidelines. A recent addition to the abundant reports and press releases is: BLACKROCK, OUR 2021 STEWARDSHIP EXPECTATIONS (2020). Since then, many other investors have followed suit and have created "stewardship and sustainability" teams to meet the investor demand for stewardship. *See, e.g.*, Theo Andrew, *M&G Creates New Stewardship and Sustainability Team*, CITYWIRE (Nov. 26, 2020), https://citywire.co.uk/wealth-manager/news/mandg-creates-new-stewardship-and-sustainability-team/a1430981 (reporting that in November 2020 M&G, a British investment management firm, created a new "stewardship and sustainability team" to meet ESG demand).

3. *See, e.g.*, Barbara Novick, Michelle Edkins & Tom Clark, *The Investment Stewardship Ecosystem*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 24, 2018), https://corpgov.law.harvard.edu/2018/07/24/the-investment-stewardship-ecosystem/ ("Investment stewardship refers to engagement with public companies to promote corporate governance practices that are consistent with encouraging long-term value creation for shareholders in the company."). On the link between stewardship and voting, see, for example, BlackRock

tive ownership and understand stewardship as an active exercise of ownership.[4] For others, stewardship is about "building *stronger portfolios*," both active and passive, collaboration between different specialists (including analysts, investment management and governance teams), analyzing companies through an ESG (environmental, social and governance) lens, setting priorities and only engaging when long-term sustainability is at stake.[5] For others it concerns active and passive strategies of *responsible investing* and ESG integration.[6] To another category, stewardship is not limited to engagement at the individual company level (micro-level stewardship) or at the level of industries, portfolios or whole markets (portfolio- or market-level stewardship). It includes engagement with governments, regulators, supranational organizations and other

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Investment Stewardship, BLACKROCK, https://www.blackrock.com/corporate/about-us/investment-stewardship (last visited July 30, 2021).

4. *See, e.g.*, Sacha Sadan, Legal & General Investment Management Ltd., *L&G Active Ownership Report*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 4, 2019), https://corpgov.law.harvard.edu/2019/05/04/lg-active-ownership-report/ (defining active ownership as "working to bring about real, positive change to create sustainable value for [the] clients").

5. *See, e.g.*, J.P. MORGAN ASSET MANAGEMENT, BUILDING STRONGER PORTFOLIOS—INVESTMENT STEWARDSHIP: PROMOTING SUSTAINABILITY THROUGH INVESTMENT-LED STERWARDSHIP 3, 4, 14 (2020) ("At the heart of our approach lies a close collaboration between our portfolio managers, research analysts and investment stewardship specialists to engage with the companies in which we invest. We call this 'investment-led stewardship.' . . . For us, investment stewardship is not about adhering to one set of norms or limiting our scope to one collection of standards. Nor is it about arbitrarily extending the time horizon of our portfolios. Rather, we strive to understand how factors impacting sustainability are financially significant to companies over time, understanding that the regions, cultures and organizations in which we invest differ greatly. . . . Our investment-led, expert-driven stewardship process has been developed over our extensive history of active management.").

6. *See* Quinn Curtis, Jill Fisch & Adriana Z. Robertson, *Do ESG Mutual Funds Deliver on Their Promises?*, 120 MICH. L. REV. 393, 395 (2021) (explaining that responsible or ESG investing is an umbrella term that refers to "investing informed by environmental, social, and governance criteria or considerations"); Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 388 (2020) (defining ESG investing as "an investment strategy that emphasizes a firm's governance structure or the environmental or social impacts of the firm's products or practices"). For an understanding of stewardship as responsible investing, see, for example, *Our Commitment to Sustainable Investment*, FIDELITY INT'L, https://www.fidelity.co.uk/responsible-investing/ (last visited July 30, 2021).

standard setters at the macro-level (macro-level stewardship).[7] Stewardship also means different things for different policymakers around the world: it encompasses shareholder engagement, voting with individual companies to improve their corporate governance standards, ESG investing and responsible risk management (beyond equity more generally), and stewardship exercised by institutional investors, service providers (including proxy advisors and investment consultants), and family owners.[8] The lack of a common "stewardship" language among practitioners and policymakers also reflects differences in investment approaches to stewardship, owing in part to differences in individual business models and investment styles.[9]

One may speculate that this lack of a common stewardship terminology is one of the main challenges for the wider implementation of stewardship practices and their acceptance by the investment community.[10] But the notion of stewardship has never been more relevant to the investment community than it is today. This is because of the increasing influence that

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7. *See ESG Definitions Glossary,* AVIVA INVESTORS, https://www.avivainvestors.com/en-se/capabilities/esg-definitions-glossary/ (last visited Apr. 15, 2022) (defining macro stewardship as "engaging with governments, regulators and supranational organizations with the aim of seeking correction of market failures and mitigation of systemic risks to put markets on a more sustainable footing"); *see also* Edie Newsroom, *Aviva's Steve Waygood: Now is the Time for Finance Firms to Become Climate Macro-Stewards*, EDIE (July 14, 2021) https://www.edie.net/avivas-steve-waygood-now-is-the-time-for-finance-firms-to-become-climate-macro-stewards/ (quoting Steve Waygood of Aviva Investors: "Many of my peers, at the point they find a market failure, will shrug their shoulders and give up, saying it is unfortunate that the current incentives in the system do not reward the right behaviour. . . . I think that's where the financial services industry is failing. It is clearly influential; we need to use that influence for macro-stewardship, not just micro-stewardship with individual companies.").

8. On these multiple faces of stewardship, see Dionysia Katelouzou & Dan W. Puchniak, *Global Shareholder Stewardship: Complexities, Challenges, and Possibilities in* GLOBAL SHAREHOLDER STEWARDSHIP 1, 5–9 (Dionysia Katelouzou & Dan W. Puchniak eds., Cambridge Univ. Press 2022).

9. *See generally* ROGER M. BARKER & IRIS H.Y. CHIU, CORPORATE GOVERNANCE AND INVESTMENT MANAGEMENT: THE PROMISES AND LIMITATIONS OF THE NEW FINANCIAL ECONOMY (2017) (examining how the internal business models and incentives of pension funds, mutual funds, hedge funds, private equity funds and sovereign wealth funds affect their corporate governance roles).

10. *See, e.g.*, Didier Cossin & Ong Boon Hwee, INSPIRING STEWARDSHIP 3–4 (2016).

institutional investors, who control the savings of millions of ordinary people, now have.[11] First, they have the muscle to ensure that the individual corporations whose shares and debt they own maintain high standards of governance, sustainability and accountability (micro-level stewardship). Second, they have the power to affect categories of industry sectors and the market as a whole (portfolio- or market-level stewardship). The focus of this Article is on micro-level stewardship.

The corporate governance role that institutional investors ought to play at the micro-level has been in focus for many years, but recently the terms of the debate have rapidly changed. At the outset, a quick snapshot of some of the key turning points in the debate is vital. From the moment institutional investors emerged as the most significant equity holders in the United States and the United Kingdom—and as they have increased in importance in many other countries—their ownership and corporate governance roles have dominated the literature on the subject.[12] This holds true for both the pre-1990 period and after the 2000s, when there was an explosion of interest in the subject. Different types of institutional investors (such as pension funds, hedge funds, and, more recently, index funds) have been discussed from different theoretical, normative and empirical perspectives. However, most of this literature has focused on the questions of passivity, time horizons and financial performance, engagement, and shareholder activism.[13] The newest addition to this voluminous body of research on the corporate governance role of institutional investors is the changing practices of large, diversified investors for whom the modern portfolio theory (MPT) is not

11. The rising influence of institutional investors is well documented in different strands of the literature, including management and law. *See* Lori V. Ryan & Marguerite Schneider, *Institutional Investor Power and Heterogeneity: Implications for Agency and Stakeholder Theories*, 42(4) BUSINESS & SOCIETY 398 (2003); Edward B. Rock & Daniel L. Rubinfeld, *Defusing the Antitrust Threat to Institutional Investor Involvement in Corporate Governance* 28 (NYU L. & Eco., Research Paper No. 17-05, 2017), https://ssrn.com/abstract=2925855.

12. For the most recent ownership data, see Adriana De La Cruz, Alejandra Median & Yung Tang, *Owners of the World's Listed Companies*, OECD CAP. MKT. SERIES 11–12 (2019), https://www.oecd.org/corporate/Owners-of-the-Worlds-Listed-Companies.htm (providing data that 41% of global market capitalization is held by institutional investors).

13. *See infra* Part II.

suitable.[14] Another change is the ideological transformation of shareholder monitoring as it has moved towards an "enlightened" standard that serves long-term, sustainable value.

This Article focuses on the language of *shareholder stewardship*,[15] a term used to refer to stewardship within equity and the way *activist investors* understand and express their stewardship role as *shareholders* of companies.[16] Two important observations are needed as background. First, shareholder stewardship is a form of monitoring, voting, and engagement by institutional investors that they can exercise at both the micro- and market-levels in such a way that both their investee companies and the ultimate providers of capital prosper in the long-term.[17] At the micro-level the main aim of shareholder stew-

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14. For more on MPT, see generally Harry Markowitz, *Portfolio Selection*, 7 J. FIN. 77, 77 (1952); Harry Markowitz, *The Utility of Wealth*, 60 J. POL. ECON. 151, 152 (1952); operationalized in HARRY MARKOWITZ, PORTFOLIO SELECTION: EFFICIENT DIVERSIFICATION OF INVESTMENTS (2d prtg. 1970); Harry Markowitz, Nobel Prize Lecture: Foundations of Portfolio Theory (Dec. 7, 1990), https://www.nobelprize.org/uploads/2018/06/markowitz-lecture.pdf. On how MPT is now changing to account for systematic risk, see Jeffrey N. Gordon, *Systematic Stewardship* 32 (Eur. Corp. Governance Inst., Working Paper No. 566, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3782814 (arguing that investors can now "achieve diversification at the portfolio level rather than at the firm level, meaning that the investor can most efficiently eliminate uncompensated idiosyncratic risk by holding a portfolio of firms with a narrow focus rather than holding shares in firms that themselves operate in diverse business segments in the name of diversification").

15. The term "shareholder stewardship" is borrowed from DIONYSIA KATELOUZOU, THE PATH TO ENLIGHTENED SHAREHOLDER STEWARDSHIP, which provides a comprehensive analysis of the broader concept of investor stewardship and its corporate governance as well as investment management aspects. *See* DIONYSIA KATELOUZOU, THE PATH TO ENLIGHTENED SHAREHOLDER STEWARDSHIP (forthcoming) (on file with author).

16. It is notable, however, that stewardship is currently encompassing investment in other assets, such as fixed income, property, and infrastructure. The term shareholder stewardship does not encompass investor stewardship outside equity. On the latter, see, for example, George Dallas, The Role of the Creditor in Corporate Governance and Investor Stewardship, Oct. 9, 2019, Harv. L. School. Forum on Corp. Governance, https://corpgov.law.harvard.edu/2019/10/09/the-role-of-the-creditor-in-corporate-governance-and-investor-stewardship/.

17. Here one needs to note that in the United Kingdom and the United States the interests of the companies are equated to the long-term interests of shareholders. But this position is highly debated. For a recent account of this literature, see Dorothy S. Lund, *Enlightened Shareholder Value, Stakeholderism, and the Quest for Managerial Accountability in* RESEARCH HANDBOOK ON

ardship is to transform rationally "apathetic" institutional investors into long-term engaged shareholders to minimize excessive risk-taking and short-termism and improve long-term performance at the individual company level. But this is where the second observation comes in. From an investment-management perspective, the development and promotion of what can be termed "micro-level shareholder stewardship" is premised on the assumption that engagement and monitoring of individual companies align with the internal business models of institutional investors.[18] However, this assumption does not always hold; the model of micro-level shareholder stewardship is, by definition, more suited to an investment strategy that entails *firm-specific monitoring* of operational and governance decisions and management oversight on a cost effective basis.

Notably, most institutional investors have neither the ability nor the incentives to engage in firm-specific shareholder stewardship despite the consensus among policymakers on the importance of such an oversight approach. This Article shows that there is a breed of investors with undiversified portfolios and firm-specific expertise for whom the model of micro-level shareholder stewardship aspired to by the first-generation UK Stewardship Code ("UK Code 2010/12") can be compatible with their business models and can be used as a strategy to unlock investment value. These *activist funds*—including hedge funds and other types of activists (referred to together in this Article as "activist funds")—can be prime candidates of that shareholder stewardship model with one significant proviso: that the activist funds' incentives need to be well aligned with the stewardship goals.[19] This triggers the question of whether the form of contemporary shareholder activism (increasingly associated with ESG demands) and firm-specific

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CORPORATE PURPOSE AND PERSONHOOD 91 (Elizabeth Pollman & Robert B. Thompson eds., 2021).

18. *See, e.g.*, FIN. REPORTING COUNCIL, CONSULTATION ON A STEWARDSHIP CODE FOR INSTITUTIONAL INVESTORS 11, 21 (2010), https://www.frc.org.uk/consultation-list/2010/consultation-on-a-stewardship-code-for-institution (setting the objective that "a stewardship code should be adopted as the standard which institutional investors practising active engagement, and their agents should aspire to follow, and against which they should report" and to "[e]nsure that engagement is closely linked to the investment process within the investment firm").

19. *See infra* Section II.C.

stewardship carried out by activist funds, which, at times, is regarded with some skepticism, can be legitimized if it conforms to the standards set up by stewardship codes in the UK and elsewhere.[20] In other words, can we expect activist funds to act in their firm-specific relationships as stewards rather than as "principals," the role traditionally ascribed to them by the agency theory? And how far do the stewardship perceptions of the activist funds themselves cohere with the policy narratives and prescriptions associated with stewardship?

In this Article, I contribute to these questions on both theoretical and empirical grounds. The Article provides an analytical framework for understanding the model of micro-level shareholder stewardship and its compatibility with firm-specific activist engagements. The analysis refutes the understanding of shareholder activism grounded in agency theory; it demonstrates that the model of shareholder stewardship signals a departure from the dominant assumptions of the economic analysis of shareholder monitoring under which the accountability parameters in investment management are a completely private, contractual, and apolitical matter revolving around institutional investors, their asset managers, and their beneficiaries. The UK Code 2010/12—like most other stewardship codes around the world[21]—is addressed to *all* asset managers and asset owners with equity holdings in UK listed companies.[22] Though it has largely ignored activist funds, this Article highlights that the model of micro-level shareholder stewardship aspired by the UK Code 2010/12 is by definition more suited to an undiversified investment strategy that entails firm-specific monitoring of operational and governance decisions

20. For the diffusion of stewardship codes around the world, see Dionysia Katelouzou & Mathias Siems, *The Global Diffusion of Stewardship Codes* in GLOBAL SHAREHOLDER STEWARDSHIP 631–662 (Dionysia Katelouzou & Dan W. Puchniak eds., Cambridge Univ. Press 2022).

21. The only exception here is the set of Singapore Stewardship Principles for Family Businesses which is addressed to non-institutional controlling shareholders. *See* Dan W. Puchniak & Samantha S. Tang, *Singapore's Embrace of Shareholder Stewardship* in GLOBAL SHAREHOLDER STEWARDSHIP 297, 310–313 (Dionysia Katelouzou & Dan W. Puchniak eds., Cambridge Univ. Press 2022) (elaborating how the Stewardship Principles for Family Businesses fits the Singapore's corporate landscape which is dominated by controlling shareholders and not institutional shareholders as is the case in many other countries).

22. *See infra* Part II.C.

and management oversight on a cost effective basis. It may, therefore, be surprising that the current corporate governance debate focuses on the stewardship role of the "Big Three"—BlackRock, Vanguard and State Street—or the "Big Four," which also includes Fidelity.[23] The Big Three or the Big Four have reasonable incentives to monitor portfolio- and market-level or "systematic" governance, but they lack firm-specific monitoring capacities.[24] This Article argues that activist funds, not the ones associated with U.S. hedge fund-style of shareholder activism but "enlightened" in nature, are better placed to undertake firm-specific shareholder stewardship and act as "stewardship arbitrageurs" or "stewardship intermediaries" at the micro-level.[25]

To test this claim and examine the degree to which the activist funds' perceptions of stewardship responsibilities cohere to those of policy-oriented institutions, I provide the first comprehensive evidence from the United Kingdom—the birthplace of the stewardship movement—on the *stewardship rhetoric* of activist funds as revealed in their stewardship disclosures. I focus on the 50 signatories to the UK Code 2010/12 with an "activist orientation" and apply natural language processing (NLP) techniques to explore their understanding of shareholder stewardship. The final corpus consists of 73,207 total words (tokens), and there are five main findings of this systematic analysis.

First, activist signatories to the UK Code 2010/12 understand stewardship to include aspects of both corporate governance and investment management.[26] Shareholder stewardship at the micro-level is understood as engagement and voting. But activist stewards are also concerned that shareholder stewardship cannot be internalized—and more fundamentally cannot be effectively exercised—if the investors' own business

23. *See* Leo E. Strine, Jr., *Fiduciary Blind Spot: The Failure of Institutional Investors to Prevent the Illegitimate Use of Working Americans' Savings for Corporate Political Spending*, 97 WASH. U. L. REV. 1007, 1016 (2020) (introducing the term "Big Four" to refer to the so-called Big Three index fund managers—BlackRock, Vanguard, and State Street—together with Fidelity). "Although Fidelity is more known for its actively managed funds . . . [it] is increasingly competing with the Big Three in the index space." *Id.*

24. *See* Gordon, *supra* note 14, at 8–11.

25. *See infra* Part II.C; Part IV.B.

26. *See infra* Part III.

models, incentives, and abilities as well as regulatory constraints (including fiduciary duties) are not accounted for. Second, the notion of responsibility, which is an inherent element of what can be termed "enlightened" shareholder stewardship, is much more embedded in the statements of friendly rather than confrontational activist stewards and those activists who are signatories to the Principles of Responsible Investing ("PRI"). Third, non-U.K. activist stewards place a greater emphasis on proxy voting and on the impact of ESG factors on risk management. Fourth, large activist stewards tend to place more emphasis on the governance of stewardship inside their organizations, which may be attributed to their greater resources and larger in-house teams. Fifth, and finally, the application of structural topic modeling disentangles a more latent role of the FRC's tiering in the textual information provided by stewardship disclosure statements and reveals that the variety of stewardship topics within a statement can be better explained by variables other than tiering.[27]

This Article makes several contributions to the literature. First, it contributes to and extends the growing literature on investor stewardship, which is mainly focused on the stewardship role of index funds—especially in the United States. The focus on *activist stewards* builds on and extends the work of Gilson and Gordon, who argued that in the United States activist hedge funds can provide a form of "market-based stewardship" leveraging institutional governance rights as "governance intermediaries" and corporate monitors and thereby substitute for top-down or self-regulatory stewardship codes and principles.[28] This Article differs from the earlier contribution of Gilson and Gordon in two respects. First, it does not look at activist stewards as substitutes of stewardship regulation but as prime candidates for implementing the regulatory-emanated model of micro-level shareholder stewardship. Second, even though I share the earlier skepticism on the undesirability of promoting the monitoring roles of short-term oriented activists, I elaborate that a special breed of enlightened, long-term, and less confrontational activist funds can play the role of

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27. *See infra* Section III.C; Section IV.A.

28. Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 867 (2013).

"stewardship arbitrageurs" or "stewardship intermediaries" for other investor-stewards with active or passive investment models. Such enlightened activist stewards are still the minority in the field, but they are no longer negligible as recent experience in climate change activism shows.[29] Both the analytical framework and the empirical evidence provided by this Article point to the ability of enlightened, activist, firm-specific monitoring to streamline micro-level shareholder stewardship, provided that the right incentives exist.

Second, this Article contributes to the shareholder activism literature, which is significantly polarized.[30] On the one hand, those who favor the governance role of activist investors have suggested that hedge fund-style activists have the potential to "arbitrage" the value of governance rights owned by other "reticent" institutional investors and therefore provide a form of market-based stewardship.[31] On the other hand, opponents of hedge fund activism have identified a number of negative externalities generated by hedge fund-style activists, including short-termism, conflicts of interests, and wealth transfers from debtholders and employees.[32] This "dark side" of hedge fund activism has become a matter of concern for

29. *See, e.g.*, Billy Nauman, Patrick Temple-West & Kristen Talman, *Exxon Shareholder Victory Charts New Course for ESG Advocates*, FIN. TIM. (May 28, 2021), https://www.ft.com/content/965ecd0d-821c-4f76-89f7-7f8cb4a649f6.

30. *See, e.g.*, Jennifer G. Hill, *Good Activist/Bad Activist: The Rise of International Stewardship Codes*, 41 SEATTLE U. L. REV. 497 (2018) (elaborating the competing narratives concerning the role of activist shareholders in corporate governance).

31. *See* Gilson & Gordon, *supra* note 28; *see also* Ronald J. Gilson & Jeffrey N. Gordon, *The Rise of Agency Capitalism and the Role of Shareholder Activists in Making it Work*, 31 J. APPLIED CORP. FIN. 8 (2019).

32. *See* Alon Brav, Wei Jiang & Hyonseob Kim, *The Real Effects of Hedge Fund Activism: Productivity, Asset Allocation, and Labor Outcomes*, 28 REV. FIN. STUD. 2723, 2724 (2015); Felix Zhiyu Feng, Qiping Xu & Caroline H. Zhu, *Caught in the Crossfire: How the Threat of Hedge Fund Activism Affects Creditors*, 64 J. EMPIRICAL FIN. 128 (2021); Anup Agrawal & Yuree Lim, *The Dark Side of Hedge Fund Activism: Evidence from Employee Pension Plans* (Jul. 2017) (unpublished manuscript), https://site.stanford.edu/sites/g/files/sbiybj8706/f/4134-s2v2dark_activism.pdf; *see also* J.B. Heaton, *The Unfulfilled Promise of Hedge Fund Activism*, 13 VA. L. & BUS. REV. 317 (arguing that "hedge fund activism has mostly disappointed"). *But see* Pat Akey & Ian Appel, *Environmental Externalities of Activism* (Nov. 18, 2019) (unpublished manuscript), https://ssrn.com/abstract=3508808 (finding that activist hedge fund campaigns are associated with reduced toxic emissions for targets).

policymakers, executives, non-activist shareholders, and other stakeholders alike, who point to the potential vulnerability of public corporations to yield to short-term pressures in view of the increasing influence of activist hedge funds and the likely negative impact on corporate wealth in general.[33] While the debate is still ongoing and heated, this Article points to two recent trends—coalition building between activist and non-activist investors and ESG activism—that could streamline the micro-level stewardship ability of enlightened activist stewards in the near future.

Third, this Article contributes to emerging literature on stewardship codes and assesses the effectiveness of the UK Code 2010/12, which has been established as the "gold" standard of global shareholder stewardship.[34] Previous literature has criticized the first generation UK Code for undertaking an "elusive" quest on various grounds, including the "passive" nature of institutional shareholders' investment practices and the lack of incentives and capacities on the part of mainstream institutional shareholders (such as pension funds, mutual funds, large asset managers) to engage in stewardship.[35] But almost no study to date has taken into consideration sufficient empirical data.[36] As a result, the debate often revolves around abstract principles and politics rather than a more detailed examination of the stewardship perceptions of institutional investors themselves. This study makes the first step to fill this

33. *See* Dionysia Katelouzou, *Myths and Realities of Hedge Fund Activism: Some Empirical Evidence*, 7 VA. L. & BUS. REV. 459, 462–63 (2013).

34. Dionysia Katelouzou & Henning Jacobsen, *Global Shareholder Stewardship: A Conference Report* 4, 24 (2020), https://ssrn.com/abstract=3610792 ("On its face, the UK Stewardship Code 2012 seems to be the gold standard followed in almost every country that has adopted such a code" and "[w]hat all the jurisdictional panels have demonstrated is that ostensibly 'seven' is the 'magic number' in terms of stewardship principles").

35. *See* Brian R. Cheffins, *The Stewardship Code's Achilles' Heel*, 73 MOD. L. REV. 1004, 1014 (2010); Simon C.Y. Wong, *Why Stewardship is Proving Elusive for Institutional Investors?*, BUTTERWORTHS J. INT'L BANKING & FIN. L. 406 (2010).

36. *But cf.* Anna Tilba & Arad Reisberg, *Fiduciary Duty Under the Microscope: Stewardship and the Spectrum of Pension Fund Engagement*, 82 MOD. L. REV. 456 (2019) (using data from interviews to unveil how U.K. pension fund trustees' interpretations of their fiduciary duties may shape their stewardship role).

gap and uses the UK Code 2010/12 as a regulatory experiment to unpack the rhetoric of activist stewards.[37]

Fourth, to the best of my knowledge, this is the first study that systematically examines the *rhetoric* of shareholder stewardship applying NLP to the disclosure statements to the UK Code 2010/12. For policymakers, this study's empirical evidence shows that the FRC's assessment (tiering) exercise has only a limited impact on the stewardship topics revealed by the disclosure statements. This Article's policy recommendation is that the FRC (and other stewardship standard-setters around the world) should reconsider ways to assess stewardship reporting especially in view of the revised UK Stewardship Code 2020 (hereinafter UK Code 2020) which moves reporting away from policy statements to stewardship activities and outcomes.[38] As this Article was going to press, the FRC announced that they will not tier the signatories to the revised UK Code 2020.[39] This decision is in line with the findings of this Article that tiering did not adequately differentiate between the signatories' statements to the UK Code 2010/12. Another key finding for the FRC is that overseas investors understand stewardship differently than domestic investors. This suggests that the FRC should focus on how to transform overseas investors—who currently dominate UK public equity[40]—into active, enlightened stewards. There is also evidence that friendlier activist stewards and those signed to the PRI have expressed their commitment to an enlightened notion of stewardship and thereby have set the bar higher than others. Nevertheless, it is apparent that the often-tenuous compatibility between the model of shareholder stewardship as is envisaged by the UK

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37. This study is part of a larger project which empirically analyzes all the 295 signatories to the UK Code 2010/12. *See* Katelouzou, *supra* note 15.

38. *See* FIN. REPORTING COUNCIL, UK STEWARDSHIP CODE 2020 [hereinafter UK CODE 2020], https://www.frc.org.uk/getattachment/5aae591d-d9d3-4cf4-814a-d14e156a1d87/Stewardship-Code_Dec-19-Final-Corrected.pdf.

39. *FRC Encouraged by Investors Embracing the Spirit of the UK Stewardship Code*, FIN. REPORTING COUNCIL (Mar. 10, 2022), https://www.frc.org.uk/news/march-2022-(1)/frc-encouraged-by-investors-embracing-the-spirit-o (last visited Mar. 14, 2022).

40. According to official data, overseas investors owned a record high of 56.3% of UK quoted shares at the end of 2020. *See Ownership of UK Quoted Shares: 2020*, OFF. FOR NAT'L STAT. (Mar. 3, 2022) [hereinafter ONS 2020], https://www.ons.gov.uk/economy/investmentspensionsandtrusts/bulletins/ownershipofukquotedshares/2020 (last visited Mar. 14, 2022).

Code 2010/12 and the investors' business models is a concern expressed in stewardship statements. This is especially true of larger asset managers who adopt a defensive activist style.

Overall, the textual findings of this Article have important implications for the ongoing efforts to improve stewardship reporting and practices, including the recent shift of policy focus in the UK from a mere emphasis on policy statements to the reporting of stewardship activities and outcomes on an annual basis.[41] More fundamentally, such an empirical study must complement ongoing engagement with the significant normative challenges addressed by shareholder engagement, shareholder activism, and shareholder stewardship more generally. In light of the significant rise of institutional investors and securities intermediation and the policy impetus to rely on institutional shareholders to constrain managerial power and more recently to "save the planet" via shareholder empowerment and stewardship, the competing positions in the old debate on shareholder empowerment and the current debate on index fund stewardship are now even more accentuated.[42] This Article contributes to this long-standing debate in corporate governance over the proper role of shareholders in modern companies and informs its policy handling.

Finally, to the best of my knowledge, no other study has attempted to examine stewardship narratives and study the text of disclosure statements operationalizing NLP and structural topic modeling. While qualitative and statistical content analysis has been used to address corporate reports in the ac-

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41. *FRC Effective Stewardship Reporting Review* (Nov. 2021), https://www.frc.org.uk/getattachment/42122e31-bc04-47ca-ad8c-23157e56c9a5/FRC-Effective-Stewardship-Reporting-Review_November-2021.pdf, at 9 ("Reports should focus on the stewardship activities and outcomes from the reporting year, and not just disclose policies and general approach").

42. The debate on shareholder empowerment and stewardship by large assets managers has changed over time. *Compare* Lucien A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675 (2007), *and* Martin Lipton & William Savitt, *The Many Myths of Lucian Bebchuk*, 93 VA. L. REV. 733 (2007) (representing old debates around shareholder empowerment), *with* Suren Gomtsian, *Voting Engagement by Large Institutional Investors*, 45 J. CORP. L. 659 (2020) (representing new debate around stewardship by large asset managers), *and* George Serafeim, *Investors as Stewards of the Commons?*, 30 J. APPLIED CORP. FIN. 8 (2018), *and supra* text accompanying note 23.

counting literature,[43] the use of automated content analysis is still in its infancy in the legal literature. In addition, NLP and topical structural modeling (a technique developed within the field of computer science) has yet to be applied in legal studies. From a methodological perspective, this Article offers a significant contribution to the widening and deepening literature on empirical legal methodologies.[44]

The rest of this Article proceeds as follows. Part II sets out the terms of the debate in which this study intervenes. By doing so it sets out the theorization of the model of firm-specific, micro-level shareholder stewardship and traces its development from narrow agency-theory-inspired shareholder monitoring to the so-called investor paradigm under which institutional investors should commit to the fiduciary duties they owe to the end investors, but also to accountability to a wider set of interests associated with other stakeholders and the *public* as a whole serving "shared value." It then focuses on the policy attempts to promote micro-level shareholder stewardship in the United Kingdom and explains the background, content and scope of the UK Code 2010/12. The final section of Part II highlights a special breed of activist funds—those engaging in an "enlightened" way and for the long-term and discusses whether this style of micro-level shareholder stewardship associated with such funds can meet the policy assumptions from a theoretical point of view. Part III is empirical in nature. It first describes the corpus and the methodology. It then assesses the stewardship rhetoric of the activist signatories to the UK Code 2010/12 with the unsupervised method of structural topic modeling, which aims at freely exploring the cognitive context of the statements. Part IV draws implications from the findings

43. *See* Mahmoud El-Haj et al., *In Search of Meaning: Lessons, Resources and Next Steps for Computational Analysis of Financial Discourse*, 46 J. BUS. FIN. & ACCT. 265 (2019); Feng Li, *Textual Analysis of Corporate Disclosures: A Survey of the Literature*, 29 J. ACCT. LITERATURE 143 (2010); Tim Loughran & Bill McDonald, *Textual Analysis in Accounting and Finance: A Survey*, 54 J. ACCT. RSCH. 1187 (2016).

44. Contributions to the field of empirical legal methodologies can be found in THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH (Peter Cane & Herbert Kritzer eds., 2010), and EMPIRICAL LEGAL RESEARCH IN ACTION: REFLECTIONS ON METHODS AND THEIR APPLICATIONS (Willem H. van Boom, Pieter Desmet & Peter Mascini eds., 2018). *See also* LEE EPSTEIN & ANDREW D. MARTIN, AN INTRODUCTION TO EMPIRICAL LEGAL RESEARCH (2014).

of this study for policymakers and activist stewards alike. It also offers overarching policy recommendations along with directions for future research. To advance the road from *instrumental* to *enlightened* shareholder stewardship, a movement already endorsed and ratified by the revised UK Code 2020, enlightened activist stewards are prime candidates to play the role of *stewardship arbitrageurs* or *stewardship intermediaries*. In this role, they can effectively mediate between boards and shareholders (institutional and retail investors alike)—and between the various participants of the investment chain—in the promotion of a stewardship ethos. Two recent trends—coalition building and monitoring environmental and social practices—can streamline the stewardship role of activist investors at the micro-level. An important caveat, however, is that while this Article covers ground both conceptually and empirically, future research needs to focus on whether these activist stewards "walk the stewardship talk" so that the stewardship rhetoric unveiled by this study matches the reality. Part VI summarizes and concludes.

I.
THE MODEL OF MICRO-LEVEL SHAREHOLDER STEWARDSHIP

A. *From Shareholder Activism to Shareholder Stewardship: Old Ideas for New Purposes*

The discussion on the role of shareholders in corporate governance is as old as the corporate form itself. From Adam Smith to Frank Knight, and from the seminal work of Adolf Berle and Gardiner Means to the highly salient neoclassical writings of Harold Demsetz, Eugene Fama and Michael Jensen, the separation of ownership and control and the monitoring (in)abilities of shareholders created much debate among scholars and legislators.[45] While Berle and Means' *The Modern Corporation* is not without contradiction when it comes to the question of the corporate governance role of the shareholders–"owners," the "nexus of contracts" theory of the firm delegitimized the monitoring role of shareholders as owners of individual companies.[46] Despite this downgrade of share-

45. *See* Katelouzou, *supra* note 15 (for a thorough analysis).

46. The literature here is voluminous. *See, e.g.*, William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407 (1989); William W. Bratton & Michael L. Wachter, *Shareholder Primacy's*

holder ownership, the risk-bearing capacity of shareholders reasserted shareholder monitoring in the 1990s. There are many reasons that shareholders may have never made full use of the monitoring role that agency-inspired theorists attributed to them in the 1990s and 2000s. These include regulatory barriers, misaligned or inadequate incentives, the "free riding" problem, and insufficient resources and expertise.[47] But the rise in the equity holdings of institutional investors and the parallel lull in takeovers created promising conditions for shareholder monitoring and engagement on the part of institutional investors at the close of the twentieth century.[48] Legal academics and policymakers alike did not remain idle. Since the 1990s, they turned their attention to the ability, skills, and capacities of institutional investors to engage in the active monitoring of portfolio company performance.[49] For many, the growth of institutional investors' assets in public equity was thought to enhance the skills and incentives of the re-concentrated institutional shareholders, especially pension funds, to reduce the agency problems arising from the familiar Berle-Means separation of ownership and control.[50] Indeed, with in-

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Corporatist Origins: Adolf Berle and the Modern Corporation, 34 J. CORP. L. 99 (2008); Charles R.T. O'Kelley, *Coase, Knight, and the Nexus-of-Contracts Theory of the Firm: A Reflection on Reification, Reality, and the Corporation as Entrepreneur Surrogate*, 35 SEATTLE U. L. REV. 1247 (2012).

47. For the United States, see, for example, Bernard S. Black, *Agents Watching Agents: The Promise of Institutional Investor Voice*, 39 UCLA L. REV. 811 (1992); John C. Coffee, Jr., *Liquidity Versus Control: The Institutional Investor as Corporate Monitor*, 91 COLUM. L. REV. 1277 (1991). For the United Kingdom, see, for example, BRIAN R. CHEFFINS, CORPORATE OWNERSHIP AND CONTROL: BRITISH BUSINESS TRANSFORMED 370–81 (2008).

48. *See* Michael Jensen, *The Eclipse of the Public Corporation*, HARV. BUS. REV., Sept.–Oct. 1989, at 61 (describing the decline of the widely held public corporation and the rise of private, institutional shareholders in the 1970s and 1980s); *see also* John Pound, *The Rise of the Political Model of Corporate Governance and Corporate Control*, 68 N.Y.U. L. REV. 1003 (1993) (analyzing the relationship between takeovers and shareholder activism, and viewing shareholder activism as a "political model" of corporate governance in place of a "transactions- and market-based" one).

49. *See, e.g.*, Black, *supra* note 47; Coffee, *supra* note 47; Ronald J. Gilson & Reinier Kraakman, *Reinventing the Outside Director: An Agenda for Institutional Investors*, 43 STAN. L. REV. 863 (1991); Edward B. Rock, *The Logic and (Uncertain) Significance of Institutional Shareholder Activism*, 79 GEO. L.J. 445 (1991).

50. ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION & PRIVATE PROPERTY 112–16 (2d ed. Transaction Publishers 2009) (1991).

creasing equity holdings, some institutional investors, such as the California Public Employees Retirement Scheme (CalPERS), have transformed from passive holders to engaged owners.[51] However, such engagement with investee companies mainly occurred on an ad hoc basis, and most traditional institutional funds have remained passive and negligible in their corporate governance roles.[52]

For a while it seemed that engaged institutional share ownership was too much to hope for, but the corporate governance potential of institutional investors has resurfaced in the years following the 2008–9 global financial crisis (GFC). This time the debate had a significant twist. In the decades preceding the GFC, shareholder value maximization had risen to become a firm's definite performance measure,[53] corresponding to the broader "financialization"[54] of the firm and the economy. Against the contractarian ("nexus-of-contracts") logic of shareholders' deprivation of any direct interference with the company's management and the alleged adequacy of market forces to align shareholders' and managers' interests, shareholder activism was endorsed in the pre-GFC decades as

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51. *See* Michael P. Smith, *Shareholder Activism by Institutional Investors: Evidence from CalPERS*, 51 J. FIN. 227 (1996); Sanford M. Jacoby, *Convergence by Design: The Case of CalPERS in Japan*, 55 AM. J. COMPAR. L. 239, 243–54 (2007); BRIAN R. CHEFFINS, THE PUBLIC COMPANY TRANSFORMED 246–47 (2019).

52. For the United States, see Stephen J. Choi & Jill E. Fisch, *On Beyond CalPERS: Survey Evidence on the Developing Role of Public Pension Funds in Corporate Governance*, 61 VAND. L. REV. 315 (2008); Roberta Romano, *Public Pension Fund Activism in Corporate Governance Reconsidered*, 93 COLUM. L. REV. 795 (1993); Bernard S. Black, *Shareholder Activism and Corporate Governance in the United States*, *in* THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 459–60 (Peter Newman ed., 1998). For the United Kingdom, see Bernard S. Black & John C. Coffee, Jr., *Hail Britannia?: Institutional Investor Behavior Under Limited Regulation*, 92 MICH. L. REV. 1997 (1994); CHEFFINS, *supra* note 47 (illustrating the "hands-off" approach of UK institutional investors especially up to 1990).

53. *See, e.g.*, William Lazonick & Mary O'Sullivan, *Maximizing Shareholder Value: A New Ideology for Corporate Governance*, 29 ECON. & SOC'Y 13 (2000). For a recent critical approach, see Brian R. Cheffins, *Stop Blaming Milton Friedman!* 21–37 (Univ. of Cambridge Fac. of L., Working Paper No. 9, 2020), https://ssrn.com/abstract=3552950.

54. *See, e.g.*, FINANCIALIZATION AND THE WORLD ECONOMY (Gerald A. Epstein ed., 2005); Paddy Ireland, *Financialization and Corporate Governance*, 60 N. IR. LEGAL Q. 1 (2009).

a value-enhancing corporate governance mechanism.[55] This marked a shift from post-war "managerial capitalism"[56] to what has been called "investor",[57] "fiduciary",[58] "shareholder"[59] or, more recently, "agency capitalism".[60] This shift was supported by a series of sweeping policy reforms on both sides of the Atlantic, aiming to strengthen the "legal status" of shareholders.[61] Such reforms—based on the positive "image"[62] of shareholders (especially institutional ones) as "owners/principals"

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55. On this contractarian assumption about the market's prophylactic powers, Chancellor Chandler of the Delaware Chancery Court asserted that "[t]he redress for failures that arise from faithful management must come from the markets." *In re* The Walt Disney Co. Derivative Litig., 907 A.2d 693, 698 (Del. Ch. 2005). On the erosion of the contractarian paradigm and the rise of institutional shareholder activism, see Dionysia Katelouzou, *Reflections on the Nature of the Public Corporation in an Era of Shareholder Activism and Stewardship*, *in* UNDERSTANDING THE COMPANY: CORPORATE GOVERNANCE AND THEORY 117, 117–144 (Barnali Choudhury & Martin Petrin eds., 2017).

56. ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS (1977); ALFRED D. CHANDLER, JR., SCALE AND SCOPE: THE DYNAMICS OF INDUSTRIAL CAPITALISM (1990). For the growing importance of corporate governance during this period, see Brian R. Cheffins, *Corporate Governance Since the Managerial Capitalism Era*, 89 BUS. HIST. REV. 717 (2015).

57. MICHAEL USEEM, INVESTOR CAPITALISM: HOW MONEY MANAGERS ARE CHANGING THE FACE OF CORPORATE AMERICA (1999).

58. JAMES P. HAWLEY & ANDREW T. WILLIAMS, THE RISE OF FIDUCIARY CAPITALISM: HOW INSTITUTIONAL INVESTORS CAN MAKE CORPORATE AMERICA MORE DEMOCRATIC (2000).

59. GERALD F. DAVIS, MANAGED BY THE MARKETS: HOW FINANCE RESHAPED AMERICA (2009).

60. Ronald J. Gilson & Jeffrey N. Gordon, *Agency Capitalism: Further Implications of Equity Intermediation*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 32 (Jennifer G. Hill & Randall S. Thomas eds., 2015); Gilson & Gordon, *supra* note 28.

61. A characteristic example is the widespread adoption of say-on-pay laws giving shareholders voting rights on executive compensation policies. *See* Randall S. Thomas & Christoph Van der Elst, *Say on Pay Around the World*, 92 WASH. U. L. REV. 653 (2015) (providing an overview of say on pay laws in the United States, the United Kingdom, Australia, Belgium, France, Germany, Sweden, and the Netherlands). For empirical evidence, see Ricardo Correa & Ugur Lel, *Say on Pay Laws, Executive Compensation, Pay Slice, and Firm Valuation Around the World*, 122 J. FIN. ECON. 500 (2016) (finding that adoption of say on pay laws is followed by declines in CEO pay growth rates and increased sensitivity of CEO pay to firm performance).

62. Jennifer G. Hill, *Images of the Shareholder—Shareholder Power and Shareholder Powerlessness*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 53 (Jennifer G. Hill & Randall S. Thomas eds., 2015).

with rights that can constrain managerial discretion—echo the broader idea that shareholder empowerment is a positive corporate governance mechanism.[63]

But this positive depiction of shareholder power and engagement was severely challenged following the onset of the GFC. Before the GFC, the "shareholder capitalism" movement had taken shape during the takeover wave of the late 1980s in the United States and spread widely in the 1990s around the world (especially in the West).[64] It had provided normative policy and moral support to value-maximizing shareholder activism.[65] Since the GFC, more and more have noted shareholder capitalism's shortcomings as a means of providing economic value and societal benefits and attempted to reimagine a "responsible" version of capitalism.[66] Calls for accountability of corporations and their investors for the economic, social

63. For early pleas for shareholders to become engaged preceding the shareholder value maximization movement of the 1990s, see, for example, FRANK D. EMERSON & FRANKLIN C. LATCHAM, SHAREHOLDER DEMOCRACY: A BROADER OUTLOOK FOR CORPORATIONS (1954). *See also* Harwell Wells, *A Long View of Shareholder Power: From the Antebellum Corporation to the Twenty-First Century*, 67 FLA. L. REV. 1033 (2015) (providing a historical account of shareholder power in the United States over the last two centuries).

64. It is noteworthy that most countries in Asia, including China and Singapore, have not embraced shareholder capitalism. *See, e.g.*, Curtis J. Milhaupt, *Chinese Corporate Capitalism in Comparative Context* 4, 7 (Columbia L. & Econ., Working Paper No. 522, 2015), https://ssrn.com/abstract=2673797. Japan has always embraced stakeholder capitalism and has only recently tried to shift towards a more shareholder-centered approach (against the general trend towards a stakeholder approach). *See, e.g.*, Steven K. Vogel, *Japan's Ambivalent Pursuit of Shareholder Capitalism*, 47 POL. & SOC'Y 117, 118 (2019).

65. *See, e.g.*, JOHN BUCHANAN, DOMINIC HEESANG CHAI & SIMON DEAKIN, HEDGE FUND ACTIVISM IN JAPAN: THE LIMITS OF SHAREHOLDER PRIMACY 41–59, 73–94, 295–321 (2012) (taking Japan as a case in point to examine hedge fund activism as an investment strategy that draws on the logic of shareholder primacy in Japan and concluding that "[t]he experience of hedge fund activism in Japan suggests that there always were limits to shareholder primacy as the driver of corporate governance ideas and practices").

66. *See, e.g.*, DAVIS, *supra* note 59, at 64 (identifying "[a] large gap between the theory of shareholder capitalism as an arm's-length meritocracy . . . and how the system operates in practice"). For a recent masterful attempt to reimagine capitalism as a system which is in harmony with environmental realities, social justice and equality, and democratic institutions, see REBECCA HENDERSON, REIMAGINING CAPITALISM IN A WORLD OF FIRE (2020).

and environmental impact of their activities are mounting.[67] The need to recast the old "shareholder value" dogma is even more pronounced now as the COVID-19 pandemic has exposed the unsustainability of current business practices.[68] It has resulted in increasing calls for "stakeholder capitalism" and a refocus of the business corporation's attention to non-shareholder constituencies.[69] Earlier critics pointed to excessive investor short-termism or myopia and the ability of institutional investors (especially activist, U.S. style hedge funds) to influence companies for their own benefit.[70] More recently, amidst a broader debate over the corporate purpose, climate change action and sustainable finance have redefined the debate about the corporate governance role of institutional investors at the micro-, market-, and macro-levels.[71] At the same

67. Such calls have been raised within the frameworks of corporate social responsibility (CSR), business ethics, corporate citizenship, stakeholder management, and sustainability. For a succinct analysis of the development of these interrelated terms, see Archie B. Carroll, *Corporate Social Responsibility: The Centerpiece of Competing and Complementary Frameworks*, 44 ORGANIZATIONAL DYNAMICS 87 (2015).

68. *See, e.g.*, Paine, *supra* note 1.

69. *See, e.g.*, Mark Carney, *Mark Carney on How the Economy Must Yield to Human Values*, ECONOMIST (Apr. 18, 2020), https://www.economist.com/by-invitation/2020/04/16/mark-carney-on-how-the-economy-must-yield-to-human-values.

70. *See, e.g.*, Iman Anabtawi & Lynn A. Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255 (2008); Lynne L. Dallas, *Short-Termism, the Financial Crisis, and Corporate Governance*, 37 J. CORP. L. 264 (2011); Alan Dignam, *The Future of Shareholder Democracy in the Shadow of the Financial Crisis*, 36 SEATTLE U. L. REV. 639 (2013); Leo E. Strine, Jr., *Can We Do Better by Ordinary Investors? A Pragmatic Reaction to the Dueling Ideological Mythologists of Corporate Law*, 114 COLUM. L. REV. 449 (2014).

71. *See* Barbara Novick, *A Fundamental Reshaping of Finance*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 16, 2020), https://corpgov.law.harvard.edu/2020/01/16/a-fundamental-reshaping-of-finance/. The debate over the corporate purpose has intensified recently on both sides of the Atlantic with proposals from the Business Roundtable, the U.S. association of corporate chief executive officers, and the British Academy. *See* Statement on the Purpose of a Corporation, Bus. Roundtable (Aug. 19, 2019), https://s3.amazonaws.com/brt.org/BRT-StatementonthePurposeofaCorporationJuly2021.pdf; BRITISH ACADEMY, PRINCIPLES FOR PURPOSEFUL BUSINESS: HOW TO DELIVER THE FRAMEWORK FOR THE FUTURE OF THE CORPORATION (2019), https://www.thebritishacademy.ac.uk/documents/224/future-of-the-corporation-principles-purposeful-business.pdf. The academic debate over the corporate purpose has been also intensified. *See, e.g.*, RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD (Elizabeth Pollman &

time, there is a broad agreement that companies cannot restore the public trust unless the dysfunctionality of shareholders' accountability is also addressed.[72] While the GFC exposed institutional shareholders' passivity and—for some—short-term risk aversion,[73] the COVID-19 pandemic heightened awareness of systemic and social risks and lent greater impetus and justification to sustainable investing and management, a trend already underway for at least two decades.[74]

An integral part of this business concern for society is tied to actions taken from the investment community to promote long-term interests and serve a range of constituents broader than the investors' clients and beneficiaries as public equity holders. Such calls for institutional investors to take action as vigilant market participants and address sustainability find expression through the policy model of shareholder stewardship, which shares many common features with the so-called "inves-

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Robert Thompson eds., 2021); Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91 (warning against the rise and growing acceptance of stakeholderism); Leo E. Strine, Jr., *Toward Fair and Sustainable Capitalism: A Comprehensive Proposal to Help American Workers, Restore Fair Gainsharing between Employees and Shareholders, and Increase American Competitiveness by Reorienting Our Corporate Governance System Toward Sustainable Long-Term Growth and Encouraging Investments in America's Future* (Univ. Penn. L. Sch. Inst. for L. & Econ., Res. Paper No. 19-39, 2019) https://ssrn.com/abstract=3461924.

72. *See, e.g.*, Strine, *supra* note 70, at 474 (contending that "all fiduciaries within the accountability system for productive corporations should themselves be accountable for acting with fidelity to the best interests of the end-user investors whose money is ultimately at stake").

73. *See, e.g.*, OECD, CORPORATE GOVERNANCE AND THE FINANCIAL CRISIS: CONCLUSIONS AND EMERGING GOOD PRACTICES TO ENHANCE IMPLEMENTATION OF THE PRINCIPLES 24 (2010), http://www.oecd.org/dataoecd/53/62/44679170.pdf ("Shareholders have tended to be reactive rather than proactive and seldom challenge boards in sufficient number to make any difference. . . . In some instances shareholders have been equally concerned with short-termism as have managers and traders, neglecting the effect of excessive risk taking policies."); TREASURY COMMITTEE, BANKING CRISIS: REFORMING CORPORATE GOVERNANCE AND PAY IN THE CITY, 2008-9, HC 519, at 64 (UK) ("Institutional investors have failed in one of their core tasks, namely the effective scrutiny and monitoring the decisions of boards and executive management in the banking sector, and hold them accountable for their performance.").

74. *See, e.g.,* Kosmas Papadopoulos, Rodolfo Araujo & Simon Toms, *ESG Drivers and the COVID-19 Catalyst*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 27, 2020), https://corpgov.law.harvard.edu/2020/12/27/esg-drivers-and-the-covid-19-catalyst/.

tor paradigm" for corporate law and corporate governance.[75] Under the shareholder stewardship model, institutional investors, who control the savings of millions of working families and invest them in public equity, should assume *responsibility* for their equity holdings. Shareholder stewardship deals with the corporate governance role of institutional investors and looks *outwards* to the relationships between the investors and their investee companies. This is a corporate governance conception of stewardship which has originated and facilitated the development of stewardship practices and policies around the world.[76] In addition, there is an *investment management* dimension of stewardship that looks *inwards* to the governance of stewardship within an organization and the relationships between institutional investors as investment intermediaries and their ultimate beneficiaries/clients.[77] Here, stewardship is about risk management and responsible allocation and management of capital to generate value for the end investors. This is the type of stewardship that many passive managers exercise today, often without any firm-specific focus on financial underperformance or poor corporate governance practices.[78] While the corporate governance and investment management

75. This term was first elaborated in Katelouzou, *supra* note 55.

76. For the diffusion of this UK-inspired corporate governance conception of stewardship around the world, see Katelouzou & Siems, *supra* note 20.

77. *See also* Katelouzou & Puchniak, *supra* note 8, at 8–9.

78. *See, e.g.*, Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 COLUM. L. REV. 2,029 (2019) (highlighting the incentives of index fund managers to "underinvest in stewardship" and to be "excessively deferential"); *see also* Jill Fisch, Assaf Hamdani & Steven Davidoff Solomon, *The New Titans of Wall Street: A Theoretical Framework for Passive Investors*, 168 U. PA. L. REV. 17, 37 (2019) (highlighting that "a passive investor can identify governance 'best practices' that are likely to reduce the risk of underperformance with little firm-specific information, and the investment in identifying a governance improvement can be deployed across a broad range of portfolio companies"); Charles M. Nathan, *Institutional Investor Engagement: One Size Does Not Fit All*, Conf. Bd.: ON GOVERNANCE (July 18, 2018), https://www.conference-board.org/blog/environmental-social-governance/Institutional-Investor-Engagement-Models?blogid=3 (explaining that the investor stewardship teams of major passive investors and large actively managed investors "are principally focused on big picture environmental, social, and governance (ESG) issues [and] lack the skill-sets and manpower necessary to deal in depth with company specific issues of strategy design and implementation, capital allocation, M&A opportunities, and operational and financial performance").

sides of investor stewardship are frequently intertwined, as often are micro-level (firm-specific) stewardship and portfolio- or market-level stewardship,[79] the focus of this Article is on *micro-level (firm-specific)* shareholder stewardship. That is the way in which institutional investors' stewardship was originally perceived in the United Kingdom, stewardship's birthplace, and policymakers have since globally promoted it.[80]

Micro-level shareholder stewardship implies a willingness to take an integrated, active approach to monitoring individual investee companies and a preference to use voting rights as a stick instead of the market carrot.[81] This has important implications for fund governance itself. To serve the micro-level shareholder stewardship model, institutional investors should act as "shareowners" rather than as shareholders and exercise stewardship *prudently* committing as shareowners of individual companies to the fiduciary duties they owe to the end investors. For asset managers, this implies that active monitoring of investee companies, engaging in dialogue, and exercising shareholder rights ought to secure good firm-level corporate governance but also serve the interests of their clients. For asset owners, such as pension funds, the model of micro-level shareholder stewardship prescribes that they ought to monitor not only their asset managers but also their investee companies from which they operate at a considerable distance due to financial intermediation. Furthermore, the policy aspiration is that in exercising shareholder stewardship institutional investors should consider a wider set of interests associated with other stakeholders and the public as a whole.

There are, however, at least three inherent tensions in this model. The first is associated with flaws in institutional investors' own investment management models and the incompatibility of investment diversification with firm-specific monitoring and stewardship. Gordon, for instance, explains that large institutional investors only have incentives to pursue systematic, market-wide stewardship focusing on maximizing risk-

79. *See, e.g.*, Fisch, Hamdani & Solomon, *supra* note 78 (highlighting the synergies between passive and active funds through their sponsors).

80. *See infra* Section II.B.

81. For the seminal voice-exit framework, see ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

adjusted rather than firm-specific returns.[82] Others praise this as so-called "beta activism," in that it targets systematic risk across the market, such as climate change or board diversity, rather than idiosyncratic risk.[83] Another tension is between investors' interpretations of fiduciary duty and the exercise of stewardship. A key stumbling block for stewardship has been the resistance of trustees of pension trusts to the shareholder stewardship model on the grounds that it entails considerations of broader benefits to third parties that extend beyond the financial interests of pension fund members and could therefore breach the fiduciary duty of loyalty to act solely for the interests of the beneficiaries.[84] The third tension is between the risk-mitigating role accorded to institutional shareholders under the shareholder stewardship model and the broad recognition that shareholders favor risk-taking more than other corporate constituencies do.[85] While both concerns still remain—at least in part—the micro-level shareholder stewardship model marks a significant departure from the dominant economic assumptions, under which the accountability parameters in investment management are a completely private, contractual and apolitical matter revolving around efficient, market-based arrangements between institutional investors, their asset managers, and their beneficiaries.[86]

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82. *See, e.g.*, Gordon, *supra* note 14.

83. JON LUKOMNIK & JAMES P. HAWLEY, MOVING BEYOND MODERN PORTFOLIO THEORY: INVESTING THAT MATTERS 41 (2021).

84. On the United Kingdom, see Tilba & Reisberg, *supra* note 36 (providing qualitative evidence that the interpretation of fiduciary duty varies significantly among pension trustees and this has an impact on the way pension funds exercise shareholder stewardship). On the United States, see Schanzenbach & Sitkoff, *supra* note 6 (arguing that only "risk-return" ESG investing, that is ESG investing aimed at improving risk-adjusted returns rather than collateral benefits to third parties, is permissible for a trustee).

85. On this tension, see CHRISTOPHER M. BRUNER, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD: THE POLITICAL FOUNDATIONS OF SHAREHOLDER POWER 271 (2013) (using the example of section 956 of the Dodd–Frank Act, which imposes limits on incentive-based pay in certain large financial firms, to showcase the need for financial regulation to balance risk and reward).

86. For a critical view of the broader public interest inherent in the notion of stewardship, see Dionysia Katelouzou, *Shareholder Stewardship: A Case of (Re)Embedding the Institutional Investors and the Corporation*, *in* THE CAMBRIDGE HANDBOOK OF CORPORATE LAW, CORPORATE GOVERNANCE AND SUSTAINABILITY 581 (Beate Sjåfjell & Christopher M. Bruner eds., 2019).

The essential thesis and animating purpose of the shareholder stewardship model is shared by the corresponding "new paradigm" famously embraced in the U.S. context. The "new paradigm" was put forward by Martin Lipton in the World Economic Forum in 2006 with the aim to steer institutional investors to meaningful and long-term behavior and essentially preempt a new wave of state-driven regulation of the relationship between public corporations and their major institutional investors.[87] Both the U.S. investor paradigm and the shareholder stewardship model as this has been embraced by the UK Code 2010/12 and other stewardship codes around the world recognize the value of and encourage shareholder dialogue and engagement that serve long-term interests. But when it comes to their normative implications there is an important difference between the two. The shareholder stewardship model does not share the same ideological stance as the U.S. investor paradigm towards state-driven regulation.[88] Rather under the shareholder stewardship model legislative or regulatory actions are needed to a greater or lesser extent; the private sector alone cannot solve all the corporate governance and investment management tensions surrounding shareholder stewardship. As is explained elsewhere, the development of stewardship codes around the world from private, quasi-public and public actors, and the embodiment of stewardship principles into voluntary and mandatory disclosure obligations and fiduciary duties in the United Kingdom and abroad, is a testament to the growing recognition that share-

87. Martin Lipton, *The New Paradigm: A Roadmap for an Implicit Corporate Governance Partnership Between Corporations and Investors to Achieve Sustainable Long-term Investment and Growth*, INT'L BUS. COUNCIL OF THE WORLD ECON. F. (2016), https://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.25960.16.pdf; Martin Lipton, *Embracing the New Paradigm*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 16, 2020), https://corpgov.law.harvard.edu/2020/01/16/embracing-the-new-paradigm/. The stewardship debate in the United States is now focusing on the role of large institutional shareholders, especially index funds, in providing this stewardship commitment. *See supra* text accompanying note 42.

88. Martin Lipton, *It's Time to Adopt the New Paradigm*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 11, 2019), https://corpgov.law.harvard.edu/2019/02/11/its-time-to-adopt-the-new-paradigm/ ("No legislation or regulation is necessary to implement *The New Paradigm*. Corporations, asset managers, and institutional investors can unilaterally announce their acceptance of and adherence to the principles of *The New Paradigm*.").

holder stewardship cannot succeed without a slate of supporting policy reforms—through legislation, regulation, soft stewardship codes or stewardship recommendations incorporated in corporate governance codes, stock exchange listing rules, or international initiatives.[89] In addition, regulatory and private best practice initiatives by international organizations and NGOs complement and extend investors' responsibilities to a broad area of ESG issues.[90] This multifaceted and complex "regulatory nexus" is an important feature of the shareholder stewardship model. Contrastingly, a similar emphasis on the need for supporting hard- or soft-law rules is not found in the U.S. new paradigm.[91]

It is important to stress that despite apparent differences between the two sides of the Atlantic in the regulatory stance with respect to how best to promote shareholder stewardship and long-termism (stewardship codes in the United Kingdom versus market-driven approaches in the United States), both sides face an irreversible transformation of the economic-grounded shareholder monitoring. As explained elsewhere, even though early agency theorists saw little scope for shareholder monitoring at the micro-level, later contractarians—including Frank Easterbrook and Daniel Fischel—viewed shareholder monitoring in the form of voting as a kind of gap-filler when market arrangements are not efficient.[92] Singling out shareholders as residual claimants and principals may not have been automatically translatable to increased shareholder mon-

89. *See* Katelouzou, *supra* note 15.

90. An example of self-regulation which is specifically addressed by some signatory statements to the UK Stewardship Code is the Principles for Responsible Investment (PRI) which extends investors' responsibilities to a broad area of environmental, social, and governance (ESG) issues. *See What Are the Principles for Responsible Investment?*, PRI (last visited July 24, 2021), https://www.unpri.org/pri/what-are-the-principles-for-responsible-investment.

91. This aversion to regulation in the context of stewardship appears to be consistent with the rather enabling character of Delaware corporate law (especially before the Dodd–Frank Act) and the greater recourse to private ordering by investors in the United States. *See, e.g.*, Jennifer G. Hill, *The Trajectory of American Corporate Governance: Shareholder Empowerment and Private Ordering Combat*, 2019 U. ILL. L. REV. 507, 509 (2019) (highlighting "the growing use by institutional investors of private ordering as a 'self-help' mechanism to gain stronger participatory rights in corporate governance").

92. *See* Katelouzou, *supra* note 15.

itoring, but the growing shareholder-focused reorientation of corporate governance following the "Deal Decade" provided shareholder governance with its ideological backing.[93]

However, this endorsement of shareholder governance based on the principal–agent model and the shareholder value maximization ideology has garnered criticism on various grounds. Among other concerns, some have asserted that the economic-grounded account of shareholder monitoring does not reflect the business reality: "[t]he principal–agent model bears no relationship to the way large companies are actually run."[94] But whereas "[t]he attempt to bring reality in line with the model is one possible road to reform: another is to adjust the model to reality."[95] What I term as "enlightened" shareholder stewardship is a possible way forward.[96] The changes in what is socially acceptable for businesses and institutional investors and the growing demands for placing the creation of "shared value" rather than shareholder value as the driving interest in corporate governance theory, regulation and practice call for a reimagination of the "old" notions of shareholder activism, shareholder engagement and shareholder monitoring.[97] Enlightened shareholder stewardship understands shareholder engagement and monitoring beyond the private contours of the agency-theory-inspired shareholder monitoring and toward the advancement of long-term value and wider public interests. The UK Code 2010/12—as I will show in the next Section—pioneered this change.

B. *The Development of Micro-Level Shareholder Stewardship through the Example of the First-Generation UK Stewardship Code: What is it and Who is it for?*

Early traces of the micro-level shareholder stewardship model exist in the 1991 statement "The Responsibilities of Institutional Shareholders in the UK" of the now-dissolved Insti-

93. *Id.*

94. John Kay & Aubrey Silberston, *Corporate Governance*, NAT'L INST. ECON. REV., Aug. 1995, at 84, 84.

95. *Id.*

96. For the earlier and contemporaneous debate on the development of the enlightened shareholder value as the standard for directors' accountability, see Lund, *supra* note 17.

97. *See* Michael E. Porter & Mark R. Kramer, *Creating Shared Value*, HARV. BUS. REV., Jan.–Feb. 2011, at 62.

tutional Shareholders' Committee (ISC)—a private body composed of four prominent UK investor associations—which culminated in the 2009 ISC "Code on the Responsibilities of Institutional Investors" and one year later the first UK Stewardship Code.[98] The UK Financial Reporting Council (FRC) took oversight of the ISC Code following Sir David Walker's recommendation in the 2009 review on corporate governance in financial institutions. In July 2010, it introduced the first UK Stewardship Code.[99] Due to its origins, the UK Code 2010 accords with market perceptions of the appropriate role for institutional investors and reflects the long history of the deference of UK policymakers to "market-invoking" regulation, especially in the financial services sector.[100] The UK Code 2010, faithful to the spirit of the previous ISC Code, focused on shareholder stewardship as the proper basis of engagement between actors in the investment chain (including asset managers and asset owners) and the boards of investee companies. The first sentence of the UK Code 2010 defines the aim of stewardship as

98. In its consultation preceding the introduction of the UK Stewardship Code, the UK Financial Reporting Council recognized the ISC 2009 Code as a "good starting point" for the UK Code and included it in Appendix B. *See* FIN. REPORTING COUNCIL, *supra* note 18.

99. *See* DAVID WALKER, A REVIEW OF CORPORATE GOVERNANCE IN UK BANKS AND OTHER FINANCIAL INDUSTRY ENTITIES: FINAL RECOMMENDATIONS 17 (2009) [hereinafter WALKER REVIEW], https://webarchive.nationalarchives.gov.uk/+/http:/www.hm-treasury.gov.uk/d/walker_review_261109.pdf ("The Code on the Responsibilities of Institutional Investors, prepared by the Institutional Shareholders' Committee, should be ratified by the FRC and become the Stewardship Code."); FIN. REPORTING COUNCIL, THE UK STEWARDSHIP CODE (2010) [hereinafter UK CODE 2010], https://www.frc.org.uk/getattachment/e223e152-5515-4cdc-a951-da33e093eb28/UK-Stewardship-Code-July-2010.pdf.

100. But this market-invoking, principles-based corporate governance regulation is not the norm everywhere, such as in the United States. *See, e.g.*, Jonas V. Anderson, Note, *Regulating Corporations the American Way: Why Exhaustive Rules and Just Deserts are the Mainstay of U.S. Corporate Governance*, 57 DUKE L.J. 1081, 1081 (2008) (suggesting that "given the longstanding and singularly American predilection for rules-based regulation and litigation, any large-scale transplant of soft law principles into U.S. corporate governance is a practical impossibility."). *See also* Dionysia Katelouzou & Peer Zumbansen, *The Transnationalization of Corporate Governance: Law, Institutional Arrangements, & Corporate Power*, 38 ARIZ. J. INT'L & COMPAR. L. 1 (2021) (arguing that private ordering in corporate governance must be seen in the context of the fundamental transformation of the political economy brought about by the last twenty or more years of globalization).

enhancing "the quality of engagement between institutional investors and companies to help improve long-term returns to shareholders and the efficient exercise of governance responsibilities."[101]

The UK Code 2010 included seven high level principles dealing with public disclosure of stewardship policies (Principle 1), conflicts of interest (Principle 2), monitoring of investee companies (Principle 3), escalation of monitoring activities (Principle 4), collective action (Principle 5), voting policy and reporting of voting activity (Principle 6), and periodic reporting on stewardship and voting activities (Principle 7). These seven principles were mainly aimed at promoting greater shareholder engagement and monitoring governance risks. Even though the UK Code 2010 also dealt with the need for greater transparency of internal investment management policies and business models, the overriding goal was to meet the perceived need for more and effective institutional shareholders' engagement with investee companies in an agency theory fashion. The Preface of the UK Code 2010 defines "engagement" in a broad fashion that includes "purposeful dialogue on strategy, performance and the management of risk, as well as on issues that are the immediate subject of votes at general meetings."[102] Embracing the earlier Cadbury Review's espousal of the 1991 ISC statement,[103] the FRC stressed the strong links between the UK Stewardship Code and the UK Corporate Governance Code for listed companies.[104] The two codes were seen as complementing each other to "lend greater substance to the concept of 'comply or explain' as applied by listed companies," and thereby advancing good corporate governance standards.[105]

101. UK CODE 2010, *supra* note 99, at 1.
102. *Id.*
103. *See* REPORT OF THE COMMITTEE ON THE FINANCIAL ASPECTS OF CORPORATE GOVERNANCE, COMMITTEE ON THE FINANCIAL ASPECTS OF CORPORATE GOVERNANCE (1992) [hereinafter CADBURY REPORT], http://www.ecgi.org/codes/documents/cadbury.pdf (in particular, paragraphs 3.4, 4.59, 6.1, 6.6, 6.10, 6.11)
104. FIN. REPORTING COUNCIL, THE UK CORPORATE GOVERNANCE CODE 2 (2018), https://www.frc.org.uk/document-library/corporate-governance/2018/uk-corporate-governance-code-2018.
105. UK CODE 2010, *supra* note 99, at 1.

The UK Code 2010 did not last long. Following the Kay Review's emphasis on the investment management fallacies of shareholder stewardship and the need to promote a stewardship culture across the equity investment chain,[106] the FRC revised the UK Stewardship Code in 2012.[107] The drafters revamped the 2010 Preface and enlarged it with new sections relating to the content, application and enforcement of the stewardship principles.[108] The 2012 version brought about a more expansive form of shareholder stewardship, focusing on engagement with investee companies on a much wider set of issues, including corporate governance, culture, risk and strategic issues, but also on the institutional investor's activities and responsibilities within the investment chain.[109] The UK Code 2012 does not simply view stewardship as a means to promote institutional shareholder engagement; it pushes stewardship as a tool to "improve the functioning of the market for investment mandates."[110] The 2012 version brings a focus on the "investment management" side of stewardship: the governance of stewardship within an organization and the relationship between the institutional investor—an investment intermediary—and their ultimate beneficiaries/clients. But essentially, the 2012 version still includes the same seven principles as the UK Code 2010, and despite not being mute on the importance of addressing the flaws of the investors' own governance models, it retains its emphasis on the corporate governance side of stewardship. The two versions are therefore

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106. JOHN KAY, THE KAY REVIEW OF UK EQUITY MARKETS AND LONG-TERM DECISION MAKING: FINAL REPORT 28 (2012), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/253454/bis-12-917-kay-review-of-equity-markets-final-report.pdf.

107. FIN. REPORTING COUNCIL, THE UK STEWARDSHIP CODE (2012) [hereinafter UK CODE 2012], https://www.frc.org.uk/getattachment/d67933f9-ca38-4233-b603-3d24b2f62c5f/UK-Stewardship-Code-(September-2012).pdf.

108. For the new sections on the application of the code and its comply or explain nature, see *id.* at 2–4.

109. *Id.* at 1 ("For investors, stewardship is more than just voting. Activities may include monitoring and engaging with companies on matters such as strategy, performance, risk, capital structure, and corporate governance, including culture and remuneration. Engagement is purposeful dialogue with companies on these matters as well as on issues that are the immediate subject of votes at general meetings.").

110. *Id.* at 2.

closely related, and I use the term "the first generation" UK Code or UK Code 2010/12 to refer to both of them.[111]

Overall, the main aim of the first generation UK Code was to transform rationally "apathetic" institutional investors into long-term engaged shareholders to minimize excessive risk taking and short-termism at individual companies. The first generation UK Code, likened to an "Engagement Code,"[112] contemplates the importance of shareholder engagement that goes beyond the box ticking exercise of governance mandates and financial metrics. The 2012 version encourages institutions to engage with corporate management and boards in a constructive way across a range of issues "such as strategy, performance, risk, capital structure, and corporate governance, including culture and remuneration."[113] Engagement is about "purposeful" and "active" dialogue, the constructive exercise of voting rights with a commitment to long term returns.[114] Engaging involves listening as well as speaking—and specifically listening to explanations as to why a company chooses not to follow the UK Corporate Governance Code.[115] The UK Code 2010/12 recommends relationships, not merely exercising rights (including voting), but it does not preclude escalation "as a method of protecting and enhancing shareholder value."[116] Such escalation activities include holding meetings with the incumbents (management, chairman or directors), making public statements or actively exercising shareholder rights such as submitting shareholder resolutions at general meetings or requisitioning general meetings.[117]

The first generation UK Code's promotion of institutional shareholder monitoring is rooted in the long-observed, economically-grounded conception of the shareholder–management relationship. The UK Code 2010/12 is ostensibly

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111. *See also* Paul Davies, *The UK Stewardship Code 2010–2020: From Saving the Company to Saving the Planet?*, *in* GLOBAL SHAREHOLDER STEWARDSHIP 44 (Dionysia Katelouzou & Dan W. Puchniak eds., Cambridge Univ. Press 2022) (referring to the 2010 and 2012 versions together as the "first version" of the UK Stewardship Code).

112. *Id.*

113. UK CODE 2012, *supra* note 107, at 1.

114. *Id.* at 6.

115. *Id.* at 7.

116. *Id.* at 8.

117. *Id.* at 8.

premised upon the idea that shareholder monitoring can overcome the agency problems between institutional shareholders and corporate directors.[118] It emphasizes the complementary capabilities and "shared" responsibility of directors and institutional shareholders to uphold the dubious comply-or-explain system.[119] However, at the same time, the 2012 version extended the ambit of shareholder monitoring and assigned a sort of "implicit social legitimacy"[120] to institutional investors' engagement and oversight. The UK Code 2012 states in its first paragraph that "[e]ffective stewardship benefits companies, investors and the economy *as a whole*."[121] There is, therefore, a strong sense of accountability and responsibility towards all corporate constituents in the UK Code 2010/12, traces of which have affected UK corporate governance thinking since the Cadbury Report.[122] Importantly, what the first generation

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118. *See also* Iris H.Y. Chiu, *Turning Institutional Investors into 'Stewards': Exploring the Meaning and Objectives in 'Stewardship,'* 66 CURRENT LEGAL PROBS. 443, 457 (2013).

119. UK CODE 2012, *supra* note 107, at 1 ("In publicly listed companies responsibility for stewardship is shared. The primary responsibility rests with the board of the company, which oversees the actions of its management. Investors in the company also play an important role in holding the board to account for the fulfillment of its responsibilities. . . . The Code assists institutional investors better to exercise their stewardship responsibilities, which in turn gives force to the 'comply or explain' system."). On the effectiveness of the comply-or-explain system, see generally Marc Moore, "*Whispering Sweet Nothings": The Limitations of Informal Conformance in UK Corporate Governance*, 9 J. CORP. L. STUD. 95 (2009).

120. *See* WALKER REVIEW, *supra* note 99, at 70.

> The potentially highly influential position of significant holders of stock in listed companies is a major ingredient in the market-based capitalist system which needs to earn and to be accorded an at least *implicit social legitimacy*. As counterpart to the obligation of the board to the [institutional] shareholders, this implicit legitimacy can be acquired by at least the larger fund manager through assumption of a reciprocal obligation involving attentiveness to the performance of investee companies over a long as well as a short-term horizon. On this view, those who have significant rights of ownership and enjoy the very material advantage of limited liability should see these as complemented by *a duty of stewardship*.

Id. (emphasis added).

