2020

Companies as Commodities

Danielle D'Onfro
Washington University in St. Louis School of Law, donfro@wustl.edu

COMPANIES AS COMMODITIES

DANIELLE D'ONFRO*

ABSTRACT

Like copper, corn, or crude oil, companies increasingly trade like commodities. Some investors—certain holders of debt, activist shareholders, and controlling shareholders, especially private equity funds—are focused solely on returns. In practice, this means that they care about the fate of the companies in which they invest no more than they care about the fate of any tonne of copper, bushel of corn, or oil barrel they happen to trade. These investors are so immune to reputational concerns that they will even prefer that the companies in which they invest fail if failure maximizes their return on investment. This Article identifies and labels these going-concern-neutral ("GCN") investors. By virtue of their singular focus on return on investment, GCN investors are not bound by the same norms and relationships as other stakeholders in a company. This disconnect allows GCN investors to transfer an outsized share of company value to themselves. As a result, GCN investing typically increases the costs and risk faced by other stakeholders.

This Article then uses property theory to understand GCN investing and the conflicts in the use of company value that it creates. Although it is contested whether GCN investors are properly understood as true owners of firms and their assets, accepting that premise to leverage the tools of property theory leads to significant insights. Analyzing these investors' ownership claims through an exclusion framework reveals unseen nuances in the relationships between GCN investors and other stakeholders. Next, four property-law concepts—the right to destroy, waste, nuisance, and the tragedy of the commons—provide a rich source of analogies. These analogies reveal that the law has long used a number of so-called "governance rules" to manage property where there are several competing users. These rules restrict the rights of owners in order to address externalities and to promote welfare maximization. Although companies have been commoditized into mere property, the governance rules that restrict property ownership in other contexts do not yet apply to ownership of companies. It is time to consider interventions that would align the benefits and burdens of ownership of commoditized companies with ownership of other assets.

---

* Associate Professor of Law, Washington University in St. Louis. For helpful suggestions along the way, I thank Robert Anderson, Scott Baker, Molly Brady, John Brooks, Vince Buccola, Adrienne Davis, Jared Ellias, Daniel Epps, Alexander Platt, Bob Pollak, Nicholson Price, Peggie Smith, and Nancy Staudt, as well as participants at the Washington University Summer Workshop Series, Climenkofest at Harvard Law School, the 2019 University of Richmond Junior Faculty Forum, and the 2019 National Business Law Scholars Conference. I am grateful to Ryne Duffy, Priya Mistry, and Jayne Ratliff for excellent research assistance.

INTRODUCTION

Stick to sports.[1] That was the mandate that newly installed editorial director Paul Maidment gave to the writers of Deadspin,[2] a fourteen-year-old sports, culture, and humor website. The site's non-sports content allegedly outperformed the sports content,[3] but new owners had come with a new vision. That vision was narrower coverage and auto-playing, sound-on ads.[4] Never mind that reputable sites mostly abandoned such annoying advertising tactics a decade

1. Maxwell Tani, *G/O Media Tells Deadspin Staff in Leaked Memo: Stick to Sports*, DAILY BEAST (Oct. 28, 2019), https://www.thedailybeast.com/go-media-tells-deadspin-staff-in-leaked-memo-stick-to-sports?ref=scroll [https://perma.cc/JKJ5-PNJB].

2. *Id.*

3. Anthony Ha, *Deadspin Writers Quit After Being Ordered to Stick to Sports*, TECHCRUNCH (Oct. 30, 2019), http://social.techcrunch.com/2019/10/30/deadspin-exodus/ [https://perma.cc/MS8F-LWWB].

4. *Id.*

ago.[5] The site's writers balked, one was fired; and with no compromise in sight, the rest resigned en masse days later.[6] The writers resigned, notwithstanding a notoriously tough job market for journalists.[7] Within a week, Deadspin ceased posting new content for roughly five months.[8]

Deadspin might have been unlucky. Its former parent, Gawker Media, built its empire on high-risk publication choices. Its undoing was choosing to publish the leaked sex tape starring Terry Gene Bollea, better known as the professional wrestler Hulk Hogan. Bollea's successful lawsuit against Gawker Media pushed the company into bankruptcy. Univision purchased the defunct company's assets, including Deadspin, but later sold Gawker Media to a subsidiary of the private equity firm Great Hill Partners.[9]

From the outside, it looks like Great Hill Partners was disinterested in maintaining Deadspin as Deadspin. It wanted a greater stream of advertising revenue; if it could not have that, it preferred to all but close Deadspin rather than to maintain the product quality.[10] The issue was not that Deadspin was unprofitable, it was just not profitable enough for Great Hill Partners.

Deadspin's story is not unique. New York City's beloved Fairway Market recently filed for Chapter 11 protection for the second time since a private equity firm, Sterling Capital, purchased 80% of the business from the founding family.[11] The debt from that buyout persisted even after the company went public in 2013. To achieve growth after an initial public offering ("IPO"), the company attempted

---

5. Jason Koebler, *G/O Media Is Fighting Its Staff Over "Objectively Bad" Autoplay Ads*, VICE (Oct. 29, 2019), https://www.vice.com/en_us/article/9kevaa/go-media-is-fighting-its-staff-over-objectively-bad-autoplay-ads [https://perma.cc/2Z9Q-5TFK].

6. Ha, *supra* note 3.

7. *See* Michael Barthel, *5 Key Takeaways About the State of the News Media in 2018*, PEW RES. CTR. (Jul. 23, 2019), https://www.pewresearch.org/fact-tank/2019/07/23/key-takeaways-state-of-the-news-media-2018/ [https://perma.cc/YW5X-KTRE] (explaining the shift in advertising revenue away from publishers to platforms like Google and Facebook). The Columbia Journalism review estimates that 3,160 journalists were laid off in 2019. *The Layoff Tracker*, COLUMBIA JOURNALISM REV. (Dec. 17, 2019), https://www.cjr.org/analysis/journalism-layoff-tracker.php [https://perma.cc/7RQX-M7M6].

8. Justin Peters, *Deadspin* is a Bad Website*, SLATE (March 16, 2020), https://slate.com/culture/2020/03/new-deadspin-review-website-returns-kinda.html [https://perma.cc/F97L-Z2WZ].

9. Erik Wemple, *Deadspin is Ceasing to be Deadspin*, WASH. POST, October 30, 2019.

10. *See* Koebler, *supra* note 5 (quoting musicologist Paula Harper explaining that "[i]mplementing autoplaying video was construed not just as an annoyance, but as objectively bad internet practice" and 2008 Web Content Accessibility Guidelines explaining how automatically playing audio interferes with site accessibility).

11. Azi Paybarah, Andrea Salcedo, Matthew Haag & Amie Tsang, *Fairway Market Files for Bankruptcy Protection*, N.Y. TIMES, Jan. 22, 2020.

an aggressive expansion[12] in an expensive real estate market, right as competition increased in the industry.[13] The expansion was doomed to fail. When it did, its creditors, Goldman Sachs and the hedge fund Brigade Capital Management, became controlling shareholders in a debt-for-equity exchange in bankruptcy.[14] That deal apparently laid the groundwork for Fairway's most recent bankruptcy filing.[15]

Bankruptcy was also the fate of Toys-R-Us. A 2005 leveraged buy-out left the company nearly insolvent.[16] Post-buyout, its annual interest payments on its debt equaled 97% of its operating profit.[17] With this expense, it had little room to weather the recession, much less compete with Amazon.[18] Toys-R-Us closed all of its stores in 2018.[19]

Stories like these are not unique to private equity. Consider TWA: once a glamorous airline owned by Howard Hughes, it filed for bankruptcy three times and is now defunct. TWA's first problem was Howard Hughes, whose eccentric behavior, personal use of the airline's assets, and financial problems slowed the company's adoption of jets as the new technology redefined the industry.[20] Its second problem was deregulation, which injected new competition into the industry in

---

12. Matthew Haag et al., *Fairway Is So Crowded! How Can It Be in Bankruptcy?*, N.Y. TIMES (Jan. 23, 2020), https://www.nytimes.com/2020/01/23/nyregion/fairway-closing-bankruptcy.html [https://perma.cc/YPL9-PSAH].

13. Dymfke Kuijpers et al., *Reviving the Grocery Industry: Six Imperatives*, MCKINSEY & COMPANY 1, 3 Exhibit 1 (2018), https://www.mckinsey.com/~/media/McKinsey/Industries/Retail/Our%20Insights/Reviving%20grocery%20retail%20Six%20imperatives/Reviving-grocery-retail-Six-imperatives-vF.pdf [https://perma.cc/2XWD-VWAB].

14. Russell Redman, *Report: Fairway Market Readies Another Chapter 11 Filing*, SUPERMARKET NEWS (Jan. 6, 2020), https://www.supermarketnews.com/retail-financial/report-fairway-market-readies-another-chapter-11-filing [https://perma.cc/B8RF-5NG5].

15. *Id.*

16. "The day of reckoning may have been delayed through a $7.5 billion leveraged buyout in 2005 by private investors Bain Capital Partners, Kohlberg Kravis Roberts and Vornado Realty Trust." *What Went Wrong: The Demise of Toys R* Us, KNOWLEDGE@WHARTON (Mar. 14, 2018), https://knowledge.wharton.upenn.edu/article/the-demise-of-toys-r-us/ [https://perma.cc/XNY2-D9ZG] [hereinafter *What Went Wrong*].

17. Bryce Covert, *The Demise of Toys "R" Us Is a Warning*, ATLANTIC (July 2018), https://www.theatlantic.com/magazine/archive/2018/07/toys-r-us-bankruptcy-private-equity/561758/ [https://perma.cc/2L4L-G2NY] (last visited Sep. 20, 2020).

18. *Id.*; Chris Isidore, *Amazon Didn't Kill Toys "R" Us. Here's What Did*, CNN BUS. (Mar. 15, 2018), https://money.cnn.com/2018/03/15/news/companies/toys-r-us-closing-blame/index.html [https://perma.cc/83DW-7JZC]; Greg Satell, *Toys 'R' Us Might be Dying, but Physical Retail Isn't*, HARV. BUS. REV. (Sept. 20, 2017), https://hbr.org/2017/09/toys-r-us-is-dead-but-physical-retail-isnt [https://perma.cc/8ZRQ-MJSP]; *What Went Wrong supra* note 16.

19. Chris Isidore, *Toys 'R' Us Will Close for Good This Week,* CNN BUS. (June 25, 2018), https://money.cnn.com/2018/06/25/news/companies/toys-r-us-store-closings/index.html [https://perma.cc/Z2W9-VNXC].

