BRINGING CORPORATE GOVERNANCE DOWN TO EARTH: FROM *CULMINATION* OUTCOMES TO *COMPREHENSIVE* OUTCOMES IN SHAREHOLDER AND STAKEHOLDER CAPITALISM

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The battle rages between the partisans of shareholder and stakeholder capitalism; the very heart and soul of corporate governance is at stake. This Article advances the scholarly debate by mapping Amartya Sen's distinction between culmination outcomes and comprehensive outcomes onto shareholder primacy and stakeholder theory. It provides foundational reasons to move away from the untenable idealism of value maximization, characterized here as a culmination outcome-oriented approach, towards a stakeholder-oriented approach that is concerned with broader comprehensive outcomes, including human dignity and corporate respect for human rights. It argues that the stakeholder approach more accurately reflects how business decision makers actually make choices; as compared to the shareholder primacy approach, which proposes that decision makers are able to seek (and should seek) to maximize a single-valued culmination score. It is argued that the value maximization approach is untenable because no decision-making space exists where a "maximal" allocation is available in its merely technical sense, free of the taint of politics or the constraints of ethics. The stakeholder approach is a more realistic account of what decision makers are actually able to do in discharging their managerial responsibilities; and thus, it provides a richer account of what they ought to do and how. While imperfect in its own way, the stakeholder approach is a more down-to-earth theory of reasoned and purposive business decision making for addressing today's critical problems of people and planet.

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INTRODUCTION

As the battle rages between the partisans of shareholder and stakeholder capitalism, the very heart and soul of corporate governance is at stake. This Article charts a way out of the quagmire by drawing on Amartya Sen's foundational distinction between *culmination* outcomes and *comprehensive* outcomes in moral and economic reasoning. It provides foundational reasons to move from the untenable idealism of value maximization, characterized herein as a *culmination* outcome-oriented approach, towards a stakeholder-oriented approach that is concerned with broader *comprehensive* outcomes, including corporate respect for human rights. Though imperfect in its own way, the stakeholder-oriented approach to corporate governance more accurately reflects how business decision making actually occurs; it also reflects a more down-to-earth and pragmatically satisfying account of reasoned and purposive business decision making in the world today.

In midsummer 2019, during the hottest month ever recorded on the planet,[1] the U.S. Business Roundtable released its controversial revised "Statement on the Purpose of a Corporation."[2] In its press release, the organization highlighted that the new direction "moves away from shareholder primacy" and includes a "fundamental commitment to all stakeholders."[3] Signed by 181 CEOs of many of the largest firms in the United States, the statement concluded with a pledge to "deliver value to all [stakeholders], for the future success of our companies, our communities, and our country."[4] Despite a deluge of criticism that followed instantly,[5] the stakeholder-oriented approach continued to gain ground a few months later through a "manifesto" issued at the World Economic Forum's annual meeting at Davos. The manifesto called on companies to treat people "with dignity and respect."[6] Around the same time, in a letter issued to CEOs, BlackRock's CEO Larry Fink declared that "[t]he importance of serving stakeholders and embracing purpose is becoming increasingly central to the way that companies understand their role in society."[7] Reacting to these dramatic manoeuvres to shift the landscape and culture of corporate governance, Harvard Law's Lucian Bebchuk and Roberto Tallarita issued a blistering counter-attack, claiming that "stakeholderism," as they call it, hurts the people that it is trying to help. They, too, raised the specter of managerial slack and reiterated arguments about the economic inefficiency that they believe will follow from adopting the stakeholder approach.[8] Moreover,

1. *See July 2019 Was Hottest Month on Record for the Planet*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (Aug. 15, 2019), https://www.noaa.gov/news/july-2019-was-hottest-month-on-record-for-planet.

2. *Business Roundtable Redefines Purpose of a Corporation to Promote an Economy That Serves All Americans*, BUS. ROUNDTABLE (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [hereinafter *Business Roundtable*].

3. *Id.*

4. *Id.*

5. One business commentator suggested that "CEOs have thought it over and decided that shareholders are annoying." Matt Levine, *Maybe CEOs Are Fed up with Shareholders*, BLOOMBERG (Aug. 19, 2019), https://www.bloomberg.com/opinion/articles/2019-08-19/maximize-shareholder-value-top-ceos-might-be-opting-out. For its part, the U.S. Council of Institutional Investors (CII) warned that "[t]he statement undercuts notions of managerial accountability to shareholders . . . ." *Council of Institutional Investors Responds to Business Roundtable Statement on Corporate Purpose*, COUNCIL OF INSTITIONAL INVESTORS (Aug. 19, 2019), https://www.cii.org/aug19_brt_response.

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

7. Larry Fink, *A Fundamental Reshaping of Finance*, HARV. L. SCH. FORUM CORP. GOVERNANCE (Jan. 16, 2020), https://corpgov.law.harvard.edu/2020/01/16/a-fundamental-reshaping-of-finance/.

8. *See* Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 105 CORNELL L. REV. (forthcoming Dec. 2020), https://ssrn.com/abstract=3547409.

they worried that "stakeholderism" will have the unintended and very detrimental consequence of chilling important regulatory reforms that would benefit stakeholders.[9] To counter Bebchuk's riposte, Martin Lipton, shareholder primacy's most formidable opponent, brought out the big guns. Referring to a string of memos that he and others published from April 2017 to January 2020, he pronounced that a wholesale paradigm shift towards the stakeholder approach is taking place.[10] Calling on business leaders to embrace "the new paradigm," he and his co-authors declared that "[a]s this new paradigm of corporate governance continues to take root and shape the gestalt of the business world, corporations will be better positioned to create sustainable, long-term value and avoid heavy-handed legislative initiatives."[11] Today, the battle lines are clearly drawn, and yet the terrain remains murky. Rather than focusing on doctrinal debates over what corporate law apparently requires or should require, this Article seeks to clarify the terrain of the debate by showing how the world's clashing paradigms of corporate governance differ in their analytic and normative foundations.

For detractors and supporters alike, the Business Roundtable's summer intervention marked a seismic shift in the debate over shareholder and stakeholder capitalism. Indeed, just a few years earlier, *The Economist* predicted that "shareholder value—properly defined—will remain the governing principle of firms."[12] Just a few years earlier, a focus group study of business executives, investors, and scholars found that a majority of the interviewees believed that "the 'conventional wisdom' in the United States today is that corporations are either legally or ethically obligated to maximize

9. Bebchuk and Tallarita claim that "by raising illusory expectations about its ability to remedy corporate externalities, stakeholderism would impede, limit, or delay policy reforms that could offer effective protection to stakeholders." *Id.* at 56.

10. *See* Martin Lipton, *Professor Bebchuk's Errant Attack on Stakeholder Governance*, HARV. L. SCH. FORUM CORP. GOVERNANCE (Mar. 4, 2020), https://corpgov.law.harvard.edu/2020/03/04/professor-bebchuks-errant-attack-on-stakeholder-governance/.

11. Martin Lipton et al., *Embracing the New Paradigm*, WACHTEL, LIPTON, ROSEN & KATZ (January 15, 2020), https://www.wlrk.com/webdocs/wlrknew/WLRKMemos/WLRK/WLRK.26737.20.pdf.

12. *Analyse This: Shareholder Value: The Enduring Power of the Biggest Idea in Business*, ECONOMIST (Mar. 31, 2016), https://www.economist.com/business/2016/03/31/analyse-this (declaring that "[t]oday shareholder value rules business"). For a rejoinder see Steve Denning, *The Economist Defends 'The World's Dumbest Idea'*, FORBES (Apr. 3, 2016), https://www.forbes.com/sites/stevedenning/2016/04/03/the-economist-defends-the-worlds-dumbest-idea/ [hereinafter *The Economist Defends 'The World's Dumbest Idea'*]. *See also* Steve Denning, *The 'Pernicious Nonsense' of Maximizing Shareholder Value*, FORBES (Apr. 27, 2017), https://www.forbes.com/sites/stevedenning/2017/04/27/harvard-business-review-the-pernicious-nonsense-of-maximizing-shareholder-value/ [hereinafter *The 'Pernicious Nonsense' of Maximizing Shareholder Value*].

shareholder value."[13] As recently as 2017, Bower and Paine claimed in no uncertain terms that "most CEOs and boards [erroneously] believe their main duty is to maximize shareholder value."[14] Whether regarded as an obligation or choice, the goal of *maximizing shareholder value* had apparently stood for years as the lodestar for business decision makers in the globalized "corporate system."[15]

So, what changed? What accounts for the sudden shift in *gestalt*, to use Lipton's words? Some commentators and academics speculated that populism's rise in the United States led business leaders to pre-emptively cast themselves in a more favorable light as a way to avoid more stringent regulation.[16] For their part, Bebchuk and Tallarita thought that "[i]t might not be a coincidence that support for stakeholderism among some management advisors and corporate leaders has been growing in recent years in which [accountability enhancing] hedge fund activism has intensified."[17] Indeed, much of the critique of rising "stakeholderism" impugns the motives of those who preach it. The fact that the most wealthy and powerful business leaders in America are calling for a more humane form of capitalism appears to some commentators as disingenuous, and reasonably so. Much of the criticism aimed at the Business Roundtable's statement focuses on deconstructing the motives and political postures of the many CEOs who endorsed it. In this Article, I take a very different approach. The reason for the seemingly endless strife between the advocates of shareholder and stakeholder capitalism, I argue, is that the two approaches rest on foundationally distinct conceptions about what flesh-and-blood managers *are able to do* and what they *ought to do* in making business decisions. Shareholder value maximization, I claim, is grounded in untenable idealism about how flesh-and-blood decision makers are able to operate in a complex world; whereas stakeholder theory, though imperfect and incomplete, is a more realistic way to characterize how business decisions are *able to be made* and *ought to be made* in the world today.

13. KELLER FAY GROUP: THE CONSUMER CONVERSATION EXPERTS, ASPEN INSTITUTE BUSINESS & SOCIETY PROGRAM, UNPACKING CORPORATE PURPOSE: A REPORT ON THE BELIEFS OF EXECUTIVES, INVESTORS AND SCHOLARS 4 (2014).

14. Joseph L. Bower & Lynn S. Paine, *The Error at the Heart of Corporate Leadership*, 95 HARV. BUS. REV. 50, 50–51 (2017).

15. In their 1932 treatise, Adolf A. Berle Jr. and Gardiner C. Means proclaimed the arrival of the "corporate system" in the world:

> The corporation has, in fact, become both a method of property tenure and a *means of organizing economic life*. Grown to tremendous proportions, there may be said to have evolved a "corporate system"—as there was once a feudal system—which has attracted to itself a combination of attributes and powers, and has attained a degree of prominence entitling it to be dealt with as a major social institution.

ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 1 (1933) (emphasis added).

16. *See, e.g.*, Cindy Posner, *So Long to Shareholder Primacy*, HARV. L. SCH. FORUM CORP. GOVERNANCE (Aug. 22, 2019).

17. Bebchuk & Tallarita, *supra* note 8, at 54.

This Article is concerned with both the descriptive question of how corporate decisions are made, and the normative question of how decisions *ought* to be made. Naturally, the descriptive and normative aspects of corporate decision making are inextricably linked. After all, it makes no sense to ask (or to demand) a person to do something that the person is logically unable to do. Here, Immanuel Kant's familiar aphorism *ought implies can* applies very straightforwardly.[18] I argue that shareholder value maximization is untenable as an overarching "rule" for corporate decision making because such a rule makes unreasonable—indeed, impossible—to fulfill demands on flesh-and-blood decision makers as ethical beings whose personal agency is never entirely severed from their professional agency. Flesh-and-blood managers are not maximizing automatons; more to the point, I argue that they *are unable to be* maximizing automatons. As corporate governance creed, maximization demands a single-dimensional way of thinking that is impossible to actualize in the multidimensional complexity of real-world business decision making, except in the narrowest of circumstances. The decision-making "space" that allows for choosing "maximal" outcomes from a range of alternatives occurs so rarely that a maximizing rule is not functionally generalizable. As a "rule" that cannot be followed generally, it should not be followed, except only in the very narrow circumstances when it can be.[19]

This Article is structured in four Parts. Part I of the Article provides the necessary background: I critically evaluate the value maximization credo and the welfarist normative justification that is given for it. In Part II, I explain and adopt Sen's distinction between *culmination* outcomes and *comprehensive* outcomes, and I map these concepts onto the debate over shareholder and stakeholder capitalism. In Part III, I address value maximization's missing moral floor and show how the "fix" that is given for this problem begs the question. And in Part IV , I give historical and present examples of how the comprehensive, stakeholder-oriented approach is reflected in actual behavior.

I make out my case in a series of argument steps: (i) I examine what the shareholder primacy approach purports to maximize and how; (ii) I consider what *efficiency* represents within the value maximization approach, and I explain this concept's inadequacies in global context; (iii) I critique the idea that a fixed set of unwritten basic customs or fixed set of "moral ground floor"

18. IMMANUEL KANT, CRITIQUE OF PURE REASON 473 (1781). Kant's insight was that if a person is obliged to do something, then, logically speaking, that person must be able to actually do it. In CRITIQUE OF PURE REASON, he writes that "the action to which the 'ought' applies must indeed be possible under natural conditions." *Id.*

19. Such circumstances might be present when the company is put up for sale in an auction; but even then, as will be discussed below, exceptions to the rule might apply. In U.S. corporate law discourse, this auction or "change of control" decision-making space is referred to as the *Revlon* zone. As no deal is ever exactly alike, it is not always crystal clear whether a decision maker is in the zone or not. In *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986), the court turned to the language of maximization, holding that "the [fiduciary] duty of the board had thus changed from the preservation of Revlon as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit."

conditions can be fully satisfied prior to running computational cost-benefit analysis in the Kaldor-Hicks efficiency approach; (iv) I reject Michael Jensen's restrictive conditions for 'rational and purposive' decision making and endorse Amartya Sen's pluralistic and comprehensive approach to reasoned decision making. The main takeaway from this examination is that the value maximization approach is unworkable in practice, except in extremely rare circumstances. This finding, I contend, goes a long way to understanding just *why* CEO Jamie Dimon (of the Business Roundtable) states that the stakeholder approach "more accurately" reflects how business managers actually make decisions.[20] Finally, I move from the descriptive and conceptual analysis to a normative one, proposing that today's managers should consult a *comprehensive* outcome-oriented "dashboard of indicators" and not just a *culmination* outcome-oriented speedometer.

I. WHAT IS VALUE MAXIMIZATION'S PURPOSE?

Is the call on managers to *maximize* a form of loose talk, or does it refer to something quite specific? The answer, it turns out, is much contested.

A. Just What is to Be "Maximized?"

Opinions differ widely about what criterion is to be maximized, whether shareholder value, profit, shareholder wealth, shareholder welfare,[21] or something else entirely.[22] What lies in common in all approaches is that the maximization of the desired outcome is generally regarded to be a *technical* objective—value maximization, in this sense, is regarded as a yardstick for making comparisons and choices.[23] In the United States, the received wisdom

20. Upon introducing the Business Roundtable's statement, Chairman Jamie Dimon, CEO of JPMorgan Chase & Co., noted enigmatically that the stakeholder approach "more accurately reflects how our CEOs and their companies operate." Rick Wartzman & Kelly Tang, *The Business Roundtable's Model of Capitalism Does Pay Off*, WALL ST. J. (Oct. 27, 2019), https://www.wsj.com/articles/the-business-roundtables-model-of-capitalism-does-pay-off-11572228120.

21. *See* Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J.L., FIN. & ACCT. 247 (2017) (arguing that the criteria to be maximized should be shareholder welfare).

22. For instance, some will say that the term "shareholder *wealth* maximization" has a distinct technical meaning as compared to "shareholder *value* maximization" though scholars argue over just how "wealth" and "value" differ in this context. The seminal debate about whether "wealth" qualified as a value occurred over 1979–1980. *See* Guido Calabresi, *An Exchange: About Law and Economics: A Letter to Ronald Dworkin*, 8 HOFSTRA L. REV. 553 (1980); Ronald Dworkin, *Why Efficiency? A Response to Professors Calabresi and Posner*, 8 HOFSTRA L. REV. 563 (1980); Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980); Richard A. Posner, *The Value of Wealth: A Comment on Dworkin and Kronman*, 9 J. LEGAL STUD. 243, 248 (1980).

23. Jensen argues that value maximization "gives management a way to assess the tradeoffs that must be made among competing constituencies, and that it allows for *principled decision making independent of the personal preferences* of managers and directors." Value maximization, he argues, comprises "an objective yardstick against which [management's] performance can be

was reflected for many years in a law school casebook edited by a trio of prominent legal scholars. Professors Allen, Kraakman, and Subramanian declared in 2012 that "the goal of the business corporation is to maximize long-term shareholder wealth."[24] This goal, they suggested, was embedded in corporate law itself: "The objective of *maximizing* shareholder welfare runs so deeply through the relevant statutory and case law that it is rarely questioned or even stated, except when the conflict between the interests of shareholders and those of other corporate constituencies grows too acute to ignore."[25] The noted exceptions turn out to have growing importance today, and we shall consider below how they arise and what they might imply legally and otherwise.

In a 2009 textbook, Stephen Bainbridge asserted plainly that "[i]t is well-settled that directors have a duty to maximize shareholder wealth."[26] Bainbridge's assertion was strikingly at odds with Einer Elhauge's seminal argument just a few years earlier that shareholder primacy is a deeply entrenched *social norm*[27] rather than a legal standard.[28] Along similar lines, David Millon spoke in 2011 of the worldwide prevalence of corporate "*social norms*" (rather than legal norms) that "encourage concentration on quarterly

evaluated." Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 22 J. APPLIED CORP. FIN. 8, 17 (2001) (emphasis added) [hereinafter Jensen, *Value Maximization* 2001]. Jensen's articles have been cited over ten thousand times a year, tracking over 200,000 citations in 2018 according to Google Scholar.

24. WILLIAM T. ALLEN, REINIER KRAAKMAN, & GUHAN SUBRAMANIAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATIONS 2 (2012). Note that the authors use the term "wealth" rather than "value."

25. *Id.* (emphasis added). Here the authors use the term "welfare" as opposed to "wealth." The other corporate constituencies they refer to include creditors and employees. *Id.*

26. STEPHEN M. BAINBRIDGE, CORPORATE LAW 141 (2d ed. 2009).

27. Regarding *social norms*, one must be cautious not to assume that a particular social norm is inherently desirable. Many social norms work against legal norms or reflect the political goals of a certain constituency. For instance, anti-unionism might be regarded as a powerful social norm in some contexts.

28. Elhauge rejects the idea that what he calls "pure" profit maximization is either a legal or social norm. *See* Einer Elhauge, *Corporate Managers' Operational Discretion to Sacrifice Corporate Profits in the Public Interest*, *in* ENVIRONMENTAL PROTECTION AND THE SOCIAL RESPONSIBILITY OF FIRMS 60 (Bruce L. Hay, Robert N. Stavins, & Richard H. K. Vietor eds., 2005). Elhauge argues that no duty to maximize profit exists in law and that the absence of such a legal duty demonstrates a "revealed preference of society for allowing social and moral sanctions to operate" in corporate decision making. *Id.* at 23. He concludes that "current law correctly finds no special rationale to impose such a special duty to profit-maximize on corporate managers." *Id.* Rather, he concludes that "two important special features of corporations—shareholders' relative insulation from social and moral sanctions, and collective-action problems in acting on any social and moral impulses they have—make it particularly important to preserve managerial discretion to respond to social and moral considerations." *Id.* On shareholder value maximization as a learned (and taught) social norm, see Craig N. Smith & David Rönnegard, *Shareholder Primacy, Corporate Social Responsibility, and the Role of Business Schools,* 134 J. BUS. ETHICS 463 (2016).

earnings as the relevant metric by which management is to be evaluated".[29] In 2017, Robert Rhee found evidence of growing use by U.S. judges of the term "maximization" in the corporate law context.[30] And then, as previously noted, came the Business Roundtable's endorsement of the stakeholder approach in 2019. Immediately afterwards, Martin Lipton and his colleagues released a memorandum on "Stakeholder Governance and the Fiduciary Duties of Directors" in which they asserted that "Delaware law does not enshrine a principle of shareholder primacy or preclude a board of directors from considering the interests of other stakeholders. Nor does the law of any other state."[31] And yet, even with Lipton's unequivocal statement of legal opinion, debate over the normative and legal status of shareholder primacy persists, with scholars and practitioners digging in their heels on either side. While the war rages, credible anecdotes suggest that many of today's business executives may still believe (rightly or wrongly) that they have a *legal duty* to maximize shareholder value. Just a few years ago, corporate law scholar John Coffee observed in his interactions with faculty at the Harvard Business School that "all the business professors assumed that the law requires shareholder wealth maximization."[32] Even so, we might have lingering doubts about the practical potency of the value maximization norm. In the real world, we might say, the truly salient challenges that managers face include competition, disruption by innovative upstarts, activist hedge funds, and takeover bids. Such sentiment, as we shall see, is fully consistent with what I shall refer to as the stakeholder-friendly, *comprehensive* outcome-oriented approach (using Sen's distinction between *culmination* and *comprehensive* outcomes).