121. UK CODE 2012, *supra* note 107, at 1 (emphasis added).

122. CADBURY REPORT, *supra* note 103, ¶¶ 7.4–7.5 ("The way forward is through clear definitions of responsibility and an acceptance by all involved that the highest standards of efficiency and integrity are expected of them. . . . This will involve a sharper sense of accountability and responsibil-

UK Code contributed to this thinking is a pertinent formalization of the corporate governance role of shareholders akin to the role of board directors as envisaged by the UK Corporate Governance Code. The latest 2020 version of the UK Stewardship Code introduced a significant overhaul to how stewardship is understood.[123] The new twelve principles of the revised UK Code 2020 contain a much broader concept of stewardship that embraces not only active engagement and monitoring of equity (shareholder stewardship) but also stewardship of other assets, prudent investment decision making and material ESG issues (which can all be termed as "investment stewardship").[124] At the same time, stewardship is moving beyond the micro-level towards the market-level in recognition that asset owners and asset managers can act as "guardians of market integrity" and work with other stakeholders, including regulators, associations and not-for-profits, in identifying market-wide and systemic risks.[125] The UK Code 2020—called the "second generation" UK Stewardship Code—marks an ambitious shift from micro- to market-stewardship or, in the words of Paul Davies, "from saving the company to saving the planet,"[126] and is an attempt to align diversified investment strategies with the stewardship ideal—a problem at the heart of the first generation UK Code as we will show below.[127] The changes the UK Code 2020 brought about have been analyzed elsewhere and will not be repeated here.[128] What deserves our attention, however, and is critical for the empirical analysis that follows, is the study of shareholder stewardship expectations that the first-generation UK code introduced and the 2020 version carried on.

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ity all round—accountability by boards to their shareholders, responsibility on the part of all shareholders to the companies they own and, accountability by professional officers and advisers to those who rely on their judgment.").

123. UK CODE 2020, *supra* note 38.

124. For an analysis of the two aspects of stewardship embraced in the UK Code 2020, see Katelouzou, *supra* note 15.

125. UK CODE 2020, *supra* note 38, at 4.

126. Davies, *supra* note 111.

127. *See supra* Section II.B.

128. A comprehensive analysis of the latest revision of the UK stewardship code remains outside the scope of this paper. On the 2020 version, see Davies, *supra* note 111; Katelouzou, *supra* note 15.

As explained above, shareholder stewardship is espoused by the first-generation UK Code as a means to improve the governance and performance of investee companies through effective shareholder engagement. While the first-generation UK Code focused on the micro-level, it viewed the exercise of shareholder stewardship at individual companies as a means to assist the efficient operation of the markets and strengthen the credibility of the market economy as a whole.[129] As such micro-level shareholder stewardship is not solely aimed at increasing shareholder value at the individual company level. Rather its aims are to promote long-term health of the broader economy. Shareholder stewardship is ultimately about building "trust"[130] between shareholders and management on the one hand and between asset managers, asset owners and their beneficiaries on the other. This is why stewardship under the UK Code 2010/12 is not about shareholder empowerment and the provision of more rights to institutional investors to engage and monitor,[131] but has a sense of shareholder responsibilities and *duties* towards the long-term interests of their investee companies and their own end-investors and was designed as a means to promote responsible shareholder conduct.[132] A skeptic, however, may say that the FRC doubled its bet with the adoption of the UK Code 2010/12 quickly sponsoring stewardship as a means to address the widespread post-GFC criticism that institutional investors failed in their role to

129. See, for example, the opening statement of UK Code 2012, stating "[e]ffective stewardship benefits companies, investors and the economy as a whole." UK CODE 2012, *supra* note 107, at 1.

130. On the role of trust in the financial markets, see generally COLIN MAYER, FIRM COMMITMENT: WHY THE CORPORATION IS FAILING US AND HOW TO RESTORE TRUST IN IT (2013).

131. Compare the way the shareholder empowerment debate has been developed in the United States. On this see, for example, Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 908–913 (2005); Bebchuk, *supra* note 42; 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, 763–68 (2015).

132. *See* Iris H.Y. Chiu & Dionysia Katelouzou, *From Shareholder Stewardship to Shareholder Duties: Is the Time Ripe?*, *in* SHAREHOLDERS' DUTIES 131 (Hanne S. Birkmose ed., 2017) (asserting that the Principles of the UK Stewardship Code can evolve into concrete institutional shareholder duties).

call boards to account.[133] A stronger critic may counter that the solution to the problems of poor corporate governance, excessive risk taking, and short-termism cannot be confined to shareholder engagement and power and that other stakeholders must be mobilized.[134] While these tensions remain largely unresolved,[135] one thing is clear: the first generation UK Code formalized the idea—albeit for some in a contradictory way[136]—that shareholder engagement and monitoring by institutional investors encompasses more than the private contours of the agency-theory-inspired shareholder monitoring but also the advancement of long-term value and wider public interests. But, as I will show below, this is not an understanding shared equally by all investors signed up to the first generation UK Code.

Turning now to its scope, the UK Code 2010/12 is principally addressed to "institutional investors" with equity holdings in UK companies.[137] Institutional investors include "asset owners," defined in the UK Code 2012 as "pension funds, insurance companies, investment trusts and other collective investment vehicles," and "asset managers," defined as those with "day-to-day responsibility for managing investments on behalf of the asset owners and are in a position to influence companies' long term performance through stewardship."[138] While the first generation UK Code recognizes that asset managers are better positioned to exercise shareholder stewardship, the

133. Lady Hogg, the then-FRC chairman, stated in 2010: "If we don't protect shareholder rights the ultimate danger is the drying-up of equity capital and to prevent these rights being overridden by international regulators, shareholders need to be able to demonstrate they're used responsibly and effectively." Kate Burgess & Miles Johnson, *FRC Offers Blueprint for Investor Engagement*, FIN. TIMES (July 1, 2010), https://www.ft.com/content/6d49e824-8544-11df-9c2f-00144feabdc0.

134. *See, e.g.*, Janet Williamson, *The Emperor's New Clothes – Enlightened Shareholder Value and the UK Stewardship Code, in* 2 EUROPEAN COMPANY LAW AND THE SUSTAINABLE COMPANY: A STAKEHOLDER APPROACH, 253, 260 (Sigurt Vitols & Johannes Heuschmid eds., 2012) (questioning the convergence between the interests of institutional shareholders and other stakeholders).

135. *See also* Katelouzou, *supra* note 86.

136. *See, e.g.*, Beate Sjåfjell, *Achieving Corporate Sustainability: What is the Role of the Shareholder?, in* SHAREHOLDERS' DUTIES IN EUROPE 377, 377–404 (Hanne Birkmose ed., 2017).

137. UK CODE 2012, *supra* note 107, at 2.

138. *Id.* at 1. Note that retail investors (asset owners) who invest in asset managers are not under any onus under the UK Code.

responsibility for stewardship, according to the Code, does not rest with asset managers alone but extends to asset owners themselves who "set the tone for stewardship"[139] and "should seek to hold their managers to account for their stewardship activities."[140] By valorizing asset owners as stewards, the first generation UK Code seeks "behavioural changes" from asset managers and, by extension, investee companies.[141] The degree to which asset managers are guided by their institutional clients depends, however, on the workings of the so-called "market for stewardship" or market for investment mandates. The assumption is that asset owners will demand stewardship to generate long-term returns for their beneficiaries, and asset managers will supply it for reputational and financial incentives.[142] An efficient market for stewardship should better equip assets owners to evaluate asset managers and enable asset managers to meet asset owners' requirements.[143] Even though respect to different business models is hailed, the first generation UK Code provides that institutional investors "cannot delegate their responsibility for stewardship" and "remain responsible for ensuring those activities are carried out in a manner consistent with their own approach to stewardship" when they "outsource to external service providers some of the activities associated with stewardship."[144] Consequently, the UK Code 2010/12 is also directed, by extension, to service providers such as proxy advisors and investment consultants.[145]

139. *Id.* at 2.

140. *Id.* at 2–3. *But see* Tilba & Reisberg, *supra* note 36, at 486 (highlighting the limits that interpretations of fiduciary duties pose on pension funds' approaches to stewardship). For a similar discussion in the United States, see Bernard S. Sharfman, *The Conflict Between BlackRock's Shareholder Activism and ERISA's Fiduciary Duties*, 73 CASE W. RES. L. REV. 1275 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3691957.

141. UK CODE 2012, *supra* note 105, at 1.

142. *See* Dionysia Katelouzou & Eva Micheler, *The Market for Stewardship and the Role of the Government*, in GLOBAL SHAREHOLDER STEWARDSHIP 67, 70–71 (Dionysia Katelouzou & Dan W. Puchniak eds., Cambridge Univ. Press 2022) (tracing the development of a "market for stewardship" in the UK from the Kay review to the UK Code 2020).

143. UK CODE 2012, *supra* note 107, at 2–3.

144. *Id.* at 2.

145. *Id.*

The targets of the first generation UK Code have no formal obligation to obey the stewardship prescriptions, and the UK Code 2010/12 similarly to the UK Corporate Governance Code—and the earlier Cadbury Code—adopts the "comply-or-explain" approach.[146] Institutional investors can choose whether or not to adopt the UK Code 2010/12, and if they do (in which case they are signatories), they should disclose information about their stewardship policy and compliance record and explain areas of non-compliance.[147] But for asset managers authorized by the Financial Conduct Authority (FCA)—the UK financial services regulator—there is a duty to disclose the extent to which they comply with the UK Code and their deviations from the Code where appropriate.[148] In other words, FCA-authorized asset managers may have no formal obligation to obey the Code, but have to disclose information about their stewardship policies and explain when they depart from the Code's principles.[149] Such a duty does not exist for the other targets of the UK Code (UK-based asset owners and service providers). Nor have overseas institutional investors investing in UK public equity—despite currently dominating UK share

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146. *Id.* It is noteworthy that the 2020 version of the UK Code has aimed to increase compliance in two important ways: (i) it follows the apply–and–explain approach, and (ii) disclosure of stewardship outcomes and practices rather than policy statements.

147. On the effectiveness of the comply-or-explain principle, see, for example, John Parkinson & Gavin Kelly, *The Combined Code of Corporate Governance*, 70 POL. Q. 101 (1999); Sridhar Arcot, Valentina Bruno & Antoine Faure-Grimaud, *Corporate Governance in the UK: Is the Comply or Explain Approach Working*?, 30 INT'L REV. L. & ECON. 193 (2010) (empirically examining the compliance levels to the UK Combined Code of Corporate Governance and finding that while most companies comply with the code, those that do not comply only provide poor explanations); Virginia Harper Ho, "*Comply or Explain" and the Future of Nonfinancial Reporting*, 21 LEWIS & CLARK L. REV. 317 (2017) (arguing that incorporating a comply-or-explain approach is more effective than voluntary ESG reporting in the United States).

148. UK CODE 2012, *supra* note 107, at 4; FIN. CONDUCT AUTH., CONDUCT OF BUSINESS SOURCEBOOK ¶ 2.2.3R (2021), https://www.handbook.fca.org.uk/handbook/COBS/2/?view=Chapter.

149. For a critical discussion of this level of coerciveness of the UK Code 2012 and of the limits of private regulation in ensuring effective stewardship and corporate governance practices, see Dionysia Katelouzou & Peer Zumbansen, *The New Geographies of Corporate Governance*, 42 U. PA. J. INT'L L. 51, 114-120 (2020).

registers[150]—been obligated to report if and how they apply the UK Code. However, in an attempt to encourage overseas investors to follow the UK Code 2010/12 without adding a considerable disclosure burden, the 2012 version advises overseas investors who follow other national or international stewardship codes that disclosures made in respect of those standards can also be used to demonstrate the extent to which they have complied with the UK Code.[151]

Figure 1 demonstrates that over the first five years after the introduction of the UK Code in 2010 the number of signatories had increased to a record high of 321 signatories in 2015. Since then, there has been a drop in the number of signatories followed by another increase. The decrease is likely to be attributed to the two- (previously three-) tier reporting system introduced by the FRC in 2016.[152] The aim of the tier reporting system, which is akin to a reputational enforcement mechanism,[153] was threefold: to improve the quality of reporting against the UK Code 2010/12, to encourage greater transparency in the market, and to improve the functioning of the market for investment mandates. The tiering exercise distinguished signatories who report well and demonstrate their

150. *See* ONS 2020, *supra* note 40 (reporting that the proportion of UK domiciled companies quoted shares owned by non-UK investors stood at 56.3% by the end of 2020). This limited focus of the UK Code led Cheffins to opine that the code is unlikely to foster investor-led governance. *See* Cheffins, *supra* note 35.

151. UK CODE 2012, *supra* note 107, at 3.

152. For additional information, see *FRC Promotes Improved Reporting by Signatories to the Stewardship Code*, FIN. REPORTING COUNCIL (Dec. 14, 2015), https://www.frc.org.uk/news/december-2015/frc-promotes-improved-reporting-by-signatories-to. Other reasons behind this trend could be the little incentives of asset managers to improve the long-term value of investee companies and promote wider public interests due to fierce competition on the basis of relative performance creates. For a theoretical model of when mutual funds should vote on behalf of their investors, see Sean J. Griffith, *Opt-In Stewardship: Toward an Optimal Delegation of Mutual Fund Voting*, 98 TEXAS L. REV. 983 (2020).

153. *See* Dionysia Katelouzou & Konstantinos Sergakis, *Enforcement of Shareholder Stewardship* in GLOBAL SHAREHOLDER STEWARDSHIP (Dionysia Katelouzou & Dan W. Puchniak, eds., Cambridge Univ. Press 2022), Ch. 27 572-598 (setting out an enforcement taxonomy of shareholder stewardship based on the nature of the norm enforcer, the nature of the enforcement mode and the temporal dimension of enforcement).

commitment to stewardship from those who must improve.[154] In November 2016, the results of the first public tiering exercise were officially announced.[155] The first tiering exercise led some signatories (approximately 20) to voluntarily withdraw their stewardship statements. From the remaining signatories, 28 asset managers were assessed as Tier 3. The FRC gave Tier 3 asset managers a period of six months to improve their statements to the Tier 1 or Tier 2 standard or be removed from the list of signatories to the UK Code 2010/12.[156] In August 2017, the FRC announced the results of the second public tiering exercise.[157] This time 256 signatories to the UK Code 2010/12 remained. (Figure 1). The FRC removed the Tier 3 category as some signatories improved their statements to the Tier 1 or Tier 2 standard, and the rest removed themselves from the list of signatories.[158]

154. For more information on the classification of the signatories to the UK Code 2010/12 into tiers, see *Tiering of 2012 Stewardship Code Signatories*, FIN. REPORTING COUNCIL (Jan. 25, 2021), https://www.frc.org.uk/investors/uk-stewardship-code/uk-stewardship-code-statements.

155. *Tiering of Signatories to the Stewardship Code*, FIN. REPORTING COUNCIL (Nov. 14, 2016) https://www.frc.org.uk/news/november-2016/tiering-of-signatories-to-the-stewardship-code.

156. *Id.*

157. *FRC Removes Tier 3 Categorisation for Stewardship Code Signatories*, FIN. REPORTING COUNCIL (Aug. 3, 2017), https://www.frc.org.uk/news/august-2017/frc-removes-tier-3-categorisation-for-stewardship.

158. *Id.*

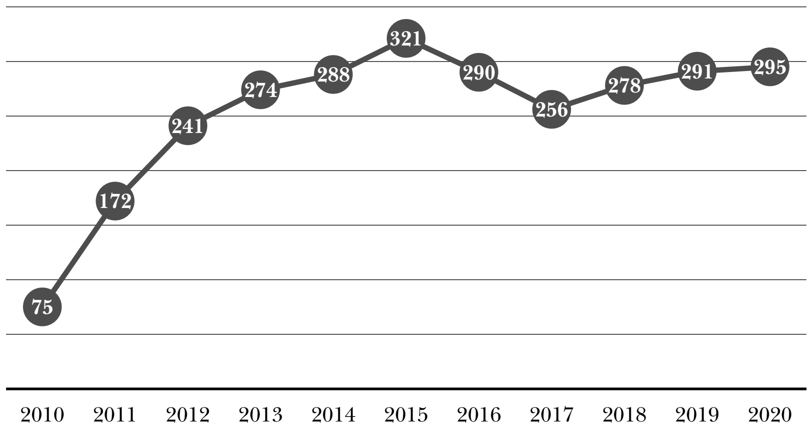

FIGURE 1: NUMBER OF SIGNATORIES TO THE UK STEWARDSHIP CODE, 2010–2020

The FRC's tiering exercise is a unique example of a membership and adherence sanction within an established stewardship network,[159] but it has—as we will see below—uncertain implications for shareholder stewardship rhetoric.[160] According to the FRC, approximately 80 signatories across all categories originally assessed as Tier 2 improved their statements to move into Tier 1, and the tiering exercise has resulted in more transparency and improved reporting with regard to the principles of the UK Code 2010/12.[161] Also, the FRC claims that the decrease in the number of signatories is not a matter of concern. Dropping an institution from the UK Code 2010/12 is appropriate if stewardship is not relevant for an institution's business model, as it should not be using the UK Code 2010/12 as a reporting framework.[162]

Finally, it is evident from Figure 1 that since 2018 there has been a slight increase in the number of stewardship signatories, which as of 2020 amounted to 295, from which 178 are

159. Katelouzou & Sergakis, *supra* note 153.

160. *See infra* Section III.C.

161. *Developments in Corporate Governance and Stewardship 2016*, FIN. REPORTING COUNCIL 26, (Jan. 2017), https://www.frc.org.uk/getattachment/ca1d9909-7e32-4894-b2a7-b971b4406130/Developments-in-Corporate-Governance-and-Stewardship-2016.pdf.

162. *Id.* at 26 ("[s]ignatories assessed as Tier 1 do not necessarily provide a "perfect" statement but provide a good overview of their approach to stewardship).

asset managers, and 105 are asset owners.[163] This trend is attributed mainly to asset managers' increased willingness to adhere to the UK Code 2010/12 and act as long-term stewards on behalf of their clients.[164] This also suggests that there is an increasing awareness and raising market expectations of signatories to the UK Stewardship Code, a trend expected to continue for the foreseeable future.[165] What is less clear, however, is the extent to which signatories, and more specifically the activist asset managers who signed to the first generatiion UK Code and are the focus of this study—irrespective of their internal business model—can truly internalize the model of firm-specific shareholder stewardship aspired to by UK Stewardship Code.

C. *The Stewardship Ability of Activist Investors: The New Breed of Activist Shareholder Stewards*

The analysis so far theorized the model of micro-level shareholder stewardship and exemplified its policy development through the first generation UK Code. This is where a paradox comes to light: the UK Code 2010/12 is addressed to *all* asset managers and asset owners with equity holdings in UK listed companies, but the model of shareholder stewardship—as originally envisaged by the UK Code 2010/12 and carried on in the 2020 Code—is by definition more suited to an undiversified investment strategy that entails firm-specific monitoring of operational and governance decisions, firm-specific engagement, and management oversight on a cost effective basis. Take, for instance, UK pension funds—the archetype of so-called "universal owners."[166] They now own just 1.8% of UK

163. The remaining 12 signatories are service providers. Latest data was collected in May 2020. Data on file with author.

164. As of October 2019, 169 asset managers were signatories to the UK Code 2010/12. Data on file with author.

165. This is illustrated by the new list of signatories to the UK Code 2020. *UK Stewardship Code Signatories,* FIN. REPORTING COUNCIL (Mar. 10, 2022), https://www.frc.org.uk/investors/uk-stewardship-code/uk-stewardship-code-signatories.

166. James Hawley & Andrew Williams, *The Emergence of Universal Owners: Some Implications of Institutional Equity Ownership*, 43 CHALLENGE, 43, 45 (2000); James Hawley & Andrew Williams, *Universal Owners: Challenges and Opportunities*, 15 CORP. GOVERNANCE: AN INT'L REV., 415, 415–16 (2007); Roger Urwin, *Pension Funds as Universal Owners: Opportunity Beckons and Leadership Calls,* 4 ROTMAN INT'L. J. OF PENSION MGMT., 26, 26 (2011).

equities,[167] but even if they owned as much public equity as they did in the 1980s and 1990s, most pension trustees have little incentives to engage in firm-specific shareholder engagement and monitoring and tend to play an "indirect" form of stewardship through mandates to their fund managers.[168] From the four categories of "traditional" domestic institutional investors (pensions, insurance, unit trusts—or mutual funds—and investment trusts), only unit trusts—the British open-end mutual funds—are still significant players in UK-listed shares despite a recent fall in their ownership share.[169] Unit trusts together with other financial institutions, such as index funds and exchange traded funds which have an increasing presence in UK listed equity could, in theory have the financial incentives to perform the role of the shareholder steward.[170] However, despite forceful scholarly debate on the stewardship role of the Big Three or the Big Four, it is becoming clearer that index funds do not monitor the fundamentals of their portfo-

167. For data, see ONS 2020, *supra* note 40 (reporting a record low of 1.8% in the equity shares of UK pension funds at the end of 2020, a further decrease from the 2.2% in 2018). *See also* Mark Cobley, *UK Pension Funds Continue to Slash Equity Investments*, FIN. NEWS (May 21, 2019), https://www.fnlondon.com/articles/uk–pension–funds–continue–to–slash–equity–investments–20190521.

168. There are notable exceptions, however, such as The Church Commissioners for England, a £8.7bn investment fund managed in an ethical and responsible way, has a long history of active engagement with companies. For the latest example, see *Church Commissioners for England Voice Support for Activist Campaign Targeting ExxonMobil*, CHURCH OF ENG. (Oct. 12, 2020), https://www.churchofengland.org/news–and–media/finance–news/church–commissioners–england–voice–support–activist–campaign–targeting (joining the activist investor campaign led by Engine No.1 and supported by CalSTRS urging ExxonMobil to develop an energy transition strategy and refresh its board). It is also worth–noting that some of the largest UK pension funds, such as Railpen, are moving from delegated stewardship to in–house stewardship and management. *See* RPMI RAILPEN, STEWARDSHIP REPORT 2021, 22, https://cdn-suk-railpencom-live-001.azureedge.net/media/media/52lhtclx/stewardship-report-2021.pdf.

169. *See* ONS 2020, *supra* note 40 (reporting that unit trusts' proportions in the UK listed market has fallen sharply from a record high of 9.6% in 2018 to 7.4 per cent at the end of 2020).

170. *Id.* (reporting that other financial institutions reached a record high of 12.8% in 2020). *See also* BARKER & CHIU, *supra* note 9 (examining how the internal business models and incentives of pension funds, mutual funds, hedge funds, private equity funds and sovereign wealth funds affect their corporate governance roles).

lio companies, have very few incentives to actively promote firm-specific governance improvements, and even if they were to do so their influence would be limited to their minority voting power.[171] Passive managers, therefore, can at best play a *systematic* (portfolio- or market-level) stewardship role.[172] This leaves us with active asset managers who are, however, unable to devote resources to engage with every company in their large portfolios. There are two instructive examples. First, when active asset managers *react* to corporate crises (such as excessive executive plans, acquisitions, poor succession plans or inappropriate capital increases) they align with the micro-level shareholder stewardship model. Second, when active asset managers address environmental and social issues engaging in ESG activism they align with the micro-level shareholder stewardship model.[173] But in the main while active asset managers invest resources in stock-picking underperforming companies, their ability to actively engage to improve performance at the individual firm-level is limited due to their business model and resources.[174] This is why the firm-specific stewardship abilities of active managers are mostly reactive and incidental.

A neglected but important candidate for shareholder stewardship is the activist investor. This is not the one associated with aggressive US activist hedge funds but the one related to a "softer" activist type mostly found outside the US

171. *See, e.g.*, Dorothy Shapiro Lund, *The Case Against Passive Shareholder Voting*, 43 J. CORP. L. 493, 498-500 (2018); Fisch, Hamdani & Solomon, *supra* note 78; Bebchuk & Hirst, *supra* note 78; Brian R. Cheffins, *The Rise and Fall (?) of the Berle–Means Corporation*, 42 SEATTLE U. L. REV. 1, 64 489–96 (2019). *But see* John C. Coates, *The Future of Corporate Governance Part I: The Problem of Twelve* (Harvard Pub. L., Working Paper No. 19–07, 2018) https://ssrn.com/abstract=3247337 (arguing that index funds have "unsurpassed power" to control the boards and management of their portfolio companies).

172. *See* Gordon, *supra* note 14.

173. *See* Elroy Dimson et. al., *Active Ownership*, 28 REV. FIN. STUD. 1, 2 (2015) (empirically analyzing ESG activism by a large active manager).

174. Marcel Kahan & Edward Rock, *Index Funds and Corporate Governance: Let Shareholders Be Shareholders,* 100 BOS. UNIV. L. REV. 1771, 1806 (2020) ("[a]ctive funds designed to exploit transient inefficiencies in market prices, which would have very short-term trading horizons, would have only minimal incentives to invest in voting because they may sell their shares between the time they vote and the time the outcome of the vote becomes public").

context.[175] This type of activism is associated with activist funds that proactively—but also sometimes reactively—engage with companies mostly behind the scenes and on a long-term investment horizon. Within Europe, the United Kingdom has the greatest concentration of activist funds and activist campaigns.[176] The appeal of UK firms to activist funds, especially those based in the United States,[177] may be attributed, among other things, to the highly institutionalized ownership structure of UK public equity and the strong rights shareholders set forth in UK company law, including a mandatory say-on-pay.[178]

The United Kingdom may be known for its tradition of private, behind-the-scenes, shareholder engagement, but public hedge-fund-style activism is picking up and one can find both "friendly" and "confrontational" activist campaigns targeting UK companies. Latest research by Activist Insight confirms that hedge fund activism in the United Kingdom hit record highs in recent years, with a total of 265 activist campaigns between 2016 and 2021.[179] Whereas not all of these public (and sometimes more aggressive) activist campaigns can fill the "stewardship bill," this Section makes the claim that activist funds can assume a stewardship role at the micro-level provided that the right incentives exist. I use the term "activist shareholder steward" to refer to this activist breed. Unlike passive investors who lack firm-specific expertise and most actively-managed funds that attempt to exploit market pricing anomalies, activist shareholder stewards aim to generate value

175. For an early account of hedge fund activism outside the United States, see Katelouzou, *supra* note 34, at 6.

176. *See, e.g.*, Dionysia Katelouzou, *Worldwide Hedge Fund Activism: Dimensions and Legal Determinants*, UNIV. PENN. J. BUS. L. (2015), 789, 833. For more recent data, see François Barrière et. al., ACTIVIST INVESTING IN EUROPE 2018 (Skadden 2019) (reporting that shareholder activism in the United Kingdom hit record levels in 2018 and 2019).

177. *See* Barrière et. al., *supra* note 176 ("[t]he number of UK–based companies subjected to public demands by US–based activists has doubled from 2017–8").

178. On the evolution of ownership in UK public equity, see ONS 2020, *supra* note 40. On the differences between the United Kingdom and the United States in terms of shareholder rights, see, for example, Hill, *supra* note 91, at 509–10 (attributing the friendlier UK regime to different organizational origins).

179. ACTIVIST INSIGHT DATABASE (data on file with the author).

through targeted activist interventions and with firm-specific information and expertise.[180]

The monitoring and engagement activities of activist shareholder stewards are part of the recent trend of a broadening base of activists, not only geographically but also in terms of investment styles and business models. Along with the globalization of hedge fund activism in recent years and the increase in local activists,[181] the style of activism originally associated with activist hedge funds has now become a widely accepted investment approach. A 2017 JP Morgan report highlighted that shareholder activism "is no longer the preserve of aggressive hedge funds but is now a tactic used by a host of traditional institutional shareholders."[182] As hedge-fund-style activism becomes more widespread among investors with different investment approaches, the distinction between "defensive" and "offensive" activists, drawn by early literature on the subject,[183] is more difficult to discern today. There are still plenty of activist hedge funds who exclusively engage in the type of offensive activism identified by the earlier literature, in the sense that they normally do not have a preexisting stake in the target company and they quickly build one when they decide to adopt a hands on strategy. But in many cases activist funds might already have a small shareholding in a company before deciding to actively lobby for changes and hedge-fund-style activism is thus not always "ex ante."[184] Also, the term

180. By way of illustration, an activist shareholder steward seeks to change corporate policies and structures, address governance factors (such as executive pay) and more recently social and environmental factors (board diversity, climate change) using formal shareholder rights or informal means of engagement (such as letter writing, public dialogue). *See also* Katelouzou, *supra* note 15.

181. *See* Becht et al., *Returns to Hedge Fund Activism: An International Study* (ECGI Working Paper No. 402, 2014), https://ssrn.com/abstract=2376271 (reporting that domestic activism outperforms foreign activism).

182. Ben Martin, *Activism 'Is No Longer the Preserve of Big Hedge Funds'*, DAILY TELEGRAPH, July 13, 2017, at 8. *See also* LAZARD'S SHAREHOLDER ADVISORY GROUP, 2018 REVIEW OF SHAREHOLDER ACTIVISM, at 6 (reporting that a record 40 "first timers" launched campaigns in 2018).

183. For more on this distinction, see Brian Cheffins & John Armour, *The Past, Present, and Future of Shareholder Activism by Hedge Funds*, 37 J. CORP. L. 51 (2011).

184. Katelouzou, *supra* note 33 (noting that occasionally they may have a small stake which they quickly increase when the decide to launch an activist campaign).

"offensive" activism implies a confrontational posture; many activists—especially outside the United States—are not high-profile, aggressive, activist investors and they generally do not seek publicity.[185] In other words, the activist funds this Article focuses on can be either offensive or defensive in style.[186]

Even though the boundaries between different activist styles are difficult to draw, the type of activist we focus on shares little with US hedge-fund-style activism besides a firm-specific focus.[187] At risk of oversimplification, one could say that the investment approach of activist shareholder stewards involves taking substantial, but noncontrolling, equity positions in underperforming companies and agitating for changes in the companies' strategic, operational, financial or corporate governance arrangements that will realize improved returns. While activist funds mostly engage *proactively* for change for the purposes of unlocking value, they occasionally "engage for information" or in a *reactive*, defensive manner with a company in their portfolios where they are dissatisfied with performance or governance parameters.[188]

Activist objectives range widely, including: campaigns for financial capital or operational measures to be taken, such as share buybacks or distribution of dividends, sale of assets, sale of business or other restructuring;[189] governance improvements including more board independence and diversity and concerns over executive compensation;[190] facilitation of, or

185. For empirical evidence, see *id.*

186. *See infra* Section III.A.

187. For recent literature reviews of hedge fund activism, see Ruth V Aguilera et.al., *Gone Global: The International Diffusion of Hedge Fund Activism in* THE OXFORD HANDBOOK OF HEDGE FUNDS 318 (Oxford: Oxford Univ. Press USA - OSO 2021); Alon Brav, Wei Jiang & Rongchen Li, *Governance by Persuasion: Hedge Fund Activism and the Market for Corporate Influence* (2021), (ECGI Fin. Working Paper No 797, 2021), https://ssrn.com/abstract=3955116.

188. Katelouzou*, supra* note 31.

189. For empirical evidence, see *id.* at 491–95; William W. Bratton, *Hedge Funds and Governance Targets*, 95 GEO. L.J. 1375 (2007); Alon Brav, et al., *Hedge Fund Activism, Corporate Governance, and Firm Performance*, 63 J. FIN. 1729, 1729–75, 1735–36 (2008).

190. Beginning in 2017, Blackrock and State Street began a campaign promoting women on the boards of their portfolio firms. *See, e.g.*, Justin Baer & Joann S. Lublin, *State Street Pushed 400 Companies to Put Women on Boards. Most Shrugged*, WALL ST. J. (July 26, 2017), https://www.wsj.com/articles/state–street–pushed–400–companies–to–put–women–on–boards–most–shrugged–1501100453. *See also* Mary Brooke Bilings et. al., *Investors' Response*

opposition to mergers and acquisitions;[191] and seeking improvements in companies' environmental and social practices.[192] In terms of strategies, activist shareholder stewards mainly encompass "friendly" activities including the subtle pressure on the incumbents behind the scenes, writing letters, holding private meetings with the board/management to discuss informal (precatory) shareholder proposals, public criticism and seeking board representation without public confrontation.[193] While the more confrontational strategies prevalent in the U.S. context are not unknown, activist shareholder stewards rarely use them and do so only as a last resort.[194] For instance, whereas winning board representation through an actual or threatened proxy fight has been a key stated activist objective and a strategy in many U.S. activist hedge fund campaigns,[195] the breed of activists we focus on tend to only pro-

to the #MeToo Movement: Does Corporate Culture Matter (ECGI Fin. Working Paper No 764, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3466326 (providing empirical evidence on how investors' beliefs were shifted by the #MeToo movement in terms of the value of having women on boards).

191. In recent years, there has been an increase in M&A activism. *See e.g.*, LAZARD, 2019 REVIEW OF SHAREHOLDER ACTIVISM (2020), at 14 (reporting that 47% of the activist hedge fund campaigns launched in 2019 were M&A driven); ACTIVIST INSIGHT, ANNUAL REVIEW 2020 (2020), at 8 (expecting more activism against buysides or mergers of equals in 2020); *see also* Carol Ryan, *Activist Investors and the Art of the Deal; Hedge Funds Spend Most of Their Cash on M&A Campaigns in 2019', a Trend That Should Continue This Year*, WALL ST. J. (Jan. 23, 2020) (reporting that 60% of the cash spent by activist hedge funds globally in 2019 went on M&As campaigns).

192. *See infra* Section IV.B.2.

193. For empirical data, *see* Katelouzou, *supra* note 33.

194. *See, e.g.*, Marco Becht, Julian Franks, Colin Mayer & Stefano Rossi, *Returns to Shareholder Activism: Evidence from a Clinical Study of the Hermes UK Focus Fund*, 22 REV. FIN. STUD. 3093 (2008).

195. For early data, see April Klein & Emanuel Zur, *Entrepreneurial Shareholder Activism: Hedge Funds and Other Private Investors*, 64 J. FIN. 187, 215 (2009) (studied activist hedge fund campaigns between 2003 and 2005 and finding that 40% of the campaigns involve an actual (12%) or threatened (28%) proxy contest). Brav et al., *supra* note 189, at 1743 (analyzing data to 2006 and finding that activist hedge funds launched a proxy fight to gain board representation in 13.2% of activist events). On the importance of proxy fights as a disciplinary mechanism, see generally Vyacheslav Fos & Margarita Tsoutsoura, *Shareholder Democracy in Play: Career Consequences of Proxy Contests*, 114 J. FIN. ECON. 316 (2013).

mote short slate board representation.[196] For such activists a board seat is a means to create a more effective board and bring about the changes of the type sought by activism, including improved operating performance, higher corporate governance standards or ESG.[197]

From an investment management perspective, the business model of activist funds is compatible with firm-specific engagement and the micro-level shareholder stewardship model aspired to by the UK Code 2010/12.[198] Activists' firm-specific engagement is in accordance with Principles 3 and 4 of the UK Code 2010/12. As we have seen before, the UK Code 2010/12 views stewardship as something "more than just voting."[199] Shareholder stewardship includes both formal and informal monitoring and engagement on a wide range of issues from strategy, performance, risk and capital structure to corporate governance, leadership and corporate reporting.[200] While becoming an insider is neither precluded nor expected by the UK Code 2010/12, the Code requires that "an institutional investor who may be willing to become an insider should indicate in its stewardship statement the willingness to do so, and the mechanism by which this could be done."[201] This implies that activists who have the propensity to join a company's boards to better their objectives, like Cevian Capital, one of the largest activist funds in Europe, are not excluded from the

196. *See* Anna L. Christie, *The New Hedge Fund Activism: Activist Directors and the Market for Corporate Quasi–Control*, 19 J. CORP. L. STUD. 1 (2019) (arguing that the phenomenon of activist, minority board representation has created an active market for corporate quasi–control). But it is also likely that activists in the United Kingdom tend to not resort to full proxy fights because of the greater shareholder rights in the United Kingdom (including in the event of a takeover) which make managerial resistance much harder. On how shareholder rights affect a hedge fund activism campaign, see Katelouzou, *supra* note 176.

197. *See* Nickolay Gantchev, *The Costs of Shareholder Activism: Evidence from a Sequential Decision Model*, 107 J. FIN. ECON. 610–631 (2013); Katelouzou, *supra* note 33 (both suggesting that board representation is a crucial step of an activist campaign, but not its ultimate objective).

198. *See supra* Section II.B.

199. UK CODE 2012, *supra* note 107, at 1 and 7.

200. *Id.*

201. *Id.*

stewardship ambit of the UK Code 2010/12.[202] Principle 4 concerning forms of escalation further legitimates shareholder activism. Under Principle 4, "if companies do not respond constructively when institutional investors intervene, then institutional investors should consider whether to escalate their action."[203] Previous literature confirms that this escalation from softer to more confrontational strategies, such as public criticism, submitting resolutions, or requisitioning a general meeting, is the lynchpin of an activist campaign.[204] The UK Code 2010/12 also endorses coalition building and collaborative forms of activism, which, as we will point out later, underscore the stewardship ability of activist funds.[205]

A cautionary note is required here. Whereas firm-specific engagement and monitoring by activist funds can be compatible with the micro-level shareholder stewardship model aspired to by the UK Code 2010/12, the Code legitimizes firm-specific engagement and activism only when long-term value improvement is aimed for and achieved.[206] The investment style of activist funds can therefore fill the stewardship bill only if such activism is not used for the purposes of short-term value extraction. This turns out to be an empirical question, for which, as yet, there is no conclusive evidence.[207] Activist funds

202. *See, e.g.*, Jen Wieczner, *Meet Europe's Best Activist Investor*, FORTUNE (Aug. 27, 2015, 11:00 AM), https://fortune.com/2015/08/27/christer–gardell–activist–investor–europe/.

203. UK CODE 2012, *supra* note 107, at 8.

204. *See, e.g.*, Katelouzou, *supra* note 33.

205. UK CODE 2012, *supra* note 107, at 8–9; *see infra* Section IV.B.

206. *See supra* Section II.B.

207. For a review of the empirical literature in the U.S. context, see Alon Brav, Wei Jiang & Hyunseob Kim, *Hedge Fund Activism: A Review*, 4 FOUNDS. & TRENDS FIN., 185 (2009); John C. Coffee, Jr. & Darius Palia, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance*, 41 J. CORP. L. 545, 551 (2016). For the inconclusive evidence relating to the long–term effect of hedge fund activism, compare Lucian A. Bebchuk, Alon Brav & Wei Jiang, *The Long–Term Effects of Hedge Fund Activism*, 114 COLUM. L. REV. 1085 (2015) (finding improved operating performance of companies following activist interventions); Martijn Cremers, Saura Masconale & Simone M. Sepe, *Activist Hedge Funds and the Corporation*, 94 WASH. UNIV. L. REV. 261 (2016) (finding that hedge fund activism is associated with excessive risk–taking but has no significant impact on managerial accountability); Martijn Cremers, Erasmo Giambona, Simone M. Sepe & Ye Wang, *Hedge Fund Activism and Long-Term Firm Value* (Dec. 13, 2018), https://ssrn.com/abstract=2693231 (documenting that firms targeted by activist hedge funds

with a long-term focus can arguably perform the role "of protecting and enhancing shareholder value," which is an explicit aim of the UK Code 2010/12 and other stewardship codes worldwide.[208] There are some limitations in the conclusion that can be drawn from the existing empirical literature, which has mainly focused on the impact of hedge-fund-style activism on target firms' performance and thus has not considered the market-wide impact of activist shareholder stewards or their direct role in corporate governance.[209] In addition, many activists—especially outside the United States—recognize "attention to shareholder value. . . as a public good,"[210] a view largely consistent with the model of shareholder stewardship and its underpinning commitment in the form of "psychological ownership."[211]

While reaching a conclusion about activist funds' net impact on corporate governance and social value is out of the scope of this Article, the arguments presented in this Section support the thesis that the business model of activist shareholder stewards is in alignment—at least from a theoretical perspective—with the firm-specific shareholder stewardship

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improve less in value than ex-ante similarly poorly performing matched firms); and Mark R. DesJardine, Emilio Marti & Rodolphe Durand, *Why Activist Hedge Funds Target Socially Responsible Firms: The Reaction Costs of Signaling Corporate Social Responsibility,* 64 ACAD. OF MGMT. REV. (2021) (finding that activist hedge funds are more likely to target companies with higher corporate social responsibility (CSR) and put pressure on them to maximize value in the short–term). For empirical evidence outside the United States, see, for example, Becht et al., *supra* note 181 (only studying the abnormal returns over the period of activist engagement). Some notable exceptions are Wolfgang Bessler, Wolfgang Drobetz & Julian Holler, *The Returns to Hedge Fund Activism in Germany,* 21 EUR. FIN. MGMT. 106 (2015) (providing evidence of long–term value creation for target companies in Germany); John Buchanan, Dominic H. Chai & Simon Deakin, *Unexpected Corporate Outcomes from Hedge Fund Activism in Japan,* 18 SOCIO–ECONOMIC REV. 31 (2020) (hedge fund activism had no effect on target firms in terms of managerial effectiveness, managerial decisions and labor management during a three–year period following the activist campaign).

208. UK CODE 2012, *supra* note 107, at 8 (outlining Principle 4).

209. Coffee & Palia, *supra* note 207.

210. BUCHANAN, CHAI & DEAKIN, *supra* note 65, at 295.

211. *See* Morela Hernandez, *Toward an Understanding of the Psychology of Stewardship,* 37 ACAD. OF MGMT. REV. 172 (2012); Terry McNulty & Donald Nordberg, *Ownership, Activism and Engagement: Institutional Investors as Active Owners,* 24 CORP. GOVERNANCE: AN INT'L REV. 346 (discussing psychological ownership in their analysis of active ownership and shareholder activism).

model of the UK Code 2010/12. As for their incentives, as long as activists aim at protecting and enhancing the long-term value of investee companies, they can fill the stewardship bill. Although this is not always guaranteed, I will highlight two trends (coalition-building and ESG activism) that have already moved activist funds in a long-term direction and can therefore streamline the activists' stewardship role.[212] But first, I will empirically test this thesis by examining how the activists themselves understand shareholder stewardship through an automated textual examination of the stewardship statements of activist asset managers to the UK Code 2010/12.

II.
WHAT CAN WE LEARN FROM THE DISCLOSURE STATEMENTS OF ACTIVIST SHAREHOLDER STEWARDS?

A. *Data Collection, Sample and Corpus*

My aim here is to empirically test whether the rhetoric of activist shareholder stewards as revealed by a systematic examination of their stewardship disclosure statements is in accordance with the theoretical claims of the previous part. The data collection comprised a four-step procedure. The first step was to identify the activist investors that have signed the first-generation UK Code. At the time of data collection, the list of the Code's signatories was available on the FRC's website.[213] The FRC divides the signatories into three groups: asset managers, asset owners, and service providers. To identify the asset managers signatories to the UK Code 2010/12 with an "activist orientation," I collected relevant data using a two-step process. First, for each of the 177 asset managers signatories to the UK Code 2010/12 (as of April 2020), I ran searches in Activist Insight to identify which of the signatories employ shareholder activism as a strategy.[214] Second, I hand-gathered information

212. *See infra* Section IV.B.

213. Because the UK Code 2012 is now obsolete, the latest list of signatories to the UK Code 2012 is found in: UK STEWARDSHIP CODE 2012 SIGNATORY LIST, FIN. REPORTING COUNCIL (SEP. 2021), https://www.frc.org.uk/getattachment/47022044-bb4b-44b0-a688-82cf3e08107c/2012-Code-Signatory-List.pdf (last visited Jan. 12, 2022).

214. Activist Insight defines activism broadly as

> The advocacy by minority shareholders that various strategic levers are pulled by a public company in a bid to create shareholder

from relevant media outlets from the Dow Jones Factiva database using the following search requests as inputs: "(name of the signatory)" "same [paragraph]" "activist" for each asset manager signatory to the UK Code.[215] The searches confirmed 50 signatories to the UK Code 2010/12 with an activist orientation.[216] These 50 investors meet the criteria of activist shareholder stewards, as elaborated above.[217]

The 50 activist signatories to the UK Code 2010/12 vary significantly across several dimensions. First, in terms of investment style, twelve are hedge funds, whereas the rests are fund managers or investment firms other than hedge funds. In terms of activist style, 25 are "engagement focus activists."[218] These are typically fund managers who resort to firm-specific shareholder engagement as an escalated stewardship activity with the objective to protect and enhance shareholder value. Engagement focus activists are typically—but not exclusively—mutual fund managers who often adopt or otherwise support ESG activism. In addition, engagement focus activists often submit public demands (especially shareholder proposals) as a mechanism to affect corporate decision making. Also, some of the engagement focus activists in the sample have different types of funds in their portfolios, and not all of these adopt an

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> value, which is broadly achieved by improving underlying operational performance, exploring strategic alternatives, lifting governance standards, and returning capital to shareholders. Activism is sometimes described as either offensive or defensive in nature. Offensive activism represents the proactive and systematic targeting of underperforming companies as part of an established activist investment strategy. Defensive activism describes instead the reaction of existing shareholders to the underperformance of public companies. This form of activism is intended to improve the performance of existing portfolio companies.

ACTIVIST INSIGHT DATABASE (data on file with the author).

215. The term "activist" used in for the Factiva searches, is not a legal term of art, and some funds described as "activist" by the press would define themselves differently. Also, labelling a signatory as an activist one does not preclude that an asset manager can also take passive stakes. Previous literature confirms that a broader definitional approach to the concept of hedge fund activism is needed outside the United States where Schedule 13D filings are lacking. *See* Katelouzou, *supra* note 33.

216. *See infra* Appendix 1 for more details.

217. *See supra* Section II.C.

218. Data retrieved from the Activist Insight Database. ACTIVIST INSIGHT DATABASE (data on file with the author).

activist approach.[219] But for all engagement focus activists in the sample, firm-specific monitoring and engagement is a key component of their business models, even if at times this takes place on the basis of internal prioritization or "warning" systems.[220] Echoing the well-established dichotomy of defensive and offensive activists,[221] "engagement focus activists" are defensive in style in the sense that they do have a preexisting stake and react to poor performance or governance-related issues.

The rest of the activist signatories are fund managers and hedge funds who engage in activism either occasionally, partially, or primarily. From these, five are exclusively "offensive" in nature, in the sense that they only engage in activism proactively rather than reactively. These offensive activist signatories systematically target underperforming companies aiming at enhancing shareholder value through shareholder activism. The portfolio of offensive activists is concentrated, typically consisting of about 50–60 holdings. All offensive activists are activist hedge funds. As may be expected, the offensive activist sample does not include the typical activist hedge funds of the US market (because for them, the type of shareholder stewardship aspired to by the UK Code 2010/12 is of little relevance), but include key vocal UK players, such as Toscafund and RWC Partners.[222]

It is noteworthy that all together, these 50 activist stewards have launched 278 public demands between 2013 and 2021

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219. For instance, Aberdeen Standard Investments is a not the typical hedge–fund–style activist. They prefer to describe themselves as favoring "active" rather than "activist" engagement, but they complement their strategies with firm–specific engagement, which often takes place privately. *See* Marco Becht, Julian Franks & Hannes F. Wagner, *Corporate Governance Through Voice and Exit* (ECGI Finance, Working Paper No. 633, 2019), https://ssrn.com/abstract=3456626.

220. *Id.* (finding that Aberdeen Standard Investments, part of Standard Life Aberdeen, engages more often with portfolio companies that are included in the "Governance Health Warning" list, that is companies flagged as posing a governance risk for fund performance).

221. Cheffins & Armour, *supra* note 183.

222. RWC Partners acquired Hermes U.K. Focus Funds (HUKFF) in 2012. *See* Sam Jones & David Oakley, *Hermes Offloads Activist Focus Unit*, FIN. TIM. (Sep. 18, 2012), https://www.ft.com/content/737db9fe–0185–11e2–81ba–00144feabdc0. On activist private engagements by Hermes U.K. Focus Funds (HUKFF) a fund managed by Hermes, see Becht, Franks, Mayer & Rossi, *supra* note 194, at 22.

(as of July 2021), 88 of which took place in the UK.[223] The activist signatories to the UK Code 2010/12 also differ in terms of their approach and are friendly and confrontational in nature (see Appendix 1 for details). None of the signatories, however, adopt an entirely confrontational approach and they all tend to start with conciliatory tactics, such as informal communicating to the incumbents and/or other shareholders where appropriate.[224]

Most activist signatories are well established funds founded before 2000 (see Appendix 1 for details). The median year is 1985. Only 10 activist signatories were founded after 2000. Among them, Independent Franchise Partners, founded in 2009, is the newest activist in the sample. The market capitalization of activists ranges widely from 1.43 billion US dollars (USD) to 7,808.50 billion USD (see Appendix 1 for details). The average size is 565.19 billion USD, while the median is 87.65 billion USD. That the average size is much larger than the median is explained by the much broader range of the quartile of largest activist signatories compared to the smallest. If one looks at the size of activist signatories by activist style, then "engagement focus activists," as expected, are much larger than defensive and offensive activists.[225]

Sixteen out of the 50 activist signatories are non-UK investors (see Appendix 1 for details). This may at first be at odds with the ownership structure of UK public companies,[226] but is in alignment with the total proportion of foreign signatories to the UK Code 2010/12 (55 out of 177 asset managers signatories to the UK Code 2010/12 are foreign investors) and can be explained by the fact that only UK asset managers authorized by the Financial Conduct Authority (FCA) are required to follow the UK Code.[227]

In addition, the FRC has assessed 40 activists as Tier 1 signatories and the rest as Tier 2 signatories (see Appendix 1 for details). Finally, 40 activist signatories to the UK Code 2010/12

223. Data on file with the author.

224. Data on file with the author.

225. The average and median size of "engagement focus activists" is \$1,040.22 billion USD and \$369.70 billion USD, respectively, while offensive activists have on average \$10.81 billion USD assets under management (the median is \$11.85 billion USD).

226. *See* ONS 2020, *supra* note 40.

227. *See supra* text accompanying note 148.

are also signatories to the Principles for Responsible Investment (PRI) supported by the United Nations.[228]

To examine the stewardship rhetoric of the 50 activist signatories, I gathered a textual dataset comprised of their policy statements to the UK Code 2010/12.[229] To understand the textual information provided in the statements, I codified the written material of the stewardship statements and applied *natural language processing* (NLP) techniques. Initially, I collected all the words and converted the language to British English. The initial set of words was 168,424.[230] To allow for machine learning, I preprocessed this set of words following standard practice in textual analysis. First, I removed all stop words (such as *and*, *so*, *on*, *of*), and I decomposed all of the words into their roots,[231] applying Porter's stemming method.[232] Second, I transformed all of the remaining words to lower case so that, for instance, "Meeting" is not different from "meeting," and I removed all numbers. I erased all words shorter than two characters (e.g., *at*) and all punctuation marks. I conducted preprocessing through *quanteda*—a toolkit for NLP—within the R environment.[233]

The final *corpus* is comprised of 73,207 total tokens (that is, stemming abbreviations after pre-processing). Details on the number of tokens found in each disclosure statement are available in Appendix 1, while some of the most common tokens are in Appendix 2. In the absence of standardized reporting, the size of the statements varies notably, from 764 tokens in the case of Independent Franchise Partners LLP to 3,642 in the case of Aviva Investors. The average size of statements is

228. *See infra* Appendix 1. *See also All Signatories Profiles Articles*, PRINCIPLES FOR RESPONSIBLE INV., https://www.unpri.org/1018.type?cmd=GOToPage&val=19 (last visited July 30, 2021).

229. At the time of data collection most statements were available on the FRC's website, but for some signatories, the author had to dig through many sources, including the signatories' webpages and direct email communications in order to identify the most updated statements.

230. This was after removing any disclaimers, tables and figures, email addresses and websites included in the statements.

231. For instance, "disclosing" and "disclose" are collapsed to the same word "disclos" for frequency counting. *See infra* Appendix 2.

232. *See* M.F. Porter, *An Algorithm for Suffix Stripping*, 14 PROGRAM: ELEC. LIBR. & INFO. SYS. 130 (1980).

233. *See generally* Kenneth Benoit et al., *quanteda: An R Package for the Quantitative Analysis of Textual Data*, 3 J. OF OPEN SOURCE SOFTWARE 30 (2018).

1,743.02 tokens, while the median is 1,683 tokens. Table 1 presents descriptive statistics for the raw and preprocessed corpus.

TABLE 1: DESCRIPTIVE STATISTICS FOR THE CORPUS OF ACTIVIST SIGNATORIES' STEWARDSHIP STATEMENTS[234]

Documents	Sample	No. docs.	Mean	Median	Std. Dev.
Raw	168,307	50	3,366.14	3,032.50	1344.32
Pre-processed	73,207	50	1,743.02	1,683	725.41

B. *How do the Activist Signatories Understand Shareholder Stewardship? Some Descriptive Statistics*

The first analytic strategy to systematically examine how the activist signatories to the UK Code 2010/12 understand shareholder stewardship was to compute the relative frequency of unigrams (single-word tokens) in the signatories' statements. The relative frequency is the absolute frequency of occurrence divided by the total amount of tokens contained in each statement and computed per 1,000 words, a conventional way of standardizing results of documents of different sizes.[235] Figure 2 shows the calculated relative frequency of the top 30 unigrams in the corpus. From these frequently occurring words, initial ideas about the ways the activist signatories understand stewardship can emerge.

234. Data on file with author.

235. Frequency word lists have long been part of the standard methodology for analyzing corpora linguistics. *See, e.g.*, Alistair Baron et al., *Word Frequency and Key Word Statistics in Historical Corpus Linguistics*, 20 ANGLISTIK: INT'L. J. ENGLISH STUD. 41 (2009).

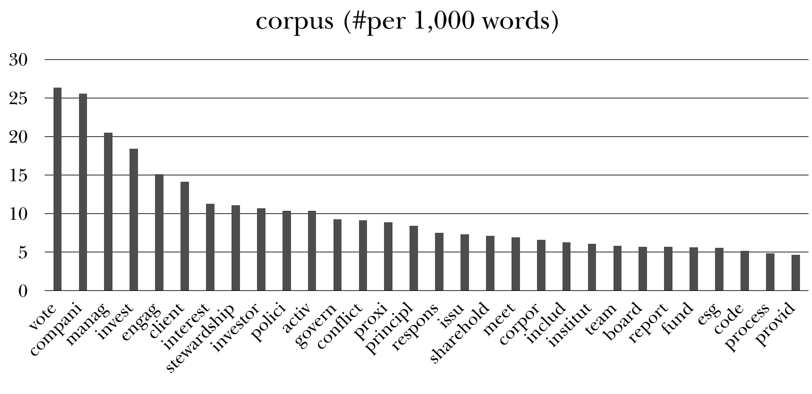

FIGURE 2: MOST FREQUENTLY OCCURRING WORDS IN THE CORPUS

As seen in Figure 2 "*vote*" is the most cited word (stems are listed in Appendix 2). This confirms that activist signatories perceive exercising voting rights and disclosing voting records as a key element of micro-level shareholder stewardship practices and oversight of managerial behavior.[236] But most asset managers rely on proxy voting firms to provide guidance on how they vote.[237] The study confirms this, as the word "*prox*" is the 14th most frequently used word. This implies that the activist signatories perceive the proxy advisory firms as key counterparts in exercising shareholder voting and shareholder stewardship. *Engag*(ement), *meet,* and *board* are also common words in the signatories' statements. Thus, it is evident that activist signatories understand shareholder stewardship in a broad way as including not only voting but also informal forms of monitoring and engagement, such as meetings and dia-

236. *See* UK CODE 2012, *supra* note 107, at 8 (describing Principle 4).
237. For the recent debate on proxy voting regulation, see Ike Brannon & Jared Whitley, *Corporate Governance Oversight and Proxy Advisory Firms*, HARV. L. SCH. ON CORP. GOVERNANCE (Sept. 17, 2018); Keith Johnson et al., *Proxy Voting Reform: What is on the Agenda, What is Not on the Agenda, and Why it Matters for Asset Owners*, 99 B.U.L. REV. 1347, 1350 (2018); Andrew F. Tuch, *Proxy Advisor Influence in a Comparative Light*, 99 B.U.L. REV. 1459, 1464 (2019). *But see* Audra L. Boone et al., *The Role of Proxy Advisors and Large Passive Funds in Shareholder Voting: Lions or Lambs?*, 2d ANN. FIN. INSTITUTIONS, REG. & CORP. GOVERNANCE CONF. (Feb. 20, 2020), https://ssrn.com/abstract=2831550 (suggesting that the Big Three are more influential in voting than ISS over time).

logue with the board of directors. This confirms the earlier understanding of stewardship (especially in the U.S. context) as including three components: monitoring, voting, and engagement.[238] Another important observation is that while the word active (*activ*) is often associated with "active portfolios" or "active investment" and "active participation" or "active engagement," it appears with the words "ownership" and "owner(s)" thirty-five times. For instance, Hermes Fund Manager states:

> our stewardship resources reflect our philosophy that *active ownership* requires an integrated and skilled approach and engagement should be carried out by individuals with the right skills and with credibility.[239]

The notion of active ownership is key to the way activist signatories understand shareholder stewardship at the micro-level and suggests that for some activist signatories shareholder stewardship is associated with some level of "psychological ownership." Katarina Sikavica and Amy Hillman refer to this as "share ownership," in the sense that increased firm-specific monitoring and stewardship ensure that the targeted firm is in alignment with the signatories' identities.[240] Active ownership, however, suggests a rather narrow understanding of stewardship as confined within equity. While such an understanding is consistent with the UK Code 2010/12, it is aging rapidly as a stewardship under the second generation UK Code expands beyond equity.[241]

Examining the unigram distribution also confirms that engagement as a means to achieve better corporate governance (*govern*) is a key component of shareholder stewardship. The frequencies of the words *client, conflict* and *interest* are indicative of the investment management side of stewardship and highlight that institutional investors have a clear understanding of managing other people's money in expressing

238. Bebchuk & Hirst, *supra* note 78, at 2,045.

239. *Approach to Stewardship*, HERMES INV. MGMT. (Dec. 2017) (on file with the author) (emphasis added).

240. Katarina Sikavica & Amy J. Hillman, *Combining Financial and Psychological Ownership Insights for a New Typology of Ownership, in* SHAREHOLDER EMPOWERMENT: A NEW ERA IN CORPORATE GOVERNANCE 36, 46–48 (Maria Goranova & Lori Verstegen Ryan eds., 2015).

241. UK CODE 2020, *supra* note 38, at 4.

their stewardship policies.[242] For instance, Aberdeen Standard Investments states:

> We believe that it is mutually beneficial for companies and long–term investors to have a relationship based on accountability, engagement and trust. Such a relationship helps to ensure that each has a good understanding of the other's views and expectations. It also enables us to exercise constructive influence as and when appropriate. We believe *this serves to enhance the long–term value of our clients' investments and to protect their interests when necessary*.[243]

The token *respons(ibility/ible)* is the 16th most frequent word. This indicates that signatories understand stewardship as a key element of their responsibilities not only towards their clients and beneficiaries but also to a wider range of constituents as public equity "owners." Characteristically, Hermes Fund Manager states that:

> . . . our *duty* extends beyond being *responsible investors* to acting as *responsible owners* of the companies and assets in which we have invested. . . We believe that effective and constructive dialogue with boards and management by investors should contribute to better management of companies and ultimately support their long-term success. This, in turn, should lead to wider benefits to society and for our clients' beneficiaries.[244]

And, Neuberger Berman Europe highlights that:

> "*responsibility* is the hallmark of quality" and, as such, focusing on environmental issues, employment issues, employment practices, diversity initiatives, community relations, supply chain and product integrity can be an important way to gain clarity on the nature of a given management team and corporate culture.[245]

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242. *See supra* Section II.A.

243. *See, e.g.*, *The UK Stewardship Code*, ABERDEEN STANDARD INVESTMENTS (July 2019) (on file with the author) (emphasis added).

244. *Approach to Stewardship*, *supra* note 239, at 2.

245. *Stewardship and Responsible Investment,* NEUBERGER BERMAN EUR. LTD. 1, 2 (2019) (on file with the author).

ESG is the 27th most frequent unigram. This is reflective of the growing percentage of investors considering ESG investing as priority investment themes,[246] and the increasing emphasis worldwide stewardship codes place on ESG oversight.[247]

Finally, among the top 30 most frequent words are *issu*, *report*, and *inform,* which all reflect the emphasis of stewardship statements on publicly available information through issuing policy statements and reporting to clients and beneficiaries on voting, engagement, and stewardship.

In addition to unigrams, I calculated the most frequently occurring bigrams (two word phrases). As seen in Table 2 proxy vote/-ing (*proxy vot*) is the most frequently occurring bigram and together with voting activity/-ies (*vote activ*) and voting policies (*vote polic*) confirm that voting at general meetings (*general meet*) is a key element of the way activist signatories understand firm-specific shareholder stewardship. Minimizing potential conflicts of interests (*conflict interest*) and serving the best interests of clients (*interest client* and *best interest*) are also core to the understanding of shareholder stewardship. The actors (*institut investor*, *asset manag*, *portfolio manag*, *fund manag*, *invest manag*, *invest team*) and targets (*investee compani*) of stewardship—unsurprisingly—appear frequently in the disclosure statements. Finally, responsible investment (*respons invest*) is the 7th most frequent bigram in the sample, a finding which points to the potential of shareholder stewardship to operationalize responsible investing and suggests that activist signatories understand firm-specific shareholder stewardship as part of their responsibilities to their clients and end investors.

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246. *See, e.g.*, Curtis, Fisch & Robertson, *supra* note 6, at 3 (providing an empirical overview of the rise of ESG mutual funds in the United States). *See also infra* Part IV.

247. Dionysia Katelouzou & Alice Klettner, *Sustainable Finance and Stewardship; Unlocking Stewardship's Sustainability Potential, in* GLOBAL SHAREHOLDER STEWARDSHIP 549, 561 (Dionysia Katelouzou & Dan W. Puchniak eds., Cambridge Univ. Press 2022) (finding that from the twenty-five stewardship codes considered in their empirical study 84 per cent refers at least once to ESG factors).

TABLE 2: MOST FREQUENTLY OCCURRING BIGRAMS[248]

Bigram	**Frequency (absolute)**
proxy vot	567
conflict interest	507
institut investor	464
corpor govern	442
investe compani	371
principle institut	265
respons invest	223
vote activ	206
stewardship cod	204
interest client	202
best interest	197
asset manag	195
portfolio manag	187
fund manag	180
invest manag	179
engag compani	169
invest team	164
vote polici	164
stewardship activ	158
general meet	151

C. *Topic Modeling*

To analyze the rhetoric (thematic content) of shareholder stewardship as it is revealed in the activist signatories' statements, I adopted an *unsupervised* machine learning-based process. Unsupervised machine learning methods use underlying features of the text without requiring researchers to condition on a predefined set of categories and enable the detec-

248. Data on file with author.

tion of themes (topics) in large collection of documents.[249] I used a technique called structural topic modeling to conduct the analysis. I implemented this technique via the *stm* software package for R programming language, which provides tools for machine-assisted reading of texts.[250] In structural topic modeling, topics are learned by the data themselves (hence the term Machine Learning).[251] Topics are mixtures of words, where each word has a probability of belonging to a particular topic, and each document can encompass multiple topics.[252] Structural topic modeling has previously been applied in the political science literature,[253] and, more recently in criminology,[254] but to the best of my knowledge, it has never been applied in legal research.[255]

To allow machine learning, the textual data need to be preprocessed by the *stm* package. Structural topic modeling analyses "bags" or groups of words together (rather than individually) in order to capture how the meaning of words is related with the broader context in which they are used. But in this "bag of words" the order of words does not inform the analysis.[256] To build the corpus *stm* follows the standard routines in computational linguistics as above.[257] In addition, words appearing in less than ten documents were dropped from the analysis; hence, a threshold of 10 was used within the *stm* package. Dropping these low frequency words, the corpus (generated by the *stm* package) has 20,970 tokens and 782

249. *See* Justin Grimmer & Brandon M. Stewart, *Text as Data: The Promise and Pitfalls of Automatic Content Analysis Methods for Political Texts*, 21 POL. ANALYSIS 267, 281 (2013) (emphasizing the need to validate unsupervised methods).

250. *See* Margaret E. Roberts et al., *stm: R Package for Structural Topic Models*, 10 J. STAT. SOFTWARE 1 (2014).

251. Sean M. Gerrish & David M. Blei, *How They Vote: Issue–Adjusted Models of Legislative Behaviour*, ADVANCES IN NEURAL INFO. PROCESSING SYS. 2573 (2012).

252. Roberts et al., *supra* note 250, at 2.

253. *See* Margaret Roberts et al., *Structural Topic Models for Open–Ended Survey Responses*, AMER. J. POL. SCI. 1,064 (2014).

254. Scott M. Mourtgos & Ian T. Adams, *The Rhetoric of De–Policing: Evaluating Open–Ended Survey Responses from Police Officers with Machine Learning–Based Structural Topic Modelling*, 64 J. OF CRIM. JUST. 61 (2019).

255. For a list of other studies utilizing this model, see Molly Roberts et al., *stm*, http://www.structuraltopicmodel.com/ (last visited July 24, 2021).

256. Grimmer & Stewart, *supra* note 249, at 272.

257. *See supra* Section III.A.

terms (unique tokens). Structural topic modeling was then performed to identify latent topics automatically inferred from the text.[258] It should be noted, however, that the structural topic model is a mixed (rather than single) membership model and thereby suffers from multi-modality with the estimated models likely to be sensitive and unstable.[259] To remedy this, I utilized a spectral learning algorithm for the initialization of the models.[260]

The next step is to define the number of topics (K)—a group of words that is associated with a theme—for the corpus. There is no "correct" answer to this, and researchers in social sciences argue that there are no statistical tests for a definitive answer to the optimal number of topics or quality of the chosen model.[261] However, if the chosen number of topics is too small, topics are potentially too general for specific analyses, whereas if the number of topics is too large, there is a likely problem of overfitting, which causes a subdivision of one topic into multiple related topics, which are intuitively less meaningful.[262] There are, however, some data-driven diagnostics tools to assist in determining the number of topics, including the held-out likelihood, residual analysis, and semantic coherence (that is, the most probable words in a topic frequently appearing together).[263] Based on the three observed diagnostics within the *stm* package I assessed a range of 2 to 20 topics, and we chose the five-topic model (K=5) as having the best goodness-of-fit.[264] Each signatory statement is then modelled as a mixture of five topics.

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258. Roberts et al., *supra* note 250.

259. *Id.* at 38–39.

260. For the technical details, see *id.*

261. *See, e.g.,* Paul DiMaggio et al., *Exploiting Affinities Between Topic Modelling and the Sociological Perspective on Culture: Application to Newspaper Coverage of US Government Arts Funding*, 41 POETICS 570, 582 (2013) ("[t]hink of the model as a lens for viewing a corpus of documents . . . The point is not to estimate population parameters correctly, but to identify the lens through which one can see the data most clearly. Just as different lenses may be more appropriate for long-distance or middle-range vision, different models may be more appropriate depending on the analyst's substantive focus").

262. *Id.*

263. *See* Roberts et al., *supra* note 250.

264. I also performed a manual examination of semantic coherence and the exclusivity of words to determine the number of topics with the best explicative power.

Figure 3 provides the expected proportion of the corpus that belongs to each of the five topics. Topic 1 is the most prevalent topic in the corpus, and Topic 5 is the least prevalent.

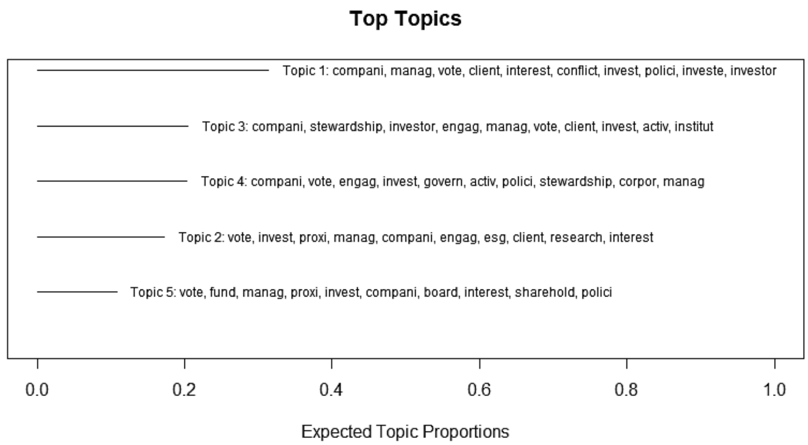

FIGURE 3: ESTIMATED TOPIC PROPORTIONS IN THE CORPUS

The *stm* package finds topics based on relational word occurrences, and it is up to the researcher to make meaning of each topic based on the coherence, frequency and exclusivity of the words. While the highest probability tokens for each topic are useful indicators (Figure 3), to better explore the topics I examined four different types of word profiles that *stm* generated for each of the five topics, as shown in Table 3. These include the highest probability words (which is a measure of semantic coherence), FREX words (that is, words exclusive to the topic), Lift words (that is, words appearing less frequently in other topics) and score words (that is, words weighted by dividing the log frequency of the word in the topic by the log frequency of the same word in other topics).[265]

265. For the technical details, see Roberts et al., *supra* note 250.

TABLE 3: TOPIC WORD (TOKENS) PROFILES

Topic 1 Top Words	Highest Prob: *compani, manag, vote, client, interest, conflict, invest*
	FREX: *investe, iss, conflict, firm, collect, maintain, alway*
	Lift: *growth, acquisit, hous, staff, announc, whilst, undertak*
	Score: *growth, conflict, nonexecut, investe, client, staff, interest*
Topic 2 Top Words	Highest Prob: *vote, invest, proxi, manag, compani, engag, esg*
	FREX: *esg, issuer, proxi, research, secur, analyst, global*
	Lift: *issuer, program, driven, affili, broad, file, secur*
	Score: *issuer, proxi, esg, global, program, item, research*
Topic 3 Top Words	Highest Prob: *compani, manag, investor, engag, stewardship, vote, client*
	FREX: *asset, institut, investor, global, guidanc, code, effect*
	Lift: *want, beneficiari, departur, pension, frc, real, guidanc*
	Score: *want, frc, global, asset, departur, investor, institut*
Topic 4 Top Words	Highest Prob: *compani, vote, engag, invest, govern, activ, stewardship*
	FREX: *sustain, websit, unit, govern, engag, specialist, corpor*
	Lift: *oppos, unit, inhous, nation, three, climat, head*
	Score: *oppos, sustain, climat, engag, head, via, esg*
Topic 5 Top Words	Highest Prob: *vote, fund, manag, proxi, invest, compani, board*
	FREX: *fund, advisor, propos, offic, committe, plan, approv*
	Lift: *advisor, authoris, elect, chief, compens, approv, evalu*
	Score: *advisor, fund, compens, proxi, evalu, propos, authoris*

I manually examined each of the words (tokens) along with word clouts (supplied by the *stm* package). As expected, tokens, such as "*engag*," "*manag*," "*invest*," "*stewardship*" appear in more than one topic, as these are at the core of the rhetoric of shareholder stewardship. Similarly, the token "*vote*," which is the most frequent unigram in the corpus (Figure 2), is among the most frequent words of all five topics. There are key differences, however, in the frequency and exclusivity of words between the five topics (as revealed by Table 2) which suggests that the activist signatories to the UK Code 2010/12 express and understand stewardship differently.

Topic 1, the most common topic, is mostly associated with the two key aspects of shareholder stewardship analyzed above,[266] and is, therefore, labeled as "Orthodox Stewardship." The corporate governance aspect of shareholder stewardship relates to the role of investors–stewards as *monitors* and key participants in corporate governance. Tokens, such as "*nonexecut*" (non-executive directors), reveal the focus of these stewardship statements on standard corporate governance topics. Monitoring and engagement, especially via formal means, such as voting ("*vote*"), feature prominently in statements on this Topic. Collective and collaborative action ("*collect*") with other shareholders is also an aspect of the shared understanding of shareholder stewardship in Topic 1. In addition to the corporate governance understanding of shareholder stewardship, the visual examination of the words associated with Topic 1 reveals that conflicts of interest ("*conflict*" and "*interest*"), relationships with clients ("*client*") and proxy advisors such as the Institutional Shareholders Services ("*iss*"), and risk management ("*manag*") appear to be critical for the way stewardship is perceived by the signatories. This indicates that statements in Topic 1 understand that micro-level shareholder stewardship is not only about monitoring and engagement, but it has an investment management aspect which relates to the relationship between the investor–steward and its ultimate investors (clients or end beneficiaries) as well as other intermediated parties on the investment chain, such as asset managers, proxy advisors and investment consultants.

Topic 3, the second most common topic, labeled as "Monitoring & Engagement" focuses on shareholder engagement via formal ("*vote*") and informal means. Engagement also includes monitoring the departure ("*departur*") of issuers from the UK Corporate Governance Code or other codes, in accordance with Principle 3 of the UK Code 2010/12.[267] While micro-level shareholder stewardship is deployed as a means to maximize the value of the target company, it is important to note that statements in this topic still emphasize that it is an unwavering commitment to the asset managers' clients ("*cli-*

266. *See supra* Section II.A.
267. UK CODE 2012, *supra* note 107, at 7.

ent") and the beneficiaries ("*beneficiari*") of pension ("*pension*") funds that drives any firm-level shareholder engagement and monitoring. This confirms that micro-level shareholder stewardship is expected to be exercised only to the degree that serves the interests of the activists' clients and therefore any firm-specific value creation should have a materially positive impact on the activist's portfolio value for shareholder stewardship to be undertaken.[268] This explains why micro-level shareholder stewardship cannot be a popular strategy for investors with large, diversified portfolios where any firm-specific value creation does not have any material impact on the total portfolio value.[269]

The third most common topic (as revealed by Figure 3) is Topic 4. Topic 4 emphasizes the notions of sustainability ("*sustain*") and active ownership ("*activ*"). Statements in Topic 4 focus on environmental themes, such as climate change (*climat*), and general ESG factors (*esg*). Topic 4 is also about transparency via the websites ("*websit*") and the importance of inhouse research ("*inhous*"). Topic 4 links stewardship to the broader literature of responsible ownership and sustainable investing and is closer associated to the notion of "enlightened" ownership which involves some form of attachment to the investee company and the broader society.[270] Topic 4 is, therefore, labeled as "Sustainability & Active Ownership."