20. Elaine X. Grant, *TWA—Death of A Legend*, ST. LOUIS MAG. (Jul. 28, 2006), https://www.stlmag.com/TWA-Death-Of-A-Legend/ [https://perma.cc/WXB3-PLHK].

1978. But its fate was not sealed until Carl Icahn amassed 20% of the company's stock in 1985. Icahn took TWA private, putting $540 million in debt on the company in the process.[21] He then sold the company's London routes even though European laws prevented it from shedding many of its European employees and other fixed costs.[22] By 1993, TWA was reorganizing in bankruptcy, but when it emerged it still owed Icahn $190 million. Unable to pay that debt, TWA sold Icahn the right to purchase tickets connecting through its St. Louis hub at a discount for eight years and resell them online. With this deal, TWA was now competing with Icahn over the price of its own tickets. The deal blocked TWA from setting its own prices on routes covered by the contract. TWA filed for bankruptcy for the second time not long thereafter. Although it reorganized, the ticket contract, high labor costs, and later, the Flight 800 tragedy continued to hobble the company.[23] As the dot-com bubble burst and business travel cratered, TWA agreed to sell most of its assets to American Airlines and liquidate the rest in its third bankruptcy proceeding. The airline could not survive long enough to regain control over its ticket prices.

Deadspin, Fairway, Toys-R-Us, and TWA all failed in times of significant secular challenges in their industry. Their challenges are part of what made them attractive investment opportunities for new owners. But rather than navigate these companies to safer shores, these owners transferred value from the company to themselves then left the companies adrift.

Under the orthodoxy of shareholder primacy, this is as it should be: companies are run for the benefit of the shareholders and shareholders alone.[24] There is a lot to like about this model. It allows investors to put their resources to the highest and best use by encouraging them to harvest the company's value before it spoils in the field.[25] And yet, stories like these make corporate law look like a vehicle for

21. *Id.*

22. *Id.*

23. Michael McCarthy & Susan Carey, *Sudden Tragedy Shakes TWA at a Time of Seeming Recovery*, WALL ST. J. (July 19, 1996), https://www.wsj.com/articles/SB837751425594307000 [https://perma.cc/W64L-P6U9].

24. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG. (Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html [https://perma.cc/H4KU-PRYZ].

25. *See* Peter Coy, *A New Menace to the Economy*, BUS. WEEK, Jan. 29, 2009, at 24-26 (explaining that zombie companies—those that can afford to pay their debts but not make investments—consume resources that would be better deployed elsewhere thereby stunting the overall economy); Hugh Pym, *"Zombie" Companies Eating Economic Growth*, BBC (Nov. 13, 2012), https://www.bbc.com/news/business-20262282 [https://perma.cc/8VWM-G23L] (same); *but see* Marcin Jaskowski, *Should Zombie Lending Always Be Prevented?*, 40 INT'L REV. ECON. FIN. 191, 191-92 (2015) (arguing that in some cases, allowing banks to prop up otherwise insolvent firms may be economically rational).

transferring value from stakeholders broadly to shareholders.[26] In this model, it is good to be an owner, and risky to be any other stakeholder.[27]

For the investors in these stories, the companies themselves are commodities.[28] To them, the success or failure of any particular business in their portfolio is secondary to their return. These investors are so focused on their return that they often make companies' balance sheets too fragile to weather the normal bumps and bruises of business. That their choices may harm other stakeholders is immaterial to them. For convenience, I call this investing strategy going-concern-neutral ("GCN") investing. From the GCN investors' points of view, it matters little that the content of their portfolio is other companies rather than real property or commodities.

I distinguish GCN investors to highlight how they are immune to the norms and relationships that typically inform owners'[29] use of company value. Typically, investors care about their reputation and standing in the community. These concerns necessitate that investors care about their companies' relationships with their stakeholders such as their workers, vendors, customers, and even local government. Are they positive actors in the community? Good places to work? Innovators? To be sure, investors working under traditional norms prefer—and indeed most require—that their investments be profitable. But these investors weigh profitability against other values

26. This Article uses the term "shareholder" generically to mean any equity holder. Similarly, "corporate law" refers to the state law governing business association in general.

27. This Article uses the term "stakeholder" to include all parties that have an interest in a business who are not traditional financing partners. "Stakeholders" therefore includes workers, vendors, customers, and the communities within which businesses operate. Kent Greenfield has argued, and I tend to agree, that many of these parties, especially the communities that provide the infrastructure essential to the business, are properly considered investors. Kent Greenfield, *Defending Stakeholder Governance*, 58 CASE W. RES. L. REV. 1043, 1043 (2008); *see also* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 253 (1999) (explaining that investors include all individuals and entities that make material contributions to a company's success and the subsequent holders of rights received in exchange for those contributions).

28. *See* Christoph Scheuplein, *Private Equity as a Commodification of Companies: The Case of the German Automotive Supply Industry*, 22 J. ECON. POL'Y REFORM 1, 9-11 (2019) (describing how a series of financial takeovers divorced the German automotive industry from its regional ties and disenfranchised its employees).

29. While I describe both corporate equity interests and some debt interests as property, this Article does not require the reader to accept that these interests are property interests full stop. It is enough for these interests to be property-like interests and for courts to have accepted them as property. *See* Malone v. Brincat, 722 A.2d 5, 9 (Del. 1993) ("The board of directors has the legal responsibility to manage the business of a corporation for the benefit of its shareholder owners."); *see also* Julian Velasco, *Shareholder Ownership and Primacy*, 2010 U. ILL. L. REV. 897, 899 (2010) (explaining that "[i]t would take a major reconceptualization of the nature of the corporation to displace shareholders as owners").

I have previously written about how one kind of investor, secured creditors, enjoys strong property rights while avoiding the liabilities that typically follow those rights. *See generally* Danielle D'Onfro, *Limited Liability Property*, 39 CARDOZO L. REV. 1365 (2018). This Article expands on that project and looks at investors broadly.

differently than investors for whom any particular company is a mere asset.

Our present framework for thinking about corporate law's treatment of companies with GCN investors puts them in a private-law fantasyland. On the one hand, they are persons, capable of using contract to privately arrange their relationships with other stakeholders while on the other, they are commodities incapable of caring about relationships and contracts. The rub is that the company is so much more than a commodity for most other stakeholders.

As the casualties have mounted, concern has grown that private equity and its kin may be harming the average American.[30] Media's coverage of private equity's role in the economy has tended to be negative.[31] Business journalism talks openly about how some owners, like private equity companies, are more profit-focused than others. For example, Inc. warns founders thinking of selling to private equity that private equity companies will "kill your company's sacred cows early on," "sweat your assets," and "pay themselves special distributions," all after leveraging the company.[32]

---

30. *See, e.g.*, Covert, *supra* note 17 (arguing that private equity has increased business failure in the retail sector by limiting companies' flexibility); Frank Partnoy, *The Death of the IPO*, ATLANTIC (Nov. 2018), https://www.theatlantic.com/magazine/archive/2018/11/private-inequity/570808/ [https://perma.cc/MDD6-JC5L] (arguing that private equity is crowding out IPOs and therefore limiting investment options for small investors); Michael Corkery & Ben Protess, *How the Twinkie Made the Superrich Even Richer*, N.Y. TIMES (Dec. 10, 2016), https://www.nytimes.com/2016/12/10/business/dealbook/how-the-twinkie-made-the-super-rich-even-richer.html [https://perma.cc/5535-MHSC] (explaining how Apollo Global Management and Metropoulos & Company cut costs and reduced salaries while increasing the owners' returns). Private equity is also blamed for raising the cost of healthcare and spikes in the costs of emergency services. *See* Lovisa Gustafsson et al., *The Role of Private Equity in Driving Up Health Care Prices*, HARV. BUS. REV. (Oct. 29, 2019), https://hbr.org/2019/10/the-role-of-private-equity-in-driving-up-health-care-prices [https://perma.cc/XQ37-7QR6]; *see also* Danielle Ivory et al., *When You Dial 911 and Wall Street Answers*, N.Y. TIMES (Jun. 25, 2016), https://www.nytimes.com/2016/06/26/business/dealbook/when-you-dial-911-and-wall-street-answers.html [https://perma.cc/8N9N-D436]. On their podcast, Kate Waldock and Luigi Zingales have suggested that private equity goes through cycles of being perceived as evil and being cool. *Capitalisn't*: *Is Elizabeth Warren Right about Private Equity?*, CHI. BOOTH REV. (Nov. 7, 2019), https://review.chicagobooth.edu/public-policy/2019/article/capitalisn-t-elizabeth-warren-right-about-private-equity [https://perma.cc/GSW7-2WEC].

31. *See* David Dayen, *Private Equity: Looting "R" Us*, THE AM. PROSPECT (Mar. 20, 2018), https://prospect.org/economy/private-equity-looting-r-us/ [https://perma.cc/N69J-ZFU9]; Neil Irwin, *How Private Equity Buried Payless*, N.Y. TIMES (Jan. 31, 2020), https://www.nytimes.com/2020/01/31/upshot/payless-private-equity-capitalism.html [https://perma.cc/YT9K-UUTU]; Abha Bhattarai, *Private Equity's Role in Retail Has Killed 1.3 Million Jobs, Study Says*, WASH. POST (Jul. 24, 2019), https://www.washingtonpost.com/business/2019/07/24/private-equitys-role-retail-has-decimated-million-jobs-study-says/ [https://perma.cc/C59A-GFY7].

32. Jim Schleckser, *6 Things a Private Equity Firm Will Do After They Buy Your Business*, INC. (Oct. 16, 2018), https://www.inc.com/jim-schleckser/the-6-things-a-private-equity-firm-will-do-after-they-buy-your-business.html [https://perma.cc/LKQ2-57MA].

There is also renewed academic interest in reforming corporate law to better align with notions of economic justice.[33] One of the most developed veins of reform is stakeholder theory, which proposes that the law require directors and managers to consider the interests of non-shareholders. Its main weakness is definitional: who is a stakeholder? Even if we can identify stakeholders, how do we identify their interests and then choose which of those interests to prioritize? And finally, if a company does identify interests to consider, what does it look like to consider those interests? After nearly a century of commentary, there is no consensus.[34]

This Article takes a different approach and makes two contributions to the literature in the process. First, I start from the perspective of company owners to identify and explain the pattern of GCN investing. This approach differs from the stakeholder theory literature in that it centers an easily identified group—owners—in lieu of the more difficultly defined stakeholders. Although related, my approach also differs from a separate thread of prior commentary on short-term investors.[35] My analysis reveals that investors' time-horizons are less relevant than their disposition towards companies as going concerns. My goal with the concept of GCN investing is to offer a more comprehensive picture of the investing landscape. This bigger picture reveals a pattern of commodifying companies.