B. Conviction and Ambivalence About Value Maximization

How do we account for the concurrence of *both* ambivalence and conviction among eminent scholars over the vital yet contested shareholder value maximization norm? Various theories have been offered up over recent decades to explain this awkward concurrence. In 2011, Millon theorized that business school teachers, "apparently misapprehending the law, preach this ethic [shareholder primacy] at the expense of a richer, more complex conception

29. David Millon, *Two Models of Corporate Social Responsibility*, 46 WAKE FOREST L. REV. 523, 536 (2011) (emphasis added).

30. *See* Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, 102 MINN. L. REV. 1951, 1981–90 (2017).

31. Martin Lipton et al., *Stakeholder Governance and the Fiduciary Duties of Directors*, HARV. L. SCH. FORUM CORP. GOVERNANCE (Aug. 24, 2019), https://corpgov.law.harvard.edu/2019/08/24/stakeholder-governance-and-the-fiduciary-duties-of-directors/.

32. John Coffee uses the term "wealth maximization" rather than "value maximization." Columbia University, *2015 Millstein Governance Forum: The ALI Principles of Corporate Governance 2.01*, YOUTUBE (Feb. 8, 2016), https://youtu.be/XnY23qXb1Ec. Ten years earlier, Hay et al. noted that several of the eminent scholars who attended an extraordinary forum on environmental protection and social responsibility "were surprised to learn that managers lacked a legally enforceable duty to maximize profits." *See* Elhauge, *supra* note 28, at 100.

of responsibility."[33] At the same time that Elhauge argued convincingly that maximization was a "social norm" rather than a legal norm (see above), John Donohue asserted that the pervasive belief that managers "have an obligation to maximize" is an *optimal* one because it avoids "all of the problematic litigation that would result if they really did have such a legal obligation" while benefiting society as a whole.[34] Though erroneous, he opined, the belief was useful because it supported efficient outcomes. Writing in the same edited collection as Donohue, Elhauge noted that even if there is no enforceable legal duty to maximize (as he believed to be the case), this "does nothing to prevent shareholders from choosing to adopt profit maximization as the goal they choose to *monitor* in exercising their voting or investment rights."[35] In other words, the shareholder value maximization norm applies as a *de facto* standard rather than a legal one—the underlying theory being that shareholders will tend to support well-performing stocks, which in turn will reward managers who pursue shareholder value maximization single-mindedly.[36] Today, we see this theory turned on its head, with prominent business leaders, scholars, and corporate lawyers (such as Lipton) believing that the value maximization approach puts the cart before the horse.[37]

How did the value maximization norm come to occupy such a vaunted position over several decades in spite of the uncertainty that surrounds its legality? We can begin to answer this question by considering the highly

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33. Millon, *supra* note 29, at 529. *See also* Smith & Rönnegard, *supra* note 28.

34. John Donohue, *Does Greater Managerial Freedom to Sacrifice Profits Lead to Higher Social Welfare?*, *in* ENVIRONMENTAL PROTECTION AND THE SOCIAL RESPONSIBILITY OF FIRMS 77 (Bruce L. Hay, Robert N. Stavins, and Richard H.K. Vietor eds., 2005). John Donohue frames the perceived obligation in terms of maximizing profits. *Id.* at 77.

35. Elhauge, *supra* note 28, at 37 (emphasis added). Here, Elhauge is speaking of profit maximization.

36. To use Eugene Fama's language, a firm's stock price (as a proxy for shareholder value) might be described as a monitoring "device." Fama writes that:

> The firm is disciplined by competition from other firms, which forces the evolution of devices for efficiently monitoring the performance of the entire team and of its individual members. In addition, individual participants in the firm, and in particular its managers, face both the discipline and opportunities provided by the markets for their services, both within and outside of the firm.

Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288, 289 (1980).

37. *See, e.g.*, Larry Fink, BlackRock, Inc., *Purpose & Profit*, HARV. L. SCH. FORUM CORP. GOVERNANCE (Jan. 23, 2019), https://corpgov.law.harvard.edu/2019/01/23/purpose-profit/. Fink writes:

> Purpose is not a mere tagline or marketing campaign; it is a company's fundamental reason for being – what it does every day to create value for its stakeholders. Purpose is not the sole pursuit of profits but the animating force for achieving them . . . . Profits are in no way inconsistent with purpose – in fact, profits and purpose are inextricably linked . . . . Purpose unifies management, employees, and communities. Similarly, when a company truly understands and expresses its purpose, it functions with the focus and strategic discipline that drive long-term profitability.

Id.

persuasive arguments that were given by one of value maximization's most renowned proponents, finance theorist Michael Jensen. Jensen argued in 2001 that a "theory of action" for managers and Boards of Directors must tell them, first and foremost, "how to choose among multiple constituencies with competing and, in some cases, conflicting interests."[38] In sorting out priorities, he advocated for a razor-sharp technical approach, calling on managers to pursue what he called a "single-valued objective function," which, he said, ought to be "value maximization."[39] One reason that managers ought to do this, he contended, was that overall "*social welfare is maximized* when all firms in an economy attempt to maximize their own total firm value," and that, "profit maximization leads to an efficient social outcome."[40] In other words, Jensen invoked the well-worn notion that when everyone strives to maximize their own self-interest in a market economy, we are all better off.[41] By this consequentialist and welfarist mode of reasoning, firms and their decision makers ought to strive to maximize shareholder value because of the socially desirable consequences that flow from such efforts.[42] The second reason he

38. Jensen, *Value Maximization* 2001, *supra* note 23, at 13. Later, we shall see how Jensen's notion of "multiple competing and inconsistent constituent interests" can be reframed using Amartya Sen's language of decision making relating to *distinct concerns* in the comprehensive outcome approach. Whereas Sen calls for exercising non-computational *judgment* between distinct concerns, Jensen calls on managers to compute the value of alternative courses of action solely in terms of their ranked scores. *See infra* Part II.

39. Jensen writes that "value maximization states that managers *should make all decisions so as to increase the total long-run market value of the firm*." Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 12 BUS. ETHICS Q. 234, 236 (2002) [hereinafter Jensen, *Value Maximization* 2002]. His use of the term "value maximization" is a close variant of "shareholder value maximization" and "shareholder wealth-maximization." While they have distinct technical meanings, these terms are often used almost interchangeably. *See id.* Note that Jensen published three articles by the same name, one in 2002, see id., and two in 2001, see *supra* note 23 & *infra* note 150. They are largely identical in content, but some important differences are notable; therefore, I refer to specific publication accordingly.

40. Jensen, *Value Maximization* 2002 *supra* note 39, at 239 (emphasis added). In his definition of "total long-run market value of the firm," Jensen includes "equity, debt, preferred stock and warrants." *Id.* at 236, 240.

41. By this view, value maximization is a pragmatic approach that recognizes that business managers do not have the capacity or powers to contend with all of the world's imperfections. They will argue that in striving to maximize shareholder value, the manager simultaneously improves livelihoods by creating jobs, producing useful goods and services, and by growing the size of the pie. By this view, a single-minded focus on growing the pie *within the rules of the game*, no matter how it is sliced, is thought to be the best approach we have (the contention is that any alternative would leave people worse off). *See generally* Bebchuk & Tallarita, *supra* note 8, at 51.

42. Pettit defines consequentialism as "the theory that the way to tell whether a particular choice is the right choice for an agent to have made is to look at the relevant consequences of the decision: to look at the relevant effects of the decision on the world." PHILIP PETTIT, CONSEQUENTIALISM xiii (1993).

Welfarism, as described by Amartya Sen:

gave implied a style of compliance obligation for managers: Value maximization is a *rational* and *purposeful* approach to management, while its main contender, stakeholder theory, is not. Stakeholder theory, he argued, "politicizes the corporation" and "violates the proposition that any organization must have a single-valued objective as a precursor to purposeful or rational behavior."[43] So far as Jensen was concerned, value maximization was defensible as a *rational* and *technical* approach (even scientific), whereas stakeholder theory was a political one. As political, rather than scientific, the stakeholder approach, he contended, was a very undesirable one.

In rejecting stakeholder theory on the grounds of *rationality*, Jensen asserted that "it is logically impossible to maximize in more than one dimension" and that "*purposeful behavior* requires the existence of a single-valued objective function."[44] We shall consider a contrary perspective on the demands of rationality in later sections below. The critical point to consider here is that Jensen argued that long-run firm value was the *only* criterion that managers should seek to maximize—this he said, was a "true (single dimensional) score."[45] By Jensen's logic, all other criteria that might be considered in managerial decision making are only relevant insofar as they affect the ultimate score. Jensen's extremely influential prescription exuded the flavor of a *compliance obligation* for managers because, as he argued, the contending alternative would lead them to act irrationally or without purpose. Needless to say, irrational action would be unjustifiable, legally or otherwise.[46]

Jensen's prescriptions have had enormous impact, with papers tracking tens of thousands of citations over the last two decades. And yet, as we saw earlier, the battle over shareholder primacy and the stakeholder approach rages on. In Part II of this Article, I will show how Sen's analytical distinction between *culmination* outcomes and *comprehensive* outcomes in ethical and economic reasoning helps to clarify the epistemological and conceptual underpinnings of the shareholder-centric approach and its main contender, stakeholder theory. As we shall see in Part III, it is difficult to reconcile a

> insists that states of affairs must be judged exclusively by the utility information (such as happiness or desire fulfillment) related to the respective states—no matter what the other features of the consequent state of affairs may be, such as the performance of particular acts (however nasty), or the violation of other people's liberties (however personal).

Amartya Sen, *Consequential Evaluation and Practical Reason*, 97 J. PHIL. 477, 478–79 (2000).

43. Jensen, *Value Maximization* 2002 *supra* note 39, at 237.

44. *Id.* at 237–38 (emphasis added).

45. *Id.* at 235.

46. In jurisdictions where the *business judgment rule* has been adopted (e.g., United States, Canada, Germany, among others), a director enjoys very broad discretion as long as (1) the decision maker acts honestly and (2) there is some rational basis for the decision. The contemporary approach to the legal appraisal of *business judgment* was articulated in Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), in which the Delaware Supreme Court stated that "to invoke the rule's protection directors have a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them."

myopic "single dimensional" focus on shareholder value with approaches that include concern for other desirable *values* such as respect for human rights, environmental sustainability, and dignity for workers and communities.

C. What is "Good" About Shareholder Value Maximization?

Like Jensen, corporate law theorists in the Anglo-American "law and economics" tradition give two principal normative reasons for adopting the value maximization norm.[47] First, they give a *consequentialist* style of argument (i.e., a welfarist justification), which holds that the shareholder primacy norm promotes economic efficiency.[48] Second, they provide a species of *deontological* argument, in which shareholders are regarded as the property rights-holding "shareowners" (or "principals") of the corporation. In the consequentialist argument, the pursuit of value maximization by individual firms is regarded to be an appropriate *proxy* objective for the broader goal of increasing overall social welfare.[49] In the deontological mode, the manager's

47. Some might call value maximization a *constitutional* norm. Berle and Means conclude their 1933 treatise by speculating that "[t]he law of corporations . . . might well be considered as a potential *constitutional* law for the new economic state . . . ." BERLE & MEANS, *supra* note 15, at 357 (emphasis added).

48. In the preceding subsection, we saw how Jensen articulates his version of the consequentialist argument. In THE ANATOMY OF CORPORATE LAW, Reinier Kraakman et al. opine that the "appropriate" interpretation of the shareholder value maximization norm reflects the view that, "focusing principally on the maximization of shareholder returns is, in general, the best means by which corporate law can serve the broader goal of advancing overall social welfare." REINIER KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 23 (2017). The authors describe the "goal" of corporate law as follows:

> As a normative matter, the overall objective of corporate law—as of any branch of law—is presumably to serve the interests of society as a whole. More particularly, the appropriate goal of corporate law is to advance the aggregate welfare of all who are affected by a firm's activities, including the firm's shareholders, employees, suppliers, and customers, as well as third parties such as local communities and beneficiaries of the natural environment.

Id. at 22–23. The author continues in a footnote: "What we are suggesting here might be put more precisely in the language of welfare economics as pursuing Kaldor-Hicks efficiency within acceptable patterns of distribution." *Id.* at 23 n.87.

49. Allen et al. adopt the welfarist paradigm in their law school textbook: "It goes without saying that the fundamental objective of enterprise law—indeed of all law—is to increase social welfare . . . . Good law [is] efficient . . . . It maximizes the size of the economic pie." ALLEN ET AL., *supra* note 24, at 2. A central premise in their overall approach to the analysis of corporate law is that "we believe that shareholder/investor welfare is *a workable if imperfect proxy for social welfare* in most situations . . . . Once shareholder/investor welfare is identified as the principal objective of enterprise law, it follows easily that economic efficiency is the logical criterion for evaluating enterprise law." *Id.* (emphasis added). Lewis Kornhauser is skeptical of this approach, stating that "wealth maximization only provides an appropriate proxy for well-being under special conditions [which may not hold generally in the context of corporate and commercial law]." Lewis A. Kornhauser, *Constrained Optimization: Corporate Law and the Maximization of Social Welfare*, *in*

obligation to maximize shareholder value is believed to flow from the consent relationship between the putative shareowners (or "principals") of the corporation and the people who consent to manage it (or "agents"). This hierarchical structure of "owner" and manager underlies the widely adopted, though also much contested, principal-agent theory of corporate governance.[50] The principal-agent approach to corporate theory is, I believe, an overly mechanistic one; it is also flawed because it rests on the erroneous contention that shareholders are the "owners" of the corporation—they are not owners; they hold shares in the corporation.[51] While the debate over principal-agent theory is a rich and interesting one, it is not the focus of this Article. Here, I focus on the consequentialist argument for value maximization, rather than the deontological claim, though the two are often linked.[52]

THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW 88 (Jody S. Kraus & Steven D. Walt eds., 2007).

50. Principal-agent theory (also known as *agency theory*) regards the shareholders as the "owners," and therefore, the *principals* of the corporation (sometimes the blended term "shareowners" is used). Principals are regarded, in effect, as the corporation's *masters*. The managers, in turn, are treated as the subordinate *agents* of the shareholders. In subordinating managers to shareholders in this way, principal-agent theory posits a world of agent-managers whose role is to serve a cadre of principal-owners in the manner of loyal technocrat-servants. With this model, any notion of the corporation as a "social entity" that might pursue a public interest other than increasing "culmination outcomes" in terms of utility, wealth, or social welfare recedes entirely. Agency theory aligns very closely with the consequentialist normative argument for shareholder primacy insofar as both arrive at the same prescriptive conclusion for managerial action: maximizing shareholder value ought to be the lodestone for decision makers. But, as Eugene Fama argues, "[d]ispelling the tenacious notion that a firm is owned by its security holders is important because it is a first step toward understanding that control over a firm's decisions is not necessarily the province of security holders." Fama, *supra* note 36, at 290. While the *principal-agent* theory of the corporation dominates much of corporate governance scholarship, its detractors argue that corporate directors are *not* the agents of the shareholders; rather, they are agents of the corporation itself. *See, e.g.*, ROBERT C. CLARK, CORPORATE LAW 594 (1986). Also in this vein of critique, corporate theorist Katsuhito Iwai argues that "it is the law that endows [directors] with the powers to act *as* the corporation rather than merely to represent the corporation as its agents under some superior authority." Katsuhito Iwai, *Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance*, 47 AM. J. COMP. L. 583, 621 (1999). As I discuss later in this Article, there is some tension between the main preoccupation of the principal-agent theory of the corporation (reducing agency costs in service of shareholder value maximization) and the *motivational* question about why business decision makers should take steps to pursue sustainable development and/or embed "corporate respect for human rights" as a policy commitment in the companies that they manage. On debates over principal-agent theory, see generally PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS (John W. Pratt & Richard J. Zeckhauser eds., 1991).

51. The main problem for the principal-agent theory of corporate governance is the much-lamented separation of ownership and control. *See* BERLE & MEANS, *supra* note 15. For a clear statement on how shareholders are *not* the owners of the corporation, *see* Fama, *supra* note 36 at 289–90.

52. Edward R. Freeman argues:

In assessing the soundness and normative adequacy of the consequentialist arguments given for shareholder value maximization, much turns on how we construe efficiency. Maximization's proponents define efficiency as Kaldor-Hicks efficiency.[53] This particular brand of efficiency is distinguished from Pareto efficiency. The Kaldor-Hicks efficiency criterion is regarded to be less demanding than Pareto efficiency, which is thought to be too demanding; consequently, the proponents of value maximization regard the former as a more workable yardstick for appraising whether corporate law rules are efficient. I shall explain what the words "less demanding" and "too demanding" imply in a moment.

In a shareholder value-maximizing world, Kaldor-Hicks efficiency is obtained if the overall gains to social welfare are great enough such that anyone who might be made worse off in that state of affairs could be *hypothetically* compensated from those gains, while still leaving an overall increase in social welfare.[54] What matters is that enough is gained in the new state of affairs that there remains an overall net gain even after those left worse off are fully compensated for their loss. Importantly though, the people who are left worse off in the chosen state of affairs need not actually be compensated for Kaldor-Hicks efficiency to obtain. For this reason, we speak of Kaldor-Hicks *potential compensation,* rather than actual compensation.[55] A Kaldor-Hicks efficient outcome has no bearing on how social welfare (or wealth) gains are actually distributed in the community—it may very well be the case that even large numbers of people are left worse off (this would not be a desirable outcome, but it does not negate Kaldor-Hicks efficiency). Moreover, for its proponents, the actual or even hypothetical mechanisms for implementing

> Stories which depict the firm as either (1) the private property of owners; (2) the necessary arrangements if we are to maximize the greatest good for the greatest number; or, (3) the result of a voluntary contracting process, all appeal to the Separation Thesis to rule out certain effects of the firm on other stakeholders.

Edward R. Freeman, *The Politics of Stakeholder Theory: Some Future Directions*, BUS. ETHICS Q. 409, 415 (1994). His "separation thesis" holds that "[t]he discourse of business and the discourse of ethics can be separated so that sentences like, 'x is a business decision' have no moral content, and 'x is a moral decision' have no business content." *Id.* at 412. Freeman observes that "it is ingrained in all that we do in business schools to separate the discourse of business from the discourse of ethics." *Id.*

53. In a footnote to the introduction of their corporate law casebook, Allen et al. explain that "by 'efficiency' we mean 'Kaldor-Hicks efficiency.'" ALLEN ET AL., *supra* note 24, at 2. *See also* KRAAKMAN ET AL., *supra* note 48.

54. In discussions about shareholder primacy and Kaldor-Hicks efficiency, the gains are variously described in terms of "social welfare," "social wealth," "wealth," and "value." As a matter of logic, if the term shareholder wealth maximization is used as the predicate, then Kaldor-Hicks efficiency would obtain with respect to overall *wealth*. On the use of "shareholder/investor welfare" as a *proxy* for social welfare in efficiency-oriented evaluations of corporate law, see ALLEN ET AL., *supra* note 24.

55. Kaldor's classic statement on hypothetical compensation can be found in Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 ECON. J. 549, 550–51 (1939).

potential compensation need not be known, as distributional outcomes are considered to be a matter for political resolution. By this account, settling on the desirable distributive outcomes for a state of affairs is left up to legislators.[56] The proponents of Kaldor-Hicks efficiency are largely satisfied with this style of *potential compensation* because their approach is coupled with the assertion that governments have the power and legitimacy to make distributions according to the politically determined priorities of the day. Whether or not governments actually desire to make such distributions or are even capable of fulfilling this role is regarded, tautologically, also to be a political problem and not a problem for setting Kaldor-Hicks efficient corporate law. Nonetheless, whether or not a pathway for potential compensation *is at all conceivable* for "all those who suffer" in a political community turns out to matter greatly, as we shall consider in more detail below.