Next, Topic 2 (the fourth most common topic in the corpus) is closely associated to the use of proxy voting and proxy advisors ("*proxi*"). At the same time, statements in Topic 2 usually refer to the use of ESG research and ratings ("*esg*" and "*research*"). Topic 2 is, therefore, labeled as "Proxy Voting & ESG Research."

Finally, Topic 5, the least frequent topic in the corpus, is about how stewardship is managed inside an organization. Statements in Topic 5, labeled as "Governance of Stewardship," emphasize risk management structures ("*manag*"), the role of external advisors ("*advisor*") and internal committees ("*committe*"). Thematically there is also an emphasis on stan-

268. See *supra* Part II.
269. An exception would be when micro-level shareholder stewardship reduces negative externalities for other portfolio companies even though it does not materially improve their value.
270. Katelouzou, *supra* note 15.

dard governance topics in statements of this topic, such as compensation ("*compens*").

To better understand the five topics, I estimated the signatory statements that are mostly associated with each topic.[271] The *Orthodox Stewardship* topic is associated with the statements of Odey Asset Management LLP, Slater Investments, Toscafund Asset Management, and Asset Value Investors.[272] The *Sustainability & Active Ownership* topic is associated with the statements of Robeco Institutional Asset Management, BNP Paribas Investment Partners and Skagen Funds. Robeco, for instance, start their statement as follows:

> Sustainability is a key pillar of Robeco's corporate strategy. We are convinced that companies with sustainable business practices have a competitive advantage and are more successful in the long-term. An active approach to the stewardship of the assets in which Robeco invests is an important part of our Sustainability Investing approach.[273]

The statement of Blackrock is also closely associated with this topic, but recent literature points to a fleeting emphasis on ESG factors by Blackrock, which is indicative of a difference between appearance and reality.[274]

The *Engagement & Monitoring* topic is associated with the statements of Investec Asset Management, Aviva Investors, BMO Global Asset Management and GAM Investments. For in-

271. For the technical details, see Roberts et al., *supra* note 250.

272. *See, e.g.*, Toscafund Commitment to Principles of the U.K. Stewardship Code (on file with author) ("Our voting actions and dialogue with investee companies will encourage sound business practices and strategy on the part of such companies and the responsible enhancement of shareholder value and always with the best interests of our investment management clients as a paramount consideration").

273. Stewardship Policy, Robeco OK Institutional Asset Management (on file with author).

274. For critical views on the mismatch between Blackrock's disclosures and actual practices, see, for example, Jan Fichtner & Eelke M. Heemskerk, *The New Permanent Universal Owners: Index Funds, Patient Capital, and the Distinction Between Feeble and Forceful Stewardship*, 4 ECON. & SOC. 493 (2020); Giovanni Strampelli, *Can Blackrock Save the Planet? The Institutional Investors' Role in Stakeholder Capitalism*, 11 HARV. BUS. L. REV. 1 (2021). *See also* Malcolm Rogge, *What BlackRock Inc. Gets Right in its Newly Minted Human Rights Engagement Policy,* HARV. L. SCH. F. ON CORP. GOVERNANCE (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3833467.

stance, Aviva Investors state that "[a]s a responsible investor, we seek to monitor the companies we commit capital to as part of our investment process" and highlight that as part of their monitoring activities, they "address departures from the UK Corporate Governance Code on a case-by-case basis."[275]

The *Proxy Voting & ESG Research* topic is highly associated with the statements of Wellington Management, Franklin Templeton, RBC Global Asset Management Inc., and Alliance Bernstein LP. For instance, Wellington Management states that:

> In order to assist analysts and portfolio managers in fulfilling our stewardship responsibilities, we have a dedicated research team of ESG experts. Our ESG Research team, part of the central investment research function, researches and provides company- and sector-specific ESG analysis and engages directly with company management teams on ESG topics. The team analyzes and executes proxy voting for over 5,000 company meetings annually, and performs portfolio reviews with portfolio managers to identify holdings with the greatest ESG risks and opportunities. . . We vote proxies in the best interests of our clients as shareholders and in a manner that we believe maximizes the economic value of their holdings. Importantly, we do not automatically vote proxies either with management or in accordance with the recommendations of third party proxy providers. . . The ESG Research team examines each proxy proposal and recommends voting against proposals that we believe would have a negative effect on shareholder rights or the current or future market value of the company's securities. While the ESG Research team provides proxy voting recommendations, the portfolio manager for the client account has the authority to decide the final vote, absent a material conflict of interest.[276]

275. Aviva Investors Stewardship and Responsible Investment Policy, Updated February 2019 (on file with author).

276. Wellington Management, UK Stewardship Code (2020) (on file with author).

Finally, the *Governance of Stewardship* topic is closely associated with the statements of Polar Capital, Vanguard Asset Management, Skagen Funds and Arrowgrass Capital Partners LLP. For instance, Polar Capital emphasizes its collaborative work between various internal risk committees and the use of proxy advisors, while Vanguard explains in detail in its statement the workings of the "Proxy Oversight Committee" in overseeing "the integration of ESG in VGI [Vanguard] investment and engaged ownership practices."[277]

Looking at the signatory statements that are mostly associated with each topic not only allows a better understanding of stewardship rhetoric, but it also makes clear that the topics are not mutually exclusive. In cases such as the statement of Skagen Funds, more than one stewardship topic appears in the same disclosure statement.[278] This is an important finding because it shows that even though all activist stewards essentially produce a stewardship policy statement in response to the UK Code 2010/12, their understanding varies from more instrumental rhetoric which directly responds to the UK Code's principles (such as Topics 1 and 3) and to a more enlightened one (as expressed in Topic 4). Next, we must ask what explains the variation.

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277. Vanguard Stewardship Policy (October 2016) (on file with author).

278. *See* Skagen Funds' Compliance with the UK Stewardship Code (stating that

> SKAGEN aims to invest responsibly because companies that bring sustainability into their business strategy tend to outperform their counterparts over the long-term. Integrating environmental, social and governance (ESG) assessment into our investment process allows us to make better-informed investment decisions and monitoring, and provides a more comprehensive view of risk and opportunities in the individual investment case. . .SKAGEN believes in the importance of being active and responsible owners. . ..

- a passage highly associated with Topic 2 (*Proxy Voting and ESG Research*) - and that

> The responsibility for execution of corporate governance in SKAGEN's funds lies with the Board of directors. The daily execution is delegated to the portfolio managers of each fund and the activities are reported on at every Board meeting. The Board annually evaluates the execution of corporate governance. . . SKAGEN will as a fiduciary vote to secure the unit holder's interests at company annual general meetings and special meetings,

which is highly associated with Topic 5, *Governance of Stewardship*) (on file with author).

D. *What Explains Variation in Stewardship Rhetoric?*

One of the key advantages of structural topic modelling is that it incorporates metadata (covariates) into the topic modeling.[279] That is, rather than assuming topics are constant across all documents, researchers can examine differences between independent covariates. To understand what determines the rhetoric of stewardship, I used seven metadata covariates in the topic induction procedure (see Appendix 4 for details). One linear regression model was specified for each of the five topics (indexed by topic number K):

$$Topic\_Proportion_{K} \sim Constant_{K} + Activist_{style} + Activist_{approach} + Country + Year + Size + Tier + PRI + error_{K}$$

where $Activist_{style}$ is a binary variable indicating whether the activist signatory is offensive in style or not. $Activist_{approach}$ is a binary variable that equals one if the activist investor employs confrontational strategies and is otherwise zero. *Country* is a binary variable that equals one if the primary headquarter country of the activist signatory is the United Kingdom and zero if any other country. *Year* is a continuous variable indicating the year the asset manager was founded. *Size* is a continuous variable which is presented by the logarithm of the total assets under management. Finally, *Tier* and *PRI* are binary variables that indicate whether the activist signatory is in Tier 1 or Tier 2 and whether it is a signatory to the Principles of Responsible Investing. Detailed information on the independent variables are available in Appendix 3.

I estimated various models with the seven variables as covariates so that topical prevalence and topical content can be allowed to be a function of document metadata (here, $Activist_{style}$, $Activist_{approach}$, *Tier, PRI, Year, Size* and *Country*). Topical prevalence refers to how much of a document is related with a topic, hence, metadata (i.e., $Activist_{style}$, $Activist_{approach}$, *Tier, PRI, Year, Size* and *Country*) that explain topical prevalence are referred to as topical prevalence covariates. Topical content refers, on the other hand, to the words used within a topic, hence, metadata (i.e. $Activist_{style}$, $Activist_{approach}$, *Tier, PRI, Year, Size* and *Country*) that explain topical content are referred to as

279. Roberts et al., *supra* note 250, at 2 (providing examples of research that incorporates document metadata into the topic model).

topical content covariates. The distinction between the two can be understood better through an example. If *Tier* is a significant topical prevalence covariate (in the statistical sense), then certain topics are more likely to be discussed in some statements and not in others. For instance, Tier 1 signatories may tend to discuss a topic more often than Tier 2 signatories. If *Tier* is a significant topical content covariate, then certain words within a specific topic (for instance, the term "*prox*" with the topic *Proxy Voting & ESG Research*) will be more associated with signatories from a specific tier (for instance, Tier 2).

The *stm* R package provides the user with the flexibility to include all, any or none of the seven metadata of interest ([$Activist_{style}$, $Activist_{approach}$, *Tier, PRI, Year, Size* and *Country*) as topical prevalence covariates and a single or no topical content covariate.[280] An immediate effect of this restriction (a single topical content covariate) is that in order to examine the impact of a document metadata, seven models are required to run and as an effect the actual topics differ in content between the models. This is an expected behavior of structural topic modelling (i.e. different model specifications result in topics that differ in both content and numbering), but in unreported results the various model estimations with each of the content covariate candidates ([$Activist_{style}$, $Activist_{approach}$, *Tier, PRI, Year, Size* and *Country*) were unstable and the results obtained were mixed (in the sense that the content differed significantly compared to the models where no content variable was used) and not straightforward to interpret. For that reason, I relied on the relative frequency analysis of words in the signatories' statements to identify certain words associated with signatories' statements, instead of specifying a new model with topical content covariates.[281]

Figures 4, 5, 6, 7, and 8 show the effects of the independent covariates on topic prevalence of individual signatory statements.

280. Roberts et al., *supra* note 250.
281. *See supra* Section III.B.

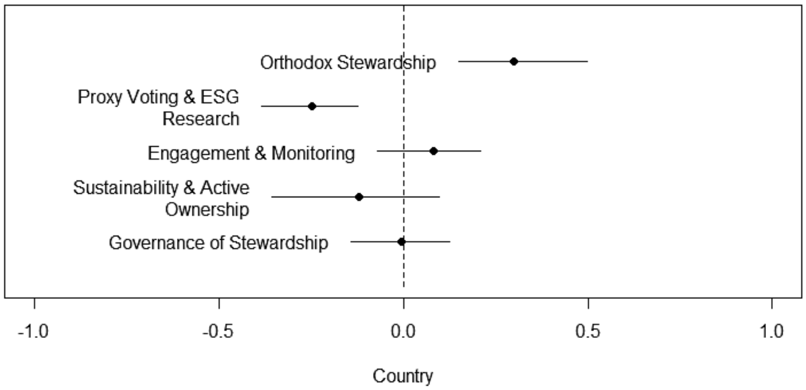

FIGURE 4: EFFECT OF UK DOMICILE ON STEWARDSHIP TOPICS

When the signatories' domicile (the UK or not) is specified as the topical prevalence covariate, we see that the topic of *Proxy Voting & ESG Research* is strongly associated with non-UK signatories (at 0.1%). This may be explained by the emphasis of US signatories, such as Wellington Management, Franklin Templeton Investments and Alliance Bernstein LP on proxy voting which is associated with Topic 2.[282] On the other hand, Figure 4 reveals that UK signatories refer more often to the orthodox understanding of shareholder stewardship as including both corporate governance and investment management elements.[283] The significant differences between UK and non-UK activist signatories in these two topics (*Proxy Voting* & *ESG Research* and *Orthodox Stewardship*) may be attributed to the fact that signing to the UK Code is not mandatory for overseas asset managers who are affected by different investment fund regulation and may follow other national or international stewardship codes in addition to the UK Code.[284]

282. *See supra* text accompanying note 276.
283. P–value = 0.017.
284. This is recognized by the UK Code itself. *See* UK CODE 2012, *supra* note 107.

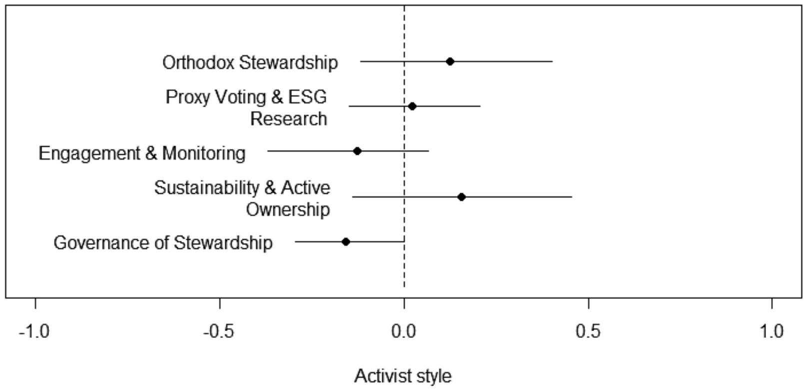

FIGURE 5: EFFECT OF ACTIVIST STYLE ON STEWARDSHIP TOPICS

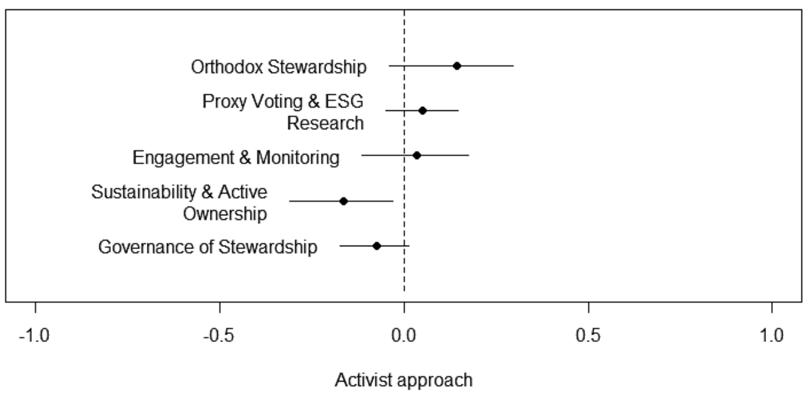

FIGURE 6: EFFECT OF ACTIVIST APPROACH ON STEWARDSHIP TOPICS

Figures 5 and 6 present the effects of the two variables associated with shareholder activism (*Activist Style* and *Activist Approach*) on the stewardship topics. Figure 5 shows that defensive rather than offensive activists tend to focus more on the *Governance of Stewardship*, but no significant differences are observed between offensive and defensive activists in terms of the other four topics. As for the impact of the *Activist Approach* on the rhetoric of shareholder stewardship, Figure 6 reveals that the activist signatories who adopt only friendly strategies tend to understand stewardship as part of sustainable investing and present themselves as responsible, active owners.[285] This has important implications for the future of stewardship, as we will discuss in the next Section.

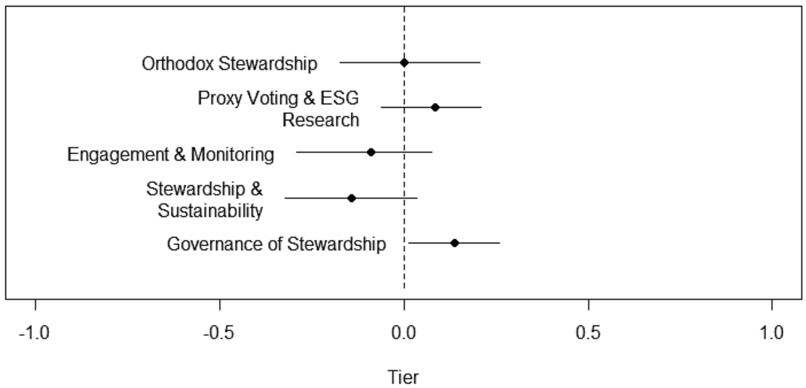

FIGURE 7: EFFECT OF TIERING ON STEWARDSHIP TOPICS

Figure 7 shows that Tier 1 statements tend to refer to the *Governance of Stewardship* topic more often than Tier 2 statements. But the p–value is 0.085. In addition, the hypothetical effect of tiering on the other four topics is no better than random. This does not imply that certain words within a topic are not likely to be discussed more or less in the statements of Tier 1 signatories than in Tier 2. Rather it is the expected proportion of each of the topics (other than the *Governance of Stewardship* topic) that cannot be associated with tiering. In other words, both Tier 1 and Tier 2 statements refer to the stewardship topics mostly in a similar proportion.

285. P–value = 0.055.

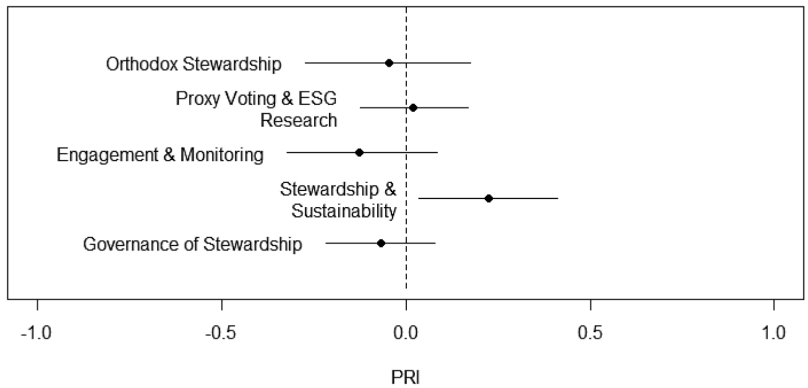

FIGURE 8: EFFECT OF PRI ON STEWARDSHIP TOPICS

Next, the prevalence of the six topics is contrasted depending on the PRI status of the signatories. Figure 8 confirms that PRI signatories refer more often to the *Stewardship & Active Ownership* topic compared to non-PRI signatories.[286] However, both PRI and non-PRI signatories refer to the other four topics in a similar proportion. A possible explanation here may be the fact that fund managers often sign up to the PRI, which establishes a series of voluntary and aspirational recommendations, to gain a marketing badge even though they do not make any actual changes in their investment practices.[287]

286. P–value=0.078.

287. *See* Arleta A.A. Majoch, Andreas G.F. Hoepner & Tessa Hebb, *Sources of Stakeholder Salience in the Responsible Investment Movement: Why Do Investors Sign the Principles for Responsible Investment?*, 140 J. BUS. ETHICS 723, 732–41 (2017) (empirically analyzing the reasons why investors sign the PRI).

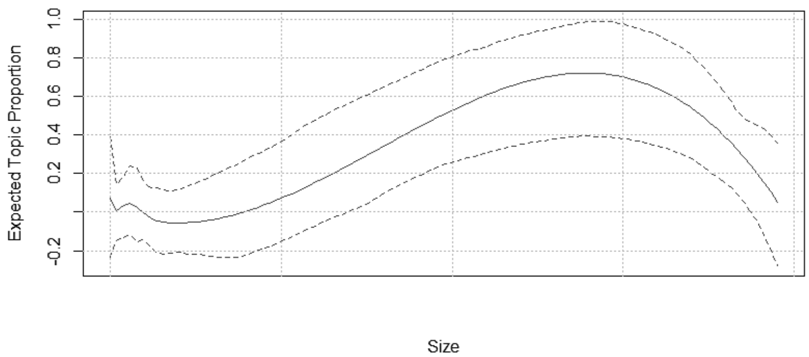

FIGURE 9: EFFECT OF SIZE ON GOVERNANCE OF STEWARDSHIP (TOPIC 5)

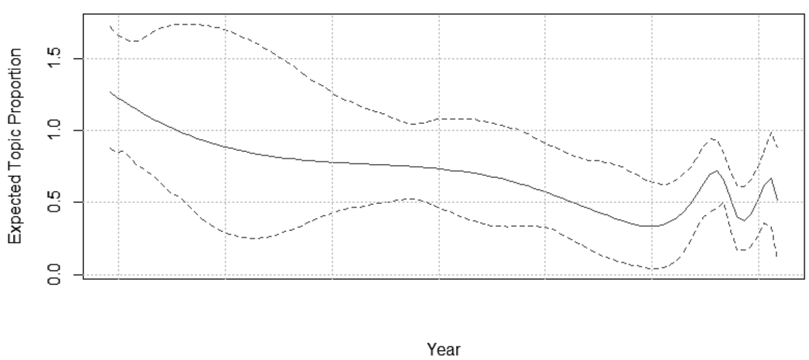

FIGURE 10: EFFECT OF YEAR ON ENGAGEMENT & MONITORING (TOPIC 3)

The *Size* of the activist signatory is found to be significant only for the *Governance of Stewardship* topic; larger asset managers tend to focus more on this topic which may be explained by the larger teams and greater resources these signatories devote to stewardship (Figure 9). Finally, an association is found between the *Year* and the *Engagement & Monitoring* topic. Asset managers founded more recently tend to emphasize this topic less in their stewardship statements (Figure 10).

* * *

Overall, the application of structural topic modelling highlighted the presence of five key stewardship topics. The activist signatories to the UK Code 2010/12 understand stewardship broadly as including both conventional and non-conventional elements. Three out of five topics are associated with a conventional understanding of micro-level shareholder stewardship, including monitoring of and engagement with issuers on governance and other environmental issues, the use of proxy voting, and ESG research. Importantly, however, my analysis uncovered the topics of sustainability and active ownership and highlighted the importance of the internal governance of stewardship, especially for larger, defensive activists. Turning now to what explains these topics, the topic of *Sustainability & Active Ownership* is best explained by the $\textit{Activist}_{\textit{approach}}$ and *PRI* variables; activist signatories who adopt a friendly approach and are PRI signatories tend to associate shareholder stewardship with responsible ownership and sustainability. There is also strong evidence that non-UK signatories understand stewardship differently compared to the UK signatories, especially in relation to *Proxy Voting & ESG Research* but also in terms of the more conventional understanding of shareholder stewardship associated with Topic 1. Tiering only impacted the *Governance of Stewardship* topic, which suggests that the FRC needs to reconsider its assessment and public exercise. Finally, larger and defensive-oriented signatories tend to focus more on the *Governance of Stewardship* topic, while those founded more recently tend to focus less on the conventional *Engagement & Monitoring* topic. The next Part will discuss some of the implications of the key findings.

III.
MARKET, REGULATORY AND POLICY IMPLICATIONS

A. *The Road from Instrumental to Enlightened Shareholder Stewardship*

This Article has covered significant ground in laying out the theoretical underpinnings of the model of micro-level shareholder stewardship and its policy prescriptions, and then in exploring through the means of NLP and structural topic modeling the rhetoric of stewardship as is unveiled in the statements of the activist signatories to the UK Code 2010/12.

The analysis has highlighted a largely neglected actor: the activist steward who has better incentives and abilities to undertake micro-level shareholder stewardship.

The four key empirical findings are as follows. First, activist signatories to the UK Code 2010/12 understand shareholder stewardship in an orthodox way as including both corporate governance and investment management aspects; the *Orthodox Stewardship* topic is the most frequent one across all disclosure statements. It is clear from NLP that for all of the activist signatories, shareholder stewardship is mainly about engagement on corporate governance issues via both formal and informal means. This understanding accords with the depiction of the UK Code 2010/12 as an "Engagement Code."[288] At the same time, it is clear from the statements of the activist signatories that shareholder stewardship cannot be understood—and more fundamentally cannot be effectively exercised—if the investors' own business models, incentives, and abilities as well as regulatory constraints (including fiduciary duties) are not considered. Second, the notion of responsibility and psychological ownership, which is an inherent element of the investor paradigm, is much more embedded in the statements of friendly activist stewards and the ones who are PRI signatories. This has important implications for the future of shareholder stewardship practices and the broader regulatory stewardship ecosystem. Third, overseas investors tend to place greater emphasis on proxy voting and ESG research, while domestic investors seem to place a greater emphasis on what can be called the "orthodox" understanding of shareholder stewardship and therefore to be in close alignment with the UK Code 2010/12 itself. Finally, the FRC's grouping of the signatories to the UK Code 2010/12 into tiers based on the quality of reporting in their statements only has an impact on the least frequent topic, the *Governance of Stewardship* topic. This topic is also associated with defensive activist signatories.

The findings have important implications for (current and future) activist stewards and policymakers alike, especially now that the new 2020 UK Stewardship Code revamps a broader model of shareholder stewardship beyond engagement and voting in equity. First, there are two key lessons for the activist stewards themselves. Some activist stewards (mainly

288. *See* Davies, *supra* note 111, at 47.

overseas and aggressive ones) tend to understand shareholder stewardship in an *instrumental* way which echoes a shareholder-centered, contractarian understanding of the role of investors–shareholders in corporate governance. On the other hand, friendly activist signatories and those who are PRI signatories appear to have a more sustainable and environment-friendly orientation in the way they perceive and communicate shareholder stewardship, while defensive activists show a greater appreciation of the need to align their internal business models with policy prescriptions. This is an understanding of shareholder stewardship which seems to be more "enlightened" in the sense that they view shareholder stewardship as a means to create sustainable value for beneficiaries, investee companies, the economy and society, and address major societal goals that are not being met right now due to public companies' transgressions.[289] Such an "enlightened" understanding seems to be consistent with the investor paradigm of corporate governance, which places shareholder stewardship and shareholder engagement in the public interest.[290]

Second, for the FRC the key lesson is that the tiering exercise, which was introduced in 2016 with the aim to improve the disclosure quality of the stewardship statements and establish a transparent and active "market for stewardship," does not map the differences across the statements as these are revealed by the topic modeling of the stewardship topics. This finding strongly suggests that any future tiering exercise or any other form of compliance assessment and enforcement needs to be closer connected to informational quality. Any assessment of stewardship reporting needs to be tailored to the spirit and language of the stewardship statements and enable improvement not only in stewardship reporting itself but also in the actual stewardship practices and outcomes. The revised UK Stewardship Code in 2020, with its greater emphasis on the market for stewardship which starts with end investors and beneficiaries and its new reporting framework which focuses on outcomes rather than policies, can provide the impetus and the means to greatly improve the level and quality of stewardship reporting. The UK Code 2020 replaced forward-look-

289. For a thorough analysis of the model of "enlightened stewardship," see Katelouzou, *supra* note 15.

290. *See supra* Section II.A.

ing, aspirational disclosure with backward looking reporting. In the place of the previous stewardship policy statements, the applicants to the UK Code 2020 should submit a stewardship report that explains how they have applied the code over a 12-month period.[291] Upon the introduction of the revised code the FRC refrained from tiering the new statements and has instead undertaken some steps to improve the quality of stewardship reporting at the aggregate level, including providing early advice on the reporting expectations,[292] and offering detailed guidance to market participants.[293] As this Article was going to press, the FRC announced that they will not tier the signatories to the revised UK Code 2020.[294] This decision is in line with the findings of this Article that the previous tiering exercise did not adequately differentiate between the signatories' statements to the UK Code 2010/12. One could also argue that the standards to become a signatory to the revised Code is already high and therefore there is already a differentiation between the signatories and the non-signatories that can stimulate the supply side of stewardship.[295] Nevertheless it remains questionable whether the supply side of the market of stewardship can efficiently work in the absence of an alternative differentiation system that rates the signatories' quality of adherence to stewardship norms and practices. In the absence of any "formal" enforcement mechanism, including membership sanctions or adherence procedures that target an individual signatory, it will be more difficult for market participants

291. FINANCIAL REPORTING COUNCIL, UK STEWARDSHIP CODE 2020 APPLICATION AND ASSESSMENT (2021), https://www.frc.org.uk/getattachment/Investors/UK-Stewardship-Code/Stewardship-Code-Application-and-Assessment-March-2021.pdf.

292. FINANCIAL REPORTING COUNCIL, THE UK STEWARDSHIP CODE REVIEW OF EARLY REPORTING (2020), https://www.frc.org.uk/getattachment/975354b4-6056-43e7-aa1f-c76693e1c686/The-UK-Stewardship-Cod-Review-of-Early-Reporting.pdf.

293. FINANCIAL REPORTING COUNCIL, UK STEWARDSHIP CODE: ADVICE FOR OCTOBER 2021 APPLICATIONS, https://www.frc.org.uk/getattachment/Investors/UK-Stewardship-Code/How-to-report/210929-Advice-for-October-2021-applications-Final.pdf.

294. *See FRC Encouraged by Investors Embracing the Spirit of the UK Stewardship Code*, *supra* note 39.

295. *Id.* (explaining this decision as follows: "Asset owners, investment consultants and investment managers felt that standard to become a Stewardship Code signatory is already high and that the FRC should focus on encouraging more of the market to reach this standard").

to assess the quality of stewardship commitment at the individual level.[296] Focusing on the demand side of the stewardship market, Katelouzou and Micheler show that even though most demand for stewardship is coming from contributors to financial markets that are seeking financial return, there are large-scale portfolio end investors who are prepared to be guided by altruistic considerations and forgo financial return to support good causes.[297] Whether the supply for such "altruistic," enlightened shareholder stewardship will be provided by the activist stewards studied here is open to further research, but surely the tiering exercise was good to be discontinued. The million-dollar question still remains however how to improve the market of stewardship and whether a new system of public rating and evaluation is needed to improve the quality of both stewardship reporting and actual stewardship practices. Future research should include consideration of this issue.

Another key message for the FRC is that the overhaul of the first generation UK Code and the introduction of the 2020 UK Stewardship Code, which places a strong focus on sustainability, responsible investment, and the governance of stewardship was a step in the right direction and in alignment with the way many of the activist signatories were already perceiving stewardship. In addition to (or perhaps instead of) focusing on the corporate-governance-conception of stewardship and ascribing investors as shareholders–monitors, the UK Code 2020 now also refers to environmental and social factors, particularly climate change.[298] Principle 7 requires that "signatories systematically integrate stewardship and investment, including material environmental, social and governance issues, and climate change, to fulfil their responsibilities."[299] The UK Code 2020 also clarifies that stewardship is not only about firm-specific engagement, and alternative business models can be compatible with a broader notion of investment stewardship outside of the strict remit of public equity. Future research should focus on how the activist signatories to the new Code will incorporate these new requirements into their stew-

296. Generally for the distinction between formal and informal enforcement mechanisms in the context of shareholder stewardship, see Katelouzou & Sergakis, *supra* note 153.

297. Katelouzou & Micheler, *supra* note 142.

298. *See* UK CODE 2020, *supra* note 38, at 4.

299. *Id.* at 15.

ardship policies, activities, and outcomes. It is expected that the UK Code 2020 will stimulate other signatories to move from an instrumental to an enlightened understanding of shareholder stewardship. It is also likely that a larger number of investors with more diverse investment styles will sign up to the new Code now that firm-specific engagement is not the only legitimate stewardship approach.

Thirdly, the empirical findings confirm that shareholder activism and micro-level shareholder stewardship are not incompatible. Shareholder stewardship may not be understood in the same way by all the activist stewards in the sample but there is encouraging evidence that activist stewards, especially the friendlier ones who are PRI signatories, recognize "shared value" rather than monolithic shareholder value as the driver for their investment decisions and stewardship activities. Whether and to what extent the "enlightened" rhetoric is translated to outcomes is open to further research, but the findings of this study offer some cautionary notes against policy attempts exerting downward pressure on the style of firm-specific stewardship and monitoring associated with activist stewards, such as the failed Brokaw Act in the United States.[300]

A final cautionary note—this study covers significant ground, investigating the stewardship rhetoric of activist signatories in the United Kingdom through the means of NLP and structural topical modeling, but it is characterized by a key limitation. The disclosure statements of the activist stewards studied here are *aspirational*; they focus on stewardship policies rather than the outcomes of engagement and stewardship activities. Kingman Review's assessment of the first generation UK Code highlighted this flaw when it criticized the Code as "simply [a] driver of boilerplate reporting."[301] I recognize that even though the systematic analysis of the disclosure statements can offer key insights on the activists' perceptions about the UK Code's principles and the functioning of soft-law disclosure obligations, it cannot provide evidence as to what the activist stewards have actually done in response to the UK Code 2010/12. And there is always the possibility that activist stewards are not acting in accordance with the disclosure state-

300. *See infra* text accompanying note 312.

301. OPEN GOVT. LICENSE, INDEPENDENT REVIEW OF THE FINANCIAL REPORTING COUNCIL 10 (2018).

ments they published.[302] Future research should focus on whether what signatories state about their stewardship policies, activities, and outcomes is simply a reflection of what they aspire to or what they believe the market for stewardship expects rather than how they really operate.

B. *Streamlining Activist Stewards as "Stewardship Arbitrageurs" or "Stewardship Intermediaries"*

The UK Code may be addressed to all asset managers and asset owners with equity holdings in UK listed companies, but the preceding analysis has shown that the model of micro-level shareholder stewardship is by definition more suited to an undiversified investment strategy that entails firm-specific monitoring of operational and governance decisions and management oversight on a cost-effective basis. The UK Code 2020 does not undermine the importance of firm-specific shareholder stewardship, even though it has certainly broadened the ambit of investment management models that can serve the now-broader policy aspirations.[303] The textual analysis of the activist signatories' statements to the first generation UK Code confirms that activist stewards fulfill the stewardship prescriptions (at least in terms of words written in the disclosure statements), and some of them are driven by strong notions of responsibility and accountability, not only to their clients but to their investee companies and broader stakeholders.[304] It remains a reality, however, that from the potential large pool of activist funds with equity holdings in UK listed companies who could serve the role of a shareholder steward, only a few have been signatories to the UK Code 2010/12. Examples of absentees include one of Europe's biggest activist funds, Cevian Capital, whose chairman is Paul Myners—one of the proponents of stewardship reform in the United Kingdom—and The Children's Investment Fund (TCI), the iconic UK activist hedge fund.[305] While one needs to recognize that incorporating

302. *See* Rajna Gibson Brandon et al., *Do Responsible Investors Invest Responsibly?* (ECGI Finance Working Paper 712, 2020), https://ssrn.com/abstract=3525530.
303. UK CODE 2020, *supra* note 38 (describing Principles 9–12). *See also* KATELOUZOU, *supra* note 15.
304. *See supra* Part III.
305. Cevian Capital was, however, an early signatory to the UK Code until 2013 (data on file with author). For Cevian Capital's critical stance to stew-

shareholder stewardship into investment management and signing up to the UK Code is the outcome of complex synergistic internal governance factors, this penultimate part points to two recent trends—*coalition building* and *ESG activism*—that could streamline activists' stewardship ability in the near future and perhaps enlarge the pool of potential activist shareholder stewards.

1. *Coalition Building*

It is well explained in the literature that for shareholder activism to take place the accrued benefits from the intervention needs to outweigh the monitoring costs.[306] Typically, an activist investor bears all the costs of a campaign but enjoys only a fraction of the benefits corresponding to the size of its ownership stake.[307] Activist funds do not normally hold a sufficiently large number of shares to drive corporate change without the support of their fellow institutional shareholders.[308] The solution to the persistent free rider problem is found in collective engagement initiatives and implicit or explicit coalitions between activist and non-activist investors.[309]

Previous literature has highlighted the importance of the "wolf pack" tactic that enables collective (or parallel) action by more than one activist fund without legally forming a group for the purposes of disclosure regulation.[310] Because of the

ardship, see Ruth Sullivan, *Investors falling short as active owners*, FIN. TIMES (Sep. 11, 2011), https://www.ft.com/content/7e6dec1e-da1a-11e0-b199-00144feabdc0.

306. *See* Gantchev, *supra* note 197.

307. *Id.*

308. For recent empirical data in the United States, see Brav, Jiang & Li, *supra* note 187 (reporting "a median initial (maximum) percentage stake that a hedge fund takes in the target is 6.6(9.4) percent").

309. *But see* Gaia Balp & Giovanni Strampelli, *Institutional Investor Collective Engagements: Non–Activist Cooperation vs Activist Wolf Packs*, 14 OHIO ST. BUS. L.J. 135, 135 (2020) (arguing that coordinated engagement can be an alternative to activist–driven ownership involvement).

310. For the use of this strategy in the United States, see Thomas W. Briggs, *Corporate Governance and the New Hedge Fund Activism: An Empirical Analysis*, 32 J. CORP. L. 681, 712 (2007) (for an early account that activist hedge funds are "not stymied by the collective action problem . . . [and] they do not have trouble attracting like–minded and unconflicted hedge–fund and other allies"), and Coffee & Palia, *supra* note 207 (highlighting that "the "wolf–pack" technique enables activists to largely outflank the poison pill and assemble a larger stock position before the bidder learns of their exis-

ability of wolf pack participants to stay below the relevant reporting thresholds (section 13d of the Williams Act in the United States or Disclosure and Transparency Rule 5.1 of the FCA in the United Kingdom), even though their collective ownership holdings as a group would require disclosure,[311] wolf pack activism has attracted the attention of policymakers and courts, especially in the United States.[312] While the "wolf pack" technique allows looser or tighter affiliations among like-minded activists, engagement coalitions are often built among a wider range of institutional investors, and non-activist investors are increasingly seen in the finance literature as "complements" of activist funds.[313] For instance, Alon Brav, Amil Dasgupta and Richmond Mathews build a theoretical model where a wolf pack is comprised of a "lead" activist with a sizeable stake and supporting smaller institutional investors

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tence"). *See also* Yu Ting Forester Wong, *Wolves at the Door: A Closer Look at Hedge Fund Activism*, 66 MGMT. SCIENCE 2347 (2007) (finding empirical evidence that wolf packs are orchestrated by lead activists and are not spontaneous).

311. *See, e.g.*, William R. Tevlin, Conscious Parallelism of Wolf Packs: Applying the Antitrust Conspiracy Framework to Section 13(d) Activist Group Formation, 84 FORDHAM L. REV. 2335 (2016) (identifying when wolf–packs in the United States could be 13(d) groups).

312. *See* Third Point LLC v. Ruprecht, No. 9497-VCP, 2014 WL 1922029 (Del. Ch. May 2, 2014) (a high-profile Delaware case which sustained a low–threshold poison pill deployed against an activist hedge fund). For a thorough review of this case, see William W. Bratton, *Hedge Fund Activism, Poison Pills, and the Jurisprudence of Threat*, Faculty Scholarship at Penn L. 1667 (2016), https://scholarship.law.upenn.edu/faculty_scholarship/1667. The prime example of proposed federal legislation to address the risks associated with "wolf–packs" is the so-called Brokaw Act, which aimed, among others, at disallowing the supporting members of a wolf–pack to avoid disclosures under section 13d and position themselves as passive investors by using Schedule 13G even though they cooperate with an activist. Brokaw Act, S. 1744, 115th Cong. (2008). For an analysis of this proposed Act, see Alon Brav et al., Failed Anti–Activist Legislation: The Curious Case of the Brokaw Act, 11 J. BUS. ENTREPRENEURSHIP & L. 329 (2018).

313. *See, e.g.*, Alex Edmans et al., *The Effect of Liquidity on Governance*, 26 REV. FIN. STUD. 1443 (2013); Øyvind Norli et al., *Liquidity and Shareholder Activism*, 28 REV. FIN. STUD. 486 (2015); Nikolay Ganthcev & Chotibhak Jotkasthira, *Institutional Trading and Hedge Fund Activism*, 64 MGMT. SCIENCE 2930 (2018) (all finding that stock liquidity which is increased by the presence of institutional ownership is an important factor for activist hedge funds).

(activist, active or passive).[314] Simi Kedia, Laura Starks and Xianjue Wang provide large-scale empirical evidence to suggest that the presence of activism-friendly institutional investors increases not only the likelihood of targeting a company but also the success rate of the campaign itself.[315]

In the legal literature, the coalition-building processes among activist and non-activist investors have been theorized within the classic agency theory framework. In the "agency capitalism" framework of Gilson and Gordon, non-activist institutions have been transformed from "rationally apathetic" investors to "rationally reticent" in that they are increasingly willing to support activist funds' proposals but are unlikely themselves to initiate them.[316] In this framework, activist funds' firm-specific monitoring is "an endogenous response to the monitoring shortfall that follows from ownership re-concentration in intermediary institutions."[317] Activist funds, therefore, play the role of "governance intermediaries" or "governance rights arbitrageurs," to put it in the words of Gilson and Gordon.[318] Several important links between activist funds and traditional institutional investors, including institutional investor investment in hedge-fund-style activists and the increasing mobility of corporate governance professionals across institutions, further support such alliances.[319]

With large passive managers having few incentives to engage in micro-level shareholder stewardship, it is the sophisti-

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314. Alon Brav et al., *Wolf Pack Activism*, MANAG. SCI. 1 (2021) (attributing the collective engagement by supportive minority investors to reputational rather than financial incentives). *See also* Alon Brav et al., *Picking Friends Before Picking (Proxy) Fights: How Mutual Fund Voting Shapes Proxy Contests* (Eur. Corp. Governance Inst., Working Paper No. 601, 2019), https://ssrn.com/abstract=3101473 (finding that active funds are more likely to support activist campaigns).

315. Simi Kedia et al., *Institutional Investors and Hedge Fund Activism*, 10 REV. FIN. STUD. 1 (2020). *See also* Ian R. Appel et al., *Standing on the Shoulders of Giants: The Effect of Passive Investors on Activism*, 32 REV. FIN. STUD. 2720 (2018) (empirically documenting a positive link between (passive) institutional ownership and the likelihood of an activist hedge fund campaign seeking board presentation or the sale of the targeted company).

316. Gilson & Gordon, *supra* note 28, at 867. *See also* Kahan & Rock, *supra* note 174.

317. Gilson & Gordon, *supra* note 28, at 867, 869.

318. *Id.*

319. Edward Rock, *Institutional Investors in Corporate Governance*, Faculty Scholarship at Penn. L. 1458 (2015).

cation of the joint forces between activist funds and other (active or passive) investors, including index funds, often supported by proxy advisory firms' voting recommendations,[320] that cannot be ignored anymore. In most of these stewardship alliances, large asset managers, including the Big Three or the Big Four, who play the role of "kingmakers," can "be passive or reactive and have much leeway to decide how active they wish to be."[321] While short-term profit making "wolf packs" are not legitimized by the UK Stewardship Code,[322] the model of shareholder stewardship is certainly facilitative of coalition building. And it is the role of activist stewards that is becoming of critical importance both inside and outside the United Kingdom. Echoing Gilson and Gordon, the empirical findings of this Article reveal that there is a breed of *enlightened* activist stewards that can play the role of "stewardship arbitrageurs" or "stewardship intermediaries" advancing long-term sustainability through firm-specific shareholder stewardship. The intermediary role that these activist stewards can play is—contrary to what Gilson and Gordon argue—*within* rather than outside the regulatory stewardship framework.[323] The empirical findings of this study support that for most activist signatories to the UK Code 2010/12 the role of "stewardship arbitrageurs" is not too far from the truth—at least on the basis of what is stated in the signatories' statements.[324]

Another parameter needs to be considered here. While in the United States, investors usually coordinate themselves informally,[325] in some countries third party coordinators can further streamline coalition-building among heterogenous investors and boost firm-specific shareholder stewardship. Investor organizations are established to address the problems associated with the widely diversified structure of equity portfolios

320. *See generally* K.J. Martjin Cremers et al., *Commitment and Entrenchment in Corporate Governance*, 110 NW. UNIV. L. REV. 727 (2016).

321. Asaf Hamdani & Sharon Hannes, *The Future of Shareholder Activism*, 99 B.U. L. REV. 971, 983 (2019).

322. BARKER & CHIU, *supra* note 9, at 175.

323. *Cf.* Gilson & Gordon, *supra* note 28.

324. *See supra* Part III.

325. *See, e.g.*, Alan D. Crane et al., *Institutional Investor Cliques and Governance*, 133 J. FIN. ECON. 15 (inferring which investors are likely to coordinate and studying the impact of "institutional investor cliques" on voting and exit).

and to increase the incentives for investors to collectively engage with investee companies. The prime example is the UK Investor Forum, an industry initiative of 56 institutional investors, accounting for a third of the UK FTSE (Financial Times Stock Exchange) all-share market capitalization.[326] The Investor Forum was established in 2014 in response to the Kay Review's recommendation that collective engagement by asset managers in UK companies should be facilitated.[327] The Investor Forum's creators envisaged it as the means to bestir Principle 5 of the UK Code 2010/12, which provided that "[i]nstitutional investors should be willing to act collectively with other investors where appropriate" and especially "at times of significant corporate or wider economic stress, or when the risks posed threaten to destroy significant value."[328] Despite a slow start, the Investor Forum has played an increasingly important role in facilitating collective engagement between different institutional shareholders in UK listed companies in recent years. Between January 2015 and December 2021, the Investor Forum evaluated 72 collective engagement requests from members and completed 43 engagements with the boards of 41 UK listed companies, 21 of which occurred between 2018 and 2019.[329] While the shareholder engagement of the Investor Forum does not share the confrontational character of many hedge-fund-style activist campaigns, the Forum has successfully voiced together different types of investors (activist, active and passive).[330] For instance, the Forum, together

326. *See* Attracta Mooney, *Andy Griffiths, The Cheery Scrapper Who Keeps UK Plc in Line*, FIN. TIMES. (Oct. 25, 2018); Attracta Mooney, *UK Urged to Introduce Mandatory Climate Votes at AGMs*, FIN. TIMES. (Jan. 12, 2021). *See also* KAY, *supra* note 106, at 13.

327. For the history of the Investor Forum, see generally THE INVESTOR FORUM, https://www.investorforum.org.uk/about/history/#:~:text=the%20Kay%20Review%20of%20UK,UK%20investors%20in%20UK%20companies%E2%80%9D.&text=A%20Collective%20Engagement%20Working%20Group,Investor%20Forum%20should%20be%20established (last visited Mar. 29, 2022).

328. *See* UK CODE 2012, *supra* note 107.

329. THE INVESTOR FORUM, REVIEW 2020 (Jan. 2021), https://www.investorforum.org.uk/wp–content/uploads/securepdfs/2021/01/TIF–Annual–Review–2020–FINAL.pdf [hereinafter INVESTOR FORUM 2020]; THE INVESTOR FORUM, REVIEW 2021 (Jan. 2022), https://www.investorforum.org.uk/full-annual-review-2021//.

330. THE INVESTOR FORUM REVIEW 2019 (Jan. 2020), https://www.investorforum.org.uk/wp-content/uploads/securepdfs/2020/01/The-Investor-Fo-

with other investors, has succeeded in forcing Unilever to abandon its plan to move its headquarters to the Netherlands[331] and spearheaded pressures against Firstgroup,[332] and Sports Direct.[333] More recently, the Investor Forum placed a focus on climate transition and, among others, called for the introduction of a non-binding "say on climate" on TCFD-aligned disclosures for UK premium-listed companies.[334]

Other examples of investor associations aiming to enhance collective engagement exist. For example, the Institutional Investors Collective Engagement Forum was established in 2017 to support the exercise of the collective engagement principle of the Japanese Stewardship Code.[335] Additionally, the Canadian Coalition for Good Governance (CCGG), a group of 54 institutional investors, engages with companies privately to advance governance reforms, such as say-on-pay or majority voting for individual directors.[336] In the area of envi-

rum-Annual-Review-2019-Final-Version.pdf, at 17 (providing the engagement with FirstGroup as an example of collective engagement by eight members of the Investor Forum initiated by an activist hedge-fund-style campaign); INVESTOR FORUM 2020, *supra* note 329, at 24 (explaining that the "first phase" (between March 2019 and January 2020) engagement with Barclays plc aimed at emphasizing "the priorities of long–standing Barclays investors at a time when the bank was facing a campaign from an activist investor seeking a Board position.")

331. THE INVESTOR FORUM, REVIEW 2018 (Jan. 2019), https://www.investorforum.org.uk/annual-review-2018/, at 25.

332. THE INVESTOR FORUM, REVIEW 2019 (Jan. 2020), https://www.investorforum.org.uk/wp-content/uploads/securepdfs/2020/01/The-Investor-Forum-Annual-Review-2019-Final-Version.pdf, at 17.

333. THE INVESTOR FORUM, REVIEW 2015–2016 (Jan. 2017), https://www.investorforum.org.uk/annual-review-2015-2016/, at 24.

334. THE INVESTOR FORUM 2020, *supra* note 329, at 41. Other investors, such as TCI, support the introduction of a binding "say on climate" shareholder vote on an annual basis. *See* Attracta Mooney, *UK Urged to Introduce Mandatory Climate Votes at AGMs*, FIN. TIMES (Jan. 12, 2021), https://www.ft.com/content/c0e039ae-b6c0-482a-af06-c8902e3ab989.

335. The Institutional Investors Collective Engagement Forum is itself a signatory to the Japanese Stewardship Code. *See* INSTITUTIONAL INVESTORS COLLECTIVE ENGAGEMENT FORUM (IICEF) (2021), https://www.iicef.jp/en/ (last visited July 30, 2021).

336. *See generally* CANADIAN COALITION FOR GOOD GOVERNANCE (CCGG) (2021), https://ccgg.ca/. Also note that CCGG is the author of the Canadian stewardship code: CCCG, https://ccgg.ca/download/4066/ (last visited on July 30, 2021). For empirical evidence, see Craig Doidge, et al., *Collective Action and Governance Activism*, 23 REV. FIN. 893 (2019) (studying private engagement by CCGG between 2008 and 2015 and finding that formal coor-

ronmental and social ("E&S") activism, the "Collaboration Platform" of the PRI has emerged as a prominent international forum that facilitates explicit coordination among like-minded investors and aggregates shareholder engagement.[337] A recent empirical study on PRI coalitions shows the importance of the leading investor in such coordinated E&S engagements and finds parallels between "wolf packs" and "two tier engagement," i.e. an engagement with a "lead" and supporting PRI signatories.[338] This has important implications for shareholder stewardship because, as detailed above, those activists who are signatories to both the UK Code and the PRI have a more holistic, enlightened understanding of shareholder stewardship as serving long-term societal goals and sustainability.[339] Other not-for-profit groups, such as Climate Action 100+ or Share Action, increasingly have the capacity to coordinate and support firm-specific stewardship, especially when environmental or social issues (such as obesity) are at stake, as recent shareholder revolts against HSBC, Barclays and Tesco show.[340] Indeed, several of the activist stewards' statements examined above highlight the role of third party

dination through CCGG can increase investor activism and have an impact on the targeted firms' governance choices).

337. The PRI Collaboration Platform, https://collaborate.unpri.org/ (last visited July 24, 2021). For empirical data, see Elroy Dimson et al., *Coordinated Engagements* (Eur. Corp. Governance Inst., Working Paper No. 721, 2021), https://ssrn.com/abstract=3209072 (analyzing 31 PRI engagement projects between 2007 and 2015).

338. *See* Dimson et al., *supra* note 337, at 11.

339. *See supra* Section III.D.

340. *See, e.g.*, Alastair Marsh, *Climate Activists Push Barclays to Ramp up Green Financing Activities*, BUS. DAY (Dec. 15, 2020), https://www.businesslive.co.za/bd/world/2020-12-15-climate-activists-push-barclays-to-ramp-up-green-financing-activities/; *HSBC Faces Calls to Dump Fossil Fuels*, NEWSBASE DAILY NEWS (Jan. 11, 2021), https://newsbase.com/story/hsbc-faces-calls-to-dump-fossil-fuels-199977; *Tesco Faces Shareholder Vote to do More to Tackle Obesity*, MARKETSCREENER (Feb. 9, 2021), https://www.marketscreener.com/news/latest/Tesco-faces-shareholder-vote-to-do-more-to-tackle-UK-obesity—32400742/. For the engagement work of ShareAction and Climate Action 100+, see generally SHAREACTION (2021), https://shareaction.org/ (last visited July 30, 2021); CLIMATE ACTION 100+ (2021) https://www.climateaction100.org/ (last visited July 30, 2021).

coordinators and investors' groups in facilitating collective engagement.[341]

2. *ESG Activism*

Another trend likely to streamline the role of activist stewards as "stewardship arbitrageurs" is the surge of ESG activism. Shareholder climate activism is on the rise and, as expected, activists stewards do not remain idle.[342] What may be more surprising, however, is that traditional activist funds—who are not generally signatories to the UK Stewardship Code—increasingly view addressing firm-specific ESG (and especially environmental) issues as a key tool in their arsenals.[343] While ESG objectives were absent from hedge-fund-style activist campaigns ten years ago, today, there are astonishing examples of potentially transformative stewardship undertaken by reputed activist hedge funds. For instance, TCI—previously characterized as a "locust" following its campaign against Deutsche Boerse in 2005—is now a "climate radical" bringing its offensive tactics to the fight against climate change.[344] TCI has

341. *See, e.g.*, Statement from Franklin Templeton Investments on Compliance with the UK Stewardship Code (November 2016) ("FTI may collaborate with institutional investors through our network of memberships. These include: The Principles for Responsible Ownership, UKSIF, Eurosif, International Corporate Governance Network. In addition we are associated with the Canadian Coalition for Good Governance through the board membership of an FTI employee."); Statement from Aberdeen Standard Investments (2019) ("We work with a number of organisations in order to participate in collective engagement, including: Asian Corporate Governance Association, The Investment Association, Council of Institutional Investors, The Investor Forum, The Principles for Responsible Investing, The 30% Club Investor Group.") (on file with author).

342. *See, e.g.*, Madeleine Taylor, *Institutions Urge HSBC to cut exposure to fossil fuels as shareholder climate activism accelerates,* INSTITUTIONAL ASSET MANAGER (Jan. 11, 2021), https://www.institutionalassetmanager.co.uk/2021/01/11/294235/institutions-urge-hsbc-cut-exposure-fossil-fuels-shareholder-climate-activism.

343. *See, e.g.*, Corrie Driebusch, *Activist Investors Join Push to Build up Do–Good Funds*, WALL STR. J. (Mar. 9, 2020). For the role hedge funds and other "responsible investors" can play in promoting ESG activism, see Anna Christie, *The Agency Costs of Sustainable Capitalism*, 55 U.C. DAVIS L. REV. 875 (2021).

344. Edward Robinson, *World's Most-Profitable Hedge Fund Is Now a Climate Radical*, BLOOMBERG NEWS (Jan. 22, 2020).

threatened three large UK banks over coal funding,[345] and has been pushing companies globally to improve disclosures of greenhouse gas emissions and adopt annual shareholder votes on climate action plans.[346] ESG engagement also takes place with the means of exit, as the recent dropping of AIG from the funds of Legal & General shows.[347] While ESG activism is currently a niche strategy, the high demand from institutional clients, including index funds currently contesting to win the Millennial generation,[348] is among the key factors set to drive future growth.[349]

Even though redirecting shareholder activism to ESG factors could be a potentially transformative exercise of shareholder stewardship, some setbacks have been experienced. Despite aspirational sounding rhetoric (as revealed in Part III), empirical evidence shows that large asset managers, including Blackrock and Vanguard, vote against most ESG shareholder resolutions.[350] As this Article is published, Larry Fink, Black Rock's CEO provocatively declared that BlackRock does not want to be "the environmental police" in combating climate

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345. Leslie Hook et al., *TCI Threatens Banks over Coal Funding*, FIN. TIMES (Mar. 2, 2020).

346. Tim Human, *TCI Goes Global with "Say on Climate" Campaign,* IR MAGAZINE (Nov. 27, 2020); *Hedge Fund Manager Hohn Steps up Campaign over Banks' Fossil-fuel Loans*, FIN. TIMES (Oct. 21, 2021). In October 2020, Spanish airport operator Aena was the first company in the world to adopt an annual advisory "say on climate" after pressures by TCI. *See* Attracta Mooney, *Billionaire Chris Hohn Forces First Annual Investor Vote on Climate Policy*, FIN. TIMES (Oct. 22, 2020).

347. Camilla Hodgson, *Britain's Largest Investor Blacklists AIG over Climate Risk Concerns*, FIN. TIMES (June 13, 2021).

348. *See* Katelouzou & Micheler, *supra* note 142, at 25 (creating a taxonomy of market participants and examining their demand for stewardship and highlighting the role of the Millennials in demanding stewardship). On social activism by index funds, see Michal Barzuza et al., *Shareholder Value(s): Index Fund Activism and the New Millennial Corporate Governance*, 93 S. CALIF. L. REV. 1243.

349. Amy Whyte, *Hedge Fund Activists Pivot to ESG*, INSTITUTIONAL INV. MAG. (Jan. 23, 2020); Greg Winterton, *ESG Issues Fuelling Shareholder Activism Growth*, ALPHAWEEK (Dec. 16, 2020) (reporting that in a study of 150 US investors three–quarters believe that they can be influential in activism relating to environmental protection and renewable energy).

350. Jackie Cook, *ESG Proxy Resolutions Find More Support in 2019,* MORNINGSTAR (Feb. 28, 2019),https://www.morningstar.com/articles/967699/esg–proxy–resolutions–find–more–support–in–2019. *See also* text accompanying note 274 above.

change.[351] In addition, not all activist funds approach ESG stewardship from the same angle. Iconic hedge-fund-style activists, such as Carl Icahn and Starboard Value LP, do not raise ESG issues with their target companies.[352] There is also growing skepticism among stakeholders about the broader motivations and incentives behind the use of ESG in activist campaigns.[353] A recent survey among asset managers, for instance, confirms that the main reasons why asset managers adopt stewardship are financial in nature, reflecting a broader recognition that ESG factors and exercising stewardship have a positive impact on returns.[354]

But here one must distinguish the activist stewards this Article focuses on from the rest of the activist funds. The activist signatories who have voluntarily signed to the UK Code have clearly indicated their commitment to ESG and responsible ownership. The 2020 UK Code highlights that stewardship aims to "create long-term value for clients and beneficiaries leading to sustainable benefits for the economy, the environment and society" and seeks to mainstream ESG factors, especially climate change, into stewardship.[355] Accordingly, the signatories to the new Code must reflect on how they integrate ESG into their own approach to investment. The key question remains, however, whether and how far the signatories will integrate ESG into their engagement approach. While it is a fantasy to expect that all signatories will rationally internalize all the costs of ESG activism, especially when such engagement is firm-specific, the activist funds this Article focuses on have the

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351. *See* Simon Foy, *BlackRock will not be the 'environmental police' in ethical investing U-turn*, THE TELEGRAPH (June 6, 2022), https://www.telegraph.co.uk/business/2022/06/06/blackrock-will-not-environmental-police-ethical-investing.u/

352. Driebusch, *supra* note 343.

353. *See, e.g.*, Hugh Leask, *Boardroom Battles: Why Activist Hedge Funds are Back in the Spotlight*, HEDGE WEEK (Feb. 26, 2020) (arguing that even the use of 'G' (governance) by activist hedge funds is "often a smoke screen for their ultimate objectives; activisthedge funds are in for the profits, everything else is less relevant.")

354. LCP, RESPONSIBLE INVESTMENT SURVEY (Jan., 2020), at 12 (providing evidence that 85% of the survey respondents said "they integrate ESG factors with the aim of improving long–term investment outcomes for their clients" and 67% said they do it "because they believe ESG risks and opportunities can affect risk–adjusted returns over the short to medium term"').

355. UK CODE 2020, *supra* note 38, at 4.

strongest incentives to streamline shareholder stewardship directed at ESG issues. Implicit or explicit coalition building with like-minded investors can be a capacitating factor. Activist signatories to the UK Code 2010/12—the focus of this Article—may still be a minority among all activists but have the potential to act as stewardship arbitrageurs. They have the incentives and abilities to engage in micro-level shareholder stewardship, bring together like-minded investors (including the largest asset managers[356]) and promote not only good corporate governance but also address environmental and social issues through shareholder engagement. Anecdotal evidence supports this claim. The pressure by Toscafund Asset Management on tool hire group Speedy Hire's chairman,[357] the engagement by a consortium of shareholders including Columbia Threadneedle, Janus Henderson Group, Legal & General and Aviva that voted against Unilever's plan to consolidate its headquarters in the Netherlands,[358] and more importantly the pressure investors put on UK mining companies Glencore plc and Rio Tinto and the 11 institutional investors co-filed resolution asking Barclays to cease financing out fossil fuel companies,[359] are all indicative of the stewardship capability of ac-

356. Some of the largest US asset managers, including Vanguard and Blackrock, publicly emphasize their commitment to stewardship, ESG and public trust even in the absence of soft–law stewardship responsibilities or hard–law duties. *See, e.g.*, BLACKROCK, INVESTMENT STEWARDSHIP ANNUAL REPORT (Sep. 2020), https://www.blackrock.com/corporate/literature/publication/blk–annual–stewardship–report–2020.pdf (last visited July 30, 2021) ("We advocate for robust corporate governance and the sound of sustainable practices core to long–term value creation for our clients"); VANGUARD, INVESTMENT STEWARDSHIP 2020 ANNUAL REPORT (2021) (last visited July 30, 2021). *But see* Attracta Mooney, *Blackrock Accused of Climate Change Hypocrisy*, FIN. TIMES. (May 17, 2020) https://www.ft.com/content/0e489444-2783-4f6e-a006-aa8126d2ff46 (reporting discrepancies between Blackrock's statements and voting).

357. Nicholas Megaw, *Toscafund calls for resignation of Speedy Hire executive chairman*, FIN. TIMES (Aug. 10, 2016), https://www.ft.com/content/2c87f959-4fe0-3702-b63c-9dd297798613.

358. Attracta Mooney, *Unilever Must Learn to Listen to Mood Music*, FIN. TIMES (Oct. 15, 2018), https://www.ft.com/content/5e441dbd-1823-395b-b8d9-2399e11f72db.

359. Carolyn Cohn, *Investors put Pressure on Miners to Respond to Climate Change*, REUTERS (Dec. 16, 2015), https://www.reuters.com/article/us–climatechange–investment–mining–idUKKBN0TZ1BS20151216; *Barclays Bank faces landmark investor vote on climate*, RFI (Aug. 1, 2020), https://www.rfi.fr/en/wires/20200108-barclays-bank-faces-landmark-investor-vote-climate.

tivist funds. This Article's systematic analysis of the rhetoric of the disclosure statements of the activist signatories to the first-generation UK Code confirms this. However, future research needs to examine how often and how successfully activist stewards walk the "stewardship talk."

Concluding Remarks

"Action speaks louder than words but not nearly as often."
Attributed to Mark Twain

We are currently at a crossroads. As we grapple with increasing global uncertainty – whether in relation to pandemic(s), climate change, natural disasters, financial volatility, global conflicts and political risks, an opportunity for institutional investors is emerging to regain society's confidence. The second generation UK Stewardship Code has broken new ground in forcing ESG into the heart of stewardship, but there are still significant differences in opinion on how to integrate ESG into investment management and what should be expected as a result. As the FRC has introduced a new reporting system to improve the quality of information and as the latest list of signatories to the new Code—published in spring 2022—will have to produce annual reports detailing stewardship activities and outcomes,[360] this study is the first to empirically examine the stewardship rhetoric of activist signatories to the first generation UK Stewardship Code and provide unique and original evidence that help to identify the way activist stewards express—and exercise—shareholder stewardship at the micro-level.

That this Article focuses on activist shareholder stewards is not by chance. From the pool of all the signatories to the UK Code 2010/12, activist funds are the only ones for whom the model of micro-level shareholder stewardship is potentially compatible with their business models and can be used as a strategy to achieve long-term value. With a growing number of activist fund campaigns encompassing less confrontational approaches and "enlightened" objectives (especially outside the

360. The latest list of signatories to the UK Code 2020 can be found at *UK Stewardship Code Signatores*, FIN. REPORTING COUNCIL (last updated Mar. 10, 2022), https://www.frc.org.uk/investors/uk-stewardship-code/uk-stewardship-code-signatories.

United States), it is time to understand how activist funds view shareholder stewardship and whether shareholder activism and shareholder stewardship can be compatible. This question is even more important in light of the diffusion of UK-style stewardship codes around the world.[361]

Applying NLP and structural topic modeling to systematically examine the stewardship statements of 50 activist stewards, this Article unveils that the stewardship rhetoric, especially of those domestic activists who are not confrontational in style, accords with the policy aspirations of the UK Code 2010/12. The empirical findings also reveal an emerging crossover between the enlightened understanding of shareholder stewardship and the way the PRI promotes responsible investing. This has important implications for the future advancement of the multilayered regulatory ecology of enlightened shareholder stewardship. Methodologically, this is the first study that applies NLP and structural topic modeling in legal research and unveils the prevalence of different topics in the statements of the activist signatories to the UK Code. Whereas actions speak louder than words, corporate law and financial regulation extensively use disclosure. Assessing the words revealed by market participants provides important lessons for both current and future signatories and policymakers alike.

The stewardship rhetoric that this Article unveils supports the claim that activist stewards not only can act "like real owners"[362] or as a "corrective mechanism"[363] in corporate governance, but also can play the role of stewardship intermediaries or stewardship arbitrageurs and streamline the micro-level stewardship activities of other asset managers (active or passive in style) and asset owners. The increasing capacities for coalition building (both among activist and non-activist stewards and other investors often facilitated by third party coordinators), and the evolution of activist objectives and strategies to include E&S factors together with the parallel growth of ESG

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361. Eleven years after the launch of the landmark UK Code 2010/12, stewardship codes or principles can be found in twenty jurisdictions around the world. For the development of stewardship codes around the world, see Katelouzou & Puchniak, *supra* note 8.

362. Marcel Kahan & Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 U. PA. L. REV. 1021, 1047 (2017).

363. Paul Rose & Bernard Sharfman, *Shareholder Activism as a Corrective Mechanism in Corporate Governance*, 2014 B.Y.U. L. REV. 1015 (2014).

investing, have all converged to change how the model of shareholder stewardship will be exercised in the future. This applies to the micro- and macro- (portfolio- and market-) levels. One thing is increasingly clear today: activist and non-activist stewards perform complementary rather than mutually exclusive functions.[364]

That enlightened shareholder stewardship and accountability has gained resonance over the last few years is undoubtful. However, not everyone agrees on the need to develop regulatory ("hard"/binding or "soft"/non-binding) norms to govern the stewardship role of institutional shareholders,[365] or even on whether the issue of the corporate governance capacity of institutional investors (or lack thereof) needs a solution.[366] Nevertheless, and amidst the shifting emphasis on "stakeholder capitalism," a consensus is increasingly gathering among policymakers, regulators and investors themselves—in almost all countries where institutional investors dominate public equity—in support of the view that institutional investors should engage in micro- and portfolio- (and potentially market- and macro-) level corporate governance arrangements in a way that aligns with the interests of their end investors and promotes long-term and sustainable value.[367] The road from an "instrumental" to an "enlightened" understanding of stewardship may still be long, but there is encouraging evidence that activist stewards have the abilities and incentives to *walk* the stewardship *talk*.

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364. *See* Kahan & Rock, *supra* note 174.

365. *See, e.g.*, Gilson & Gordon, *supra* note 28 (favoring the role of activist shareholders in providing a form of market–based stewardship).

366. Dan W. Puchniak, *The False Hope of Stewardship in the Context of Controlling Shareholders*, AM. J. COMPAR. L. (forthcoming 2021) (elaborating that, outside the United Kingdom and the United States, institutional investors are collectively minority shareholders in most listed companies around the world and forcefully arguing that transplanting the UK–style stewardship is a largely a "misfit").

367. *See, e.g.*, Leo Almazora, *Institutional Investors Seeking Change are Going Beyond Disinvestment*, WEALTH PROFESSIONAL (Oct. 30, 2020), https://www.wealthprofessional.ca/investments/alternative–investments/institutional–investors–seeking–change–are–going–beyond–divestment/334714 (reporting that "[i]n a survey of 650 institutional investors around the world that represent US$25.9 trillion in assets, it found 59% saw active company engagement and stewardship as a key approach to integrating sustainability, compared to just 38% a year ago.").

Appendix 1

Name of Signatory	HQ Country	Corpus Size	Tier	PRI	AUM (in $ bn)	Year	Activist Style	Activist Approach
AB (AllianceBerstein LP)	USA	1792	1	1	585.96	1967	0	1
Aberdeen Standard Investments	UK	1482	1	1	644.50	1825	0	0
Alken Asset Management Limited	UK	1346	1	1	3.73	2005	0	1
Allianz Global Investors	Germany	3197	1	1	595.83	1998	0	0
Arrowgrass Capital Partners LLP	UK	997	2	1	7.49	2008	0	1
Asset Value Investors Limited	UK	745	2	0	13.26	1985	1	1
Aviva Investors	UK	3334	1	1	414.00	1696	0	0
Axa Investment Managers	UK	838	1	1	77.31	1994	0	0
Baillie Gifford	UK	1354	1	1	242.97	1908	0	0
Blackrock	USA	2203	1	1	7808.50	1988	0	0
BMO Global Asset Management (prev F&C)	Canada	2464	1	1	263.00	1817	0	1
BNP Paribas Investment Partners	France	2129	1	1	48.27	1964	0	0
City of London Investment Management	UK	696	2	1	5.63	1891	1	1
Columbia Threadneedle	UK	2497	1	0	468.00	2003	0	0
Edentree Investment Management Ltd	UK	1465	1	1	2.70	1988	0	0
Fidelity International	UK	1714	1	1	400.94	1980	0	0
Franklin Templeton Investments	USA	1796	2	1	744.70	1947	0	1
GAM Investments	Switzerland	2571	1	1	133.45	1983	0	1
Generation Investment Management LLP	UK	1552	1	1	18.50	2004	0	1

Name of Signatory	HQ Country	Corpus Size	Tier	PRI	AUM (in $ bn)	Year	Activist Style	Activist Approach
Gresham House Specialist Asset Management	UK	857	2	0	4.00	1857	0	1
Henderson Global Investors (Janus Henderson Group plc)	UK	804	1	1	357.30	1934	0	1
Hermes Fund Managers (Part of Federated Homes)	UK	1981	1	1	44.40	1983	0	0
Independent Franchise Partners LLP	UK	708	2	0	15.83	2009	0	1
JO Hambro Capital Management Limited	UK	907	2	1	36.11	1993	0	1
Jupiter Asset Management	UK	1485	1	1	54.85	1985	0	1
Lansdowne Partners (UK) LLP	UK	988	1	0	11.85	1988	1	1
Legal & General Investment Management	UK	1792	1	1	1636.81	1836	0	0
Liontrust Investment Ltd	UK	1338	1	1	14.10	1994	0	1
M&G Investment Management Ltd	UK	2285	1	1	338.45	1901	0	0
Macquarie Investment Management (ValueInvest)	Luxembourg	1813	1	1	231.20	1969	0	1
Manulife Investment Management	Canada	1912	1	1	406.00	1968	0	0
Marathon Asset Management LLP	UK	1413	1	1	45.29	1986	0	1
Neuberger Berger Europe Ltd	USA	1415	1	1	2838.53	1939	0	0
91 Ninety One (previously Investec Asset Management)	UK	2560	1	1	98.00	1974	0	0
Odey Asset Management LLP	UK	1429	1	0	3.55	1991	0	1
Polar Capital	UK	1416	2	0	16.75	2001	0	0
Rathbone Unit Trust Management Ltd	UK	1608	2	1	48.59	1999	0	0

Name of Signatory	HQ Country	Corpus Size	Tier	PRI	AUM (in $ bn)	Year	Activist Style	Activist Approach
RBC Global Asset Management	Canada	2679	1	1	371.50	2002	0	1
Robeco Institutional Asset Management BV	NL	1499	1	1	208.04	1929	0	0
Royal London Asset Management	UK	845	1	1	156.35	1988	0	0
RWC Partners	UK	742	2	0	21.00	2000	1	1
Sarasin & Partners LLP	UK	2145	1	1	17.33	2007	0	0
Schroders	UK	2096	1	1	649.60	1804	0	0
Skagen Funds	Norway	1568	1	1	9.15	1993	0	1
Slater Investments Limited	UK	1005	1	0	1.43	1994	0	1
T Rowe Price	USA	2335	1	1	1188.46	1937	0	0
Toscafund Asset Management LLP	UK	1197	1	0	2.29	2000	1	1
TT International	UK	1149	1	1	8.07	1988	0	1
Vanguard Asset Management	USA	3029	1	1	5716.12	1975	0	0
Wellington Management	USA	1474	1	1	1229.64	1933	0	0

Appendix 2: Stemming Abbreviations (Tokens)

Stems (as per Porter algorithm)	**Words**
account	account(s), accounting, accountant, accountability, accountable
activ	active, actively
analyst	analyst(s)
annual	annual, annually
audit	audit(s), audited, auditor(s)
board	board(s)
capit	capital
client	client, clients
collabor	collaborate, collaboration(s), collaborative(ly), collaborating, collaborated
collect	collective(ly)
compani	company, companies
complianc	compliance
conflict	conflict, conflicts, conflicting
dialogu	dialogue(s)
director	director(s)
dislcos	disclose(s), disclosing, disclosed
disclosur	disclosure(s)
discuss	discuss(es), discussed, discussion(s)
duti	duty, duties
engag	engage, engages, engagement, engaged
environment	environment, environmental
equiti	equity, equities
escal	escalate, escalating, escalated, escalation
esg	ESG
fund	fund(s), funding
govern	govern, governs, governance
inform	inform, informed, informing, information
integr	integrate, integration, integral, integrating, integrated, integrity

Stems (as per Porter algorithm)	**Words**
interest	interest, interests, interested
invest	invest, invests, invested, investing, investment
investor	investor, investors
iss	ISS (Institutional Shareholder Services)
issu	issue, issuing, issued
longterm	long-term
manag	manage(s), managed, management
meet	meet, meeting(s)
monitor	monitor(s), monitoring, monitored
nonexec	non-executive(s)
perform	perform, performance, performing
polici	policy, policies
portfolio	portfolio(s)
principl	principle, principles
proxi	proxy, proxies
publicli	publicly
record	record(s), recorded
remuner	remuneration
report	report, reports, reported, reporting
report	report(s), reported, reporting
research	research(es), researched, researching
resolut	resolution(s)
respons	responsible, responsibility, responsibilities
return	return(s)
right	right(s)
risk	risk(s)
sharehold	shareholder, shareholders, shareholding
social	social, socially
stewardship	stewardship
strategi	strategy, strategies, strategic

Stems (as per Porter algorithm)	**Words**
sustain	sustainable, sustainability
team	team(s)
transpar	transparency, transparent
valu	value(s), valued
vote	vote, votes, voted, voting
websit	website

Appendix 3: Independent Variables for Structural Topic Modeling

Variables	Definition
Country	Primary HeadQuarter Country location of activist signatory. Equals 1 when the UK is the primary HQ country and 0 otherwise. Source: Activist Insight and signatories' websites.
Activist Style	Signatory's style of shareholder activism. Equals 1 if the activist signatory adopts an offensive style of activism, and 0 otherwise. Source: Activist Insight and signatories' websites.
Activist Approach	Signatory's approach to activist investing. Equals 0 if the activist signatory only engages with companies in a friendly way and 1 if it adopts both friendly and confrontational strategies. Source: Activist Insight and signatories' websites.
PRI	Equals 1 if the signatory is also a signatory to the Principles of Responsible Investment (PRI). Source: https://www.unpri.org/signatories
Tier	Equals 1 if the signatory's statement has been assessed by the Financial Reporting Council (FRC) as Tier 1 statement, and 0 otherwise. Source: https://www.frc.org.uk/investors/uk–stewardship–code/uk–stewardship–code–statements/asset–managers
Size	The assets under management in billion USD of the activist signatory as of May 2021. Source: Activist Insight and signatories' websites.
Year	The year the activist signatory was founded. Source: Activist Insight and signatories' websites.