In this commodification process, the GCN investors subject the company to more intense use. For example, where ordinary investors previously harvest only surplus from the company, a GCN investor may not hesitate to consume the corpus of the company as well. This

33. *See* Jeff Schwartz, *De Facto Shareholder Primacy*, 79 MD. L. REV. 652, 696-97 (2020); Asaf Raz, *A Purpose-Based Theory of Corporate Law* (Working Paper, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3406942 [https://perma.cc/SL8E-8474]. *See generally* Tamara Belinfanti & Lynn Stout, *Contested Visions: The Value of Systems Theory for Corporate Law*, 166 U. PA. L. REV. 579 (2018); J. Haskell Murray, *Adopting Stakeholder Advisory Boards*, 54 AM. BUS. L.J. 61, 77 (2017).

34. *See infra* Part II.

35. *See* Jeremy Stein, *Efficient Capital Markets, Inefficient Firms: A Model of Myopic Corporate Behavior*, 104 Q.J. ECON. 655, 656 (1989) (explaining how "managers are 'trapped' into behaving myopically"); Frank Gigler et al., *How Frequent Financial Reporting Can Cause Managerial Short-Termism: An Analysis of the Costs and Benefits of Increasing Reporting Frequency*, 52 J. ACCT. RES. 357, 358 (2014) (finding that "the price pressure created by high reporting frequency induces managers to adopt a short-term perspective (myopia) in choosing the firm's investments"); Kent Greenfield, *The Puzzle of Short-Termism*, 46 WAKE FOREST L. REV. 627, 628-29 (2011) (explaining that short-termism causes managers not only to externalize costs onto other stakeholders, but also onto future shareholders and arguing that this short-termism should be a "central worry" about the sustainability of corporations); *but see* Mark J. Roe, *Stock Market Short-Termism's Impact*, 167 U. PA. L. REV. 71, 105 (2018) (questioning the narrative that managerial short-termism harms companies in the long term and suggesting that weakened competition is weakening R&D expenditures); Nickolay Gantchev, *The Costs of Shareholder Activism: Evidence from a Sequential Decision Model*, 107 J. FIN. ECON. 610, 621 (2013) (showing that while hedge-funds are maligned as short-term investors, those that engage in shareholder activism often have few short-term holdings).

intensification puts the GCN investors' use of companies in conflict with the uses of other stakeholders.

This Article's second contribution is to analogize this conflict to the classic property-law problem of conflicting uses. Property is an ideal point of departure for two reasons: First, property is inherently relational.[36] When property law recognizes one party as an owner, it imposes obligations on other parties—usually, stay out![37] Property law starts with a thing.[38] Then, as needed it identifies and doles out uses of that thing. [39] As it defines uses, it does not hesitate to allow those uses to overlap. For example, a tract of land might be used for grazing and foraging, all while hosting a public hiking trail. Each of those uses might belong to a different user who may or may not be an owner. Where overlapping uses lead to conflict, the private law defines use-

36. This account tracks Blackstone's conception of property as "sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 WILLIAM BLACKSTONE, COMMENTARIES *3. But the meaning of property has long been malleable to the present needs of society. PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 1 (Crawford Brough Macpherson ed. 1978) ("The meaning of property is not constant. The actual institution, and the way people see it, and hence the meaning they give to the word, all change over time."). The trend has long been away from property rights as platonic shadows existing in isolation towards a way of describing the relationships between people and the things they hold dear. *See* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1904 (1987) (theorizing which property is non-saleable from with an eye to human flourishing instead of economic efficiency and explaining that "connections between the person and her environment are integral to personhood"); Joseph William Singer, *The Reliance Interest in Property*, 40 STAN L. REV. 611, 621 (1988) (explaining how the private law already recognizes how certain relationships can create property rights); *Distributive Liberty: A Relational Model of Freedom, Coercion, and Property Law Notes*, 107 HARV. L. REV. 859, 861-67 (1994) (arguing that "[r]elationality rejects separateness as the state of human being. It expands Coasean reciprocal causation to all human choices, so that no choice is free-standing.").

37. *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30 (1913) (theorizing the connection between obligations on third parties that attend any claim to right); *see also* Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 731-32 (1998) ("[N]early everyone agrees that the institution of property is not concerned with scarce resources themselves ('things'), but rather with the rights of persons with respect to such resources."). No such consensus exists about the role of exclusion in the institution of property. *Compare* Int'l News Serv. v. Associated Press, 248 U.S. 215, 246 (1918) (Holmes, J., concurring) ("Property depends upon exclusion by law from interference . . . ."); Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (explaining that "one of the most essential sticks in the bundle of rights that are commonly characterized as property . . . [is] the right to exclude others"); Philip Morris v. Reilly, 312 F.3d 24, 51 (1st Cir. 2002) (Selya, J., concurring) (explaining that the value of a property right "is inextricably tied to both the demand of others for access and the legal enforceability of the owner's right to exclude" such that government action impairing the right to exclude requires just compensation), *with* State v. Shack, 277 A.2d 369, 374 (1971) (abridging a land owner's right to exclude in order to give workers on that land access to aid).

38. This statement is a semi-heretical departure from the property-as-a-bundle-of-rights regime that has reigned in recent decades but is accurate both historically and as a statement of how people conceive of property outside the academy. *See* Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics*, 111 YALE L.J. 357, 359 (2001); Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 976 (2004).

39. Smith, *supra* note 38, at 978.

specific governance rules to resolve those conflicts.[40] So in the example above, if sheep spoil the hiking trail, the sheep's owners might be liable in nuisance lest they contain their sheep.

This Article conceives of investments as one of several uses of company value. This use is distinct from other uses associated with operating the company such as research and design. For example, in a company with a lot of cash like Apple, one use of the cash is to return it to shareholders, another is to invest in research and design, and a third would be to distribute it to workers as increased compensation. The options are almost limitless. Some of these uses overlap—giving engineers a raise might produce better technology—while others, like returning value to shareholders, conflict with other uses. A dollar spent in a dividend is a dollar not invested in the going concern. For the most part, corporations law empowers shareholders where there is a conflict among users of company value since they are the only user group that has a non-contractual right to that value. While laudable in its simplicity, this view of private law rights is anemic. The private law has a richer set of governance rules for resolving these conflicts. Although not traditionally applied to companies, these governance rules suggest ways to mitigate some of the social costs of GCN investing.

The second reason to look to property is that property provides the most coherent foundation for shareholder primacy and shareholder wealth maximization doctrine. Looking at how property rights tend to concentrate company value in a small group of investors reveals that GCN investors, not shareholder primacy, are the main culprit.

This Article proceeds in four parts. Part I begins by briefly tracing the tug-of-war between stakeholder theory and shareholder primacy to highlight existing gaps in our understanding of the relationship between financial investors and other stakeholders. Part II then identifies how GCN investing commoditizes companies, putting investors' uses of the company in conflict with other stakeholders' uses. Part III turns to four property analogies—the right to destroy, waste, nuisance, and the tragedy of the commons—to explore these conflicting uses and the governance rules that might mitigate them. These analogies offer a menu of new options for reigning in GCN investors' ability to extract value from companies at the expense of other stakeholders. Part IV sketches these potential interventions, ranging from fully private to fully public options. It is my hope that these sketches prompt future research.

---

40. *Id.* at 976. Although the focus here is property rights, some of the doctrine discussed technically belongs to torts. Nevertheless, because some torts, like nuisance, act on property, they are fair game here.

I. STAKEHOLDER THEORY AND SHAREHOLDER PRIMACY

This Part sets up the existing theoretical frameworks for thinking about company decision-making and the distribution of company value. That is, for whom should a company operate? Section A explores the intuitive appeal of stakeholder theory but ultimately concludes that definitional uncertainty will limit its utility as a theory of corporate law. Section B then turns to shareholder primacy and roots it in a property-focused understanding of companies.

A. Unanswerable Questions

In response to some of the more egregious examples of shareholders transferring a company's value from diverse stakeholders to themselves, reformers of all stripes have called for a reconsideration of the purpose of companies.[41] Before she announced her bid for the Democratic presidential nomination, Senator Elizabeth Warren accelerated the debate with her Accountable Capitalism Act.[42] In an opinion piece accompanying the act, Warren claims that businesses historically considered their stakeholders, including their community at large, in their decisions.[43] She tells a story about how companies traded that broad focus for shareholder primacy, noting how in 1981 the Business Roundtable, a group comprised of CEOs, "stated that corporations 'have a responsibility, first of all, to make available to the public quality goods and services at fair prices, thereby earning a profit that attracts investment to continue and enhance the enterprise, provide jobs, and build the economy.'"[44] By 1997, she explains, "the Business Roundtable declared that the 'principal objective of a business enterprise is to generate economic returns to its owners.'"[45] Her bill rejects this shift to shareholder primacy with a new federal charter for corporations with revenues over one billion dollars, representation for workers on boards of directors, and a requirement that management hold their equity compensation for at least five years.[46]

---

41. Kent Greenfield described the debate between shareholder primacy and stakeholder theory as the "divide between the Red Sox and the Yankees" of corporate governance scholars. Kent Greenfield, *The Rise of the Working Class Shareholder: An Application, an Extension, and a Challenge*, 99 B.U. L. REV. 303, 304 (2019). Despite disagreement among academics, curbing shareholder primacy polls well among voters of all stripes. Matthew Yglesias, *Elizabeth Warren Has a Plan to Save Capitalism*, VOX (Aug. 15, 2018), https://www.vox.com/2018/8/15/17683022/elizabeth-warren-accountable-capitalism-corporations [https://perma.cc/3HE8-NKLY].

42. *See generally* Accountable Capitalism Act, S. 3348, 115th Cong. (2018).

43. Elizabeth Warren, Opinion, *Companies Shouldn't Be Accountable Only to Shareholders*, WALL ST. J. (Aug. 14, 2018), https://www.wsj.com/articles/companies-shouldnt-be-accountable-only-to-shareholders-1534287687 [https://perma.cc/6QB4-WK65].