D. Compensating "All Those Who Suffer"?

If it is not the business manager's job to sort out how to compensate "all those who suffer" (to use Nicholas Kaldor's words) in the world, then whose job is it? For the efficiency theorist, the tax and transfer powers of government are engaged to compensate those who might be harmed (e.g., employees who lose their jobs because workers at a factory located elsewhere are able to do the job more efficiently, i.e., at lower cost to the firm). Government compensation schemes, so the thinking goes, promise an actual state of affairs in which overall social welfare is increased while no individual remains worse off—representing a Pareto-efficient outcome.[57] A less state-driven alternative to "tax and transfer" is captured in the aphorism, "a rising tide lifts all boats." Here, the rising tide stands in for the gradual growth in overall social welfare that is purported to arise from repeated Kaldor-Hicks efficient allocations in the economy. The growing aggregate effect of such allocations presumptively leads to new opportunities for those who would be left worse off in particular instances, thereby putting the "losers" in at least as good a position as they were at the outset, while overall social welfare increases. By this approach, Pareto-efficient outcomes are *potentially* realized over time.[58] In the vernacular, the

56. Kornhauser paraphrases arguments by law and economics theorists in this way: "[T]he redistributive aims of law ought to be accomplished through legal institutions that are distinct from the institutions that maximize the general level of well-being." Kornhauser, *supra* note 49, at 88 (referring to Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994)).

57. Pareto efficiency of outcomes is not required for a Kaldor-Hicks efficient allocation; rather, hypothetical *ex-post* pareto-optimal outcomes can be engineered through government action such that anyone who is made worse off is fully compensated (e.g., the person could be made worse off because of a loss of livelihood or forced displacement to make way for a mining project, dam, oil pipeline, etc.). *See* DANIEL A. FARBER, *Economic Efficiency and the Ex Ante Perspective*, *in* THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW 54 (Jody S. Kraus & Steven D. Walt, eds., 2007).

58. This approach is referred to as "logrolling" in Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of Just Compensation Law*, 80 HARV. L. REV.

pie gets bigger, and so, hypothetically, there is more dessert to go around. We shall return to consider the size of the social welfare "pie" in a moment. It is worth repeating that for Kaldor-Hicks efficiency to obtain in a projected state of affairs, equalization of outcomes *need not* occur in fact. The distribution-sensitive Pareto-efficient outcomes that are implied in the two pathways to compensation just described are realized in idealized and *hypothetical potential compensation* scenarios, not in factual ones.[59] In this respect, a Kaldor-Hicks efficient state of affairs is fully consistent with an actual state of affairs in which some people end up worse off as a result of overall welfare-enhancing allocations, though hopefully not destitute!

Mixing well-worn metaphors, we might say that as the proverbial tide of social welfare rises in the background, people who lose one match on a level playing field are free to prepare for another round of play—it is hoped that they capture a bigger piece of the pie next time around. But in the real world that lies far from the imagined place where such metaphors apply, the prospect of *potential compensation* (the possibility of capturing some of the general gains in social welfare) might never be realized. Why not? Because the incidental matter of whether compensation is actually made out over time is contingent on the actual *political* state of affairs. In the welfarist framework, such *politically determined* distributional outcomes are viewed as standing apart from the matter of raw economic growth. In vulgar terms: there might be enough money in the system, but the political conditions for its fair distribution may be lacking.[60] This is an all too familiar-sounding state of affairs in the world today. To wit, one should not regard the invocation of the Kaldor-Hicks *potential compensation* criterion by the proponents of value maximization as expressing an underlying egalitarian ethos.[61] It is egalitarian only insofar as the free enterprise system gives "all those who suffer" equal opportunity to try to do better in the next round of play (hypothetically, at least).

1165, 1178 (1967). For a critique of the widely adopted though unproven hypothesis that repeated applications of the Kaldor-Hicks criterion will lead to long run balanced distributional outcomes, see Brad Hackinen, Does Repeated Application of the Kaldor-Hicks Criterion Generate Pareto Improvements? 9–10 (2012) (unpublished manuscript) (on file with University of Victoria).

59. For this reason, Kornhauser argues that, "it is unclear that [Kaldor-Hicks] superiority is an *ethically significant relation*." Kornhauser, *supra* note 49, at 101 (emphasis added).

60. Though beyond the scope of this Article, we might consider supplementing the notion of Kaldor-Hicks *potential compensation* with the notion of a *prospect of compensation*, thereby adding a probability dimension (whereby "prospect" is defined as "the possibility or likelihood of some future event occurring"), such that Kaldor-Hicks efficiency cannot obtain *where no conceivable pathway* for compensation exists.

61. On the apparent distributional agnosticism of economic science, Kaldor writes:

> And short of complete equality, how can the economist decide precisely how much inequality is desirable—*i.e.*, how much secures the maximum total satisfaction? All that economics can, and should, do in this field, is to show, given the pattern of income-distribution desired, which is the most convenient way of bringing it about.

Kaldor, *supra* note 55, at 551–52.

In the real world, forever tainted by politics and ethics, normative concerns about distributive outcomes are never left out of the drama entirely; indeed, such concerns take center stage. I contend that there is a *sense* even when speaking formally about *potential compensation* that actually helping those who are left worse off in the community is normatively desirable. This sense lingers even if, technically-speaking, Kaldor-Hicks efficiency is regarded to be agnostic about fairness. The dangling prospect of *potential compensation* for those left worse off (the essence of Kaldor-Hicks efficiency) implicitly acknowledges broader societal concern about very skewed distributional outcomes. This sentiment, I contend, is reflected in Nicholas Kaldor's own words:

> There is no need for the economist to prove—as indeed he never could prove—that as a result of the adoption of a certain measure nobody in the community is going to suffer. In order to establish his case, it is quite sufficient for him to show that even if all those who suffer as a result are fully compensated for their loss, the rest of the community will still be better off than before.[62]

In Kaldor's hypothetical compensation test, *all those who suffer* must be *fully compensated for their loss* while still leaving gains for *the rest of the community.* While couched in artfully simple terms, the conditions of Kaldor's test are markedly strict. It is not enough that a majority of those who suffer are compensated, or even two thirds. Kaldor's test implies that one person's loss, whether tragic or trivial, matters as much as any other's loss. In this respect, he treats all individuals in the community as having equal dessert. The suffering of each of those left worse off appears to matter enough that the economist might imagine societal concern (if not legislative concern) for their collective and individual wellbeing, even if the actual outcomes diverge significantly from what is desired. Here the division of technical-economic and political labor is most discernable: the economist evaluates the potential outcome of courses of action in terms of individual and overall utility, treating all those in the community with equal measure; while the politician evaluates the outcomes in terms of political value and makes policy accordingly.

With all this in mind, it is extremely significant that when speaking about the overall goal of corporate law, Professor Kraakman and his colleagues call for "pursuing Kaldor-Hicks efficiency *within acceptable patterns of distribution*."[63] Distribution matters. However, as we have just seen, what is considered acceptable to the efficiency-seeking corporate lawmaker remains a largely unanswered question. For the proponents of shareholder value-maximization, the clamor for justice that rings out in the real world is difficult to shut out. Recognizing such difficulties, we are given the *less demanding* yardstick of Kaldor-Hicks efficiency for appraising efficient corporate law, rather than the *too demanding* standard of Pareto efficiency. There is a logically circular aspect to using overall pie-maximizing

62. *Id.* at 550.

63. KRAAKMAN ET AL., *supra* note 48, at 23 n.87 (emphasis added).

Kaldor-Hicks efficiency as the consequentialist's yardstick for evaluating shareholder value-maximization. Shareholder primacy is regarded as a good approach (i.e., as a desirable approach) because it is the maximally efficient approach in a world where growing shareholder value is seen as a reasonable proxy for improving overall social welfare. This concern about circularity will be taken up further below.

E. Keeping Externalities Outside

The proponents of value maximization fully acknowledge that the problem of externalities is a critical one; nonetheless, they contend that the value-maximization norm is part of the solution to this problem, not its source. We might imagine some world where negative externalities are simply unknown (In Pan's Arcadia, perhaps?). In the world where we actually reside, negative externalities and regulatory failures (sometimes called "governance gaps") make a great mess of things.[64] Kraakman and his co-authors make clear that the pursuit of shareholder value-maximization will only tend to advance overall social welfare if appropriate regulatory measures are in place.[65] Similarly, in their critique of "stakeholderism"—Bebchuk and Tallarita insist that they remain as concerned as anyone else about the need for externality regulation, declaring that, "we take stakeholder interests seriously and believe that some of the adverse effects that companies impose on stakeholders raise serious policy concerns and warrant legal and regulatory intervention."[66] On both sides of the shareholder-stakeholder debate, regulations are thought to act as a brake on companies that would otherwise generate unacceptable externalities. Here, one is reminded of Adam Smith's invocation of the "well-governed society" as a necessary background for realizing "universal opulence" within a market system.[67] And yet, while acknowledging that such rules of the game are needed as pre-conditions for expanding overall efficiency, Kraakman et al. caution against conflating failures in the regulatory braking system with a failure of corporate law.[68] To this point, they lament that the "perceived

64. On global "governance gaps," see PENELOPE SIMONS & AUDREY MACKLIN, THE GOVERNANCE GAP: EXTRACTIVE INDUSTRIES, HUMAN RIGHTS, AND THE HOME STATE ADVANTAGE (2014). *See also* John Gerard Ruggie, *global_governance.net: The Global Compact as Learning Network*, 7 GLOB. GOVERNANCE 371, 377 (2001).

65. *See infra* note 67 and accompanying text.

66. Bebchuk & Tallarita, *supra* note 8, at 6 (referring to "stakeholderism" in the abstract).

67. 1 ADAM SMITH, THE WEALTH OF NATIONS 10 (New York E.P. Dutton ed., 1910). Adam Smith recognized that a "well-governed society" was a necessary background condition for realizing the "universal opulence" of the division of labor in a free market. *Id.* In his canonical discussion on the division of labor in a pin factory, he surmises that "[i]t is the great multiplication of the productions of all the different arts, in consequence of the division of labour, which occasions, in a *well-governed society*, that universal opulence which extends itself to the lowest ranks of the people." *Id.* (emphasis added).

68. *See* Luca Enriques, Henry Hansmann, Reinier Kraakman, & Mariana Pargendler, *The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies*, *in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 93 (Kraakman et

limitations" of regulatory frameworks for addressing inequality, environmental protection, and human rights lead critics "to focus on the structure of corporate law itself."[69] From within some of the critical tendencies that Kraakman et al. allude to, much ire is directed at the concept of shareholder value-maximization, notwithstanding its contested status as a *legal* norm or *social* norm.[70] For their part, Bebchuk and Tallarita advise that, "it would be a mistake to focus on reforming corporate governance" (i.e., it would be a mistake to adopt "stakeholderism") as a way to address the deficiencies in externality regulation that are a concern to all.[71]

In concurrence with Kaldor's separation of political and economic labor,[72] Kraakman and Bebchuk contend that a strict separation ought to be maintained between the structure of efficiency-promoting organizational law (i.e., corporate law rules and shareholder primacy governance) and public regulatory policy and law. By this way of thinking, political choices about background rules, regulatory frameworks, and wider distributional outcomes should be made in the political arena, while managers ought to focus only on running their

al., ed., 2017). Kraakman et al. argue that the "protection of interests extraneous to the firm" should come from other areas of the law, not from corporate law:

> The crucial question is not whether the corporation's non-contractual stakeholders deserve legal protection of some sort—they clearly do—but whether corporate law is the proper channel through which to deliver this. A simple answer is that protection of interests extraneous to the firm should come from other areas of law, such as environmental law, human rights law, antitrust law, or financial regulation. Indeed, the use of legal rules and standards—the constraints strategy—to promote interests extraneous to the corporate form is, almost by definition, not corporate law, but the application to corporations—as legal persons—of norms from other fields of law.

Id.

69. John Armour, Luca Enriques, Mariana Pargendler, & Wolf-Georg Ringe, *Beyond the Anatomy*, *in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 271 (Kraakman et al., ed., 2017). They argue that:

> One broadly accepted view . . . is that corporate law should seek to maximize shareholder value, because this ordinarily tends to serve the broader goal of advancing social welfare. Yet for this to be true, regulatory measures must be used to impose the social costs of corporate activities onto the firm's bottom line where affected parties cannot bargain with the firm. . . . The *perceived limitations* of existing regulatory regimes in dealing with issues such as human rights, inequality, and environmental protection have likewise *led activists to focus on the structure of corporate law itself*.

Id. at 271 (emphasis added).

70. *See, e.g.*, Bower & Paine, *supra* note 14, at 58; Denning, *supra* note 12; Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 VA. L. & BUS. REV. 163 (2008).

71. Bebchuk & Tallarita, *supra* note 8, at 59.

72. *See* Kaldor, *supra* note 55. On the separation of "economic" and "political" questions, see *id.* at 550–52. Elhauge argues that this separation (cast as a public-private division of labor) assumes that, "the public interest was or could be fully taken into account by the law." Elhauge, *supra* note 28, at 52. He asserts (and I concur) that, "this belief in the perfection or even perfectibility of law is misplaced," and that, "…even the most efficient and socially optimal legal rules will fail to cover much undesirable conduct." *Id.* at 53.

businesses as efficiently (and as profitably) as possible.[73] Here we begin to see just how value maximization represents a narrow *culmination* outcome-oriented approach to normative economic reasoning, as I will explain in detail in the next section.

Good corporate law, so we have heard, is *efficient* corporate law. The shareholder value-maximization norm is thought to be a "good" basis for rule-making because, when shareholder value is taken as a reasonable proxy for social welfare, it promotes efficiency. The proponents of shareholder value-maximization suggest that one ought not to tinker with the "structure of corporate law itself" when the roots of the aforementioned environmental and social problems lie in failed public action. Thus, while distributional outcomes may, at times, appear to be grossly unfair, and externality regulation may appear to be distressingly ineffectual,[74] the putatively efficient shareholder value-maximization norm remains unassailable to its most trenchant advocates. By this logic, shareholder value-maximization has been elevated to the status of

73. Jensen's view is that:

> Resolving externality and monopoly problems is the legitimate domain of the government in its rule-setting function. Those who care about resolving monopoly and externality issues will not succeed if they look to firms to resolve these issues voluntarily. Firms that try to do so either will be eliminated by competitors who choose not to be so civic minded, or will survive only by consuming their economic rents in this manner.

See Jensen, *Value Maximization* 2002, *supra* note 39, at 246. Jensen's approach is represented clearly in a 2018 report commissioned by the National Association of Manufacturers on political, social and environmental shareholder resolutions. In their report, the authors conclude that political, social, and environmental shareholder resolutions are an "ineffectual" substitute for legislative action:

> Effectively dealing with such [issues as global climate change] will require that wise public policy measures be taken across a wide swath of the world's nations. While frustration with slow progress on this front is understandably accompanied by the desire to "do something", doing something effective is the task of our political institutions, and shareholder resolutions targeted at prominent corporations is an ineffectual substitute for policy making via the political institutions of democracy.

See JOSEPH P. KALT ET AL., NAT'L ASS'N OF MANUFACTURERS, POLITICAL, SOCIAL, AND ENVIRONMENTAL SHAREHOLDER RESOLUTIONS: DO THEY CREATE OR DESTROY SHAREHOLDER VALUE 53 (2018). For a critique of the separation of politics from economic science, see Morton J. Horwitz, *Law and Economics: Science or Politics?*, 8 HOFSTRA L. REV. 905 (1980).

74. In a 2017 speech, the Chair of the International Accounting Standards Board, Hans Hoogervorst, drew attention to the urgent need for governments to address externalities through taxation:

> To address the big environmental questions of our time it is urgent that the damaging external effects of economic activities are fully translated into their price through taxation. Proper pricing will reduce such activities and encourage development of cleaner alternative. Proper pricing of externalities would also mean that regular financial reporting would become more reflective of sustainable business activities.

See Hans Hoogervorst, *IASB's Chair Speech: The Times, They Are A-Changin'*, IFRS (Sept. 18, 2017), http://www.ifrs.org/news-and-events/2017/09/iasb-chairmans-speech-the-times-the-are-achangin/.

constitutional principle for efficient corporate law as well as for business decision makers day to day.

As a *constitutional principle,* the shareholder value-maximization norm is projected globally today, though it has come under fire increasingly in recent years. In a world rife with negative externalities, in a world so unequal, so far apart from the unspoiled and idealistic realm of Pan's *Arcadia*, the specter of catastrophically failing regulatory brakes is magnified. And so we face the question: in today's interdependent global community that is beset with "problems without passports," do the directors of global corporate enterprises have a role to play beyond the single-minded pursuit of maximizing value for shareholders?[75] While Martin Lipton, Colin Mayer, and the Business Roundtable call on managers to adopt a "new paradigm" (stakeholder capitalism) to emancipate managerial discretion for addressing critical problems of people and planet, their detractors, including Bebchuk and Tallarita, worry that, by eschewing the discipline of shareholder primacy, the proponents of stakeholderism are hurting the people they are trying to help.[76]

F. Shareholder Value Travels the Globe/Tax and Transfer Stays Home

Today's corporate system is a global one; and yet, there is no global regulator.[77] In this section, I consider the debate over value maximization and stakeholder theory as it applies to a global arena of agile multinational enterprises and globally mobile shareholders.[78] I broaden Kaldor's concern for the welfare of "the rest of the community" to encompass concerns at the global level; in other words, I consider overall outcomes for a global community, not only a local one.[79] Does seeking maximum value for globally dispersed shareholders help or harm "all those who suffer" (to use Kaldor's words) at the local level? The answer to this question is decidedly unclear.

Let us consider the viability of *tax and transfer* as a direct mechanism for *potential compensation* in a global corporate system that functions in a global

75. *See* Kofi A. Annan, *Problems Without Passports*, 132 FOREIGN POL'Y, Nov. 2009, at 30–31 (My thanks to Professor Ruggie for bringing this expression to my attention.). Recall that in Kaldor's compensation test, the relevant state of affairs pertains to the "community." Today, we live in an interdependent global community. *See supra* note 62 and accompanying text.

76. *See* Bebchuk & Tallarita, *supra* note 8, at 49.

77. In 1933, Adolf A. Berle Jr. and Gardiner C. Means observed the emergence of a "corporate system" in America:

> The corporation has, in fact, become both a method of property tenure and a *means of organizing economic life*. Grown to tremendous proportions, there may be said to have evolved a "corporate system"—as there was once a feudal system—which has attracted to itself a combination of attributes and powers, and has attained a degree of prominence entitling it to be dealt with as a major social institution.

See BERLE & MEANS, *supra* note 15 (emphasis added). Many thanks to John G. Ruggie for pointing out to me the straightforward notion that there is "no global regulator."

78. In transnational and multinational corporate groups, many of the separately incorporated legal entities that comprise the group are themselves shareholders.

79. *See* source cited *supra* note 62 and accompanying text.

community domain. While permissive national laws allow shareholder value to travel the globe,[80] the tax and transfer function of government remains idiosyncratic and locally rooted. No effective coordinated global tax and transfer mechanism exists (I am agnostic here about whether one ought to exist). In the absence of such a mechanism, we must ask whether the prospect of compensation given by Kaldor-Hicks efficiency is enough to sustain the consequentialist's normative argument for shareholder value-maximization. If it is does not, then what more is needed? For some, the answer to this problem lies in repeated application of Kaldor-Hicks efficient allocations over the long run; an approach that some scholars refer to as "logrolling."[81] If long-run economic growth spurred by maximizing value at the individual firm level is intended to provide the requisite *indirect* compensation over time (as captured in the temporal phrase "a rising tide lifts all boats"), how long do "all those who suffer" expect to wait for the rising tide to lift them? Ten years? Thirty?[82] No one really knows the answer. To sharpen our view of the problem, let us consider briefly how we might apply the consequentialist efficiency argument for value maximization to multinational firms that operate in a global economy.

80. The motivation for having such permissive rules is articulated clearly in this speech given by the Ghanaian Finance Minister to an investor audience at a conference in the United States in the 1980s:

> Ghana will actively encourage direct foreign investment and ensure that while safeguarding the interest of the economy and the honour of the people, *investors will not be frustrated when the time comes to transfer their profits and dividends to their shareholders overseas* . . . . Investors would be particularly welcome in such priority areas as petroleum exploration and production, mining and mineral processing, timber logging and wood processing, quarrying, deep-sea fishing, food processing and local resource-based manufacturing industries . . . .

See Nelson Oppong, Political Settlement and the Unsettling Politics of Oil in Ghana 17 (March 12, 2019) (emphasis added) (unpublished manuscript) (on file with author). I am grateful to Kwabena Oteng Acheampong for bringing this example to my attention.