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REIMAGINING CORPORATE ACCOUNTABILITY: MOVING BEYOND HUMAN RIGHTS DUE DILIGENCE*

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The global movement towards the adoption of human rights due diligence laws is gaining momentum. Starting in France, moving to Germany, and now at the European Union level, lawmakers are heeding the call to mandate that companies conduct human rights due diligence throughout their global operations. The situation in the United States is very different: although ESG (environmental, social, and governance) has received increasing national attention, there is currently no law that mandates corporate human rights due diligence.

Recognizing this disparity and acknowledging the specific context for ESG-related issues in the United States, we consider how the United States could provide clarity and direction to corporate America and global leadership on business and human rights. Our assessment reveals that while due diligence models have rapidly become the global standard for increasing corporate human rights accountability, there is concern that the legislative frameworks being adopted in Europe fail to live up to their promise.

We assess a bold and novel legislative proposition for the United States: a human rights due diligence law that is patterned after the influential anti-bribery statute, the Foreign Corrupt Practices Act. The proposal—which

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we coin as the due diligence + model—provides a unique response to corporate human rights abuses by combining an outright prohibition on certain serious human rights violations with due diligence and record-keeping obligations. We offer a first-of-its-kind analysis that provides crucial insight to lawmakers in the United States and around the world as they seek to craft new regulatory regimes for corporate accountability.

Introduction: A Tale of Two Scandals

On September 27, 2018, the U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) announced the settlement of charges for violating the Foreign

Corrupt Practices Act (FCPA) against a Brazilian company.[1] The resulting settlement for $850 million is one of the highest settlements in the history of FCPA enforcement.[2]

Just four months earlier, there was another corporate scandal in Brazil: several fishermen were threatened and intimidated by oil and gas companies.[3] The corporate campaign was allegedly in retaliation[4] for the fishermen's ongoing protests of business and environmental practices in the area that had previously (according to the protests' leader) led to "a number of threats to his life."[5]

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1. Press Release, U.S. Dep't of Just., Petróleo Brasileiro S.A. – Petrobras Agrees to Pay More than $850 Million for FCPA Violations (Sept. 27, 2018), https://www.justice.gov/opa/pr/petr-leo-brasileiro-sa-petrobras-agrees-pay-more-850-million-fcpa-violations.

2. Richard Cassin, *Petrobras Reaches 1.78 Billion FCPA Resolution*, THE FCPA BLOG (Sept. 27, 2018), https://fcpablog.com/2018/09/27/petrobras-reaches-178-billion-fcpa-resolution/ (noting that "Based on $1.78 billion in total penalties and disgorgement assessed against Petrobras in the DOJ's NPA and the SEC's administrative order, this is the biggest FCPA enforcement action.").

3. *Alexandre Anderson Associação dos Homens do Mar – AHOMAR*, BUS. & HUM. RTS. RES. CTR. (May 21, 2018),https://www.business-humanrights.org/en/latest-news/alexandre-anderson-associa%C3%A7%C3%A3o-dos-homens-do-mar-ahomar/.

4. *Id.*

5. *See Case History: Alexandre Anderson*, FRONT LINE DEFENDERS, https://www.frontlinedefenders.org/en/case/case-history-alexandre-anderson. This is not the first time that Mr. Anderson—the protest's leader—has allegedly been attacked by Petrobras. For instance, in 2013 Mr. Anderson's home and office were ransacked, leading Mr. Anderson to flee the area and Brazilian civil society groups to write open letters to the National Programme for the Protection of Human Rights Defenders. *See id.* As with many allegations of this sort, however, the human rights defenders could not directly link the intimidation directly to the companies. The Business and Human Rights Resource Centre notes: "It is not clear that the threats are related to or coming from the company or its employees." *See supra* note 3. This is not surprising in the business and human rights space. Human rights defenders frequently claim that corporations use intermediaries and private security to engage in intimidation and harassment techniques, making it difficult to mount campaigns against the companies directly. *See, e.g.*, INST. FOR HUM. RTS. AND BUS. ET AL., HUMAN RIGHTS DEFENDERS AND BUSINESS: SEARCHING FOR COMMON GROUND 40 (Occasional Paper Series, Paper 4, Dec. 2015), https://www.ihrb.org/pdf/2015-12-Human-Rights-Defenders-and-Business.pdf (discussing corporations' use of private security contractors in connection with the mining of "blood diamonds"). Other forms of intimidation come from the government itself, often time with the alleged support of the companies. *Id.* at 10 (discussing cases of human rights abuses at the hands of the state

Taken on their own, neither of these scandals are unusual. Accusations of such corporate misconduct are unfortunately routine. What makes these two scandals particularly significant is that they both involve the same company: Petrobras, a Brazilian oil and gas company. These tales are striking for another reason as well. In the instance where Petrobras was found to have bribed Brazilian politicians, there was a clear pathway to corporate accountability in the United States: The Foreign Corrupt Practices Act.[6] As a result, the United States' full enforcement powers could come to bear on the company when it acted corruptly. In contrast, there was no means of holding Petrobras accountable under U.S. law for the human rights abuses alleged by the fishermen. The United States has no commensurate framework to hold U.S. (and U.S.-listed) corporations accountable for their human rights abuses overseas.[7]

The interaction with Petrobras and the fishermen is just one example of corporate scandals[8] that take place in the ab-

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and stating that "[i]n one case, a company provided tools that enabled the state to violate human rights.").

6. Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1, et seq. Because Petrobras' shares are traded on the U.S. securities markets, they are subject to liability under the FCPA (a U.S. law that prohibits any corporation that trades on the U.S. securities markets from bribing foreign officials). Even though Petrobras is a foreign company, its shares are traded on the New York Stock Exchange as American Depository Receipts (ADRs). As such, they are subject to the same securities' regulatory framework as U.S. companies that have registered their shares with the SEC and that are trading on U.S. exchanges.

7. While the Alien Tort Statute may be one avenue, it is much reduced as a pathway for corporate accountability. *See* 28 U.S.C. §1350; Rachel Chambers, *Parent Company Direct Liability for Overseas Human Rights Violations: Lessons from the U.K. Supreme Court*, 42 U. PA. J. INT'L L. 519 (2021); Rachel Chambers & Jena Martin, *United States: Potential Paths Forward after the Demise of the Alien Tort Statute*, *in* CIVIL REMEDIES AND HUMAN RIGHTS IN FLUX: KEY LEGAL DEVELOPMENTS IN SELECTED JURISDICTIONS 351 (Ekaterina Aristova & Uglješa Grušić eds., 2022).

8. There are many other examples of corporations involved in the harassment of human rights defenders. *See, e.g.*, *Silencing the Critics: How Big Polluters Try to Paralyse Environmental and Human Rights Advocacy Through Courts*, BUS. & HUM. RTS. RES. CTR. (Sep. 30, 2019), https://www.business-humanrights.org/en/from-us/briefings/silencing-the-critics-how-big-polluters-try-to-paralyse-environmental-and-human-rights-advocacy-through-the-courts/ (stating that, "[s]ince 2015, [the Centre] has tracked 1,852 killings, beatings, threats and other forms of intimidation against indigenous and

sence of a comprehensive framework to ensure that corporations engage with human rights issues from the inside out.[9] In response to this and other pressures,[10] movements are underway—particularly in Europe—to enact laws that hold corporations accountable under a mandatory human rights due dili-

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community leaders, . . . and civil society groups focused on business-related issues. Increasingly, companies turn to the courts to bring lawsuits against such defenders with the aim of silencing or intimidating them and stopping their work."). One of the most documented ways that businesses intimidate human rights defenders is using Strategic Lawsuits Against Public Participation (SLAPP) lawsuits, which are intended to silence human rights defenders who speak out against businesses' negative human rights impacts. For a discussion of the ethics behind SLAPP lawsuits, see Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 716 (2003). Similarly, accusations of corporations being corrupt are routine. For instance, in 2020 there was a record $2.78 billion in fines levied against corporations by the SEC and DOJ. *See* JONES DAY, WHITE PAPER: FCPA 2020 YEAR IN REVIEW 1 (2021), https://www.jonesday.com/en/insights/2021/01/fcpa-2020-year-in-review. From 2016 through 2020, these two agencies have brought a total of 78 cases against businesses for violations of the FCPA. *Id.* at 2.

9. Examples of U.S. corporate human rights failings abound. For instance, the Australian Strategic Policy Institute published a report documenting U.S. brands including Amazon, Gap, Nike, Abercrombie & Fitch, Calvin Klein, Carter's, L.L. Bean, Polo Ralph Lauren, and Victoria's Secret as directly or indirectly benefiting from forced Uyghur labor, as part of the Chinese government-sponsored oppression of the Uyghur people. *See* AUSTRALIAN STRATEGIC POL'Y INST., REPORT NO. 26/2020, UYGHURS FOR SALE (2020), https://www.aspi.org.au/report/uyghurs-sale. Similarly, Facebook was used as a tool in the Myanmar government's campaign of ethnic cleansing against the Rohingya Muslim minority. *See, e.g.*, Dan Milmo, *Rohingya Sue Facebook for £150bn over Myanmar Genocide*, THE GUARDIAN, Dec. 6, 2021, https://www.theguardian.com/technology/2021/dec/06/rohingya-sue-facebook-myanmar-genocide-us-uk-legal-action-social-media-violence.

10. Specifically, the U.N. Human Rights Council's adoption of the Guiding Principles on Business and Human Rights—a soft law initiative that was widely lauded as a pivotal moment for the business and human rights agenda. John Ruggie (Special Representative of the Secretary-General), *Guiding Principles of Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter *UNGPs*]. Since the adoption of the Guiding Principles, scholars have spent a significant amount of time analyzing their benefits and limitations. *See, e.g.*, Linda Reif, *The UN Guiding Principles on Business and Human Rights and Networked Governance: Improving the Role of Human Rights Ombudsman Institutions as National Remedies*, 17 OXFORD UNIV. HUM. RTS L. REV. 603 (2017); Björn Fasterling & G. Demuijnck, *Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights,* 116 J. BUS. ETHICS 799 (2013).

gence (mHRDD) framework. Starting in France,[11] before moving to the Netherlands,[12] Germany,[13] and Norway,[14] and at the European Union level,[15] lawmakers are accepting the need to create a system that requires companies to conduct human rights due diligence throughout their global operations.

The situation in the United States is very different. There is no legislative framework ensuring that U.S. companies respect human rights throughout their global operations.[16]

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11. Loi 2017-399 du 27 Mars 2017 Relative au Devoir de Vigilance des Sociétés Mères et des Entreprises Donneuses D'Ordre [Law 2017-399 of March 27, 2017 relating to the Duty of Vigilance of Parent Companies and Ordering Companies], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 28, 2017 [hereinafter Loi de Vigilance].

12. Wet Zorgplicht Kinderarbeid 24 Oktober 2019 [Child Labor Duty of Care Act], Stb. 2019, 401 (2019) (Neth.) [hereinafter Dutch Child Labor Due Diligence Law]. This is likely to be superseded by a human rights due diligence law that is not focused solely on the issue of child labor. *See* OECD Watch (@OECDwatch), TWITTER (Dec. 3. 2021, 4:11 AM), https://twitter.com/OECDwatch/status/1466696684214304781.

13. Gesetz uber die unternehmerischen Sorgfaltspflichten in Lieferketten [Act on Corporate Due Diligence Obligations in Supply Chains], July 16, 2021. BGBL I at 2959 (Ger.). Official English translation at https://www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains.pdf?__blob=publicationFile&v=3 [hereinafter Act on Corporate Due Diligence Obligations in Supply Chains]. *See* Markus Krajewski, Kristel Tonstad & Franziska Wohltmann, *Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?*, 6 BUS. & HUM. RTS. J. 550 (2021).

14. Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold, 18. Juni 2021. [hereinafter Act Relating to Enterprises' Transparency and Work on Fundamental Human Rights and Decent Working Conditions]. Unofficial English translation at: https://lovdata.no/dokument/NLE/lov/2021-06-18-99#:~:text=the%20Act%20shall%20promote%20enterprises,fundamental%20human%20rights%20and%20decent.

15. *Commissioner Reynders Announces EU Corporate Due Diligence Legislation*, Eur. Coalition for Corp. Just., Apr. 30, 2020, https://corporatejustice.org/news/16806-commissioner-reynders-announces-eu-corporate-due-diligence-legislation. In March 2021, the European Parliament adopted a report which includes the text of a proposed Directive. *Report of the Committee on Legal Affairs with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability*, at 79 (Feb. 11, 2021), https://www.europarl.europa.eu/doceo/document/A-9-2021-0018_EN.pdf.

16. There are a number of legislative proposals, mainly for disclosure laws, but none has been adopted yet. *See* MICHAEL R. LITTENBERG, EMILY J. OLDSHUE, ANNE-MARIE L. BELIVEAU & NELLIE V. BINDER, ROPES AND GRAY, ESG LEGISLATION: TEN BILLS FOR PUBLIC COMPANIES TO WATCH IN 2021

While some limited legislative efforts have been made within a disclosure paradigm, these laws fall short of the mHRDD standard in many ways. Specifically, their reliance on a disclosure-based framework means that they lack the rigor that many attribute to the mHRDD framework.[17] As such, the mHRDD framework would appear, at least at first glance, to be the logical next step for the United States to adopt in preventing corporate human rights violations and thereby fulfilling its international human rights obligations.[18] Indeed, the mHRDD framework seems largely to have been accepted as the gold standard for advancing the corporate responsibility to respect human rights.[19]

(2020), https://www.ropesgray.com/en/newsroom/alerts/2020/11/ESG-Legislation-Ten-Bills-for-Public-Companies-to-Watch-in-2021.

17. While disclosure was initially viewed as a low-cost point of entry for businesses to assess their human rights impacts, scholars quickly realized that disclosure, by itself, wasn't enough. *See* Barnali Choudhury, *Social Disclosure*, 13 BERKLEY BUS. L.J. 183 (2016) (arguing that disclosure regimes have a limited place as a supplementary form of enforcement as long as they are narrow and specific); Jena Martin, *Hiding in the Light: The Misuse of Disclosure to Advance the Business and Human Rights Agenda*, 56 COLUM. J. TRANSNAT'L L. 530 (2017) [hereinafter Martin, *Hiding in the Light*] (arguing that disclosure laws can be counter-productive to the business and human rights regime).

18. The business and human rights agenda has emerged as a multi-faceted approach to minimizing negative human rights impacts that corporations can have on affected communities and individuals. We return to this framework in more detail in Part I, *infra.* For additional context on the BHR agenda, the Three Pillar Framework, and the UNGPs, see generally Jena Martin, '*The End of the Beginning?': A Comprehensive Look at the U.N.'s Business and Human Rights Agenda from a Bystander Perspective*, 17 FORDHAM J. CORP. & FIN. L. 871 (2012) (written as Jena Martin Amerson) [hereinafter Martin, *End of the Beginning*] (discussing the context surrounding the nascence of the UN's business and human rights agenda).

19. See *infra* Part III, for a discussion of the emergence of the mHRDD frameworks in jurisdictions around the world. In addition, many commentators have welcomed the advent of mHRDD frameworks as a significant advancement of the BHR agenda. *See, e.g.*, Eric DeBrabendere & Marys Hazelzet, *Corporate Responsibility and Human Rights: Navigating Between International, Domestic and Self-Regulation*, *in* RESEARCH HANDBOOK ON HUMAN RIGHTS AND INVESTMENT 221 (Yannick Radi ed., 2018); Jaako Salminen & Mikko Rajavuori, *Transnational Sustainability Laws and the Regulation of Global Value Chains: Comparison and a Framework for Analysis*, 26 MAASTRICHT J. EUR. & COMP. L. 602, 605 (2019); Kevin Sobel-Read, *Global Value Chains: A Framework for Analysis*, 5 TRANSNAT'L LEGAL THEORY 364, 371 (2014); Sarianna Lundan & Peter Muchlinski, *Human Rights Due Diligence in Global Value Chains*, *in* NEW POLICY CHALLENGES FOR EUROPEAN MULTINATIONALS 181, 186 (Rob Van

Unfortunately, it isn't enough. Although human rights due diligence is arguably an advancement over some of the more laissez-faire disclosure frameworks, by having corporate accountability solely be determined by corporate *actions* rather than corporate *outcomes*, this framework also runs the risk of becoming ineffective.[20]

One potential avenue, which has so far *not* been discussed in the literature,[21] is a framework that combines a mandatory human rights due diligence framework with a prohibitive framework—one that focuses on outcomes and, in some instances, acts as an outright ban on the most egregious corporate conduct within the area of human rights. A framework such as this, (which we label here as mandatory human rights due diligence plus–or mHRDD+) combines the best of what the typical mHRDD framework has to offer with the robust regimentation of a prohibitive framework.

This Article advocates for the adoption of a mHRDD+ model in U.S. law. By drawing on examples from other countries where a mHRDD model is being proposed or has been adopted, as well as providing historical examples from U.S. securities laws and regulatory theory, we endorse a bold legislative proposal for the United States that would provide a clear and principled framework on human rights responsibilities for businesses. This approach would enable companies to under-

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Tulder, Alain Verbeke & Liviu Voinea eds., 2012); Michael Rawling, *Legislative Regulation of Global Value Chains to Protect Workers: A Preliminary Assessment*, 26 ECON. & LAB. RELS. REV. 660, 673 (2015). However, some significant critiques of this model have also emerged. *See, e.g.*, Rachel Chambers, *An Evaluation of Two Key Extraterritorial Techniques to Bring Human Rights Standards to Bear on Corporate Misconduct*, 14(2) UTRECHT L. REV. 22 (2018); Caroline Omari Lichuma, *(Laws) Made in the 'First World': A TWAIL Critique of the Use of Domestic Legislation to Extraterritorially Regulate Global Value Chains*, 81 HEIDELBERG J. INT'L L. 497, 500 (2021).

20. *See* discussion *infra* Part III.

21. *See* Pierre-Hugues Verdier & Paul B. Stephan, *International Human Rights and Multinational Corporations: An FCPA Approach*, 101 B.U. L. REV. 1359 (2021) (discussing the FCPA as a model for enforcement of human rights norms against corporations as an alternative to Alien Tort Statute litigation against corporations rather than as potentially part of a global movement toward the adoption of mHRDD); Irene Pietropaoli et al., *A UK Failure to Prevent Mechanism for Corporate Human Rights Harms*, BRITISH INST. OF INT'L & COMP. L. (2020), https://www.biicl.org/documents/84_failure_to_prevent_final_10_feb.pdf (a report on introducing a prohibitive framework in the United Kingdom).

stand what is expected of them and to direct their compliance efforts efficiently towards the mHRDD+ standard. In this way, we argue, the United States could assume its rightful place as a champion of business and human rights (BHR),[22] akin to the place it has assumed with respect to bribery and corruption, using a structural framework that is already familiar to companies whose securities are traded in the United States.

This Article proceeds in five parts. In Part I, we make the case for the United States fulfilling its obligation (under international human rights law) to protect individuals and communities who have been harmed by businesses. Specifically, in this Part we discuss the impact of the U.N. Guiding Principles on Business and Human Rights (UNGPs or Guiding Principles), arguably the most authoritative statement on the subject, and outline how states' and civil society's responses to the call to action of the UNGPs have led to a groundswell of support that the United States can no longer ignore. Then, in Part II, we turn to what the United States would need to do to meet its obligations under the UNGPs. Specifically, we discuss the disclosure model—the predominant model that has been used in the United States to address BHR issues[23]—and which has been developed with spotty implementation and mixed success. In this Part, we also demonstrate why the disclosure model in general falls short and discuss why—despite this—it has been so widely adopted. In Part III, we examine the mandatory human rights due diligence (or mHRDD) model that has been adopted in civil law countries in Europe. Here, we discuss the potential advantages of this model over a basic disclosure framework and analyze why it was met with so much

22. To be sure, not everyone agrees that the United States ever had a rightful place in the BHR framework. For instance, scholars from the global south often argue for a more nuanced non-hegemonic approach to BHR. *See, e.g.*, Lichuma, *supra* note 19. However, based on our arguments developed in Part IV, *infra*, we stand by our assessment.

23. While disclosure is the predominant model for addressing BHR issues within the United States, it is not the only one. For instance, the U.S. Customs and Border Protection has used its authority under the Tariff Act to combat coercive labor practices in supply claims. For an in-depth analysis of their work, see THE HUM. TRAFFICKING LEGAL CTR., IMPORTING FREEDOM: USING THE TARIFF ACT TO COMBAT FORCED LABOR IN SUPPLY CHAINS (2020), https://www.htlegalcenter.org/wp-content/uploads/Importing-Freedom-Using-the-U.S.-Tariff-Act-to-Combat-Forced-Labor-in-Supply-Chains_FINAL.pdf.

acclaim (by government *and* civil society) while ultimately falling short of many of the key goals of the BHR framework. In Part IV, we consider the prohibitive conduct framework—specifically as used in the United States within the context of the FCPA, arguably to great effect. In this Part we also discuss why combining these two frameworks (namely within what we label as a mHRDD+ model) offers many of the advantages of both and should be used as the new gold standard.[24] Finally, in Part V, using a model developed by civil society organization International Corporate Accountability Roundtable (ICAR) as a case study, we analyze the strengths and weaknesses of their proposal—a FCPA for Human Rights or FCPA-HR law—and show the value of an mHRDD+ framework for business, government, and civil society in advancing the BHR agenda in the United States.

Assuming that the underlying allegations against Petrobras are true, the timing of these events and the overlapping allegations regarding inappropriate conduct with governmental officials—the bribing of officials in one instance, and negative human rights impacts in response to protests in the other—it seems reasonable to consider that perhaps the same underlying corporate culture that led to the corruption and bribery could also be responsible for negative human rights impacts.[25] As such, it also seems reasonable (and appropriate) for us to develop a framework for corporate human rights abuses that is modeled after (among other things) the FCPA. In short, the time for the mHRDD+ standard has come.[26]

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24. *See infra* Part IV for a discussion of the regulatory theory about why this is so.

25. *See infra* Part V for a discussion of the link between corruption and human rights abuses.

26. For a discussion of the role of corporate culture within the context of BHR, see Jena Martin, *What's in a Name? Transnational Corporations as Bystanders under International Law*, 85 ST. JOHN'S L. REV. 39 (2011) (written as Jena Martin Amerson) [hereinafter Martin, *What's in a Name*] (discussing the impact of internal culture on the framework of transnational corporations as bystanders under international law).

I.
The United States Falls Short on Meeting its Human Rights Obligations

Examples of U.S. corporate human rights failings abound.[27] Particularly in the absence of a comprehensive framework to ensure that corporations engage with human rights issues from the inside out, victims of human rights abuse overseas are left with few options for remedy in the United States.[28] In response to this (and similar situations around the world), the United Nations has adopted a human rights due diligence model as the centerpiece of its BHR work. The U.N. Guiding Principles on Business and Human Rights (the UNGPs or Guiding Principles),[29] adopted unanimously by the U.N. Human Rights Council in 2011, is the expression of this work and the key international soft law framework on business and human rights.[30] The UNGPs are organized into three pillars: the state's duty to protect human rights,[31] the corporation's responsibility to respect human rights,[32] and victims' access to an effective remedy.[33] Each pillar contains foundational principles and operational principles. There is a commentary to each principle. Pillar I, drawing on international human rights law (IHRL), recognizes states as the primary duty bearers for preventing adverse human rights impacts of businesses.[34] Under IHRL, states must take positive steps to ensure that the rights of persons within their jurisdiction are protected from activities of non-state actors harmful to human rights, including businesses.[35] As the state duty to

27. For examples, see *supra* note 9.

28. *See generally* Beth Stephens, *Extraterritoriality and Human Rights after Kiobel*, 28 Md. J. Int'l L. 256 (2013) (discussing the extraterritoriality challenges for multinational corporations in particular after the Supreme Court case of *Kiobel*).

29. *UNGPs*, *supra* note 10.

30. *Id.*

31. *Id.* at 4 (identifying the three pillars on which the "Protect, Respect, and Remedy" framework rests).

32. *Id.*

33. *Id.*

34. *Id.*

35. U.N. Hum. Rts. Comm. (HRC), Gen. Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) [hereinafter General Comment 31]; U.N. Comm. on Econ., Soc. and Cultural Rts.

protect is a standard of conduct, it is up to each state to determine the steps it must take to fulfil its duty to protect.[36] Generally, the UNGPs do not contain extraterritorial legal obligations—obligations of the home state (the state where the business is legally located) to prevent and redress activities that happen in the host state (the state where the business is engaged in operations/activities).[37] However, within the broader framework of IHRL, the Committee on Economic, Social and Cultural Rights has taken a more expansive approach, stating in a General Comment that there *is* an expectation on states to:

> take steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control, especially in cases where the remedies available to victims before the domestic courts of the State where the harm occurs are unavailable or ineffective.[38]

The operational principles of Pillar I tell states to encourage, and where appropriate require, business enterprises to communicate how they address their human rights im-

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(CESCR), Gen. Comment No. 24 on State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, ¶ 14, U.N. Doc. E/C.12/GC/24 (Aug. 10, 2017) [hereinafter General Comment 24]; U.N. Hum. Rts. Council, Business and Human Rights: Towards Operationalizing the "Protect, Respect and Remedy" Framework – Rep. of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, ¶¶ 8, 13, U.N. Doc. A/HRC/11/13 (Apr. 22, 2009) [hereinafter HRC, Operationalizing the Framework].

36. General Comment 31, *supra* note 35, ¶ 13; HRC, Operationalizing the Framework, *supra* note 35, ¶ 14. *See* Anil Yilmaz Vastardis & Rachel Chambers, *UN Guiding Principle Number 3, in* THE RESEARCH HANDBOOK ON THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (Barnali Choudhury, ed., forthcoming 2022) (on file with author).

37. *UNGPs*, *supra* note 10, ¶ 26 and Commentary.

38. General Comment 24, *supra* note 35, ¶ 30. Note that the United States has not ratified ICESCR. The General Comment explains when states parties may exercise control: "Consistent with the admissible scope of jurisdiction under general international law, states may seek to regulate corporations that are domiciled in their territory and/or jurisdiction: this includes corporations incorporated under their laws, or which have their statutory seat, central administration, or principal place of business on their national territory." *Id.* at ¶ 31.

pacts.[39] They also have a catch-all provision telling states to enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps.[40] Their commentary tells states to provide businesses with guidance on human rights due diligence (HRDD), but otherwise they do not compel states to mandate companies to conduct HRDD.[41] The U.N. Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (the Working Group)[42] has issued guidance to help states implement their obligations set out under the UNGPs, specifically with regard to the development of National Action Plans.[43] In its guidance, the Working Group has indicated that HRDD should be the foundational principle guiding governments on the issue of business and human rights.[44]

Under Pillar II (the corporation's responsibility to respect human rights), business actors are expected to "operationalize" their responsibility[45] to respect human rights through re-

39. *UNGPs*, *supra* note 10, ¶ 3(d).

40. U.N., Off. of High Comm'r, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, at Principle 3(a), U.N. Doc. HR/PUB/11/04 (2011) [hereinafter U.N., Implementing the Framework].

41. *Id.* at Principle 3.

42. This Working Group was established by the Human Rights Council in 2011 with a mandate that includes promoting the UNGPs and good practices and lessons learnt on the UNGPs' implementation. U.N. Working Grp. on Bus. and Hum. Rts., U.N. OFF. OF THE HIGH COMMISSIONER, https://www.ohchr.org/en/special-procedures/wg-business (last visited Mar. 31, 2022).

43. U.N. WORKING GRP. ON BUS. AND HUM. RTS., GUIDANCE ON NATIONAL ACTION PLANS ON BUSINESS AND HUMAN RIGHTS (Nov. 2016), https://www.ohchr.org/Documents/Issues/Business/UNWG_NAPGuidance.pdf.

44. *Id.* at ii.

45. As the foundational document for the UNGPs – the Three Pillar Framework– makes clear, the responsibility held by corporations is not a legal one under international law. *See* John Ruggie (Special Representative to the UN Human Rights Council), The UN "Protect, Respect, and Remedy" Framework for Business and Human Rights, U.N. Doc. at 2, (Sep. 2010), https://media.business-humanrights.org/media/documents/files/reports-and-materials/Ruggie-protect-respect-remedy-framework.pdf (stating that "the term 'responsibility' rather than 'duty' is meant to indicate that respecting rights is not currently an obligation that international human rights law generally imposes directly on corporations").

porting processes and HRDD.[46] Under the reporting processes, businesses are expected to communicate the steps they take to address human rights impacts by publishing sufficiently detailed information on any impacts and steps taken to prevent, mitigate, and remediate them, in appropriate form and with appropriate frequency.[47] The concept of HRDD supplements the reporting processes just described. According to the UNGPs, HRDD entails a business identifying whether it has caused or contributed to adverse human rights impacts by integrating and acting upon the findings, tracking responses, and remediating the harm if it has caused or contributed to an adverse impact.[48]

The model for implementing HRDD has been widely accepted[49] and there are movements underway—particularly in Europe—to place this soft law on a firmer footing. Starting in France,[50] before moving to the Netherlands,[51] Germany,[52] Norway,[53] and the European Union more broadly,[54] lawmakers are accepting the need to create a system that requires companies to conduct HRDD throughout their global operations.

The situation in the United States is very different. There is no legislative framework ensuring that U.S. companies re-

46. U.N., Implementing the Framework, *supra* note 40, at Principles 16–24 (these are the "operational principles" in relation to the "corporate responsibility to respect" pillar).

47. *Id.* at Principle 17.

48. *Id.*

49. *See, e.g.*, Off. of High Comm'r, *The Corporate Right to Respect Human Rights: An Interpretive Guide*, at 1, , U.N. Doc. HR/PUB/12/02 (2012), https://www.ohchr.org/sites/default/files/Documents/Publications/HR.PUB.12.2_En.pdf (discussing the Guiding Principles and, with it, the human rights due diligence as "the global standard of practice").

50. Loi de Vigilance, *supra* note 11.

51. Dutch Child Labor Due Diligence Law, *supra* note 12. This is likely to be superseded by a human rights due diligence law that is not focused solely on the issue of child labor. *See* OECD Watch, *supra* note 12.

52. Act on Corporate Due Diligence Obligations in Supply Chains, *supra* note 13. *See* Krajewski, Tonstad & Wohltmann, *supra* note 13.

53. Act Relating to Enterprises' Transparency and Work on Fundamental Human Rights and Decent Working Conditions, *supra* note 14.

54. EUR. COALITION FOR CORP. JUST., *supra* note 15.

spect human rights throughout their global operations,[55] despite the fact that the United States was a member of the Human Rights Council that adopted[56] the Guiding Principles.[57] Domestic follow-up to the UNGPs has been stilted, as demonstrated by a lackluster National Action Plan on Responsible Business Conduct of 2016[58] and the absence of further legislation.[59] While some steps have been taken on the subnational level (mainly in the state of California),[60] most of these

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55. There are a number of legislative proposals, mainly for disclosure laws, but none has been adopted yet. *See* LITTENBERG, OLDSHUE, BELIVEAU & BINDER, *supra* note 16.

56. *See* List of Past Members of the Human Rights Council,? U.N. HUM. RTS. COUN., https://www.ohchr.org/EN/HRBodies/HRC/Pages/PastMembers.aspx.

57. U.N., Implementing the Framework, *supra* note 40.

58. U.S. DEP'T OF STATE, RESPONSIBLE BUSINESS CONDUCT: FIRST NATIONAL ACTION PLAN FOR THE UNITED STATES OF AMERICA (2016), https://2009-2017.state.gov/documents/organization/265918.pdf. The plan was rushed through in the final weeks of the Obama Administration. The Biden Administration has announced a consultation for a new plan. *See* Anthony J. Blinken, U.S. Sec'y of State, 10th Anniversary of the UN Guiding Principles on Business and Human Rights (June 16, 2021), https://www.state.gov/10th-anniversary-of-the-un-guiding-principles-on-business-and-human-rights/. National Action Plans are frameworks developed by states to help them implement various international obligations. The U.N. Working Group on Business and Human Rights strongly encourages all states to develop, enact and update a national action plan on business and human rights as part of the state responsibility to disseminate and implement the UNGPs, *supra* note 42. *See United States*, NAT'L ACTION PLANS ON BUS. AND HUM. RTS., https://globalnaps.org/country/usa/ (last visited Apr. 3, 2022); *see also* INT'L CORP. ACCOUNTABILITY ROUNDTABLE, ASSESSMENT OF THE NATIONAL ACTION PLAN (NAP) ON BUSINESS AND HUMAN RIGHTS OF THE UNITED STATES (2017), https://globalnaps.org/wp-content/uploads/2017/11/icar-analysis-usa.pdf.

59. Both the relevant laws in force, the California Transparency in Supply Chains Act, CAL. CIV. CODE § 1714.43 (2012), and sections 1502 and 1504 of the Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), predate the adoption on the UNGPs. For recent federal initiatives, see U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., *U.S. Government Efforts to Advance Business and Human Rights in 2020* (Jan. 11, 2021), https://www.state.gov/u-s-government-efforts-to-advance-business-and-human-rights-in-2020/. The main actions are Withhold Release Orders under section 307 of the Tariff Act of 1930 preventing import of certain products made with forced labor and government advisories. 19 U.S.C. § 1307 (2016).

60. For instance, the California Transparency in Supply Chains Act, requiring companies to report what (if any) steps they have taken to address trafficking in their efforts. CAL. CIV. CODE § 1714.43 (2012). For a critique

initiatives represent minimal efforts to comply with a state's Pillar I obligations under the UNGPs.[61] The result is that the United States is not providing U.S. and foreign corporations who choose to access U.S. securities markets with clear rules for when they will be held accountable for complicity in human rights violations—nor does the United States have a reputation as a global leader in the fight against serious human rights violations by corporate actors, as it does with respect to the fight against bribery and corruption. In the next part we will examine U.S. law as it currently stands, before showing (in Part III) how European states are taking on a global leadership role in legislating on business and human rights.[62]

II.
LIMITS OF THE DISCLOSURE MODEL

For those wishing to address the negative human rights impacts of corporations, few options are available within the United States.[63] At the subnational level, only California has taken strides to directly regulate business on any facet of extraterritorial human rights abuses.[64] Specifically, California has passed the Transparency in Supply Chains Act (TSCA), which requires corporations to report on what steps (if any) they have taken to identify and address forced labor and human

regarding the disclosure-based model, see *infra* Part II. *See also* Martin, *Hiding in the Light, supra* note 17.

61. *Id.* at 566–78.

62. Despite lagging, the opportunity remains for the United States to leapfrog over the European legislative initiatives and build on its strength in combating bribery and corruption to forge a new role. For further discussion on this possibility, see *infra* Part IV.

63. Arguably, the most active government enforcement of a law touching on corporate human rights impacts in recent years has been through the use of Withhold Release Orders which implements section 307 of the Tariff Act of 1930. *See* THE HUM. TRAFFICKING LEGAL CTR., *supra* note 23, at 3, 26; *see also* David Hess, *Modern Slavery in Global Supply Chains: Towards a Legislative Solution*, CORNELL INT'L L.J. (forthcoming 2022).

64. On January 7, 2022, a new bill in New York state was presented, initially drafted in October 2021, that would require fashion companies to disclose information on human rights and environmental impacts throughout their supply chains if passed into law. *See* Fashion Sustainability and Social Accountability Act, Assemb. 8352, 2021–22 Reg. Sess. (N.Y. 2021), https://www.nysenate.gov/legislation/bills/2021/A8352.

trafficking within their supply chains.[65] Although there is some movement on these issues within the state system—for instance the Uniform Law Commission has formed a committee to examine the feasibility of a uniform law that would address coercive labor practices in supply chains[66]—California remains the pioneer in its efforts to regulate businesses in this way. At the federal level, the Dodd–Frank Act required companies to disclose non-financial information that also impacts human rights.[67] Unfortunately, as the next section will demonstrate, both the California and federal initiatives on this front have been viewed by many as a failed attempt to advance efforts to mitigate negative human rights impacts precisely because of their disclosure-based framework.[68]

A. *Overview of the U.S. Disclosure Framework*

There are currently only two legal frameworks in the United States that require corporations to disclose human rights impacts: one under California law and two under federal law. In 2010, California became the largest (and, to date, the only) state within the United States to take on the role of corporate involvement with coercive labor practices overseas when it passed the TSCA.[69]

Also in 2010, the U.S. Congress enacted the Dodd–Frank Act. While the law was predominantly enacted in response to the financial crisis of 2008, there were two provisions within the bill that had a direct effect on corporate human rights reporting.[70] The first, the Conflict Mineral Rule (promulgated

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65. CAL. CIV. CODE. § 1714.43.

66. *See Supply Chain Transparency Committee*, UNIFORM LAW COMMISSION (2020), https://www.uniformlaws.org/committees/community-home?CommunityKey=8b5ff376-8537-41c9-8dfb-928fd271d406 (noting the committee's charge to "study the need for and feasibility of state legislation dealing with transparency in the context of international supply chains" and determine if "reporting requirements for business with respect to human trafficking, child labor, or substandard production and facility standards is desirable and feasible.")

67. Dodd–Frank Wall Street Reform and Consumer Protection Act, PUB. L. NO. 111-203, §§ 1502, 1504, 124 Stat. 1376, 2213–18, 2220–22 (2010) (codified as amended in scattered sections of U.S.C.)

68. *See* Martin, *Hiding in the Light*, *supra* note 17, at 578.

69. CAL. CIV. CODE. § 1714.43.

70. Dodd–Frank Wall Street Reform and Consumer Protection Act, PUB. L. NO. 111-203, §§ 1502, 1504 (2010).

pursuant to § 1502 of Dodd–Frank), was designed to prevent money from conflict minerals[71] from being used to finance human rights violations in the Democratic Republic of the Congo (DRC). The second, the Resource Extraction Payment Rule (brought under § 1504 of the Dodd–Frank Act), was an attempt to "prevent the exploitation of citizens and the enrichment of corrupt government officials in resource-rich states."[72]

Both the California[73] and the federal framework rely on a *comply or explain* approach to regulate corporate human rights abuses. Under the California law, corporations with global annual revenues in excess of $100 million that do business in California must *comply* with the law by disclosing on their website any initiatives they undertake to eliminate coercive labor practices in their supply chain.[74] However, corporations can also satisfy this obligation by *explaining* that they have not taken any initiatives to eliminate trafficking in their supply

71. *Id.* § 1503(e)(4) (identifying columbite-tantalite (coltan), cassiterite, gold, wolf-ramite, or "any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the Democratic Republic of the Congo or an adjoining country.") The "derivatives" stated in the statute include "tantalum. tin, tungsten, and gold" which is often described as "3TG" by companies. RESPONSIBLE MINERALS INITIATIVE, *What are conflict minerals?*, https://www.responsiblemineralsinitiative.org/about/faq/general-questions/what-are-conflict-minerals/.

72. Martin, *Hiding in the Light*, *supra* note 17, at 538.

73. At the time it was passed, the TSCA was internationally groundbreaking, and certain countries have adopted laws modeled on it, notably the United Kingdom. *See* Modern Slavery Act 2015, c. 30 (U.K.). There are also proposals for similar laws in Australia, New Zealand, and Canada. *See Modern Slavery Act 2018* (cth) (Austl.); Fighting Against Forced Labour and Child Labour in Supply Chains Act, S-211 (Can. 2021), https://www.parl.ca/legisinfo/en/bill/44-1/s-211; ROPES & GRAY, *New Zealand Moves Towards Proposal of Modern Slavery Legislation that Would Create New Compliance Obligations for U.S. Based and Other Multinationals* (May 20, 2022), https://www.ropesgray.com/en/newsroom/alerts/2022/May/New-Zealand-Moves-Toward-Proposal-of-Modern-Slavery-Legislation-that-Would-Create-New-Compliance.

74. Companies must disclose what initiatives (if any) they have undertaken within five methodological categories: (1) verifying and evaluating the risk of trafficking in their supply chains; (2) performing audits of suppliers; (3) requiring supplier certification; (4) creating accountability standards and procedures for both employees and contractors; and (5) providing corporate training on slavery and human trafficking. CAL. CIV. CODE. § 1714.43(c)(1)–(5).

chains.[75] As such, California relies on consumers, investors, and civil society organizations to act on the information disclosed and pressure companies to improve their performance.[76]

Similarly, the two federal laws on this issue also request that companies disclose whether they have engaged in the specific activity mentioned in the regulation: either using conflict minerals in their supply chain (under Rule 1502), or making payments to foreign governments, which has been linked to issues of corruption (under Rule 1504). For instance, the Conflict Mineral Rule[77] imposes reporting requirements on any reporting[78] company that used conflict mineral rules as a necessary part of their business model.[79] The rule also requires that

75. Consumers have no private right of action for violations of the TSCA. Rather, the California Attorney General has exclusive enforcement powers. To date, there have been no actions brought by the Attorney General. It is argued that companies will only start paying attention to the TSCA when agencies start bringing enforcement actions for violations (similar to the FCPA and insider trading laws). *See* Rachel Chambers & Anil Yilmaz Vastardis, *Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability*, 21 CHICAGO J. INT'L L. 323, 337–38 (2021).

76. *Id.* at 338.

77. The Trump Administration opposed section 1502 and drafted a proposal to suspend it. Ed Pilkington, *Proposed Trump Executive Order Would Allow US Firms to Sell 'Conflict Minerals'*, THE GUARDIAN (Feb. 8, 2017), https://www.theguardian.com/us-news/2017/feb/08/trump-administration-order-conflict-mineral-regulations. Verification and enforcement were stepped down. *See* RESPONSIBLE SOURCING NETWORK, MINING THE DISCLOSURES 2019: AN INVESTOR GUIDE TO CONFLICT MINERALS AND COBALT REPORTING IN YEAR SIX 4, 9 (2019), https://static1.squarespace.com/static/594cbfa3440243aef3dfa1c4/t/5dee7d1b9d16d153cba70a04/1575911082732/MiningtheDisclosures+2019.pdf. Whether coincidentally or because of these developments, very little verification and enforcement of this law has occurred in practice. Marc Butler, *Why the Conflict Minerals Rule Refuses to Die*, INTELLIGIZE (June 21, 2018), https://www.intelligize.com/why-the-conflict-minerals-rule-refuses-to-die/. It does not appear as if the Biden Administration is taking any proactive steps to change the status quo left by the Trump Administration.

78. Reporting companies are any companies that have registered their securities with the SEC, and as such, are required to file periodic reports with the Commission pursuant to sections 1, 13, or 15(d) of the Exchange Act. *See* Securities Exchange Act of 1934, §§ 12, 13, 15; 15 U.S.C. §§ 78l, 78m, 78o.

79. Conflict Minerals, 77 Fed. Reg. 56,274, 56,276 (Sept. 12, 2012) (codified at 17 C.F.R. pts. 240, 249b).

the issuer submit a report, as necessary, that "includes a description of the measures taken by the [issuer] to exercise due diligence on the minerals' source and chain of custody."[80] To that end, the SEC adopted Form SD, a specialized disclosure report form that requires companies to investigate the country of origin of their minerals.[81] If, in turn, a company discovers that any of their necessary products contained conflict minerals that originated in the DRC, it must: (1) employ a due diligence mechanism, specifically with regards to the source and chain of custody of its materials; and (2) file annual reports discussing its mechanisms on both its website and with the SEC.[82]

Also, as part of the Dodd–Frank Act, the SEC was tasked with developing rules on Resource Extraction Payment to address the resource curse.[83] The rules require corporations involved in resource extraction to disclose whether they have made any payments to foreign governments to "further the

80. *Id.*

81. *Id.* at 56,280.

82. *Id.* at 56,310. The Conflict Mineral Disclosure Report, in turn, requires the following items: (a) a description regarding what due diligence measures the company took; (b) a statement regarding the company's independent audit mechanisms; and (c) a risk mitigation analysis that discussed additional steps the company took to improve its due diligence in this area. *See id.* at 56,363. The required risk mitigation analysis is probably the closest the United States has to an mHRDD law, but it can be distinguished from the European model by the lack of definition of due diligence, which allows corporations to apply a more traditional due diligence model than the human rights due diligence framework.

83. *See* Commissioner Caroline A. Crenshaw, Statement of Resource Extraction, Dec. 16, 2020 (dissenting), n. 7. The term "resource curse" refers to a historical phenomenon whereby many states (and regions) with an abundance of natural resources face significant economic challenges, often at the hands of foreign investors who extract resources from the area without either providing adequate compensation or supporting the community. *See* NATURAL RESOURCE GOVERNANCE INSTITUTE, THE RESOURCE CURSE: THE POLITICAL AND ECONOMIC CHALLENGES OF NATURAL RESOURCE WEALTH (Mar. 2015), https://resourcegovernance.org/sites/default/files/nrgi_Resource-Curse.pdf. For an academic treatment of the issue within the context of business and human rights, see Nyakundi M. Michieka & Dustin Blankenship, *Avoiding the Resource Curse: Applying the Guiding Principles in Kenya*, *in* THE BUSINESS AND HUMAN RIGHTS LANDSCAPE: MOVING FORWARD, LOOKING BACK 559, 559–73 (Jena Martin & Karen E. Bravo eds., 2016).

commercial development of oil, natural gas, or minerals."[84] This particular section of Dodd–Frank was to provide, in the words of one commentator, a "promising strategy to help lift this so-called 'resource-curse' [through] natural resource revenue transparency. The idea is simple: force international companies to disclose what they pay—and to whom—and then let local stakeholders and international NGOs make use of this information to hold corrupt leaders accountable."[85]

Unfortunately, the rule has largely stalled. After a protracted fight in the courts, Congress intervened and repealed the rule using the Congressional Review Act (CRA).[86] President Trump signed a law repealing the rule on February 14, 2017.[87] As one of us has previously noted:

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84. Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. 56,365, 56,365 (Sept. 12, 2012) (codified at 17 C.F.R. pts. 240, 249).

85. Daniel Firger, *Lifting the Resource Curse: Will Dodd-Frank Do the Trick?*, HUFFPOST, (May 25, 2011), http://www.huffingtonpost.com/daniel-firger/post_945_b_741761.html. According to Firger, "corporations from ExxonMobil on down were caught by surprise when the provision was inserted into Dodd–Frank at the 11th hour." *Id.* During the comment period for the subsequent proposed rule, current and former U.S. senators stated that "transparency is a critical tool to ensure that citizens in resource rich countries can monitor the economic performance of oil, gas, and mining projects and ensure that revenues, especially if more meager than hoped, are used responsibly." Disclosure of Payments by Resource Extraction Issuers, Exchange Act Release No. 34–78167, 81 Fed. Reg. 49360, 49362 (July 27, 2016); *see also id.* at 49,372 n.194 (citing Letter from Richard G. Lugar, U.S. Sen. (Ret.), Carl Levin, U.S. Sen. (Ret.), & Christopher J. Dodd, U.S. Sen. (Ret.), to Hon. Mary Jo White, Chair, SEC (Feb. 4, 2016)). In that regard, as we note later, section 1504 shares characteristics of the FCPA (particularly in that it targets payments to foreign governments in a way that requires them to disclose their payments to foreign officials, which as Firger highlights, can be used in the fight against corruption). Firger, *supra* note 85.

86. H.R.J. Res. 124, 115th Cong (2017). *See also* Nicholas Grabar & Sandra L. Flow, *Congress Rolls Back SEC Resource Extraction Payments Rule*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 16, 2017), https://corpgov.law.harvard.edu/2017/02/16/congress-rolls-back-sec-resource-extraction-payments-rule/. Under the CRA, Congress is allowed to use a simple majority vote to disapprove of a rule that has not yet become effective. Moreover, any vote under the CRA is not subject to judicial review. *Id.*

87. Pub. L. 115–4. *See also* Roger Yu, *Trump Signs Legislation to Scrap Dodd–Frank Rule on Oil Extraction*, USA TODAY (Feb. 15, 2017, 2:13 PM), https://www.usatoday.com/story/money/2017/02/14/trump-scraps-dodd-frank-rule-resource-extraction-disclosure/97912600/. This was the first legislation that President Trump signed into law. *Id.*

> [T]he SEC is caught between a rock and hard place. On the one hand, it is still mandated under [the Dodd–Frank Act] to promulgate a rule requiring resource-related corporate payments to be disclosed. On the other hand, [under the CRA] the SEC cannot re-issue an identical or substantially similar rule as the one rejected by Congress. The SEC's previous action and inaction regarding § 1504 have resulted in legal challenges on everything from the substance, process, and constitutional manner of promulgation.[88]

And, yet, somehow, it seems that the SEC has managed. In December 2020, the SEC adopted a new rule.[89] It is weak in comparison to the previous rule. Extractive companies covered by the rule will only have to report their aggregate payments at the national or subnational level, rather than on a more detailed per-project basis, as the previous rule had required.[90] The minimum payment reporting threshold has been raised from $100,000 to $150,000, which, according to critics, is too high.[91] Civil society organizations are unlikely to be satisfied with the new rule, hence the prediction that "organizations such as Oxfam and Public Citizen will continue their already sustained push to repeal the new rule or effectively stop it from being implemented."[92]

The comply or explain approach has limited effect. For instance, a company can satisfy its obligations under the TSCA by stating that it is taking no action in each of the five categories listed in that Act.[93] Moreover, in the case of California, while *the information* must be publicly disclosed, there is no central disclosure system or repository for the *names* of compa-

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88. Martin, *Hiding in the Light*, *supra* note 16, at 547 (footnotes omitted).

89. Press Release, SEC, SEC Adopts Final Rules for the Disclosure of Payments by Resource Extraction Issuers (Dec. 16, 2020), https://www.sec.gov/news/press-release/2020-318.

90. Isa Mirza, *SEC Issues Controversial New Rule on Payment Transparency in the Natural Resource Sector,* JD SUPRA (Dec. 18, 2020), https://www.jdsupra.com/legalnews/sec-issues-controversial-new-rule-on-93504/.

91. *Id.*

92. *Id.*

93. *See* Jena Martin, *Guest Blog: ULC's Work on Coercive Labor Practices in Supply Chains, Part 2*, BUS. L. PRO. BLOG (Aug. 23, 2020), https://lawprofessors.typepad.com/business_law/2020/08/guest-blog-ulcs-work-on-coercive-labor-practices-in-supply-chains-part-2.html.

nies that would be subject to the Act.[94] As such, civil society actors and advocates can only guess as to which companies fall within the law's ambit. In addition, while the federal laws require an annual disclosure, under the TSCA this is a one-off event, meaning that once a company has posted its disclosure, it has satisfied the law's requirements.[95] Consumers and shareholders do not have a private right of action in any of these frameworks. In short, disclosure-based frameworks for corporate engagement in the area of human rights such as the TSCA and Rules 1502 and 1504 tend to represent a minimal amount of engagement from companies and may, in certain instances, be counter-productive to increasing corporate accountability for negative human rights impacts.[96]

Despite these limitations, the disclosure model is the only framework that has been adopted in the United States. There are several potential reasons for this. First, disclosure laws would satisfy the minimal level of state obligations under Pillar 1 of the Guiding Principles.[97] Similarly, a corporation that has provided disclosure under a comply or explain framework arguably could satisfy their responsibility to respect under Pillar 2 of the UNGPs.[98] Finally, compared to other forms of regulation, disclosure laws in the United States seem to be favored by corporations; this, in turn, leads to a greater likelihood of political will by lawmakers for their passage.[99] As we discuss below, the situation in Europe is significantly different.

III.
An Analysis of the Human Rights Due Diligence Model – Geographically & Substantively

> *Empirical work continues to find no evidence that risk assessment and enhanced due diligence foster peace, even for multinational corporations (MNCs). More often, these are tools for MNCs that allow them to escape legal liability in*

94. *Id.*
95. *See* Cal. Civ. Code § 1714.43.
96. *See* Martin, *Hiding in the Light*, *supra* note 17, at 565.
97. *See id.* at 563–64.
98. *Id.* at 564–65.
99. It could be that disclosure laws are largely favored because U.S. companies are already accustomed to the regime under the securities regulation framework. As such, adding one more disclosure, while inconvenient, is far less daunting.

their home countries while still often operating in ways that undermine peace.[100]

In contrast to the weak, disclosure-based BHR legislative initiatives in the United States, in Europe, there is a gradual movement towards the adoption of HRDD laws,[101] indicating a process of translation of this concept from the UNGPs from soft into hard law.[102] HRDD laws are not a homogenous group, however. Although all laws of such kind require companies to undertake HRDD, the HRDD obligations differ in scope and in how companies are held accountable for inadequate HRDD. Some laws, for instance the French law, expressly provide for civil liability when harm eventuates because of a company's failure to conduct adequate HRDD; but, as will be seen, bringing civil liability claims under this law presents a significant challenge to victims.[103] Other laws, such as the German law discussed below, do not provide for civil liability to a victim of human rights abuse.[104] An international discussion about the different types of HRDD laws and the implications of the different regulatory models is underway.[105] For in-

100. John E. Katsos, *Business, Human Rights and Peace: Linking the Academic Conversation*, 5 BUS. & HUM. RTS. J. 221, 231 (2020). Later, Katsos further elaborates on the inadequacy of due diligence by stating "[a] proactive legal requirement to protect human rights would likely look quite similar to one that promoted peace and would hopefully move companies beyond due diligence standards and the off-loading of legal liability." *Id.* at 238.

101. Such laws have been proposed, adopted, and entered into force in various European countries. *See* Jonathan Drimmer et al., *Human Rights Diligence Catching Up to Anti-Corruption*, PAUL HASTINGS LLP (June 1, 2020), https://www.paulhastings.com/insights/client-alerts/human-rights-diligence-catching-up-to-anti-corruption. Note that the Dutch law is limited to due diligence on child labor, rather than due diligence for the full range of human rights violations. We focus on the French, German, and Norwegian laws, as well as a legislative proposal at the EU level. *See* discussion *infra* Part III.

102. Chiara Macchi & Claire Bright, *Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation*, *in* LEGAL SOURCES IN BUSINESS AND HUMAN RIGHTS: EVOLVING DYNAMICS IN INTERNATIONAL AND EUROPEAN LAW 218, 218–19, 240 (Martina Buscemi et al. eds., 2020).

103. *See* discussion *infra* Part III.A. and accompanying notes.

104. *See* discussion *infra* Part III.B. and accompanying notes.

105. *See, e.g.,* Off. of High Comm'r, *U.N. Human Rights "Issues Paper" on Legislative Proposals for Mandatory Human Rights Due Diligence by Companies* (June 12, 2020), https://www.ohchr.org/sites/default/files/Documents/Issues/Business/MandatoryHR_Due_Diligence_Issues_Paper.pdf.

stance, the Office of the U.N. High Commissioner for Human Rights (OHCHR) published an "issues paper" on this subject which includes categories of the HRDD regime and guidance for states on framing legal obligations.[106] Absent in this discussion, however, is an analysis of the model we propose, namely the prohibitive model.[107]

A. *France*

France is the first and only country to date that has established a HRDD requirement in law.[108] The French Law on the Corporate Duty of Vigilance, enacted in 2017, compels French companies that meet threshold criteria for size to establish and implement an annual vigilance plan.[109] The plan covers a company's own activities, the activities of companies the company controls, and the activities of subcontractors and suppliers with whom the company has an established commercial relationship.[110] The plan must contain the steps that the company will take to detect risks and prevent serious violations with respect to human rights and fundamental freedoms, health and safety, and the environment.[111] To create the plan, the company must map out and analyze the risks it may present to the enumerated rights and freedoms, and it must put measures in place to mitigate these risks and address negative impacts if they occur. Such measures include an alert mecha-

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106. *Id.* at 12–14.

107. *Id.*

108. *See* Rachel Chambers & Gerlinde Berger-Walliser, *The Future of International Corporate Human Rights Litigation: A Transatlantic Comparison*, 58 AM. BUS. L.J. 579, 605 (2021) (discussing the law and its requirements for companies); Li-Wen Lin, *Mandatory Corporate Social Responsibility Legislation Around the World: Emergent Varieties and National Experiences*, 23 U. PA. J. BUS. L. 429, 437 (2021) (discussing the law's mandatory vigilance plan requirements). By comparison, the Netherlands has adopted an issue-specific law, the Dutch Child Labor Due Diligence Law of 2019, and Switzerland is expected to enact a limited version of a HRDD law soon. *See* Hess, *supra* note 63, at 40.

109. The law applies to any company registered in France that has (a) 5,000 or more employees, including employees of its direct or indirect French-registered subsidiaries; or (b) 10,000 or more employees, including employees of its direct or indirect French-registered or foreign subsidiaries. *See* Loi de Vigilance, *supra* note 11.

110. *Id.* art. 1.

111. *Id.*

nism and a monitoring scheme to follow up on the plan's implementation.[112]

There is civil liability under the law for failure to fulfil the requirements of the duty of vigilance.[113] This is fault-based liability, requiring a causal link between the company's failure to establish or effectively implement a vigilance plan (the breach) and the resulting damage.[114] In practice, this is likely difficult to prove when a subsidiary, supplier, or other affiliate is the primary perpetrator of the human rights violation.[115] The law also contains an enforcement mechanism, whereby any interested party can seek an injunction from the courts requiring a company to comply with the law, first having served notice to the company of its alleged failure to do so.[116]

The enforcement mechanism was triggered for the first time in 2019 and has now been used in several instances, with two cases having reached court so far.[117] Beyond the role of

112. *Id.*

113. *Id.* art. 2. The law expressly links the specific duty of vigilance to the general tort provisions in Art. L. 1240 C. civ. and Art. L. 1241 C. civ. in the French Civil Code. *Id.*

114. Stéphane Brabant & Elsa Savourey, *Loi sur le devoir de vigilance, pour une approche contextualisée*, Revue Internationale de la Compliance et de l'Éthique des Affaires (2017), *translated in* BUS. & HUM. RTS. RES. CTR. 3 (2017), https://media.business-humanrights.org/media/documents/22c06f17a79b040b5170bcd636c79a4d3a3bc74a.pdf.

115. *See* Nicolas Bueno & Claire Bright, *Implementing Human Rights Due Diligence Through Corporate Civil Liability*, UNIV. ZURICH OPEN REPOSITORY & ARCHIVE 13 (2020); Almut Schilling-Vacaflor, *Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?*, 69 INT'L AND COMP. L. QUARTERLY 789 (2020) (describing the legal separation of parent firms as allowing them to maximize their profits while minimizing their liability).

116. *See* Loi de Vigilance, *supra* note 11, art. 1.

117. The two cases are against oil company TotalEnergies SE (Total). They allege that Total has failed to adequately undertake the duty of vigilance. *See Total Lawsuit (Re Failure to Respect French Duty of Vigilance Law in Operations in Uganda)*, BUS. & HUM. RTS. RES. CTR., https://www.business-humanrights.org/en/total-lawsuit-re-failure-to-respect-french-duty-of-vigilance-law-in-operations-in-uganda (last visited Apr. 6, 2022); *Total Lawsuit (Re Climate Change, France)*, BUS. & HUM. RTS. RES. CTR., https://www.business-humanrights.org/en/latest-news/total-lawsuit-re-climate-change-france/. In a recent victory in a procedural battle for the plaintiffs in the Total Uganda case, the French Supreme Court rejected the jurisdiction of the commercial courts in favor of the civil courts. *See also* Friends of the Earth France, *France's Highest Court Recognizes Jurisdiction of Civil Court in Case Against Oil Giant Total for Crimes in Uganda*, BUS. & HUM. RTS. RES. CTR. (Dec. 16, 2021), https://

the court as arbiter of such disputes, there is no state-based enforcement of the French law; for instance, there is no provision for criminal prosecution of companies where serious human rights violations occur, nor is there a provision for state-based oversight of the due diligence via a regulatory body.[118] Early studies on the quality of outputs from companies on their fulfilment of the corporate duty of vigilance are critical of these endeavors, suggesting that companies are taking a minimalist approach to fulfilling their obligations under the law.[119]

B. *Germany & Norway*

In June 2021, the German Federal Parliament approved the draft bill of a Supply Chain Due Diligence Act.[120] The draft bill obliges large German companies, and foreign companies with administrative headquarters in Germany,[121] to identify and assess human rights and environmental risks and to establish an adequate and effective risk management system to prevent or minimize human rights and environmental violations.[122] The draft bill will come into force at the beginning of

www.business-humanrights.org/en/latest-news/france-la-cour-de-cassation-rejette-la-compétence-des-tribunaux-de-commerce-dans-laffaire-total-ouganda/.

118. *See generally* Loi de Vigilance, *supra* note 11.

119. ACTIONAID ET AL., THE LAW ON DUTY OF VIGILANCE OF PARENT AND OUTSOURCING COMPANIES: YEAR 1: COMPANIES MUST DO BETTER 15 (Juliette Renaud et al. eds., 2019).

120. Sebastian Rünz, *Overview of the German Supply Chain Due Diligence Act*, TAYLORWESSING (July 28, 2021), https://www.taylorwessing.com/en/insights-and-events/insights/2021/07/overview-of-the-german-supply-chain-due-diligence-act#:~:text=After%20long%20and%20tough%20negotiations, force%20on%201%20January%202023. For the final act as passed, see Act on Corporate Due Diligence Obligations in Supply Chains, *supra* note 13.

121. Act on Corporate Due Diligence Obligations in Supply Chains, *supra* note 13, art. 1, § 1. The bill's scope includes companies with a central administration, principal place of business, administrative headquarters or statutory seat in Germany, and at least 3,000 employees in Germany. Starting Jan 1, 2024, this will be 1,000 employees. *Id.*

122. *Id.* art. 1, § 4. The Act's provisions are quite detailed. For example, to tackle identified human rights risks, companies are required to develop appropriate procurement strategies and purchasing practices, consider human rights when selecting suppliers, and use "contractual assurances" from suppliers and control mechanisms. *Id.* art. 1, § 6.

2023.[123] Companies are only required to conduct due diligence with respect to their own business operations and their direct suppliers' operations.[124] For indirect suppliers, which frequently play a large role in global supply chains, companies are not required to conduct a risk analysis proactively and systematically, but only on an ad hoc basis, when they gain "substantiated knowledge" of a potential human rights violation.[125] This restriction, along with the absence of a specific provision for civil liability in cases of human rights violations,[126] has prompted civil society organizations to describe the initiative as: "Not there yet, but finally at the start."[127] A Norwegian law, passed around the same time as the German law, does reach indirect suppliers by requiring companies to conduct human rights due diligence throughout their supply chains.[128] Like the German law, the Norwegian law does not contain any pro-

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123. *Id.* art. 5.

124. *See id.* art. 1, §§ 5–7. The Act's obligations apply to a company's own business area and that of direct suppliers; specifically, there is an obligation to conduct a human rights risk analysis, *id.* § 5, an obligation to adopt preventative measures to tackle identified risks, *id.* § 6, and an obligation to take remedial action, *id.* § 7.

125. *Id.* art. 1, § 9 (detailing obligations regarding indirect suppliers).

126. *Id.* art. 1, § 3 ("A violation of the obligations under this Act does not give rise to any liability under civil law. Any liability under civil law arising independently of this Act remains unaffected."). German tort law provides for compensation in cases where a person or company commits a breach of a statute that is intended to protect another person. The new law may well qualify as such a "protective" law and hence give human rights victims a cause of action. Virginia Harper Ho, Gerlinde Berger-Walliser & Rachel Chambers, *Corporate Groups: Toward Corporate Group Accountability, in* HANDBOOK OF CORPORATE LIABILITY (Martin Petrin & Christian Witting eds., forthcoming 2022).

127. INITIATIVE LIEFERKETTENGESETZ, NOT THERE YET, BUT FINALLY AT THE START: WHAT THE NEW SUPPLY CHAIN ACT DELIVERS – AND WHAT IT DOESN'T 1 (June 11, 2021), https://corporatejustice.org/wp-content/uploads/2021/06/Initiative-Lieferkettengesetz_Analysis_What-the-new-supply-chain-act-delivers.pdf.

128. *See* Act Relating to Enterprises' Transparency and Work on Fundamental Human Rights and Decent Working Conditions, *supra* note 14. Due diligence obligations apply through the supply chain, which is defined as "any party in the chain of suppliers and sub-contractors that supplies or produces goods, services or other input factors included in an enterprise's delivery of services or production of goods from the raw material stage to a finished product." *Id.* § 3(d).

vision for civil liability.[129] Both laws include provisions for administrative enforcement. In the case of the German law, these are strong administrative enforcement provisions, but they are vested in the Office for Economic Affairs and Export Control, as supervised by the Ministry for Economic Affairs and Energy.[130] The enforcement provisions include coercive measures to require a company to take certain due diligence steps,[131] and the ability to levy fines.[132] Administrative oversight of the Norwegian law will be undertaken by the national consumer protection agency.[133]

C. *The European Union*

The European Parliament adopted a resolution in March 2021 with recommendations to the European Commission for the adoption of an EU human rights due diligence law.[134] The European Commission responded with a new legislative proposal, the Directive on Corporate Sustainability Due Diligence, in February 2022.[135] The proposal would require EU Member States to introduce rules to compel companies[136] to "conduct human rights and environmental due diligence as laid down

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129. *See id.* Companies must report on their adverse impacts and measures taken to address them. *Id.* § 5. Consumers have a right to information on how companies address negative human rights risks and impacts. *Id.* § 6.

130. Act on Corporate Due Diligence Obligations in Supply Chains, *supra* note 13, art. 1, § 19.

131. *Id.* art. 1, § 15.

132. *Id.* art. 1, § 24(2). The highest fine for specific violations is up to two percent of the average annual turnover. *Id.* § 24(3). Repeat offenders can be excluded from being awarded public procurement contracts. *Id.* art. 1, § 22.

133. Act Relating to Enterprises' Transparency and Work on Fundamental Human Rights and Decent Working Conditions, *supra* note 14, § 9.

134. For the text of the recommendations on corporate due diligence and corporate accountability, see European Parliament Resolution of 10 March 2021 with Recommendations to Commission on Corporate Due Diligence and Corporate Accountability, EUR. PARL. DOC. 2020/2129 (INL) (2021), https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.pdf. *See also* EUR. COAL. FOR CORP. JUST., *supra* note 15.

135. *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937*, COM (2022) 71 final (Feb. 23, 2022).

136. Companies covered by the duty to do due diligence include all "very large" companies as well as "large" companies in just sectors (textiles, agriculture and extraction of minerals). No small or mid-size enterprises (SMEs) are covered. *Id.* at 14–15, 46–47.

in Articles 5 to 11."[137] These obligations extend to a company's own operations and those of its subsidiaries, and to entities within its value chain with whom the company has "an established business relationship."[138] Civil society organizations have criticized the draft law for limiting the due diligence obligation using this "established business relationship" test rather than requiring companies to conduct due diligence throughout their value chain, prioritizing the company's leverage over the primary perpetrator of the violation rather than prioritizing human rights risks based on their seriousness and the likelihood of the risks materializing.[139] Civil liability is provided in the proposal: EU Member States must ensure that companies are liable for damages if they failed to comply with the due diligence obligations and as a result of this failure, an adverse impact that should have been identified and prevented, occurred and led to damage.[140] This provision suffers from the same shortcomings that the Loi de Vigilance suffers from—in particular the challenge of overcoming the burden of proof.[141] There are further stages in the European Union's legislative process, however, and this text will likely evolve during the process.

137. *Id.* at 53. The following actions are specified: integrating due diligence into their policies in accordance with Article 5; identifying actual or potential adverse impacts in accordance with Article 6; preventing and mitigating potential adverse impacts, and bringing actual adverse impacts to an end and minimising their extent in accordance with Articles 7 and 8; establishing and maintaining a complaints procedure in accordance with Article 9; monitoring the effectiveness of their due diligence policy and measures in accordance with Article 10; and publicly communicating on due diligence in accordance with Article 11. *Id.*

138. *Id.* at 46. This test is akin to the test found in the French Loi de Vigilance, which extends to the activities of subcontractors or suppliers with whom there is an established commercial relationship. *See* Loi de Vigilance, *supra* note 11, art. 1.

139. *See Dangerous Gaps Undermine EU Commission's New Legislation on Sustainable Supply Chains*, EUR. COAL. ON CORP. JUST. (Feb. 23, 2022), https://corporatejustice.org/news/dangerous-gaps-undermine-eu-commissions-new-legislation-on-sustainable-supply-chains/.

140. *See Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive*, *supra* note 135, at 65.

141. *See* Bueno & Bright, *supra* note 115, at 803 (describing the difficulty of the plaintiff under the French Duty of Vigilance Law in proving that (i) the company breached its obligation and (ii) the company's failure caused the damage).

As discussed above, while these mHRDD frameworks are certainly an advancement over disclosure laws, we argue that, for several reasons, mHRDD is still not enough. First, rather than incentivizing corporations to examine the impact of their operations and relationships on the communities with which they engage, a human rights due diligence framework might turn into a navel-gazing exercise that once again has the corporation as the focal point, rather than the impacted individual or the community, or worse, into little more than another form of disclosure.[142] Second, by focusing on internal mechanisms rather than larger societal outcomes, human rights due diligence could become little more than a check-the-box exercise that a company does perfunctorily and superficially in order to avoid liability.[143] It is to this second point that we turn next.

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142. Indeed, one of us has previously argued this exact proposition. *See* Martin, *Hiding in the Light*, *supra* note 17, at 556–59, 569–70, 577 (discussing how the French law is similar to the other forms of disclosure laws, such as the U.K. Modern Slavery Act, that provide little support for the advancement of the business and human rights agenda).

143. This can be particularly problematic when companies perform their due diligence without any meaningful consultation with affected communities or impacted individuals. *See, e.g.*, WHEN BUSINESS HARMS HUMAN RIGHTS: AFFECTED COMMUNITIES THAT ARE DYING TO BE HEARD (Jena Martin, Karen E. Bravo & Tara Van Ho eds., 2020) (discussing the consequences of corporate activities on affected communities). Recent scholarship largely argues in favor of mHRDD on the basis that it represents a significant improvement on a disclosure-based framework. *See, e.g.*, Holly Cullen, *The Irresistible Rise of Human Rights Due Diligence: Conflict Minerals and Beyond*, 48 GEO. WASH. INT'L L. REV. 743, 743–44, 780 (2016). We are not, however, the first to draw attention to potential drawbacks of a mHRDD model. *See* Ingrid Landau, *Human Rights Due Diligence and the Risk of Cosmetic Compliance*, 20 MELBOURNE J. INT'L L. 221 (2019) (arguing that human rights due diligence fails to lead to genuine and substantial improvements in practice); Jonathan Bonnitcha & Robert McCorquodale, *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights*, 28 EUR. J. INT'L L. 899, 910 (2017) (describing "concerns that an exclusive focus on due diligence processes that are not tethered to the foundational responsibility to respect human rights may encourage 'tick-box' exercises that allow businesses to claim that they are compliant with the Guiding Principles"); Surya Deva, *The UN Guiding Principles' Orbit and Other Regulatory Regimes in the Business and Human Rights Universe: Managing the Interface*, 6 BUS. & HUM. RTS. J. 336, 339–41 (2021) (making the point that a state's duties under the UNGPs are not exhausted by adopting mHRDD legislation, and that, vice versa, a company's UNGPs responsibilities are not fulfilled by following mHRDD legislation).