44. *Id.*

45. *Id.*

46. Accountable Capitalism Act, S. 3348, 115th Cong. §§ 4, 6-7 (2018).

As if on cue, the Business Roundtable released a new Statement on the Purpose of Corporations in 2019. One hundred eighty-one CEOs, including giants from diverse industries like Amazon, Comcast, JP Morgan, PwC and Raytheon signed on to this new vision.[47] Although this Statement received much fanfare, it never became more than words on a page. A year later and there were few signs that the Statement's signatories intended to make changes to their handling of company value. Still, the Statement is a window into what business leaders believed was politically expedient at the time. Like Warren's proposal, the Statement departs from shareholder primacy in favor of corporations considering the interests of a broader group of stakeholders.[48]

Pressure to move beyond shareholder primacy grew on all sides. The largest institutional investors are pressuring companies to articulate a purpose beyond shareholder wealth maximization.[49] Similarly, a new crop of academic activism[50] and commentary is rethinking the shareholder primacy model.[51]

Despite all of the attention, there is reason to be skeptical that this renewed focus on stakeholders will produce change. This is not the first time that reformers have promoted stakeholder theory in response to the harsh realities of traditional corporate law. Berle and Dodd famously debated the purpose of the corporation in the 1930s.[52] In the mid-1980s, several states passed so-called "stakeholder" statutes that proposed a new model of corporate governance that was ostensibly more inclusive than the shareholder primacy model. [53]

---

47. *Id.*

48. Press Release, Bus. Roundtable, Statement on the Purpose of a Corporation (Aug. 19, 2019), https://opportunity.businessroundtable.org/wp-content/uploads/2020/08/BRT-Statement-on-the-Purpose-of-a-Corporation-August-2020-1.pdf [HTTPS://PERMA.CC/JKD7-PXCP].

49. *See* Gillian Tett, *In the Vanguard: Fund Giants Urge CEOs to Be 'Force for Good,'* FIN. TIMES. (Feb. 1, 2018), https://www.ft.com/content/a28203d8-067d-11e8-9650-9c0ad2d7c5b5 [https://perma.cc/EQA9-JUZD]; Richard Henderson et al., *BlackRock Shakes up Business to Focus on Sustainable Investing*, FIN. TIMES (Jan. 14, 2020), https://www.ft.com/content/57db9dc2-3690-11ea-a6d3-9a26f8c3cba4 [https://perma.cc/M4B4-MEVB]; *see also* Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1401 (2020).

50. *See* Andrew Edgecliffe-Johnson, *Companies under Pressure to Declare 'Social Purpose,'* FIN. TIMES (Aug. 22, 2019), https://www.ft.com/content/7ba44ea8-c4f7-11e9-a8e9-296ca66511c9 [https://perma.cc/G7M3-5W3H] (describing an effort by Oxford university's Saïd Business School, Berkeley law school, and Hermes EOS to encourage "company directors to provide a one-page 'statement of purpose,' detailing the most important stakeholders and timeframes for evaluating strategy and how capital is spent").

51. *See supra*, note 33.

52. *See generally* A.A. Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931); E. Merrick Dodd Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1148-49 (1932).

53. *See* Roberta S. Karmel, *Implications of the Stakeholder Model*, 61 GEO. WASH. L. REV. 1156, 1157 (1993); Eric W. Orts, *Beyond Shareholders: Interpreting Corporate*

Contemporaneous academic commentary[54] and even the Business Roundtable[55] called for including the interests of other stakeholders in corporate governance. Little has changed.

Commitments to delivering value to stakeholders broadly have always been hollow. The Business Roundtable's 2019 Statement is no different. Although it purported to announce a significant policy change, Lucian Bebchuk and Roberto Tallarita found that only a tiny fraction of the signatories consulted their company's board of directors before signing.[56] Bebchuk and Tallarita explain that "[t]he most plausible explanation for the lack of board approval is that CEOs didn't regard the statement as a commitment to make a major change in how their companies treat stakeholders."[57] In other words, even the strongest-sounding commitments to stakeholders struggle to find meaning on the ground.

Any focus on stakeholders quickly runs into four problems: identifying the stakeholders, identifying those stakeholders' preferences, determining which (if any) of those preferences matter, and, finally, determining the process by which companies should consider these preferences. The lack of consensus on these questions is well documented.[58]

Turning first to the issue of who the stakeholders are, there are three broad categories of definitions,[59] but almost unlimited variation

---

Constituency Statutes, 61 GEO. WASH. L. REV. 14, 20-26 (1992). In response to a spate of corporate scandals, the U.K. arguably codified stakeholder theory in section 172 of the Companies Act of 2006, which compels directors to "have regard" for several factors beyond the interests of shareholders. Companies Act 2006, c. 46, § 172(1) (Eng.); *see also* Jessica A. Clarke, *Identity and Form*, 103 CALIF. L. REV. 747, 772-77 (2015) (explaining the debates leading up to the adoption of section 172); Georgina Tsagas, *Section 172 of the UK Companies Act 2006: Desperate Times Call for Soft Law Measures*, OXFORD BUS. L. BLOG (Sept. 1, 2017), https://www.law.ox.ac.uk/business-law-blog/blog/2017/09/section-172-uk-companies-act-2006-desperate-times-call-soft-law [https://perma.cc/ZFC7-PJX5] (explaining the motivations for section 172 and questioning whether the statute ever had the teeth to accomplish its goals).

54. *See* R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH 25-26 (1984).

55. Press Release, Bus. Roundtable, Statement on the Purpose of a Corporation (1981), http://www.ralphgomory.com/wp-content/uploads/2018/05/1981-Business-Roundtable-Statement-on-Corporate-Responsibility-11.pdf [https://perma.cc/L7JZ-UFNP].

56. *See* Lucian Bebchuk & Roberto Tallarita, *'Stakeholder' Capitalism Seems Mostly for Show*, WALL ST. J. (Aug. 6, 2020), https://www.wsj.com/articles/stakeholder-capitalism-seems-mostly-for-show-11596755220 [https://perma.cc/8K8S-MHAB].

57. *See id.*

58. *See* James Mackintosh, *In Stakeholder Capitalism, Shareholders Are Still King*, WALL ST. J. (Jan. 19, 2020), https://www.wsj.com/articles/in-stakeholder-capitalism-shareholders-are-still-king-11579462427 [https://perma.cc/WP6V-BUHP].

59. *See* John Kaler, *Morality and Strategy in Stakeholder Identification*, 39 J. BUS. ETHICS 91, 91 (2002) (categorizing theories as "claimant," "influencer," or a combination of the two).

in the literature. [60] Under "claimant" theory, stakeholders are those individuals or groups for whom the company is responsible. This view is contractarian, recognizing only a narrow pool of stakeholders that tracks the parties that the law would recognize as potentially having a specific claim against a company.[61] Claimants need not have traditional ownership interests over the firm's assets, but they may.[62] Under this framework, the focus is on whether the relationship between the parties is legitimate.[63]

By contrast, under "influencer" theory, stakeholders are those that the company must take account of but is not strictly responsible to.[64] The focus of this definition is on the power dynamic between the company and the would-be stakeholder.[65] Here, stakeholders are parties who can influence or are influenced by the company.[66]

The final category of definitions looks to both the legitimacy of the relationship between the parties and the power between them. These definitions tend to view the ability to influence a company as a necessary condition for having a claim.[67] For example, Yves Fassin adds reciprocity of influence to his definition, limiting it to "genuine stakeholders with a legitimate stake, the loyal partners who strive for mutual benefits."[68] In his framework, parties necessarily have a long-term interest in the company's wellbeing.[69]

Even if we can reach a coherent definition of who stakeholders are, we still face the task of identifying their preferences. With respect to any business decision, diverse stakeholders may have as many different opinions as there are stakeholders. Some of these preferences are bound to be mutually exclusive: for example, workers negotiating

---

60. *See* Ronald K. Mitchell et al., *Toward a Theory of Stakeholder Identification and Salience: Defining the Principle of Who and What Really Counts*, 22 ACAD. MGMT. REV. 853, 858 (1997) (cataloging over 20 competing definitions in the literature between 1963 and 1997); Yves Fassin, *Stakeholder Management, Reciprocity and Stakeholder Responsibility*, 109 J. BUS. ETHICS 83, 86 (2012) (cataloguing additional definitions of "stakeholder").

61. *See* Kaler, *supra* note 59, at 93 (explaining that one limit of the claimant model is that neither the law nor morality requires much self-sacrifice for the benefit of others); *see also* Kaler, *supra* note 59, at 94 (arguing that the claim that a stakeholder has must be role specific and not a general claim that one has against all other actors such as a right not to be murdered).

62. *Id.* at 94.

63. Mitchell et al., *supra* note 60, at 859.

64. Kaler, *supra* note 59, at 91.

65. Mitchell et al., *supra* note 60, at 859.

66. FREEMAN, *supra* note 54, at 46.

67. Kaler, *supra* note 59, at 92.

68. Fassin, *supra* note 60, at 83.

69. *Id.* at 84. *See also* Boris Holzer, *Turning Stakeseekers Into Stakeholders: A Political Coalition Perspective on the Politics of Stakeholder Influence*, 47 BUS. SOC. 50, 56 (2008) (describing companies' struggle with certain social movement organizations).

for healthcare coverage will have different preferences than contractors whose work may be reduced to cover those healthcare costs.

Further complicating the picture is that stakeholders' preferences can and do change over time. Moreover, merely identifying stakeholder preferences at one point in time entails considerable information costs. Nevertheless, to give their commitment to stakeholders any semblance of legitimacy, companies would have to iterate this information gathering process.

The next issue is determining which stakeholders' preferences matter. Even if stakeholders can be made to reveal their own preferences, there is no guarantee that those with the strongest, or most legitimate, claims will be heard over the din of competing interests. To function at all, a company must pick and choose which preferences it will favor in any decision. Ronald K. Mitchell, Bradley R. Agle and Donna J. Wood call this analysis "stakeholder salience," which is "the degree to which managers give priority to competing stakeholder claims."[70] They identify power, legitimacy, and urgency as the key factors that determine which stakeholders' preferences company management will consider in any decision.[71] All three considerations are variable over time as relationships and social expectations change,[72] but the modern media climate might make power and urgency more volatile and more closely knit together. Although legitimacy is itself a social construct, it might be the most objective of the criteria that determine which stakeholders' interests are salient. Legitimacy turns in part on an analysis of the stakeholders' underlying legal interests, even if these interests are not full-fledged legal claims in our present system.[73]

The final question for proponents of stakeholder theory is how, as a practical matter, companies are supposed to consider stakeholders. The Wall Street Journal recently noted the lack of consensus on this front, writing that World Economic Forum founder Klaus Schwab proposed "a (voluntary) trade-off between shareholders and other interests, managed by a CEO trusted to run the company in the interest of society, whether or not that makes for higher profits and share prices" while the Business Roundtable's grand statement on the purpose of the corporation merely called for "paying attention to

70. Mitchell et al., *supra* note 60, at 854.

71. *Id.* at 855, 869.

72. *Id.* at 870.