81. *See* Michelman, *supra* note 58, at 1178.

82. Beyond direct tax and transfer, a wide range of compensation implementation mechanisms come to mind (some direct, others indirect) including: i) tort remedies (as direct compensation to address specific harms when they occur and to act as a deterrent); ii) the proverbial "rising tide" of growth and development (we considered this above); iii) global equalization efforts (national and supranational aid programs and policies, including development bank loans); iv) corporate and non-profit philanthropy (including some forms of corporate social responsibility); v) foreign direct investment; vi) State-led development initiatives (e.g., infrastructure development, investment in public health, etc.); and vii) remittances. Penz and Drydyk argue that in circumstances where a project requires that local residents be resettled elsewhere (e.g., where forced displacement/eviction of a community to make way for an extractive project is regarded as a social cost), "the design of options" (according to cost-benefit analysis) should be concerned with minimizing displacement while maximizing benefits, whether in the form of electricity, cheaper transportation costs, reduced congestion, increased irrigation, easier access to household water, and so on. *See* PETER PENZ ET AL., DISPLACEMENT BY DEVELOPMENT: ETHICS, RIGHTS AND RESPONSIBILITIES 70–71 (2011). "The minimization of displacement costs is in a trade-off relationship with other variables to be maximized (when positive) and minimized (when negative). In the end, it is the overall net benefits which count." *Id.* at 71.

To its proponents, value maximization is taken to be a universal approach: all firms, wherever they operate, large and small, ought to govern themselves by this criterion. And yet, in applying the Kaldor-Hicks efficiency criterion in a world of multinational corporate enterprises, a troubling inconsistency arises over how we might count and subtract the theorized benefits and costs.[83] Some might say that such arithmetic simply cannot be done—that the Kaldor-Hicks efficiency criterion is not workable for a global domain that includes multinational enterprises playing multiple games on multiple fields of play (each field with different rules). The problem arises in trying to define the boundaries of the overall domain for counting benefits for shareholders and setting off costs for "all those who suffer." For its proponents, shareholder value-maximization is regarded as an adequate "proxy" for maximizing social welfare in the overall economy—the approach involves aggregating shareholder gains as they are maximized by individual firms.[84] It stands to reason that the gains arising out of a global company's success would be counted (by this approach) at the level of the parent company. In other words, the value to be maximized at each firm level is the value that is accrued to the parent company's shareholders. One might also include the gains made by minority shareholders—those who invest in subsidiaries that are controlled but not wholly owned by the parent. By this approach, the proxy measure for the gain in social welfare is reflected in the gains realized by those who hold stock in the controlling parent company and its subsidiaries.[85] Today, such gains are distributed among global shareholders (the individual shareholders or "ultimate investors" might be based anywhere in the world). At the same time, though, "all those who suffer" are, by this theory, *potentially* compensated by tax and transfer at the local-national level, according to the vagaries of local politics. The troubling inconsistency here is that the shareholder value gains accrue globally, while the myriad losses are hypothetically compensated (or not) locally.

The measurement problems for counting and setting-off benefits and costs that arise from the inconsistency just described appear to be insurmountable, at least to this author. At best, for Kaldor-Hicks efficiency to obtain in this context (albeit loosely), an elaborate auxiliary theory must be introduced whereby *all* of "those who suffer" are potentially compensated over the long run through broad economic transformation at the global and local-national level. Hypothetically, such transformation might include growing employment opportunities, improved public health and education, infrastructure development, multiplier effects of foreign direct investment, the gains that flow from comparative advantage in trade, etc. Indeed, it may or may not be the case that "all those who suffer" today can be hypothetically compensated by a global

83. The Kaldor-Hicks potential compensation test is, in effect, cost-benefit analysis (CBA).

84. *See, e.g.*, KRAAKMAN ET AL., *supra* note 48 (on the "appropriate proxy").

85. On the accounting practice of aggregating income at the parent company level and with regards to reporting standards for multinational enterprises, see INTERNATIONAL ACCOUNTING STANDARDS BOARD, CONCEPTUAL FRAMEWORK FOR FINANCIAL REPORTING, chs. 3.11–3.21 (May 2015).

program for long run development.[86] Nonetheless, it seems (at least to this author) that such multifaceted programs for economic development have little to do with a single manager's laser-focused pursuit of shareholder value-maximization today—I leave debate on this issue for future consideration.[87] For the present argument, the point is this: while businesses globalize and their managers pursue shareholder value, no matching globalized redistributive mechanism exists which might implement the full compensation that is contemplated in Kaldor's potential compensation test, except in a most indirect, heterogeneous and uncoordinated manner. With such uncertainty in the background, we might ask whether the belief that shareholder value-maximization is a socially "efficient" credo for multinational corporate governance is meaningful at all—efficient for whom, we must ask?

Without a global regulator (which we do not have), the purported social efficiency of shareholder value-maximization does not scale very well in a global community, if at all. It bears reminding that when Kaldor spoke in 1939 of fully compensating "all those who suffer," he was referring to a hypothetical scenario in which those who end up "better off" and "all those who suffer" are part of *the same political community*.[88] In contrast, the multinational enterprises of today inhabit multiple, unequal, and disjoined political communities simultaneously while their shareholders are distributed globally in just as many or more places. Given present conditions, the hypothetical compensation called for in Kaldor-Hicks efficiency could only occur in a very piecemeal fashion, with great variations in implementation from one country to the next—sorting all of this out falls to the very contested domain of global development economics. Needless to say, the proponents of the value-maximization approach have never proffered a programmatic and coherent "auxiliary hypothesis" about how the logs should be rolled over time, even if the general prescriptions of "neoliberalism" might fit the bill for some proponents, though not all.[89]

86. Frank Michelman describes the long run case for repeated application of cost-benefit analysis as a "logrolling" approach, which holds that, "when the effects of all measures are summed from time to time, no one will have been hurt while some will have benefited through the overall collective enterprise." Michelman, *supra* note 58, at 1177. Here, the "collective enterprise" is public policy and State action for economic development. *See id.*

87. Bradley Hackinen notes that, "surprisingly little research has been performed on what happens when the Kaldor-Hicks criterion is applied to many decisions over a long period of time. [What Michelman refers to as "logrolling."]. One hypothesis [proposed by Hotelling in 1938 and by Hicks in 1941] is that, in the absence of transfers, benefits and costs will average out in a way that makes everyone better off in the long run." Hackinen, *supra* note 58, at 2. Ultimately, Hackinen rejects this hypothesis, suggesting that Hicks and Hotelling did not provide a rigorous proof of the assertion (even while the hypothesis has been taken up widely); to the contrary, Hackinen finds that repeated application of the Kaldor-Hicks criterion leads to wealth concentration, rather than averaging. *Id.*

88. *See* Kaldor, *supra* note 55, at 551–52.

89. On multiple applications of Kaldor-Hicks efficient allocations as "logrolling," see Michelman, *supra* note 58; Hackinen, *supra* note 58.

What actually happens in the world? Around the globe, local tax and transfer mechanisms aimed at lifting up "all those who suffer" are highly idiosyncratic. To be sure, a global company's subsidiaries are taxed in the "host" country; but whether such revenues are used to compensate all those who suffer at the local level is entirely contingent on the circumstances in each case. The impacts of global equalization efforts also figure in the overall equation. The combined impact of these transfers, including foreign direct investment, development finance (e.g., World Bank loans), family remittances, and direct foreign aid is very substantial in some countries and minimal in others; nonetheless, such efforts do not substitute for direct compensation of "all those who suffer" for specific harms. They also do not substitute for an effective system of civil compensation for damages in tort or otherwise. How does Kaldor-Hicks efficiency apply when such compensation functions are inadequate or absent entirely?[90] To consider a practical example, how is hypothetical compensation conceived when the aggrieved farmer faces eviction from her land without due process by a notoriously corrupt government to make way for an extractive project that is controlled by a value-maximizing multinational enterprise? What happens when a local subsidiary's poorly trained private security forces overreact to protests causing bodily harm and/or death, with no reasonable prospect of a remedy for the victims? By some accounts, global economic transfers and equalization efforts lift many boats on a slowly rising tide. But what safety net exists for those whose boats are sunk, even incidentally?

The theorized long run increase in social welfare that is attributed to a foreign investment-led mega project (such as a mine, oil pipeline, or dam) does not, in and of itself, compensate the aggrieved farmer who is harmed directly by that project *today*. To some, such incidental harms may seem to be unfortunate details in overall welfare-enhancing projects. But they will not feel the same way when the aggrieved farmers organize themselves, mount protests on the ground, and launch legal challenges that threaten to derail the entire project.[91] After all, the mere prospect of *potential compensation* at some point in the future through national development brings the aggrieved farmers little satisfaction today.

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90. In a separate article, I have discussed the inadequacies and practical limits of local tort law as a direct compensation mechanism in a transnational corporate system. *See* Malcolm Rogge, *Vesting Transnational Corporate Responsibility*, *in* Natural Persons v. Legal Persons – *What Matters Today?*, in CORPORATE CITIZEN: NEW PERSPECTIVES ON THE GLOBALIZED RULE OF LAW (Oonagh Fitzgerald, ed., 2020).

91. On the risk to business of local conflicts in the extractive industry see, e.g., Daniel M. Franks, et. al., *Conflict Translates Environmental and Social Risk into Business Costs*, 111 PROCEEDINGS NAT'L ACAD. SCIS. 7576 (2014); Rachel Davis & Daniel M. Franks, *The Costs of Conflict with Local Communities in the Extractive Industry*, 30 PROCEEDINGS FIRST INT'L SEMINAR SOC. RESPONSIBILITY MINING ch. 6 (2011).

II. FROM CULMINATION OUTCOMES TO COMPREHENSIVE OUTCOMES

In this Part, I apply Amartya Sen's analytical distinction between *culmination* and *comprehensive* outcomes in ethical and economic reasoning to differentiate shareholder primacy and stakeholder theory at a foundational level.[92] The distinction between these two categories of outcomes, Sen argues, "can be very central to certain problems in economics, politics, [and] sociology."[93] To illustrate how these two categories of concerns differ, he gives the following example: "[I]f a presidential candidate in an election were to argue that what is really important for him or her is not just to win the forthcoming election, but 'to win the election fairly', then the outcome sought must be something of a comprehensive outcome."[94] A concern for comprehensive outcomes includes some aspects of the process and agency involved, "not just the culmination outcome of winning the election—no matter how."[95]

As we shall see, Sen's distinction between *culmination* and *comprehensive* outcomes maps very closely onto the shareholder primacy and stakeholder theories of corporate governance; it helps us to understand just why the two main contending theories of corporate governance are regarded often as two poles apart. The map may be drawn in the following way: shareholder value-maximization reflects a mode of ethical and economic reasoning that is concerned with maximal *culmination* outcomes, while stakeholder theory is concerned with the appraisal of broader *comprehensive* outcomes, including corporate respect for human rights and human dignity. Very importantly, concern over comprehensive outcomes *includes* paying attention to culmination outcomes, but it goes beyond them. In contrast, the value-maximization approach is concerned solely with maximizing the desired "score" within the rules of the game; with maximal shareholder value regarded generally as the desired culmination outcome.

Value maximization's concern with culmination outcomes finds its intellectual origins in utilitarianism, as is common to all welfarist frameworks. Stakeholder theory's concern with comprehensive outcomes is common to a heterogenous and evolving family of approaches to corporate governance that includes the "New Paradigm" advocated by Martin Lipton[96] as well as Colin Mayer's program for a renewal of "corporate purpose."[97] The growing

92. *See* AMARTYA K. SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE 34–37 (2017).

93. Sen, *supra* note 42, at 492.

94. AMARTYA SEN, THE IDEA OF JUSTICE 23 (2009).

95. Sen, *supra* note 42, at 492.

96. In Lipton's *Embracing the New Paradigm*, "shareholder value is realized by (rather than at the expense of) a thoughtful balancing of the stakeholder interests that are critical to the success of the corporation, and corporations are animated by a sense of purpose that extends well beyond a myopic focus on profits." Lipton et al., *supra* note 11, at 2.

97. Mayer argues that, corporate "[g]overnance is not just about aligning managerial with shareholder interests; it is about achieving the purpose of corporations where those purposes include everything from purely positive benefits for customers to the attainment of normative

stakeholder family includes corporate sustainability, corporate citizenship, and "human rights due diligence" as it is articulated in the U.N. Guiding Principles on Business and Human Rights and its derivatives.[98] The Business Roundtable's statement of August 2019 falls generally within the stakeholder family, evincing concern for a range of comprehensive outcomes that are not so easily quantified, scored, and ranked; including "a life of meaning," "dignity," and a "healthy environment."[99]

Culmination outcomes are those that can be measured, counted, ranked, and compared to other values that have been measured and counted by the same or compatible metric. Using a single dimensional "score," the state of affairs that scores higher or at least as high as any other alternative is regarded as the most desirable one. In the value maximizing approach, the desired culmination outcome is an increase in shareholder value as reflected in the company's stock price and shareholder earnings.[100] By this mode of reasoning, an efficient system of corporate law will mandate or promote an approach to corporate decision making that tends to maximize the desired culmination score.

The battle over the heart and soul of corporate governance is, I contend, a battle between the two poles just described. The shareholder primacy approach prioritizes rules that promote efficiency through maximizing the desired *culmination* outcome (shareholder value); while the alternative view calls for a systemic and *comprehensive* approach that gives broader latitude to corporate decision makers to consider a plurality of values, some not at all reducible to ranked culmination scores. [101]

The quintessential expression of priority concern for culmination outcomes is found in classical utilitarianism. In utilitarianism, all utility values in a given domain are summed together to produce an aggregate score that can

welfare-enhancing outcomes for society at large." COLIN MAYER, PROSPERITY: BETTER BUSINESS MAKES THE GREATER GOOD 223 (2018).

98. Off. of the U.N. High Comm'r for Hum. Rts., Report on Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, U.N. Doc. A/HRC/17/31 (2011), https://www.ohchr.org/documents/publications/guidingprinciples businesshr_en.pdf [hereinafter U.N. Rep. on Guiding Principles on Business and Human Rights]. In 2011, the OECD incorporated "Pillar II" of these Guiding Principles ("the corporate responsibility to respect human rights") into its Guidelines for Multinational Enterprises. *See* OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011). For a recent appraisal of the role of "human rights due diligence" (HRDD) in corporate governance, see, e.g., John G. Ruggie et al., *Making 'Stakeholder Capitalism' Work: Contributions from Business & Human Rights* (Corp. Resp. Initiative, Harv. Kennedy Sch., Working Paper No. 76., Nov. 2020).

99. *See Business Roundtable*, *supra* note 2.

100. There is some ambiguity over what time horizon should apply, whether short term or long term, with Jensen specifying "long term" value on the one hand, while Bebchuk seems to be more agnostic about whether long term value is the appropriate goal.

101. On systems theory, corporate governance and corporate law, see Edward J. Waitzer, *Rethinking the Purpose of the Corporation*, 30 J. APPLIED CORP. FIN. 18, 20 (2018).

be compared to the score of alternative states of affairs.[102] By its strictest and most reductive formulation, the utilitarian decision maker will choose the state of affairs that realizes the highest utility (or at least as high as any other) without regard to how the utility value is distributed among the individuals concerned.[103] Along with its many variants, including welfarism,[104] the utilitarian mode is concerned generally with choosing states of affairs with the best scores. As noted earlier, the relevant terminology that is used for scoring in the corporate governance context varies to some extent and includes shareholder value-maximization, shareholder wealth maximization, shareholder primacy, and simply "value maximization." Adopting Sen's terminology, such modes of appraisals are concerned with seeking maximal culmination outcomes. For example, Richard Posner's notion of "wealth maximization" reflects overarching priority for the culmination outcome measured in terms of "wealth."[105]

In stakeholder-friendly comprehensive-outcome oriented reasoning, it is not enough to look at the final scores; one must also look at the processes and agencies involved which lead to such outcomes.[106] Comprehensive outcomes "include actions undertaken, agencies involved, processes used, etc. *along with* the . . . 'culmination outcomes.'"[107] In the comprehensive mode, the process that leads to an outcome is regarded to be part of its consequence (this idea shall be explored further below). It bears emphasizing that the appraisal of

102. By Sen's definition, "utilitarian reasoning is an amalgam of three distinct axioms: (1) consequentialism, (2) welfarism, and (3) sum-ranking (the last stands for the requirement that utilities of different people must simply be added up to assess the state of affairs, paying no attention to, say, inequalities)." SEN, *supra* note 94, at 219.

103. Sen and Williams' criticisms of utilitarianism as a "criterion of public action" holds that such an approach, "must assume a public agent, some supreme body which chooses general states of affairs for the society as a whole." Amartya Sen & Bernard Williams, *Introduction: Utilitarianism and Beyond*, *in* UTILITARIANISM AND BEYOND 2 (Amartya K. Sen & Bernard Williams, eds., 1982).

104. Kornhauser's description of "welfarist" appraisals aligns, in my view, with Sen's notion of *culmination*-outcome oriented reasoning. Kornhauser writes: "Welfarist evaluations rank states of the worlds solely in terms of the well-being of the individuals in the states of the world under consideration. No other information about the states is relevant. One need not ask how those states arose or how (or with what intentions) individuals acted." Lewis A. Kornhauser, *Wealth Maximization*, *in* 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 680 (1998) [hereinafter *Wealth Maximization*]. In contrast to welfarist appraisals which focus on aggregating 'what we end up with,' *comprehensive* outcome-oriented reasoning seeks to appraise, 'what we end up with, and *how* we end up with it.' In Sen's words, "[w]elfarism is the view that the only things of intrinsic value for ethical calculation and evaluation of states of affairs are individual utilities . . . '[u]tility' can serve as a . . . shorthand for 'well-being.'" AMARTYA K. SEN, ON ETHICS AND ECONOMICS 40, 40 n.13 (1999).

105. For his part, Richard Posner contends that his notion of wealth maximization is *not* utilitarian. *See* Posner, *supra* note 22, at 248–51.

106. On the distinction between the use of the term "agent" in principal-agent theory and Sen's term "agency-goals," see supra note 50.

107. SEN, *supra* note 94, at 215.

comprehensive outcomes *includes* consideration of consequentialist-style culmination outcomes—it does not exclude such outcomes or stand entirely apart from them. The critical distinction is that comprehensive-outcome oriented reasoning goes beyond concern over culmination outcomes.

The "act of choice" and the choice maker's agency are relevant to a full appraisal of comprehensive outcomes.[108] Unlike "nonvolitional maximization" that occurs in physics and in the natural sciences, the "maximizing behavior" of business decision makers involves *volitional* decisions that are made by reflective agents.[109] In the comprehensive outcome-oriented approach to corporate governance, the "choice act" and the chooser's agency matter for the simple reason that no business decision is ever made by a maximizing automaton. Indeed, the inescapable centrality of the business decision maker's personal agency and volition is captured in the corporate law concept of the fiduciary duty, which cannot be entirely stripped of its discretionary and reflective aspects. All business decisions involve an "act of choice" by a reflective agent who is constrained and liberated by the demands of the fiduciary duty as well as other normative constraints, including regulations, industry standards, codes of conduct, customs, and personal beliefs.[110] Of course, the decision maker is also constrained by external economic, social, and political forces. The value-maximization approach seeks to diminish the *volitional* aspect of corporate decision making such that allocations are regarded as technical operations for seeking maximal outcomes; on the other hand, the stakeholder approach regards the processes involved and the "choice act" in business decision making as having an inescapable reflective ethical component. In the stakeholder approach, managerial discretion is prioritized because judgment cannot and does not involve solely technical allocations for maximal outcomes. Stakeholder theory is more in line with a strong *volitional* theory of fiduciary decision making within a corporate governance framework.

In the stakeholder approach, decision makers are called on to exercise their discretion in making judgments among and between a plurality of values. This approach reflects the reality that, as Sen puts it, "all appraisals undertaken as part of normal living involve prioritization and weighing of *distinct concerns* . . . ."[111] Such distinct concerns touch on mixed quantitatively and qualitatively appraised outcomes. The appraisal of comprehensive outcomes in decision making requires reflective judgments to be made from among the many incompletely ranked alternatives that we are faced with in our daily lives. In other words, not everything that matters in the business decision maker's choice act can be counted, scored, ranked, coded, and processed algorithmically. This

108. *Id.* at 23.