D. *HRDD as a Check-the-Box Exercise*

Despite what appears to be a promising legislative trend in the civil law countries of Europe away from disclosure laws, the capacity of mHRDD to improve corporate human rights performance is far from a given. Ingrid Landau accurately observes that:

> There is a significant risk that these regulatory interventions will result in companies adopting policies and implementing internal compliance structures that exhibit some or all of the formal elements of HRDD—and have the purpose of conveying the appearance of taking action—but ultimately fail to achieve the public goal they are designed to achieve: that is, the reduction or elimination of adverse human rights impacts.[144]

Landau argues that certain features of HRDD, as a process-based regulation, increase its susceptibility to become a check-the-box exercise.[145] This susceptibility has also been observed by others, notably the U.N. Working Group on Business and Human Rights.[146]

The process-based nature of HRDD is one of its strengths, but it is also one of its weaknesses. A key feature of process-

144. Landau, *supra* note 143, at 222–23.

145. *See id.* at 234–35. Landau terms this "cosmetic compliance." *Id.* at 223 & n.6, 232, 235–239 (citing Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487 (2003)). Other similar formulations of this phenomenon, Landau notes, include superficial compliance, creative compliance, and paper compliance. Landau, *supra* note 143, at 223 n.6; *see also* Robert McCorquodale & Justine Nolan, *The Effectiveness of Human Rights Due Diligence for Preventing Business Human Rights Abuses*, 68 NETH. INT'L L.R. 455, 468 (2021) ("[T]he ongoing reliance on social auditing by businesses reflects a very limited vision of HRDD and may result in cosmetic or self-legitimating compliance-oriented responses . . . ."). Note that this argument has also been made in relation to disclosure, in what has been described as companies "decoupling" their disclosure from their operating practices. *See* David Hess, *The Transparency Trap: Non-Financial Disclosure and the Responsibility of Business to Respect Human Rights*, 56 AM. BUS. L.J. 5, 39–40 (2019).

146. Rep. of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, transmitted on 16 July 2018 by the Secretary-General Pursuant to Human Rights Council Resolutions 17/4 and 35/7, ¶¶ 25(c). 28, 73(c). U.N. Doc. A/73/163 (July 16, 2018) (identifying the tendency towards "tick the box" approaches to HRDD).

based regulation is that it seeks to require business to internalize public policy goals (i.e., respect for human rights and the environment) into its own internal systems and processes. This can be a strength, capitalizing on a company's inherent capacity to regulate itself and its superior access to company-specific information. However, these processes are subsumed within the firm's own objectives: that is, the production of profit and market share.[147] The two may sometimes, but do not always, coincide. There is always the danger that, where there is significant scope for managerial discretion and insufficient regulatory oversight, commercial objectives will prevail. By way of a simple example, in principle HRDD requires the business to assess, prioritize, and act on risks to rights-holders rather than to the business. In practice, however, the business's commercial objectives may be accorded equal, if not greater, weight in the prioritization process. Risks that are easier, cheaper to manage, or that have the potential to inflict the most reputational damage may be prioritized over those that are deemed the most severe.

There are inherent risks in process-based regulation.[148] In the case of HRDD, the risk of process trumping outcomes would appear particularly significant when there is absence of any liability incentive to undertake the process substantively. As noted above, only French law has a civil liability provision, and plaintiffs will face an uphill task in using that provision to gain access to remedy.[149] Other concerning features of the current crop of mHRDD laws that might lead to process trumping outcomes include a high level of ambiguity about what HRDD requires of them and a lack of any requirement

147. *See* Julia Black, *Forms and Paradoxes of Principles-Based Regulation*, 3 CAP. MKTS. L.J. 425, 444 (2008).

148. *See* Christine Parker, *Meta-Regulation: Legal Accountability for Corporate Social Responsibility?*, *in* THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW 207, 209 (Doreen McBarnet, Aurora Voiculescu & Tom Campbell eds., 2007) ("To the extent that law focuses on companies' *internal responsibility processes* rather than *external accountability* outcomes, law runs the risk of becoming a substanceless sham, to the delight of corporate power-mongers who can bend it to their interests. Law might be hollowed out into a focus on process that fails to recognize and protect substantive and procedural rights . . . .").

149. *See* discussion *supra* Part III.A. and accompanying notes.

for companies to be transparent about how they go about the process.[150]

Underlying these concerns is a fear that the process (HRDD) will become an end in itself, rather than the intended end (the implementation of corporate responsibility to respect human rights). For this reason, Landau calls for greater attention to be paid by lawmakers and civil society to crafting regulatory interventions that seek to influence the *quality* of HRDD undertaken, rather than simply its *quantity*.[151] It is to this call, and in particular to the observation that HRDD can become detached from the standard or outcome of respect for human rights, that our argument for a prohibitive model responds. This has prompted us to consider a prohibitive model for the United States, namely one that builds off the highly successful model of the FCPA, a law designed to combat bribery and corruption.[152] In this next Part, we will analyze the elements of the prohibitive model within the FCPA framework as well as within a proposed framework currently being developed in the United Kingdom.

IV.
THE PROHIBITIVE MODEL AS THE WAY FORWARD FOR THE UNITED STATES

> *We are currently putting excessive trust in processes over tangible outcomes. The current obsession with (mandatory) human rights due diligence, or the focus on effectiveness of remedy mechanisms rather than on effective remedies illustrates this well. However, as outcomes are equally important*

150. Landau, *supra* note 143, at 235–39; *see also* Gabriela Quijano & Carlos Lopez, *Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?*, 6 BUS. & HUM. RTS. J. 241, 249 (describing Landau's concerns of ambiguity and transparency with regard to HRDD requirements). Norway's law is a positive development with regard to transparency, as consumers have a right to information on how companies address negative human rights risks and impacts. *See* Act Relating to Enterprises' Transparency and Work on Fundamental Human Rights and Decent Working Conditions, *supra* note 14.

151. Landau, *supra* note 143, at 223, 243.

152. *See* FCPA, 15 U.S.C. §§ 78dd-1, et seq. For a discussion on the effectiveness of the FCPA, see Rachel Brewster, *Enforcing the FCPA: International Resonance and Domestic Strategy*, 103 VA. L. REV. 1611, 1677 (2017) (discussing the national and international framework that developed to help make the FCPA effective).

> *for rights and rightsholders, businesses should have an obligation of result too.*[153]

Unlike process-based models that focus the standard for liability based on the corporate actions, a prohibitive model would establish liability based on corporate outcomes (good intentions and best efforts notwithstanding). In the United States, by far the most successful prohibitive model for addressing corporate behavior around larger societal impacts such as bribery and corruption has been the FCPA. As such, examining the FCPA and its structure can provide a useful starting point for how a prohibitive model can be applied in the BHR context.

A. *The FCPA: A Working Prohibitive Model*

The United States' current lackluster stance on BHR-related issues is ironic given that, in earlier decades, the U.S. regulatory apparatus led the way in recognizing the connection between corporate activities and larger societal impacts. For instance, in 1971, the SEC promulgated rules requiring companies to consider both environmental and civil rights impacts in their disclosure obligations. [154] However, the FCPA remains one of the most enduring legislative legacies of that time.

The FCPA was enacted by Congress in 1977 to address corporate bribery and government corruption. Part of the motivation behind the FCPA came when a Congressional report disclosed that over 400 U.S. companies, including 117 Fortune 500 companies, had made "questionable or illegal payments" to foreign officials, politicians, and political parties.[155] The law makes it a crime for companies to pay bribes to foreign officials in order to either obtain or retain the company's business.[156] This portion of the Act is enforced by the DOJ.[157] In addition, the FCPA has accounting provisions that require cor-

153. Surya Deva, *A Just Recovery for Whom? And How to Achieve It?* BUS. & HUM. RTS. RES. CTR. (Jan. 8, 2021), https://www.business-humanrights.org/en/blog/a-just-recovery-for-whom-and-how-to-achieve-it/.

154. Martin, *Hiding in the Light*, *supra* note 17, at 537.

155. *See* H.R. REP. NO. 95-640, at 1 (1977).

156. FCPA, 15 U.S.C. § 78dd-1(a)(1).

157. Since the SEC does not have criminal authority, any portion of the Act which constitutes a criminal violation would be prosecuted by the Department of Justice. *See The Foreign Corrupt Practices Act: An Overview,* Jones

porations to keep accurate books and records.[158] This portion of the law is generally enforced by the SEC.[159] Each is discussed below. An examination of the FCPA, and the way that it addresses corruption, shows the merits of being able to use those issues not strictly related to financials as a way of maintaining investor protection,[160] as well as achieving the broader social goals envisaged by the law.

The FCPA amended several portions of the Securities Exchange Act of 1934. First, under Section 13(b)(2)(A) of the Exchange Act, the FCPA provides that corporations must maintain accurate books and records.[161] This particular section is one of strict liability—corporations can be held liable if the corporation's books are inaccurate even if the lapse did not occur as a result of the company's negligence or intentional conduct.[162] In addition, there is no materiality requirement to Section 13(b)(2)(A): the slightest infraction can lead

Day Publ'ns (Jan. 2010), https://www.jonesday.com/en/insights/2010/01/the-foreign-corrupt-practices-act-an-overview.

158. *See Spotlight on Foreign Corrupt Practices Act*, U.S. SEC (Feb. 2, 2017), https://www.sec.gov/spotlight/foreign-corrupt-practices-act.shtml#:~:text=the%20FCPA%20also%20requires%20issuers,in%20accordance%20with%20management's%20authorization.

159. Although, in particularly egregious cases of inaccurate books and records, cases have been referred to the DOJ for criminal prosecution. *See e.g.*, DEPARTMENT OF JUSTICE, A Resource Guide to the U.S. Foreign Corrupt Practices Act 2 10.49 (2nd ed. 2020) (discussing the criminal case of United States v. Ericsson related to a books and records violation).

160. Indeed, when it was first introduced, one of the main oppositions of the FCPA came from the business lobby who contended that managing issues like corruption was outside of the corporation's mandates. *See, e.g.*, Ellen Gutterman, *Easier Done Than Said: Transnational Bribery, Norm Resonance, and the Origins of the US Foreign Corrupt Practices Act*, 11 FOREIGN POL'Y ANALYSIS 109, 115 (2015) ("[Businesses] . . . argued that its prohibition of 'questionable' payments in foreign jurisdictions represented an unacceptable effort to impose American morality on other states . . . .") (citation omitted). In addition, corporations stated that not being able to use bribery would make them less competitive vis-à-vis other companies that were not under the regulatory ambit of the SEC. *See* Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 510 (2011) ("U.S. companies subject to the FCPA complained that they were put at a competitive disadvantage against non-U.S. companies in seeking business abroad because non-U.S. companies could pay off local authorities to obtain business.") (footnote omitted).

161. Securities Exchange Act of 1934 § 13(b)(2)(A), 15 U.S.C. § 78m.

162. *See id.*

to liability.[163] Finally, there is no private right of action with the FCPA.[164] Rather, enforcement cases can only be brought either by the SEC or the DOJ.[165] Part of the impetus for enacting the books and records portion of the FCPA was a concern that "the siphoning of such vast amounts of corporate funds demonstrated that these corporations lacked financial accountability."[166]

While the books and records provisions of the FCPA have a very low entry to liability, the SEC has considered a company's action in responding to the violations. For instance, in *the Matter of Oil States International Inc.*, the SEC took into consideration the fact that the company self-reported its inaccuracies to the Commission.[167] According to the SEC's release on the matter, "[i]n determining to accept [Oil State's offer of settlement] the Commission considered remedial acts promptly undertaken by Respondent and cooperation afforded the Commission staff."[168] As a result, the company was not required to pay a monetary penalty.[169] In contrast, *in the Matter of Walmart, Inc.*, Walmart agreed to pay $144 million for

163. *See id.*

164. FCPA, 15 U.S.C. §§ 78dd-1, et seq. *See The Law of Wind: A Guide to Business and Legal Issues*, Stoel Rives LLP, https://www.stoel.com/legal-insights/special-reports/the-law-of-wind/sections/foreign-corrupt-practices-act#:~:text=the%20FCPA%20does%20not%20contain,individuals%20for%20bribing%20foreign%20officials (last visited Apr. 17, 2022) ("The FCPA does not contain a private right of action. In other words, under the FCPA, only the U.S. government may sue entities and individuals for bribing foreign officials.").

165. *See The Law of Wind*, *supra* note 164. Although both the SEC and the DOJ have enforcement purview over the FCPA, the SEC could arguably be considered the first line of enforcement (given that the agency is allowed to proceed under civil, rather than criminal authority, which would in turn allow them to take advantage of the lower burden of proof to bring more cases).

166. Mary Siegel, *The Implication Doctrine and the Foreign Corrupt Practices Act*, 79 COLUM. L. REV. 1085, 1086 (1979); *see also Foreign Corrupt Practices Act*, DEP'T OF JUST. (Feb. 3, 2017), https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act (stating that the books and records provisions were designed to be used "in tandem" with the corruption portion of the law).

167. *See* Oil States Int'l, Inc., Current Report (Form 8-K) (Apr. 27, 2006).

168. Oil States Int'l, Inc., Exchange Act Release No. 53,732, 87 SEC Docket 2588 (Apr. 27, 2006)

169. *Id.*

its role in an ongoing bribery scheme in Mexico and Brazil.[170] According to the SEC order, Walmart was made aware of issues that raised the specter of corruption but did nothing to alleviate the situation.[171]

In addition to the books and records provisions, the key provisions relating to corruption under the FCPA are part of Section 13(b)(2)(B) of the Exchange Act. The statute provides, in part, that:

> It shall be unlawful for any issuer . . . to make use of . . . any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay . . . or offer, gift, promise to give, or authorization of the giving of anything of value to— (1) any foreign official for purposes of— (A)(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or (B) inducing such foreign official to use his influence with a foreign government . . . to affect or influence any act or decision of such government . . . in order to assist such issuer in obtaining or retaining business . . . .[172]

Not all payments to a government or government official would violate the FCPA. For instance, the statute specifically provides an exception for any payment when "the purpose . . . is to expedite or secure the performance of a 'routine governmental action.'"[173] In addition, the FCPA provides for two affirmative defenses: (1) if the corporation can show that the payments are legal under the law of the host country; and (2) if a corporation can show that the payments were "directly re-

170. *See* Press Release, SEC, Walmart Charged with FCPA Violations (June 20, 2019), https://www.sec.gov/news/press-release/2019-102.

171. *See* Walmart Inc., Exchange Act Release No. 86,159 (June 20, 2019). Investigative journalists for The New York Times went further, alleging a vast cover up of Mexican Bribery. *See* David Barstow, *Wal-Mart Hushed Up a Vast Mexican Bribery Case*, N.Y. TIMES (Apr. 21, 2012), https://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a- bribe-inquiry-silenced.html.

172. FCPA, 15 U.S.C. § 78dd-1.

173. *Investor Bulletin: The Foreign Corrupt Practices Act – Prohibition of the Payment of Bribes to Foreign Officials*, SEC OFF. INV. EDUC. & ADVOC. 2 (2011), https://www.sec.gov/investor/alerts/fcpa.pdf.

lated to" a "reasonable and bona fide expenditure."[174] When originally enacted, the FCPA's anti-bribery provisions were primarily uni-directional, in that they only applied to U.S. firms that were conducting business overseas and certain foreign issuers of securities.[175] However, the 1998 amendments to the Act make it illegal for any foreign corporation to "act in furtherance of such a corrupt payment to take place within the territory of the United States,"[176] in essence making the bribery provisions apply bilaterally.

After its initial passage in 1977, the FCPA was used relatively minimally until the early 2000s.[177] The corporate lobby's early resistance to the FCPA has waned.[178] Moreover, while bribery is now seen as something that is directly related to issues that a reasonable investor might consider, this has not always been the case.[179]

One of the things that makes the FCPA unique among the U.S. securities regulatory framework is that, unlike the vast majority of the securities laws that the SEC enforces, the FCPA does not specifically employ a disclosure-based regime to regulate corporate behavior.[180] Instead, it prohibits the actual be-

174. *See* FCPA, 15 U.S.C. § 78dd-1.

175. *See* DEP'T OF JUST., *supra* note 166.

176. *Id.*

177. While we agree with one commentator that the statute was in fact used (and not, as many have argued, dormant for those two decades), it is clear that the statute's increased substantially in the early 2000s. For a look at the dormancy debate, see Mike Koehler, *The Fallacy That the FCPA Was "Dormant" for Decades*, FCPA PROFESSOR (Aug. 1, 2018, 12:02 AM), https://fcpaprofessor.com/fallacy-fcpa-dormat-decades/.

178. *See, e.g.*, Conniel Malek, *Six Reasons Why Corporations Like (and Want) the Foreign Corrupt Practices Act Even If They Won't Admit It*, BUS. & HUM. RTS. RES. CTR. (Jun. 13, 2017), https://www.business-humanrights.org/en/blog/six-reasons-why-corporations-like-and-want-the-foreign-corrupt-practices-act-even-if-they-wont-admit-it/.

179. *See* Andrew B. Spalding, *Corruption, Corporations, and the New Human Right*, 91 WASH. U. L. REV. 1365, 1368 (2014) (stating that anti-bribery law is not generally thought of in relation to the broader movement to hold corporations accountable for human rights violations).

180. For a discussion of the SEC's disclosure-based framework (and its many shortcomings), see Jena Martin, *Changing the Rules of the Game: Beyond a Disclosure Framework for Securities Regulation,* 118 W. VA. L. REV. 59 (2015) [hereinafter Martin, *Changing the Rules*].

havior itself.[181] This is in direct contrast to how Congress typically empowers the SEC to regulate.[182] As one of us has noted:

> The model that the Commission uses to serve [its] mandate can by and large be framed as a laissez-faire approach to regulation. Rather than directly intervene in the corporate governance of a company, the SEC primarily uses a disclosure paradigm to protect American investors. The disclosure model rests on the premise that "an educated investor is a protected investor." As such, the SEC model requires companies to provide investors with a substantial amount of information regarding its financial operations and financial well-being in the hope that investors will use that information to make sound choices for their investments.[183]

By using a different model—to wit, a substantive prohibition model—the FCPA diverges from the disclosure-based paradigm and offers more comprehensive oversight of issuers related to bribery. This has two advantages. First, it allows the United States to take a more affirmative stance on the issue of bribery. Second, it places a much more stringent burden on a corporation to actively ferret out corruption within its organizational structure.[184]

Thus, the FCPA provides the SEC with a powerful tool to combat bribery in a much more effective way than a mere dis-

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181. *See* 15 U.S.C. §§ 78dd-1, et seq.
182. *See* Martin, *Changing the Rules*, *supra* note 180, at 60.
183. *Id.* at 60–61 (footnotes omitted).
184. As one of the earliest commentaries on the FCPA noted:

> The legislative history is replete with the reasons why bribery had to be prevented rather than merely punished: bribery is inherently invidious; bribery is harmful to the free enterprise system because it enables corporations to obtain business on a basis other than the quality of their goods and services; and bribery is harmful to the nation because it undermines United States foreign relations . . . The Act reflects Congress's condemnation of bribery by imposing both civil and criminal penalties . . . These penalties demand that the business community conform to a certain standard of conduct. As such, the Act's purpose is to deter bribery, not to compensate those injured by the prohibited payments.

Siegel, *supra* note 166, at 1113–14 (footnotes omitted).

closure-based regime,[185] while also creating a mechanism that promotes human-rights related norms abroad. As will be seen in Part IV, U.S. civil society advocates for a similar approach for mandatory HRDD laws.

B. *Using the Prohibitive Model for Business and Human Rights*

While prohibitive models have been used to prevent bribery and corruption, there is currently no enacted prohibitive model to address BHR impacts head on. However, there is work currently being undertaken in the United Kingdom that is attempting to change that: a legislative proposal for a U.K. corporate duty to prevent adverse human rights and environmental impacts that was put forward by U.K. civil society organizations in 2019.[186] This is an example of a prohibitive model, in contrast to the process-oriented laws and legislative proposals from continental Europe. It may be the closest legislative cousin to a proposed prohibitive model for the United States.[187] The U.K. proposal contains specific provisions for liability for failure to prevent adverse human rights and environmental impacts, in addition to a requirement that companies conduct HRDD. The provisions include:

- Commercial and other organizations must develop and implement reasonable and appropriate due diligence procedures to identify, prevent, and mitigate adverse human rights and environmental impacts.[188]
- Commercial and other organizations shall be liable for harm, loss, and damage arising from their failure to prevent adverse human rights and environmental impacts from their domestic and international opera-

185. For criticisms of a disclosure-based regime to combat human rights issues, see Martin, *Hiding in the Light*, *supra* note 17.

186. *Proposed UK Corporate Duty to Prevent Adverse Human Rights and Environmental Impacts*, CORP. JUST. COAL. (March 2020), https://corporate-responsibility.org/wp-content/uploads/2020/04/Duty-to-prevent_principal-elements_FINAL.pdf [hereinafter *Proposed UK Corporate Duty*].

187. For a proposed law for Canada, see *The Corporate Respect for Human Rights and the Environment Abroad Act*, CAN. NETWORK ON CORP. ACCOUNTABILITY 9–11, https://cnca-rcrce.ca/site/wp-content/uploads/2021/05/The-Corporate-Respect-for-Human-Rights-and-the-Environment-Abroad-Act-May-31-2021.pdf, which contains a private right of action against companies that fail to avoid, prevent, and address human rights violations.

188. *Proposed UK Corporate Duty*, *supra* note 186.

tions, products, and services including in their supply and value chains.[189]

- It shall be a defense from liability for damage or loss, unless otherwise specified, for commercial and other organizations to prove that they acted with due care to prevent human rights and environmental impacts.[190]

The failure to prevent offense is subject to criminal penalty if the human rights and environmental violations are "serious" and otherwise subject to a civil penalty.[191] The due care defense may be substantiated by demonstrating that the company is in compliance with the human rights due diligence obligation.[192] The failure to prevent model mirrors an offense from the U.K. Bribery Act 2010,[193] with obvious parallels to legislative proposal for the United States which will be discussed in the next part. However, it differs from the U.S. proposal in several ways, most significantly in its inclusion of a private right of action.[194] Whether this ambitious legislative proposal will be politically palatable remains to be seen.

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189. *Id.* The U.K. civil society organizations have good reason to advocate for a "failure to prevent" offense. The failure to prevent offense is modeled on section 7 of the UK Bribery Act, which is a strict liability offense, meaning that prosecutors do not have to establish the mens rea of the company. *See* Bribery Act 2010, c.23 (U.K.), https://www.legislation.gov.uk/ukpga/2010/23/crossheading/failure-of-commercial-organisations-to-prevent-bribery. This is significant in the U.K., where the test for attributing mens rea to a corporation ("the directing mind and will") is difficult to prove, in contrast to the U.S. test for attributing liability to companies (repondeat superior). UK LAW COMMISSION, CORPORATE CRIMINAL LIABILITY (Jun. 9, 2021) https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2021/06/Corporate-Criminal-Liability-Discussion-Paper.pdf 2 and 38. For an example of a strict liability offense for a corporation in the U.K., see LINKLATERS, *Ten years of the Bribery Act – A success?* (Jul. 2, 2021), https://www.linklaters.com/en-us/insights/blogs/businesscrimelinks/2021/july/the-rule-of-ten/ten-years-of-the-bribery-act-a-success.

190. *Proposed UK Corporate Duty*, *supra* note 186, para. 6.

191. *Id.*, paras. 4, 7.

192. *Id.*, para. 6.

193. Bribery Act 2010, c.23, s.7 (2); *see also* Pietropaoli et al., *supra* note 21 (advocating a failure to prevent approach for corporate human rights harms).

194. *Proposed UK Corporate Duty*, *supra* note 186, para. 5.

V.
MANDATORY HUMAN RIGHTS DUE DILIGENCE+ IN ACTION: FCPA-HR

In Part I, we examined what the United States would need to do to meet its obligations under the UNGPs in a way that it is currently failing to do. Here, using a model developed by the International Corporate Accountability Roundtable (ICAR)[195] as a proposed case study, we demonstrate how the United States could rise to the challenges created by both a disclosure and an mHRDD model, and we show the value of an mHRDD+ framework.

There are a number of reasons why an mHRDD+ model is valuable. First, companies would benefit from increased legal certainty, allowing them to draft contracts with suppliers and organize their relationship with subsidiaries according to regulatory requirements. Economics professors Joseph E. Stiglitz and Geoffrey M. Heal, in an amicus brief to the Supreme Court in 2020, reported that the FCPA "created an international environment that is more attractive for U.S. firms."[196] They affirm that the Act "led to an economic and political environment in which bribery was discouraged both by host countries and other source countries."[197] U.S. corporations benefited from a more conducive business environment internationally and enjoyed a "reputational premium" because they were known to engage in more responsible practices.[198] As civil society organization EarthRights International observes, the same logic could apply to human rights abuses.[199]

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195. *See supra* Part IV(A).

196. Brief for Oxfam America & Joseph E. Stiglitz et al. as Amici Curiae Supporting Respondents, Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021) (No. 19-416), at 25.

197. *Id.*

198. *Id.*

199. EARTHRIGHTS INT'L, CANCEL CORPORATE ABUSE: HOW THE UNITED STATES CAN LEAD ON BUSINESS AND HUMAN RIGHTS 19 (2020), https://earthrights.org/wp-content/uploads/EarthRights-How-the-US-can-lead-on-business-human-rights-2020.pdf. The European Round Table of Industrialists recently issued a joint statement which includes the argument that harmonized EU due diligence laws would boost the EU and its businesses' competitiveness. European Round Table of Industrialists, *Ensuring Harmonisation and Consistency Across Due Diligence Frameworks*, ERT (Dec. 16, 2021), https://ert.eu/wp-content/uploads/2021/12/Statement-harmonisation-of-due-diligence-frameworks.pdf.

Second, on a wider scale, adopting an mHRDD law would give the United States a tool for inducing other states to pressure companies under their influence to do the same. Congress originally enacted the FCPA in 1977 specifically to promote democratic values across the world through international business, i.e., with what can be argued to be human rights-related aims in addition to the specific aim of combatting corruption.[200]

It worked.

Since Congress originally enacted the FCPA in 1977, the United States has built a reputation as a global leader in the fight against bribery and corruption.[201] Having enacted the FCPA, the United States pushed for international consensus and multilateral agreement on criminalizing extraterritorial acts of bribery and corruption, which later came in the form of the UN Convention against Corruption.[202] Translating that expertise to the human rights context would enable the United States to rejoin the global leadership on business and human rights. International consensus would level-up the playing field for responsible business conduct, thus strengthening the international democratic order as expressed in norms such as the UNGPs, and the OECD Guidelines for Multinational Enterprises,[203] and—over time—improving the investment environment overseas for U.S. corporations.

200. *See* Spalding, *supra* note 179, at 1371–75 ("Though Congress then used the language of democracy rather than of human rights, the meaning is essentially the same."). Whether democratic values are human rights values is debatable. *See, e.g.*, Yoshimi Matsuda et al., *Democratic Values and Mutual Perception of Human Rights in Four Pacific Rim Nations*, 25 INT'L J. INTERCULTURAL RELS. 405, 418 (2001) (discussing the results of the authors' study which indicated that there is no correlation between democratic orientation and human rights values).

201. *See, e.g.*, Beverley Earle, *The United States' Foreign Corrupt Practices Act and the OECD Anti-Bribery Recommendation: When Moral Suasion Won't Work, Try the Money Argument*, 14 PENN ST. INT'L L. REV. 207, 207 (1996) (discussing the United States as the "lone" voice in the fight against bribery through the 1990s).

202. *See* David Hess, *Business, Corruption, and Human Rights: Towards a New Responsibility for Corporations to Combat Corruption*, 2017 WIS. L. REV. 641 (2017); Anita Ramasastry, *Closing the Governance Gap in the Business and Human Rights Arena: Lessons from the Anti-Corruption Movement*, *in* HUMAN RIGHTS OBLIGATIONS OF BUSINESS 162 (Surya Deva & David Bilchitz eds., 2013).

203. *See* EARTHRIGHTS INT'L, *supra* note 199, at 20.

As seen in Part I, the United States has not enacted legislation to fulfill its state duty to protect under Pillar 1 of the UNGPs. It is this gap that the FCPA-HR seeks to fill. There is a clear difference between an outcome-based assessment of a prohibitive model (like the FCPA and the FCPA-HR represent) and a process-oriented human rights due diligence model (such as is at the heart of most European legislation). In our view, the key consideration in favor of the former and against the latter is that any new laws do not create another box-checking exercise. Such an exercise would take us back down the dead-end route of disclosure laws. Rather, the combination of judicially enforceable liability for human rights violations and the maintenance of books and records documenting HRDD processes undertaken and their outcomes, are, in our submission, requirements for prevention and deterrence of human rights violations.[204] We address the question of compensation (i.e., private right of action) in Part IV.D.2 below. First, we turn to the FCPA-HR.

A. *An Examination of the FCPA-HR*

ICAR was founded in 2010 to coordinate the joint advocacy and campaigns on corporate accountability of its member organizations, including Amnesty International, Human Rights Watch, the American Federation of Labor and Congress of Industrial Organizations, Global Witness, EarthRights International and others.[205] One of ICAR's areas of work is enacting legal safeguards to prevent corporate human rights abuses. The legislative proposal for a FCPA-HR is part of this work.[206]

The concept for using the FCPA as a model for holding corporations accountable for human rights violations has been circulating in human rights and academic circles for several

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204. *See* INT'L FED'N FOR HUM. RTS., A MATTER OF JUSTICE: HOW EUROPEAN LEGISLATION CAN MAKE A DIFFERENCE 40 (2020), https://www.fidh.org/IMG/pdf/loi_vigi763angweb.pdf.

205. *Our Work*, INT'L CORP. ACCOUNTABILITY ROUNDTABLE, https://icar.ngo/our-work-overview/.

206. *See Preventing Corporate Human Rights Abuses*, INT'L CORP. ACCOUNTABILITY ROUNDTABLE, https://icar.ngo/preventing-corporate-human-rights-abuses/ (discussing an FCPA for human rights).

years,[207] partly in reaction to Supreme Court decisions greatly limiting the possibility for victims to use the Alien Tort Statute to seek remedy for corporate human rights violations.[208] As the latest Alien Tort Statute case made its way to the Supreme Court in 2020,[209] ICAR decided to officially draft the FCPA-HR in collaboration with its members and partners. The core hope for this model is that time-tested corporate compliance and government enforcement under the FCPA will be successfully replicated in the FCPA-HR to prevent human rights abuses in the operations of multinational companies and hold those companies accountable when abuses occur.

The FCPA-HR covers the same classes of entities as the FCPA regarding their bribery prohibitions:[210] (1) "issuers" (including publicly traded companies); (2) "domestic concerns" (including U.S. nationals and residents); and (3) "other people," including non-U.S. nationals who work to advance a bribery scheme or serious human rights violations while in U.S. territory.[211] Thus U.S. and foreign corporations who choose to access U.S. securities markets are captured. Additionally, ancillary individuals to any of the covered entities may be held liable, including officers, directors, employees, agents,

207. *See, e.g.,* Verdier & Stephan, *supra* note 21. The authors argue that a new statute modeled on the FCPA is a better approach to redress and prevention of serious human rights violations by corporate actors than the Alien Tort Statute and criminal prosecutions—or lack thereof to date. A key argument in favor of this approach is that "it brings the enforcement of U.S. human rights policy within the institutional arrangements normally used to develop and apply U.S. foreign relations, namely executive implementation of legislative mandates." *Id.* at 1404. *See also, e.g.*, Pierre-Hugues Verdier & Paul B. Stephan, *After ATS Litigation: A FCPA for Human Rights?*, LAWFARE BLOG (May 7, 2018), https://www.lawfareblog.com/after-ats-litigation-fcpa-human-rights; Malek, *supra* note 178.

208. Chambers, *supra* note 7, at 535–40 (describing the rise and fall of the Alien Tort Statute); Chambers & Martin, *supra* note 7.

209. Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021); *see also* Desirée LeClercq, *Nestlé United States, Inc. v. Doe. 141 S. Ct. 1931(2021)*, 115 AM. J. INT'L L. 694 (2021) (discussing the case).

210. ICAR, *A bill to amend the Securities Exchange Act of 1934 to prohibit corporate violations of human rights throughout their supply chains and enforce reporting mechanisms* (Aug. 12, 2020) (app. A) [hereinafter FCPA-HR]; *see also* Verdier & Stephan, *supra* note 21, at 1396–97 (justifying an approach to who is covered in a FCPA for human rights that mirrors the approach taken in the FCPA, on grounds of its compliance with public international law).

211. FCPA, 15 U.S.C. §§ 78dd-1, et seq.

and even stockholders acting on behalf of an entity.[212] Finally, the FCPA-HR (like the original FCPA) provides both civil and criminal liability.[213]

The FCPA's bribery provisions prohibit the covered businesses and individuals from bribing foreign officials for a corrupt purpose in the course of business.[214] The FCPA-HR, on the other hand, prohibits the knowing commission of a violation of human rights for a business purpose by all covered businesses and individuals.[215] Furthering a "business purpose" means obtaining, retaining, maintaining, or otherwise securing an advantage for an entity's financial, territorial, or other gain.[216] In contrast to the FCPA, which *created* the crime of foreign bribery, the FCPA-HR takes *existing* U.S. crimes and provides a new means of enforcement and implementation of a system to prevent these crimes from happening.[217]

Under the draft text of the FCPA-HR, there is a prohibition against any issuer or covered person to:

> knowingly or recklessly participate or assist in the commission, be it an act or omission, of a violation of human rights for a business purpose, even if the act or omission was not the cause-in-fact, including the ordering, controlling, or otherwise directing of such violation; or
>
> knowingly benefit from the commission, be it an act of omission, of a violation of human rights by a supplier in its supply chain, where the entity knew or should have known its supplier has committed such violation. For the purposes of this section, it is not necessary to establish that the entity enjoyed a monetary benefit.[218]

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212. *Id.*
213. FCPA-HR, *supra* note 210.
214. FCPA, 15 U.S.C. §§ 78dd-1, et seq.
215. FCPA-HR, *supra* note 210.
216. *Id.* §2(i).
217. *Id.*
218. The FCPA-HR model combines both a failure to prevent model (as outlined in section 3(b) of the proposed law), similar to that of the FCPA, and a human rights due diligence model (as outlined in section 4 of the proposed law), which specifically includes a human rights due diligence model in its measure of its "accurate books and records" standard. In that

Thus, the bill sanctions not only any illegal acts of covered persons but also any knowing benefit as a result of a relationship within the issuer's supply chain that has come about as a result of a violation of human rights.[219] As such, the bill effectively prohibits not just corporate conduct but also violations that could arise within the context of corporate relationships. In that regard, it is very much aligned with the UNGPs' stance regarding the corporate responsibility to respect human rights.[220] The bill, in turn, defines violations of human rights that relate to currently enacted federal crimes including murder, kidnapping, "federal crimes related to forced labor and trafficking," and "federal crimes related to sexual abuse or sexual exploitation."[221] By limiting itself to certain human rights violations, the bill is not aligned with the UNGPs.[222]

In addition to the outright prohibition of human rights violations found in Section 3, the FCPA-HR also has a reporting requirement found in Section 4 of the bill. Every reporting issuer shall keep accurate books and records that "fairly reflect the procedures with which the issuer uses or plans to use to meet the due diligence requirements [of the Act]."[223] The due diligence measures also require multi-stakeholder involvement at all levels of corporate operations including with affiliates, subsidiaries, or parent companies.[224] In that sense, it goes be-

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sense, it deviates from the FCPA, which includes the former but not the latter. FCPA-HR, *supra* note 210, § 3(b)(2).

219. To that end, the Act helps with a corporation's Pillar 2 responsibilities under the UNGPs specifically as it relates to relationships with the corporation. *Id.* § 4(b).

220. In fact, the UNGPs arguably go further than the language of the statute. Specifically, UNGP 13 states that corporations should "[s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, *even if they have not contributed to those impacts.*" *UNGPs*, *supra* note 10, at 14 (emphasis added). For a discussion regarding the interplay between corporate relationships and the UNGPs, see Jena Martin, "*The End of the Beginning?": A Comprehensive Look at the U.N.'s Business and Human Rights Agenda from a Bystander Perspective*, 17 FORDHAM J. CORP. & FIN. L. 871 (2012) (written as Jena Martin Amerson).

221. FCPA-HR, *supra* note 210, § 2(h). Note that the approach of targeting certain human rights violations that are already serious criminal offenses was also proposed by Verdier & Stephan, *supra* note 21, at 1399.

222. See *infra* Part V(D)(1) for our discussion.

223. FCPA-HR, *supra* note 210, § 4(b)(2).

224. *Id.*

yond the original law's accurate books and records to provide an underlying framework of due diligence that is more in line with the current global trends regarding the most effective way to combat human rights violations in supply chains.[225] The due diligence measures that an issuer must undertake include: analysis of human rights risks throughout the supply chain, proactive measures to mitigate or prevent such violations, monitoring of the effectiveness of the program, and collection of records and reports of human rights violations.[226]

B. *Advantages of the FCPA-HR Model*

As currently drafted, the FCPA-HR bill operates under a similar framework to the original FCPA, in that it "first, prohibits companies from violating human rights in their course of business, and second, requires companies to institute a due diligence system to prevent any such violations from occurring, and make regular reports regarding their compliance and success."[227] In that sense, while the underlying content of what is prohibited is different, the framework will be familiar to those who work on FCPA cases. In addition, the link between corruption and gross human rights violations[228] provides some cover for those who would say that the new law is inappropriate as a regulatory objective of the SEC (an argument we address in Part V.D.4. *infra*).

The FCPA-HR also aligns with the FCPA in that it does not rely heavily on a disclosure-based framework. Instead, corporations are subject to an outright ban, not only on their involvement in any activity that leads to the enumerated serious

225. Specifically, the UNGPs provide that the concept of "human rights due diligence" and "human rights risk assessment" should not simply consider the risks of the underlying activity to the corporation but also to the affected community or impacted individual. *UNGPs*, *supra* note 10 (Principle 15). For a discussion of the HRDD and its placement within the trend of corporate legislation in supply chains, see Jena Martin, *Guest Blog: ULC's Work on Coercive Labor Practices in Supply Chains, Part 5*, BUS. L. PROF BLOG (Sept. 13, 2020), https://lawprofessors.typepad.com/business_law/2020/09/guest-blog-ulcs-work-on-coercive-labor-practices-in-supply-chains-part-5.html.

226. FCPA-HR, *supra* note 210, § 4(b)(2).

227. ICAR, *The Foreign Corrupt Practices Act (FCPA) v. The Foreign Corrupt Practices Act for Human Rights (FCPA-HR) How do they Compare?* (Aug. 12, 2020) (on file with authors).

228. The link is discussed in Part V(C) *infra*.

human rights violations but also on receiving a knowing benefit from any relationship that came as a result of such a human rights violation. Further, the FCPA-HR follows both the standing and the threshold of liability model of the traditional FCPA in that the prohibition requires knowing conduct on the part of the covered person while the books and records violations has a strict liability standard.

However, in many ways, the FCPA-HR goes far beyond the original purview of the FCPA to situate itself firmly within the current business and human rights debate. The combination of prevention through the books and records provisions, coupled with the legally enforced prohibition, means that this proposal is more effective than the HRDD model.[229] In fact, the complementary frameworks outlined, including (1) a penalty for engaging in the wrongful conduct set out in the law, and (2) a human rights due diligence standard (as encompassed through the books and records section of the law), provide lawmakers with much more regulatory oversight than each of the individual components would have on its own.

A concern that has been raised about the due diligence model is that companies that have complied with the technical requirements of the law may be granted some form of safe harbor from liability, even if human rights violations were subsequently found, so long as they had met their due diligence obligations.[230] The FCPA-HR on the other hand *penalizes* companies where the enumerated human rights violations are found, regardless of the level of due diligence that they had undertaken to ensure that there were no adverse human rights impacts in their global operations.[231] It could also allow com-

229. Wim Huisman, *Corporations, Human Rights and Compliance*, *in* THE CAMBRIDGE HANDBOOK OF COMPLIANCE (Benjamin Van Rooij & D. Daniel Sokol eds., 2021) 989, 1006 (arguing for states to take five steps to provide a "smart" regulatory mix in the business and human rights field including HRDD as one step and "sanctioning corporations' involvement in human rights abuses" as another).

230. RACHEL CHAMBERS, SOPHIE KEMP & KATHERINE TYLER, REPORT OF RESEARCH INTO HOW A REGULATOR COULD MONITOR AND ENFORCE A PROPOSED UK HUMAN RIGHTS DUE DILIGENCE LAW, 20 (2020), https://media.business-humanrights.org/media/documents/Researchreport11.pdf; OLIVIER DE SCHUTTER, TOWARDS MANDATORY DILIGENCE IN GLOBAL SUPPLY CHAINS 48–52 (2015), https://www.ituc-csi.org/IMG/pdf/de_schutte_mandatory_due_diligence.pdf.

231. FCPA-HR, *supra* note 210.

panies opportunities to improve on their practices. While the SEC would have no specific requirement to do so, past practice by the SEC in the realm of the FCPA suggests that, if a company cooperated with the investigation and undertook some form of due diligence, the SEC would likely recommend a less severe penalty.[232]

The ability of regulators to give companies the opportunity to improve on their practices is recognized in regulatory theory as valuable. When taking enforcement action under the FCPA, through deferred prosecution agreements, the DOJ and SEC reach settlement agreements with corporations who run afoul of the FCPA without having to indict them, in return for the company's compliance with certain conditions. These conditions can include the company improving its practices. Hannah Harris and Justine Nolan propose that experimental governance features should be explored with modern slavery regulation, and in particular, penalty defaults.[233] Their conclusions can be applied more broadly to human rights regulation under discussion here. The experimental governance literature uses the term "penalty defaults" to refer to a regulatory penalty that motivates regulated actors to engage and innovate.[234] The SEC's approach to the FCPA enforcement through deferred prosecution agreements is endorsed by Harris and Nolan as a model of penalty defaults[235] and—if transposed to FCPA-HR—would enhance this regulatory model for BHR.

Both the due diligence and the prohibition models represent a sea change in implementing human rights outcomes into a corporation's operations. Both require substantive engagement by the company around potential human rights abuses within their operations, in stark contrast to the procedural requirements that characterize the current dominant

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232. *See, e.g.*, Oil States Int'l, Inc., Exchange Act Release No. 53,732, 87 SEC Docket 2588 (Apr. 27, 2006) (the SEC recommended a lower sanction and only issued a cease-and-desist proceeding, in part, due to the company's actions).

233. Hannah Harris & Justine Nolan, *Learning from Experience: Comparing Legal Approaches to Foreign Bribery and Modern Slavery*, 4 CARDOZO INT'L & COMPAR. L. REV. 603, 638–44 (2021).

234. *Id.* at 639.

235. *Id.*

model: disclosure.[236] But, for the reasons outlined in this section, the FCPA-HR is a significant step forward.[237] It is also sound for policy reasons to pair human rights and corruption legislation, as the next Part explores.

C. *The Link Between Corruption and Human Rights Violations*

Modeling the FCPA-HR on the FCPA is intuitively sound given the commonality between the different forms of corporate misconduct that the two statutes target. The link between corruption and human rights violations is widely acknowledged.[238] In the international policy sphere, U.N. agencies have long connected the two issues, documenting corruption's direct and indirect effects on human rights. For example, when there is corruption in a criminal justice system, there are direct effects on the right to a fair trial and indirect effects including contributing to an environment where related human rights abuses can occur with impunity and facilitating abuses linked to detention and treatment of suspects.[239] Similarly, the resource curse, in which countries that are supplied with the most abundant natural resources are often plagued by corruption and human rights violations, is also widely documented.[240]

A recent report by the U.N. Working Group on Business and Human Rights makes the link between business, human rights, and anti-corruption agendas, and encourages states to do the same.[241] The Working Group advises states to enact leg-

236. *See, e.g.,* Hess, *supra* note 63.

237. *See* discussion of deficiencies of mHRDD as a check-the-box exercise, *supra* Part III(D)

238. Hess, *supra* note 202; Ramasastry, *supra* note 202, at 163.

239. *Corruption, Human Rights and the Human Rights-Based Approach*, ANTI-CORRUPTION RSCH. CTR., https://www.u4.no/topics/human-rights/basics. The website lists a number of examples of corruption's impact on human rights. Taking the argument one step further, Spalding, *supra* note 179, at 1402, argues that "freedom from corruption can, and should, be understood as a foundational human right."

240. Nyakundi Michieka & Dustin Blankenship, *Avoiding the Resource Curse: Applying the Guiding Principles in Kenya, in* THE BUSINESS AND HUMAN RIGHTS LANDSCAPE: MOVING FORWARD, LOOKING BACK 559–73 (Jena Martin & Karen E. Bravo eds., 2016).

241. *See* Connecting the Business and Human Rights and the Anti-Corruption Agendas, Rep. of the Working Grp. on the Issue of Hum. Rts. & Transnat'l Corps. & Other Bus. Enters. on Its Forty-Fourth Session, 15 June–3 July

islation requiring companies to conduct both human rights and anti-corruption due diligence across their supply chains.[242] "In places where corruption is rife, companies need to consider human rights and anti-corruption measures as linked, for example, in situations where officials expected bribes to approve inspections, human rights abuses were also likely."[243] The report later urges "businesses to identify synergies between human rights and anti-corruption compliance to meet their responsibility to respect human rights in a systematic and structured way."[244]

In the United States, the pairing of anti-corruption measures and human rights measures has already taken place, albeit to a limited extent. As discussed in Part II.A. *supra*, Sections 1502 and 1504 of Dodd–Frank pair human rights disclosure, due diligence measures, and anti-corruption measures. Both apply to the extractive sector only, with Section 1502 being limited geographically to the Democratic Republic of Congo and surrounding countries, and rights-wise, to those rights violated through the sourcing of conflict minerals.

More recently, corruption and human rights violations have been addressed as part of a global sanctions regime against those who perpetrate corruption and serious human rights violations. The Global Magnitsky Human Rights Accountability Act allows the U.S. government to sanction perpetrators of certain gross human rights abuses against individuals who have taken on the role of whistleblowers or human rights defenders.[245] This Act also allows the U.S. government to sanction perpetrators of serious acts of corruption outside of the country. In both instances, sanctions include denying such perpetrators visas to enter the United States and freezing their U.S.-based property and interests in property.[246] Importantly,

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2020, U.N. Doc. A/HRC/44/43 (June 17 2020) [hereinafter Rep. of the Working Grp.]; *see also* BUS. AT OECD & THE INT'L ORG. OF EMPLOYERS, CONNECTING THE ANTI-CORRUPTION AND HUMAN RIGHTS AGENDAS: A GUIDE FOR BUSINESS AND EMPLOYERS' ORGANIZATIONS (Sept. 2020).

242. Rep. of the Working Grp., *supra* note 241, at ¶ 46.

243. *Id.* ¶ 48.

244. *Id.* ¶ 50.

245. Global Magnitsky Human Rights Accountability Act, S. 284, 114th Cong. (2016).

246. It has been questioned whether significant acts of corruption belong in the context of a human rights sanctions regime or are perhaps better addressed by other means. *See* Nienke van der Have, *The Proposed EU Human*

however, those targeted with sanctions are individuals, not corporations. Thus, although these examples demonstrate some legislative pairing of anticorruption and human rights measures, the overall legislative picture in the United States for the prevention of and liability for corporate human rights impacts remains unpromising, in contrast to the picture for corporate liability for bribery and corruption. It is this gap that the FCPA-HR would fill.

D. *Critiquing the FCPA-HR*

Despite these important considerations in favor of the FCPA-HR, the model does have certain drawbacks. We acknowledge and discuss these here, offering recommendations for improvements to the draft law where relevant.

1. *Limited number of human rights violations covered*

The focus on a limited number of enumerated human rights violations that are already crimes for enforcement is not in step with the basic notion that all human rights are interconnected and interdependent. As a result, several human rights violations that are frequently associated with business operations are not addressed by the draft law.

The interconnectedness and interdependence of human rights is reflected in the UNGPs and other enacted HRDD laws, such as the French Law on the Corporate Duty of Vigilance,[247] German,[248] and Norwegian.[249] In its policy paper on the enactment of mHRDD laws, the OHCHR affirms that "[t]here are strong arguments to be made in [favor] of general human rights regimes, covering all internationally recognized human rights, based on the universality, interrelatedness

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Rights Sanctions Regime: A First Appreciation, 30 SEC. & HUM. RTS. 56, 68 (2020).

247. Loi de Vigilance, *supra* note 11, art. 1, provides that the plan should "identify risks and prevent severe impacts on human rights and fundamental freedoms, on the health and safety of persons, and on the environment."

248. Act on Corporate Due Diligence Obligations in Supply Chains, *supra* note 13.

249. Act Relating to Enterprises' Transparency and Work on Fundamental Human Rights and Decent Working Conditions, *supra* note 14.

and indivisibility of human rights."[250] The challenge, of course, is that the FCPA-HR is a criminal statute and human rights and criminal offenses are not synonymous. The difficulty with extending the reach of the FCPA-HR to all human rights is in defining an offense in relation to each human right with sufficient precision that it could form the basis of a criminal charge. This is particularly true where the right is subject to progressive fulfilment (e.g., the right to education) or is limited by certain restrictions (e.g., the right to freedom of speech). That said, many human rights violations (especially "serious" or "gross" human rights violations[251]) will amount to criminal offenses.

Under the FCPA-HR, corporate human rights violations will not be prosecuted if they do not fall within the statutory specification of the enumerated human rights violations, namely: murder, kidnapping, "federal crimes related to forced labor and trafficking," "federal crimes related to sexual abuse or sexual exploitation," torture or "severe mental pain or suffering," war crimes, and damage to religious real property.[252] A major omission from this list of offenses is bodily harm. The equivalent U.K. draft law includes the offenses of grievous bodily harm, wounding with intent, and endangering life by damaging property.[253] In addition, there are other serious human rights violations that are not actionable under the FCPA-HR. For example, it would not be possible to prosecute a mining company that poisons the local water supply, violating people in the local community's rights to health and clean water, among other rights, because the conduct likely does not fall within FCPA-HR's definition of a human rights violation.

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250. UN Human Rights "Issues Paper" on Legislative Proposals for Mandatory Human Rights Due Diligence by Companies, *supra* note 105, at 16.

251. This has been discussed at the international level. *See* TAKHMINA KARIMOVA, GENEVA ACAD., WHAT AMOUNTS TO "A SERIOUS VIOLATION OF INTERNATIONAL HUMAN RIGHTS LAW"? AN ANALYSIS OF PRACTICE AND EXPERT OPINION FOR THE PURPOSES OF THE 2013 ARMS TRADE TREATY (2014).

252. FCPA-HR, *supra* note 210, § 2.

253. TRAIDCRAFT EXCH. & CRIM. JUST. COAL., RESPONSE TO THE U.K. LAW COMMISSION CONSULTATION ON CORPORATE CRIMINAL LIABILITY 14 (2021) (on file with the authors).

2. *No private right of action*

To victims of corporate human rights abuses, receiving adequate remedy often proves elusive.[254] The UNGPs' third pillar explores the need for states and companies to provide access to remedy,[255] and discusses three avenues for remedy: state-based judicial mechanisms, state-based non-judicial mechanisms, and non-state grievance mechanisms.[256] The FCPA-HR creates neither the first nor second, nor does it oblige companies to conduct the third.[257]

Under Pillar 3 of the UNGPs, states must provide access to judicial remedy for human rights violations at the hands of corporate actors. While that obligation does not extend to extraterritorial violations,[258] the UNGPs do encourage states to provide access to remedy in such cases where local remedy in the host state is not feasible.[259] As noted above, in recent years, the Supreme Court has greatly limited the possibility to claim remedy under the Alien Tort Statute,[260] referring to Congress to provide a legal basis for such cases.[261] The FCPA-HR would not fill this gap.

Neither the FCPA nor the FCPA-HR allows for a private right of action. However, unlike in corruption cases,[262] business and human rights cases usually have clearly identifiable victims in need of redress. When the FCPA was first enacted, some commentators argued that there should be at least some private right of action granted under the implication doctrine

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254. *See* Rep. of the U.N. High Comm'r for Hum. Rts., U.N. Hum. Rts. Council on its Thirty-Second Session, A/HRC/32/19 (May 10, 2016).

255. Pillar 3 has sometimes been called the "forgotten pillar," *See, e.g.,* Sarah Mcgrath, *Fulfilling the Forgotten Pillar: Ensuring Access to Remedy for Business and Human Rights Abuses*, INST. FOR HUM. RTS. & BUS. (Dec. 15, 2015), https://www.ihrb.org/other/remedy/fulfilling-the-forgotten-pillar-ensuring-access-to-remedy-for-business-and.

256. *UNGPs*, *supra* note 10, at 28–31.

257. *See* FCPA-HR, *supra* note 210.

258. *UNGPs*, *supra* note 10, at 26.

259. *Id.*

260. *See supra* Part IV(A).

261. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1406 (2018).

262. There can be direct or indirect victims of corruption, but society as a whole is also a victim. *See* Open-Ended Intergovernmental Working Grp. on Asset Recovery, Good Practices in Identifying the Victims of Corruption and Parameters for Their Compensation ¶ 12, U.N. Doc. CAC/COSP/WG.2/2016/CRP.1 (Aug. 4, 2016).

for a portion of the law.[263] Where private rights of action have been explicitly permitted in securities regulatory action, commentators argue that such rights of actions provide a robust complementary enforcement schema that eases the burden of otherwise overtaxed federal agencies.[264]

The mHRDD laws enacted in European countries vary in terms of whether they provide a civil claim for victims of human rights violations,[265] but they all require companies to establish grievance mechanisms and provide remedy in situations where the business is connected to human rights violations.[266] Under the German law, the regulator can give specific orders to companies directly, without having to go to court.[267] These orders could very well include that a company provide adequate remedy.[268] The Norwegian Law seems to provide for that possibility as well.[269]

The FCPA-HR lacks similar provisions. It does, however, provide injunctive relief if the Attorney General or the SEC bring a civil action.[270] This could become relevant, for instance to prevent food and beverage companies from displacing communities in order to clear the land for plantations such as palm oil. The FCPA-HR also provides that a court may grant "any equitable relief, including the disgorgement of ill-gotten gains, that may be appropriate or necessary for the benefit of victims."[271] It is also possible that, as part of a criminal

263. *See* Daniel Pines, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 CAL. L. REV. 185, 216 (1994).

264. *See* Bernard S. Black, *The Legal and Institutional Preconditions for Strong Securities Markets*, 48 UCLA L. REV. 781, 789 (2001) (arguing that a regulatory system that includes "private plaintiffs" and "self-regulatory organizations" can "work fairly well."); Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEO. L.J. 923, 964–65 (2019).

265. See the discussion *supra* Part III.

266. Act on Corporate Due Diligence Obligations in Supply Chains, *supra* note 13, §§ 7–8; Loi de Vigilance, *supra* note 11, art. 1.

267. Act on Corporate Due Diligence Obligations in Supply Chains, *supra* note 13.

268. *Id.* § 15(3).

269. Act Relating to Enterprises' Transparency and Work on Fundamental Human Rights and Decent Working Conditions, *supra* note 14.

270. FCPA-HR, *supra* note 210, § 3(b)(1). Footnote 10 in the FCPA-HR, *supra* note 214, at fn.10, clarifies that this does not apply to issuers.

271. FCPA-HR, *supra* note 210, § 3(d).

sentencing under the FCPA-HR, companies could be ordered to provide compensation to victims.[272]

3. *Encourages Cutting and Running*

The FCPA-HR could encourage "cutting and running,"[273] thereby undermining the UNGPs' approach to put outcomes for people in the center of business decisions. The UNGPs ask for a shift in how companies approach human rights issues—away from considering risks to the company and towards thinking about risks to people. This concept becomes particularly relevant when a company is connected to human rights violations, either through its supply chain or because it is active in conflict areas. To avoid reputational risk to companies in such situations, the obvious step is to cancel the business relationships or withdraw from the area. That way, the company cuts the connection and association to the human rights violations by other parties. However, not only does this behavior fail to address or improve the human rights situation, but it can even worsen the situation. The UNGPs clearly state that disengagement is a last resort and is appropriate only where the company cannot use or build leverage to mitigate or prevent the human rights impacts.[274]

Harm also occurs through hasty disengagement from conflict areas. For example, if a company cancels a supplier contract because of forced labor in the supplier's production facilities, that supplier might then lay off these workers, who will be stranded in a foreign country without employment.[275] After the February 1, 2021, military coup in Myanmar, a Norwegian

272. Verdier & Stephan, *supra* note 21, at 1408.

273. By "cutting and running," we mean exiting a business relationship with an entity found to be involved in human rights harms, to avoid the risk of financial or other sanctions. *See* Joseph Wilde-Ramsing, *Telenor's Exit from Myanmar - A Cautionary Tale for the Just Transition*, INST. HUM. RTS. & BUS. (Sept. 26, 2021), https://www.ihrb.org/focus-areas/just-transitions/telenor-exit-from-myanmar-a-cautionary-tale-for-the-just-transition.

274. *See United Nations Guiding Principle 19*, NAT'L ACTION PLANS ON BUS. & HUM. RTS. (last visisted Mar. 28, 2022), https://globalnaps.org/ungp/guiding-principle-19/.

275. Unintended negative consequences of company disengagement are also relevant in the use of Withhold Release Orders to block products produced (in part) by forced labor. *See* Allie Brudney, *Using the Master's Tool to Dismantle the Master's House: 307 Petitions as Human Rights Tool*, CORP. ACCOUNTABILITY LAB, (Aug. 31, 2020), https://corpaccountabilitylab.org/cal-

telecom company withdrew from the area and sold off its Myanmar business to a company that has been linked to allegations of corruption and terrorist financing, human rights violations, and ties to the Myanmar military.[276] Civil society organizations now contend that the company puts human rights at risk through this hasty disengagement.[277]

By prohibiting that a company "knowingly benefits from a violation" of a direct or indirect supplier, where the company "knew or should have known" of the violations, the FCPA-HR increases the risks to companies if they are connected to human rights violations in the supply chain. If a company discovers, for example, forced labor in its supply chain, it might be afraid to now "knowingly benefit" if it continues the supplier relationship. This shifts the focus away from the risks to people. A response focusing on the human rights implications would likely attempt to first remediate the situation by using the leverage that the company has over its suppliers. An important role of the regulator (i.e., the SEC), would be to advise companies against cutting and running through techniques such as official guidance on the statute.

4. *The role and readiness of regulators*

Although the U.S. securities market is currently dominated by quantitative and algorithmic based trading (that rarely, if ever, looks at the fundamentals of the company from an investment perspective),[278] having the SEC actively engage in its regulatory function vis-à-vis human rights would serve as an important signaling device to the market that could lead institutional investors to adopt human rights indicators as part of their formulas that decide which companies to invest in. Another advantage of the SEC taking a more overt lens in examining corporate human rights issues is that it would also help

blog/2020/8/28/using-the-masters-tools-to-dismantle-the-masters-house-307-petitions-as-a-human-rights-tool.

276. *See Irrawaddy Towers Asset Holdings PTE.*, FMO (Dec. 15, 2015), https://www.fmo.nl/project-detail/45082.

277. *See* Complaint, Ctr. for Rsch. on Multinational Corps. v. Telenor ASA (Nor. Nat'l Contact Point 2021), https://www.oecdwatch.org/wp-content/uploads/sites/8/dlm_uploads/2021/07/Telenor-OECD-GLs-complaint-1.pdf.

278. *See* Martin, *Changing the Rules*, supra note 180.

the United States satisfy its obligations under Principle 8 of the UNGPs related to policy coherence.[279]

Nonetheless, one could challenge the SEC as the proper agency for this regulatory function specifically because it has no current institutional expertise in human rights-related securities regulation.[280] As such, the agency would need to devote resources to training and hiring staff with the requisite level of expertise to tackle these issues. While, assuredly, the SEC could eventually obtain the necessary knowledge base to undertake meaningful investigations, at the present stage the SEC is generally focused on financial-based misconduct rather than a broader, non-financial mandate.[281] In that regard, even if the proposed FCPA-HR law were to be enacted, it may take years, if not decades, for the SEC to vigorously enforce the law. Civil society organizations, in advocating for a new FCPA-HR, would either immediately need to dedicate resources to ensuring that regulators can hit the ground running[282] with meaningful enforcement or they must be content with playing the

279. Jena Martin, *UN Guiding Principle Number 8*, *in* THE RESEARCH HANDBOOK ON THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, (Barnali Choudhury ed., forthcoming 2022) (on file with authors).

280. *See* Chambers & Vastardis, *supra* note 75 (proposing a model for a sui generis regulator to oversee and enforce human rights disclosure and due diligence laws).

281. The appropriateness of the SEC as a regulator on corporate human rights impacts is debated. For instance, with regard to Dodd–Frank § 1502, the ability of the SEC to be a "humanitarian watchdog" has been questioned, due to the organization's lack of specialist knowledge. *See* Karen E. Woody, *Conflict Minerals Legislation: The SEC's New Role as Diplomatic and Humanitarian Watchdog*, 81 FORDHAM L. REV. 1315 (2012). Note that the SEC's role in enforcement of the FCPA is not without challenge. *See* Barbara Black, *The SEC and the Foreign Corrupt Practices Act: Fighting Global Corruption Is Not Part of the SEC's Mission*, 73 OHIO STATE L.J. 1093 (2012). Woody distinguishes between the FCPA and § 1502, arguing that the FCPA regulates issues that directly relate to a company's bottom line, and malfeasance involving its employees, while § 1052 does not directly relate to the bottom line and involves people who are "not linked" to the corporation. *See* Woody, *supra*, at 1343. We disagree. Companies are linked to (and may well contribute to) human rights impacts that occur through the procurement of conflict minerals. A company's bottom line is increasingly involved when human rights impacts occur—e.g., through reputational damage, or as a result of litigation against the company.

282. U.K. civil society organizations, for instance, have commissioned research on the role of a regulator in overseeing and enforcing the proposed U.K. failure to prevent law, *see* Pietropaoli et al, *supra* note 21, which exam-

long game and hoping for a more gradual inculcation of the statute into the existing legal and regulatory framework.

CONCLUSION

There is a growing international movement regarding the adoption of a mHRDD framework. However, as with any framework, the momentum towards being proactive in BHR issues may come at a cost of thoughtful reflection regarding whether the current action is, in fact, the best one. Although the United States has an historical framework that the world has used to combat bribery and corruption through the FCPA, its failure to take on the issues of corporate accountability for human rights abuses head on has now placed it firmly behind the curve vis-à-vis its UNGP Pillar 1 obligations. Now, however, the United States has the chance to change that. Having policymakers and legislators meaningfully engage with ICAR's proposal would provide the United States with the opportunity to thoughtfully consider the role that the state should play in holding corporations accountable. We believe that the mHRDD+ model (as exemplified by the ICAR model) is an important step towards that re-engagement.

The diversity of domestic legislative initiatives on HRDD raises an important subject for future scholarship, namely whether an international treaty would create regulatory convergence in this field which is currently lacking. Under the current draft of a proposed BHR treaty,[283] all corporations are required to undertake HRDD.[284] In addition, the current draft contains an offense of failure to prevent another person (or legal entity) from "causing or contributing to a human rights

ines best regulatory practice across fields such as competition law in curbing corporate misconduct. *See Proposed UK Corporate Duty*, *supra* note 186.

283. In 2014, the United Nations Human Rights Council adopted a resolution to establish an open-ended intergovernmental working group (OEIGWG) to elaborate on a treaty. Human Rights Council Res. 26/9, U.N. Doc. A/HRC/RES/26/9 (July 14, 2014). At the time of writing, the current version of the draft treaty is the Third Revised Draft. U.N. Human Rights Council, OEIGWG Chairmanship Third Revised Draft of Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (Aug. 17, 2021), https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf.

284. *Id.*

abuse."[285] Thus, elements of the enacted and proposed European laws and the proposed FCPA-HR are present.

The ratification of the proposed treaty remains a somewhat distant prospect, however; and, for this reason, despite the need for regulatory convergence, we advocate for the adoption of the FCPA-HR. We believe that modeling human rights violation prevention and remedy on the FCPA would significantly improve the legal architecture for business and human rights in the United States. The combination of the substantive prohibition and the books and records due diligence—HRDD+—would be an enormous step forward from the current paradigm of disclosure laws. Of course, like any legislative initiative, in order for this to truly be effective, the framework would have to be developed to prevent pro forma compliance programs designed to ward off liability without materially altering corporate behavior.[286] We recommend that this concern be at the front and center of advocates' and lawmakers' minds and that lessons be drawn from successes and failures in other areas of corporate compliance to reduce the likelihood of this occurring.

We hope policymakers heed our call.

285. *Id.* at art. 8.6.

286. For instance, the anti-corruption landscape is not immune from this behavior. *See, e.g.*, Verdier & Stephan, *supra* note 21, at 1403 (citing the Siemens corruption case).

Appendix A

Proposed Law of FCPA-HR[287]

A Bill to Amend the Securities Exchange Act of 1934 to Prohibit Corporate Violations of Human Rights Throughout their Supply Chains and Enforce Reporting Mechanisms.

SECTION 1. SHORT TITLE

This Act may be cited as XXX.

SECTION 2. DEFINITIONS

In this Act—

(a) COMMISSION.—The term "Commission" refers to the Securities and Exchange Commission as established by Section 4 of the Securities Exchange Act of 1934 (15 U.S.C. § 78d).

(b) DOMESTIC CONCERN. —The term "domestic concern" means a national of the United States (as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. § 1101)) or any corporation, partnership, association, joint-stock company, business trust, incorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof, as also defined in the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2(h)(1).

(c) ENTITY.—The term "entity" includes "issuers," "domestic concerns," and other persons as defined in the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1, § 78dd-2(h)(1), and § 78dd-3(f)(1) respectively.

(d) ISSUER.—The term "issuer" includes any issuer organized under the laws of the United States, or a State, territory, possession, or commonwealth of the United States or a political subdivision thereof and which has a class of securities registered pursuant to 15 U.S.C. § 78l or which is required to file reports under 15 U.S.C. § 78o(d), or for any person that is an officer, director, employee, or agent of such issuer or a stockholder thereof acting on behalf of such issuer, as referenced in the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1(a).

287. *See* FCPA-HR, *supra* note 210.

(e) KNOWING.—

(1) A person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if—

(A) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or

(B) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

(2) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.

(f) SUPPLY CHAIN. —The term "supply chain" means, for an entity—

(1) any recruiters of workforce labor, and suppliers of products, component parts, raw materials, and services used by the entity in manufacturing any products of the entity, even if the relationship with such recruiter or supplier is informal; and

(2) other entities that receive products or services from the entity, other than for personal use.

(g) VIOLATION.—The term "violation," when used in the context of human rights, means an entity's act or omission which has an adverse impact on the enjoyment of human rights.

(h) VIOLATION(S) OF HUMAN RIGHTS—The term "violation of human rights" or "violations of human rights" includes actions, which, if committed, ordered, or financially, materially, or technologically supported, as well as a failure to take any action, within the special maritime and territorial jurisdiction of the United States, would meet the definition of:

(1) Homicide, as defined in 18 U.S.C. § 1111 et seq.;

(2) Kidnapping, as defined in 18 U.S.C. § 1201 et seq.;

(3) Federal crimes related to forced labor and trafficking, including peonage, as defined in 18 U.S.C. § 1581; involuntary servitude, as defined in 18 U.S.C. § 1584; forced labor, as defined in 18 U.S.C. § 1589; trafficking with respect to peonage, slavery, involuntary servitude, or forced labor, as defined in 18 U.S.C. § 1590; sex trafficking of children or by force, fraud, or coercion, as defined in 18 U.S.C. § 1591; unlawful conduct with respect to documents, as defined in 18 U.S.C. § 1592;

benefiting financially from peonage, slavery, and trafficking in persons, as defined in 18 U.S.C. § 1593A; attempting to or conspiring to commit any crime in this definition, as defined in 18 U.S.C. § 1594;

(4) Federal crimes related to sexual abuse or sexual exploitation, including sexual abuse, as defined in 18 U.S.C. § 2241 et seq.; sexual exploitation and other abuse of children, as defined in 18 U.S.C. § 2251 et seq.; transportation for illegal sexual activity and related crimes, as defined in 18 U.S.C. § 2421 et seq.;

(5) "Torture" and/or "severe mental pain or suffering" as defined in 18 U.S.C. § 2340 et seq.;

(6) War crimes, as defined in 18 U.S.C. § 2441 et seq.; or

(7) Damage to Religious Real Property, as defined in 18 U.S.C. § 247.

(i) BUSINESS PURPOSE —The term "business purpose" includes actions or omissions to obtain, retain, maintain, or otherwise secure an interest and/or advantage for an entity's financial, territorial, or other gain.

SECTION 3. PROHIBITED BUSINESS PRACTICES BY ENTITIES

(a) PROHIBITIONS. —It shall be unlawful for any entity, or for any officer, director, employee, or agent of such entity, any stockholder thereof, or participant within an entity's supply chain acting on behalf of such entity to—

(1) make use of, assist, aid and abet, or conspire with one making use of the mails or any means or instrumentality of interstate commerce in furtherance of a business purpose that directly or indirectly causes a violation of human rights;

(2) knowingly or recklessly participate or assist in the commission, be it an act or omission, of a violation of human rights for a business purpose, even if the act or omission was not the cause-in-fact, including the ordering, controlling, or otherwise directing of such violation; or

(3) knowingly benefit from the commission, be it an act or omission, of a violation of human rights by a participant within its supply chain, where the entity knew or should have known its supplier has committed such violation. For the purposes of this section, it is not necessary to establish that the entity enjoyed a monetary benefit.

(4) ALTERNATIVE JURISDICTION: It shall also be unlawful for any entity or United States person to knowingly participate or assist in the commission, be it an act or omission, of a violation of human rights for a business purpose, even if the act or omission was not the cause-in-fact, including the ordering, controlling, or otherwise directing of such violation, irrespective of whether such issuer or person makes use of the mails or any means of instrumentality of interstate commerce in furtherance of such violation.

(b) INJUNCTIVE RELIEF.—

(1) Whenever it shall appear that any domestic concern or person to which this section applies, or officer, director, employee, agent, or stockholder thereof, is engaged, or about to engage, in any act or practice constituting a violation of Section 3(b), the Attorney General or the Commission may, in their respective discretions, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing, a permanent injunction or a temporary restraining order shall be granted without bond.

(2) For the purpose of any civil investigation which, in the opinion of the Attorney General or the Commission, is necessary and proper to enforce this section, the Attorney General, their designee, or the Commission are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Attorney General or the Commission deems relevant or material to such investigation. The attendance of witnesses and the production of documentary evidence may be required from any place in the United States, or any territory, possession, or commonwealth of the United States, and may be requested from any foreign jurisdiction, at any designated place of hearing.

(3) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Attorney General or the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, or other documents. Any such court may issue an order requiring such person to appear before the Attorney General, their designee, or

the Commission there to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district in which such person resides or may be found. The Attorney General or the Commission may make such rules relating to civil investigations as may be necessary or appropriate to implement the provisions of this subsection.

(c) PENALTIES.—

(1) Administrative fines. Any entity that violates Section 3(b) shall receive a monetary fine.

(2) Civil liability. Any entity, and/or any natural person that is an officer, director, employee, or agent of an entity, or stockholder acting on behalf of such entity, who violates Section 3(b) shall be subject to a civil penalty imposed in an action brought by the Attorney General or the Commission.

(3) Criminal liability. Any natural person that is an officer, director, employee, or agent of an entity, or stockholder acting on behalf of such entity, who willfully violates Section 3(b) shall be fined, imprisoned, or both.

(4) Whenever a monetary penalty is imposed under Section 3(d) upon any natural person that is an officer, director, employee, agent, or stockholder of an entity, such fine may not be paid, directly or indirectly, by such entity.

(5) Whoever obstructs, or attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be liable to the penalties prescribed in this subsection.

(d) EQUITABLE RELIEF. In any action or proceeding brought or instituted by the Department of Justice or the Commission under any provision of the securities laws, the Department of Justice Commission may seek, and any Federal court may grant, any equitable relief, including the disgorgement of ill-gotten gains, that may be appropriate or necessary for the benefit of the victims. Equitable relief may be sought contemporaneously with other remedies, including injunction and civil and/or criminal penalties.

(e) SUSPENSION AND DEBARMENT. Any entity who violates this Section shall be subject to suspension and debarment as specified in subpart 9.4 of Title 48 of the Code of Federal Regulations (or any successor regulation).

SECTION 4. REPORTING REQUIREMENTS

(A) REPORTS BY ISSUER OF SECURITY, CONTENT.—

(1) Every issuer of a security registered pursuant to Section 78l of this title shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security—

(A) such information and documents (and such copies thereof) as the Commission shall require to keep reasonably current the information and documents required to be included or filed pursuant to Subsection XX of this Chapter;

(B) all relationships to suppliers, producers, purchasers, and all other upstream and downstream business partners, to the extent not otherwise disclosed in the report; and

(C) certified private sector audits that may be required for high risk sectors and entities operating in high risk areas, as required by Section XXX of this Chapter. Such a certified audit shall constitute a critical component of due diligence.

(2) Unreliable Determination. If a report required to be submitted by a person under subparagraph XX relies on a determination of an independent private sector audit, as described under subparagraph XX or other due diligence processes previously determined by the Commission to be unreliable, the report shall not satisfy the requirements of the regulations promulgated under subparagraph XX.

(B) FORM OF REPORT; BOOKS, RECORDS, AND DUE DILIGENCE; DIRECTIVES.—

(1) The Commission may prescribe, in regard to reports made pursuant to this chapter, the form or forms in which the required information shall be set forth, the methods to be followed in the preparation of reports, and specify content to provide, but in the case of the reports of any entity whose methods of disclosure are prescribed under the provisions of any law of the United States, or any rule or regulation thereunder, the rules and regulations of the Commission with respect to reports shall not be inconsistent with the requirements imposed by such law or rule or regulation in respect of the same subject matter (except that such rules and regulations of the Commission may be inconsistent with such requirements to

the extent that the Commission determines that the public interest or the protection of investors so require).