73. Separating legal interests from legal claims is essential at this junction because many valid legal interests will not give rise to legal claims under modern rules of procedure or other doctrinal considerations such as standing.

stakeholders because it is an essential part of making money for shareholders in the long run."[74]

Where stakeholder theory raises several unanswerable questions, shareholder primacy stands as a tidy alternative. Recent scholarship highlighting the diversity of interests among shareholders should complicate this view.[75] But from the perspective of policy makers and many managers, it is likely easier to let shareholders duke it out among themselves than to amend corporate law to identify stakeholders and tell companies how to consider their interests. In sum, while attractive from a fairness and social justice perspective, stakeholder theory is unlikely to offer a viable alternative to shareholder primacy.

B. To Own a Company

Stakeholder theory tends to collide with the question of what property is and, more specifically, who "owns" a company. If shareholders are the sole owners of a company, then they might expect the kinds of broad rights and privileges that owners of other assets enjoy. These rights include, among other things, the right to exclude, enjoy, manage, alienate, and even destroy. To be sure, these rights manifest in ways particular to corporations: shareholders can manage a company only indirectly by electing directors and, in some contexts, making proposals that become binding on the directors. But, if shareholders are owners, they might reasonably expect directors to act in their interests alone.

To date, the debate about whether shareholders own companies has been polarized. Milton Friedman famously argued that because shareholders are "the owners of the business," the only social responsibility of business is to "increase its profits."[76] Delaware courts

---

74. Mackintosh, *supra* note 58. Echoing the U.K.'s Companies Act of 2006, Klaus Schwab's "Davos Manifesto 2020" on "The Universal Purpose of a Company in the Fourth Industrial Revolution" proclaims that:

> The purpose of a company is to engage all its stakeholders in shared and sustained value creation. In creating such value, a company serves not only its shareholders, but all its stakeholders – employees, customers, suppliers, local communities and society at large. The best way to understand and harmonize the divergent interests of all stakeholders is through a shared commitment to policies and decisions that strengthen the long-term prosperity of a company.

Klaus Schwab, *Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution*, WORLD ECONOMIC 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/ [https://perma.cc/ZV28-YJ49].

75. *See generally* DAVID WEBBER, THE RISE OF THE WORKING-CLASS SHAREHOLDER: LABOR'S LAST BEST WEAPON (2018) (arguing that pensioners can and should use their clout as investors to encourage companies to adopt pro-labor policies).

76. Friedman, *supra* note 24.

also consider shareholders to be the owners of companies.[77] Nevertheless, other commentators argue exactly the opposite: shareholders have scarcely any influence over a corporation and their right to receive a share of a corporations' profits is too contingent to make them owners.[78]

A more complete understanding of shareholders' property claims reveals that their ownership interest cannot fully exclude other stakeholders from a firm's value. Sometimes, contractual rights abrogate shareholders' interest in firm value,[79] but other times, the limits on the right to exclude are a function of property law itself.

Henry Smith has argued that, where information costs are high, property tends to elevate the right to exclude as a "rough but low-cost" understanding of rights in a thing.[80] More elaborate governance rules only become desirable as "the gains from specialization through multiple use become more important."[81] This framework maps onto the rise of and, more recently, questioning of shareholder wealth maximization. Where stakeholder theory imposes high information costs and uncertainty on boards and courts, shareholder wealth maximization is a cheap and certain alternative.[82] While purely economic efficiency might militate maintaining shareholder wealth maximization as the law of the land, evolving social conditions suggest otherwise.[83]

The next section explores the investors who push shareholder wealth maximization to its limits. This study of GCN investors reveals that the right to exclude as embodied in corporate law is strong. This right gives GCN investors dominion over company value as if there are no other parties with claims on that value. But there are several parties with claims on this value in most companies. The challenge then is to give meaning these claims within a regime of investor ownership.

77. *See* Malone v. Brincat, 722 A.2d 5, 9 (Del. 1993).

78. Lynn A. Stout, *Bad and Not-so-Bad Arguments for Shareholder Primacy Lecture and Commentary on the Social Responsibility of Corporate Entities*, 75 S. CAL. L. REV. 1189, 1191-92 (2002).

79. *See* discussion *infra* Section II.B.

80. Smith, *supra* note 38, at 971; *see also id.* at 982 ("Exclusion allows courts to avoid dividing rights into component use rights. Thus, exclusion carries with it information-cost savings *even where transaction costs are high.*") (emphasis added).

81. *Id.* at 982.

82. *See* Friedman, *supra* note 24.

83. *See infra* Section II.B.

II. GOING-CONCERN-NEUTRAL INVESTING

Having considered the existing theoretical frameworks for analyzing the purpose of companies, this Part offers a more comprehensive framework, GCN investing, that captures the distributional concerns of stakeholder theory within the simplicity of shareholder primacy. Section A begins by exploring historical examples and the accounting literature for what it means for a company to be a going concern. Section B then explains what it means to invest in a company while being ambivalent to whether the company remains a going concern. Finally, Section C traces the impact of GCN investing on social welfare.

A. Preserving Going Concerns

Unlike natural persons, corporate persons have no inherent life span. A successful business can last centuries or longer. In Japan, Kongo Gumi was organized in 578 and remained independent until 2006, when it became a subsidiary of Tamakasu Construction.[84] Although no longer independent, Kongo Gumi is still a going concern and could theoretically stand on its own again in the future. Hardly an outlier, Japan has thousands of businesses that are more than two-hundred years old.[85] Europe has a similarly impressive list of long-lasting businesses, many of them family run.[86] The list of companies claiming that distinction would grow considerably if we included universities and other non-profit business associations. Many of these comparatively ancient businesses, mostly banks, hotels, restaurants, and specialty goods manufacturers, have built formidable reputations and relationships with the communities they serve. These connections enabled them to outlive the average business despite changing economic, technological, and cultural conditions.

Thinking about the lifespan of businesses requires thinking about what it means for a business to continue operating. This question has long been controversial in accounting where it is essential to know

---

84. James Hutcheson, *The End of a 1,400-Year-Old Business*, BLOOMBERG (Apr. 16, 2007), https://www.bloomberg.com/news/articles/2007-04-16/the-end-of-a-1-400-year-old-businessbusinessweek-business-news-stock-market-and-financial-advice [https://perma.cc/ZW9B-HTY8]; David Pilling, *Kongo Gumi: Building a Future on the Past*, FIN. TIMES. (Oct. 19, 2007), https://www.ft.com/content/3997c610-7bf9-11dc-be7e-0000779fd2ac [https://perma.cc/GX4P-XTB9].

85. Toshio Goto, *The Longevity of Japanese Family Firms*, *in* HANDBOOK OF RESEARCH ON FAMILY BUSINESS 517, 517 (Panikkos Poutziouris et al. eds., 2006).

86. Chris White, *The World's Oldest Companies*, ATLAS OBSCURA (Feb. 20, 2015), http://www.atlasobscura.com/articles/the-world-s-oldest-companies [https://perma.cc/N4AN-ANNC]; s*ee generally* WILLIAM T. O'HARA, CENTURIES OF SUCCESS (2003)

when the so-called "going-concern assumption"[87] applies.[88] Continuity of ownership is not essential to preserve operations.[89] It follows that a business can remain a going concern even if its shares trade among investors or it sells itself in whole. But if that sale causes some large percentage of employees to lose their jobs and forces clients to make alternative arrangements, then the original business is no longer a going concern.[90] To be a going concern implies some kind of ongoing "competitive capacity," a plan not only to fulfil current obligations, but to generate new ones.[91] This future-planning distinguishes going concerns from slowly liquidating businesses, sometimes called zombie companies.

Modern American law does little to stop transactions that may convert going concerns into zombie companies even where those transactions raise ERISA[92] and other legal issues. For example, the Pension Benefit Guarantee Corporation ("PBGC") insures many defined benefit programs in the event that the sponsoring company is no longer able to meet its obligations to retirees.[93] Although the PBGC's liability turns on the decisions that these sponsors make, it has virtually no say in their actions.[94] A more recent development is the so-called "kill-zone" around tech giants in which startups fail either because the tech giants buy them to eliminate the competition or copy their functionality thereby eliminating their market.[95] Theoretically, antitrust regulation could police this behavior, but has

---

87. Roughly, the going concern assumption is the assumption that an entity will remain in operation indefinitely.

88. *See* James M. Fremgen, *The Going Concern Assumption: A Critical Appraisal*, 43 ACCT. REV. 649, 649 (1968) (attempting to define going concern); Elizabeth K. Venuti, *The Going-Concern Assumption Revisited: Assessing a Company's Future Viability*, CPA J., May 2004, at 40, 41-42 (arguing that a lack of clarity about what a going concern is and when to apply the going concern assumption has led to an embarrassing failure by accountants to predict bankruptcy).

89. *See generally* Lynn M. Lopucki, *The Myth of the Residual Owner: An Empirical Study*, 82 WASH. U.L.Q. 1341 (2004).

90. Fremgen, *supra* note 88, at 650 (citing DWIGHT R. LADD, CONTEMPORARY CORPORATE ACCOUNTING AND THE PUBLIC 44 (1963)).

91. *Id.* at 651.

92. *See generally* William E. Hiller et al., *Liability of Private Equity Fund Portfolio Company for ERISA Liabilities of Other Portfolio Companies,* 23 COM. LENDING REV. 35 (2008).

93. 29 U.S.C. § 1302 (1974).

94. *See generally* David A. Groshoff, *The New Meaning of Public Company: Challenges to the Government's Post-Bailout Exit as a Corporate Stakeholder*, 34 OKLA. CITY U. L. REV. 179 (2009) (explaining the government's awkward position as an investor given securities laws).

95. *American Tech Giants Are Making Life Tough for Startups*, THE ECONOMIST (Jun. 2, 2018), https://www.economist.com/business/2018/06/02/american-tech-giants-are-making-life-tough-for-startups [https://perma.cc/R2GL-VURL]; Noah Smith, *Big Tech Sets Up a 'Kill Zone' for Industry Upstarts*, BLOOMBERG (Nov. 7, 2018), https://www.bloomberg.com/opinion/articles/2018-11-07/big-tech-sets-up-a-kill-zone-for-industry-upstarts [https://perma.cc/3WVS-BXN3].

done little in this space since the Microsoft litigation at the turn of the century.[96] Instead, the American system appears to assume that private ordering will optimally preserve going concerns.

The structure of corporate law assumes that, in most circumstances, equity holders would prefer that a company remain a going concern. Shareholder primacy is supposed to be welfare maximizing because shareholders are the residual owners.[97] Since they get paid last if a company fails, they should prefer that a company not fail.[98] To protect this preference, corporate law imposes various fiduciary duties to shareholders on the board of directors.[99] Corporate law has little to offer when this preference no longer applies.