109. On volitional and non-volitional maximization, see Amartya Sen, *Maximization and the Act of Choice*, 65 ECONOMETRICA 745, 745 (1997).

110. In a separate paper, the author discusses how the range of the corporate fiduciary duty of loyalty is constrained by the normative ecosystem which surrounds it. *See* Malcolm Rogge, *Humanity Constrains Loyalty: Fiduciary Duty, Human Rights, and the Corporate Decision Maker*, 26 FORDHAM J. CORP. & FIN. L. 147 (2021).

111. SEN, *supra* note 94, at 395 (emphasis added).

is why businesses are run by reflective decision makers rather than by machines. Acknowledging the role of fuzzier appraisals, as Sen argues, does not amount to "abandoning reason." Rather, it reflects "as much as reasoning can deliver, given what is known and what valuational priorities have been sorted out" by the choice maker.[112] Indeed, the making of reasoned judgments between distinct concerns amid complexity might well be regarded as the fullest expression of the human capacity for responsible and reflective reasoning.

A. Kaldor-Hicks Efficiency and Value Maximization Are Concerned with Culmination Outcomes

As discussed above, value maximization is thought to promote Kaldor-Hicks efficient outcomes in terms of shareholder value, utility, social welfare, wealth, or some other criterion that can be scored and ranked. A Kaldor-Hicks efficient allocation is thought to increase the overall size of the pie, where the "size of the pie" is a term of art for whatever value is measured, summed and ranked. The overall size of the pie is roughly analogous to aggregate utility, though aggregate wealth is also used frequently as a criterion. Within the law and economics school of thought, it is generally regarded that allocations that increase the overall size of the pie are a social good, so long as such increases are Kaldor-Hicks efficient.[113] Increasing overall growth, however such growth may be distributed, is the goal. In seeking to maximize *culmination* outcomes, the proponent of value maximization aggregates all values into a single score (into a complete resolution) and compares that score to the scores of alternative states of affairs. Jensen's theory of management calls on the decision maker to choose the outcome with the highest score or at least as high as any available alternative. As we saw earlier, he argues that the best way to grow the pie is for all individual firms, as directed by their managers, to coolly seek to maximize value for their shareholders.[114] This, he contends, is a "rational" and "purposeful" approach; stakeholder theory, he argues, is neither. This use of the Kaldor-Hicks efficiency criterion in appraising corporate decision making (and for crafting efficient corporate law) is highly representative of priority concern given to *culmination* outcomes.

B. Stakeholder Theory is Concerned with Comprehensive Outcomes

In his foundational work on the stakeholder approach, Edward Freeman defines a stakeholder as "any group or individual who can affect, or is affected

112. Amartya Sen, *Reason and Justice: The Optimal and the Maximal*, 92 PHIL. 5, 15 (2017).

113. Robert Frank puts it in the following way: "Rich and poor alike have an interest in making the economic pie as large as possible. Any policy that passes the cost-benefit test makes the economic pie larger. And when the pie is larger, everyone can have a larger slice." Robert H. Frank, *Why is Cost-Benefit Analysis So Controversial?*, 29 J. LEGAL STUD. 913, 917 (2000).

114. Nien-hê Hsieh argues that Jensen's notion of maximization is better regarded as *optimization*. *See* Nien-hê Hsieh, *Maximization, Incomparability, and Managerial Choice*, 17 BUS. ETHICS Q. 497, 510 n.2 (2007).

by, the achievement of a corporation's purpose."[115] His principal list of stakeholders includes "employees, customers, suppliers, stockholders, banks, environmentalists, government[,] and other groups who can help or hurt the corporation."[116] Broadly speaking, Freeman advocates for an approach to strategic management that is highly responsive to the firm's relationship to its external environment (in all of its economic, social, and political dimensions). "[I]f you want to be an effective manager," he says, "then you must take stakeholders into account."[117] By bringing social concerns, including concerns about social responsibility, within the manager's purview, Freeman blurs the boundary line drawn between the economist's labor and the politician's authority (the distinction between technical and normative economics was inscribed by Kaldor[118]). Going against the grain, Freeman argues that "[i]solating 'social issues' as separate from the economic impact which they have, and conversely isolating economic issues as if they had no social effect, misses the mark both managerially and intellectually."[119] The essential role of stakeholder theory, he concludes, is to "help managers to formulate processes for routinely addressing the concerns of stakeholders at a number of organizational levels, from grand strategy to product development."[120] It is not enough for managers to concern themselves solely with making money for stockholders; they must also concern themselves with *what they make* and *how they make it*, all while taking into account stakeholder concerns. In other words, they must concern themselves with the processes and agencies involved in arriving at desired outcomes, where such processes and agencies are regarded as outcomes in themselves. Freeman acknowledges outright that this is no straightforward task by any means (the "sledding is rough" he says), and that ultimately these issues "must be resolved in the arena of 'distributive justice.'"[121]

Freeman's comprehensive and context-sensitive approach is a dramatic contrast from the laser-focus on *culmination* outcomes that Jensen's maximizing approach represents. Many variations of stakeholder theory have been developed since the 1980s, including some by corporate law theorists who propose alternatives to principal-agent theory and shareholder primacy.[122] In this Article, I am putting forth the proposition that the family of approaches to corporate governance that fall under the rubric of stakeholder theory are roughly aligned with concern for Sen's *comprehensive* outcomes.

115. R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH vi (1984).

116. *Id.*

117. *Id.* at 45.

118. *See* Kaldor, *supra* note 55.

119. FREEMAN, *supra* note 115, at 40.

120. *Id.* at 247.

121. *Id.* at 249.

122. *See, e.g.*, Margaret M. Blair & Lynn A. Stout, *Director Accountability and the Mediating Role of the Corporate Board*, 79 WASH. U. L. Q. 403, 407 (2001).

C. From Ranked Scores to Judgment Between Distinct Concerns

The sum ranking of final scores between states of affairs is central to the method of both classical utilitarianism and welfarism; it also lies at the core of the value maximization approach to corporate governance. In utilitarianism, sum ranking comprises "the requirement that utilities of different people must simply be added up to assess the state of affairs, paying no attention to, say, inequalities."[123] The problem that arises in applying a strict sum ranking method to business decision making (as in Jensen's "single-dimensional" value maximization approach) is that in the real world, it is not possible to completely rank one state of affairs as compared to another, except in extremely narrow circumstances. This problem arises because, as noted above, the business decision maker must make judgments among and between an array of *distinct* concerns. At best, decision makers might be able to discern a partial ordering of the various states of affairs that will result from different decisions taken. When it is impossible to completely rank the projected outcomes of a business decision vis-à-vis the available alternatives, it is inconsistent to call upon the decision maker to "maximize" as between those options by a strictly technical or mechanical operation.[124] In other words, the maximization approach calls on decision makers to do something that they are not actually able to do. This may go some distance towards explaining why, as noted earlier, Jamie Dimon suggested that the stakeholder approach "more accurately reflects how our CEOs and their companies operate."[125] In other words, business decision makers do not go about "maximizing value" in a mechanical or deterministic way. Why not? Because the judgments that they are routinely called on to make involve choosing among and between *distinct* concerns rather than selecting from sum-ranked, complete, and directly comparable "scores."

Sen argues that "any serious problem of social judgment can hardly escape accommodating pluralities of values . . . . We cannot reduce all the things we have reason to value into one homogenous magnitude."[126] He suggests that "[i]n many-dimensional moral conflicts the presumption of completeness of ranking [of scores] may well be quite artificial."[127] Similarly, in business decision making, it is rather artificial to posit that decision makers are generally able to come up with a complete ranking of alternative and comparable outcomes. What rankings they do come up with are partial rankings at best. Indeed, as Frank H. Knight observed a century ago, "making decisions in practical life is a rather inscrutable or 'intuitive' formation of 'estimates,' subject to a wide margin of error or uncertainty."[128] Typical business judgments, he contended, involve "opinions" derived from estimates rather than

123. Sen, *supra* note 42, at 479 n.2.

124. *See* Sen, *supra* note 42, at 483.

125. Wartzman & Tang, *supra* note 20.

126. SEN, *supra* note 94, at 239.

127. SEN & WILLIAMS, *supra* note 103, at 18.

128. FRANK H. KNIGHT, RISK, UNCERTAINTY AND PROFIT 314 (1985).

certain calculations.[129] Sen surmises that "[t]hose who are insistent that human beings cannot cope with determining what to do unless all values are somehow reduced to no more than one, are evidently comfortable with counting ('is it more or is it less?') but not with judgment ('is this more important than the other?')."[130] Such anxiety seems to be reflected in Bebchuk and Tallarita's recent critique of "stakeholderism," in which they fret over the prospect of widening the ambit of managerial discretion. Pluralistic stakeholderism, they say, "amounts to no more than hoping that corporate leaders would use their discretion to balance the interests of stakeholders and shareholders in a socially desirable way."[131] Indeed, there may be a sense of security for some people in the notion that "good" decisions can be made by counting and comparing single-dimensional values rather than having to contend with the many-dimensional morass that stakeholderism appears to demand. Bebchuk and Tallarita's worry about managerial discretion seems to reflect the utilitarian's suspicion about the "tractability of 'judging' combinations of many distinct good things."[132] For his part, Jensen invokes the "single valued objective function" (value maximization) as the only rational and purposive basis on which to make managerial decisions. His prescription is clearly aimed at maximizing his chosen *culmination outcome*, while neutralizing the morass of other criteria that might be brought to bear in appraising outcomes. Sen is critical of such narrow views of purposive reasoning, opining that "if counting one set of real numbers is all we could do for reasoning about what to choose, then there would not be many choices that we could sensibly and intelligently make."[133] In real world decision making, the scoring and ranking of a complete ordering of alternatives is not required for making reasonable, even rational, choices. At the end of the day, a manager's job is to make decisions;[134] and with or without complete rankings, judgments must be made. The propriety and desirability of such judgments will be evaluated over time by corporate boards, shareholders, customers, clients, suppliers, proximate communities, legislative committees, regulatory bodies, judges, pundits, sages, and the general public.

III. VALUE MAXIMIZATION'S MISSING MORAL FLOOR

We live in a world where corporate respect for a moral ground floor of acceptable business practice cannot be taken for granted. At what point do managers stand firmly on the moral floor where they are able to proceed with

129. *See generally id*.

130. SEN, THE IDEA OF JUSTICE, *supra* note 94, at 395. Elsewhere, Sen writes that the "needs of policy do require that something or other must be ultimately done [and yet] . . . even institutional public decisions may have to be taken on the basis of partial justification . . . . Rational public decisions have to come to terms with such partially justified choices." SEN, ON ETHICS & ECONOMICS, *supra* note 104, at 67–68.

131. Bebchuk & Tallarita, *supra* note 8, at 60.

132. SEN, *supra* note 94, at 239.

133. *Id.* at 240.

134. *See* Fama, *supra* note 36, at 288.

technical value-maximizing allocations that are not tainted by political or ethical considerations? My claim here is that such untainted vantage points are never fully reached. If normative priors are not completely satisfied prior to making 'maximal' allocations, what should managers do? Within the confines of Kaldor-Hicks efficiency in the value-maximization approach, it is not at all clear what a manager *is able to* do other than to comply optimally with positive law and to seek maximal value for shareholders—this curious situation arises because the moral ground floor is treated as a stylized assumption that is already satisfied prior to undertaking maximizing allocations.[135] I now consider how value maximization's invocation of a prior and minimalist "moral ground floor" leaves the problem of what to do about ethics and politics in a welfarist efficiency paradigm unsolved—it begs the question. Stakeholder governance, on the other hand, does not face this conundrum because its appraisals consider a plurality of values, including political and ethical values, within an ongoing comprehensive outcome-oriented approach.

A. Moral Ground Floors and the "Taint" of Politics

Milton Friedman left no doubt about his distaste for managers who spend other people's money on subjectively determined social objectives rather than on corporate ones.[136] His enormous influence in the 1980s and 1990s still holds sway today, though it is waning. Friedman, the capitalist idealist, wanted to purge business decision making of the taint of politics. Even so, he argued, a business must live up to a minimal standard of behavior. While managers should try to "make as much money as possible" for the shareholders, he thought, they must still conform to "[the] basic rules of the society, both those embodied in law *and those embodied in ethical custom*."[137] These background conditions comprise Friedman's *ex ante* ground floor rules for a market-based economy. To this assertion, we must ask just where the minimal ground floor of ethical acceptability lies. Friedman did not provide a fine-grained picture, preferring to leave that endeavor to others—though, in his style, anything that resembled "unadulterated socialism" clearly missed the mark.[138] The vast and

135. Referring to Milton Friedman and others, Hsieh opines that "most [libertarian] versions of the market value thesis [value maximization] recognize some set of moral constraints to the maximization of long-run market value." Hsieh, *supra* note 114, at 503. In such approaches, "principles of fairness or human rights place constraints on what managers are permitted to do" in the pursuit of maximum profits. *Id.* at 502.

136. *See* Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES MAG., Sept. 13, 1970 [hereinafter Friedman, *The Social Responsibility*]. Elsewhere, Friedman writes: "Few trends could so thoroughly undermine the very foundations of our free society as the acceptance by corporate officials of a social responsibility other than to make as much money for their stockholders as possible. This is a fundamentally subversive doctrine." MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (1962) [hereinafter FRIEDMAN, CAPITALISM & FREEDOM].

137. Friedman, *The Social Responsibility*, *supra* note 136 (emphasis added).

138. Denis Arnold argues that Friedman assumes that businesses operate in a democratic society, an assumption which does not hold in today's world of multinational enterprises:

nebulous field of business ethics emerged in the 1980s and 1990s to address this gap.[139]

Not surprisingly, Friedman took a minimalist approach to ground rules, settling on a few neutral-sounding constraints for businesses: acting lawfully, staying "within the rules of the game" (by which he meant engaging in "open and free competition without deception and fraud"), and respecting "ethical custom."[140] Today, his minimalist notion of "ethical custom" seems to underestimate the global *interdependence* of many culturally diverse players on a common and ever more crowded field of play. Where does the baseline lie today? For his part, Elhauge proposed that moral norms "make certain choices *unthinkable* regardless of how much they might benefit us."[141] Taking his cue, we might regard Friedman's *ex ante* ground floor standard as excluding certain *unthinkable* choices, such as the use of child labor or engaging in human trafficking. But, as we might expect, the hardest cases to evaluate often inhabit the grey-space between acceptable and unacceptable choices. One *unthinkable* option is slavery,[142] and yet modern-day slavery is very real today.[143] Around the world, unthinkable options are exercised where they are least likely to be detected, while sometimes they carry on in plain sight—the tragic collapse of

> Friedman demonstrates little concern with the ethical foundations of his view of the normative core of the corporation because he assumes the existence of a democratic system of government. He regards a democratic form of government as preferable to others because he views it as the form of government most compatible with political freedom. He appears to assume that all citizens have an equal ability to regulate corporate behavior through the legislative process.

Denis G. Arnold, *Libertarian Theories of the Corporate and Global Capitalism*, 48 J. BUS. ETHICS 155, 160 (2003). For an analysis of the shortcomings in Friedman's approach, see Jonathan B. Wight & Martin Calkins, *The Ethical Lacunae in Friedman's Concept of the Manager*, 11 J. MKTS. & MORALITY 221 (2008).

139. For a contemporaneous account of the rising interest in business ethics in the 1980s and 1990s, see Andrew Stark, *What's the Matter with Business Ethics*, HARV. BUS. REV., May–June 1993.

140. Friedman, *The Social Responsibility*, *supra* note 136.

141. Elhauge, *supra* note 28, at 19 (emphasis added).

142. Robert N. Stavins underscores that "[i]n the case of slavery, ethics clearly should constrain behaviour." Robert N. Stavins, *The Business Perspective: Summary of Discussion*, *in* ENVIRONMENTAL PROTECTION AND THE SOCIAL RESPONSIBILITY OF FIRMS 204 (Bruce L. Hay, Robert N. Stavins, & Richard H. K. Vietor eds., 2005).

143. In January 2018, the United Kingdom saw the first conviction under the U.K. modern slavery act. *See* Emma Batha, *Traffickers Jailed for Enslaving Vietnam Women in UK Nail Bars*, REUTERS, Jan. 2, 2018, https://www.reuters.com/article/us-britain-trial-trafficking-nailbars/traffickers-jailed-for-enslaving-vietnam-women-in-uk-nail-bars-idUSKBN1ER1J2. *See also* Annie Kelly, *Nestlé Admits Slavery in Thailand While Fighting Child Labour Lawsuit in Ivory Coast*, GUARDIAN, Feb. 1, 2016, https://www.theguardian.com/sustainable-business/2016/feb/01/nestle-slavery-thailand-fighting-child-labour-lawsuit-ivory-coast#:~:text=Nestl%C3%A9%20admits%20slavery%20in%20Thailand%20while%20fighting%20child%20labour%20lawsuit%20in%20Ivory%20Coast,-The%20company%20has&text=By%20independently%20disclosing%20that%20Nestl%C3%A9,of%20its%20own%20supply%20chains.

the defectively constructed Rana Plaza garment factory in Bangladesh, killing over a thousand workers, serves as a grim example.[144] In a world where unthinkable options are all too commonly exercised, Friedman's minimal-sounding constraints of "ethical custom" and the "basic rules of society" are sorely needed in the foreground, and not merely as side constraints to the dominant shareholder value-maximizing credo.

Simply positing an *ex-ante* moral ground floor does not provide the "fix" that its proponents hope for; indeed, such a move merely begs the question. This is because we ought not to define the moral ground floor of acceptable behavior of businesses as standing apart from the complex and urgent multidimensional problem of evaluating stakeholder tradeoffs in day-to-day decision making. As I argued earlier, every managerial decision involves making tradeoffs against the background of economic, social, environmental, and political conditions in which the firm operates. And yet, much of what is thought to be ethically acceptable or unacceptable depends on the cultural and political context in which one operates. Tradeoffs that would be unthinkable in one country are considered to be business as usual in another. In a global firm, the board members of a parent company may well wake up one day to find that the company's variously located subsidiaries are operating at both ends of the spectrum of acceptable and unacceptable behavior.

The *unthinkable* example of modern-day slavery provides a good illustration of how treating business decisions about stakeholder tradeoffs as though they stand apart from the *ex ante* satisfaction of moral ground floor conditions (as side constraints) is something of a fallacy. An action that is legal and customary in one jurisdiction might still be regarded as wrong by the decision maker, who may decide that avoiding that action is the right thing to do in any event. A multinational enterprise may operate in a country where the use of bonded labor is both legal and customary; and yet, in evaluating stakeholder tradeoffs, the global business decision maker may elect not to make use of such labor.[145] The appraisal of a vast range of stakeholder tradeoffs is an inevitable part of managerial decision making that does not stand entirely apart from some hypothetical baseline constraint of ethical custom—globalization and its extremes have brought the ethical dimensions of day-to-day tradeoffs into sharper focus.

In today's global corporate system, satisfying the "basic rules of society" and "ethical custom" as *ex ante* constraints on otherwise unbridled value-maximization is a goal to strive for mightily—it is, however, a goal that is never fully achieved. Why not? Because there is always something more one could do to make a better world for workers, customers, and communities; and we should strive always to do the best we can. The task grows ever more

144. *See* Jason Motlagh, *The Ghosts of Rana Plaza*, 90 VIRG. Q. REV., no. 2, Spring 2014 (finding that "one year after the worst accident in the history of the garment industry, recovery remains a fragile process, justice seems elusive, and reform has a long way to go").

145. It is highly positivistic and formalistic to view conformity with legal norms and minimalist "ethical custom" as entirely distinct from the day-to-day normative evaluation of stakeholder tradeoffs in business decision making.

complex as business expands globally and opportunities for regulatory arbitrage and strategic gaming proliferate. The problem here goes beyond the familiar one of the moving goalposts; it lies in the multiplication of fields of play. For global corporate groups, the rules of the game in one jurisdiction might be played against the rules in another, while overarching global *rules about rules* can be vague, ineffectual, or simply nonexistent. If value maximization has any moral floor at all, it is a constantly shifting one. With rising inequality, climate disruption, ocean pollution, species extinction, global pandemics, and a host of other "wicked problems" facing future generations, the basic rules of society from a century ago, or even decades ago, need a substantial overhaul.[146] Certainly, there is no straightforward checklist for how the basic rules of the society should be fixed in the globe as *ex ante* constraints to value maximization in the multinational arena. Having said that, international human rights norms *do* provide an extremely useful normative framework because of their global uptake and institutional context. We shall consider human rights as an ethical framework more deeply below.