(2) Every issuer which is required to file reports pursuant to this Section shall—

(A) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the procedures with which the issuer uses or plans to use to meet the due diligence requirements of [the following subsection], as well as the due diligence measures taken.

(B) devise and maintain a system, in association with relevant stakeholders, and where appropriate, within multi-stakeholder initiatives within affiliate, subsidiary, or parent levels, that is sufficient to provide reasonable assurances that the entity is not engaging via act or omission in the violation of human rights, and that shall include the following measures:

i. Risk analysis. Procedures to regularly and continually identify, analyze, and rank the risks of violations of human rights throughout the entity's supply chain, considering factors including—

1. Country and/or region-specific risks;
2. Sector-specific risks;
3. The severity of the potential or actual impact;
4. The likelihood that such an impact would occur;
5. How directly the entity is contributing to such violations, and
6. The actual and economic leverage the entity can exert on the actor directly causing such violations.

ii. Preventative measures. Action to mitigate risks and/or prevent violations of human rights throughout the entity's supply chain, including a policy regarding human rights, business, and the supply chain, which shall be communicated to employees and business partners;

iii. Monitoring. A method to monitor ongoing, recent, or imminent adverse impacts or violations of human rights throughout the entity's supply chain, as well as the effectiveness of the risk analysis process and preventative measures; and

iv. Collection of records and reports. Processes to collect all records and reports of ongoing, recent, or imminent violations of human rights throughout the entity's supply chain, which must in turn include the entity's response to the record or report, or explanation for lack of response.

(3) Where an issuer which has a class of securities registered pursuant to section 78l of this title or an issuer which is required to file reports pursuant to section 78o(d) of this title holds 50 per centum or less of the voting power with respect to a domestic or foreign firm, the provisions of Subsection 4(b)(2) require only that the issuer proceed in good faith to use its influence, to the extent reasonable under the issuer's circumstances, to cause such domestic or foreign firm to devise and maintain a system of human rights due diligence consistent with Subsection 4(b)(2). Such circumstances include the relative degree of the issuer's ownership of the domestic or foreign firm and the laws and practices governing the business operations of the country in which such firm is located. An issuer which demonstrates good faith efforts to use such influence shall be presumed to have complied with the requirements of Subsection 4(b)(2).

(4) Definitions. For the purpose of this subsection, the terms "reasonable assurances" and "reasonable detail" mean "such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs," as defined in the Foreign Corrupt Practices Act, 15 U.S.C. § 78m(b)(7).

(C) PENALTIES

(1) Willful violations; false and misleading statements.

Any person who willfully violates any provision of Section 4, or any rule or regulation thereunder, the violation of which is made unlawful or the observance of which is required under the terms of this Section, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o(d), or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any material fact, shall upon conviction be served a monetary fine, or imprisoned, or both; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if they prove that they had no knowledge of such rule or regulation.

(2) Failure to file information, documents, or reports.

Any issuer which fails to file information, documents, or reports required to be filed under Section (4)(B)(2) shall forfeit to the United States a monetary sum, specified by the investigating agency, for each and every day such failure to file shall continue. Such forfeiture, which shall be in lieu of any criminal penalty for such failure to file which might be deemed to arise under subsection (C)(1) of this section, shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States.

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A DIFFERENT CURSE: IMPROVING THE ANTITRUST DEBATE ABOUT "BIGNESS"

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Over one hundred years ago, Louis Brandeis explained his views on antitrust law in an essay titled "A Curse of Bigness." Now, a progressive movement, inspired by Brandeis and thus dubbed the "Neo-Brandeisians," challenges the status quo in American antitrust law. Yet, the response from establishment antitrust scholars has been remarkably inhospitable. Unfortunately, the current debate about Bigness is thus "cursed" by close-minded and unproductive criticism.

This Note's purpose is not to assert that reform ideas are beyond reproach but to move the legal and policy debate into more productive territory. Part I outlines the current debate. Part II clarifies the often misunderstood or overlooked tenets of the Neo-Brandeisian movement of antitrust reform. Part III examines three common criticisms of the reform movement, describing each and then responding with why each is unproductive. Part IV advocates for a more substantive and legally focused debate over "Bigness" in antitrust. This Note closes with optimism by promoting examples of scholarship that seem to be heading in a more fruitful direction.

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INTRODUCTION

Over one hundred years ago, legal scholar and future Supreme Court Justice Louis Brandeis explained his views on antitrust in an essay titled *A Curse of Bigness*: "The evil of the concentration of power is obvious; and as combination necessarily involves such concentration of power, the burden of justifying a combination should be placed upon those who seek to effect it."[1]

Now, a progressive movement, inspired by Brandeis and thus dubbed the "Neo-Brandeisian" movement, challenges the status quo in American antitrust law.[2] In this "battle for the soul of antitrust," Neo-Brandeisian ideas have already won in-

1. Louis D. Brandeis, *A Curse of Bigness, in* OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 120–133 (Melvin I. Urofsky, ed., 1995) (originally published in *Harper's Weekly* on Jan. 10, 1914).

2. *See infra* Part II for a detailed explanation of the content of Neo-Brandeisians' suggestions for reform. *See infra* Appendix, Exhibit B for a summary and categorization of Neo-Brandeisian proposals.

fluence and allies in government.[3] Reformers now occupy powerful roles in the executive branch,[4] and lawmakers have included Neo-Brandeisian ideas in proposed amendments to antitrust laws, several of which have bipartisan co-sponsors.[5]

However, despite this quick uptake of their ideas in the executive and legislative branches, establishment antitrust scholars' reception of these reformers has been inhospitable.[6]

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3. *Cf.* Eleanor M. Fox, *The Battle for the Soul of Antitrust*, 75 CALIF. 917 (1987) (stating that intellectual battles over the soul of antitrust are not unprecedented); *see also infra* notes 26–27.

4. President Biden appointed progressive reform-minded lawyers to influential roles: Tim Wu as National Economic Council advisor, Lina Khan as Chair of the FTC, and Jonathan Kanter as Assistant Attorney General for Antitrust. Jim Tankersley & Cecilia Kang, *Biden's Antitrust Team Signals a Big Swing at Corporate Titans*, N.Y. TIMES, (July 24, 2021), https://www.nytimes.com/2021/07/24/business/biden-antitrust-amazon-google.html. While Kanter did not publicly comment much when in private practice, Khan and Wu have articulated their views. *See* Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131, 132 (2018); Tim Wu, *The Utah Statement: Reviving Antimonopoly Traditions for the Era of Big Tech*, ONEZERO/MEDIUM (Nov. 18, 2019), https://onezero.medium.com/the-utah-statement-reviving-antimonopoly-traditions-for-the-era-of-big-tech-e6be198012d7; Tim Wu, *After Consumer Welfare, Now What? The 'Protection of Competition' Standard in Practice*, COMPETITION POL'Y INT'L 2018.

5. *See, e.g.*, American Choice and Innovation Online Act, H.R. 3816, 117th Cong. (2021) (sponsored by Rep. David Cicilline (D-RI) with several Republican co-sponsors); Merger Filing Fee Modernization Act of 2021, H.R. 3843, 117th Cong. (2021) (sponsored by Rep. Joe Neguse (D-CO) with several Republican co-sponsors); Platform Competition and Opportunity Act of 2021, H.R. 3826, 117th Cong. (2021) (sponsored by Hakeem Jeffries (D-NY) with a few Republican co-sponsors); Open App Markets Act, S. 2710, 117th Cong. (2022) (sponsored by Sen. Blumenthal (D-CT) with several Republican co-sponsors). While outside this Note's scope, reformers in the E.U. have succeeded in passing the Digital Markets Act, significantly altering competition law. *See* Press Release, Deal on Digital Markets Act, Eur. Parliament (Mar. 24, 2022), https://www.europarl.europa.eu/news/en/press-room/20220315IPR25504/deal-on-digital-markets-act-ensuring-fair-competition-and-more-choice-for-users.

6. *See, e.g.*, Elyse Dorsey et al., *Consumer Welfare & the Rule of Law: The Case Against the New Populist Antitrust Movement*, 47 PEPP. L. REV. 861 (2020); Mark Jamison, *Proponents of Hipster Antitrust Fail to Understand Economic History and Business Realities*, AM. ENTER. INST. (Aug. 6, 2019), https://www.aei.org/technology-and-innovation/proponents-of-hipster-antitrust-fail-to-understand-economic-history-and-business-realities/. This "just say no" approach is reminiscent of the "inhospitable" tradition of antitrust law from an earlier era; *see What More Should Antitrust Be Doing?*, THE ECONOMIST (Aug. 6, 2020),

Thus, this debate over "Bigness" is suffering from a different curse: many scholars are unfairly criticizing Neo-Brandeisians, rather than debating the legal and policy merits of their ideas.[7] Unfortunately, smart people are talking past each other.

So, when change seems likely, or at least possible, a failure to thoughtfully engage in this current debate enhances the risk that antitrust law will proceed in a poorly considered direction or become politically polarized. The consequences of an improperly scoped or enforced antitrust law can be severe.[8] And, as with many other collective action problems, political

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https://www.economist.com/schools-brief/2020/08/06/what-more-should-antitrust-be-doing ("Donald Turner, America's top trustbuster in the mid-1960s, saw antitrust law as benefiting from an 'inhospitable' tradition: on many matters its default response was to say no."); *see also* Donald F. Turner, *Some Reflections on Antitrust*, 1966 N.Y. ST. B.A. ANTITRUST L. SYMP. 1, 1–2 ("I approach territorial and customer restrictions not hospitably in the common law tradition, but inhospitably in the tradition of antitrust law.") (coining the "inhospitable tradition" phrase in the sense of enforcers reflexively nipping monopoly problems in the bud). This Note argues that establishment scholars are unhelpfully and unsuccessfully attempting to do the same thing to the Neo-Brandeisian reform movement.

7. In general, by unfair, I mean that these criticisms are either inapt, distortional, unproductive, or all three. *See infra* Part III for greater discussion of these criticisms and my responses.

8. To conservatives, over-enforcement errors are a greater risk: over-enforcement errors violate principles of freedom and perversely hamper rather than help the free-market economy that it is meant to protect. *See, e.g.*, ROBERT H. BORK, THE ANTITRUST PARADOX 20–21 (1978) ("The struggle between economic freedom and regulation also reflects and reacts upon the tension in our society between the ideals of liberty and equality. Neither of these can be an absolute, of course, but the balance between them *and the movement of that balance* are crucial.") (emphasis added). Additionally, lost upside potential of well-functioning capitalism also poses a risk. Daron Acemoglu & James A. Robinson, *Is This Time Different? Capture and Anti-Capture of U.S. Politics*, 9 THE ECONOMISTS' VOICE 1, 2 (2012) ("The consequences of these inclusive institutions were that the U.S. became one of the most prosperous and technologically dynamic societies in the world."). Alternatively, progressives generally perceive that under-enforcement errors pose a greater risk: under-enforcement errors may result in a vicious cycle where citizens lose control of government to a nefarious entity that unifies political and economic power. *See, e.g.*, TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 78–80 (2018) (explaining how monopolies enabled and sustained the Nazi Party's fascist priorities); Luigi Zingales, *Towards a Political Theory of the Firm*, 31 J. ECON. PERSPS. 113, 115 (2017) ("That [the East India Company's] 15-year monopoly right lasted 233 years is a harsh reminder of how dangerous the commingling of economic and political power can be."); *id.* at 120 ("The

partisanship can risk harmful ossification and irresponsible tinkering with the law, both of which should be avoided.[9]

This Note's purpose is not to assert that these reform ideas are beyond reproach but to move the legal and policy debate into more productive territory.[10] Several problems frustrate the current antitrust legal debate. One problem is that many people are rejecting Neo-Brandeisian theory without first seeking to understand it on its own terms. To that end, this Note summarizes and explains the main tenets of Neo-Brandeisian thinking, which have been clear for years[11]: Anti-Bigness, reducing or eliminating pro-defendant biases in antitrust law, enhancing enforcement, and reforming problems with the Consumer Welfare Standard (CWS).[12]

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fear is of a 'Medici vicious circle,' in which money is used to gain political power and political power is then used to make more money.").

9. Take as an example the problematic ossification and polarization of American immigration law. Congressional inaction has led to outdated law and creative exercises of Executive power in both Republican and Democratic administrations. *See* Tom Jawetz, *Restoring the Rule of Law Through a Fair, Humane, and Workable Immigration System*, CTR. AM. PROGRESS (July 22, 2019), https://www.americanprogress.org/article/restoring-rule-law-fair-humane-workable-immigration-system/; David J. Bier, *Why the Legal Immigration System is Broken: A Short List of Problems*, CATO INST. (July 10, 2018), https://www.cato.org/blog/why-legal-immigration-system-broken-short-list-problems. Given the increased congressional dysfunction and decline of public lawmaking over the past few decades, the same problem is arguably happening in many other areas of law. *See* Ezra Klein, *Congressional Dysfunction*, VOX (last updated May 15, 2015), https://www.vox.com/2015/1/2/18089154/congressional-dysfunction (see charts showing declines in productivity and increases in party polarization and use of the filibuster).

10. More debate should focus on law and policy, as opposed, in particular, to macroeconomic trends, which I partially address in Part III under the establishments' critiques about "History." *See infra* Part III. While a fuller discussion is outside the scope of this Note, my view is that the discussion over what empirical economic data mean can and should *inform* but cannot and should not *answer* antitrust law's central legal and policy questions. This Note advocates for more substantive discussion of the latter in the context of the reform agenda.

11. *See infra* Appendix, Exhibit B for a summary of the Utah Statement, which is an articulation of Neo-Brandeisian values and proposals for reform; Wu, *supra* note 4.

12. For more background on the meaning of the Consumer Welfare Standard *see* Herbert J. Hovenkamp, *On the Meaning of Antitrust's Consumer Welfare Principle*, CONCURRENTIALISTE (Jan. 17. 2020) ("[T]he consumer welfare principle in antitrust should seek out that state of affairs in which output is maximized, consistent with sustainable competition. Viewing the con-

Another overarching problem is that the debate's scope is too broad, attempting to draw conclusions about history, economics, and politics. The debate over Bigness would benefit from a narrower focus on the legal and policy substance of reform proposals and their potential consequences. To generalize, a substantial amount of criticism of Neo-Brandeisian ideas has failed to substantially engage with reform proposals in three main ways.

First, legal scholarship often overvalues irrelevant historical context at the expense of substantive analysis. Rather than engage with the current proposals, establishment scholars complain that reformers apparently "ignore that over fifty years ago, antitrust law debated the same proposals that they are raising anew today."[13] Critics argue that the reformers would agree with the status quo if they just took the time to fully understand and appreciate why antitrust law took such an economically conservative, pro-defendant turn over the past fifty or so years.[14] However, these arguments about history distract from substantively analyzing the reformers' proposals in the current context, rather than the circumstances of a half-century ago.[15]

Second, rather than engage with nuance, critics have often mischaracterized Neo-Brandeisian thinking as being antithetical to certain values imbued in current antitrust standards. For example, assume that the current CWS's main goal

sumer welfare principle as output maximization has the effects of (1) protecting the consumer interest in low prices; (2) protecting intermediaries all the way down the distribution chain because high output tends to benefit all of them; (3) protecting competitive labor and other supplier markets, because these are also best off when output is maximized and wages are unrestrained.").

13. Dorsey et al., *supra* note 6 at 862.

14. *Cf.* Verizon Commc'ns, Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system.").

15. *See* JONATHAN B. BAKER, THE ANTITRUST PARADIGM 3, 5 (2019) ("Today's antitrust paradox is not Bork's. . . . [There are] four competitive problems new to the information economy or exacerbated [by] it: algorithmic coordination; exclusionary conduct by dominant platforms; threats to innovation; and harm to users on all sides of platforms—suppliers as well as customers.").

is low prices[16] and that Neo-Brandeisians disagree with it because it is biased toward defendants and difficult to administer.[17] Establishment thinkers then mischaracterize reformers' disagreement with the CWS by substituting that nuanced disagreement with some inversion of the CWS. Thus, anyone who disagrees with the CWS must therefore believe that the goal of antitrust is instead to raise prices and harm end-consumers.[18] This approach ignores the nuance of reformers' positions and attacks straw man arguments when reformers are actually making different points.

Third, establishment scholars, accustomed to the CWS, are frustrated that Neo-Brandeisians' proposals do not look like the CWS, accusing them of vagueness.[19] And beyond vagueness, some critics also accuse reformers of hiding the

16. *Cf.* Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. CORP. L. 101, 108 (2020) (summarizing that the standard that federal antitrust agencies apply in evaluating mergers is "simply whether price is likely to go up or down–much simpler than an inquiry into general welfare effects.").

17. *See infra* Part I.B for a discussion of the Neo-Brandeisians' proposals to reform the CWS.

18. Assume the premise: "If you believe in the Consumer Welfare Standard, then the goal is low prices" (If $X \rightarrow Y$).
The logical error is accepting the inverse premise as true when they are not logically equivalent:
Inverse: "If you do not believe in the Consumer Welfare Standard, then the goal is not low prices." (If $\sim X \rightarrow \sim Y$).
Rather, the contrapositive, a much less insightful statement, is logically equivalent:
"If the goal is not low prices, then you do not believe in the Consumer Welfare Standard." (If $\sim Y \rightarrow \sim X$).
Thus, it still remains necessary to figure out what reformers actually think.

19. *See, e.g.*, Daniel Crane, *How Much Brandeis Do the Neo-Brandeisians Want?*, 64 ANTITRUST BULL. 531, 531 (2019) ("Nonetheless, to skeptics of the movement like myself, the lack of a significant body of work articulating the movement's views creates a framing difficulty—how does one critique a movement without a canon of literature or, to date, any tangible political or judicial achievements?"); *Consumer Welfare Standard*, ANTITRUST EDUC. PROJECT, https://www.antitrusteducationproject.org/consumer-welfare-standard.html (last accessed Nov. 4, 2021) ("Vague New Notions: Legislators are advancing new theories of antitrust that would address poorly defined ideas about 'equity' and 'values' that would uncouple this body of law from its beneficial economic effects."). Advisory Board members of the Antitrust Education Project include the Hon. Judge Douglas Ginsburg and Professors Joshua D. Wright, Daniel A. Crane, Thom Lambert, Geoffrey A. Manne, Alan J. Meese, Donald Kochan, Alden Abbott, & Kenneth G. Elzinga. *Staff &*

ball, purportedly because the reformers know their ideas are unpopular.[20] Whether implicit or explicit, this expectation that a new standard must look exactly like the CWS is misguided. Neo-Brandeisians rebut this expectation as flawed because it accepts the erroneous premise that the CWS is clear, objectively neutral, and easy to administer.[21]

Neo-Brandeisian proposals are imperfect and should be rigorously debated. Accordingly, this Note concludes by addressing three related critiques that deserve more attention. First, how do reformers plan to address antitrust law's classic administrability challenges? Second, which standard, if any, do the reformers prefer? Third, what is the reformers' stance on the proper extent and role of economic evidence and economists in antitrust law? Scholars should prioritize these challenging topics because both practitioners and the academic debate would benefit from further clarification and analysis.

This Note proceeds as follows. Part I begins by providing a very brief background of antitrust law and summarizing the nature of the current dispute over legal standards. With this context, Part II then explains the Neo-Brandeisian reform movement, including its values, doctrinal proposals, enforcement priorities, and concerns with the current legal standard. Part III then turns to criticisms of the Neo-Brandeisian movement, describing three frequent criticisms and explaining why they are unproductive or otherwise unfair. In closing, Part IV advocates for a more substantive and legally-focused debate over "Bigness" in antitrust and provides examples of more productive criticisms.

Board, ANTITRUST EDUC. PROJECT, https://www.antitrusteducationproject.org/staff.html (last accessed May 23, 2022).

20. *See* Hovenkamp, *supra* note 16, at 130 ("A neo-Brandeis approach whose goals were honestly communicated would never win in an electoral market, just as it has never won in traditional markets."); Christine S. Wilson, *The Chair's Showcase: The Future of Antitrust*, 35 ANTITRUST 4, 23 (2021) ("Herbert Hovenkamp said that if the Neo-Brandeisians were clear in the outcomes that they are seeking, these ideas would not get traction—and I think that is true.").

21. *See infra* Part I.B. for an explanation about what problems Neo-Brandeisians have with the CWS.

I.
Progressive reformers are challenging the status quo in antitrust law

This part provides background on the current debate in antitrust law. First, this part describes the Sherman Act—America's first antitrust law—and two important judicial interpretations of the law. It then explains the ideas and logic of antitrust law's current CWS and explores how and why Neo-Brandeisian reformers oppose it.

Since the Sherman Act was passed in 1890,[22] its scope has been vigorously debated.[23] The Act's prohibitions are simple and short:

> [Section One:] Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.
> [Section Two:] Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony [* * *].[24]

Congress' original intent remains vigorously debated,[25] and scholarly analysis of its legislative history provides no clear consensus as to its intended scope.[26] Thus, against this background, the interpretation of the Sherman Act and, consequently, American antitrust law, was left to the judiciary, most

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22. 15 U.S.C. §§ 1–38 (1890).

23. *See infra* notes 26–27, 35–40.

24. 15 U.S.C. §§ 1–2 (1890).

25. *Compare* Robert H. Bork, *Legislative History and the Policy of the Sherman Act*, 9 J.L. & Econ. 7 (1966) (antitrust law is a delegation to the courts was constrained by the "consumer welfare" policy and wealth redistribution questions are irrelevant), *with* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 50 Hastings L.J. 871 (1999) (purpose was to prevent redistribution from consumers to monopolist producers).

26. *Compare* William L. Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. Chi. L. Rev. 221 (1956) (passage was a populist reaction requiring a radical change to status quo), *with* Hans B. Thorelli, The Federal Antitrust Policy (1954) (passage was merely formalizing English common law without any intent for radical change from status quo).

notably the Supreme Court. While the Court's interpretative history is a winding road, only two turns are relevant here.[27] In both cases, the Court significantly narrowed the statute's scope.

First, in *Standard Oil v. United States*, the Supreme Court read a reasonableness requirement into the statute, finding that the text must not literally mean what it says.[28] Simply, the Sherman Act's assertion that "Every contract . . . in restraint of trade . . . is declared to be illegal" is too broad to be taken literally. Because all contracts restrain trade in some manner, the Sherman Act, taken literally, would essentially proscribe all of contract law. To avoid this absurd outcome, the Court adopted what became known as the "rule of reason," which reads a reasonableness element into the Sherman Act.[29] So, under this interpretation, the Sherman Act only prohibits contracts that *unreasonably* restrain trade.[30] But that begged another question: What constitutes reasonableness or, said differently, fair competition?

Second, eighty years later, the Court tried to definitively answer this question in *Reiter v. Sonotone*.[31] In *Reiter*, the Court

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27. This Note argues that, in the current debate, overemphasis on history is problematic because participants too often invoke history to reject reform proposals rather than analyze them in the present context. *See infra* Part III.

28. 221 U.S. 1, 60 (1911) (Congress "intended that the *standard of reason* which had been applied at the common law and in this country in dealing with subjects of the character embraced by the [Sherman Act] was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided.") (emphasis added).

29. *Id.* at 66 ("If the criterion by which [liability under the Sherman Act] is to be determined in all cases whether every contract, combination, etc., is a restraint of trade within the intendment of the law, is the direct or indirect effect of the acts involved, then of course the *rule of reason* becomes the guide, and the construction which we have given the statute, instead of being refuted by the cases relied upon, is by those cases demonstrated to be correct.") (emphasis added).

30. *Id.* at 59, 63–68.

31. 442 U.S. 330 (1979). In the intervening eighty years, the Court expounded the rule of reason by setting forth standards for particular types of anticompetitive conduct or effects, but it rarely rejected *as a matter of law* entire categories of arguments. *See generally*, Rudolph J. Peritz, *A Counter-History of Antitrust Law*, 1990 DUKE L.J. 263, 279–302 (1990) (critically tracing the history of the Supreme Court's rule of reason jurisprudence from 1911 in *Standard Oil* to adoption of the "price theory" or some variation of the CWS by the 1980s).

found that "Congress designed the Sherman Act as a 'consumer welfare prescription.'"[32] In doing so, the Court attempted to clarify what constitutes reasonableness by narrowing the standard to behavior that, on net, does not harm "consumer welfare."

What the Court meant by "consumer welfare" was somewhat unclear. But, by adopting the CWS as the *only* acceptable gloss on reasonableness, the Court clearly signaled that a subset of *economic* evidence and arguments would now carry *exclusive* weight in antitrust law.[33] As discussed below, under the CWS, arguments about why misconduct unreasonably harmed competition in any other sense (i.e., aside from consumer welfare) would no longer suffice. Dissenters lost this argument.[34]

A. *The status quo: the CWS*

The status quo is the CWS, which reflects the legal embrace of economic analysis and laissez-faire thinking.[35] The CWS is a collection of legal rules and analytical methods informed by economic theory.[36] Its basic premise is that antitrust law's goal is to pursue a specific sense of economic efficiency meant to benefit "consumers."[37] Further, it guides courts to

32. 442 U.S. at 343 (1979) (quoting ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 66 (1978)).

33. *See* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 66 (1978).

34. *See, e.g.*, Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979) ("The issue among most serious people has never been whether non-economic considerations should outweigh significant long-term economies of scale, but rather whether they had any role to play at all, and if so, how they should be defined and measured. . . . It is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws.").

35. *See* Maurice E. Stucke & Ariel Ezrachi, The Rise, Fall, and Rebirth of the U.S. Antitrust Movement, HARV. BUS. REV. (Dec. 15, 2017) (explaining how "the Chicago School's assumptions of self-correcting markets" is the "status quo" currently being challenged by the Neo-Brandeisians).

36. Hovenkamp, *supra* note 12 (explaining the evolution of the CWS and reconceptualizing it as a normative goal "in antitrust [to] seek out that state of affairs in which output is maximized, consistent with sustainable competition.") (emphasis removed).

37. *But see* Eleanor M. Fox, *The Efficiency Paradox*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 77, 88 (Robert Pitofsky ed., 2008) ("The Efficiency Paradox is that, in the name of efficiency, economically conservative

use economic analysis to make legal decisions instead of leveraging other legal decision-making tools. Thus, other non-economic, or "political," considerations are irrelevant in antitrust legal analysis.[38]

The CWS holds that antitrust law *over*-enforcement poses a greater threat than *under*-enforcement.[39] In other words, the CWS accepts the assumption that enforcing the antitrust laws too aggressively is more harmful than enforcing them too leniently. CWS adherents claim that economic analysis and empirical data show that consumers benefit from allowing companies to achieve and maintain monopolies, as long as the monopolists do not abuse their power.[40] Two examples, one from each of the Sherman Act's sections, demonstrate how courts have narrowed the scope of antitrust liability by applying the CWS's bias toward free markets.

First, consider the deference that courts grant to defendants in the context of Sherman Act Section One, which addresses multilateral conduct.[41] When defendants' agreements to restrain trade seem to produce benefits for consumers, the Supreme Court has held that antitrust law gives the benefit of

U.S. antitrust law protects inefficient conduct by dominant and leading firms and thus protects inefficiency."); John B. Kirkwood & Robert H. Lande, *The Chicago School's Foundation Is Flawed: Antitrust Protects Consumers, Not Efficiency*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 89, 90 (Robert Pitofsky ed., 2008).

38. Non-economic considerations are pejoratively referred to as "political" and have been rejected from antitrust analyses as irrelevant. *See, e.g.*, Robert H. Bork, *Legislative History and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 42–43 (1966) ("[I]t is impossible to find even colorable language suggesting most of the other broad social or political purposes that have occasionally been suggested as relevant to the application of the Sherman Act."); *accord* FTC v. Superior Ct. Trial Lawyers Ass'n, 493 U.S. 411, 424 (1990) ("The social justifications . . . for the restraint . . . do not make it any less unlawful.") (rejecting First Amendment arguments to justify a price-fixing-related boycott).

39. *See* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 16 (1984) (arguing that it is better to assume that over-enforcement errors are more frequent and costly than under-enforcement errors).

40. *See* Trinko, 540 U.S. at 407 ("The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth.") (citing nothing).

41. Vexingly, *uni*lateral conduct is covered in Sherman Act Section *Two*. *See* 15 U.S.C. § 2.

the doubt to defendants, even when the conduct would otherwise constitute a clear violation.[42] Economic evidence suggests that, because joint ventures can produce efficiencies that may result in lower prices or enhanced output, which may benefit end-consumers, antitrust claims against joint venturers require more scrutiny to evaluate a constraint's reasonableness than those of unaffiliated competitors.[43] So, defendant joint venturers may avoid liability by offering valid business justifications,[44] even though antitrust law usually finds that price-fixing for labor (or colluding to suppress wages) is per se unlawful and unjustifiable.[45]

For example, the National Collegiate Athletics Association (NCAA), a joint venture of amateur athletics programs, has benefitted for decades from this background legal presumption.[46] To simplify slightly, NCAA organizations collude to

42. *See* Copperweld Corp. v. Independ. Tube Corp., 467 U.S. 752, 768 (1984) (Usually, "[c]oncerted activity subject to § 1 is judged more sternly than unilateral activity under § 2. Certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal per se without inquiry into the harm it has actually caused. . . . [But, o]ther combinations, such as mergers, joint ventures, and various vertical agreements, hold the promise of increasing a firm's efficiency and enabling it to compete more effectively. Accordingly, such combinations are judged under a rule of reason, an inquiry into market power and market structure designed to assess the combination's actual effect.") (citations omitted).

43. *See* NCAA v. Alston, 141 S. Ct. at 2141 (2021) ("There's no question, for example, that many 'joint ventures are calculated to enable firms to do something more cheaply or better than they did it before.'") (citing 13 Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶2100c, at 7 (4th ed. 2019)).

44. *See* Broadcast Music Inc. v. Columbia Broadcasting Syst., Inc., 441 U.S. 1, 20–22 (1979) (rejecting application of the per se rule to activity accurately characterized as price-fixing in a literal sense because "[h]ere, the whole is truly greater than the sum of its parts; [the joint venture's effect] is, to some extent, a different product."); *see also* John M. Newman, *Procompetitive Justifications in Antitrust Law*, 94 IND. L.J. 501 (2019).

45. *E.g.*, Mandeville Island Farms v. Am. Crystal Sugar, 334 U.S. 219 (1948); Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006).

46. *See* NCAA v. Bd. of Regents, 468 U.S. 85, 99–102 (1984) (noting that even though "[a] restraint of this type has often been held to be unreasonable as a matter of law," the court declined to do so because the horizontal restraint was "essential if the product [wa]s to be available at all."); Alston, 141 S. Ct. at 2166 (2021) (Kavanaugh, J., concurring) (noting that "with surprising success, the NCAA has long shielded its compensation rules from ordinary antitrust scrutiny").

limit the pay their employees: college athletes.[47] This is collusion to suppress wages that courts should theoretically treat as per se illegal.[48] The NCAA has maintained that the benefits to consumers from college sports reasonably outweigh the anticompetitive harms of its coordinated agreement to not pay college athletes.[49] However, the CWS grants this type of rebuttable presumption *to the defendant*, reflecting how the standard influences antitrust law to narrow the scope of liability. The fact that the NCAA has withstood antitrust scrutiny for almost forty years since its first visit to the Supreme Court shows how deferential to defendants the courts can be when interpreting the antitrust laws under the CWS.[50]

Second, consider how difficult it is for a plaintiff to prove that a monopoly has abused its market power in the Sherman Act's Section Two context, which covers unilateral conduct. The Supreme Court has held that certain "monopolization" theories require plaintiffs to allege unique factual circumstances to distinguish impermissible conduct from what may otherwise be procompetitive conduct, like in predatory pricing claims.[51] In theory, monopolization claims require plaintiffs to

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47. *See* Alston, 141 S. Ct. at 2149–50 (Gorsuch, J.) (explaining the recent state of its pay rules).

48. *See No More No-Poach*, U.S. DEP'T OF JUST. (last updated Apr. 10, 2018) ("Naked no-poach and wage-fixing agreements are per se unlawful because they eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers."); Mandeville Islands Farms, 334 U.S. 219; Texaco Inc., 547 U.S. at 5. In the most recent challenge to the NCAA's restraints on paying student-athletes, Justice Kavanaugh noted that the "NCAA's business model would be flatly illegal in almost any other industry in America." Alston, 141 S. Ct. at 2167 (Kavanaugh, J., concurring) (Slip Op. at 3).

49. Alston, 141 S. Ct. at 2152 (Gorsuch, J.).

50. *See* Alan Meese, Requiem for a Lightweight: How NCAA Continues to Distort Antitrust Doctrine, WAKE FOREST L. REV., (forthcoming) (manuscript at 2) (last updated June 7, 2021) ("Failure to condemn the restraints before it as unlawful *per se* also distorted the Court's pronouncements regarding how to conduct rule of reason analysis."); Sandeep Vaheesan, Antirust Law is the Key to Making the NCAA pay Student Athletes, WASH. POST (Apr. 1, 2021).

51. *See* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 221, 224–26 (1993) (Technically the plaintiff's cause of action in *Brooke Group* arose from the Robinson-Patman Act, but the court noted that "the type alleged here[ ] is of the same general character as a predatory pricing claim under § 2 of the Sherman Act.") (noting the recoupment requirement). The Court has also developed and applied these principles in the

demonstrate (1) that the defendant has power to control prices or output in the relevant market and (2) purposefully acquired or maintained this monopolistic power in an anticompetitive manner.[52]

For example, a predatory pricing claim contemplates a monopolist abusing its market power and often its vast resources by driving prices so low for so long that it forces a less well-resourced competitor to exit the market.[53] Because low prices generally benefit consumer welfare, however, courts have held that predatory pricing claims require alleging additional elements: below-cost pricing and recoupment of supracompetitive profits.[54] These additional elements are meant to distinguish price wars that are good for consumers from those that are not. As a result of these enhanced requirements, plaintiffs rarely succeed in proving predatory pricing claims.[55] Some CWS adherents are so skeptical of this theory of harm that they think it should be per se legal.[56] Embedding such a degree of skepticism in law has drawn criticism that these enhanced requirements unfairly preclude meritorious claims.[57] This skepticism toward the predatory pricing theory of harm

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Section One context; *accord* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986) ("But antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case."); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 554 (2007) (holding that "proof of a § 1 conspiracy must include evidence tending to exclude the possibility of independent action").

52. United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

53. Brooke Grp., 509 U.S. at 225.

54. *Id.* at 224–26. *See also* United States v. AMR Corp., 335 F.3d 1109 (rejecting many different and valid proxies for below marginal cost pricing).

55. *See Predatory or Below Cost Pricing*, FED. TRADE COMM'N (last visited Oct. 13, 2021), https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/predatory-or-below-cost ("Instances of a large firm using low prices to drive smaller competitors out of the market in hopes of raising prices after they leave are rare").

56. Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 333–37 (1981) (arguing "Why Not Per Se Legality?" for predatory pricing allegations).

57. *See, e.g.*, Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017); Christopher R. Leslie, *Predatory Pricing and Recoupment*, 113 COLUM. L. REV. 1695, 1718 (2013) ("By assuming that the length of both the predation and the recoupment periods must be substantial, courts put plaintiffs in an impossible bind.").

again reflects how the CWS has influenced antitrust law to narrow the scope of liability.

B. *The reformers' challenges to the CWS*

The progressive challengers disagree with this legal status quo because its exclusively "economic" approach is ideologically biased and logically flawed. First, reformers disagree with the conclusions that CWS-adherents have drawn from empirical economic data.[58] While explaining the economic fundamentals of this disagreement is outside the scope of this Note, the reformers' most essential disagreement is that the CWS too often and too quickly assumes that the market will self-correct and therefore little to no intervention is necessary.[59] This conservative economic assumption serves as the foundation for the CWS's preference for under-enforcement and the ideolog-

58. Explaining this disagreement is out of this Note's scope, but the recent dispute over the FTC's Vertical Merger Guidelines (VMGs) is illustrative. *Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary*, FED. TRADE COMM'N (Sept. 15, 2021), https://www.ftc.gov/news-events/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines [hereinafter Press Release, Fed. Trade Comm'n]. *Compare* Carl Shapiro & Herbert Hovenkamp, *How Will the FTC Evaluate Verger Mergers?* PROMARKET (Sept. 23, 2021), https://promarket.org/2021/09/23/ftc-vertical-mergers-antitrust-shapiro-hovenkamp/, *with* Hal Singer & Marshall Steinbaum, *Missing the Forest for the Trees: A Reply to Hovenkamp and Shapiro*, PROMARKET (Sept. 27, 2021), https://promarket.org/2021/09/27/ftc-vertical-mergers-guidelines-hovenkamp-shapiro-singer-steinbaum-response/.

59. *See* Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L.J. F. 960, 974 (2018) ("The [CWS's] preference for false negatives [and belief that the market tends to self-correct] is offered as a way to guide enforcers through uncertainty. . . . Consumer welfare weds analysis to an inquiry that ultimately proves indeterminable, and that indeterminacy is then used as justification for under-enforcement. But this indeterminacy is not inevitable."); *see also* Herbert J. Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 168 U. PA. L. REV. 1843, 1852 (2020) ("The economic literature has come down solidly against the key early assumption of the Chicago thinkers that markets will self-correct. To the contrary, the evidence demonstrates that eliminating antitrust enforcement likely results in monopoly prices and monopoly levels of innovation in many markets."). Notably, however, Prof. Hovenkamp does not seem to consider himself a Neo-Brandeisian. *See* Christopher S. Yoo, *Herbert Hovenkamp as Antitrust Oracle*, Faculty Scholarship at Penn Law, 1, 19–20 (2021) (noting Prof. Hovenkamp's "critique of Neo-Brandeisianism" and his "rejection of neo-Brandeisian antitrust.").

ical bias that is now embedded in law.[60] Reformers want to eliminate this conservative, pro-defendant bias from antitrust law.

Second, reformers doubt that a consumer-welfare-focused economic analysis can or should be the only way to evaluate antitrust legal claims.[61] One issue is that the economic underpinnings of the CWS rely significantly on unobservable economic phenomena, like willingness-to-pay or marginal costs and revenues.[62] Obviously, this evidentiary issue is a problem for all economic analysis, not just the CWS. But the CWS's demand that antitrust law rely primarily on economic evidence exacerbates these evidentiary problems. And, because the plaintiff bears the burden of proof, these problems accrue to the defendant's benefit, further entrenching a pro-defendant bias into the law.

Also, the subsequent legal doctrine suffers from slippery terms (e.g., "market power" and "consumer welfare") and logically flawed or often misunderstood analytical methods (e.g., market definition; balancing procompetitive benefits with anticompetitive harms).[63] Most problematic are the indeterminacy of the words "consumer welfare," the CWS's assumptions about how low prices and high output tend to benefit everyone, and the ambiguities still plaguing its administration.[64]

60. *See* Khan, *supra* note 59, at 974–75 (explaining why antitrust law's "embedded preference for under-enforcement" is problematic).

61. Mark Glick, *How Chicago Economics Distorts "Consumer Welfare" in Antitrust*, 64 ANTITRUST BULL. 495 (2019), https://journals.sagepub.com/doi/pdf/10.1177/0003603X19875038.

62. Jonathan B. Baker & Timothy F. Bresnahan, *Economic Evidence in Antitrust: Defining Markets and Measuring Market Power*, 19–21 (2006) (working paper).

63. *See* Louis Kaplow, *Why (Ever) Define Markets?*, 124 HARV. L. REV. 438 (2010) (explaining antitrust law's overreliance on the flawed logical circularity of the analytical method of market definition); C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 COLUM. L. REV. 927, 929, 947–50, 987 (explaining the "judicial anxiety about balancing" and offering an alternative while recognizing that it is "subject to significant limitations."); Steven C. Salop, *The AT&T/Time Warner Merger: How Judge Leon Garbled Professor Nash*, 6 J. ANTITRUST ENF'T 459 (2018) (demonstrating that perhaps generalist judges and expert economists do not always have a meeting of the minds and highlighting the fact that the judge retains discretion to set aside expert testimony).

64. Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133 (2011).

Again, a full explanation of the logical flaws with and administrability challenges arising from the CWS is outside this Note's scope, but the point is that reformers want to fix the problems that they see with the CWS and what it has wrought.[65] And beyond addressing these shortcomings, reformers have other ideas for how to administer antitrust law that are not captured within an exclusively economic paradigm.

II.
THE MAIN TENETS OF NEO-BRANDEISIAN ANTITRUST REFORM

The main tenets of progressive antitrust reform are (1) Anti-Bigness, (2) burden rebalancing, (3) effective enforcement, and (4) legal rule and standard reform. This part aims to summarize the movement's general themes, but, in doing so, must simplify and gloss over some important points of disagreement.[66] As with any movement, the Neo-Brandeisian movement is not monolithic.[67] Nevertheless, this Note argues that Neo-Brandeisians are not merely unguided partisans; they have a coherent, if not yet comprehensive, theory of antitrust reform.[68]

To that end, this part begins by briefly addressing the utility of taxonomies, the often pejoratively used term "populist," and why debate over labels, including this one, can be un-

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65. *See, e.g.*, Sandeep Vaheesan, *The Profound Nonsense of Consumer Welfare Antitrust*, 64 ANTITRUST BULL. 479 (2019) ("First, consumer welfare antitrust is built on false history and a rewriting of legislative intent. Second, it relies on a false conception of the market and submerges the state construction of the economy. Third, it depends on, and is informed by, false assumptions about business conduct.").

66. Notably, Neo-Brandeisian scholars have not yet formed consensus over the proper legal standard, the extent to which antitrust law should accommodate or accomplish economic redistribution, and economic theory's role in antitrust. *See infra* Part IV for more discussion of potential legal rules and standards Neo-Brandeisians propose.

67. Many scholars have supported this intellectual movement, even if these individuals would not self-identify as Neo-Brandeisians or always agree with each other, such as Jonathan Baker, Mark Glick, Hiba Hafiz, Lina Khan, Amelia Miazad, Fiona Scott Morton, Matt Stoller, Zephyr Teachout, Sandeep Vaheesan, and Tim Wu.

68. This Note argues that a substantial body of Neo-Brandeisian scholarship already exists and presents a coherent view for how antitrust law and policy should be reformed. *See infra* Appendix, Exhibit C (providing a selected list of scholarship that the author considers to intellectually support the Neo-Brandeisian reform ideas).

helpful. Next, it turns to the values and principles underlying the Neo-Brandeisian reform movement. With this background, this part then discusses how those ideas could be put into practice through doctrine and enforcement and then closes with a discussion of what changes to the current legal standard reformers want. Overall, Neo-Brandeisians want to reduce or eliminate antitrust's conservative bias and adopt a more democracy-protective approach to regulating the American "free" market.[69]

Antitrust jargon may do more harm than good.[70] In general, rather than assigning labels to ideas, antitrust scholars should explain why certain ideas would have good or bad outcomes. Currently, some scholars' pejorative labeling of reformers as "populist" sheds no light on why the scholar disagrees with the idea other than that it is presumably different in some way from the currently accepted framework. While certain efforts to explain the "populist" label have some utility,[71] a brief glance at any antitrust law textbook suggests that shorthand labels and jargon can obfuscate as much as (or more than) elucidate.[72] So, acknowledging that the attempt to label a collection of ideas can be counterproductive, this part does not explore the "Neo-Brandeisian" label or what constitutes "populism."[73] Rather, the point is to explain how the reform agenda proceeds logically from a coherent set of beliefs—the most im-

69. *See* Sandeep Vaheesan, The Chair's Showcase: The Future of Antitrust, Address at ABA's 69th Antitrust Law Spring Meeting, 4, 15 (Mar. 26, 2021) (referring to the idea of free markets as "a false and mythical dichotomy. Every market is a government-designed market; property, contracts, corporations are products of government design and action. Property is just another name for entitlements to things, tangible and intangible, that are backed by the coercive power of the government.").

70. "We must think things not words, or at least we must constantly translate our words into the facts for which they stand, if we are to keep to the real and true." Oliver Wendell Holmes, Jr., *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 460 (1899).

71. *See, e.g.*, Sandeep Vaheesan, *The Evolving Populisms of Antitrust*, 93 NEB. L. REV. 370 (2014); Joshua Wright & Aurelien Portuese, *Antitrust Populism: Towards a Taxonomy*, 25 STAN. J.L. BUS. & FIN. 131 (2020).

72. *See also* Edwin S. Rockefeller, THE ANTITRUST RELIGION 16 (2007) (To become a modern Antitrust Lawyer requires "learning to speak of vocabulary of meaningless or ambiguous terms—with authority.").

73. This Note uses these terms interchangeably: "Neo-Brandeisians," "progressive reformers," or just "reformers."

portant of which is the Neo-Brandeisian concern over "Bigness" and its relationship to the purpose of antitrust law.

A. *The first and most important tenet: "Anti-Bigness" as a guiding principle*

The first and most important tenet of Neo-Brandeisian antitrust reform is that antitrust law should recognize "Anti-Bigness" as a guiding principle. Coined in a series of essays about antitrust concerns that Louis Brandeis wrote in the lead-up to President Wilson's election and the subsequent creation of the Federal Trade Commission, "Bigness" is a concept *distinct* from "monopoly" and means *something different* from size or a high market share.[74] As Brandeis used it, Bigness "connotes large firms exerting power and influence over politicians on one side and smaller merchants on the other."[75] Justice Douglas explained:

> *The Curse of Bigness* shows how size can become a menace . . . . For all power tends to develop into a government in itself. Power that controls the economy should be in the elected representatives of the people, not in the hands of an industrial oligarchy. Industrial power should be decentralized . . . . That is the philosophy and command of the Sherman Act.[76]

Thus, the concern of Bigness is how the unity of concentrated economic and political power poses threats not just to the economy, but to democracy and society as well. Perhaps the term "Anti-Domination" more clearly reflects the concern than "Anti-Bigness."[77]

The major cleave with the CWS is over the extent to which one believes that markets tend to self-correct. CWS adherents believe that markets tend to self-correct and antitrust over-en-

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74. Louis D. Brandeis, *New England Railroad Situation*, BOSTON J. (Dec. 13, 1912) ("Excessive bigness often attends monopoly; but the evils of excessive bigness are something distinct from and additional to the evils of monopoly.").

75. Adi Ayal, *The market for bigness: economic power and competition agencies' duty to curtail*, 1 J. ANTITRUST ENF'T 221, 222–23 (2013).

76. United States v. Columbia Steel Co., 334 U.S. 495, 535–36 (1948) (Douglas, J., dissenting).

77. *Cf.* K. Sabeel Rahman, *Anti-Domination as Regulatory Strategy, in* DEMOCRACY AGAINST DOMINATION 116, 116–18 (2017).

forcement poses bigger risks than under-enforcement.[78] In contrast, Anti-Bigness adherents believe that monopolies pose an unacceptable risk of Bigness to the economy and democracy and that *under*-enforcement poses bigger risks than *over*-enforcement.[79]

The modern sense of Anti-Bigness reflects similar concerns yet differs from older conceptions in at least two important ways. First, the modern sense of Anti-Bigness more willingly accepts that economies of scale from large private entities *could* widely benefit Americans.[80] So, the modern idea of Anti-Bigness does not mean "Pro-Smallness"—merely equating Neo-Brandeisian Anti-Bigness concerns with economic structuralism is a misread.[81] Notably, while Brandeis is often characterized as disliking companies because they were large,[82] the better understanding is probably that he perceived the mo-

78. *See supra* notes 8, 14, 40 and accompanying text.

79. *E.g.*, Geoffrey Manne & Dirk Auer, *Antitrust Dystopia and Antitrust Nostalgia: Alarmist Theories of Harm in Digital Markets and Their Origins*, 28 GEORGE MASON L. REV. 1279, 1297 (2021) (Monopolists' "power feels like 'a kingly prerogative, inconsistent with our form of government' in the words of Senator John Sherman, for whom the Sherman Act is named.") (quoting TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 89 (2018) (quoting 21 Cong. Rec. 2457 (1889) (statement of Sen. John Sherman)); *see also infra* Exhibits A & B (explaining reformers' enforcement goals in the Utah Statement).

80. *See* Tim Wu, *The Utah Statement: Reviving Antimonopoly Traditions for the Era of Big Tech*, ONEZERO/MEDIUM, (Nov. 18, 2019), https://onezero.medium.com/the-utah-statement-reviving-antimonopoly-traditions-for-the-era-of-big-tech-e6be198012d7 (noting that Bigness has "become a threat to the basic idea of representative democracy. The simple premise of anti-monopoly revival is that concentrated private power has become a menace, *a barrier to widespread prosperity*, and an indefensible division of the *spoils of progress and economic security* that yields human flourishing.") (emphasis added).

81. Structuralism and industrial organizational economics were popular pre-CWS forms of economic analyses. *E.g.*, Khan, *supra* note 57, at 718 (2014) ("Broadly, economic structuralism rests on the idea that concentrated market structures promote anticompetitive forms of conduct."); *see also* Lina Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655, 1666–77 (2020) (explaining the theoretical evolution from structural industrial organization economics to present and the empirical *and normative* Neo-Brandeisian critiques thereof).

82. *See, e.g.*, Barak Orbach & Grace Campbell Rebling, *The Antitrust Curse of Bigness*, 85 S. CAL. L. REV. 605, 608 (2012) ("Justices Louis Brandeis and William Douglas believed absolute corporate size was a public evil and weaved such a narrative into their extrajudicial writings and opinions.").

nopolies of his time to widely suffer from *dis*economies of scale.[83] Disentangling size and efficiency is crucial: Brandeis did not ignore efficiency in his analysis of monopolies.[84]

Second, modern Anti-Bigness perceives the Bigness problem as primarily a private sector issue, not a public sector issue.[85] Perhaps this is because Neo-Brandeisians perceive that the scale of the private sector Bigness problem requires big government. Still, the better view is that they are not concerned with big government because it is a legitimate vehicle for the People's will.[86] Bigness is about the risk that monopolies can *illegitimately* drain political power from the People.[87] From this animating concern follows a roadmap for how antitrust law should change. To restore antitrust's Anti-Bigness goals, Neo-Brandeisians want to correct the law's pro-defendant bias, improve enforcement, and develop a better legal standard. Each of these tenets will be discussed in turn.

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83. Louis D. Brandeis, *A Curse of Bigness, in* OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 186–88 (Frederick A. Stokes Company 1914) (making recommendations about how to end Bigness issues in the railroad monopolies but not recommending limits on firm size or scale and rather concluding that "We shall also escape from that inefficiency which is attendant upon excessive size.") (much turns on one's reading of the word "attendant").

84. *See id.* at 139–49 (explaining, in a chapter titled "The Inefficiency of the Oligarchs," how issues like management obsession with stock price and divided attention in large corporations can lead to inefficiency).

85. *See* Crane, *supra* note 19, 533–34 (helpfully contrasting Louis Brandeis and Thomas Jefferson with progressive figures like Franklin D. Roosevelt and Elizabeth Warren, who were and are more comfortable with big government than Brandeis was). This is not to say that the private sector problem cannot affect the public sector—it can and does, through institutional and political capture—but rather that the problem arises in the private sector.

86. *See* Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 FORDHAM L. REV. 2543, 2544 (2013) ("The institutional aspects of today's antitrust enterprise, however, are increasingly out of balance, threatening the democratic, economic, and political goals of the antitrust laws. The shift . . . has led to an antitrust system captured by lawyers and economists advancing their own self-referential goals, free of political control and economic accountability. Some of this professional control is inevitable . . . . But antitrust is also public law designed to serve public ends.").

87. United States v. Columbia Steel Co., 334 U.S. 495, 535–36 (1948) (Douglas, J., dissenting) ("Power that controls the economy should be in the elected representatives of the people, not in the hands of an industrial oligarchy.").

B. *The second tenet: rebalancing burdens to correct pro-defendant bias*

The second tenet of Neo-Brandeisian antitrust reform is rebalancing burdens to correct antitrust law's current pro-defendant bias. As discussed above, Neo-Brandeisians think that the CWS has enshrined a conservative economic bias into antitrust law by making it increasingly more difficult for plaintiffs to prove a violation.[88] Reformers have several ideas to address this imbalance: (1) override unfavorable precedent, (2) adjust procedural burdens and standards of proof, and (3) adopt presumptions.

First, reformers identify many opinions that go too far in narrowing the scope of antitrust liability. For example, reformers call for overturning decisions that overly narrow legitimate theories of liability, such as predatory pricing (and mirror-image predatory bidding)[89] and monopoly leveraging.[90] They also call for overturning decisions that overly broaden immunity, such as implied regulatory preemption[91] and the govern-

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88. *See supra* text accompanying notes 33–57.

89. *See* Ari Lehman, *Eliminating the Below-Cost Pricing Requirement from Predatory Pricing Claims*, 27 CARDOZO L. REV. 343 (2005) (criticizing the predatory pricing test announced in Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993)); Sandeep Vaheesan, *Reconsidering* Brooke Group*: Predatory Pricing in Light of the Empirical Learning*, 12 BERKELEY BUS. L.J. 81 (2015) (criticizing the *Brooke Group* test for predatory pricing and its application in the predatory bidding context under Weyerhaeuser Co. v. Ross–Simmons Hardwood Lumber Co., 549 U.S. 312 (2007)).

90. *See* Robin Cooper Feldman, *Defensive Leveraging in Antitrust*, 87 GEO. L.J. 2079, 2081 (1999) ("Defensive leveraging theory shows that the Chicago school is wrong because it fails to consider changes in the structure of the primary market. When these changes are considered, leveraging that damages competition is neither a white tiger nor a unicorn. It is just a plain old work horse in a monopolist's field."). For illustration, compare Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 275 (2d Cir. 1979) (a preferable standard for monopoly leveraging), with Spectrum Sports v. McQuillan, 506 U.S. 447, 459 (1993) (a vaguer and narrower standard) (holding that Section Two "makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so").

91. *See* Howard A. Shelanski, *The Case for Rebalancing Antitrust and Regulation*, 109 MICH. L. REV. 683, 732 (2011) (arguing that Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 412 (2004) "weakened that important relationship between antitrust and regulation. Until the balance is restored, regulators will face difficult choices between overregulation and underregulation, with consequences potentially far more costly

mental petitioning defense.[92] And specifically, reformers often call for overturning judicial acceptance of the CWS narrative of antitrust legislative history on which these judicial decisions often rely.[93] By targeting these precedents, Neo-Brandeisians seek to simplify and restore antitrust liability to a more neutral playing field. Reformers want to ensure that factually meritorious arguments are not dismissed as a matter of law.

Second, reformers suggest reducing the number of procedural pro-defendant biases that they argue the CWS has built into antitrust law. The proposals about burden-shifting and standards of proof range widely. For example, Senator Klobuchar introduced a bill that proposes lowering the Clayton Act's standard for what constitutes an anticompetitive merger from one "substantially to lessen" competition to one that "create[s] an appreciable risk of materially lessening" competition.[94]

Third, reformers argue in favor of adopting legal presumptions to protect against Bigness. Reformers want to and have begun to rescind certain pro-defendant presumptions in law enforcement, such as the recently rescinded vertical merger guidelines[95] and other similarly self-restraining resolutions.[96] Reformers also want to introduce presumptions that

than those that would have arisen from errors in antitrust enforcement in the regulated markets at issue.").

92. *See* Tim Wu, *Antitrust & Corruption: Overruling* Noerr 3 (Columbia L. Sch. Pub. L. Working Paper No. 14–663, 2020) ("Congress could do what this article calls for, namely, return the immunities granted political speech and petitioning to their Constitutional limits, while reaffirming the purposes of the antitrust laws."). Wu criticizes R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) and United Mine Workers v. Pennington, 381 U.S. 657 (1965).

93. *See, e.g.*, Vaheesan, *supra* note 65, at 480 ("[The Supreme Court and the executive branch] have reinterpreted the antitrust laws based on the false historical analysis of Robert Bork.").

94. *See* Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. § 4(b)(3) (2021) (proposing to amend Clayton Act Section 7, 15 U.S.C. § 18).

95. *See* Press Release, Fed. Trade Comm'n, *supra* note 58.

96. *See* Press Release, Fed. Trade Comm'n, FTC Rescinds 2015 Policy that Limited Its Enforcement Ability Under the FTC Act (July 1, 2021), *https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under-ftc-act*; Press Release, Fed. Trade Comm'n, FTC Rescinds 1995 Policy Statement that Limited the Agency's Ability to Deter Problematic Mergers (July 21, 2021), https://www.ftc.gov/news-events/

would make it easier to legally prove certain violations when facts suggest that a high risk of antitrust misconduct or Bigness is likely, such as when a company possessing a very high market share wants to acquire a nascent competitor or when employers abuse non-compete agreements.[97]

These proposals are meant to strip away the procedural and legal presumptions in favor of defendants that the CWS's adoption has encouraged over the past few decades. Through various means, reformers point out how the purportedly "objective" architecture of antitrust law is significantly biased toward narrowing the scope of liability. And beyond rebalancing the legal framework, reformers argue for more effective enforcement.

C. *The third tenet: more effective regulatory and law enforcement*

The third tenet of Neo-Brandeisian antitrust reform is more effective regulatory and law enforcement. Reformers argue that the growth of the American economy and the evidence of Bigness issues merit greater resources for antitrust law enforcers. For example, in 1985, six years after the adoption of the CWS in *Reiter*,[98] the FTC had 1,201 employees, and the U.S. GDP was around eight trillion dollars.[99] In 2021, U.S. GDP was almost twenty trillion dollars, but the FTC had 61 fewer employees, only 1,140.[100] Beyond resource limitations, reformers point to empirical evidence demonstrating lax antitrust enforcement[101] and worryingly concentrated market

news/press-releases/2021/07/ftc-rescinds-1995-policy-statement-limited-agencys-ability-deter-problematic-mergers.

97. *See, e.g.*, C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. PA. L. REV. 1879 (2019); Hiba Hafiz, *Labor Antitrust's Paradox*, 86 U. CHI. L. REV. 381 (2019); ERIC A. POSNER, HOW ANTITRUST FAILED WORKERS 108–13 (2021).

98. *See* Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979). *See supra* notes 31–32 and accompanying text for background on the case.

99. FED. TRADE COMM'N, CONGRESSIONAL BUDGET JUSTIFICATION FISCAL YEAR 2022, at 4 (2021); Real Gross Domestic Product, FED. RSRV. ECON. DATA, FED. RSRV. BANK OF ST. LOUIS, https://fred.stlouisfed.org/series/GDPC1 (Oct. 28, 2021).

100. FED. RSRV. BANK OF ST. LOUIS, *supra* note 99; FED. TRADE COMM'N, *supra* note 99.

101. *Antitrust Enforcement Data*, THURMAN ARNOLD PROJECT AT YALE, YALE SCH. OF MGMT., https://som.yale.edu/centers/thurman-arnold-project-at-yale/antitrust-enforcement-data (last visited Nov. 14, 2021) ("Without re-

power.[102] In addition, reformers think enforcers have (1) poorly strategized governmental priorities, (2) underutilized or ignored existing tools, and (3) refrained from bringing important cases. Each of these is addressed in turn.

In mid-to-late 2021, the Biden administration, likely guided by Neo-Brandeisian Tim Wu, and the FTC, chaired by Neo-Brandeisian Lina Khan, announced new priorities for competition law. President Biden issued an Executive Order on "Promoting Competition in the American Economy," taking a "whole-of-government" approach to more rigorous antitrust and fair competition law enforcement.[103] Likewise, the FTC re-prioritized its agenda to focus on areas reflecting Anti-Bigness concerns, such as "Common Directors and Officers and Common Ownership" and "Monopolization Offenses."[104]

Reformers also argue for the use of long-dormant tools that will assist in achieving their goals.[105] One example is the FTC's authority to promulgate rules about what constitutes "unfair methods of competition."[106] As Rohit Chopra and Lina Khan have pointed out, "[t]he FTC has issued an antitrust rule

gard for good research or scientific evidence—as the literature review below shows—today, many continue to claim a benefit for consumers from a limited enforcement agenda. The experiment of enforcing the antitrust laws a little bit less each year has run for 40 years, and scholars are now in a position to assess the evidence.") (providing charts demonstrating the decline of anti-monopoly enforcement over time since the adoption of the CWS). *See also* FED. RSRV. BANK OF ST. LOUIS, *supra* note 99; FED. TRADE COMM'N, *supra* note 99.

102. Jonathan B. Baker, *Market Power in the U.S. Economy Today*, WASH. CTR. FOR EQUITABLE GROWTH, Mar. 20, 2017, at 1, 4, https://equitablegrowth.org/market-power-in-the-u-s-economy-today/. See *infra* Appendix, Exhibit D for economic research supporting Neo-Brandeisian concerns about Bigness.

103. Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 9, 2021).

104. Press Release, Fed. Trade Comm'n, FTC Streamlines Consumer Protection and Competition Investigations in Eight Key Enforcement Areas to Enable Higher Caseload (Sept. 14, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/09/ftc-streamlines-consumer-protection-competition-investigations-eight-key-enforcement-areas-enable.

105. Sandeep Vaheesan, Unleash the Existing Anti-Monopoly Arsenal, AM. PROSPECT (Sept. 24, 2019), https://prospect.org/day-one-agenda/unleash-anti-monopoly-arsenal/.

106. *See* Federal Trade Commission Act § 5, 15 U.S.C. § 45. The FTC Act grants the FTC authority over both antitrust law, via the words "unfair methods of competition" (§ 45(a)(1)), and consumer protection, via the words "unfair and deceptive acts or practices" (§ 45(a)(2)).

only once in its history."[107] However, the FTC can more easily promulgate rules about antitrust than those about consumer protection. They explain:

> [A] common misconception is that this authority is extremely limited because FTC rulemaking is subject to the extensive hurdles posed by the Magnuson–Moss Warranty–Federal Trade Commission Improvements Act ("Magnuson–Moss"). In reality, Magnuson–Moss governs only rulemakings interpreting "unfair or deceptive acts or practices." For rules interpreting "unfair methods of competition," the FTC has authority to engage in participatory rulemaking pursuant to the APA. Several antitrust scholars have affirmed this authority, and the Appendix lays out further background on and discussion of it.[108]

The FTC could also make greater use of Part 3 administrative proceedings, which provide an alternative tribunal to hear antitrust or consumer protection matters before an administrative law judge.[109] These proceedings benefit the Commission by providing more favorable procedural conditions for factfinding (among other procedures).[110]

Similar changes at the DOJ are likely once Jonathan Kanter, President Biden's nominee for Assistant Attorney General for the Antitrust Division, settles in.[111] Aggressive and novel use of these tools will enable new rules and increase the likelihood of success in establishing favorable precedent (or at

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107. Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357, 369 n.54 (2020).

108. *Id.* at 369–70. *See also id.* app. at 375–79 (explaining the mechanics of the FTC's antitrust rulemaking authority).

109. *See* 16 C.F.R. §3.42 (2021).

110. For background on Part 3 litigation, see Maureen K. Ohlhausen, *Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?*, 12 J. COMPETITION L. & ECON. 623 (2016). While the author raises questions about this process, she provides a very good background and overview of how it works.

111. *See* Brent Kendall, Senate Confirms Jonathan Kanter as Justice Department Antitrust Chief, WALL ST. J. (Nov. 16, 2021), *https://www.wsj.com/articles/senate-confirms-jonathan-kanter-as-justice-department-antitrust-chief-11637104400*; *see also* Bryan Koenig, In Kanter, DOJ Would Get an Aggressive Antitrust Enforcer, LAW360 (July 22, 2021), https://www.law360.com/articles/1405654/in-kanter-doj-would-get-an-aggressive-antitrust-enforcer.

least in heightening the sense of urgency for new legislation in the case of repeated losses in the courts).

Reformers also think that enforcers have failed to address the Bigness issues that now plague the economy.[112] Most notably, FTC Chair Khan has written about Amazon's predatory pricing tactics and antitrust issues with platform providers.[113] Others have made the arguments for antitrust cases against Facebook[114] and Google.[115] Further, the neglect toward labor markets is another significant area of Neo-Brandeisian concern.[116] Reformers point out that the exclusive and relentless focus on *consumers* has been to the neglect and detriment of *employees* as victims of anticompetitive harms, like suppressed wages and collusive agreements not to hire competitors' employees.[117] Thus, reformers argue that antitrust should be used in new ways to address areas of concern traditionally ignored by enforcers due to the CWS's influence.[118]

Due to President Biden's appointments of Neo-Brandeisian thinkers, reform ideas have been most fully embraced in the federal executive branch. However, the federal government is not the only player. State, commonwealth, and territory attorneys general have played a significant and growing

112. Substantial controversy exists about why. To a large extent, the reform enforcement agenda seems not to care about these reasons and is more focused on pursuing Anti-Bigness priorities and, ideally, outcomes, despite risks of losing, the popularity of defendants, or the theory of the case's novelty.

113. *See, e.g.*, Khan, *supra* note 57; Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973 (2019).

114. *See* Dina Srinivasan, *The Antitrust Case Against Facebook*, 16 BERKELEY BUS. L.J. 39 (2019).

115. *See* Fiona M. Scott Morton, The Antitrust Case against Google, YALE INSIGHTS: FAC. VIEWPOINTS (June 8, 2020), https://insights.som.yale.edu/insights/the-antitrust-case-against-google.

116. *See, e.g.*, Hafiz, *supra* note 97; POSNER, *supra* note 97, at 3.

117. *See, e.g.*, Sandeep Vaheesan & Matthew Buck, Antitrust's Monopsony Problem, PROMARKET (Feb. 3, 2020), https://www.promarket.org/2020/02/03/antitrusts-monopsony-problem/. *See also* Ioana Marinescu & Eric A. Posner, A Proposal to Enhance Antitrust Protection Against Labor Market Monopsony (Dec. 21, 2018) (unpublished working paper) (on file with Roosevelt Institute) (arguing for statutory clarification).

118. *See, e.g.*, Zephyr Teachout, How Biden Can Break the Stranglehold of Amazon and Other Monopolies, THE NATION (Jan. 4, 2021), https://www.thenation.com/article/economy/monopoly-policy-biden/.

role in the enforcement of competition laws.[119] Notably, large coalitions of attorneys general played important roles in developing the cases against Facebook and Google in federal courts.[120] They have also had successes in pursuing cases in state courts.[121]

Despite this emphasis on regulatory enforcement, litigation is where the future of antitrust law truly lies. As Joshua Soven, an experienced practitioner and former enforcer, elegantly explained: "The reality (unsettling for some) is that these strategies, and how well they are executed, could have a greater impact on the outcomes of future antitrust enforcement actions than will changes to the antitrust laws."[122]

D. *The fourth tenet: the development of a better legal standard*

The fourth tenet of Neo-Brandeisian antitrust reform is the development of a better legal standard that addresses Anti-Bigness concerns. As explained above, reformers have many problems with the CWS on its own purportedly "objective" and economic terms. The CWS supporters tout that it is coherent, objective, and administrable,[123] but reformers challenge these assertions.[124] In addition to pointing out how the CWS's legal presumptions favor defendants and discourage enforcement actions, reformers point to issues of economic scientism,[125]

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119. *See* Antitrust, STATEAG.ORG, https://www.stateag.org/policy-areas/antitrust (last visited Dec. 6, 2021) (collecting news about State AG antitrust actions); Renata B. Hasse, Acting Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., Remarks at the American Bar Association Fall Forum: Protecting Competition Across 50 United States: Advocacy and Cooperation in Antitrust Enforcement (Nov. 17, 2016), https://www.justice.gov/opa/speech/file/911166/download.

120. John D. McKinnon, These Are the U.S. Antitrust Cases Facing Google, Facebook and Others, WALL ST. J., https://www.wsj.com/articles/these-are-the-u-s-antitrust-cases-facing-google-facebook-and-others-11608150564 (Dec. 17, 2020).

121. *See generally* State Antitrust Litigation and Settlement Database, NAT'L ASS'N OF ATT'YS GEN., https://www.naag.org/issues/antitrust/state-antitrust-litigation-and-settlement-database/ (last accessed Dec. 6, 2021).

122. Joshua H. Soven, *What Happens Next to Antitrust—in 6 Questions*, ANTITRUST, Summer 2021, at 75, 79.

123. Dorsey et al., *supra* note 6, at 879.

124. See *supra* notes 61–65 and accompanying text for greater discussion of reformers' challenges to the CWS.

125. *See e.g.*, Kaplow, *supra* note 63 (explaining antitrust's overreliance on the flawed logical circularity of the analytical method of market definition).

overreliance on outdated assumptions,[126] and difficulties in proper judicial administration.[127] But, these critiques of the CWS are not new.[128] The Neo-Brandeisians' animating concern is not merely that the CWS *inadequately addresses* Anti-Bigness concerns. Instead, Neo-Brandeisians also find the CWS problematic because it *rejects as invalid* Anti-Bigness concerns.

To Neo-Brandeisians, the CWS adherents' most important and problematic belief is that markets will self-correct. In the CWS framework, Anti-Bigness concerns are essentially overblown figments of imagination.[129] Neo-Brandeisians think this is folly. While consensus has not yet coalesced around a new, fully fleshed-out legal standard for antitrust, many proposals have been proffered.[130] Neo-Brandeisians want a new standard that addresses Anti-Bigness, among other concerns. The depth of this fundamental disagreement may explain the inhospitable welcome that Neo-Brandeisian ideas have received from status quo scholars.

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126. *See* Herbert Hovenkamp, *The Looming Crisis in Antitrust Economics*, 101 B.U. L. REV. 489, 494–95 (2021) ("To the extent that courts, including the Supreme Court, have erred in recent years, it has been in ways that favor nonenforcement. . . . At the same time, changes in both economic theory and economic methodology have strengthened the case for intervention on economic grounds.").

127. *See* Salop, *supra* note 63.

128. *See, e.g.*, Pitofsky, *supra* note 34; David W. Barnes, *Nonefficiency Goals in the Antitrust Law of Mergers*, 30 WM. & MARY L. REV. 787, 865–66 (1989) ("The response of current antitrust enforcers and pro-efficiency commentators is that social and political goals of antitrust are too vague, too mushy, and too unstructured to be appropriate for consideration. . . . A more rigorous response to the policy problem would be to consider how analysis of nonefficiency goals might be structured to make it more susceptible to the powerful analytical tools available."). *See generally* ROBERT PITOFSKY ET AL., HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (Robert Pitofsky ed., 2008).

129. Dorsey et al., *supra* note 6, at 911 (rejecting a mischaracterized version of Neo-Brandeisian concern that "economic power leads to political power. . . . [T]his purported causal relationship has already been rejected as having no basis in reality; and no new evidence suggests otherwise.").

130. *See infra* Part IV (discussing proposed legal standards).

III.
Unfair critiques—a different "curse"—and the responses to them

The main unfair or unproductive critiques of progressive antitrust reform are that reformers (1) fail to understand history, (2) propose vague ideas, and (3) want bad things for American consumers. This part begins with a few caveats about the scope of its argument. With those qualifications, it addresses these three thematic critiques that have been frequently raised against the Neo-Brandeisian reform movement. In turn, each criticism will be described, illustrated, and then rebutted. Before engaging with these criticisms, three caveats are warranted.

First, this Note does not present an exhaustive literature review. Second, this Note does not argue that Neo-Brandeisian proposals are perfect nor undeserving of criticism. Third, this Note does not imply broad disagreement with the critics cited below. Instead, this Note argues that the cited examples represent a larger, problematic trend, thus "cursing" the current scholarly debate about Bigness in antitrust law and policy. In doing so, this part hopes to move the current debate to more productive territory, as this Note will discuss below in Part IV.

A. *The History Critique*

The first unhelpful criticism is about history. This criticism challenges the various premises from which Neo-Brandeisians draw their conclusions. The criticism goes, if the reformers got the facts straight, then they would see the law correctly and agree with the status quo. Essentially, the criticism is that reformers fail to understand, explain, or appreciate antitrust law's historical development. This criticism is primarily applied in three areas: legislative-judicial, scholarly, and economic history.[131]

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131. *See, e.g.*, Christine S. Wilson & Pallavi Guniganti, *Before We Tear Down the Fence: Understanding the Past and Building the Future of Antitrust Law*, Antitrust, Summer 2021, at 57, 57 ("Before tearing down antitrust precedents, however, reformers should understand the historical context that led the judiciary to its present interpretation of the Sherman and Clayton Acts."); Hovenkamp, *supra* note 16, at 119, 121 ("At least up until this writing, the New Brandeis writers simply restate these positions and do little to engage revisionist critics from the 1960s and after. . . . In sum, the neo-Brandeis movement hardly reflects new thinking on these issues."); Nicholas Short,

The legislative-judicial history criticism is that Anti-Bigness cannot be a value in antitrust because that is inconsistent with congressional intent. Critics marshal evidence from the late 1800s to demonstrate that the Sherman Act was merely an intentional delegation to the courts to develop further the common law of unfair competition.[132] This intentional delegation, combined with (1) the subsequent judicial adoption of the CWS and (2) the lack of congressional override, means to critics that the congressional intent is clear: Anti-Bigness was rejected, and that is what Congress and the courts wanted.

The scholarly history criticism is that the reformers inaccurately characterize how and why the CWS was adopted. Often, reformers place the blame entirely on conservatives and sometimes solely on Robert Bork.[133] But, critics assert, this is an inaccurate understanding of history because the deregulatory movement leading to the adoption of the CWS had liberal allies and other influential theoretical contributors.[134] Thus, critics point out that the CWS is not merely a conservative ideology masquerading as economics, as Neo-Brandeisians may claim, but was a bipartisan agreement to avoid the same mistakes made in the mid-to-late twentieth century.

Antitrust Reform in Political Perspective: A Constructive Critique for Neo-Brandeisians (Sept. 3, 2021) (unpublished working paper) (on file with Harvard University) ("But reformers fail to explain why the consumer welfare standard gained legitimacy throughout the 1970s, when Democrats controlled Congress, and why it became a central pillar in antitrust analysis after Ronald Reagan's victory in 1980, when the House . . . remained under Democratic control."); *id.* at 3 ("Specifically, the reformers tend to both understate and overstate the role of the conservative ideology in producing and maintaining the current antitrust regime.").