When trying to make sense of stories like Fairway, Toys-"R"-Us, and TWA, corporate law's critics have mostly missed the mark. Where they have focused on shareholders and short-termism,[100] corporate laws' wealth-consolidating tendencies lie in a broader group of investors. As the following Sections show, many longer-term investors have the same incentives as those maligned short-term investors. Although long-term investors may plan to hold their position for years, they nevertheless may be mostly indifferent to whether the business thrives or fails. The time-horizon of their investment goals is less important than the character of those goals. In other words, it matters whether the target company is a means or an end.

The following sections provide an abbreviated overview of specific kinds of GCN investors. While the category of GCN investors is diverse, this Article is concerned only with those that can influence decision-making at a company.

---

96. *See* Lina Kahn, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 1026 (2019).

97. *See generally* Lopucki, *supra* note 89 (explaining and criticizing the narrative that shareholders' interests align with the interest of the firm as a whole).

98. *But see* Stout, *supra* note 78, at 1193 (explaining that shareholders can realistically only expect to be paid if and when the board of the corporation decides to declare a dividend).

99. *See* Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063, 2065 (2001) ("In the long run, the argument goes, employees and other stakeholders are overall better off with fluid and efficient capital markets, managers need a simple metric to follow, and both wealth and, in the end, fairness are maximized by shareholders being the corporation's residual beneficiary, with the other claimants getting what they want via contract with the corporation."). To be sure, some of the judicial rhetoric about allowing boards to divert resources to stakeholders other than shareholders for the long-term benefit of shareholders is likely a "judicial 'elision'" meant to avoid wading into "broad issues of public policy." Stout, *supra* note 74, at 1203; *see also* William T. Allen et al., *The Great Takeover Debate: A Meditation on Bridging the Conceptual Divide*, 69 U. CHI. L. REV. 1067, 1070 (2002) ("Reticence to express an adjudicative decision as a policy choice comes naturally with the acceptance of the judicial role. A policy choice is a debatable proposition that exposes the court to the same kinds of criticism directed against policymakers within the 'political' branches of government. Most judges worry about the legitimacy of their policymaking authority.").

100. *See supra* note 33.

B. The Structure of Going-Concern Neutral Investing

There is no definitive structure for GCN investments, but rather four broad categories within which there is considerable variation: holders of priority debt, secondary-market debt purchasers, activist shareholders, and controlling shareholders. Although the activist and controlling shareholders provide some of the starkest examples of GCN investing, those without operational control are nonetheless important because they may block efforts to right a business once it is off course. This Section discusses GCN investors from those with the weakest operational control to the strongest.

1. Holders of Priority Debt

Priority debt is debt that is entitled to payment ahead of other claims in the event that a company has fewer assets than it has obligations. There are two kinds of priority debt: secured debt and debt that is statutorily entitled to payment above other kinds of debt.[101] Secured debt tends to come from sophisticated lenders and sellers of high-value items. Debt given a priority by statute tends not to be traditional debt, but rather claims by entities that the legislature has decided to protect, such as workers and taxing authorities.

In the event of default, secured lenders are entitled to either foreclose on their capital or receive its cash equivalent.[102] Because their collateral often gives them the right to take their ball and go home,[103] companies may have the incentive to satisfy their obligations to these creditors even if other investments, such as research and development or marketing, might better protect the long-term survival of the company. Of course, this hypothesis runs counter to the common narrative that borrowers will "gamble[] with creditors' funds"[104] by, for example, spending heavily on research and development, since the upside risk of these expenditures falls exclusively on the borrowers.[105] This hypothesis is weaker in covenant-lite lending environments where borrowers face both few restrictions on their post-origination

---

101. *See, e.g.,* 11 U.S.C. § 507 (1978) (dictating priority in bankruptcy proceedings*); see also* 31 U.S.C. § 3713 (1982) (giving priority to federal tax claims).

102. *In re* Murel Holding Corp., 75 F.2d 941, 942 (2d Cir. 1935) (explaining that a secured lender is entitled "to get [its] money or at least the property" securing the debt); *see also* D'Onfro, *supra* note 29, at 1387-92 (explaining secured lenders' claims on collateral).

103. *See* Saul Levmore, *Monitors and Freeriders in Commercial and Corporate Settings*, 92 YALE L.J. 49, 52 (1982) (explaining that secured lenders may require covenants not to engage in risky new business and reserve the right to call the loan on demand in order to protect themselves should borrowers' post-origination activities change the risk profile of the loan).

104. *See id.*; Robert E. Scott, *A Relational Theory of Secured Financing* 86 COLUM. L. REV. 901, 909 (1986).

105. *See* Levmore, *supra* note 103, at 52.

investment choices,[106] and few consequences if they increase their lenders' risk notwithstanding covenants.[107]

Commentators in the bankruptcy literature have observed that a rise in secured debt has coincided with fewer companies exiting bankruptcy as a going concern.[108] Since the law requires priority lenders to make few compromises in a bankruptcy proceeding,[109] companies wishing to reorganize often leave bankruptcy with significant debt burdens, thereby increasing their risk of returning to insolvency in the near term.[110]

Despite these priority rights, relationships between the borrower and the creditor may nevertheless cause the lender to intentionally attempt to preserve the borrower as a going concern. For example, a creditor who is willing and able to amend debt to cure borrower default, often by collecting fees, raising interest rates, installing covenants, or extending terms, may ultimately transfer more value to itself from the borrower than if it had liquidated its position. Indeed, as long as credit conditions allow amend-and-extend borrowing to continue, a long-term relationship with a borrower may be profitable even if the borrower is unlikely to pay the face value of its debt in full.[111] Similarly, personal relationships between the borrower and

---

106. *See* Albert Choi & George Triantis, *Market Conditions and Contract Design: Variations in Debt Contracting*, 88 N.Y.U. L. REV. 51, 53 (2013).

107. *See* George Triantis, *Exploring the Limits of Contract Design in Debt Financing Response*, 161 U. PA. L. REV. 2041, 2059-60 (2013). *See also* Jared A. Ellias & Robert Stark, *Bankruptcy Hardball*, 108 CAL. L. REV. 745, 750 (2020); Vincent S. J. Buccola, *Bankruptcy's Cathedral: Property Rules, Liability Rules, and Distress*, 114 NW. U. L. REV. 705, 705 (2019).

108. *See* Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 STAN. L. REV. 751, 780 (2002); Douglas G. Baird & Robert K. Rasmussen, *Chapter 11 at Twilight Reply*, 56 STAN. L. REV. 673, 684 (2003); *Commission to Study the Reform of Chapter 11*, AM. BANKR. INST. 1, 12 (2014), https://abiworld.app.box.com/s/vvircv5xv83aavl4dp4h [https://perma.cc/D2FL-Z7C2].

109. Prior to a debtor filing for bankruptcy, a lender has significant incentives to negotiate with a borrower either to avoid bankruptcy and the transaction costs it imposes on all stakeholders or to negotiate a pre-packaged bankruptcy to reduce both the uncertainty of the process and their transaction costs. Once in bankruptcy, a secured lender is entitled either to have their lien protected or to receive the equivalent value of their lien. 11 U.S.C. § 1129(b)(2)(A) (1978). Much of the uncertainty that secured creditors currently face in bankruptcy arises from limitations on effectively perfecting so-called blanket liens and the proceeds of collateral. *See generally* Edward J. Janger, *The Logic and Limits of Liens*, 2015 U. ILL. L. REV. 589 (explaining the difficulty of perfecting blanket liens); Melissa B. Jacoby & Edward J. Janger, *Tracing Equity: Realizing and Allocating Value in Chapter 11*, 96 TEX. L. REV. 673 (2018) (arguing that tracing concerns should often threaten claims of liens on the proceeds of collateral).

110. Recent studies suggest that over 18% of firms "that emerge from the bankruptcy process as a continuing, independent entity" end up refiling, many within five years of emerging from their prior bankruptcy proceeding. Edward I. Altman & Ben Branch, *The Bankruptcy System's Chapter 22 Recidivism Problem: How Serious is It?*, 50 FIN. REV. 1, 3 (2015).

111. Amendments to debt agreements often require the borrower to pay the lender additional fees and, when the amendment cures a default or extends the term, increases the interest rate on the debt.

lender may encourage lender leniency if the lender expects the long-term relationship to be more profitable than the individual loan. Among priority lenders, those that can substitute one investment for another may be the most ambivalent about a borrower's success.

In sum, priority lenders' dark reputation owes itself partially to their ambivalence about the going concern as long as they get paid. Although there are exceptions, particularly in low interest-rate environments, there is little reason to expect lenders to behave altruistically towards their borrowers.

2. Secondary-Market Debt Purchasers

Investors who purchase debt on the secondary market are similar to holders of priority debt but may have even fewer incentives to preserve the going concern. This is because they often have neither an existing relationship with the borrower nor the opportunity to profit from amend-and-extend activities.[112] This is consistent with the theme that investors are more likely to be going-concern-neutral when they lack relationships with the companies in which they are invested.

When these investors purchase their claims under par, their investment may be profitable without full payment. For example, if an investor buys debt at sixty cents on the dollar and can expect to receive eighty cents on the dollar if they force a liquidation, they may prefer the certainty of payment in liquidation to gambling on reorganization. Moreover, these investors may expect a different return on capital than original investors. If they can buy debt at forty cents on the dollar at T_1 and receive eighty cents at T_2, their return on capital is 100% from T_1 to T_2. Even if they might receive one-hundred cents at T_3, that additional return may be an inefficient use of their capital given other investment opportunities. In that case, these investors can either sell to someone who is happy to buy at eighty cents, or they can attempt to liquidate their claim while it's worth eighty cents, even at the expense of the going concern.

The business model of these secondary market purchasers is about return on invested capital, a metric that is not sensitive to whether the businesses in which they invest survive or fail. This is not to say that these investors are going to intentionally kill the companies in which they invest simply to realize gains, but to acknowledge that their incentives are different and that this difference may in fact matter. At least one study of outcomes in bankruptcy proceedings has found that claims trading—a form of secondary-market debt purchasing—correlates with more liquidations than reorganizations.[113] Secondary

112. *See* Jared A. Ellias, *Bankruptcy Claims Trading*, 15 J. EMPIRICAL LEGAL STUD. 772, 774 (2018).

113. *See* Victoria Ivashina et al., *The Ownership and Trading of Debt Claims in Chapter 11 Restructurings*, 119 J. FIN. ECON. 316, 333-34 (2016).

market purchasers' incentives to agree to a forbearance or otherwise tolerate borrower-side breach of the loan agreement are likely fewer than other lenders. These incentives exist both inside and outside of bankruptcy and, therefore, may impact any company with traded debt.

3. *Activist Shareholders*

Shareholder activism covers topics from environmental sustainability to governance to shareholder distributions. While activist shareholders are perceived as short-term investors, this perception is not quite true as either a theoretical[114] or an empirical matter.[115] Because activist investors have such diverse intentions, shareholder activism is not inherently a GCN strategy, though it may be used as one. Although any shareholder can strive to be an activist in a company, this Article is only concerned with GCN investors who have clout to influence company decision-making.