B. Value Maximization Does Not Escape Trade-offs, it Occludes Them

Bebchuk and Tallarita worry that stakeholderism "would make corporate leaders freer in their decision-making."[147] The problem, they say, is that "there is no reason to expect that expanding the freedom of corporate leaders to pursue their own preferences would systematically operate to the benefit of the company's stakeholders."[148] Years ago, Jensen lamented that the stakeholder approach "politicizes the corporation" and empowers managers "to exercise their own preferences in spending the firm's resources."[149] Yet Jensen's proposed alternative (value maximization) does not succeed in removing politics; indeed, it merely occludes the role that politics plays in the background. The reflective "choice act" is an ineluctable part of managerial decision making.

That stakeholders do matter is not at issue in either the shareholder or stakeholder approach. The real issue is about why they matter and how they matter. Jensen acknowledges plainly that "[a] firm cannot maximize value if it ignores the interests of its stakeholders."[150] Even so, he rejects the stakeholder

146. *See* Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153 (2009). Consider, for instance, Naomi Klein's thesis that the climate challenge "changes everything." NAOMI KLEIN, THIS CHANGES EVERYTHING: CAPITALISM VS. THE CLIMATE (2014). For a review of the limits of the classical economic approach given today's resource constraints and alternative approaches, see Louis Lefeber & Thomas Vietorisz, *The Meaning of Social Efficiency*, 19 REV. POL. ECON. 139 (2007).

147. Bebchuk & Tallarita, *supra* note 8, at 53.

148. *Id.* at 55.

149. Jensen, *Value Maximization* 2001, *supra* note 23, at 10. For the classic statement of this concern about managerial agency costs, see *id.*

150. *See* Michael C. Jensen, Abstract, *Value Maximisation, Stakeholder Theory, and the Corporate Objective Function*, 7 EUR. FIN. MGMT. 297, 297–98 (2001) [hereinafter Jensen, Abstract]. Bebchuk and Tallarita emphasize this point as well, stating that "it is undeniable that, to effectively serve the goal of enhancing long-term shareholder value, corporate leaders should take

approach to corporate governance because, as he charges, it does not advance its own theory of how to evaluate the pros and cons of making "tradeoffs among stakeholders." He takes the purported absence of a theory of stakeholder tradeoffs within stakeholder theory as a point in favor of his value-maximization approach.[151] And yet, Jensen declines to advance a theory of his own about *how not to ignore the interests of stakeholders*—interests that he nonetheless recognizes are critically important. Instead, Jensen proposes that managers take stakeholder concerns into consideration to the extent that they advance the ultimate goal of value maximization. Value-maximizing decision makers, he says, can learn from stakeholder theory as a way to maximize value![152] Here, Jensen proffers an "enlightened" version of shareholder value maximization that draws on the experience and insights of stakeholder theory while remaining faithful to his "single-valued objective function." But, without a theory of his own about how not to ignore the critically important matter of stakeholders, how exactly is Jensen's single-dimensional prescription superior to the stakeholder approach? What are we left with? Reading the tealeaves? There is no clear answer.

Michael Jensen's approach has had and continues to have enormous impact.[153] To be fair, he recognizes that that the world "may be governed by

into account stakeholder effects—as they should consider any other relevant factors." Bebchuk & Tallarita, *supra* note 8, at 12.

151. In 1976, Jensen claimed that no theory of stakeholder tradeoffs existed. In my view, no general theory of stakeholder tradeoffs exists because such a theory would have to be so broad as to contain all of politics, ethics, and economics. Nevertheless, some alternatives to the value maximization approach have been advanced, the most influential one being Michael E. Porter and Mark R. Kramers' *shared value* approach, with *corporate citizenship*, *sustainability*, and the *triple bottom line* also having much influence. *See* Michael E. Porter and Mark R. Kramer, *The Big Idea: Creating Shared Value*, HARV. BUS. REV., Jan.–Feb. 2011; *see also* COLIN MAYER, FIRM COMMITMENT (2013); and most recently, MAYER, *supra* note 97. Novel contributions to this effort come from the field of "business and human rights" and the rapid growth of "ESG" factor investment. *See, e.g.*, U.N. Rep. on Guiding Principles on Business and Human Rights, *supra* note 98.

152. *See* Jensen, Abstract, *supra* note 150, at 297–98.

153. For instance, in a 2018 report commissioned by the National Association of Manufacturers, the authors concluded that political, social, and environmental shareholder resolutions raise the specter of "agency costs" exactly as Jensen and Meckling defined them in 1976. *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 305 (1976). The National Association of Manufacturers' study concludes that socially and environmentally-oriented shareholder resolutions have no measurable impact on shareholder value; nevertheless, they stress that such resolutions are risky because they may lead managers to "seek other goals besides maximizing shareholder wealth":

> Creating incentives for managers to act in ways that focus more on environmental and social goals instead of strictly maximizing shareholder wealth may simultaneously license managers to seek other goals besides maximizing shareholder wealth, such as maximizing personal wealth or popularity, which will be more difficult to discipline appropriately.

complex dynamic systems that are difficult to optimize in the usual sense" and he suggests that:

> [t]o create value we need not know exactly what maximum value is and precisely how it can be achieved. What we must do, however, is to set up our organizations so that managers and employees are clearly motivated to seek value—to institute those changes and strategies that are most likely to cause value to rise.[154]

And so, with complexity and dynamism in mind, he settles on the rather loose notion of "value seeking" as the appropriate goal.[155] And with this move, we enter the realm of best guesstimates with a view to maximizing shareholder value over the long run.[156] How this approach is normatively superior to the unabashed messiness of stakeholder theory is not entirely clear. After all, a critical question remains for the value maximization approach: What criteria and concerns should managers give priority to in their formation of such guesstimates? In other words, how exactly and how deeply should managers treat the critically important matter of stakeholder concerns? According to the value maximization approach, managers should only consider stakeholder concerns insofar as they serve the goal of maximizing the desired culmination outcome: long-term value for shareholders. What if considering a specific stakeholder concern does not serve long-term value? Then, according to this view, it should not be considered, unless not considering it turns out to have a detrimental rebound effect, and then it should be considered after all. The apparent inconsistency in rejecting stakeholder theory, yet also using its insights to seek value, is worthy of further critical reflection, though this problem goes beyond the scope of this paper.

For today's critical challenges, such as climate disruption and ocean pollution, one company's stakeholders might include almost any person on the globe. Today's "super wicked" global problems affect everyone, including the

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KALT ET AL., *supra* note 73, at 50. Like Jensen and Friedman before them, the authors refer (erroneously) to the shareholders as "owners." *See id.*

154. Jensen, *Value Maximization* 2001, *supra* note 23, at 17.

155. Jensen says, "I know of no other scorecard that will score the game as well as this one . . . . It is not perfect, but that is the nature of the world." Jensen, *Value Maximization* 2001, *supra* note 23, at 17.

156. On "guesstimates" in cost-benefit analysis, see John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882, 891–96 (2015). Referring to the findings of a study by Credit Suisse, Steve Denning argues that "most key investment decisions are based on the reputation of the executive making the investment proposal and the CEO's '*gut feel*' about shareholder value." Denning, *The Economist Defends 'The World's Dumbest Idea'*, *supra* note 12 (emphasis added). The report by Credit Suisse concludes that "few senior executives are versed or trained in methods to allocate capital most effectively," and that "incentive programs frequently encourage behaviors that are not in the best interests of long-term shareholders." MICHAEL J. MAUBOUSSIN & DAN CALLAHAN, CREDIT SUISSE, CAPITAL ALLOCATION – UPDATED: EVIDENCE, ANALYTICAL METHODS, AND ASSESSMENT GUIDANCE 54 (2015).

long-run viability of business itself.[157] If Jensen's intent is to avoid politicized management, his turn to the laser-focused pursuit of the "single valued objective function" does not succeed. To the contrary, the value maximization approach represents a powerful political project dressed in technical garb. Its legitimacy and appeal are derived, in part, from its apparently authoritative and technocratic origins—and by its Hippocratic zest, as Jensen himself proclaims.[158] In presenting value maximization as the business decision maker's solemn promise to shareholders in the style of an oath, Jensen shows himself to be a most effusive "norm entrepreneur."[159]

C. Value Maximization's Human Rights Problem

This discussion would not be complete without a treatment of value maximization's human rights problem. With the unanimous adoption by the U.N. Human Rights Council of the U.N. Guiding Principles on Business and Human Rights in 2011, the "corporate responsibility to respect human rights" was institutionalized globally as a normative ground floor of its own.[160] Unlike stocks, human rights violations do not have a readily discernable market price. How are the values of human rights assessed under the rubric of efficiency within the value maximization approach? It is not so easily done. And yet, business leaders from around the world readily confess that their companies respect human rights.[161] What then accounts for this apparent disjunct between value maximization's sole focus on culmination outcomes (maximal shareholder value) and the business leaders' apparent concern for the value of human rights? Should we take this as further evidence that the stakeholder approach, as Dimon says, "more accurately reflects how our CEOs and their companies operate"?[162] With the importance given to human rights around the globe, this matter deserves further scrutiny.

One would be hard-pressed to deny that an individual whose human rights are violated in connection with a business activity is left worse off. Consider the case of the aggrieved subsistence farmer who, without due process, is forced off her land to make way for the extraction of conflict minerals. Imagine that her children are forced to work in the mining pits and that members of her family

157. On "super wicked" problems, see Lazarus, *supra* note 146.

158. By his own self-assessment, value maximization does no less than "provide the business equivalent of the medical profession's Hippocratic Oath." Jensen, *Value Maximization* 2001, *supra* note 23, at 9.

159. Jensen is one of the most widely cited authors in the social sciences. On "norm entrepreneurs," "norm bandwagons," and "norm cascades," see Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 909 (1996).

160. *See* U.N. Rep. on Guiding Principles on Business and Human Rights, *supra* note 98.

161. When the U.N. Special Representative on Business and Human Rights (John G. Ruggie) consulted with business leaders from major firms from around the world, he found that all of them claimed, quite readily, that their companies respected human rights. *See* JOHN GERARD RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS 92–93 (2013).

162. Wartzman & Tang, *supra* note 20.

go missing after a protest at the mine site.[163] The minerals sought beneath her farmland are essential for building smartphones, laptop computers, and the glass cockpits of commercial passenger airliners. How might we appraise this scenario overall under the quantitative rubric of value maximization? On one side of the cost-benefit ledger, consumers and shareholders might do very well (especially when they are subjectively unaware of the farmer's plight); on the other side, we must reserve an entry for great misery, if not atrocity. The difficult question that arises is whether it is even possible to characterize human rights violations within a welfarist framework by utility, well-being, wealth, social welfare, or by some other criterion that is amenable to counting and ranking, in the manner described in Part I, above.[164] Human rights impacts are limitlessly varied in texture; they range from violent and egregious impacts to procedural and conceptual ones (such as denials of legal personhood, due process, and equality before the law).[165] Drawing on the foregoing analysis of culmination and comprehensive outcomes, we can see that adverse human rights impacts tend to involve a combination of: (i) unmeasurable social and political *processes* that lead to adverse outcomes or that prevent positive outcomes from being realized; and (ii) measurable material and physical outcomes that are the result of such processes, as well as iii) the "choice acts" of agents. It is manifestly unclear how the Kaldor-Hicks *potential compensation* criterion would account for all manner of such processes, agencies, and outcomes in counting and ranking costs and benefits under the rubric of shareholder value maximization.[166] The consequentialist argument for

163. Two notable lawsuits from Canada involving analogous factual scenarios are: *Choc v. Hudbay Minerals Inc.*, [2013] 116 O.R. 3d 674 (Can. Ont. Ont. Super. Ct. J.) (allegations of violent attacks by company security); and *Garcia v. Tahoe Resources Inc.*, [2017] 92 B.C.L.R. 5th 249 (Can. B.C. B.C.C.A.) (settled in 2019) (allegations of violent repression of protesters by company security).

164. I defer to another day further argument about whether to define "worse off" in terms of value, wealth, utility, dignity, or some other criterion of appraisal. On incorporating qualitative assessments of impact on dignity in cost-benefit analysis, see Rachel Bayefsky, *Dignity as a Value in Agency Cost-Benefit Analysis*, 123 YALE L.J. 1732 (2014).

165. Article 6 of the Universal Declaration of Human Rights (UDHR) states: "Everyone has the right to recognition everywhere as a person before the law." Article 7 states that "All are equal before the law and are entitled without any discrimination to equal protection of the law." Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

166. On related valuation questions, see Eric A. Posner & Cass R. Sunstein, *Moral Commitments in Cost-Benefit Analysis*, 103 VA. L. REV. 1809 (2017). *See also* Martha C. Nussbaum, *The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1005, 1014–17 (2000). Amartya Sen and Bernard Williams argue that the "impersonal metric of utility" neglects personal autonomy and personal integrity. *See* SEN & WILLIAMS, *supra* note 103, at 18. Their critique rings very true when procedural human rights are affected, such as equality before the law and non-discrimination. In their critique of utilitarianism, they point out that "[i]n many-dimensional moral conflicts the presumption of completeness of ranking may well be quite artificial." *Id.* Given so, they are critical of the notion that a maximum overall utility value can be counted and compared to other states of affairs (as a style of *culmination* outcome). *See id.*

value maximization discussed earlier is severely impaired by this methodological shortcoming.

Concerns for human rights, Sen argues, are accommodated within the framework of comprehensive outcomes, but not culmination outcomes alone.[167] The problem for the Kaldor-Hicks efficiency approach is that the very notion of a "market price" in relation to *human rights* is anathema. The cost of human rights harm (in terms of utility, wealth, wellbeing, social welfare, or some other criterion) may well be fully indeterminate.[168] If we regard such harms or losses to be *priceless* or *indeterminate* social costs, we introduce an inconsistency that renders the Kaldor-Hicks compensation criterion inoperable.[169] The assertion of *pricelessness* of human rights impacts has intuitive appeal especially with regards to egregious human rights violations such as disappearances, torture, kidnappings, and prolonged arbitrary detention, as well as those that relate to basic political freedoms, such as democratic participation, freedom of association, and due process rights.[170] The idea that one might calculate whether an increase in shareholder gain in one domain (as a "proxy" for social welfare) is adequate to potentially compensate human rights victims in another domain verges on nonsensical. The presence or risk of such priceless social costs, I contend, negates the operability of the Kaldor-Hicks potential compensation criterion, at least for that instance of harm.[171]

As we saw in the discussion above, the value-maximizing approach is often *informally* predicated on the notion that a prior normative "moral ground

167. *See* Sen, *supra* note 42, at 492.

168. In his critique of wealth maximization, Kornhauser highlights the "problem of 'untraded goods' such as those implicated in personal injury cases and in other policies that alter the risks to life and limb[,] . . . [in which] compensation after death or injury may always prove inadequate." Kornhauser, *supra* note 104, at 680. Furthermore, he notes that "many goods, such as environmental goods and rights to bodily integrity, do not trade on well-developed markets if they trade at all. Consequently, one cannot rely on insurance and other markets to solve all the problems." *Id.* at 682.

169. On the problem of pricelessness in cost-benefit analysis, see generally Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553 (2002). Amartya Sen argues that *existence values* in environmental cost-benefit analysis pose a similar problem. *See* Amartya Sen, *The Discipline of Cost-Benefit Analysis*, 29 J. LEGAL STUD. 931, 951 (2000). In a similar vein, Penz et al. conclude that cost-benefit analysis "does not readily accommodate *preferences for social justice or the shape of society at large*, or the environmental conditions of the planet." PENZ ET AL., *supra* note 82, at 68 (emphasis added).

170. Penz et al. gives a summary of "[p]rocedural rights of project-affected people." PENZ ET AL., *supra* note 82, at 241. Such rights include: "[t]he right to refusal by those to be evicted until overruled by judicial (not administrative) action," and "[t]he right of access to competent, timely and uncorrupted dispute resolution, including adjudication." *Id.*

171. On the other hand, we might attempt to fix a value on "dignity" by conducting surveys on the "willingness to accept" compensation and by other means (I do not endorse this approach, but one might try to do it). For further discussion on this tricky valuational problem, see Bayefsky, supra note 164, at 1732. *See also* CASS R. SUNSTEIN, VALUING LIFE: HUMANIZING THE REGULATORY STATE (2014); Posner & Sunstein, *supra* note 166, at 1809; Cass R. Sunstein, *Manipulation, Welfare, and Dignity: A Reply*, 1 J. MKTG. BEHAV. 351 (2016).

floor" is satisfied in the background. By this thinking, cost-benefit analysis and value maximization may be undertaken after a ground floor moral standard has been satisfied. This also means that, at a minimum, business decision makers should not trade off human rights for shareholder gain. This is sometimes regarded as a matter of common sense, as something so fundamental that it need not be formally incorporated into economic analysis. But this informal "fix," as I have already contended, reveals the fundamental flaw of the value maximization approach: it is too idealistic; too aspirational. Value maximization is a normative economic prescription for a world that does not actually exist. As shown above, adhering to the "moral ground floor" in the global corporate system is much easier said than done. As the literature on the emerging practice of corporate human rights due diligence shows, appraising the human rights *risks to business* and *risks to people* of global business activity is a complex and labor-intensive task.[172] Much depends on the point of view from which impacts are assessed. It also costs money to do this work. Where the moral ground floor lies at any given time and place is impossible to pinpoint; we should nevertheless do our best at all times. The challenge grows when global firms are networked and trade across dramatically different local contexts. The moral ground floor is never fixed, only estimated—sometimes very roughly.

172. For an example of the specialized labor needed for "knowing and showing" corporate respect for human rights, see, e.g., SHIFT & MAZARS LLP, UN GUIDING PRINCIPLES REPORTING FRAMEWORK WITH IMPLEMENTATION GUIDANCE (2015), https://shiftproject.org/wp-content/uploads/2015/02/UNGPReportingFramework_withguidance2017.pdf. See also Kendyl Salcito & Mark Wielga, *What Does Human Rights Due Diligence for Business Relationships Really Look Like on the Ground?*, 3 BUS. & HUM. RTS. J. 113 (2018); Nien-hê Hsieh, *Putting the Guiding Principles into Action: Human Rights at Barrick Gold (A), (B), and (C)*, HARV. BUS. SCH. TEACHING NOTE 315-108, 316-139, 321-033 (Oct. 2016, revised Aug. 2020); Robert McCorquodale et al., *Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises*, 2 BUS. & HUM. RTS. J. 195 (2017); ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE SUPPLY CHAINS OF MINERALS FROM CONFLICT-AFFECTED AND HIGH-RISK AREAS (3d. ed. 2016), https://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf.

In the year following the adoption of the United Nations Guiding Principles on Business and Human Rights, Muchlinski warned against "tick-box" exercises, arguing:

> unless a corporate culture of concern for human rights is instilled into the officers, agents and employees of the company[, human rights] due diligence could end up missing the very issues it is set up to discover. At worst it could degenerate into a "tick-box" exercise designed for public relations purposes rather than a serious integral part of corporate decision-making. It is here that the ethical duty to respect human rights is key.

See Peter Muchlinski, *Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation*, 22 BUS. ETHICS Q. 145, 156 (2012).

A guide produced by the German Global Compact Network notes that, "[n]o matter how well-designed the corporate policies and [human rights] due diligence processes are, there will always be instances where things go wrong." *See* DEUTSCHES GLOBAL COMPACT NETZWERK, STAKEHOLDER ENGAGEMENT IN HUMAN RIGHTS DUE DILIGENCE: A BUSINESS GUIDE 31 (2014).

It is fair to surmise that "all those who suffer" from human rights abuses today are not interested in waiting to be compensated by the future "summing up"[173] of social welfare that is promised by efficiency theory. Overall growth does little to assuage those individuals whose livelihoods are turned upside down today through human rights abuses, displacement,[174] and environmental degradation.[175] Kaldor's invocation of hypothetical compensation within a self-contained political community is not fit for purpose in the global economy—a world in which business activity and regulatory arbitrage take place over multiple and drastically uneven political communities and juridical spaces. For "those who suffer" human rights violations today, the *mere prospect of compensation* given by Kaldor-Hicks efficiency-theory is no salve; it is all but worthless.[176]

The matter of human rights in a globalized economy is a normative challenge that value maximization's theory and method have no clear means to address.[177] This problem cannot be avoided by positing an *ex-ante* moral

173. Indeed, Chief Justice Leo Strine asserts that this great "summing up" never actually happens—it's a purely theoretical exercise. *See* Leo Strine, C.J. Del. S. Ct., Lecture at Harvard Law School (2016) (on file with author).