132. *E.g.,* Thorelli, *supra* note 26. *But see* Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 175, 180 (2021) (arguing that the goal "suggested by the legislative history is to *disperse economic coordination rights*").

133. Robert Bork was a conservative antitrust scholar, and subsequently Solicitor General and a judge on the U.S. Court of Appeals for the D.C. Circuit. He wrote *The Antitrust Paradox*, which was cited by the Supreme Court in *Reiter* when it adopted the CWS. Thus, he is often credited as the leader of the "Chicago Revolution," which advocated for the adoption of more rigorous economic analysis in antitrust law and the CWS. Bork was one of many conservative scholars advocating this approach during his time at University of Chicago, hence the "Chicago School." For more background, see MATT STOLLER, GOLIATH: THE 100-YEAR WAR BETWEEN MONOPOLY POWER AND DEMOCRACY (2019).

134. *See e.g.*, Short, *supra* note 131, at 3–4.

The economic history criticism can be applied to essentially any period but is most relevantly argued about recent empirical data during the early 2000s. Some critics claim that reformers are disregarding economic data entirely.[135] Reformers rebut that they are drawing conclusions from economic data showing extreme wealth and income inequality, wage stagnation, and industrial concentration.[136] But other critics reply that reformers infer causation where only correlation is clear and express doubt that antitrust is the proper tool to address the perceived issues.[137] Thus, the critics draw the opposite conclusions as reformers do or assert that uncertainty is the only conclusion one may reasonably draw from mixed data.[138] They say that reformers' conclusions reflect either reliance on flimsy data or overconfidence relative to what the available data justify. Other variations doubtlessly exist, but these examples summarize the most frequently levied history-related criticisms.

1. *The responses*

The strongest response to these arguments is that they distract from the substance of legal proposals. The issue with most of these arguments is a failure to offer a compelling comparison to the present circumstances. Even if the same arguments were raised in the 1880s, 1960s, or 2007, the issue is that American society, politics, and economics look very different now. As discussed above, the legislative history is vague, and the scholarly history is mostly irrelevant. Neither helps us understand the present or why the current reform proposals are right or wrong. Recent economic history is more important.

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135. *See* Dorsey et al., *supra* note 6, at 867 ("These virtues [from empirical economics] are precisely the target of the new populist antitrust movement, which seeks to reject economics in favor of mere supposition in order to achieve decidedly political, not economic, ends.").

136. *See infra* notes 141–46 and accompanying text.

137. *See* Robert D. Atkinson, *How Progressives Have Spun Dubious Theories and Faulty Research Into a Harmful New Antitrust Doctrine*, INFO. TECH. & INNOVATION FOUND. (Mar. 10, 2021), https://itif.org/publications/2021/03/10/how-progressives-have-spun-dubious-theories-and-faulty-research-harmful-new (discussing correlation versus causation); Dorsey et al., *supra* note 6, at 905 (challenging the need for increased antitrust enforcement in combating inequality).

138. *See, e.g.*, Dorsey et al., *supra* note 6, at 862; Atkinson, *supra* note 137, at 6–11.

Perhaps a good response to criticisms that reformers misunderstand economic theory, data, and history is that reasonable minds may disagree about the implications of unclear evidence.[139] Given the importance of economics in antitrust law, proper analysis and interpretation are critical to proper administration. But that is very difficult to do in the short- to medium-term. However, sufficient and growing economic evidence now supports the reformers' concerns, even if not incontrovertibly so,[140] and the perception of comfortable consensus with the status quo has increasingly frayed, unlike perhaps a decade ago.[141]

A better response is that Neo-Brandeisians are aware of the history and empirical evidence but have drawn different conclusions.[142] Neo-Brandeisians think that the Gilded and Progressive Eras from the late 1800s through the early 1900s are a more apt comparison to the present moment than the 1960s are. But, regardless, technology and the American economy are so different from the 1960s that comparisons between the rejected antitrust thinking from that time and modern Neo-Brandeisians are inevitably inapt. So, endlessly debating history is not a productive exercise, and nit-picking Neo-Brandeisian characterizations distracts from the more important work of analyzing and critiquing their ideas.

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139. *See* Crane, *supra* note 19, at 539 ("In other words, are the neo-Brandeisians genuinely open to fact-based, empirical antitrust, regardless of its outcomes? The answer may well be 'of course we are, with the caveat that we are likely to interpret the empirical outcomes differently than you do.' Fair enough.").

140. *See infra* notes 142–47.

141. *Compare* William A. Galston & Clara Hendrickson, *A policy at peace with itself: Antitrust remedies for our concentrated, uncompetitive economy*, BROOKINGS INST. (Jan. 5, 2018) ("[M]ultiple analyses, using a variety of measurements, reveal that rising market concentration is a troubling, economy wide phenomenon.") *with* ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS i–ii, 9 (2007), https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf (concluding that "the state of the U.S. antitrust laws [i]s 'sound,' [and] that new or different rules are [not] needed to address so-called 'new economy' issues.").

142. *See, e.g.*, Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551 (2012); WU, *supra* note 8; Thomas J. Horton, *Rediscovering Antitrust's Lost Values*, 16 U.N.H. L. REV. 179 (2018); STOLLER, *supra* note 133.

Further, a growing body of empirical economic evidence supports the Neo-Brandeisian concerns about "Bigness."[143] Many, if not most, American markets are growing more concentrated.[144] Income and wealth inequality are extremely high.[145] And evidence of the harms of the CWS's bias can be quantified: Thomas Philippon calculated that from the late 1990s to 2019, "the lack of competition has deprived American workers of $1.5 trillion of income."[146] While this Note makes no claims about causation, the Neo-Brandeisians seem to be winning the argument about problems arising from recent economic history.[147]

In sum, while it is helpful to understand economic signals and noise, antitrust law should not be a reactionary pendulum that swings back and forth; it should be unbiased, easily administrable, and sustainable for the long term. Debates about economics can only inform, not decide, debates over law and policy. So, overemphasizing debate over even recent economic history sacrifices needed debate over the substance of antitrust legal proposals: how do we craft a dynamic legal standard with long-term sustainability? Antitrust legal scholars should direct less attention to history and more to explaining why reform

143. *See infra* Appendix, Exhibits C, D (assembling scholarship that supports the Neo-Brandeisian reform movement).

144. Marc Jarsulic, *Antitrust Enforcement for the 21st Century*, 64 ANTITRUST BULL. 514, 514 (2019) ("Measures commonly used by economists to evaluate firm-level economic performance now indicate that many firms have market power and are earning profits above competitive levels. The expected response–the entry of new firms that want to earn a share of those higher returns in those markets–has not happened.").

145. *See* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 1, 16 (Arthur Goldhammer trans., Harvard Univ. Press 2014) ("When the rate of return on capital exceeds the rate of growth of output and income, as it did in the nineteenth century and seems quite likely to do again in the twenty-first, capitalism automatically generates arbitrary and unsustainable inequalities that *radically undermine the meritocratic values on which democratic societies are based*. . . . For far too long, economists have neglected the distribution of wealth . . . .") (emphasis added).

146. THOMAS PHILIPPON, THE GREAT REVERSAL: HOW AMERICA GAVE UP ON FREE MARKETS 293 (2019).

147. *See* Hovenkamp, *supra* note 126, at 489 ("[T]he progressive wing of antitrust does a better job of identifying the problems that the competitive economy faces, [even though] some of its proposed solutions are calculated to make them worse.").

proposals are good or bad in the present and future economy *and* society.[148]

B. *The Vagueness Critique*

The second unhelpful criticism is that Neo-Brandeisian reform proposals are vague, intentionally or not. According to critics, reformers fail to (1) clearly articulate their ideas or (2) present their ideas honestly because they know the ideas are unpopular. For example, critics point out the lack of Neo-Brandeisian consensus surrounding a new replacement theory for the CWS[149] and that many questions still remain about how reformers would handle certain issues.[150] To critics, the reformers' generalized frustration with the status quo is insufficient to warrant abandoning the current framework.[151] Especially given the clarity, coherence, and constraining objectivity that the CWS brings to antitrust analysis, adjustments from the status quo are not justified to critics.[152] And without the ability

148. See *infra* Part IV for this Note's argument as to where the debate over Bigness in antitrust scholarship should go.

149. *See, e.g.*, Christine S. Wilson, Comm'r, U.S. Fed. Trade Comm'n, Remarks for the ABA Antitrust Law Section's 2021 Fall Forum: The Neo-Brandeisian Revolution: Unforced Errors and the Diminution of the FTC (Nov. 9, 2021) ("Instead of devising new solutions for their concerns, they are resurrecting past policy mistakes."); John O. McGinnis, The Rotten Roots of Neo-Brandeisian Antitrust, L. & LIBERTY (June 10, 2020), https://lawliberty.org/forum/the-rotten-roots-of-neo-brandeisian-antitrust ("Neo-Brandeisian antitrust puts old wine into old wineskins.").

150. *See, e.g.*, Crane, *supra* note 19 ("[T]o skeptics of the movement like myself, the lack of a significant body of work articulating the movement's views creates a framing difficulty–how does one critique a movement without a canon of literature or, to date any tangible political or judicial achievements?").

151. Either because the status quo is correct, to those who William E. Kovacic calls "traditionalists," or because further reform would go too far, a view held by the "expansionists"–those who propose "significant extensions in competition policy, but [reject] the restoration of an egalitarian goals framework and broad application of structural remedies to deconcentrate the American economy." William E. Kovacic, *Root and Branch Reconstruction: The Modern Transformation of U.S. Antitrust Law and Policy?*, ANTITRUST, Summer 2021, at 46, 47 (citing examples of each).

152. *See, e.g.*, Dorsey et al., *supra* note 6, at 868 (arguing against "unsupported populist antitrust reforms," a traditionalist viewpoint); Carl Shapiro, *Antitrust: What Went Wrong and How to Fix It,* ANTITRUST, Summer 2021, at 33, 33 (arguing for "strengthening antitrust enforcement, but [not] . . . changing the mission of antitrust," an expansionist viewpoint) (emphasis omitted).

to evaluate the reformers' claims, it is incumbent on reformers to explain their proposals in greater detail, so the critique goes.

Some critics take this line of argument further, arguing that this vagueness is intentional. Perhaps, critics say, this is because the ideas are unpopular and would be rejected if the reformers were honest about them.[153] Perhaps the vagueness is intended to gain more advantageous territory in the political debate.[154] Or perhaps it is because the reformers' ideas are unprincipled, unserious and mere partisan complaints.[155] The overarching theme of these critiques is that it is effectively impossible to engage with or evaluate reform proposals because the proposals are too general, incoherent, or nonexistent.

2. *The responses*

These vagueness critiques have three main problems. First, they reflect an unawareness or disregard of existing Neo-Brandeisian literature that explains and proposes a concrete agenda. Indeed, in 2019, responding to this criticism from Professor Crane, reformers wrote and published the Utah Statement.[156] The Utah Statement provides a set of beliefs, doctrinal proposals, and enforcement priorities for antitrust

See generally Kovacic, *supra* note 151 (providing the "traditionalist" and "expansionist" labels).

153. Hovenkamp, *supra* note 16, at 94 ("[A] neo-Brandeis approach whose goals were honestly communicated could never win in an electoral market, just as it has never won in traditional markets.").

154. *See* Atkinson, *supra* note 137, at 13 ("[T]here is no convincing case for a change of antitrust laws since adaptation to new market realities has been inherent to the practice of the Sherman Act. But neo-Brandeisians know this, which is why they work so hard to perpetuate myths, define many markets as monopolies, and call for a new 'public interest' standard. Before policymakers go down such a transformative path, they should stop and carefully assess the evidence behind the neo-Brandeisian case.").

155. *See id.* at 2 ("The neo-Brandeisian project is not about efficiency, innovation, consumer benefits, or American competitiveness; it is about 'values.' The core value is deconcentration for the sake of it–almost always without tangible benefits, and with a certainty of considerable costs and stifled innovation.").

156. Wu, *supra* note 4 (The Utah Statement "was authored by a group of participants at 'A New Future for Antitrust,' [on] Oct 25, 2019, and edited thereafter," being published by Wu in a blog post on Medium on Nov. 19, 2019).

law and policy.[157] In addition to this statement, a significant body of scholarly work now exists, articulating what reformers propose and why.[158] These writings and ideas can and should be analyzed. Whether these ideas can be properly administered is a separate and important question.

The second problem is that the critiques too often start from the assumption that the only valid comparison for clarity, coherence, and objectivity is the CWS. It is not.[159] Analysis that accepts this framing usually is shallow, merely explaining why some proposal is not the CWS and concluding that it is therefore wrong. The CWS is not objective truth. And arguing to maintain it is not a neutral position.

Antitrust scholars should seek first to understand the principles of Neo-Brandeisian theory and respond to the proposals that logically follow. For students of antitrust, this important debate remains largely unspoken and unwritten. This scholarly closed-mindedness is a curse. It harms the debate about Bigness by depriving it of the clarity, analysis, and theoretical development that establishment scholars have an ability—and this Note argues, a *duty*—to deliver.

The third problem is the unrealistic expectation that the Neo-Brandeisian movement should have a fully formed legal standard by now. Developing a legal standard takes time. Given that the CWS took at least two decades to be adopted and required a great deal of doctrinal refinement, these criticisms seem unfair. The early thought leadership that eventually created the CWS began in the 1950s.[160] The Supreme Court adopted it in 1978.[161] And, in 2021, we still are unsure

157. *See infra* Appendix, Exhibits A, B (presenting the Utah Statement and explaining how it corresponds to the aforementioned core tenets of Neo-Brandeisian thinking).

158. *See infra* Appendix, Exhibit C.

159. The CWS has many problematic ambiguities. *See supra* notes 63–65 and accompanying text.

160. *See* STOLLER, *supra* note 133, at 236–41, 249 (discussing how Aaron Director headed the Antitrust Project at University of Chicago in 1953, setting the stage for Robert Bork to rise to prominence).

161. *See* Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1978).

what it means[162] or how to administer it properly.[163] A further issue with this critique is that it hypocritically ignores the ambiguities and legal fictions in the current paradigm. Judges are prone to make errors in economic thinking, even at the Supreme Court.[164] And, if they want to, judges can simply ignore economic experts.[165]

C. *The Anti-Consumer Critique*

The last unhelpful criticism is that by rejecting the CWS, Neo-Brandeisians want absurd policy goals: smallness, high prices, low output, slow innovation, and inefficiency.[166] Essentially, critics think that reformers are endorsing the *opposite* of the CWS's goals. If the critic accepts that the CWS stands for maximizing consumer welfare, then any deviation from the CWS is necessarily suboptimal, at least in aggregate. And, if the critic accepts the further premise that we are all consumers, then any deviation from the CWS is suboptimal for us all.

162. *See* Hovenkamp, *supra* note 16, at 68–79 (explaining the ambiguity of the term "Consumer Welfare," and what it meant when Robert Bork discussed it).

163. *See* Kaplow, *supra* note 63, at 440, 517 (explaining the logical circularity problems involved with antitrust law's dependence on market definition). Notably, the analytical method of market definition is often dispositive. Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 469 n.15 (1992) ("Because market power is often inferred from market share, market definition generally determines the result of the case.") (citing Robert Pitofsky, *New Definitions of Relevant Market and the Assault on Antitrust*, 90 COLUM. L. REV. 1805, 1806–13 (1990)).

164. For a case notable for an error in economic reasoning that the majority opinion accepted, see United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 394–401 (1956). *See* George W. Stocking & Willard F. Mueller, *The Cellophane Case and the New Competition*, 45 AM. ECON. REV. 29, 53–57 (1955); Philip Nelson, Monopoly Power, Market Definition, and the Cellophane Fallacy, U.S. DEP'T OF JUST. (June 25, 2015), https://www.justice.gov/sites/default/files/atr/legacy/2007/03/27/222008.pdf (explaining how to avoid the cellophane fallacy); *see also* Michael R. Baye & Joshua D. Wright, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals*, 54 J.L. & ECON. 1, 20–21 (2011) (finding empirical support that the answer to the question posed by the title of that article is yes).

165. *See, e.g.*, Salop, *supra* note 63, at 460–61.

166. *See, e.g.*, Atkinson, *supra* note 137 ("Progressives now argue: 1) Big firms are bad; 2) market power harms economic welfare; 3) antitrust should protect competitors, especially small business; 4) the goal is promoting the 'public interest' (however progressives definite [sic] it).").

In simplified economic terms, the CWS guides that antitrust law should seek outcomes that result in low prices and high output for consumers.[167] Especially given Neo-Brandeisians' aversion to "Bigness," critics reason that reformers want smallness, high prices, and lower output. Or, even if reformers do not want these outcomes, the outcomes are an inevitable consequence of abandoning the CWS.[168] And, because CWS adherents seem to accept that non-economic concerns are irrelevant to antitrust law, the beneficial trade-offs from a different standard are either presumably irrelevant or already accounted for in the CWS's economic analysis.[169]

3. *The responses*

Three responses demonstrate why this criticism is unfair and unhelpful. First, as discussed above, this process of imputing certain unpopular beliefs to Neo-Brandeisians is logically flawed.[170] Second, in doing so, it mischaracterizes and obfuscates actual Neo-Brandeisian thinking and proposals.[171] Third, this anti-consumer critique ignores the trade-offs that the CWS makes by rejecting them as irrelevant rather than discussing them and imagining how antitrust law could be different.[172]

As discussed above, this imputation of anti-consumer beliefs to Neo-Brandeisians is logically flawed because it attempts to flatten all legal thinking into a binary choice about the CWS: pro-consumer or anti-consumer. This is wrong as a mat-

167. *See* Hovenkamp, *supra* note 16, at 66.

168. *Id.* at 67, 82, 92 ("On the left is an emergent 'neo-Brandeisian' approach that often regards low prices as the enemy, at least when they come from large firms at the expense of higher cost rivals. The neo-Brandeisian approach is also redistributive, tending to redistribute wealth from larger to smaller firms, particularly when larger firms have lower costs. It also redistributes wealth away from consumers and toward these smaller producers. . . . While the word 'Luddite' is probably too strong, the neo-Brandeisians exhibit strong ambivalence about innovation, particularly when firms who engage in it become large. They show similar antipathies toward cost savings.").

169. *See, e.g.*, Atkinson, *supra* note 137, at 2 ("The neo-Brandeisian project is not about efficiency, innovation, consumer benefits, or American competitiveness; it is about 'values.' The core value is deconcentration for the sake of it—almost always without tangible benefits, and with a certainty of considerable costs and stifled innovation.").

170. *See infra* notes 173–75 and accompanying text.

171. *See supra* Part II (explaining Neo-Brandeisian proposals).

172. *See infra* Part III.

ter of basic logic.[173] As explained above, Anti-Bigness is not necessarily Pro-Smallness.[174] The grounds for disagreement with the CWS are a vast continuum that exists not solely along an economic plane.

This critique is unhelpful because it mischaracterizes Neo-Brandeisian views and distracts from the substantive policy dispute. As discussed above, the Neo-Brandeisian beliefs and proposals, while deeply informed by economics, stem from values and concerns about power and governance.[175] Neo-Brandeisians' goals are not low prices and high output, but neither are they high prices and low output. To interpret its proposals in only these economic terms is to make them too narrow to understand them properly.

In fact, the goals of low prices and high output are not necessarily in conflict with Neo-Brandeisan thinking. Like any good lawyer, a Neo-Brandeisian practitioner would argue that the value of sub-optimizing consumer welfare depends on the circumstances. For example, Lina Khan's argument about Amazon's predatory pricing is both that the consumer welfare model fails to account for this behavior's negative consequences fully and that pursuing maximal consumer welfare is not worth the harmful non-economic consequences for our society.[176] Reformers criticize that the status quo ignores how the economy shapes our society as irrelevant "political" considerations, but these are real trade-offs. Currently, critics ignore

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173. *See supra* note 18; *see also* Daniel Freeman, *Discrete Math: Lecture 3*, St. Louis Univ., 3, https://mathstat.slu.edu/~freeman/Discrete_Lecture_3.pdf (last accessed Oct. 8, 2021) ("A conditional statement and its inverse are NOT logically equivalent.").

174. *See supra* Part II.a. The point is that Neo-Brandeisian concerns about Bigness exist on a distinct plane from the Consumer Welfare Standard's economic analysis of firm behavior as pro- or anti-consumer.

175. *See supra* Part II.

176. *See* Khan, *supra* note 57, at 743 ("Focusing antitrust exclusively on consumer welfare is a mistake. For one, it betrays legislative intent, which makes clear that Congress passed antitrust laws to safeguard against excessive concentrations of economic power. This vision promotes a variety of aims, including the preservation of open markets, the protection of producers and consumers from monopoly abuse, and the dispersion of political and economic control. Secondly, focusing on consumer welfare disregards the host of other ways that excessive concentration can harm us—enabling firms to squeeze suppliers and producers, endangering system stability (for instance, by allowing companies to become too big to fail), or undermining media diversity, to name a few.").

the trade-offs inherent in using the CWS as antitrust law's guiding value. The substantive legal and policy debate that should be happening is about these trade-offs.

As Robert Pitofsky so cogently put it: "The issue among most serious people has never been whether non-economic considerations should outweigh significant long-term economies of scale, but rather whether they had any role to play at all, and if so, how they should be defined and measured."[177] He articulated three specific and related non-economic concerns: (1) "a fear that excessive concentration of economic power will breed antidemocratic political pressures," (2) "a desire to enhance individual and business freedom by reducing the range within which private discretion by a few in the economic sphere controls the welfare of all," and (3) the concern that "if the free-market sector of the economy is allowed to develop under antitrust rules that are blind to all but economic concerns, the likely result will be an economy so dominated by a few corporate giants that it will be impossible for the state not to play a more intrusive role in economic affairs."[178] Now, the Neo-Brandieisans again ask: when does the drive to maximize "consumer welfare" undermine democracy, fair competition, or indeed, long-term efficiency?

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In sum, these criticisms mislead rather than elucidate the nature of the current disagreement in antitrust law. This is the "curse" in the debate over Bigness. Neo-Brandeisian reform proposals should be evaluated in economic terms. However, the fundamental disagreement between Neo-Brandeisians and the status quo is about the capacity of the market to self-correct. And further disagreement arises from the societal consequences of this belief, broader than mere economics. Happily, some better examples exist of how the debate over antitrust reform should proceed and which subjects of debate deserve more attention.

177. Pitofsky, *supra* note 34, at 1051.
178. *Id.*

IV.
NEXT STEPS: HOW SCHOLARS CAN "BREAK THE CURSE" IN THE DEBATE ABOUT "BIGNESS"

The current debate about Bigness in antitrust is cursed by scholars' closed-mindedness toward, and unproductive criticisms of, Neo-Brandeisian proposals. Like with all new ideas, scholars should first seek to thoroughly understand Neo-Brandeisian proposals, which are more nuanced than some scholars seem to acknowledge. Again, however, this Note acknowledges that Neo-Brandeisians certainly are not perfect. But the way to break this curse is by engaging in difficult and unresolved questions facing antitrust. This part proposes three such questions.

The first is about Anti-Bigness as an idea and the extent of its utility as a guiding principle in antitrust law. After understanding Neo-Brandeisian values, the second question is to seriously evaluate their proposed reforms for antitrust rules and standards. The third, final, and overarching question is about the proper role of economics, economists, and evidence in antitrust law and policy. After exploring these questions, this Note concludes with optimism, recommending research that moves the debate into more productive territory. This Note argues that more energy should be dedicated to these types of efforts.

A. *Analyze Anti-Bigness as a value*

Scholars should seriously revisit antitrust law's sanguine relationship with monopoly. As discussed in Part II, Neo-Brandeisians' concerns with Bigness have less to do with market share and more to do with unchecked power. It bears repeating that Anti-Bigness is not Pro-Smallness. Instead of endlessly debating inconclusive economic data or historical narratives, scholars should invest time analyzing how or if Anti-Bigness could fit into antitrust. Is Anti-Bigness incompatible with the current iteration of the CWS, or do they actually converge on the need for an unbiased approach to economic analysis that makes fewer assumptions?

Likewise, Neo-Brandeisians should clarify how far they want to go with Anti-Bigness as a value. Is the movement's goal to develop a sustainable, unbiased economic method that mostly maintains the existing legal apparatus after scrubbing away the stain of CWS's conservative bias? Or is the movement's goal more ambitious? The existing scholarship points to the latter.

Neo-Brandeisians seem to want to dispense with the legal fictions currently clouding the CWS and engage in open debate about what reductions in "efficiency" or "consumer welfare" may be warranted and when.[179] This evaluation of tradeoffs need not be unprincipled or merely a partisan desire for redistribution. It could be guided by economics. Part of the curse in this debate is presuming there is no middle ground.

This Note argues that there is room for a new consensus to develop that reconciles the benefits that the CWS brought to antitrust law with the benefits that Neo-Brandeisian proposals could bring. That proposition begs the next question: what are the Neo-Brandeisian proposals?

B. *Analyze reformers' proposed rules and standards*

All choices between legal rules or standards require tradeoffs.[180] Further, the law's recognition of any decision-making paradigm, including the CWS, reflects substantive tradeoffs.[181] While "consumer welfare" may seem to carry the benefits of a rule (coherent, objective, and easily administrable), that view may simply reflect the comfort that scholars have with the concept by virtue of spending so much time thinking about it. Often, establishment scholars seem to presume both (1) that antitrust law must have an overarching legal standard and (2) that any workable legal standard must resemble the

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179. *See* Khan, *supra* note 57, at 743. *Cf.* Nancy Scola, Lina Khan Isn't Worried About Going Too Far, N.Y. MAG.: INTELLIGENCER (Oct. 27, 2021), https://nymag.com/intelligencer/article/lina-khan-ftc-profile.html ("Khan took her arguments directly to her natural critics. On Fox News, she laid out a case for treating Amazon the way the country long ago decided to treat railroads: requiring that third-party sellers get equal access to its e-commerce platform. *Wouldn't that be a political decision?* the host asked. 'I think all decisions are political,' Khan shot back.").

180. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

181. Hovenkamp, *supra* note 12, at 2 (explaining the influence of Oliver Williamson's "welfare tradeoff" model on the CWS and its subsequent theoretical developments, eventually settling on the more modern idea that "antitrust should seek out that state of affairs in which output is maximized, consistent with sustainable competition," while also acknowledging that "antitrust analysis is not generally concerned with macroeconomics.").

current "consumer welfare" concept. A clear and administrable antitrust standard is a worthy goal, but it may be more like a Holy Grail—nice in theory but impossible to attain in practice.

In Part II, this Note presented only a small sample of the explosion of proposed progressive reforms to antitrust law and policy.[182] For all the critiques that have been leveled at Neo-Brandeisians, the scholarship that takes the ideas seriously and evaluates them thoughtfully is problematically thin. Even if establishment scholars ultimately conclude that these ideas are, in fact, misguided, that does not excuse them from their duty of demonstrating how or why.

Neo-Brandeisians have pointed out the antitrust problems in today's society, which antitrust law, as currently conceived, fails to address.[183] They have also proposed rule changes and new laws to address the alleged problems.[184] If establishment scholars agree or disagree with these proposals, they should at least test these hypotheses. If Amazon's market power is imaginary or new entrants will emerge to unwind its dominance, explain why. If Senator Klobuchar's bills would either not solve today's antitrust problems or would create new ones, explain why. If removing pro-defendant biases and rebalancing burdens will throw courts and the economy into disarray, explain how.

As for standards, reformers offer a variety of proposed replacements for the CWS. One option is abandoning the idea of a legal standard for antitrust law entirely. Without a guiding standard for decision-making, antitrust law could foreseeably go in at least two directions: an instrumental approach or a rule-based approach. The former is what many scholars seem to fear most, the idea that antitrust becomes untethered from economics and becomes, like many other areas of administrative law, a means to effect a political policy end.

Often, this approach is derided as "partisan" or "populist" because, without constraints on prosecutorial or judicial discretion, the problematic influence of personal animosity, lob-

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182. *See infra* Appendix, Exhibits C, D (presenting further reformist scholarship).
183. *See supra* Part I.
184. *See supra* Part II.

byist capture, and crony capitalism creeps in quickly.[185] While the CWS doubtlessly does constrain decision-making, many scholars go too far by conflating this anti-corruption norm with the need for the CWS. But adopting the CWS does not eliminate the risks of corruption, politically motivated enforcement, or unethical behavior. Furthermore, these risks can be avoided without using the CWS.

As for a rules-based approach, it is certainly possible to craft much more specific rules and regulations than the Sherman Act. With Lina Khan now leading the FTC, the federal administrative agencies seem poised to craft antitrust rules.[186] However, it remains unclear how relatively specific rules could entirely cut back on the CWS's influence, especially if they are eventually challenged in courts that may or may not choose to grant interpretative deference to the FTC. Rather, if the movement opts for a new standard, the reformers must coalesce around a champion. The two leading contenders for replacement standards in Neo-Brandeisian theory are the Abuse of Dominance and the Protection of Competition Standards.

The Abuse of Dominance Standard (ADS) largely accepts the economic mode of analysis and theories of harm of the CWS but embraces a broader scope of antitrust liability.[187] Conceptually, the ADS's central legal inquiry is about the actions of the antitrust defendant, as opposed to the CWS's focus on the behavior's consequences for consumers. The European Union has adopted this standard for its competition law.[188]

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185. *See* Seth B. Sacher & John M. Yun, *Twelve Fallacies of the "Neo-Antitrust" Movement*, 26 GEO. MASON L. REV. 1491, 1514–19 (2019). For examples of this negative behavior, even under the current CWS regime, *see, e.g.*, William E. Kovacic, *Politics and Partisanship in U.S. Federal Antitrust Enforcement*, 79 ANTITRUST L.J. 687 (2014); James F. Rill & Stacy L. Turner, *Presidents Practicing Antitrust: Where to Draw the Line*, 79 ANTITRUST L.J. 577 (2014).

186. *See supra* notes 106–08.

187. James Keyte, Why the Atlantic Divide on Monopoly/Dominance Law and Enforcement Is So Difficult to Bridge, ANTITRUST, Fall 2018, at 113, 113–14 (explaining the differences between American and European competition law).

188. *Antitrust Overview*, EUR. COMM'N.: COMPETITION POL'Y, https://ec.europa.eu/competition-policy/antitrust/antitrust-overview_en (last accessed Oct. 13, 2021) ("Article 102 of the Treaty prohibits firms that hold a dominant position on a given market to abuse that position, for example by charging unfair prices, by limiting production, or by refusing to innovate to the prejudice of consumers."). *See also* Control of Abusive Practices, BUNDESKARTELLAMT (German Competition Authority), https://www.bundes

Most Neo-Brandeisians would probably think that adopting the ADS was a step in the right direction but may also think it is still insufficient to address their concerns, particularly non-economic ones about the use of antitrust as a bulwark to protect democracy.[189]

Another alternative is the Protection of Competition Standard (PCS), which centers on the competition process as the potential victim of antitrust violations rather than consumers.[190] As Tim Wu explains, the PCS endorses returning antitrust analysis to a simpler line of inquiry:

> Given a suspect conduct (or merger): Is this merely part of the competitive process, or is it meant to 'suppress or even destroy competition?' This standard actually already forms a part of antitrust doctrine. What changes is eliminating 'consumer welfare' as a final or necessary consideration in every case.[191] Thus, the PCS endorses a reasonableness inquiry applied to the antitrust laws without the concept of 'consumer welfare' as the guiding principle or rule of decision-making.

Finally, reformer consensus may develop around a legal standard that does not yet exist. This Note offers the Neo-Brandeisian idea of Anti-Bigness as a starting point for another alternative that adopts the best economic wisdom of the CWS but broadens its scope, probably most similarly to the ADS and PCS. Rather than treating the CWS as the "end of antitrust

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kartellamt.de/EN/Abusecontrol/abusecontrol_node.html (last accessed 2021).

189. *Compare* Keyte, *supra* note 187, *with* Appendix Exhibit A. Comparing the differences between the CWS and ADS with the breadth of the Utah Statement, the ADS would probably help address the doctrinal concerns and some but not all of the belief and enforcement concerns. For instance, it remains unclear the extent to which the ADS addresses Neo-Brandeisians concerns about how antitrust should protect democratic infrastructure and address concerns of monopsony and labor market issues, especially given cultural and constitutional differences between American and European law.

190. Wu, *supra* note 4.

191. *Id.* at 2 (quoting Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918)).

history," scholars should embrace greater intellectual curiosity and analytical rigor toward Neo-Brandeisian proposals.[192]

C. *Analyze the role of economic evidence and economists in antitrust law*

Neo-Brandeisians should clarify their position on this subject. As Professor Crane has helpfully pointed out, a problem arises from their claim that (1) antitrust over-relies on economic analysis and yet (2) they are inheritors to Brandeis' intellectual mantle:

> The paradox for the neo-Brandeisians is this: to be a genuine Brandeisian means to be an empiricist, to prefer inductive fact-based reasoning to a priori generalization or deduction. Today, antitrust empiricism is owned by an economics profession that deploys complex tools on which most lawyers are not qualified to opine and judges outcomes based on welfarist criteria. Therefore, to be a contemporary, Brandeisian on empiricism is to cede the field straight back to the very economists who supposedly have been asleep at the wheel for the last forty years and are unlikely to be sympathetic on average to Brandeisian social and political ideology. . . . Are the neo-Brandeisians genuinely open to fact-based, empirical antitrust, regardless of its outcomes?[193]

Perhaps this is a genuine paradox. Or perhaps Neo-Brandeisians would not perceive this as a paradox because they argue that economic data is not the only relevant evidence in a legal proceeding. Given their broader Anti-Bigness concerns, Neo-Brandeisians would not so cavalierly toss out categories of evidence that the CWS tends to disregard.[194] Re-

192. Lina Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655, 1656 (2020) (book review) (citing FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992)). Khan also noted that "[n]ot all antitrust scholars adopted this 'end of history' view of the field." *Id.* at 1656 n.6. For example, some predicted that "that deconcentration will reemerge as a significant policy concern in antitrust's second century." *Id.* (quoting William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105, 1110 (1989)).

193. Crane, *supra* note 19, at 538–39.

194. *See e.g.*, Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1069, 1077–78 (10th Cir. 2013) (Gorsuch, J.) (discussing why Microsoft CEO Bill Gates's

gardless, this questioning of where Neo-Brandeisian thinking leads or should lead is very useful.

This is the most challenging question to formulate and address. Essentially, scholars should assess the utility of economic analysis and economists in reaching the correct legal answer in antitrust cases. Neo-Brandeisians and progressive scholars have raised valid questions about the capacity of conservative economic analysis to address excess market power adequately. However, if one is convinced by those questions, it prompts further unpacking: is the problem with the conservative bias or the economic analysis, or, as Neo-Brandeisians suggest, both? Perhaps the academy's influence can correct an ideological bias in economic analysis (but one might ask just how long that will take). However, the more unsettling question is, what if the problem is with antitrust law's reliance on economic analysis itself? And, if there is a problem with antitrust law's reliance on economics, is it with the theory or the practice? Many scholars may prefer to think that antitrust law *is* economics, but how well has the legal system coped with the supposed economic and analytical rigor promised by the CWS? Do judges and enforcers tend to analyze economic evidence correctly when presented with it?[195] How would we know? This question interplays with all the others and should receive more direct attention.

Conclusion

The current debate about Bigness in antitrust law has been cursed by closed-mindedness toward and unproductive criticism of Neo-Brandeisian proposals. Scholars should break this curse by understanding neo-Brandeisian proposals and testing these hypotheses through application to present and foreseeable antitrust problems. Happily, this Note ends with optimism because the antitrust bar is full of brilliant and respectful thought leaders who assuredly can meet the challenge of breaking this curse.

emails discussing his strategy to foreclose technologically Microsoft's rivals was not probative to the elements of a monopolization claim.); *see also* Marina Lao, *Reimagining Merger Analysis to Include Intent*, 71 Emory L.J. (forthcoming 2022).

195. *See* sources cited *supra* note 164.

In closing, this Note points to three examples of encouraging scholarship from more establishment-leaning sources that helped move the debate into more productive territory. First, Professor Crane deserves recognition for his efforts to push the Neo-Brandeisians to produce the Utah Statement and for his work analyzing the possible contradictions that are raised by adopting Brandeis's mantle and applying those ideas to present debates.[196] Second, antitrust scholars are recently engaging in productive debate about the acquisition of nascent competitors as a monopolization theory of harm, which will inform today's debate about digital platforms and dominance.[197] Third, scholarly projects like the Thurman Arnold Project and the Stigler Committee on Digital Platforms are engaging in important debates about how antitrust law can, should, or fails to address anticompetitive abuses in our economy *and society* today and in the future.[198]

196. Paul Gabrielsen, What is the "Utah Statement?", @THEU, THE UNIV. OF UTAH (Jan. 2, 2020), https://attheu.utah.edu/facultystaff/what-is-the-utah-statement/ ("In October 2019, the U convened a conference titled 'A New Future for Antitrust?' that included judges, law professors, attorneys and economists from around the country, including many from Utah. In one panel session, moderated by [University of Utah economist Marshall] Steinbaum, University of Michigan law professor Daniel Crane challenged panelists to move beyond criticism of current antitrust policies and begin outlining a positive path forward, including actions that could restore the power of antitrust laws. In response, Steinbaum joined with Tim Wu and Lina Khan, both of Columbia University, to write the 'Utah Statement.'"); *see also* Crane, *supra* note 19.

197. *See, e.g.*, C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. PA. L. REV. 1879 (2019); John M. Yun, *Potential Competition and Nascent Competitors*, 4 CRITERION J. INNOVATION 625 (2019); Colleen Cunningham, Florian Ederer, Song Ma, 129 J. POL. ECONOMY 649 (2021); A. Douglas Melamed, *Mergers Involving Nascent Competition*, Stanford Law & Economics Olin Working Paper No. 566 (Last revised Apr. 6, 2022).

198. *See generally* THURMAN ARNOLD PROJECT AT YALE, YALE SCH. OF MGMT., https://som.yale.edu/centers/thurman-arnold-project-at-yale (last accessed Dec. 7, 2021); STIGLER COMM. ON DIGIT. PLATFORMS, GEORGE J. STIGLER CTR. FOR THE STUDY OF THE ECON. AND THE STATE, FINAL REPORT (2019), https://research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms—committee-report—stigler-center.pdf?la=EN&hash=2D23583FF8BCC560B7FEF7A81E1F95C1DDC5225E&hash=2D23583FF8BCC560B7FEF7A81E1F95C1DDC5225E.

Appendix

Exhibit A. *The Utah Statement* (Excerpted)
Tim Wu, The Utah Statement, Medium: OneZero (2019), https://onezero.medium.com/the-utah-statement-reviving-antimonopoly-traditions-for-the-era-of-big-tech-e6be198012d7.

[Preamble/Beliefs:] We believe that:

(1) Subjecting concentrated private power to democratic checks is a matter of constitutional importance;

(2) The protection of fair competition is a means to a thriving and democratic society and an instrument for both the creation of opportunity and the distribution of wealth and power;

(3) Excessive concentration of private economic power breeds antidemocratic political pressures and undermines liberties; and

(4) While antitrust is not an answer to every economic distress, it is a democratically enacted and necessary element in achieving these aims. [***]

Doctrine [Section A]

1. Vertical coercion, vertical restraints, and vertical mergers should enjoy no presumption of benefit to the public;

2. By rule or statute, non-compete agreements should be made presumptively unlawful;

3. The *Trinko* doctrine of implied regulatory preemption should be overruled;

4. The *Brooke Group* test for predatory pricing and *Weyerhaeuser* test for predatory bidding should be overruled;

5. The *Berkley Photo* standard for establishing monopoly leveraging should be restored;

6. The essential facilities doctrine should be reinvigorated for dominant firms that deny access to critical infrastructural services;

7. Structural presumptions in merger review should be restored;

8. The *LinkLine* doctrine holding that price squeeze allegations fail as standalone Section 2 claims should be overruled;

9. *Noerr-Pennington* should be overruled and replaced by a First Amendment defense and appropriate statutory protections for workers; and

10. The Clayton Act's worker exemption should be extended to all who labor for a living [***]

EXHIBIT A. *The Utah Statement* (Excerpted) (cont'd)

METHOD AND ENFORCEMENT PRACTICE [Section B]

1. It is not true that "Congress designed the Sherman Act as a 'consumer welfare prescription'";

2. Antitrust rules should be created through case development, agency rule-making, and legislation;

3. The States, the laboratories of economic experimentation, are a critical vanguard of enforcement efforts;

4. Private enforcement is a critical complement to public enforcement;

5. The markets for labor — and in particular problems caused by labor market monopsony — should be subject to robust antitrust enforcement, and enforcers should treat business structures that restrict alternatives for or coerce working Americans as suspect;

6. The broad structural concerns . . . including due concern for the economic and political dangers of excessive industrial concentration, should drive enforcement of Section 7 of the Clayton Act;

7. Anticompetitive conduct harming one party or class should never be justifiable by offsetting benefits to another party or class. Netting harms and benefits across markets, parties, or classes should not be a method for assessing anticompetitive effects;

8. False negatives should not be preferred over false positives, and the costs of erroneous lack of enforcement should not be discounted or assumed harmless, but given appropriate weight when making enforcement decisions;

9. Structural remedies are to be preferred;

10. Harms demonstrated by clear and convincing evidence or empirical study should never be ignored or discounted based on theories that might predict a lack of harm;

11. Clear and convincing evidence of anti-competitive intent should be taken as a presumptive evidence of harm;

12. Mergers should be subject to both prospective and retrospective analysis and enforcement practice; and

13. The determination by the antitrust agencies of relevant market definitions should receive judicial deference.

EXHIBIT B. Collapsing *The Utah Statement* into Four Neo-Brandeisian Tenets

Neo-Brandeisian Tenets	***The Utah Statement*'s Labelling**		
	Preamble/ Beliefs	**Doctrine (Section A)**	**Method and Enforcement Practice (Section B)**
Anti-Bigness	1, 3, 4	1, 3	1, 2, 8, 9
Rebalancing Burdens	-	1–10	5, 7–9, 11–13
Effective Enforcement	-	2, 6, 10	2–6, 12, 13
A Better Legal Standard	2	2, 7	1, 2, 5–8, 10, 11, 13

EXHIBIT C. Progressive Antitrust Reform or Neo-Brandeisian Scholarship

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11TH ANNUAL SPORTS LAW COLLOQUIUM[1]

PRESENTED BY:
NYU SPORTS LAW ASSOCIATION
NYU JOURNAL OF LAW & BUSINESS

Friday, March 4, 2022

INTRODUCTION

OLIVER GREEN:
Hi, everyone. Thank you so much for joining us. My name is Oliver Green.

TATIANA DUBOSE:
And my name is Tatiana DuBose.

OLIVER GREEN:
And as co-presidents, it is our pleasure to welcome you to the NYU Sports Law Association's 11th annual Sports Law Colloquium. Given that the last year's colloquium was forced to take place entirely virtually, we are especially excited to be able to

1. Editor's Note: The transcript has been edited for clarity.

host some of our members and other students in person for the first time in two years. And, of course, we are glad to welcome those virtually as well. Thank you all for joining us. This year's program features four incredible panels, all touching on some of the most pressing legal issues in sports.

OLIVER GREEN:
First up will be name, image, and likeness policy for college athletes. Next, we have the future of blockchain and cryptocurrency in the sports world. Then we will learn about the rise of legalized sports gambling. And finally, we will wrap up with navigating labor disputes and CBA negotiations. We would like to thank our board members for assisting in putting this together, you all for attending, and of course, the moderators and panelists themselves as this event would not be possible without them. Thank you.

TATIANA DUBOSE:
This event has been approved for up to four New York state continuing legal education credits in the areas of professional practice category with one credit per colloquium panel attended. The colloquium is appropriate for both experienced and newly admitted attorneys. So, for the attorneys out there that are a bit behind on their CLEs, make sure to pay attention, as I will be inserting CLE passwords at the end of each panel. When you hear the password, please write it down, as you will need to include it in your attendance affirmation form for CLE credit later. More information about the CLE credit option will be emailed to all registered attendees within the coming days.

TATIANA DUBOSE:
Finally, thank you to our platinum sponsor, Winston & Strawn, who is well represented here today. And shout out to our gold sponsors as well, Latham & Watkins and Skadden. This event would not have been possible without you. A considerable amount of time and effort has gone into planning this event so we truly hope you all enjoy and learn some new things about the fast changing sports law world. Without further ado, I will turn things over to our Vice President, CONNOR RISER, to introduce the moderator for the first panel. Thank you.

Panel 1: The Future of Name, Image, & Likeness Policy for College Athletes

Sponsored by Winston & Strawn LLP

Connor Riser:
Good morning, everyone. My name is Connor Riser, and I am the Executive Vice President of NYU Sports Law Association. Thank you for joining us here today. Our first panel's on the future of name, image, and likeness, policy for college athletes. It is my extreme pleasure to introduce the moderator of our first panel, Dr. Daniel G. Kelly.

Dr. Kelly is the academic director of graduate programs and a clinical assistant professor at the Preston Robert Tisch Institute for Global Sport at NYU's School of Professional Studies. Among his many professional pursuits and accomplishments, he has recently helped to launch the NFL/NYU executive education program for rising NFL leaders. He has previously served as the academic lead for the Josoor Institute of Qatar's football and sports management diploma program in preparation for the 2022 FIFA World Cup. He also previously served as the faculty director and Professor of Practice at Georgetown University's sports industry management program. Dr. Kelly holds a PhD in sports management from The Ohio State University, a master's in sports studies, and a bachelor's in business management from the Richard T. Farmer School of Business at Miami University. Dr. Kelly, I'll let you take it from here.

Daniel G Kelly:
Thank you, Connor. I really appreciate this opportunity and thank you to the leadership of the NYU Sports Law Association. The opportunity to serve in this capacity as a moderator for this panel is a fantastic opportunity, and I'm really excited for it. Joining me today are our fantastic panelists.

We'll start with David Feher, who is the Co-Chair of Winston & Strawn's Sports Law Practice. He is one of the leading sports lawyers in the country with extensive experience in complex litigation, negotiations and arbitrations, involving contract, intellectual property, antitrust and international issues. He has been outside for the NFL Players Association and the NBA

Players Association for many years. He is one of the prime negotiators in collective bargaining agreements and antitrust settlements in the NFL. Thank you, David, for joining us.

DAVID FEHER:
Thank you.

DANIEL G KELLY:
Next, we have Michael McCann who is a legal analyst and senior sports legal reporter at Sportico. Prior to joining Sportico he was the legal analyst and staff writer for Sports Illustrated from 2007-2020. McCann is also an attorney and Professor of Law at the University of New Hampshire Franklin Pierce School of Law, where he's the Director of the Sports and Entertainment Law Institute. He's the editor of the Oxford University Press Handbook of American Sports Law and Ed O'Bannon and co-author of Court Justice: The Inside Story of My Battle Against the NCAA.

McCann has also authored more than 20 book chapters and law review articles, including placements in the Yale Law Journal and the Boston College Law Review. He holds degrees from Harvard Law School, University of Virginia School of Law, and Georgetown University. Thank you, Michael, for joining us.

MICHAEL MCCANN:
Thank you for having me.

DANIEL G KELLY:
And finally, Daniel Lust. Daniel is an attorney in the New York City office of Geragos & Geragos. After working for the New York Giants in the PR department, Dan went on to Fordham Law School, where he split his focus between trial advocacy and sports law. In the sports law realm, he served as President of Fordham Sports Law Forum, and founded the National Basketball Negotiation Competition. He has also worked for SFX Baseball, one of the premier baseball agencies in the country, and assisted in the arbitration cases with several MLB teams including Cincinnati Reds, Minnesota Twins, and Oakland Athletics. Daniel, thank you for joining us.

DANIEL LUST:
Thank you. My pleasure.

DANIEL G KELLY:
All right. Our first topic to get the ball rolling, let's look at what are your initial thoughts on the NCAA's interim NIL, name, image, and likeness policies and its impact on student athletes? We'll get a round-robin going, but we'll start with David.

DAVID FEHER:
Morning, thanks everyone for being here. This is really great. And I'm actually in New Orleans. It's a hotel room behind me, that's been virtually out. But the reason I mentioned that is because two years ago, it was the last trip I took to New Orleans to a similar panel at Tulane, which was the last trip I took before the pandemic. And so, this is the first trip, I hope, after at least the main phase of the pandemic. And it's good to get back to at least half normal life.

I want to start off by laying down a couple of first principles, which is that for NIL, my main response is: it's about time and it's not nearly enough yet. And I say that for a couple of fundamental reasons. One is that some of the topics we've been discussing here have been about NIL policy.

Policy is normally something that's done by a government, or it's done by an individual economic actor, like a company. The NCAA is a collection of competing business entities. Conferences are also collections of competing business entities, but they don't have individual market power, generally. And so, that's usually okay, and there's a distinction there. But the fundamental point here is that the NCAA isn't some kind of quasi-governmental entity that we should all bow down to and give deference to, with the belief that somehow they're acting on our interests and the interest of consumers generally, and that they're going to necessarily do good.

I hate to say this, but in my 30 plus years of experience in the sports industry, and generally, when you give economic actors, essentially, unfettered authority, they're going to exercise it in their self-interests. I mean, that's true with almost everyone. These are not organizations where you can expect them to say, "Oh, you have billions of dollars in contracts, and we want you to dispose of those billions of dollars in a way that is consistent with the public good." And expect people who are individual decision makers with their own interest to do anything other than to follow their own interest.

And with the NCAA and the conferences, especially the NCAA, because they've had monopoly market power over the years, every time in a major economic area, where they put rules together, it's been destructive of competition and destructive of consumer welfare. In the 1980s, they essentially wanted to have a rule that would limit national TV broadcasts to just a game or two on weekends, where they would control the monopoly. And it would prevent fans all around the country from seeing games that they were desperate to watch. It went all the way up to the Supreme Court. The Supreme Court completely batted it down as being completely destructive of competition and consumer welfare.

In the coaching area, salaries for head coaches are way out of whack from competitive market forces, because money is being funneled in there when it can't be funneled in more efficient ways. And what did the NCAA do? They passed a rule that limited the salaries of the weakest assistant coaches, who were making hardly anything. And so, they were not only acting in a way that was anti-competitive, but against the weakest people.

And in our case, that just went before the Supreme Court *Alston*, the NCAA was restricting educational opportunities for students. And student athletes is a misnomer, because that's only been done to avoid paying them fair remuneration for their service on behalf of the schools. And so, just as a predicate, you can't do any of this thinking that, "Oh, it's good to have NCAA policies, and they're going to do good things."

In terms of NIL, the main thing I think of is when you look at the results we're getting this year, there's a trail of broken people, in decades and decades before, of people who were denied these opportunities, of people who should have been making compensation for their own name, image, and likeness.

This is not college or conference or NCAA intellectual property. This is their face. This is their name. This is their autograph. This is their time. And the fact that these rules that were passed to economically restrict them from selling their identity, I think it was appalling and in terms of the harm that was left in this wreckage over all these years, it's just. . . With everything going on in the world, I don't want to say that it's something that should be at the top of the world list, but in terms of how we focus on sports and how we care about these things, we need to teach the right lessons. And if we can't teach the lessons to fans that you own your own identity, and you should be free to sell it, then I don't know what we can do. So the main thing I'll say is that it's about time.

DANIEL G KELLY:
Yeah. That's fantastic thoughts. I'm going to take it to Michael next, because I know you have extensive experience, especially with Ed O'Bannon. And so, Michael, your initial thoughts on the interim NIL policies.

MICHAEL MCCANN:
And I would just echo, I mean, David's very eloquent, thoughtful comments. Just to add a couple points to what he said, I would say, one, NIL, at least in the media, is often thought of as a new right. It's not a new right. In fact, all Americans have an inherent right in their ability to commercialize their identity. It's through the right of publicity. And most states have explicitly recognized a right of publicity and others have incorporated it through privacy law. And it's important to stress that because NIL is really about removing a restraint more than anything else.

It's a restraint on college athletes' ability to generate income or other benefits for their name, image, and likeness. And the reason why that's significant, is that it's really about restoring the status of one set of college students with their classmates. If you're an actor, if you're a musician, if you have some other marketable trait, while you're in college, you're able to make money from it, including for your publicity of it.

And NIL is about saying, the NCAA and its member schools can no longer construct a constraint and then impose it in ways in which are adverse to the students. So, again, it's really about equalizing the playing field more than anything else, and about removing a restraint on a right they already have. And the second point, Oliver, you referenced Ed O'Bannon, Ed and I have had so many conversations over the years about NIL. And one point that always struck with me is that he said, "It's not about college athletes getting rich." Most college athletes, and the data suggests this, are not making a ton of money through NIL. It's really about dignity. It's about the idea. David's comments noted this. It's about saying, "You have this right, and we've taken this right away from you for reasons that are largely fictitious." And it's about ensuring that you now have that right back. And as Ed has noted, many athletes, if you look at the data on athletes who are most adversely affected by constraints on NIL, it's often African American men. And as a result, there's an issue of race that's part of this as well. That, even if it was not intentional, it's important to point out, in terms of the context of the issue. So, I would just raise those two points.

DANIEL G KELLY:
Thank you, Michael. That was great work. I'm going to transition over to Daniel Lust. And the same question about the NIL policies, but on the backend, the impact on the dynamic between student athletes, agents, NCAA.

DANIEL LUST:
I'm happy you asked that. I think Michael and David laid it out really well. I think the portion that I tend to fall in as, we'll say, a diehard college sports fan, I think what's lacking in the NCAA's interim rules is really this impact on competitive balance, and where athletes are going as a result of the world of NIL. So, I think as to at least the initial question, I think the NCAA, we could talk about their interim NIL policies, but we're almost really talking about a lack of a true NCAA policy. We're kind of talking about what the NCAA is going to do to provide some procedural safeguards.

And I think they've been kind of walking around it for, at this point, maybe close to a year, year plus about what the NCAA's actual active role is going to be in managing this, we'll call it landmines coming here and there. And I'm sure we're going to talk about collectives and whatnot. But, yeah, I think the NCAA, I've been a little, hopefully not controversial, but a little disappointed with the NCAA's active role in managing the chaos. We've called it the wild, wild West. And I think it still is the wild, wild West. And we're basically almost a year into the era.

So I think with respect to agents, and we should mention our colleague, Darren Heitner, couldn't be with us today with the birth of his first child. He's probably who would've got this question, so I'll do my best to answer on his behalf. But the world of agents is kind of upside down as to where we were, basically, a year ago. For, I don't know, the better part of a half century agents were not allowed in the sport.

I'm sure agents found their way in, under the table and sneaky ways to get around it with, we'll say, pseudo promises and bags of, we'll say, the $100 handshakes underneath the table. But now we have an opportunity for this all to be done above the table. So, agents are allowed in the space, the top agencies in our professional sports world are now moving into college. So, I think in the first, maybe, we'll say that initial wild, wild West era, the first 30 days of NIL, nobody really knew what you had to do. They didn't know that you had to register with the particular state.

DANIEL G KELLY:
Exactly.

DANIEL LUST:
They didn't know what you could put in the contracts. You had a lot of predatory people who had never been in the space before thinking that these athletes were going to sign up for these get rich quick schemes. And I know we're going to talk about it a little bit, but I don't think anyone was advising them of the tax ramifications. I don't think anybody necessarily knew for these new people getting into the space.

And I know Dave and Michael have all commented on this NCAA world, but there was a period of time, we're still kind of there, where the rules are very fuzzy and very gray as to what you can and can't do. And that's maybe the lack of a federal bill, and the lack of the NCAA really putting out a formal policy. So, maybe with a broad brushstroke, the rules of agents are going to vary depending on the state that you're in. There is no NCAA certification. One of my students just got NBA certified, so they are now an NBA player agent. There's an NBA certification. At least for the time being, maybe in the next five years, there will be an NCAA certification, but not as of today. So, for all of our 85 participants looking to get into that world of agency, just be very mindful that just like our state laws, it does vary state by state. It is not yet quite done at the NCAA level.

DANIEL G KELLY:
Thank you, Daniel. That was fantastic. I'm going to spin back to Michael for a follow-up on what Daniel pointed out. Is this surprising that the NCAA has implemented an interim policy more, so than trying to be forthwith with policies to tackle NIL? And as Daniel pointed out, the fact that it isn't a federal policy or federal law, and that we're trying to interpret it along the way. And we'll get to David as well on that.

MICHAEL MCCANN:
I mean, it's not surprising, in a sense that NIL as an issue has been around for decades, and the NCAA has opposed it until recently. So, the idea that they sort of ran out of time and that's what happened. I had a chance to testify before the United States Senate on this in June of last year. And I noted that a federal bill would make a lot of sense, but by that point it was too late. States had already adopted NIL statutes that were going to go into effect on July 1.

So, the idea that they rushed to put together an interim policy, isn't surprising, because the alternative would've been to sue, seek conjunctions in every state that had a statute going into effect on July 1. And then running the table, which would've been, I think, by that point 14 states, and trying to lock their statute. So, it became impractical. And I know that there were discussions about use of the commerce clause, that there has been past litigation, the *Miller* case in particular, as potential precedent. But the NCAA didn't go in that direction, they more or less capitulated to state statutes. So, it's not surprising.

And Dan mentioned the role of agents. I think it's something to keep in mind. I question, and I have a law review article on this, how is the NCAA in a position to actually certify agents? It's not a labor entity. It's not a governmental entity that's in the business of licensing. Typically, agency agents are licensed by players' associations, by unions. It's not immediately clear that the NCAA has the legal capacity to operate in that way. Now, maybe they do, and it goes fine. But it presents a whole host of issues. So, I'll stop there. I think David wants to jump in.

DANIEL G KELLY:
I think David's ready.

DAVID FEHER:
I've got a bunch to say. I mean, I'm going to start off by saying the NCAA is not a government, and can't be trusted. They proved that over and over again. Secondly, this notion of a federal bill as being a good thing to restore order to the Wild West. First off the Wild West, and Dan, I know you didn't intend it this way, but competition's a good thing. I mean, apart from various areas, we can all agree on, I hope, like environmental laws, where there are external harms to other people, we should generally try and let competition produce public benefits and produce more efficient solutions.

And so, to the extent people are saying that, "Oh, what's going on now is disorderly." That's the way economic activity is supposed to be. It's not supposed to be a government that tells you what to do, and with a state run economy, at least not in this country. We're supposed to be able to make our own individual decisions. That's why in all of these disputes that we've had over the years with antitrust, it's never been a political issue from the right, far right to the far left. Everyone agreed that they hated the NCAA, and they hated them as like a command economy trying to do things that would benefit themselves and destroy everyone else. And by the way, their disciplinary regulatory behavior has been so destructive in terms of being random in their punishments for people, it gives no confidence that they can do anything. I mean, the list of people who've been aggrieved by the NCAA over the years is so long, it's crazy.

The thing I want to focus on, too, is, on the federal bill, it's largely a Trojan horse to let the NCAA get back to telling us all what to do. And they're doing it in horribly misleading and kind of almost marketing ways that are designed to deceive people. At the end of last year, actually the year before last, before the *Alston* decision, there was a Republican bill that was submitted by then the head of one of the main committees with jurisdiction over it, and the Senator trumpeted the fact that it was going to allow students to get money from NIL.

While buried within the provisions, which nobody focused on, which nobody talked about, was a provision that gave the NCAA carte blanche to basically do anything they wanted, apart from the little bit of crumbs that were granted to the athletes. That would've allowed them to go back to regulating everything in terms of compensation that athletes are receiving, in a way that would've been totally destructive of athletes.

Again, the NCAA can't be trusted. And this notion of a federal bill to bring order to some place to protect the students is crazy. The last thing I want to say is in terms of competitive balance, there has never been competitive balance in the NCAA. It's always been the same schools that have generally prevailed. Sometimes over time, they shift to a degree, but there's never been competitive balance. And beyond that, we went through a massive antitrust trial in the *Alston* case on educational benefits. The NCAA couldn't even make a competitive balance argument with a straight face and they dropped it early on. They know that it has no credibility at all. And so, when you ask, what are the justifications that the NCAA can make in terms of any regulations on this? It needs to be procompetitive, they can't restrict economic activity because they think that the educational psychology of students is somehow going to be harmed. "Oh, my God, because they're too precious!" I mean, this is not a power that the NCAA has. It has to be an economic benefit. And they've yet to come up with any justification that makes any sense.

And by the way, their amateurism defense, which is kind of an oxymoron, because it was never about amateurism, it was about shifting money from the athletes to the administrators and to the schools, has been totally shattered by the NIL developments too. So, to the extent that anyone was giving them deference in terms of amateurism, that is now as dead as dead can be, and we'll see what the future brings. But why is the NCAA not doing anything? Because they know they're going to be violating the laws.

That's a good thing. Restraining behavior because people were afraid that they're going to be violating the laws. When they economically injure people who have the least leverage, and who are in some of the most economically distressed situations, constraining their behavior is a good thing.

DANIEL LUST:
Daniel, could I jump in really quick, please?

DANIEL G KELLY:
Of course, please.

DANIEL LUST:
By all means, if I came up as an NCAA apologist, I am not, by any means. If anyone follows me on social media, probably quite the opposite. All I wanted to point out, from a fan standpoint, we're experiencing something new. That's all I meant by wild, wild West. It's not meant to say that's good or bad, it's that we are experiencing a time where laws are being passed. Right now, Alabama is now repealing its NIL law, so it's an era where the laws are very much in flux, which could be a good thing. And again, I'm just speaking from a. . . I go on enough shows, people there are college football purists that are nervous, to some extent, that national championships are being somewhat decided by whether or not your state law is going to help you recruit on an NIL basis.

And on a conference level, conferences are made up of different states. So, I'm just pointing out, it's not necessarily that it's good or bad, it's that it's something new. And that it's something that sports fans and college purists have to get used to. And as someone that's championing player empowerment and athletes being able to make money, it's a good thing. And it's putting the NCAA in an uncomfortable position. But if we're going to have a National Champion and all of a sudden we're going to have NIL and the transfer portal decided based off of one state, for example, Alabama, who has just repealed their

NIL law, they now can do certain things that other states. . . Florida has a NIL law, Texas does as well, I mean, I think about half the country does at this point. And Alabama can do certain things that other states can't do.

Again, not that it's good or bad, that it's just a new type of edge that is being fought by politicians, which, at a certain point, I'm not one that loves to blend sports and politics, but it's kind of unavoidable. So, I think that's the "uncomfortability" that some of our sports fans are having. That's my main point there.

DAVID FEHER:
Before Michael jumps in, I'll just say, competition's a beautiful thing. And generally, politicians should get out of the way of competition, yielding benefits for fans all over the country.

DANIEL LUST:
Politicians tend to go to whatever gets them reelected. I feel like the carrot, they keep going towards it.

DANIEL G KELLY:
Of course, Michael, please weigh in.

MICHAEL MCCANN:
No, I know you want to move on to another question. So, I'll defer to you.

DANIEL G KELLY:
Okay, perfect. My next question, and we'll start with Dan, is about, let's see, the ability for student athletes to maintain compliance, but still maximize their NIL opportunities. Do you see a lot of issues coming up in the future for athletes to maintain their compliance?

DANIEL LUST:
I actually think for the athletes, it depends, again, what school you're at. Certain states are going to require you to actually go to your school and tell them what NIL deals you have, some before you sign them, some after you sign them. But by and large, I don't know if that's going to be an athlete concern. I think it's going to be more of a school concern. I guess the scenario that I know that I've grappled with online, and I will

see what chess pieces and dominoes fall, but it's this whole conversation with respect to Nike athletes.

DANIEL G KELLY:
Of course.

DANIEL LUST:
So if you are a Nike athlete and you're at a school that's not a Nike school, be it an Under Armour school, Adidas school, whatever your school is, I think, as an athlete, you're going to say, "I'd like to sign with whatever sponsor I want to sign with." And then you're going to have the school saying, "Well, we are an Adidas school, or Under Armour or Reebok," whatever you name it. So, I think that's going to be tough, because I think as our NIL world expands. . . And Nike and Gatorade have actually just gotten into the NIL space fairly recently. They weren't in the space on July 1st, August 1st.

So I think once these A-level brands and we're starting to see more and more of them enter the space, we're going to start seeing those kinds of conflicts hit one another. But really for the first six months of the NIL era it was fairly small brands. It was mom and pop. It was local shops, local restaurants. Those were a lot of the deals, smaller deals, social media based deals, influencer deals. But we're now starting to see our athletes get these large deals that aren't necessarily coming from boosters, but coming from national brands.

So I think that's going to be more and more of an issue and it's going to start pitting the schools against the athletes. And then there's a question as to what extent the school can tell an athlete what they can't do, because they're not employees. I mean, that's certainly an interesting conversation that we're going to continue to have. But I don't think those lines are so clear about what schools can tell the athletes to do on a compliance level. I don't think that point is, again, David, I'll probably stop using the term, but when I'm saying wild, wild West, there is no black and white answer to that. We don't know. So, until that's tested, until there's precedent on point, it's kind of a guessing game. It's shades of gray.

DANIEL G KELLY:
All right. Thank you, Daniel. Michael thoughts on athletes or universities maintaining compliance or maintaining the balance of compliance?

MICHAEL MCCANN:
Well, I think transparency is key, so that both the school and the athlete and the recruit are aware of the contracts that the other has. That is one way of mitigating some of the concerns of potential conflicts and endorsements and sponsorships is that there's communication. And if a recruit knows that a school is a Nike school or Adidas or New Balance or whatever it may be, that is helpful information to the recruit in making a decision on where they want to play.

So, in some ways, I think the market can sort of self-correct this. And usually just being transparent is the best way of dealing with things. And I know that hasn't always been the case in college sports. I'm well aware of that, but I also think schools that are more direct with. . . And I know athletic directors, some are really candid. They're not trying to scheme. They're really just trying to operate an athletic department. And one way of facilitating that, I think, is to be open and candid. And to the extent that's the case that might, again, mitigate some of the concerns that I think your question alludes to.

DANIEL G KELLY:
Okay. David, thoughts?

DAVID FEHER:
I think those points all make sense. And in terms of transparency and information flow, I think that's very important. And I think part of the difficulty right now, and this goes to what Dan is talking about, is that we're in a state of transition right now. Things can get rough sometimes when you go from a command economy to competition. There's a lot of chaos sometimes, and it can get very, very messy and people can have bad information. And that's not a good thing, if people are kind of defrauded by individual "bad agents" and who are told things that aren't accurate under the law.

And I think that the dissemination of accurate information by schools is very, very important. And I think what Michael said in terms of people, knowing what the different contracts are, makes sense, too. In terms of Nike schools or Adidas schools or all of that, in professional sports, there have been fairly clear lines of demarcation, which have worked for a lot of years. And it's based on what people own, in terms of their own intellectual property. And so, if you want to use a league NFL shield or a team mark, you need to go to the league or the team in order to do it. It's the same thing now with colleges. You can't use your school mark in any way you want to, I won't say that. . . because we get into arguments on a legal basis, whether you can use school colors in your advertisements. That happened in the NFL when there wasn't a union and there were disputes about that. But there are boundaries of intellectual property, and if everyone knows what they can and can't do, consistent with the law, there's nothing wrong with that. That's actually something you should do.

The difficulty is that before, when the NCAA and the schools were just trying to write all the rules and keep all of the money, they were doing things as a kind of performance art. And beyond performance art also in ways to kind of get around what they viewed as political issues, so that they maybe wanted to pay coaches X dollars, but they didn't want to pay Y, and so then they allowed coaches to do deals, where the coaches would have to have shoe company logos displayed, and the coaches would get income streams off of that, that they were used to.

And so, in the pros, if you want to wear a particular kind of shoe, the way it generally works is the athlete can do the deal to wear the shoe and can do the ads. And by the way, there's a difference between what you're doing on your own time versus what you're doing on the broadcast of the particular game. And you need to know the rules there. And so, I think this will sort it out, but the main thing is that I think the schools need to, going forward, not overreach and not try and live like it's in the world that we used to be. And I'm not asking for much here, really, all that I'm saying is that the NCAA should be acting like they're subject to the laws, just like anyone else.

And in terms of agent regulation, it's the same thing, they're not the player's association. The player's association has the right to regulate agents as a result of their status as a union. The NCAA can't do that. At the same time, individual states have passed rules that limit what agents can do, and make sure that agents register in various ways. And that's okay too, if the rules are reasonable. If the state wants to do that, God bless them. And so, I don't discourage that at all. But the main thing is to let people have accurate information and make their own economic decisions, as to rights that they own.

DANIEL G KELLY:
All right, great. Great analysis. Thank you for that. I'm going to switch gears. And I want to start with Michael on this question about tax implications, because now that we have this new dynamic of student athletes being able to monetize their name, image, and likeness, they have to pay their taxes. And so, whose responsibility is it to monitor, support, or ensure that the student athletes are maintaining their tax eligibility or paying their taxes? Is it on the student athletes themselves? Is it on the university? Is it on the NCAA? Is it on their potential agents? Whose responsibility is to make sure that the athletes remain in tax compliance?

MICHAEL MCCANN:
Well, as taxpayers, we are ultimately responsible to pay our taxes, right?

DANIEL G KELLY:
Yeah.

MICHAEL MCCANN:
That's a duty that we all have as citizens if we make money. So, ultimately, it's on the athlete himself or herself to pay their taxes. And if they're not sure how to do that, to seek help in doing so. Schools can certainly provide guidance and suggestions and reminders, but ultimately, whether you're an athlete or just anyone, if you sign a contract with a company and it's a sponsorship or endorsement contract, and you're making money from it, you have to figure out how to pay taxes. This is on you, and many of these contracts are constructed as independent contractor relationships. So, they're not getting taxes taken out initially. So, that means that the athlete will have to

know that their tax burden later on will be higher, because they're not getting taxes taken out immediately.

It's not the hardest concept. I think it's something that athletes should be able to grasp just like anyone who's earning income. So, I would say it's on the person being paid and that's sort of a responsibility that we have as citizens is to pay our taxes, and make sure that we're adhering to federal and state laws. And, again, there are accountants, there are tax attorneys, there are professionals out there that can be retained. If there's an agent that has taken on the duty of representing the athlete, then he or she likely has a responsibility as well to at least encourage the athlete to pay their taxes.

But, again, it's something that we have as Americans. When somebody's charged with tax evasion and tax fraud, it's the taxpayer. And to the extent that an accountant or tax attorney errored, it would be in the form of malpractice. So, I would say it's really up to the athlete.

DANIEL G KELLY:
All right. Thank you. Thank you. Moving to Daniel, the same question about the impact of student athletes dealing with taxes, but let's add a bit of a caveat to it where this is their first time paying taxes, possibly. This is their first time being in a situation with this type of monetary value coming in and managing that, in addition to being a student athlete and balancing all of the pressures and the obstacles that come along with it.

DANIEL LUST:
So I guess I could speak from firsthand experience. Not that I am in any way, shape, or form close to being a professional athlete or a collegiate athlete. I did play intramural sports at a D3 level, and we did win a D3 soccer intramural championship. But I'm in my early 30s, I have someone to pay my taxes for me. That's what I would do. And these athletes are coming in sometimes 18, 19, 20, so they're not going to know the tax ramifications of accepting a deal, as some of the numbers for NIL purposes.

A lot of these deals are very small deals, like $100, 250, like posting something on Instagram. They're very small, and athletes might not think, and not saying anything good or bad, but they don't know the tax ramifications of accepting that. And maybe they're not filling out a W-9 and sending it to someone. So, it's merchandise deals, Instagram posts, car leases, art, they all have different tax ramifications and they have no idea.

So I guess to the larger point, I've always been in favor of agents being allowed in the sport, at least done over the table, and lawyers being involved in the space. Darren, who's not with us on the panel today, Darren is a lawyer and he's also in this NIL world. He's helping athletes kind of monitor. So, I don't mind if we're going to have this really short window, especially for some of our college basketball players that are one and done guys, they have one year of earning. Like Zion Williamson had one year in college, and then he went to the pros. I don't mind surrounding those people with the best possible financial teams, the best lawyers, the best agents.

So for their first time making money at this level, a guy like Bryce Young at Alabama was accordingly making a million dollars, over seven figures reportedly. And the guy's, I don't think, ever made any money in his life, at least to that extent. So, yeah, he needs to be surrounded by agents, financial people, lawyers. So, yeah, I mean, to Mike's point, you don't want to get in trouble by not paying your taxes, but they kind of have to go part and parcel. So, taxes, you do need financial professionals around you. So, I think the NCAA or the state laws, whoever you want to give credit for it, I think they got that part, allowing those two things to work hand in hand.

DANIEL G KELLY:
Thank you, Daniel. Going to David, let's move the question up to a 30,000 foot view. Let's look at it. We have student athletes like Bryce Young from Alabama, we have Paige Bueckers from UConn that have signed lucrative deals, seven figure deals, and balancing taxes, balancing the pressure of the financial literacy. Just being able to balance being a student athlete, being a millionaire, and also being in compliance with taxes. What are your thoughts?

DAVID FEHER:
First of all, in terms of the schools and the NCAA, I think educational efforts are fine and should be encouraged. And I think it's important for the schools to give accurate educational information to athletes as to what their obligations are. And so, I don't think people make decisions in a vacuum without good information, so I encourage that.

At the same time, I think that's pretty much where it needs to end in relation to contracts that students make with third parties. Because, just for an example, if you work for NYU, and you do a separate job as an expert, in a case for a law firm where you testify as an expert or serve as a consulting expert and they pay you $10,000 for your work. Does NYU have any business telling you what you should or should not do with that money? And what your obligations are or aren't with regard to taxes? No, that's your decision. That's your job. That's a contract you're making with a third party. NYU has no business telling you what to do with your own money.