In theory, a rational shareholder should prefer to own shares with the highest possible expected return. Still, there are shareholders who hold shares for idiosyncratic reasons whose incentives are different. First, there are the sentimental holders, who value the status of shareholder in a particular business for one reason or another.[116] Second, there are holders whose other holdings cause them to prefer that a particular company remain a going concern.[117] And third, there are shareholders, especially those at startups, whose shares are not tradeable.[118] But on the whole, shareholders care more about their returns and portfolio composition—diversification, overall risk, etc.—than about which individual stocks they hold. For this reason, most shareholders in large companies are likely GCN investors.

That most shareholders do not care about which company they hold often does not impact the company because individual shareholders have virtually no control over the future of the company—their holdings are just too small. Indeed, most individual shareholders do

---

114. *See* Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 898-99 (2013).

115. *See* Gantchev, *supra* note 35, at 621.

116. For example, in *Coggins v. New England Patriots Football Club, Inc.,* David Coggins arguably wanted to own a part of his favorite local sports team more than he wanted the best possible return on his equity investment. 492 N.E.2d 1112, 1115 (Mass. 1986). Even Milton Friedman conceded that shareholders' interests are diverse. *See* Friedman, *supra* note 24.

117. For example, if Shareholder owns stock in both Manufacturer and Supplier, and the value of Supplier's shares depends on its orders from Manufacturer, Shareholder may be interested in preserving Manufacturer as a going concern.

118. *See generally* Abraham J.B. Cable, *Fool's Gold: Equity Compensation & the Mature Startup*, 11 VA. L. & BUS. REV. 613 (2017) (explaining how startup employees often accept illiquid shares as compensation and questioning whether the law is sufficiently protective of these shareholders).

not exercise their corporate governance rights.[119] There is some evidence that many do not even exercise valuable economic rights.[120]

Shareholder incentives only begin to matter when a shareholder amasses a large enough block of shares to influence board composition or promulgate shareholder proposals. To be clear, influence does not mean owning a majority of the shares. Rather it means owning a large enough stake in a company that the board feels compelled to consider the shareholder's demands.[121] For example, the activist shareholders who cause much of the handwringing around short-termism—those who press publicly traded companies for stock repurchases, dividends, or spin-offs—rarely own anything close to a majority stake in a company.[122] Commentators describe managers appeasing GCN shareholders as taking a "downsize and distribute" approach to the company's value as opposed to a "retain and reinvest" approach.[123] For

119. *See* Jill E. Fisch, *Standing Voting Instructions: Empowering the Excluded Retail Investor*, 102 MINN. L. REV. 11, 12 (2017).

120. *See* Clifford G. Holderness & Jeffrey Pontiff, *Shareholder Nonparticipation in Valuable Rights Offerings: New Findings for an Old Puzzle*, 120 J. FIN. ECON. 252, 258 (2016) (finding in a multi-national study that many shareholders do not participate in valuable rights offerings which leads to wealth transfers from non-participating shareholders to participating shareholders). Even when shareholders exercise their rights, many merely follow the advice of a handful of proxy advisors such as Institutional Shareholder Services and Glass Lewis. *See* Stephen Choi et al., *The Power of Proxy Advisors: Myth or Reality?*, 59 EMORY L.J. 869, 906 (2010) (finding that ISS recommendations can shift 6%-10% of shareholder votes); *see generally* Cindy R. Alexander et al., *Interim News and the Role of Proxy Voting Advice*, 23 REV. FIN. STUD. 4419 (2010) (tracing the influence of proxy advisors).

121. Because holders of seemingly *small* stakes can influence the path of a company, the SEC imposes filing requirements on shareholders who amass more than a 5% stake in a company that is registered under the Exchange Act. In these filings, the shareholder must reveal whether they plan to be active in the company's governance. 17 C.F.R. §240.13d-1 (1934). As a shareholder's stake grows, so too does its filing burden. *See also* Schwartz, *supra* note 33 (explaining how filing rules create opportunities for activist shareholders to intervene).

122. For example, when Carl Icahn acquired 7.3% of Xerox, he became its second largest shareholder after Vanguard. *Carl Icahn Picks 7.13% in Xerox, Says It's Undervalued*, VENTURE CAPITAL POST (Nov. 25, 2015), https://www.vcpost.com/articles/108926/20151125/carl-icahn-picks-7-13-xerox-undervalued.htm [https://perma.cc/Z958-8JMB]. He then used that position to pressure the company to spin off its services business to its shareholders. Leslie Picker & Liz Moyer, *Xerox Planning Spinoff, Under Pressure from Carl Icahn*, N.Y. TIMES (Jan. 28, 2016), https://www.nytimes.com/2016/01/29/business/dealbook/pressured-by-icahn-xerox-will-split-in-2.html [https://perma.cc/F74P-R56Q]. He later used this position to sue to block one proposed merger. Sujeet Indap, *Pressure is on for Icahn and Deason to produce results at Xerox,* Fin. Times. (Oct. 22, 2018), https://www.ft.com/content/9283a536-d580-11e8-a854-33d6f82e62f8 [https://perma.cc/C2Y2-VBFT]. A year later, he proposed a different merger, this time with HP, where he was also a significant shareholder. Cara Lombardo, *Carl Icahn Makes Case for Xerox-HP Union*, WALL ST. J. (Nov. 14, 2019), https://www.wsj.com/articles/carl-icahn-makes-case-for-xerox-hp-union-11573702903 [https://perma.cc/ZM56-CQDH].

123. William Lazonick & Mary O'Sullivan, *Maximizing Shareholder Value: A New Ideology for Corporate Governance*, 29 ECON. & SOC'Y 13, 18-19 (2000).

this reason, a single GCN investor can quickly alter the company's course.

GCN shareholders have four main strategies for securing and distributing value to themselves. First, they may push to make the company operate more efficiently, whether by ousting stale management or aggressive cost-cutting.[124] The cost-cutting necessarily reallocates value away from the prior cost centers: labor, suppliers, and sometimes also compliance.

Second, they may pressure the existing board of a company to pay out greater dividends or repurchase shares.[125] Since both dividends and share repurchases require cash, this strategy may necessitate that the company incur debt, sell assets, or scale back spending to generate cash.[126] In turn, the company may compromise its competitive capacity and its future as a going concern.[127] This is not to say that all stock buybacks and dividends are bad for non-equity stakeholders,[128] but rather to acknowledge that money returned to investors is money not invested elsewhere in the company.[129]

124. *See* Alon Brav et al., *Hedge Fund Activism, Corporate Governance, and Firm Performance*, 63 J. FIN. 1729, 1741-45 (2008); Lucian A. Bebchuk et al., *The Long-Term Effects of Hedge Funds Activism*, 115 COLUM. L. REV. 1085, 1117 (2015); Matthew D. Cain et al., *How Corporate Governance Is Made: The Case of the Golden Leash*, 164 U. PA. L. REV. 649, 670 (2016).

125. *See* Patrick Thomas, *EBay to Pay Its First-Ever Dividend.*, WALL ST. J. (Jan. 30, 2019), https://www.wsj.com/articles/ebay-to-pay-its-first-ever-dividend-11548800151 [https://perma.cc/9MBB-5KFL] (recounting how hedge fund investors pressured eBay to return roughly 7 billion of its 8.6 billion of its cash, equivalents and nonequity investments portfolio to shareholders over a two-year period).

126. Lydia DePillis, *Why Companies Are Rewarding Shareholders Instead of Investing in the Real Economy*, WASH. POST (Feb. 25, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/02/25/why-companies-are-rewarding-shareholders-instead-of-investing-in-the-real-economy/ [https://perma.cc/MPE5-JNN4] ("[L]ately, companies have even been borrowing money to make those shareholder payouts, because with interest rates so low, it's a relatively cheap way to push stock prices higher.").

127. *See also* Fremgen, *supra* note 88, at 650 (explaining which companies are entitled to a presumption of being a going concern). *But see* Jesse M. Fried & Charles C.Y. Wang, *Short-Termism and Capital Flows*, 8 REV. CORP. FIN. STUD. 207, 209 (2019) (arguing that the data does not support the conclusion that short-termism in general and buybacks in particular are depriving companies of needed capital); Joseph W. Gruber & Steven Kamin, *Corporate Buybacks and Capital Investment: An International Perspective*, BD. OF GOVERNORS OF THE FED. RES. SYS. (Apr. 11, 2017), https://www.federalreserve.gov/econres/notes/ifdp-notes/corporate-buybacks-and-capital-investment-an-international-perspective-20170411.htm [https://perma.cc/2JR8-BJXL] (finding no relationship between the scale of stock buybacks and corporate investment).

128. *See* Michael C. Jensen, *Agency Costs of Free Cash Flow, Corporate Finance, and Takeovers*, 76 AM. ECON. REV. 323, 324 (1986) (explaining that companies with significant free cash flows may direct those cash flows towards inefficient projects if they do not return them to shareholders as dividends).

129. DePillis, *supra* note 126 (noting that companies were not investing in their workers at the same rate as they were returning cash to shareholders); Roger Cheng, *Why Technology Companies Loathe Dividends*, CNET (Mar. 19, 2012), https://www.cnet.com/news/why-technology-companies-loathe-dividends/ [https://perma.cc/2G6D-24NW] (explaining that significant cash reserves are important to "keep the growth engine running . . . through the

The third strategy that shareholders may deploy to capture more value for themselves is the sale or spin-off of assets. Shareholders may believe that some assets may be more valuable when sold to a different company or stood up as their own company. They can capture some of that higher value by selling the asset or spinning it off. As a result, the original company may be better able to focus on its core operations and, ultimately, become more profitable. It is also possible that the original company depended on the revenues of or synergies from the spun-off asset. In this case, a spin-off may be a way to isolate businesses for which there is no longer an economic case and prevent them from dragging down more promising ventures. The ailing business may either be the one spun off or the one left behind, but the result is the same. This desire to end subsidies between profitable and unprofitable lines of business, even if that portends the failure of the unprofitable line of business, is a quintessential GCN strategy.

Although this strategy often rids the economy of corporate debris, it is easy to find cases in which allowing companies to shed less profitable businesses creates gaps in the market. Consider the rural landline telephone service. The large telephone service providers have sought to spin off these assets because they have enormous capital costs but generate little revenue.[130] Yet, for this same reason, it is unclear that these assets can survive as stand-alone businesses. If indeed rural telephone service is both essential and fundamentally unprofitable, it seems odd to require one group of shareholders to carry that burden. It also seems odd to limit shareholders' ability to divest such unprofitable assets if their motivation for doing so is purely economic and not an opportunistic value transfer. Cases like this reveal both the urgency of finding interventions to mitigate the impact of GCN investing and that there will be no one-size-fits-all solution.