174. The tension is illustrated in reportage about The Coca-Cola Company's pledge to review the land assembly and land tenure practices of its top sugar suppliers:

> "Land grabs" are a controversial concept among development economists. Consolidating tracts of land into larger plantations to grow crops for export could leave a country better off, with the foreign exchange earnings allowing it to more than replace the lost production of food for local consumption. *But Oxfam and other groups have documented cases over the years in which individual farmers or communities have been evicted without compensation, warning or knowledge of what was happening*.

Howard Schneider, *Coke, Pressed by Oxfam, Pledges Zero Tolerance for Land Grabs in Sugar Supply Chain*, WASH. POST (Nov. 8, 2013), https://www.washingtonpost.com/business/economy/coke-pressed-by-oxfam-pledges-zero-tolerance-for-land-grabs-in-sugar-supply-chain/2013/11/08/cb6946e4-48b3-11e3-a196-3544a03c2351_story.html (emphasis added). *See also* Stella Dawson, *Coke's Zero Tolerance for Land Grabs Proves Difficult to Fulfill*, REUTERS (Mar. 25, 2015), https://www.reuters.com/article/us-landgrab-coke/cokes-zero-tolerance-for-land-grabs-proves-difficult-to-fulfill-idUSKBN0ML0LE20150325.

175. Using Sen's approach, we can talk about the collateral negative impacts on individuals and communities of business activity in terms of a *loss of freedom*. *See* AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999).

176. In his critique of wealth-maximization, Ronald Dworkin argues that the aggregation of wealth in the wealth-maximization approach does not consider adequately the consequences for individuals acting under uncertainty. *See* Dworkin, *supra* note 22, at 203. In situations where individuals are left worse off while overall wealth is still considered to be maximized, he argues: "*No* particular individual will, then, be concerned about social wealth (or, indeed, about Pareto efficiency). It makes no sense for him to trade off anything, let alone justice, for *that*. He will be concerned with his individual fate . . . ." *Id.*

177. Sen writes:

> Utilitarians do not include the realization of freedoms, or the fulfillment of rights or duties, among the valued objects at all, and so there is a fundamental gap here. Of course, rights or duties may be instrumentally valued by utilitarians for what they can do to

constraint (i.e., respecting human rights as a moral ground floor) *and then* seeking maximal outcomes for shareholders. Why is this so? Because the proposed *ex-ante* constraint is never fully defined, nor satisfied; nevertheless, we should always try our best to behave ethically. This means that even with the stylized *ex-ante* normative constraint in place, additional moral, ethical, and political work always remains to be done. By whom? By business decision makers, including managers, board members, and shareholders. This is why we seek wise and virtuous people to lead companies and institutions, not fraudsters and con artists; it is why the shareholders of early corporations were empowered to elect a reflective and distinguished "court of directors" rather than a gang of thieves (aspirationally).[178]

What does this mean in practice? We might ask, for instance, whether Alphabet Inc. should refuse to do business in countries where the government attacks journalists, political dissidents, and labor organizers. We might ask if a global mining company should exit a country where a military junta has toppled the elected government and announces plans to expand resource extraction aggressively. There are no straightforward deductive and computational answers to such questions; judgments need to be made at the top. Very often, there is deep uncertainty about how to satisfy the minimal requirements of the moral ground floor; this does not mean, however, that the *ex-ante* constraint can simply be ignored. The value-maximizing approach cannot simply dispense with concern for background norms because they are too difficult to satisfy in any straightforward way. And yet, Jensen's reasoning for rejecting stakeholder theory exudes such flavor: he dispenses with stakeholder theory because it makes things very difficult for managers—it requires them to make political-style judgments where Jensen would rather have them make laser-focused maximal value-seeking calculations.

Value maximization's human rights problem is thus laid bare: the intractable valuation problems that arise in complex human rights controversies negate the formal operability of Kaldor-Hicks efficiency within the value maximization approach. Business decision makers who are caught up in a human rights controversy must contend with non-computational "tragic dilemmas" (to borrow Martha Nussbaum's language) where no option is facially acceptable; and yet, a decision must be taken.[179] For instance, while facing growing risks to business, an extractive firm might consider abandoning a project in a conflict zone only to realize that exiting the project might lead to even worse outcomes for people in the community affected. Indeed, it may appear that the business or government administrators that are expected to take over the project will end up exacerbating the conflict rather than ameliorating it. In this way, business decision makers must address human rights and ethical

> promote utilities, but their fulfillment or violation does not, by itself, make the states better or worse in utilitarian accounting.

Sen, *supra* note 42, at 493.

178. *See* 2 ADAM SMITH, THE WEALTH OF NATIONS 211–45 (J.M. Dent & Sons Ltd., 1910).

179. *See* Nussbaum, *supra* note 166, at 1010–11.

concerns as they arise and are ongoing with reference to the very particular circumstances and conundrums that are presented in each case.[180] In facing such dilemmas, decision makers must anticipate Sen's broad category of comprehensive outcomes, including the processes and agencies that are involved, *as well as* the culmination outcomes that might be expected for shareholders.[181]

IV. WHEN VALUE MAXIMIZATION "RUNS OUT"

In the global movement to abolish the slave trade of the eighteenth and nineteenth centuries, business decision makers faced their own ethical dilemmas and challenges. Business decision making has always had a reflective and ethical dimension that shareholder primacy's technical prescription does not fully live up to. There is no sense in which business decision making is rightly regarded as an impersonal and technical exercise that takes place apart from the wider ethical and social issues of our time. All business decision making concerns both *value* and *values*; the former cannot be entirely sliced apart from the latter. Imperfect as it is, the stakeholder approach better reflects the real constraints and limitations (empirical, epistemic, and normative) that decision makers actually must contend with. Today's managerial decision dilemmas that involve critical problems of "people and planet," such as climate disruption, ocean pollution, and pandemics, only serve to highlight this reality.[182]

When the best way forward is discerned by instincts and deliberations over what is "the right thing to do," rather than by the comparison of ranked quantitative scores, the shareholder value-maximization norm can be said to "run out."[183] Outside of hypothetical *Arcadian* worlds (free of negative

180. Muchlinski opines that "it is hard to see how the existence of the corporate responsibility to respect human rights can become a significant element in corporate action unless a more stakeholder oriented approach is adopted in corporate governance and regulatory developments." Muchlinski, *supra* note 172, at 163.

181. Sen speaks of "deeply divisive dilemmas" and "decision problems in the context of ethical arguments and welfare-economic assessment . . . ." SEN, *supra* note 104, at 69–70.

182. On problems of "people and planet," see generally MAYER, *supra* note 97.

183. The notion that a legal rule (or a norm) "runs out" finds its origin in the debate between H.L.A. Hart and Ronald Dworkin over the role of interpretation and discretion in judicial decision making. Hart argued that through the interpretation of indeterminate laws in the adjudication of disputes, judges must exercise discretion:

> Laws require interpretation if they are to be applied to concrete cases[,] . . . it is patent . . . that the open texture of law leaves a vast field for a creative activity [by judges] which some call legislative. Neither in interpreting statutes nor precedents are judges confined to the alternatives of blind, arbitrary choice, or "mechanical" deduction from rules with predetermined meaning. Very often their choice is guided by an assumption that the purpose of the rules which they are interpreting is a reasonable one, so that the rules are not intended to work injustice or offend settled moral principles . . . . In all this we have the "weighing" and "balancing" characteristic of the effort to do justice between competing interests.

externalities and sundry imperfections), all business allocations involve some forms of tradeoff among distinct concerns. No objective maximizing decision-making space exists that permits corporate agents to merely count up and allocate the residual that is thought to be due to investor principals, free of non-computational ethical and political judgment. Any portion, no matter how small, taken from the putatively "maximal" residual that is thought to be owed to the principal, would have some potential value to other corporate constituents or to the world in general. Such value could take the form of increased wages or benefits for employees, a better-quality product, improved worker health and safety, fewer people forced to relocate to make way for a project, less air pollution, more natural habitat protection, less plastic clogging up the oceans, and so on. Taking Jensen strictly, his prescription to maximize his preferred culmination outcome (shareholder value) to the exclusion of all else leaves aside the art of judgment and the reflective texture of human decision making.

There is nothing particularly novel about managerial concern for Sen's comprehensive outcomes; indeed, the resurgence of stakeholder theory is just that—a resurgence.[184] A notable historical example of a company explicitly adopting what can only be described as a *comprehensive* outcome approach occurred in the mid-1990s when the Royal Dutch/Shell Group faced overwhelming pressure to respond to the crisis in Nigeria's Ogoniland. When the Nigerian military government executed Ogoni environmental activist Ken Saro-Wiwa[185] along with eight other men, the company was condemned around the world for having failed to use its leverage with the Nigerian government to halt the killings. The Royal Dutch/Shell Group's Chairman at the time, Cor Herkströter, chose not to intervene publicly with the Nigerian government. In

See HERBERT L. A. HART, THE CONCEPT OF LAW 200 (1961). In Dworkin's words, Hart's position is that there comes a time in decision making when the judge "runs out of rules." *See also* Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 35 (1967). Cristina Besio acknowledges that a gap exists between technical (computational) and moral decision making in the corporate risk management context, suggesting:

> In situations in which technical and managerial knowledge are called into question or completely lacking, instead of producing calculations or scientific arguments, it is often possible to refer to established moral values in order to find a common ground (at least temporarily and in a specific context) to continue operating. However, this strategy generates new risks, since moral communication can suppress other types of communication.

Cristina Besio, *Transforming Risks into Moral Issues in Organizations*, in BUSINESS ETHICS AND RISK MANAGEMENT 72 (Christophe Luetge & Johanna Jauernig eds., 2014).

184. *See generally* John Gerard Ruggie, *The Paradox of Corporate Globalization: Disembedding and Reembedding Governing Norms* (M-RCBG Faculty Working Paper Series, 2020–01, 2020).

185. Ken Saro-Wiwa was a Nigerian author, environmental activist, and leader of the Movement for the Survival of the Ogoni People (MOSOP). He was hanged by the Nigerian government along with eight other men in 1995. At the time, Royal Dutch/Shell had extensive operations in the region called Ogoniland as well as in other parts of Nigeria. On the death of Saro-Wiwa, see Frank Aigbogun, *It Took Five Tries to Hang Saro-Wiwa*, INDEP. (Nov. 13, 1995), https://www.independent.co.uk/news/world/it-took-five-tries-to-hang-saro-wiwa-1581703.html.

explaining his decision years later, Herkströter stated: "I cannot believe it is our proper role to see ourselves as moral arbiters of what is acceptable behaviour for sovereign states. That is a matter for Governments and the international institutions empowered to do so."[186] In a remarkable about-face two years after the hangings, the firm rewrote its major business policies and recognized for the first time its responsibility "to express support for fundamental human rights in line with the legitimate role of business . . . ."[187]

Sir Mark Moody-Stuart was the Royal Dutch/Shell Group's Managing Director when the company's new policy was drafted. In his memoir, Moody-Stuart recounted:

> The combined changes in the principles on politics and human rights meant people were *empowered to use their own judgment* as to when it was likely to be constructive and helpful to speak in private or in public. . . . Many people had in fact used their initiative before and raised issues of human rights with governments, but this codification led to wider understanding . . . .[188]

With these policy changes, Royal Dutch/Shell Group's General Business Principles included both respect for human rights and protection of shareholders' investment on the same plane. The decision makers' new responsibilities were stated in the following way:

> Principle 2: Responsibilities
>
> Shell companies recognise five areas of responsibility:
>
> a. *To shareholders:* To protect shareholders' investment, and provide an acceptable return.
>
> . . . .
>
> c. *To employees:* To respect the human rights of their employees with good and safe conditions of work . . . .
>
> . . . .
>
> e. *To society:* To conduct business as responsible corporate members of society, to observe the laws of the countries in which they operate, to express support for fundamental human rights in line with the legitimate role of business and to give proper regard to health, safety and the environment consistent with their commitment to contribute to sustainable development.[189]

186. Cor Herkströter, *Dealing with Contradictory Expectations: Dilemmas Facing Multinationals,* 63(4) VITAL SPEECHES OF THE DAY 100, 105 (1996).

187. *Shell Statement of General Business Principles: Royal Dutch/Shell Group of Companies (1997)*, 79 DIE FRIEDENS-WARTE 230. 231 (2004) [hereinafter *Shell Statement of General Business Principles*].

188. MARK MOODY-STUART, RESPONSIBLE LEADERSHIP: LESSONS FROM THE FRONT LINE OF SUSTAINABILITY AND ETHICS 257 (2014) (emphasis added).

189. *Shell Statement of General Business Principles*, *supra* note 187, at 230–231.

It is noteworthy that the distinct concerns listed above were regarded as being "inseparable" from one another. They included "the duty of management continuously to assess the priorities and discharge its responsibilities *as best it can* on the basis of that assessment."[190] At the same time, the firm's economic principles stated unequivocally that "[p]rofitability is essential to discharging these responsibilities and staying in business. . . . Without profits and a strong financial foundation it would not be possible to fulfil the responsibilities outlined above."[191] It is especially significant that the revised principles called for "an acceptable return" (see above) for investors, rather than shareholder value-maximization.

We can interpret Shell's revised principles as mandating a shift in thinking from a culmination-outcome oriented approach towards a comprehensive-outcome oriented approach. As shown earlier, the comprehensive approach is concerned with *both* shareholder value and a broader range of consequences, including the evaluation of processes that lead to outcomes. In what was likely the first global corporate policy on human rights ever implemented by a major multinational, the Royal Dutch/Shell Group acknowledged the role for individual reflection and judgment while recognizing that the firm's economic responsibilities and human rights responsibilities overlap. This example of Royal Dutch/Shell Group's experience in Nigeria, and its subsequent reaction, shows that circumstances do arise for business decision makers in which a *culmination*-outcome oriented logic "runs out" and a broader range of normative criteria enters the picture (aspirationally, at least). This is not an exceptional circumstance but rather reflects what goes on generally and day-to-day in albeit less dramatic fashion.

We might also interpret the growing concern for acquiring the "social license to operate" with managerial concern for Sen's comprehensive outcomes. In the extractive industry today, much thinking about *how not to ignore the interests of stakeholders*[192] relates to obtaining the highly prized social license. Here, an entire sub-field of literature has emerged on how companies should strive to acquire social license to operate and hold on to it.[193] Another recent comprehensive-outcome oriented innovation in some large firms is to assess human rights *risks to people* (referred to as "salient risk") as well as material *risks to business*, combining both dimensions into a materiality and salience

190. *Id.* at 231 (emphasis added).

191. *Id.*

192. The problem of *how not to ignore the interests of stakeholders* was discussed above in connection with Jensen's critique of the stakeholder approach. *See supra* Part III.B.

193. *See, e.g.*, Neil Gunningham et al., *Social License and Environmental Protection: Why Businesses Go Beyond Compliance*, 29 L. & SOC. INQUIRY 307 (2004); *see also* Robert A. Kagan et al., *Explaining Corporate Environmental Performance: How Does Regulation Matter?*, 37 L. & SOC'Y REV. 51 (2003); Kieren Moffat & Airong Zhang, *The Paths to Social Licence to Operate: An Integrative Model Explaining Community Acceptance of Mining*, 39 RESOURCES POL'Y 61 (2014).

matrix.[194] The rising concern among some major firms over "salient risk" (risk to people) and process-legitimacy (e.g., social license) evinces a shift from prioritizing *culmination* outcomes to a wider appraisal of *comprehensive* outcomes in decision making.

The present movement led by Lipton and Mayer (among others) calling for a renewal of "corporate purpose" within a "New Paradigm" evinces concern for goals that go beyond value maximization and culmination scores.[195] By reimagining the corporation as having a social purpose as well as an economic one, the focus on *culmination* outcomes is deprioritized, though it remains a critically important consideration among many others. Again, such shifts in thinking are not entirely brand-new; rather, they harken back to an earlier era in which the business corporation was regarded as a social entity rather than merely a "thing" owned by its stockholders (its "principals").[196] A bold contemporary example of such a reordering of priorities took place in 2009, when newly appointed Unilever CEO Paul Polman announced that the company would no longer issue quarterly earnings statements. This move, he contended, was needed to pivot the company towards a long term "equitable" and "sustainable" business model.[197] Applying Sen's distinction, we might say that he sought to pivot the governance of the firm from a fixation on narrow culmination outcomes to embrace broader comprehensive outcomes.

When business leaders strive towards conduct befitting of a "corporate citizen," they go beyond culmination-outcome oriented scorekeeping. In today's climate, corporate decision makers may find themselves looking for an adequate way to respond to heightened public scrutiny of their ostensibly private business affairs. As in the example of Royal Dutch/Shell Group above, such heightened public scrutiny may push the highest level corporate decision makers to shift from culmination-outcome oriented logic to a more

194. For examples of the term "salient risk" adopted by global firms, see UNILEVER, HUMAN RIGHTS REPORT: ENHANCING LIVELIHOODS, ADVANCING HUMAN RIGHTS 26 (2015); M&S, HUMAN RIGHTS REPORT 9 (2016); MICROSOFT, CITIZENSHIP REPORT 40 (2015); and for a recent example of the use of the term "salient human rights issues," see also NESTLÉ, NESTLÉ IN SOCIETY: CREATING SHARED VALUE AND MEETING OUR COMMITMENTS 60–61 (2017).

195. For example, Henderson and Van den Steen state that "[w]e define 'purpose' as a concrete goal or objective for the firm that reaches beyond profit maximization . . . ." Rebecca Henderson & Eric Van den Steen, *Why Do Firms Have "Purpose"? The Firm's Role as a Carrier of Reputation*, 105 AM. ECON. REV. 326, 327 (2015). Another alternative approach has been dubbed "Total Societal Impact." *See* Douglas Beal et al., *Total Societal Impact: A New Lens for Strategy*, BOS. CONSULTING GRP. (Oct. 25, 2017), https://www.bcg.com/en-us/publications/2017/total-societal-impact-new-lens-strategy.aspx.

196. On the social entity versus property theory of the corporation, see generally William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO. L. REV. 261 (1992). For a critique of the notion of corporations as "things," see generally Iwai, *supra* note 50.

197. On Unilever CEO Paul Polman's decision to stop issuing quarterly earnings reports, see Andy Boynton, *Unilever's Paul Polman: CEOs Can't Be "Slaves" to Shareholders*, FORBES, (July 20, 2015), https://www.forbes.com/sites/andyboynton/2015/07/20/unilevers-paul-polman-ceos-cant-be-slaves-to-shareholders/#63e0ee16561e.

comprehensive approach.[198] For global companies, such shifts might be induced by concerns about forced labor in the supply chain, conflict-driven violence, forced displacement,[199] attacks on human rights defenders,[200] and crack downs on labor organizers.[201] In addressing such complex issues,

198. For example, in a case concerning alleged forced labor in Sudan, one corporate law theorist opined that "firms choose not to operate in Sudan not because of reputational costs, but because managers think it is wrong." HAY ET AL., *Summary of Discussion on Corporate Social Responsibility and Business*, ENVIRONMENTAL PROTECTION AND THE SOCIAL RESPONSIBILITY OF FIRMS 203 (2005) (this example attributed to Harvard Law Professor John Coates). *See also* Steve Prokesch, *"The Right Thing to Do"*, HARV. BUS. REV. (Dec. 7, 2017), https://hbr.org/2017/12/the-right-thing-to-do; Alison Taylor, *We Shouldn't Always Need a "Business Case" to Do the Right Thing*, HARV. BUS. REV. (Sept. 19, 2017), https://hbr.org/2017/09/we-shouldnt-always-need-a-business-case-to-do-the-right-thing. Freeman et al. argue that for business decision makers a "moral choice to act can arise in response to situations where not acting in the face of egregious human rights violations can signal acquiescence, or even tacit support for such violations." BENNETT FREEMAN ET AL., BUS. & HUM. RTS. RES. CTR., SHARED SPACE UNDER PRESSURE: BUSINESS SUPPORT FOR CIVIC FREEDOMS AND HUMAN RIGHTS DEFENDERS: GUIDANCE FOR BUSINESSES 44 (Aug. 2018), https://media.business-humanrights.org/media/documents/fdfe07e3d812cfcfed4235f bbf820a3d77599b13.pdf.