And the other thing is that in terms of the examples that you gave, this is not new. This is not unusual. There have been actors, musicians, social media people, today, attending colleges, making millions upon millions of dollars. This is telling my age, but Jodie Foster went to Yale while she was making millions of dollars making films in Hollywood. Today, I'm sure there are tons of people in colleges who are making millions or hundreds of thousands or tens of thousands or whatever in their own jobs, while they're attending school.

Being a student and holding down a job is a difficult balance. And you need to make your own decisions. What do you want to focus on? Where do you want to make your money? What choices do you want to make? And so, that's fine, but that's not anything new. That's something that students have been doing for ages. And I think allowing. . . Not allowing, actually allowing is like the worst word in the world that we've been using that word, all of us. What does this mean "allowing?" We're not allowed to do something unless somebody says, "Yes, you can." That's not the way this country works. We don't have to ask for permission slips from mommy and daddy universities before we make our economic decisions, because we can't do anything. That's just not this country. That's not the country we've been taught about and we've grown up with since the time we were kids.

I mean, we're supposed to be adults making our own economic decisions. What do the laws do? They tell us not to commit crimes. They tell us not to engage in monopolistic behavior. They tell us not to pollute. They tell us not to commit fraud. Those are the sorts of things that laws are supposed to do. The laws are not supposed to be there to appoint universities to act as some kind of state actor, where every time we want to enter into an economic contract, we have to ask for permission-

DANIEL G KELLY:
Permission. Yeah.

DAVID FEHER:
. . . from the administrator who's going to tell us where we're going to live and what we're going to do. This country is not a dictatorship. It is not. It's not a political dictatorship. It's not an economic dictatorship. And it's very easy to kind of think that, oh, we should defer to what people are going to tell us to do. That's not the country I believe in, especially not today.

DANIEL G KELLY:
All right, David. . . Oh, please, Michael.

MICHAEL MCCANN:
Just to add to that, I mean we're all anchored to college as this construct of sports, that there's this entity that during this age, the sequence of age, players go to college and they play a sport and they're students. It's really an American construct. I mean, this is not something that other parts of the world do. And there are pro athletes at very young ages in other parts of the world. I mean, Ed O'Bannon was telling he had a 13-year-old teammate when he was playing over in Poland. And you'd pick him up from his parents' house, and he had a tutor. I mean, it wasn't a weird thing.

And sort of having the opportunity to make money earlier in life, it shouldn't be seen as strange, as David noted, there are child actors and musicians. When John Mayer went to the Berklee School of Music, he could have signed a record deal. It wasn't somehow endangering his eligibility in some way. I think the further we get away from sort of anchoring our viewpoints to that construct, I think is probably healthy.

DANIEL G KELLY:
I want to stay with Michael. You made a point earlier about the NIL laws impacting African Americans in particular, more so than other racial groups. Where you gave the John Mayer example, and I think David gave the Jodie Foster example. Do you think that there are still those concerns about the viability of African Americans being able to benefit through NIL?

MICHAEL MCCANN:
Well, I think if you look at the data, men's basketball players and college football players, and the percentage of African Americans who play in those sports, and to the extent that those sports are generating a lot of the NIL opportunities. I would also add women's basketball as well has done very well with NIL. That it should benefit those that are playing in those sports in a way that might be more lucrative than athletes in other sports. Although I'm hesitant to say it with too broad of a brush, because we've seen athletes in a whole host of sports benefit from NIL, but I do think it goes to equity. And even if preventing NIL, restraining a right somebody already has wasn't motivated by race, if it had a disproportionate impact on race, that courts have identified is a justification to change things.

DANIEL G KELLY:
Correct.

MICHAEL MCCANN:
So, yeah, I think, again, this is not about sort of intentional racism. I remember Ed O'Bannon saying, "It's not about people sitting around a table saying, 'Let's do something racist.' It's about not caring about race." And it's about not being sensitive to the impact of a set of policies that disproportionately affect one race more than others. So, it should have more of an equalizing effect. I think everyone's going to benefit from being able to use it. They already have, that has been constrained. And to the extent that it's sports that are dispropor-

tionately African American, then it should help that group more than others, if the data works out that way.

DANIEL G KELLY:
Okay. Please. Please, David, please respond.

DAVID FEHER:
I'm going to talk just briefly, as kind of like the more elder person on this group, because I'm 63 and I grew up in the 60s. And it's not entirely my place, or even largely my place to talk about this in great depth, because I can't walk in other people's shoes. But the country I grew up in the '60s was, as much as people argue about things today, it was so much more horrific back then. Where violent behavior against people because of their race was incredibly common. And I remember as a young kid, all the assassinations and civil rights workers getting murdered, and it was a different country, and I hope we're getting to a better, far better place, not just better. I know we're better, but a far, far better place.

And sports is a funny thing, because we care so deeply about it. And it's a piece, but one thing I will say is in terms of what competition does, people don't realize this, but there was a lot of social change in this country when a lot of states, I'm not going to. . . I mean, at the time it was one geographic region, but where there were a lot of states with a lot of state universities, where they essentially were getting the hell beat out of them on the football field, because they were limiting their recruitment to white athletes. And the people living in those states were like, "Oh, wait this is a problem. We can't do this." And then they started viewing people who weren't viewed as people more like people and they got to know them better. And I say this from the perspective of someone who wasn't on the receiving end of that, so much. But I mean, I grew up in a part of the country that was kind of tough in those areas. But if we say these things aren't important, they are important.

And in terms of the racial equity issues, the one thing I'll say is that the sports we tend to talk about in this area are football and basketball. How often do we hear people complain about 15-year-old hockey players in Quebec becoming a pro? How often do we hear about high school baseball players signing a massive bonus baby contract and how we applaud them? "Oh, my God, this is great. This high school kid just signed with the Yankees and just signed a bonus for two million dollars."

DANIEL LUST:
That might be Rob Manfred's fault, Dave, that might not be. . . Maybe a topic for a different battle.

DAVID FEHER:
No, no, I know that, but at least in terms of young kids making money and having those choices, we don't bat an eye. We don't talk about, "How do we protect them? How do we set rules that prevent them from being taken advantage of?" We treat them as human beings, and I just think we need to do that more.

DANIEL G KELLY:
All right. We'll get to our final comment from Dan, and then we'll do rapid fire for our last question.

DANIEL LUST:
I guess, well, I was going to answer a question that was given to us by Cabot Marks from the-

DANIEL G KELLY:
Oh, perfect.

DANIEL LUST:
I think that's what you're referencing.

DANIEL G KELLY:
Yeah, of course. Perfect. Good.

DANIEL LUST:
On this NIL panel, part of what we wanted to do is to flag what the next issues are and really what the current issues are. Professor McCann had identified, I think earlier in this conversation, whether there will be unions in the NCAA or with schools. That's that, maybe two, three years down the line, this employment question. But for right now, I think the biggest question is what these collectives are doing at a school by school basis. And whether that's, we'll say, allowed, permissible, whether we're okay with it.

Texas A&M, Texas, Florida, there's a number of these what we're calling collectives around the country. And these are either some form of, we'll say, supporters of the school that are raising money. And then if you are an athlete at that school, so Texas University has a program called the Pancake Factory, and if you're an offensive lineman at the University of Texas, that fund can be used to compensate you in some way, shape, or form.

The NCAA rules are such that you're not allowed to give an inducement to make a player switch schools. But the question is this weird fine line, if you say, "Hey, you're an offensive lineman at our school, and we'll use this money to pay you if you're at our school," whether that's an inducement. Whether the advertising of such a fund is akin to inducement. And then there's kind of this related question that we saw at a school like Eastern Michigan, Charlie Batch, former Detroit Lions quarterback played at Eastern Michigan, basically, went online, and he, I don't know if you want to call, it made an offer to Caleb Williams who was in the transfer portal, former Oklahoma quarterback ended up going to USC. And basically said, "Hey, Caleb Williams, if you want to come to Eastern Michigan, we'll pay you a million dollars."

That seems to be a pretty obvious inducement. But then again, Charlie Batch doesn't work for Eastern Michigan. He's this kind of outside player. So, can you punish Eastern Michigan for something that basically a fan, an alumni of the school is saying? So, that's the really interesting question. When we cross the line with inducements, and then really to my first point I made, what the NCAA is going to do about it, if anything. And if they're allowed to do something about it, if they're allowed to police the schools in that sense.

Yeah, I mean, that's the scenario, more collectives are popping up. I'm speaking to schools and fans at these schools pretty regularly. They want to create funds of their own. Darren, who's not here, has been helping with the Florida Gator Collective. And now as weird as it sounds, the Gator Collective is a sponsor of the University of Florida. That's how weird this world has become. You have a fund that's created to help Florida. And now they're sponsoring sporting events at Florida.

Again, I like Dave, how you said this world of transition. I'm going to go with that instead of wild, wild West. I think that's a better term, but it's definitely something new.

DANIEL G KELLY:
No, that's a great way for us to wrap up this panel. I'd like to thank David, Daniel, Michael for great insights, great perspectives, fantastic conversation. And also a big kudos to Tatiana and Oliver with the leadership. And we will throw it back to Oliver for the conclusion, and transition to the next panel. Thank you.

PANEL 2: THE FUTURE OF BLOCKCHAIN & CRYPTOCURRENCY IN THE SPORTS WORLD

Sponsored by Skadden, Arps, Slate, Meagher & Flom LLP

Panelists in Panel 2 kindly requested that their session not be recorded, as such, their remarks are omitted from this transcript.

PANEL 3: THE RISE OF LEGALIZED SPORTS GAMBLING

Sponsored by Latham & Watkins LLP

CALEB PAASCHE:
Hi everyone. We apologize for the delay there. We've had some technical difficulties getting our fourth panelist online. But good morning and thank you all for joining us for our third panel. My name is Caleb Paasche. I'm a 1L Representative on the Board of the NYU Sports Law Association. It's my pleasure to introduce the moderator of our third panel, The Rise of Legalized Sports Gambling, Michelle Coohen.

Michelle Cohen is a Partner at Ifrah Law, where she practices in all areas of the firm's Chambers-ranked gaming practice. She counsels clients across gaming verticals including sports betting, esports, i-gaming, and fantasy sports. Clients include sports betting operators, professional sports teams, payment processors, and media affiliates. Michelle has deep experience in sweepstakes, contests, and other promotions. As a Certified Information Privacy Professional since 2008, Michelle adds her data privacy expertise to gaming matters. Michelle practiced with Paul Hastings for over a decade and was a Hiring Partner at Thompson Hine. She is a graduate of Emory Law School. Thank you to Michelle for joining us and I will turn it over to you to introduce the rest of our panelists.

MICHELLE COHEN:
Thank you for that warm welcome. Special thanks to the NYU Sports Law Association for putting together this amazing panel. I know it is not easy to coordinate all these speakers across all these cutting-edge topics. So, super amazing job to the association and hats off to Tatiana and Oliver. And also thanks to our sponsor, Latham and Watkins, for this panel. We do have a great panel and I wanted to introduce folks on our panel.

First up is Frank DiGiacomo, who is a partner at Duane Morris, and he is the team lead for the firm's Gaming Industry Group. He practices in areas of gaming, sports betting, i-gaming, entertainment and regulatory law. And he's also the Former Chairman of the Casino Law Section of the New Jersey State Bar Association.

I think we have Marc Edelman on the phone and joining us. He is a sports, gaming and antitrust attorney. He launched Edelman Law, which is a sports and entertainment law boutique firm. And he's also a Professor of Law and a Director of Sports Ethics at the Robert Zicklin Center for Corporate Integrity and an Adjunct at Fordham University. He has worked extensively on gaming and fantasy sports websites.

Moving along to Carolyn Renzin, who is the Chief Risk and Compliance Officer at FanDuel, who I'm sure you're all familiar with. It's a leading operator in the space. Carolyn is an experienced regulatory litigator and compliance expert. Before FanDuel, she spent several years at JPMorgan Chase, including acting as an Assistant General Counsel.

And then last but not least is Dan Wallach, who is the founder of Wallach Legal, a law firm devoted principally to sports wagering and gaming law. Dan counsels professional sports teams, sports betting operators, fantasy sports companies, data providers, racetracks on gambling laws and regulations. And he is also the co-founding director at the University of New

Hampshire School of Law's Sports Wagering and Integrity Program.

So thank you, everybody. There's so many developments and a lot of information to cover, so I want to get right into our program. I mean, it's hard to believe that the *Murphy* decision which essentially launched all these states into having regulated sports betting was just three years ago, and two of those years included lockdown. So, it's fairly amazing to think that in that time, we have total states over 30. [inaudible 00:04:10] as well as mobile and/or online, and just a few ready to go soon, including Ohio and Maryland. So, I want to throw it out to the panel. And Carolyn, I'll start with you. Does that surprise you, the pace that we've been at?

CAROLYN RENZIN:
Does it surprise me? No, it doesn't surprise me, but handling it is challenging. I think that particularly with some of the economic challenges that the states have faced in the pandemic years, the opportunities for states to make some money out of this opportunity has sped up a lot of this, from our perspective, which is great for us and, frankly, great for the states. We are helping a lot of people through the tax revenue that the industry provides. So, I don't find it surprising, but it is exciting and it is extraordinarily challenging as we try to navigate our way through the sort of hyper growth that it means from an operational perspective on the operator side.

MICHELLE COHEN:
Frank, do you think we're going to get to all 50 states?

CAROLYN RENZIN:
I think we're going to get close. I think this is attainable. If you read the pundits and the political pundits, I think there's certainly a momentum. A lot of the hesitancy that I historically saw in gaming expansion, for the reasons Carolyn referred to, seem to have gone by the wayside. A lot of the legal uncertainties, for example, surrounding the Wire Act, seem to have been tamped down. So, I do think that it will continue in . . . There will always be a handful of states where there'll be no form of gambling, but I think it'll get into the 40s.

MICHELLE COHEN:
Dan, what are your thoughts on all 50? And I just also want to ask, who do you think has surprised you in terms of going superfast or a little slower than expected?

DAN WALLACH:
Well, I think eventually, we're going to get close to all 50. It's a very common refrain or narrative that Utah will never have sports betting because it's a conservative state, Mormons, and they outlaw all forms of gambling, but it's certainly not the most conservative state in the country. And we're seeing states like Alabama, Georgia, Wyoming, South Dakota, Tennessee, South Carolina beginning to enter the conversation. So, I would never say never about all 50. And for me, the biggest surprise has been New York State in terms of its slowness to market and with Massachusetts a close second. And the reason I say New York is that of all the states that offer legal sports betting within the United States, New York's law is the oldest one on the books. It dates back to 2013.

There were a handful of states that passed laws in anticipation of PASPA being overturned and conditioned on that, Pennsylvania, Mississippi, New York State among them, but it took New York six additional . . . No, seven or eight additional years to pass a mobile sports betting law and they call the 2013 law, which was the implementing legislation that accompanied the casino gambling, constitutional amendment. I call that a $4 billion mistake because they omitted online sports betting language. Had they included that language in the 2013 law, we would have sped up the process for New York by a number of years. Instead, it took nearly eight additional years, or almost nine, by the time online sports betting launched in New York. So, that to me is the biggest surprise, the spread between retail and online in New York, given that New York was the first state to have a go at it.

MICHELLE COHEN:
Right. Thank you. Marc, thanks for joining us. I know we had some technical difficulties. But I wanted to bring you in. Did you have any thoughts on any surprises as the states rolled out rather quickly, following the *Murphy* case?

MARC EDELMAN:
Well, thank you, Michelle, for including me in the conversation. I think they made a very wise move from blocking having me online. But I guess you're stuck with me now in this other forum. To an extent, I agree with Dan Wallach that the amount of time it took for New York to roll this out was surprising. But what's more surprising still was not the amount of time that New York took, but given how much time New York took to roll it out how, from my opinion, the protocols they put in place were incredibly non-sophisticated. Given the amount of time New York spent on this, I very much expected to see more robust protections against problem gambling than just having a 1-800 number online.

I thought New York would have addressed the bizarre issue of them having allowed gun jumpers into the DFS marketplace in 2015 and still not had a new way for daily fantasy sports operators that waited for legality to enter the market. And I thought there would be a lot more transparency in terms of how they chose which companies will be allowed to operate and why so. The fact that New York delayed so much and really did so little once they came in was what astounded me.

MICHELLE COHEN:
Since we're on the subject of New York, former Governor said that mobile sports betting was against the Constitution. And it couldn't be shoehorned into the casino exception. I was going to ask, I'll start with Dan. Can you explain briefly how the mobile sports betting is consistent with the Constitution?

DAN WALLACH:
Sure. I testified on this topic along with Jeff Ifrah from your firm about three years ago. So, hopefully, I'll have some recall of the topic. New York's Constitution has some of the most robust anti-gambling language in the country. Many state constitutions prohibit some type of gambling like lotteries, New York goes the full distance. It outlaws all forms of gambling, including bookmaking, pool selling and lotteries, but carves out as exceptions certain permissible forms of gambling and one of those is casino gambling at no more than seven facilities. That was a legislatively proposed constitutional amendment that the voters of New York approved in 2013. So, the

language that's operative here that is important is, "What does it mean to be casino gambling at no more than seven facilities?"

Crucially, the Constitution in that exception gives the legislature the languages as authorized and prescribed by the legislature. So, it gives the state legislature the discretion and the authority to outline and determine the contours of constitutionally permissible forms of gambling. And there are comparisons or analogs to that. For example, New Jersey has locational restrictions built into their state constitution as to where casino gambling can take place. It can only take place in Atlantic City under the state constitution, yet New Jersey has their legislature authorized i-gaming in 2013 by determining or dictating that the bet is deemed to be made at the location of where it's processed and received by the servers in Atlantic City. And that mechanism is utilized in a number of different state statutes that have locational restrictions enshrined in the state constitution. And this is consistent with state contract law in that a wagering transaction is tantamount to a contract. You have an offer and you have an acceptance and the acceptance is deemed to be the place where the contract is made. And that's why states are able to use the location of the server for purposes of state law to determine where the bet takes place.

So New Jersey is one of the states, Michigan, Rhode Island. Without that legal analysis or that kind of contract law analysis, all these types of online betting wouldn't be able to take place in those states. A good comparison is horse race betting in New York. I'll leave it on that one. In New York, the 1939 Constitution restricted horse race betting to the oval of the racetrack, and over time, the legislature expanded it to include advanced deposit wagering, simulcast wagering, telephone betting, and ultimately online betting, and they did all that without having to amend the state constitution. So, the mobile piece is consistent with that methodology.

MICHELLE COHEN:
Great. Thank you. I wanted to go back to Frank for a minute. How do you see any other participants getting into the very hot New York market, other stakeholders? Will we see betting at Yankee Stadium and some other opportunities?

CAROLYN RENZIN:
As Dan alluded to, the legislation in New York allows for up to seven casinos, but in 2014 and 2015, the Commission went forward with a location selection board and only selected four casinos at that time. So, it is anticipated that the three remaining constitutionally allowed casino licenses in New York will go through a process probably in the coming year, a request for application process. And you will see three casino properties in what's called the downstate region around New York City. The conventional wisdom is that there are two, I guess, favorites. It would be MGM in Yonkers and Aqueduct since they are already video lottery terminal facilities, which is something similar to a slot machine but not legally a slot machine, but they have that type of gaming. So, the conventional wisdom is that they would be the two frontrunners for two of those three remaining licenses. And the third license, again, it will be a competitive process. Projected tax revenues, projected jobs, a lot of considerations in place with respect to the selection of those three casinos, but I do think you will see that process begin sometime this year.

MICHELLE COHEN:
All right, Carolyn, can you give us some sense of FanDuel's experience in New York? I mean, to give people some sense, I know you hear that New York is a huge market. But I was reading an article that said that over 2.4 billion in wagers has been made in five weeks in New York, which was about 80 million in tax revenue. But it would be interesting to hear from the operator's perspective how things are going and just what happened at rollout.

CAROLYN RENZIN:
Yeah. So, it's been an interesting process. What's exciting about New York is the number of new folks who are coming online that hadn't before. We obviously have some folks who were happily traveling over the bridge to New Jersey to place their wagers that now don't have to make that trip. So, it's not all new folks for us. I think the biggest challenge in New York has been the tax rates. And I'm sure that's been something that folks have read about. New York has a 51% tax rate, which is the highest of any of the states. They also have some structural organization of how they consider promotions to be a

component of the taxable moneys, basically, such that if we say we'll give a customer $100 for a promotion, that $100, while it's coming out of our pocket, is also taxable in New York. As a result of that, there have been some significant challenges placed on the financial opportunity for the operators in New York that far outweigh the challenges in any other state.

So, it's going to be a very interesting next few years as we try to iron out both the expectations of New York and the tax hopes of New York with the ability for the operators to be in any way profitable in New York. So, it'll be interesting. But in the meantime, from an operational perspective, it is exciting to see this many people getting involved in the space. And we have blown all of our projections in terms of numbers out of the water. But again, from a profitability standpoint, we've got some challenges.

MICHELLE COHEN:
Right. Do you think there's other states with, or, certainly, there are other states with better models. Would you point to a couple that you think would be preferable for the industry over the New York model?

CAROLYN RENZIN:
Every other state would be preferable for the industry over the New York model. I think the New York model against New Jersey, which is very, very challenging as well, but made it worse from the operator's perspective, and more challenging. So, I think having the opportunity to work with the regulators on what this means to the viability of the industry in their state, we understand they want to make money, we want them to make money. We're actually very supportive of that element of the industry, meaning we can actually raise a lot of money for a lot of good things in partnership with the state. That being said, if we can't make money at all or it costs us money to operate in that state based on their tax structure, it will make it hard for us to continue to operate in the state.

So, there's going to be a balance, and we're going to need to partner with our regulators as we go forward. I think there's a perception that the operators are just rolling in money, and therefore, the taxes should be so high because of headlines like what you've mentioned, right? But the reality is the cost of operation is high and the tax implications are extreme. So, we are not deep pockets in the construct. So, we're going to have to see how it plays out.

MICHELLE COHEN:
Right. Frank, do you see other new states following a New York or following a different model, the other models?

CAROLYN RENZIN:
I think New York is unique in that just given the population and the propensity of that population to engage in sports betting. It's certainly an outlier. If that model were put forth in other states, I think it would fail miserably. I really do. I think, as Carolyn indicated, even with the volume that the operators are doing now in New York with that 51% tax rate, throw in the $25 million license fee at the front, I mean, they are formidable financial obstacles for a successful operation, and I just don't think that it would work in other states.

MICHELLE COHEN:
Right. Dan, did you have some information you wanted to share about some [inaudible 00:19:57]?

DAN WALLACH:
Yeah, sorry to jump in ahead of you on that one. Carolyn, I do have some good news for you. I don't know if you've heard and this is pertinent to anyone following the New York sports betting landscape. Assemblyman Gary Pretlow, who introduced and sponsored the model that eventually became law, introduced a new bill yesterday. And New York Senator Joseph Addabbo will introduce a companion version of that bill, which would overhaul the existing online sports betting structure. It would require a minimum of 14 operators by January 1, 2023, at least 16 by January 1, 2024. And it would reduce the tax rate dramatically based on a sliding scale tied to the number of operators. For example, if there are 15 or more operators, the tax rate goes down to 25%. If there are 13, 14 operators, it's 35%. So, I guess you have to ask yourself, what environment would you rather be in. Do you want to be one of nine operators paying a 51% tax rate or one of 16 paying a 25% tax rate?

So there are four months left or three and a half months left in the existing legislative session. I'm hearing this one has a really good chance of passing, because nobody's happy with this law. Nobody. This was foisted upon the legislature by outgoing Governor Andrew Cuomo, who at the time wasn't outgoing yet, but this was his model, his version. The legislature preferred a straightforward, like a taxation model, where online sports betting would be taxed, I think, at 13 or 14 and a quarter percent, and that's the version that Pretlow and Addabbo championed for so many years. So, it's not surprising that the Assemblyman and the New York State Senator are now going to try to tinker with the existing system to make it more palatable for operators and more important or equally important, create a much more opening licensing process to give opportunities to some other companies, maybe some startups. So, this might be good news all around, depending on whether it gets enacted.

MICHELLE COHEN:
Thank you.

CAROLYN RENZIN:
Dan, it was tied into the New York budget process, as you alluded to, in June. And I agree with you that that is the model that was previously championed by the legislature. It just got consumed by Governor Cuomo's model, which is the existing model. And if they can make those changes and fit it into the budget, that always gets shoehorned the revenue from that perspective, I do think that certainly the industry, not only the operators now but the existing casino industry, would fully support that. I do think it's doable.

DAN WALLACH:
Yeah, I mean he copied that from New Hampshire. New Hampshire has a 51% tax rate. But what he overlooked was that that was based upon exclusivity for DraftKings. Rhode Island has a 51% tax rate. There's one operator. To have 51% for nine operators, that's unprecedented anywhere within the country. It's only within those lottery states where there's like one operator chosen through competitive bidding. And then there's one more wrinkle to the bill. There was another amendment proposed several weeks ago, which would extend

mobile sports betting to include mobile kiosks at professional sports stadiums around New York State, Madison Square Garden, Yankee Stadium, UBS Arena, and OTB locations as well as horse race tracks. So, if placing a wager on your mobile device connected to the casino server is a legal mobile sports bet, then why wouldn't the mobile kiosk connected the same way also qualify under the state constitution? So, we would rope in the sports arenas and create these mega sports books, in-arena sports books throughout the state.

MICHELLE COHEN:
I did want to hop over, because I know time is going to go so fast, to a couple of important topics that were touched on earlier, but moving over to responsible gaming and problem gambling. And I did want to bring in Marc on that topic. Many states have had gambling, some type of gambling for some time, but do sports gambling add to these concerns? And your thoughts about what regulators and industry can do to address it?

MARC EDELMAN:
Well, at present, as much as we'd like to put the responsibility on industry to address these issues, with no disrespect to industry, every one of these company's primary goal is to maximize their own revenue for shareholders. So, I put a lot of the burden not on the industry to exceed expectations, I put a lot of the burden on the regulators to put the obligations on industry. And there are two very quick points I'd like to make. One is many of these states, including New York, are doing a little bit to bring attention to the issue of problem gambling. For example, in New York, in all advertisements by a gambling company, they have to make available the 1-800 hotline for problem gamblers. Now, I think that's a step in the right direction. One of the shortcomings of these current requirements is many of these gambling companies hire outsource companies to recommend their games.

So, for example, The Action Network has all types of Tweets on the web encouraging people to use one of the online sports books. I think it's an unfortunate loophole at present that the advertisers or third party partners, such as The Action Network, do not need to have the 1-800 hotline. Or, for example, Darren Rovell has an incredible Twitter following. He has over 2 million followers and he's with The Action Network. And he'll regularly tout out different bets that people are making. But under the New York rule, he's not required to have that gambling hotline and others who do something similar. So, I think that's one area which we really could clean up. The other is in the precursor to the mass legalization of sports gambling, we had the states that began to regulate daily fantasy sports. And two of the other states to do early daily fantasy sports regulation were Massachusetts as well as Maryland.

And I remember sitting on a panel with Dan Wallach and Michael McCann and several other folks over at the University of New Hampshire, right when Massachusetts put in their DFS, their daily fantasy sports regulation. And one of the things that Massachusetts did was it had an initial requirement for any DFS company, that they could only accept $1,000 per month of entry fees from any participant. And if a participant wanted to enter more money than $1,000, it would be on the burden of the company to investigate the individual to make sure that it wouldn't cause them financial harm to pay for more. And we saw that $1,000 cap adopted by Massachusetts and adopted by Maryland, and then Tennessee has its $4,500 cap. And then that fell out all together from DFS regs because the DFS companies didn't like it. And apparently, nobody's implemented anything like that in terms of sports gambling regs.

I think we need to bring that back. Not a hard cap, but I think there needs to be a soft cap. And I think an obligation should be placed on the licensed sports gambling operators, that if they want to accept more than a certain amount of fees from any entrant or any participant in any month, there should be a heightened duty to investigate the financial means to make sure that it would not cause harm to these individuals, and to check the past betting behavior to make sure it does not align with algorithms out there, which should be addictive gambling type behavior, and I think that would be beneficial to everybody.

CAROLYN RENZIN:
Michelle, can I please be involved in this conversation?

MICHELLE COHEN:
I was actually going to pivot to you, Carolyn. And I did just sort of thinking out loud, Marc, when we touched on sort of determining someone's financial means, I mean, that to me seems like a big ask and problematic from just sort of the consent and credit reporting and all of those issues. But I think that raises a lot of issues. But over to Carolyn, because she's on the front lines on the operator side.

CAROLYN RENZIN:
Yeah. So, thanks so much. And look, Marc, I appreciate very much your suggestions there. And I am actually responsible for FanDuel's responsible gaming. And I have recently hired someone actually out of the beer industry, who was handling responsible drinking at one of the major beer manufacturers. And at FanDuel, when you talk about the goal of a company to be the commercial impact, I would actually let you know that that is not FanDuel's goal. FanDuel's goal is a long-term sustainable customer experience that is entertainment. So, we are very firmly in favor of $1 a bet for the next 20 years rather than $120,000 bet tomorrow that causes somebody to cause harm to their family.

So, I would first want to say that and when I say that, I'm not just saying it because those are the party lines, but all of our internal processes actually align with those principles. And we have an internal Responsible Gaming Steering Committee that our CEO Amy Howe is on, our head of product is on, I am on, our head of legal is on, and our chief financial officer. So, when we make responsible gaming decisions as a company, we're looking at it holistically in the best interest of the customer and we also think about the customer's family a lot in that.

The biggest challenges in our ability to effectively basically create an environment that's entertainment-friendly and not, in any way, harming those people who may be susceptible to harm is we need to have some clarity around what it means to be at risk. Because at FanDuel, what we do is we're looking at every single customer, not just those who are spending particular amounts of money, because the challenges with responsible gaming issues doesn't necessarily correlate to how much money you're spending. So, we're looking at the low-level spend as well as the high-level spend and looking for deltas between what used to be the spend and what's the spend now or whether people are chasing, et cetera, et cetera.

But we have to define for ourselves what does it mean to be at risk. And once we identify a play that looks at risk, we're identifying for ourselves and setting our own standards for what happens next. Does someone get a limit placed on them? Do we ask them for a source of funds to understand more about affordability? Do we call them? Do we kick them off the platform? And if we kick them off the platform, do we kick them just off of the sports betting platform or do we kick them off of all of our platforms, including horse racing? And is there a difference between retail risk versus online risk?

So there's a very complex set of questions around what does that risk look like, and then what is the responsibility accountability of the operators for what to do when someone's at risk. And I'm going to add another layer of complexity here. There are no standards in the industry for any of these questions. So, what that means is FanDuel has an extremely high standard around responsible gaming. For the most part, if we see risk of responsible gaming issues, they're off our platform and they're off all of our products. If I do that and DraftKings or any other operator has a lower standard, this then becomes an opportunity for them to take customers and make money off of our standards, high standards for responsible gaming. That is not fabulous from a commercial standpoint for us. We do it anyway because we think it's the right thing to do. That being said, one of our biggest goals is to find a way to create some standards, so it doesn't become a race to the bottom, which is how it is if you don't have standards.

I'm much more comfortable with it being we all have standards and then the black market/gray market operators are the ones who get the responsible gaming issue people, because then it's up to the states to regulate those out of business and to actually go after them, which they're not now. But at this point in time, without these standards, what we have is FanDuel operating in the way we choose to with these extremely high standards for integrity and anti-responsible gaming issues, making sure that people really are using this as an entertainment platform. But I don't know what my counterpart operators are doing around this space. And my strong guess is very few of them are operating at our standards, and that puts us at a commercial detriment, which is not the way this should be.

So that's where we're working. And I love Marc's ideas. There's many others where there's so many different opportunities that we're exploring all the time with how do you identify people who are at risk, what does it mean to be at risk? What can you do consistently across the board for people? How do you give more money to research? There's so much work that we're really excited to do. But at the moment, without standards, we're doing that in a vacuum to our own commercial detriment to put ourselves in detriment against our competitors, and that's a problem.

MICHELLE COHEN:
Right. Thank you.

CAROLYN RENZIN:
So, I had to get on my exciting soapbox there.

MICHELLE COHEN:
We've talked a lot about the legislators and the operators, and certainly, responsible gaming issues can lead to consumer protection issues, but there's a host of other consumer protection issues in terms of content that's not being run as advertised or probably tech problems when you're trying to make a bet. So, I wanted to ask Frank, do we think that we'll see more in the way of consumer protection issues before the courts or before the regulators?

CAROLYN RENZIN:
I think just in this past month, New York State Attorney General Letitia James actually issued a bulletin with respect to some of the promotional offerings about sports books in New York, the free bet offerings, which are certainly in a new market, as Carolyn knows. That becomes quite an aggressive push by all the regulators to get market share and to get it rolling. And they've seen that in other states. So, those types of promotional offerings are going to continue to garner scrutiny from

the likes of Attorney General Letitia James and in other states as well. And regulators, they generally approve those or require those types of promotions to at least come across their desk in advance. So, there is some level of review of that promotion, but it is a competitive market, as Carolyn referred to, so there is that balance.

You see, online gaming in Europe, particularly in the UK, has been in existence for a number of years, certainly predating that in the United States. And I think their consumer protection requirements have gone way overboard. Bet limitations, like social engineering in Europe, and I haven't seen any inclination of the US market, or certainly, of regulators in the US of going to that extreme. But I think, as Carolyn refers to, the industry has standards in place. And it's just good business on their part, on the operator's part, to be an honest product, because if the public doesn't think it is or they're not getting a fair shake, they're not going to participate.

MICHELLE COHEN:
Absolutely. Dan, what are your quick thoughts on whether the litigators in the group and on the phone are going to see further litigation around this industry?

DAN WALLACH:
Well, I think it's already happening. The *Murphy v. NCAA* case wasn't exactly the last lawsuit around sports betting in the last couple of years. I mean, Florida has been a hotbed of litigation around the enactment of the Seminole Tribe's compact with the State of Florida that's now on appeal before the DC Circuit Court and the federal court system. In California, there are competing ballot initiatives for sports betting, and there have already been lawsuits filed to try to invalidate those ballot initiatives. The great Ted Olson, who brought legal sports betting into existence, is challenging a tribal monopoly in Washington State. He filed a federal lawsuit in DC to challenge the ability of a state to grant the monopoly to a tribe under IGRA. So, he's basically challenging the constitutionality of IGRA itself.

And on and on it goes in New York, we've got fantasy sports litigation. In Arizona, a tribe tried to unravel the sports betting framework by claiming that it required a ballot question and that gaming expansion was prohibited. So, in the last two years alone, we've seen so many satellite lawsuits spin out in the area of legalized sports wagering. So, I think the litigators and the appellate lawyers are being kept quite busy. Usually, they're being weaponized by competitors, looking to gain an edge or to level the playing field somewhat. But that is a major area of practice in the post-PASPA era. So, if you're a litigator, there's a lot going on nationally in the realm of sports betting.

MICHELLE COHEN:
Right. Speaking of areas of practice, sports betting industry does lead to several different areas of law, whether it's constitutional law, lobbying, government relations, regulatory compliance, privacy, IP law, and I know we likely do have a lot of law students and newer lawyers on our webinar because it's associated with the Sports Law Association at NYU. So, what are your thoughts, panel, and I think that we can do a Robin round and throw it out quickly to everybody. What are your thoughts on opportunities for newer and experienced entrants as well? Marc, can we start with you?

MARC EDELMAN:
Michelle, I think you hit a lot of areas and privacy is definitely growing. But one thing I really hear on this call speaking to just about everybody that concerns me is everybody's talking about industry standards. And as somebody who's putting on a law professor hat here, when I hear about industry standards, I think a lot about what we saw in the housing market right around 2008, or what we saw in terms of accounting practices before Sarbanes-Oxley. I think the states are going to need to step in and create hard regulations instead of soft standards. And I think there's going to be a lot of opportunity to work with gaming commissions as outside or as a people who are not in the space to think about industry regulation, not from the interest of the companies themselves, but from the interest in society. And I think we're going to start to see some of those jobs emerging, as well as a growing amount of compliance jobs and privacy jobs, and even intellectual property jobs from the gaming operators themselves.

MICHELLE COHEN:
Right. Frank, your thoughts being in a private firm?

CAROLYN RENZIN:
I think areas of data protection, certainly IP licensing, as you see, for example, sports media companies playing varying roles, trying to play varying roles in this industry, right? Whether that's Fox or NBC with PointsBet, ESPN, others trying to fit their brands into a regulated industry without having to go through the regulatory burden of an operator. I think IP and licensing issues, those types of things are really going to be interesting moving forward.

MICHELLE COHEN:
Carolyn, what's your thoughts on opportunities for some of our newer lawyers and compliance professionals, and even some experienced people?

CAROLYN RENZIN:
I think we have, across the board, needs for lawyers. So, I'm responsible for regulatory compliance and risk. I have lawyers that practice in all of those different spaces, as well as sort of product compliance, which they're all lawyers. In the regulatory response area, I've got former law clerks and white collar criminal defense litigators, because they're engaging with the regulators when the regulators are concerned. We also have sort of straight civil litigators who are handling the class action work in that space. And obviously, there's privacy, there's basic contract law, there's employment law, sort of in the general, general counsel space.

But I think there's huge opportunities for smart generalists, because one of the benefits of this industry and space is that there's a lot of making it up as we go along. And what that means is, those all-around smart athletes have a fantastic opportunity, because I can't go out in the market and find someone who's been a product compliance, regulatory compliance lawyer for the last five years. They don't exist. So, I'm going to find a smart lawyer who has no experience but who's eager and wants to learn, maybe has some technical interest.

So, a great thing for some folks coming right out of school who want to try something and get in early and become one of the first people who knows anything about this space from a legal perspective. Because right now, we have to make it up as we go along. And if you're eager and you're hungry, and you've got a lot of interest in continuing to learn, it's a fantastic opportunity. So, in case anybody asks, we don't typically hire people right out of law school. I get those asks all the time, including for summer internships and what have you. We're typically looking at people with three to five years of experience at the lowest end from a legal perspective, because we need you to come in with some legal experience to do most of this. That being said, for those of you who want a compliance career and are not necessarily interested in practicing law, but want to get more into the operational or compliance end of things, I do have openings, which would be appropriate for right-out-of-law-school folks. So, I put that out there to all of you. My husband's an NYU Law School alum. And I love you guys. So, come and find me if you're interested.

DAN WALLACH:
Okay. Carolyn just gave some-

MICHELLE COHEN:
Great. Dan, hand it over to you.

DAN WALLACH:
Sorry. Carolyn just gave some phenomenal advice. My years of experience in a law practice were irreplaceable. I wouldn't have been able to do what I'm doing today without sharpening the tools and the toolbox as a lawyer. And it didn't take me two, three years to get there. It took me years of litigating cases and really gaining some top-shelf analytical skills, which I probably wouldn't have gotten had I left law practice earlier on in my career. But there are different paths. That is probably the number one path I would recommend.

I tell a lot of my students at University of New Hampshire School of Law that state regulatory agencies are hotbeds for hiring because they're ramping up hiring these new agencies that are adding sports wagering divisions, and they have to add employees, licensing managers, and a lot of attorneys, typically right out of law school, interview for positions like that. It's a great feeder to go from law school to a state regulatory agency and some licensing or regulatory aspect of what the state agency does. And then, you work there for a little while and then that could be your pathway into getting into one of those jobs at FanDuel that maybe Carolyn would prefer some experience at.

But if you've had two, three years of experience at the New Jersey Division of Gaming Enforcement, I think she's going to interview you. If you've worked for Charlie McIntyre at the New Hampshire Lottery, doing a lot of the sports betting regulatory and compliance side work, she's going to interview you, so will Frank. And the experience requirement at the state agencies may not be as steep as it would be in a major law firm or in a public company where thousands of people might be applying for a dozen jobs. So, I've seen a couple of my students get positions like this at state regulatory agencies across the country. So, that would be my number one recommendation for hitting the ground running and getting into the industry right away.

MICHELLE COHEN:
Right. I think they're all really good points. I think if you are doing work in a regulated industry, and it doesn't have to be gaming, there's very similar concepts about licensing and compliance and understanding the rules and the regulations and learning how to interact with the regulators. I think, no matter what the industry is, that is easily transferable. And several of you have touched on a topic near and dear to my heart, privacy, which is super hot. And I think, especially for students, newer entrants, or even experienced people, there's a huge need for privacy professionals. There is an organization, IAPP, that certifies and tests and you get a certification. And as with any industry, the operators and other participants are required to collect so much more information than in many other industries because of their compliance obligations, AML and KYC, and all that. So, there's more information coming in and increasingly state laws that protect that information. So, I think they go along very well and there's lots of opportunities.

Well, it's been great to have everybody. We're near just about the end of [the panel]. I got cut off there for a minute. I was going to say super thank you to our panelists, and I hope you all enjoyed this panel. We touched on a lot of emerging issues, hot issues, and some good advice at the end. So, thank you to everybody for-

CAROLYN RENZIN:
Thank you, Michelle.

DAN WALLACH:
Thank you, Michelle. Great job.

MARC EDELMAN:
Thank you.

DAN WALLACH:
Thank you, everybody.

PANEL 4: NAVIGATING LABOR DISPUTES & CBA NEGOTIATIONS

Sponsored by Winston & Strawn LLP

TATIANA DUBOSE:
Thank you. Welcome back to the 11th Annual New York Sports Law Colloquium. For our final panel, we will be discussing navigating labor disputes in collective bargaining agreement (CBA) negotiations. This panel will begin with an introduction of the moderator by NYU Sports Law Association's 2L representative Calvin Chappell.

CALVIN CHAPPELL:
I would like to introduce you all to our moderator for this panel Stan Van Gundy. Stan is a current TNT analyst. He actually called the Boston game last night if anyone was watching. In addition, he was a head coach in the NBA for quite a number of years where he coached the Miami Heat, the Orlando Magic, and the Detroit Pistons, where he also served as the president of basketball operations. Most recently, he coached the Pelicans. With that, I'll let the panel get started and I'll pass it over to Stan.

STAN VAN GUNDY:
Thank you, Calvin. This is certainly a timely panel with what's going on with Major League Baseball and I'll start by introducing our panelists. I don't see Mr. Berger here right now, but Kirk Berger is an Associate Counsel at the National Basketball Players Association. He's been with the NBPA since 2015 and

helped play an integral role in the union's negotiations with the NBA for a new collective bargaining agreement in 2016. Mr. Berger's expertise includes evaluating player contracts, salary cap considerations and interfacing with players' agents to craft NBPA's approach to negotiating. Prior to joining the NBPA, Mr. Berger worked in various roles in sports as an intern with the New Jersey, now Brooklyn Nets, a salary cap expert for Excel Sports Management, a front office intern with the NBA. Mr. Berger is a graduate of the Cardozo School of Law.

Our second panelist is Charles Grantham. He is the Director of Center for Sport Management at Seton Hall University's Stillman School of Business. Mr. Grantham has deep expertise in sports, and he formerly represented or advised NBA players including Charles Oakley, Amar'e Stoudemire, and Tobias Harris. Mr. Grantham began his career with the NBPA as an executive for almost two decades, then served as the Union's Vice President before being named its first Executive Director. Mr. Grantham was a consultant to the plaintiffs in the *O'*Bannon v. NCAA lawsuit. He earned his M.B.A. from the Wharton School at the University of Pennsylvania.

Jeffrey Kessler is the Co-Executive Chairman of Winston & Strawn LLP. Mr. Kessler has served as lead counsel in some of the most complex sports disputes in the country. His impressive litigation background includes representing college athletes in *NCAA v. Alston* (a case decided by the Supreme Court just last year), NFL quarterback Tom Brady in his litigation against the NFL during the "Deflategate" controversy, the players' unions for MLB, NFL, NHL, and MLS in collective bargaining with their associated leagues, including the Major League Baseball Players Association's ongoing negotiation with MLB to resolve the lockout and much more. Mr. Kessler is a graduate of Columbia Law School.

Ms. Pamela Wheeler is a former consultant to the National Football League for diversity, inclusion, as well as executive leadership development. Ms. Wheeler previously served as Director of the WNBPA for more than 15 years. She regularly lectures at Columbia University on labor and employment law topics, as well as leadership and personnel management. She is a graduate of Boston University School of Law.

Mr. Don Zavelo is the General Counsel for the National Hockey League Players' Association. He has been with the NHLPA since 2011, after serving over 30 years with the National Labor Relations Board. While with the NLRB, Mr. Zavelo was in charge of unfair labor practice investigations and worked on numerous high-profile sports cases during his time at the NLRB. Mr. Zavelo is a graduate of University of Kansas School of Law.

We'll start with some process stuff. I'm going to go to Ms. Wheeler first and then after she answers, Mr. Zavelo, if you can add to that. Most of us start paying attention to these labor disputes when deadlines approach and lockouts are imposed – sort of what happened with Major League Baseball this week. Can you give us an idea of how teams and unions approach preliminary negotiations for a new CBA – months, even years before we get to these deadlines?

Pamela Wheeler:
Thank you Stan, thank you to the other panelists and thank you for the students who continue to invite me back. I appreciate the invitation and I look forward to this every year. It's interesting because CBA negotiations don't start the day you start walking in and talking about the second one. They begin way before. Your preparation for what your goals and objectives are going to be for not just the next CBA, but for the second and third one start in the back office. I can fairly speak for the leagues that they're doing the same thing. You're setting your goals and objectives with your constituencies way before you even walk into the room with the other side.

Even when we were negotiating the first agreement, we were already thinking about the second and third collective bargaining agreements and what our goals and objectives were going to be. For our case at the WNBPA, I currently am the Chief Diversity and Inclusion Officer for NFP. I've been creating spaces for diversity, equity inclusion and belonging my entire career.

So, for us, it was not just about what we were attempting to negotiate for WNBA players, but also the recognition that what we were doing exceeded beyond just the WNBA players. That there was a social value to what we were doing, and that there was an element of women's empowerment and equity that we were dealing with. And so, from that perspective, we were consistently thinking about the next step. I think I can speak fairly confidently that that's the case with all the unions and all the leagues. It's not that we wake up one morning and say, hey, we need to negotiate this next deal, but we're constantly in contact with each other, trying to establish goals and objectives for where we want to go in the future.

STAN VAN GUNDY:
And Mr. Zavelo, when does the current NHL CBA expire?

DON ZAVELO:
We negotiated a four-year CBA extension agreement during the pandemic when it became necessary to address a lot of profound issues with regard to the effect of the pandemic on the salary cap system. We used that as an opportunity to go ahead and extend the entire agreement through the 25–26 season. We had been engaged in extension talks with the league in 2019, and they sort of stalled in September 2019 when the players decided not to reopen the agreement. There was a reopener that was available at that time. We picked it up during the pandemic and over the course of about a month of virtual bargaining – it was all done over the phone and on Zoom. We incorporated all of the changes that we had discussed during the previous year and focused on the burning issues of the day, which was how do we continue on under this system, given the sudden drop in revenue.

STAN VAN GUNDY:
As Ms. Wheeler just talked about, are you already sort of behind the scenes starting to work on the next collective bargaining agreement?

DON ZAVELO:
I think Pam nailed it. The key to the whole process is being in constant communication with players. It's all about player communication and player education, and you have to go into

bargaining with a really clear understanding of what the membership wants. And it's also an opportunity to educate the membership about ideas or changes that the union thinks it's important to address. We're always thinking ahead. We just literally signed off on this deal several months ago. But we're thinking about the next agreement for sure.

STAN VAN GUNDY:
Mr. Grantham, how does the negotiation strategy change over the course of the bargaining period? It's starting like, as Ms. Wheeler said, years in advance and then you're leading up to when the next one has to be signed. How does that negotiation strategy change especially as the deadlines approach and lockouts are imposed?

CHARLES GRANTHAM:
There are a couple things. One, there's differentiating between labor relations and labor negotiations. If I go back and think about the last deal I negotiated in '94, we started with a video countdown to '94 in 1990. The concept of labor relations throughout that time period had a major impact also on your strategic plan as you got closer to '94. So, the main point, as Don pointed out here, is not what we want for the players – it's what they want for themselves.

There's the constant educational process to get them to know what's best because we may have a long-term vision, but many of them with two- and three-year contracts and a short lifespan, as an athlete, may be looking for benefits in a quicker or a shorter time period. So, it's against that kind of tension throughout that time. It's how you manipulate change because it's an institutional issue as well. You're constantly moving and thinking about your strategic plan. You don't want to be throwing fastballs all the time.

STAN VAN GUNDY:
Absolutely. Mr. Kessler, you've been involved in countless labor disputes as outside counsel. I've got two questions for you. The first one is how would you describe your role in what you do as an outside counsel, as opposed to somebody who is working directly for the players' association?

JEFFREY KESSLER:
My role has varied in many different situations with different unions and even has varied for the same union over time. To use the NBA Players Association, as an example, at different times, I have been the co-lead negotiator with the executive director, which took place, for example, in some of the negotiations in the mid-2000s and in 1999 as well. I've also been a member of the negotiating team as an advisor that took place, for example, the most recent collective bargaining negotiations that took place in 2016–17 for the NBA Players Association.

I've also had ones where I've been primarily the litigation counsel, trying to get leverage in the negotiations, usually through the prosecution of an antitrust litigation against the league over their various restraints. And at times, I've had combinations of those roles, being both the litigator or the advisor or the negotiator. I've done that many times in the NBA Players Association, many times for the NFL Players Association, and occasionally for baseball and hockey at times. I have had that role as well as for some of the smaller unions I have been involved in. At one point, I did that for the MLS Players Association. I've done that for the Women's National Team Players Association at various times, including in their most recent equal pay litigation. I've had a lot of different hats in that role.

STAN VAN GUNDY:
I'm going to stay with you to start, but then I want everyone to chime in on this. What do you think is the most challenging aspect of negotiating with leagues and owners?

JEFFREY KESSLER:
The most challenging aspect is that the owners often have diverse interests from each other, and don't agree with themselves as to what their negotiating objectives actually are. This causes a situation where they negotiate among themselves to reach some compromise as to what they're willing to offer. And then they first start negotiating with the union who has a whole different set of interests, and the owners become in fact paralyzed in their objectives because they can't move because they work so hard to compromise among themselves when in

fact, the ones they need to compromise with is labor. That has historically been the greatest obstacle to getting deals done. Whenever you see complete breakdowns and contentious negotiations, it is almost always because the owners have set an unrealistic set of objectives based on their own internal political divisions.

STAN VAN GUNDY:
Ms. Wheeler, what are your biggest challenges in dealing with owners?

PAMELA WHEELER:
I mean, just by sheer numbers. You're dealing with like 30 owners as opposed to 400 players. In particular in the WNBA, and I don't think it is inconsistent, you have a certain number of players and you have a smaller number of owners who are also then guided or led by a commissioner or a president. So, there's like one person and they have a little bit more control over what the owners say publicly. What we have is 200 to 400 players who could, at any given day, say something publicly that could be counter to what our objectives are.

And then in particular with the WNBA, you have the players playing overseas as well. You have that sort of mass exodus at the end of the season where you're trying to coordinate and communicate with 200 some odd players, who are spread throughout the world. It's a little bit more difficult on this side to manage that than on the ownership side, especially where they have the commissioner who has a little bit more control and contact with the 16 to 32 owners. I think that's one of the major obstacles for us.

STAN VAN GUNDY:
I want to come back to that in a minute regarding the players, but Mr. Grantham, what are your challenges with the leagues and owners?

CHARLES GRANTHAM:
To follow up on some of the points that have already been made, a lot of that also has to do with the leadership of the commissioner. So, if the commissioner has a strong leadership ability, then he will certainly get those guys together on certain platforms. Also, particularly during the time when I was there

with David Stern, we had a very interesting timeframe when the NBA was not so fantastic, and the TV ratings were poor. We had tape delays, drug abuse, drug scandal. So, we had some common interests here to try to make the business work.

If there was ever a time period that I saw that we sort of collaborated, it was that time period to get us into the business of generating more revenue. So, that contrast to the time when greed seeps in after the NBA was so successful and became fantastic. Then all of a sudden, the owners got a little more greedy and then all of a sudden wanted to set the players back by redefining how much of the revenue would go to the players.

A lot of it has to do with the leadership of those owners. But make no mistake about it. They have an easier time of getting 30 or 32 owners together who are astute business people than we do in terms of getting 200 or 300 players on the same page, in addition to dealing with their agents. That's another factor that becomes part of that. That's why I always characterize it as labor relations versus labor negotiations. So, a lot of it is built into that time period.

STAN VAN GUNDY:
Mr. Zavelo, continuing on that and from your time at the NLRB, what are the unique challenges with sports owners compared to when you do other labor relations type of problems? What are the things in sports that make it different?

DON ZAVELO:
One of the things that makes it different is that these leagues in this industry don't really have much competition. They're able to act sort of like cartels and that leads them to invoke the well-thumbed dog year lockout playbook, and it's based upon their understanding and everybody's understanding that they're not going to really lose market share. It's not like if you're Ford and you decide to lockout, and that gives the consumer the ability to go over and buy a car from General Motors.

There's no real fear of losing market share here. So, they lock out players because they know that players have very short playing careers. Lawyers and teachers, and most other professions allow the people who apply that trade to work 20, 30, 40, 50 years. For players in our league, their average career is four to five years.

It's a kind of an elusive statistic because it depends on the factors you incorporate and how you define that. But four to five years. So, there's a really good chance that players may never make up the money they lose by missing a season in which they're locked out. This sort of reflexive lockout at the beginning of the negotiations is not the way that it was contemplated when the NLRA was written and the way it was practiced when I was at the board. Lockouts were like strikes were a weapon of last resort, not first. It creates a very difficult negotiating environment and a very difficult atmosphere and puts a lot of strain on the relationships from the get go when the owners pull the lockout lever.

STAN VAN GUNDY:
Ms. Wheeler and Mr. Grantham, you both sort of touched on this, so I'll start with you. The challenges of negotiating a CBA with a large group of players who have varied situations – people at the top of the pay scales issues are different than the people in the middle and at the bottom. You have to keep them unified to get an agreement. How do you meet that challenge, Ms. Wheeler?

PAMELA WHEELER:
What you do is just provide as much information and education as you possibly can, making sure that the players understand the business. I think that is one of the most important things is once they understand the business of the sport, of basketball, of whatever sport that they're negotiating, they're then able to negotiate from a much better position for themselves and for the collective. In the case of the WNBA players, at least those initial players, knew that they weren't ultimately going to get rich negotiating those deals.

So their goal initially was to create a system by which when the WNBA becomes wildly successful, that the players would then be able to reap the rewards from that system. That was because they had a very good understanding of history. They had a very good understanding of their place in history, and they had a very good understanding of where they wanted the sport to go, knowing that they might not be the immediate recipients of those rewards.

But that was because they understood the business, they understood incrementally where the sport was going and how they could play a part in that. Each collective bargaining agreement built upon the next and the next and the next. I think all of that came from having a real clear understanding of where they were. Again, that's incumbent upon the union officials to make sure that they are constantly involved in the business of the league. Part of that comes with participating on different player advisory councils, where constantly not just the union officials, but the players are actually involved, whether it's the player representatives or specific council where they're involved in meetings with the league, where we're talking about marketing objectives, talking about salaries, talking about revenues, talking about it from the television perspective. From that vantage point, it's a lot easier when you're providing as much information to the players as you possibly can.

STAN VAN GUNDY:
Mr. Kessler, the kind of challenges of making a CBA work for all of the players and thinking specifically of the NBA, the NBA has a salary cap for teams and then a luxury tax. But one of the things the NBA has, I'm not as sure in other leagues, is an individual maximum salary that players can make. That has benefited the vast majority of players. In other words, if I have a salary cap of $120 million, but I can only pay LeBron James $30 million, well, that leaves me $90 million for the rest of the players.

If I add a $120 million cap in and no limit on what I could pay LeBron James or Kevin Durant or those players, somebody would be willing to pay those people two thirds of their cap, and that would leave much less money. We'd have a lot more "minimum wage" players at the bottom. It seems to me that the CBAs have benefited the people at the middle and the bottom, maybe to the detriment of the stars of the game. Can you talk about the challenges of trying to be fair to everyone in your constituency?

JEFFREY KESSLER:
The NBA players union has always had a view that it had to advance the interest of every category of player in a negotiation. So, what does that mean? It means that you want to benefit the star players because they frankly drive the revenues in the game. They also are a rising tide of water that pulls up all the boats. All the players have an interest in letting the stars make a very significant amount of money because they deserve it. And by the way, in the NBA, they do. The NBA contracts for the star players are the highest of any sport in terms of that.

There are reasons for that, but they've been able to achieve that where you now get contracts with guaranteed money for the star players that are over $200 million in terms of that. The stars are taken care of. But the union also wants to make sure that it has benefited what they call the "middle class" players, who would be players that are maybe the sixth man on the roster, or a six, seven, eight man on the roster, or even sometimes the fifth and other type of team that you have.

What they did there is they created a whole variety of salary cap exceptions that could be used for those players. There's something called the average salary cap exception, which now I think it's close to $9 million a year that you could pay now or you could split it between two players, but that's designed for that. There's also the annual exception, which used to be called the million dollar exception. It used to be $1 million, but now it's like $3 million and that's designed for another category of players to go above the salary cap.

They also focus on increasing the minimums. One of the big achievements of the 2017 deal was a very, very large increase in the minimum salary structure and the minimums go up over years so a temp to player in the NBA gets a veteran recognition that is higher. By the way, there's always a salary cap exception to pay the minimum salary. So, all those different constituencies have been advancing over the years in different parts of the agreement benefit for them.

The final category are the rookies. There are lots of issues about getting great rookie players in their first contracts to get a greater ability. And in the last deal, the stars were given the ability to negotiate bigger, what we called super max exceptions. If they achieve certain levels to go above the salary caps, we worry about those players. And then there's the legacy, which is that NBA players have always worried about those who came before them. In the last CBA, lifetime health insurance was extended to former NBA players. This has been an important objective in the NBA.

There are lots of different groups within the union constituency who the union worries about. I think they've done a great job of balancing all those interests in the NBA union just as the other unions have done terrific jobs in trying to think about their different groups.

STAN VAN GUNDY:
Mr. Zavelo, it sort of all starts with what's the revenue we're talking about splitting up? What is the hockey related revenue that we're talking about? How is that calculated and how much trust is there between the players association and owners in terms of the figures they're getting? And then arguing over the split of that revenue, can you take us through that process and the trust or lack of it between the two sides?

DON ZAVELO:
Sure, Stan. So, in terms of the trust, one of the areas that our cap section focuses on in the CBA is the ability for us to go in and audit all the club books and the league books and records. And we have forensic accountants who specialize in this, that is in going in and looking at the books in arena based sports and looking for all the money that may or may not be included in the definition of hockey related revenue. In our CBA, the section that describes what HRR is runs like 30 pages. And it gets down into the details, everything from gate receipts to parking to TV and radio revenue and Internet and the whole thing.

And so, we rely upon the auditing process throughout the league year. Our auditors go in, club by club, and sit down and set up camp for two or three days and go through the books. So, I think there's a confidence that the numbers that we get and the reports that we get are accurate. The fighting ground though, is over what should be shoehorned into the definition of HRR and what lies outside of it. For example, as we've seen over the past decade, arenas are now becoming reimagined as entertainment districts, or as residential communities. And they're all sorts of millions and billions of dollars being made on what could arguably be called Hockey Related Revenue, even though it doesn't involve sitting in an arena and watching a game. So, that's one of the real fighting grounds and I think it will be the next round of negotiations as well, particularly the arena district issue. I could go into the escrow system and so forth, but that's basically the HRR picture right now.

STAN VAN GUNDY:
Go ahead and go into the escrow situation a little bit.

DON ZAVELO:
Just for background, I'm sure most people are aware of at least some of this, but HRR isn't really totaled up and reconciled until way after the league year is over. So, the escrow system is essentially an accounting mechanism that provides the source of funds that are available to the owners. And to the extent that the end of the day after the reconciliation, it turns out players have received more than 50% in our case of the HRR, so if that turns out to be the case, the owners get part of that money back, and if the players have been underpaid, then that money goes to the players.

So, if there's a 10% escrow rate, for example, a player with a million dollar face value contract ends up getting paid $900,000 during the season, and then the remaining money is divided up after reconciliation. So, that in fact was the real issue we had to negotiate through in light of the pandemic, in the aftermath of those early years of the pandemic when revenues disappeared. I know our friends in basketball had to do the same thing. So, the pandemic really, it wreaked havoc on the system, and we had to come up with creative ways to sort of rejigger things so that we could work through it.

STAN VAN GUNDY:
And Mr. Grantham, we know that the money is the major issue in all these negotiations, but you hit on it earlier talking about some of the other issues. So, what are some of the non wage issues that come up in collective bargaining agreements?

CHARLES GRANTHAM:
The easier things are negotiated first. And as you point out, trust is the most important facet of any negotiation, but dispute resolution, fines and suspensions of players, behavior, all those other issues, I think are ones that are relatively important, but at the same time are ones that you can negotiate earlier on in the process. But make no mistake about it, revenue is the main theme here because revenue over time, over these years, has steadily increased. And probably over the last 20 years, I would think all of the players unions have really tried to maintain what they have because the real argument that you have is every dollar that's generated in the NBA, the NFL, Major League Baseball, et cetera, they may want to define it as non-basketball related or not hockey related, but it's related. And so, that distinction and that argument will always continue as long as there are CBAs.

And it's that institutional - once you institutionalized something like the escrow system, that's probably something that would never be reversed. I mean, we spoke of an escrow system way back in the 80s and 90s, because when we started this whole process and 53% share going to the players of a defined revenue, the actual payment by leagues were somewhere around 60, 62, 64%. So, there was a way that even then that Stern was looking to figure out how do we make sure that we only spend what we commit?

So any way, shape, or form you come back to what is called "basketball related income." We always took the position that every dime made really is basketball or hockey or football are set to related income. It's the fight over that that I think you see the tension. And then of course, the basis of all this is trusting whether or not we can figure out ways to resolve those disputes.

STAN VAN GUNDY:
And Ms. Wheeler, some of these non-wage issues have been very prominent recently with the WNBA. The most recent one obviously everybody saw in the news this week is the New York Liberty being fined $500,000 because, the way I framed it, is essentially they treated their players very well and put them on charter flights. And so, they pay a big fine, from the league's

perspective, it's a competitive balance issue, but from the player's standpoint, it's a treatment issue. The money may not be going into their pockets, but they're being treated better. How are some of these issues resolved and particularly in the WNBA, the evolution of it as the league has made more money and been more popular, how are some of these things focuses of collective bargaining agreements?

PAMELA WHEELER:
So that definitely, it is counterproductive or counterintuitive when you think a team was fined $500,000, you could have paid three players instead of doing that. But those are what we would generally call your quality of law life issues, right? So, as Charlie mentioned, you have your revenue side of the slate, which is the money and the hard cash dollars and how are the players sharing in that. And then particularly you have your quality of life issues.

And I can tell you that one of the first questions in rookie orientation that the players used to ask me all the time was, "How come we don't fly charter?" Because they're coming from college programs where they're flying charter planes. And so, they're now going to the WNBA saying, why don't we fly charters? And that's one of the issues that had been on the table and all five collective bargaining agreements that the WNBA has, I negotiated the first four.

And so, that's an issue that generally, when you start, when you're dealing with a smaller pool, and unfortunately the pools aren't the same as they are in the NBA and the NFL. And so, you begin to chip away at that and as relates to the charters, that's one that just sort of falls by the wayside. And what you then try to do is, as Jeffrey mentioned earlier, how do you then instead of having charters, enhance the traveling experience?

So, we went from every player riding in coach to then some selected players can possibly ride in first class. And then the evolution of that will, at some point, get to what I hope will be again, a system whereby every player is not just riding in first class, but a system where the teams are paying for charters, but that's, again, one of those quality of life issues that falls by the wayside when it comes, as it relates to others, when the players are then moving into these different cities, again, remember that there's this diaspora going on in the WNBA.

So, players are playing here in the United States, then they're going overseas, they have families. So, is it more important to then say, "Let's have housing for them in the local markets where they can bring their families, because they're only going to be here for five or six months. Let's make that much more comfortable. Let's enhance that experience. Let's provide them with cars. Let's provide them with different ways in which the security is better there. Let's put them in different housing locations. Let's enhance the housing allowance in case the team housing isn't what we want it to be."

And so, again, it's looking at those quality of life issues. And again, it's all dictated by the players. If the players are then saying that, "Okay, I'll live with the non-charter for right now, but I need my own room." At the beginning of this negotiation, or beginning of the WNBA, players were actually sharing rooms. And there were two players in a room, imagine that.

So, we had to go from players not sharing rooms to players now having their own individual rooms on the road. And so, there was this evolution of the quality of life, and then what the players dictate as what's most important to them. And again, it goes back to creating that system. When the WNBA players decided to unionize, they decided to unionize because there were no minimum salaries in the WNBA, there were no contract guarantees, there was no revenue sharing, there was no free agency, WNBA players were assigned to a team because the WNBA operated as a single entity.

And so, going from. . . they had no retirement plan, no year round medical benefits, no share in group license revenues. And certainly there was no revenue sharing at that time because the league was in a time buy situation. And so, what we were trying to do is create a system again, what I was talking about before, create that system, so that when the WNBA becomes successful, the players will be able to reap the benefits from it.

One of the things I think about all the time is I think about Ballmer purchasing the Clippers for $2 billion. Think about had there not been any revenue sharing program in place, BRI, the league certainly would not consider negotiating for that now after someone pays 2 billion for a team. So, the fact that we were able to, even though it is not the most robust revenue sharing program, but the fact that we were able to negotiate some form of a revenue sharing program, even before we contemplated revenue sharing in its robust fashion, means that we can now at least start from a good place and then be able to negotiate from there.

But, again, those quality of life issues are just, again, those things that you just sort of build upon from CBA to CBA. And like Mr. Grantham said, there's life in between CBAs as well. We don't just negotiate the CBA and then that's it. There are certain. . . we would love to think that we all contemplate. We're all highly intelligent people on both sides. And we'd love to think that we contemplate every scenario, but that's simply not the case. What we do is we negotiate a baseline in the CBA, and then we live out the CBA every day.

And so, there's sometimes when we have to go back to each other, we have to do negotiations, midterms, we have to do side letters where we'll correct what we didn't contemplate, or we correct something that we negotiated and realize that that's just not going to work and we need a better situation. So, there's a constant ebb and flow to it where it's not just every day you just live out the parameters of the CBA, sometimes we just have to negotiate off of that. And I'd love to see someone negotiating midterm that they can have charters in the WNBA.

STAN VAN GUNDY:
Very good. Mr. Kessler, I want to get to the baseball situation because it's in the news. And specifically, how do you hold a player's union together as games are being canceled and checks are not coming in? I mean, I know they have some money that they've put away that is coming in, but it's nothing close to their salaries. And despite what a lot of people think, these guys aren't all making millions of dollars. How do you hold it together when the owners seem to have quite a bit more leverage?

JEFFREY KESSLER:
So I'm going to talk about this issue, not just with respect to baseball, because I don't want to get into specifically what's going on there since that's a live controversy, but I can talk, because this challenge applies to all the sports unions. Whenever there's a work stoppage, how do you deal with that? And the first answer is something, one of our panelists said earlier, I think it was Pam, which is education. You spend years educating your membership about the history of the union and about how each generation stands up for the generations that come after and what is owed by the sacrifices and those who came before you so that the players, when they get to a time where there's a work stoppage, really understand the importance of sticking together and making financial sacrifices so that, in the long run, players can benefit future generations. That's number one.

Number two, out of that education becomes, "Be ready for this, have savings, put aside money, be ready to understand you may go through a period of time when you're not getting your normal salaries and have the ability to do that." The unions also will put together their own funding. All the unions these days generate substantial licensing money for their players, group licensing money, where the players donate their IP rights for video games and for jersey deals and other types of ventures, trading cards. And then that money would ordinarily be distributed for the players. When a work stoppage may be coming a few years later, when you're getting near the end of the CBA, typically the unions save that money. Don't distribute it to the players and then they have it available as a fund to help out any players to try to get by financially if they need assistance.

Usually, there'll be individual payments to players. And sometimes, there'll be hardship players if someone really got into trouble. Because remember not every player in the NBA or in the NFL or Major League Baseball is making a huge amount of money. Some of them are rookies who are at the bottom of the scale who have been in the league a year or two and they really haven't made that much or at least they may make more still than the average person, but they really haven't developed a lot of savings or planning skills.

And so, you worry about those players and helping them out. So, it's a combination of getting the players to understand the importance of their commitment and their sacrifice, how to prepare for that sacrifice and then how the communication becomes critical, because throughout a work stopper situation, there is lots of fake news. There is stuff, there's frankly stuff the owners put out there, that is fake news. There is stuff that other people just get wrong.

One of the goals here is the ownership side would like to divide the players and get groups who say, "Gee, we need to get a deal, make a compromise, give up things. We just want to get back to work." And so, you constantly have to communicate to your players about what's actually happening, hold them together, keep them involved. And then you'll get strong unions who are able to hold their players together. And eventually, it's the owner's side that feels the pressure that those fishes come out. And they're the ones who end up saying, "Gee, we better compromise and let's make a deal that's going to benefit everyone to get back to work."

STAN VAN GUNDY:
And Mr. Zavelo, to sort of continue on that, while you are in there negotiating the nuts and bolts of the deal, how important is the PR part of it and the message you get out publicly regarding what's going on in those negotiations? Because us as fans, we don't know what's going on behind closed doors that you guys are doing. We just know what we read in the newspapers and what we see on TV.

JEFFREY KESSLER:
Just before we get to that, I'm sorry. I see I've got an urgent client emergency. And since I think I probably have had my last speaking time given it, I'm going to wish everyone a great time and I'm going to have to pick this up. So, I apologize, unfortunately, this is my day job. So, I'm going to have to run to this right now, but it's been a great panel and I apologize for getting off 10 minutes early, but I'm going to jump off. Thank you.

STAN VAN GUNDY:
Thank you.

DON ZAVELO:
So, Stan, answer your question. I think media is super important, not just because it communicates the state of affairs to the fans, but also to the players as well. And so, you want to cover all the bases. I know that when we were locked out in 2015, after every meeting, we went back to the office and it was like a phone bank. Everybody was on the phone to players all over North America, catching them up on what just happened and what's the next step and so forth. And at the same time, we were out in the media, our media guys were in constant contact with all the relevant reporters and going through and laying out our position and our take on things. And it's a real battle because they're getting it from, as you said, from the ownership side as well. And you want to make sure the record is complete. So, quite a bit of effort is put into that endeavor.

STAN VAN GUNDY:
And Mr. Grantham, how do you see the, just throughout sports, but particularly in your time in the NBA, you were one of the pioneers of what they now call player empowerment, how have you seen it change, the relations between the players and the league in terms of power dynamics and everything else?

CHARLES GRANTHAM:
One of the things that I tried to do during the time I was there was make our unions more multifaceted to not only deal with the economics and the bargaining, but at the same time to help players on their second careers, for example, to look at savings and investments, etc. But as I see it now, there's become more restraints, not fewer restraints, because when I go back and think about this salary cap and its structure, I think Don put it really clearly. They are cartels. They benefit by being cartels. The intersection of labor and antitrust law favors labor law. And it favors labor law because the feeling is both have an economic weapon to use. Let's take that weapon, the lockout and the strike. I've always maintained that both of those weapons are not favorable to the players because of this monopolistic cartel behavior.

They can't go anywhere else. The players lose on a strike and a lockout, because if they go out on strike, not only they lose money, but they lose some of their players' ability, their asset, their biggest asset is the unique skill that they have, it depreciates. So, when they say, "Well, they have this thing called the strike," not likely, because today the way the revenue is being generated and look at the value of the franchises and the kind of money these "owners" have recouped. Because remember, that increased value of franchise, the players get none of that shared and nothing is in lieu of not sharing that.

So, when you take that into consideration, you recognize that the players had to maintain what they have and over time, just because of the value franchise, they've been getting less of that pie that we talk about. So, when you encourage and you look at something like the baseball situation, we push, we say, "Hey guys, trust is a big factor here. Do you have the right president? The right officers, etc., pushing the players?"

Bottom line, however, is that it's affecting their lives differently. And if I have a three year contract, two years of guarantee, I'm thinking about now. I recognize the generation before me made sacrifices and I'm going to make some, but at a certain point here, I'm the big loser, because I can never recoup that salary, not as a basketball or football or a baseball or hockey player.

So, I see this thing evolving. By the way, I think it's time that the respective unions form a federation of sports unions. And I think that federation will give them the perception of the kind of unity that the ownership has. Proskauer Rose, that represents baseball, they represent football, hockey, basketball as well. So, we've moved into a different timeframe here. We haven't even talked about college athletes. In fact, our union should be helping them.

STAN VAN GUNDY:
Unfortunately we need to wrap it up there. I think I'm probably speaking for everybody in the audience. I thank all of you for the insights you've been able to give us today and I'll hand it back over to Oliver.

Closing Remarks

Oliver Green:
Thank you so much for joining us. That was excellent. I'm going to let Tatiana give the CLE and then we will do closing remarks.

Tatiana DuBose:
Hello. Thank you so much for that incredibly fascinating panel. We really appreciate all of you being with us, both moderators, panelists and attendees. For those attendees who would like CLE credit for attending the previous panel, the passcode will be N-Y-U Labor. Again, that's N-Y-U Labor. You will need to produce that password in an attendance affirmation form that will be sent to you in the coming days via email. Thank you for attending.

Oliver Green:
Wonderful. Thank you all. This would not be possible without our sponsors, Latham, Skadden and Winston. Thank you all for attending in person and for joining us for this incredible day of panels with these distinguished panelists. We'd love to have you all back next year and we hope to do it in person. So, thank you.