199. In 2005, Mark Moody-Stuart (who was then the Chair of Anglo-American Gold) identified "the resettlement of populations affected by the extractive sector" as one of the main human rights challenges for the industry. *See* Comm'n on Hum. Rts., Rep. of the Economic and Social Council on the Sectoral Consultation Entitled "Human Rights and the Extractive Industry," U.N. Doc. E/CN.4/2006/92, ¶12 (Dec. 19, 2005). In their analysis of displacement and resettlement in the mining sector, Deanna Kemp et al. note that "displacement effects are well established. They are so well established in fact, that researchers can claim that these effects will arise out of any resettlement event, regardless of which industry or development has caused the displacement." Deanna Kemp et al., *Global Perspectives on the State of Resettlement Practice in Mining*, 35 IMPACT ASSESSMENT & PROJECT APPRAISAL 22, 30 (2017); *see also* John R. Owen & Deanna Kemp, *Mining-Induced Displacement and Resettlement: A Critical Appraisal*, 87 J. CLEANER PROD. 478 (2015).

200. The term "human rights defenders" was adopted formally by the United Nations in 2000. *See* U.N. Secretary-General, *Promotion and Protection of Human Rights: Human Rights Defenders*, U.N. Doc. E/CN.4/2000/95 (Jan. 13, 2000); *see also* Human Rights Council Res. 2000/61, U.N. Doc. E/CN/2000/61 (Apr. 26, 2000). The Special Rapporteur's 2017 report concludes with several recommendations to States, companies, investors and financial institutions. *See* Michel Forst (Special Rapporteur on the Situation of Human Rights Defenders), *Rep. on the Situation of Human Rights Defenders*, U.N. Doc. A/72/170, 21–22, (July 19, 2017). In 2016, the Government of Canada published official guidelines on "Voices at Risk: Canada's guidelines on supporting human rights defenders." For a case study on human rights defenders, see Elisabeth Malkin, *Who Ordered Killing of Honduran Activist? Evidence of Broad Plot is Found*, N.Y. TIMES (Oct. 28, 2017), https://www.nytimes.com/2017/10/28/world/americas/honduras-berta-caceres-desa.html. For a report on twenty years of human rights defenders, see FRONT LINE DEFENDERS, INT'L FOUND. FOR THE PROTECTION OF HUM. RT.S DEFENDERS, STOP THE KILLINGS (2018), https://www.frontlinedefenders.org/en/statement-report/stop-killings.

201. For a case study of violations against labor organizers in Colombia, see INT'L FED. FOR HUM. RTS. ET AL., THE CONTRIBUTION OF CHIQUITA BRANDS INTERNATIONAL INC. CORPORATE OFFICIALS TO CRIMES AGAINST HUMANITY IN COLOMBIA: ARTICLE 15 COMMUNICATION TO THE INTERNATIONAL CRIMINAL COURT (May 2017).

managerial concern goes beyond philanthropic gift-giving or instrumental risk mitigation. How do we know this? Because in situations like those faced by Royal Dutch/Shell Group in Nigeria, a legally available course of action may be assiduously avoided, notwithstanding that it would generate long-run value for shareholders and, on some criteria, a net gain in overall social welfare (i.e., it would generate a Kaldor-Hicks efficient result). Legally available options are, at times, avoided because they are ethically untenable, even if it is thought that exercising such options would increase shareholder value.

The range of management and mixed public/private institutional processes that would support comprehensive appraisals is vast. To give just a few examples from the global extractive industry, greater attention to processes might include: more rigorous and more participatory public consultation at the earliest stages of project conception and design;[202] consultation processes that directly support the public's right of access to information and the freedom to impart information; the presence of a free and independent press; the right of workers and affected community members to organize and bargain collectively; open scrutiny of environmental impact assessments; independent human rights impact assessments of mega development projects; and institutional processes that support the indigenous right of "free, prior and informed consent" (FPIC).[203]

Commenting in 2012 on the implementation by firms of the then recently adopted U.N. Guiding Principles on Business and Human Rights (UNGPs), Peter Muchlinski opined that "it seems clear that any move towards operationalising the corporate responsibility to respect human rights will involve a departure from a shareholder based corporate governance model towards a more stakeholder based model."[204] The foregoing analysis supports Muchlinski's assertion: a firm that incorporates the UNGPs into its global policy framework (and acts by it) takes a step towards the appraisal of *comprehensive*-oriented outcomes in decision making, and thus moves closer to a stakeholder-oriented approach to corporate governance.[205]

202. For instance, Sheldon Leader argues that in doing consultations for a mega extractive project:

> [T]he *equitable* approach demands that consultation take place well before key decisions about projects, and indeed about policies are taken by the company. This mode of early and thorough consultation is precisely designed to impinge on a terrain that the strategic approach [e.g., the business case] often leaves untouched: the terrain of basic decisions to pursue or to abandon, or to seriously modify the whole design and rationale of a project.

Sheldon Leader, *Human Rights and the Constitutionalized Corporation*, *in* MULTINATIONALS AND THE CONSTITUTIONALIZATION OF THE WORLD POWER SYSTEM 202 (Jean-Philippe Robé, Antoine Lyon-Caen, and Stéphane Vernac eds., 2016) (emphasis added).

203. On free, prior, and informed consent (FPIC), see Lisa J. Laplante & Suzanne A. Spears, *Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector*, 11 YALE HUM. RTS. & DEV. L.J. 69 (2008).

204. Muchlinski, *supra* note 172, at 167.

205. *See* U.N. Rep. on Guiding Principles on Business and Human Rights, *supra* note 98.

CONCLUSION

Value maximization as a lodestone for decision making is too idealistic, which is why the stakeholder approach, difficult as it may be, remains a vigorous contender in the battle over the heart and soul of corporate governance. The problems inherent in the maximization approach have been raised by others before me who have proffered alternative approaches to corporate decision making such as optimization[206] and satisficing.[207] My contribution to this long-running debate has been to draw on Sen's distinction between culmination outcomes and comprehensive outcomes to articulate a more foundational aspect of the problem: the value maximization approach does not provide a rich and deep enough normative framework for actually making reasoned and ethically sound decisions.

The main findings of this Article are these: the shareholder value maximization approach is best characterized as a style of ethical and economic reasoning that is concerned with maximizing a desired *culmination* outcome within a welfarist paradigm. In this approach, *efficiency* is construed as Kaldor-Hicks efficiency. I have argued that the Kaldor-Hicks efficiency criterion does not scale beyond a well-defined political and juridical community; and so, this criterion is not operable in today's multinational and global corporate system; thus, it does not provide a sound normative basis for value maximization in a global context. Furthermore, in a global corporate system, maximizing shareholder value is not an adequate proxy for improving the lot of "all those who suffer" in the transnational and global economy. As with value maximization, the stakeholder approach is concerned with quantifiable outcomes that can be ranked and compared (e.g., earnings, stock prices, shareholder returns); however, the stakeholder approach differs in a very critical respect: it is *also* concerned about the processes and agencies involved in realizing those outcomes—it is concerned with Sen's multifaceted array of *comprehensive* outcomes. The stakeholder approach is directly amenable to concern with a broader range of values including the "dignity" of employees and respecting human rights.

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206. In 2012, the Business Roundtable's Principles of Corporate Governance described the "paramount" duty as one of optimization, rather than maximization:

> Corporations are often said to have obligations to shareholders and other constituencies, including employees, the communities in which they do business and government, *but these obligations are best viewed as part of the paramount duty to optimize long-term shareholder value*. Business Roundtable believes that shareholder value is enhanced when a corporation engages effectively with its long-term shareholders, treats its employees well, serves its customers well, fosters good relationships with and appropriately oversees its major suppliers, maintains an effective compliance program and strong corporate governance practices, and has a reputation for civic responsibility.

BUSINESS ROUNDTABLE, PRINCIPLES OF CORPORATE GOVERNANCE 2012, at 30 (2012) (emphasis added); *see id.* at 30–32.

207. Choper et al. argue that managers "satisfice" rather than maximize (they seek to satisfy the shareholders rather than maximize shareholder value). *See* JESSE H. CHOPER ET AL., CASES AND MATERIALS ON CORPORATIONS (6th ed., 2004).

As legal obligation or social expectation, shareholder value-maximization represents a powerful overarching norm in business culture around the world, but in recent years, it has begun to lose its luster. The problem with the shareholder primacy doctrine, as I see it, is this: if value maximization, or any of its close variants, is taken to be management's only rational and purposeful "objective function" (i.e., if it is regarded as a technical matter[208] in the style of a *compliance obligation*), this may lead managers to frame today's decision-dilemmas as zero-sum tradeoffs between value-seeking (maximizing the desired culmination outcome) and realizing other important values, such as environmental sustainability or corporate respect for human rights.[209] For the corporate decision maker steeped in the value-maximization credo, situations may arise when it may seem that the internally oriented expectation to maximize shareholder value (whether legally required or not) and the externally oriented demands of environmental sustainability, human rights, human dignity, and equity are in tension, if not outright conflict. Some will argue that the degree of tension depends, in part, on how we circumscribe the duty of corporate loyalty.[210] The precise contours of fiduciary loyalty vary from one jurisdiction to another—the extent to which managers may consider (or should consider) such values and their relevance to non-shareholders is much contested. The opponents of stakeholder theory frequently raise the specter of breach of fiduciary duty, while the proponents of the "New Paradigm" argue forcefully that the stakeholder approach is fully consistent with the corporate fiduciary duty of loyalty.[211] This Article provided a new lens for examining the

208. Rendtorff argues that in hierarchical organizations the "goal-rationality" of an organization is received by its staff as a "technical" matter; that is to say, "[t]he manager, investor, business leader, or public administrator" only follows orders and justifies his or her actions by reference to the *technical goal-rationality* of the organizational system and that "[t]he administrative obedience to realize the organizational aim becomes the central interest of the managers, investors or administrators of the organization." Jacob Dahl Rendtorff, *Risk Management, Banality of Evil and Moral Blindness in Organizations and Corporations*, *in* BUSINESS ETHICS AND RISK MANAGEMENT 45, 59 (Christoph Luetge & Johanna Jauernig eds., 2014).

209. Smith and Rönnegard note that the shareholder primacy norm is considered by some to be an "impediment" to corporate social responsibility: "The shareholder primacy norm . . . has been treated as a major obstacle to corporate social responsibility (CSR) because it is said to hinder managers from considering the interests of other corporate stakeholders besides shareholders." Smith & Rönnegard, *supra* note 28, at 463.

210. Referring to the reformed 2006 U.K. Company Act, Peter Muchlinski argues that "the 'enlightened shareholder value' model of corporate governance can allow for some room to make human rights oriented decisions provided that they do not weaken the success of the company." Muchlinski, *supra* note 172, at 166.

211. Lipton et al. argue:

> Delaware law does not enshrine a principle of shareholder primacy or preclude a board of directors from considering the interests of other stakeholders. Nor does the law of any other state. Although much attention has been given to the *Revlon* doctrine, which suggests that the board must attempt to achieve the highest value reasonably available to shareholders, that doctrine is narrowly limited to situations where the board has

long-running controversy over the demands of fiduciary duty. It makes clear that there can be no generalizable legal duty to maximize value because, except in the narrowest of circumstances, value maximization is too idealistic—it calls on decision makers to do something that they are, in the real world, unable to do. The stakeholder approach, on the other hand, is more down to earth and is more in accord with the natural plasticity and open textured aspects of the fiduciary duty concept.

It is critical to recognize that the problems and alternatives addressed in this Article have a multifaceted and systemic character. At the same time that outside pressures may cause decision makers to consider broader *comprehensive* outcomes for "people and planet," market forces push corporate decision makers towards prioritizing straightforwardly measurable *culmination* outcomes (e.g., stock prices) for the sole reason that to survive in the market, it is felt that one must conform to its manifestly *culmination*-oriented logic.[212] Managers are pulled in both directions at once: they may well believe that the long-run success of any business depends, in part, on the realization of broader *comprehensive* outcomes for workers and communities; and yet, in making decisions today they may be highly constrained by market pressures that place overwhelming emphasis on final *culmination* scores. A more fulsome treatment of the economic and social constraints on business decision makers is beyond the scope of this Article and must be left for another day.

The value maximization credo purports to purify the business decision maker's choice act of its ethical and political dimensions. But the purity that it offers is illusory. No politics-free maximizing allocations occur except in unspoiled hypothetical worlds where the constraints of morality and custom are un-controversially and fully satisfied before earnings are declared.[213] There is

> determined to sell control of the company and either all or a preponderant percentage of the consideration being paid is cash or the transaction will result in a controlling shareholder.

Martin Lipton et al., *Stakeholder Governance and the Fiduciary Duties of Directors*, HARV. L. SCH. FORUM CORP. GOVERNANCE (Aug. 24, 2019), https://corpgov.law.harvard.edu/2019/08/24/stakeholder-governance-and-the-fiduciary-duties-of-directors/.

212. In their corporate law casebook, Allen et al. write that "control contests, such as takeover bids, are profoundly unpleasant for incumbent managers. But for this very reason, the threat of a takeover has the salutary effect of encouraging all managers to deliver shareholder value." ALLEN ET AL., *supra* note 24, at 511. For the classic work on the competitive "market for corporate control," see Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965).

213. Jensen acknowledges that there are "those who argue the world is too complex to maximize anything." Jensen, *Value Maximization* 2002, *supra* note 39, at 247. Reflecting this sentiment, Damon A. Silvers argues that shareholder value-maximization is a "mirage"; he speaks of the "value maximization calculus" calling it a "fantasy—it cannot be done." In his view, maximization cannot be done because of failures in the predictive power of the firm as a "complex human institution," and that "as a going concern . . . the question [of value maximization] is so much about [ambivalent] time horizons." Columbia University, *2015 Millstein Governance Forum: The ALI Principles of Corporate Governance 2.01*, YOUTUBE (Feb. 8, 2016), https://www.youtube.com/watch?v=XnY2

no sense in which the manager-as-agent merely gives the principal-as-owner her due without the taint of ethics or politics; there is no decision-making space where a "maximal" allocation is available in its *merely technical* sense.[214] For the corporate decision maker, each unit of value that is allocated is as much an ethical property as an economic one.

In their August 2019 statement, the CEOs of Business Roundtable asserted that "[w]e *respect* the people in our communities and protect the environment by embracing sustainable practices across our businesses."[215] The economy, they say, should allow each person "to lead a life of meaning and dignity."[216] One ought not make too much of the words chosen for a press release, and yet, it's curious that the Business Roundtable's 2019 statement explicitly references the values of dignity and respect. Similarly, the "Davos Manifesto" of 2020 calls on companies to treat their people "with dignity and respect."[217] Do they mean to say that business decision makers, as a matter of fact, make noncomputational judgements between and among the distinct concerns of dignity and profit? Probably not. Nonetheless, one might reasonably ask why they were moved to highlight the values of dignity and respect when they could have avoided such terms altogether. Of course, actions speak louder than words. Their three-hundred-word statement did not indicate how their stakeholder-respecting goals should be realized. The world is still waiting to see what steps the CEO signatories will take to implement their stated commitment. At the present pace of change, the world's well of patience will soon be dry.

The notion of "human dignity" is widely thought to be the foundation that underlies human rights. The 2019 report of the Corporate Human Rights Benchmark shows that many of the firms run by the Business Roundtable's CEOs are failing the grade on the matter of corporate respect for human rights.[218] It remains to be seen whether these firms will move to embed the corporate responsibility to respect human rights into their global policy frameworks. They have good reason for doing so, if only to make good on their public pledge to treat all stakeholders with dignity.

3qXb1Ec (quoting a portion of lecture given by Damon A. Silvers, at 29:25–36:22). On the "cloak of science" in law and economics, Horwitz opines that "it is only a short time before the main attraction of efficiency analysis—the promise of a single 'scientific' right answer—will begin to fade into a quaint and nostalgic past." Horwitz, *supra* note 73, at 905.

214. I borrow the term "merely technical" from Duncan Kennedy. Kennedy writes: "In discussing technical issues, legal scholars make arguments, and these arguments 'resonate' with, or are homologous with, or are mutually re-enforcing vis-à-vis arguments in domains conventionally thought to be political rather than 'merely technical.'" Duncan Kennedy, *The Political Stakes in "Merely Technical" Issues of Contract Law*, 1 EURO. REV. PRIV. L. 7, 7 (2001).

215. *Business Roundtable*, *supra* note 2, at 4 (emphasis added).

216. *Id.* at 3.

217. Schwab, *supra* note 6, at 2.

218. *See* Jennifer Thompson, *Starbucks, Amazon and Costco Rapped for Weak Human Rights Disclosure*, FIN. TIMES (Nov. 14, 2019), https://www.ft.com/content/48c63846-9e6c-4898-bc73-8b4ce10b627c.

In their salvo aimed at discrediting "stakeholderism," Bebchuk and Tallarita express deep concerns over expanding the breadth of discretion given to business managers.[219] Their anxiety over expanded discretion is not unsurprising as it reflects the kind of nervousness over heterogeneity and incommensurability that so many normative economists feel. Nonetheless, this aspect of Bebchuk and Tallarita's critique is myopic. As Sen observes:

> [T]here is such a long tradition in parts of economics and political philosophy of treating one allegedly homogenous feature (such as income or utility) as the sole 'good thing' that could be effortlessly maximized (the more the merrier), that there is some nervousness in facing a problem of valuation involving heterogenous objects . . . .[220]

The business leader's motivation today for exercising discretion in one way or the other might be influenced by wider concerns than a rational self-interest model of behavior admits. The fact is that individual motivations can change and will change over time, and motivations can be very mixed, even contradictory. As Martin Lipton contends, we may well be living through a paradigm shift.[221] We may well have entered an era in which the exercise of managerial discretion in dealing with critical problems of "people and planet" over the next decade will be essential for human survival.

In describing shareholder value maximization as one of the "goals" of corporate law, Kraakman et al. include a pointed caveat: "[T]o say that shareholder value is the principal objective toward which corporations should be managed *is not to say that the corporation should maximize pecuniary profits regardless of the means employed*."[222] In a similar vein, Elhauge argues that "while shareholders expect profits and do not regard stock investments as tantamount to charitable contributions, they also do not expect unabashed profit seeking untempered by any sense of social responsibility."[223] In any business, the residual value that remains at the end the day for its investors depends directly on how all of a firm's relationships and multi-faceted obligations are attended to—from labor relations, to community relations, to government relations. As in private life, judgments about how to attend to such relationships and obligations are shaped by interests, convictions, cultural values, habits, and personal preferences.[224] I propose that we embrace the view that corporate

219. Bebchuk & Tallarita, *supra* note 8, at 60.

220. SEN, *supra* note 94, at 239.

221. *See* Lipton, *supra* note 12. On the movement to address problems of "people and planet" through a revival of corporate purpose, see generally MAYER, *supra* note 97.

222. KRAAKMAN ET AL., *supra* note 48, at 23 (emphasis added). Kraakman et al. point to corporate lobbying efforts to relax rules as one "unappealing implication of the unrestrained pursuit of profit . . . ." *Id.*

223. Elhauge, *supra* note 28, at 41.

224. Freeman concludes his reflection on stakeholder theory with the following words: "We cannot divorce the idea of a moral community or of a moral discourse from the ideas of value-creation activity of business. To do so, entails the acceptance of a principle, the Separation Thesis, which has for too long been used to close off discussion and to silence conversation." Freeman, *supra* note 52, at 419.

managers make *ethical and political choices* when they evaluate stakeholder tradeoffs and allocate each unit of value that the firm earns, invests, and expends. In the imperfect and uncertain non-Arcadian world that we actually live in, business decision makers neither maximize nor optimize but rather exercise non-computational reflective judgment while choosing among incompletely ranked options. This exercise sometimes comes down to "rough guesswork" or "gut instinct" about the best way forward. That does not make it irrational; it means that reasoned, though imperfect, judgments have to be made. To reiterate a point made earlier, this is precisely why we desire ways to select wise and virtuous people to run today's corporations and other institutions.

The proponents of value maximization are comfortable with counting shareholder value as a proxy for social welfare (an increase in shareholder value means that social welfare is up, and a decrease means that social welfare is down); yet they show aversion to the idea that managers make decisions that involve value judgments among and between concerns so distinct as profit, human dignity, economic inequality, environmental sustainability, and fundamental human rights. Stakeholder theorists are less nervous about the need to make judgments among and between a plurality of values. Stakeholder theory is more down to earth. In the decade ahead, we need managers who strive to make wise reflective judgments among such mixed distinct concerns; they must not be constrained in their role by the formalistic construct of "maximization." A world comprised of business decision makers who fixate on counting and scoring, and more counting and scoring, is not a purposeful one, nor is it a humane one.