Fourth, the most effective strategy that all shareholders, but especially activist shareholders, have for privatizing company value is the buyout. Buyouts differ from the routine sale of shares at market because they typically involve the coordinated sale of all or most of the business's equity to a single shareholder. The buyer then becomes the controlling shareholder. Most of these transactions occur at a premium over the market price of the shares.[131] As discussed below, rational buyers would only pay such a premium if they believed that they could

---

acquisition of new technology, talent, or customers" and to ensure that the company has the flexibility to respond to changes in the market).

130. *See* David Lazarus, *Will AT&T Follow Verizon in Selling Its California Landline Network?*, LA TIMES (Apr. 26, 2016), https://www.latimes.com/business/la-fi-lazarus-20160426-column.html [https://perma.cc/6FK2-HUGL].

131. Recent analysis suggests that buyers are paying sellers the equivalent of about half of their expected synergies as an acquisition premium. Jans Kenglebach et al., *The 2018 M&A Report: Synergies Take Center Stage*, BCG (Sep. 12, 2018), https://www.bcg.com/publications/2018/synergies-take-center-stage-2018-m-and-a-report [https://perma.cc/4DEM-Q88C].

somehow recover it.[132] Whatever the buyer's plans are for recovering the premium they paid—that is, whatever the buyer's plans are for "unlocking" value from the firm—is irrelevant to the rational seller. Unless the seller has a sentimental attachment to the target firm, they will not care if the buyer has a reputation as a liquidator or union-buster. All any rational seller should care about is that they maximized the price they received for their shares and that they have another satisfactory place to redeploy their assets.

Activist shareholders are similar in many ways to secondary-market debt purchasers. Provided that they can realize an acceptable return on their equity investment, they have no particular reason to prefer that the company remain a going concern. They may prefer to effectively liquidate the company if doing so enables them to redeploy their invested capital in higher-return investments. However, recent empirical work suggests that shareholder activism does not dim the long-term outlook of a firm.[133] The pernicious side of shareholder activism may not harm the firm so much as it concentrates the benefits of the firm in the shareholders at the expense of other stakeholders.

4. *Controlling Shareholders*

Many of the most troublesome examples of GCN investing come from controlling shareholders. This category includes shareholders who are the sole shareholder of a company and shareholders who own a large enough stake in a company to control decision-making at that company. They are similar to activist shareholders, except that their ability to bend a company to their desires is virtually unchecked due to the size of their stake in the company.

Private equity offers some of the starkest examples of how controlling shareholders can exclude other stakeholders from firm value. Historically, private equity firms create funds in which the private equity company is the general partner and investors are limited partners. Only the general partner manages the fund's assets once invested.[134] They then acquire companies through leveraged buyouts.[135] In a leveraged buy-out, the fund uses debt to purchase all the equity of a target company. The target company then becomes responsible for that debt. Once acquired, the target companies become portfolio companies.

132. *See infra* Section II.B.4.

133. *See* Bebchuk et al., *supra* note 124 at 1154.

134. Steven N. Kaplan & Per Strömberg, *Leveraged Buyouts and Private Equity*, 23 J. ECON. PERSP. 121, 123 (2009).

135. *Id* at 121-22. Recently, private equity companies have begun making investments in companies without acquiring total control of the company. Andrew F. Tuch, *The Remaking of Wall Street*, 7 HARV. BUS. L. REV. 315, 340-41 (2017).

While some or all of its pre-acquisition management might stay in place,[136] executives from the private equity company take over the target's board. The private equity company usually bases these executives' compensation in part on performance of target company.[137] Michael Jensen famously credited private equity with reuniting ownership and control, thereby reducing management-induced waste.[138] According to Jensen, private equity unites the incentives of owners and managers with "pay-for-performance compensation systems, substantial equity ownership by managers and directors, and contracts with owners and creditors that limit both cross-subsidization among business units and the waste of free cash flow."[139] But performance does not mean long-term health of the company, it means hitting targets on returns. For example, there is no reward for paying down the debt initially incurred in the buyout.

Private equity firms have mastered operating their portfolio companies for its own benefit. Elisabeth de Fontenay aptly describes their "governance advantage" as "ensur[ing] that companies are the servant of only one master."[140] That master is the private equity company itself.[141] Their profit comes from many sources: fees on the invested capital,[142] carried interest on the profits of the fund, fees charged to the portfolio companies for monitoring and other services, and finally profits from selling or spinning off the portfolio company once they can get an acceptable return on their investment.[143]

Part of how private equity companies ensure that they can sell their portfolio companies at a profit is by making these companies' operations dramatically more efficient. They drive down labor and supply costs, streamline management, and cut "fat" wherever they can.[144] They often reap benefits at the expense of all other stakeholders, even where different operational choices might produce

---

136. Cynically, management might prefer leveraged buyouts to other M&A options because it enables them to keep their jobs temporarily. *See* Kaplan & Strömberg, *supra* note 134, at 135.

137. *Remuneration in Private Equity Portfolio Companies*, KPMG 1, 6 (Sept. 2018), https://assets.kpmg/content/dam/kpmg/uk/pdf/2018/09/kpmg-remuneration-in-private-equity-backed-companies.pdf [https://perma.cc/3UH3-QGNJ].

138. *See* Michael C. Jensen, *Eclipse of the Public Corporation*, HARV. BUS. REV., Sept. to Oct. 1989, at 61, 61-62; *see also* Lucie Courteau et al., *The Role and Effect of Controlling Shareholders in Corporate Governance*, 21 J. MGMT. & GOV. 561, 563 (2017).

139. Jensen, *supra* note 138, at 65; *see also* Elisabeth De Fontenay, *Private Equity's Governance Advantage: A Requiem*, 99 B.U. L. REV. 1095, 1103 (2019).

140. Fontenay, *supra* note 139, at 1101.

141. *Id.*

142. Kaplan & Strömberg, *supra* note 134, at 123-24.

143. *Id.* at 124; Felix Barber & Michael Goold, *The Strategic Secret of Private Equity*, HARV. BUS. REV., Sept. 2007, at 53, 54.

144. *See supra*, notes 30-32.

greater overall wealth.[145] As owners, private equity companies are divorced from place and people—if a job can be done more cheaply somewhere else or by someone else, it will be.[146] Before a buyout, agency costs may shield management from "unpopular" decisions, such as offshoring and demanding concessions from unions.[147]

Private equity companies receive an outsized share of public scrutiny for this business model, but hedge funds, venture capitalists, and even other operating companies may take the same approach to companies that they acquire.[148] One reason why a company may be an attractive target is because there is an unrealized opportunity for returns in its operations, management, or finances that the acquiring company believes it can exploit better than the company otherwise can.[149] The acquiring company may be better able to exploit an opportunity because it is not bound by the relationships that constrain the former directors and managers. It lacks the sentimentality of founders, lifers, and neighbors. Private equity companies and their kin are further immunized from sentimental decisions because they plan to exit the company in the near term. As Leo Strine frames it: "[I]n corporate polities, unlike nation-states, the citizenry can easily depart and not 'eat their own cooking.'"[150]

Shareholders who can control the company but do not own all of the shares are similar to the GCN investors who own a company in whole, except that corporate law nominally restrains these shareholders' ability to transfer value from the minority shareholders to themselves.[151] Although shareholders do not generally owe each other fiduciary duties, courts occasionally hold that controllers owe a duty to minority shareholders.[152] In Delaware, controllers who engage in interested transactions are potentially liable for breach of fiduciary

---

145. Matt Levine, *Private Equity Looks Out for Itself*, BLOOMBERG (Apr. 18, 2019), https://www.bloomberg.com/opinion/articles/2019-04-18/private-equity-looks-out-for-itself [https://perma.cc/TXY6-ZWU4] ("There is one general lesson here, which is that when a portfolio company runs into trouble, a smart aggressive private equity firm will tend to do a good job of maximizing the value of its own stake in that company rather than the total return to all stakeholders."); *see also* Jensen, *supra* note 138, at 325 (arguing that the debt incurred in the buyout would lead to significantly improved governance at private firms than public firms).

146. Martin Olsson & Joacim Tåg, *Private Equity, Layoffs, and Job Polarization*, 35 J. LAB. ECON. 697, 698 (2017).

147. *Id.* at 698-99.

148. Fontenay, *supra* note 139, at 1105-11.

149. *Id.* at 1106-07.

150. Leo E. Strine Jr., *One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed for the Long Term Unless Their Powerful Electorates Also Act and Think Long Term?*, 66 BUS. LAW. 1, 8 (2010).

151. *See* Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720-21 (Del. 1971); *see also* Ralph K. Winter Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 280-83 (1977).

152. Jones v. H.F. Ahmanson & Co., 460 P.2d 464, 471-72 (Cal. 1969); Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1115 (Del. 1994); Levien, 280 A.2d at 720 (Del. 1971).

duty. These protections are designed to be substantive. For example, because breach of duty is an equitable claim, controllers cannot rely on additional corporate shells to conceal their interest in transactions.[153] Similarly, in some transactions, such as when a controller wants to purchase the remainder of the firm, Delaware courts refuse to give boards the benefit of the business judgment rule and instead employ the entire fairness standard because the risk of coercion is so great.[154] But these protections do not limit the controller's ability to push for the same value transferring strategies that private equity companies and other sole shareholders might use to maximize their short-term returns.[155]

C. The Impact of GCN Investing

Why have a preference between continued operation and liquidation? In theory, if there is demand for a product or service, a new company will replace a liquidated company. Indeed, basic economics tells us that competition from start-ups should prevent companies from degrading a product or service below customer preference. Similar market forces should limit the extent to which GCN investors can reallocate resources from employees and vendors to themselves since these employees and vendors will pursue other opportunities if conditions deteriorate.

Relationships complicate the picture. Almost no one else who interacts with businesses does so quite as unburdened by relationships as GCN investors. Society's conception of business is one in which relationships and reputations matter. For example, tech founders whose reputations are bound up in their companies have used elaborate stock structures to ensure that they remain in control of the company's legacy.[156] When particular families remain the public face of companies despite no longer owning significant stakes in companies, we see the importance of relationships between individuals and the going concern. Communities that support businesses with

---

153. *In re* EZCORP Inc. Consulting Agreement Derivative Litig., No. CV 9962-VCL, 2016 WL 301245, at *9 (Del. Ch. Jan. 25, 2016) ("[B]ecause the application of equitable principles depends on the substance of control rather than the form, it does not matter whether the control is exercised directly or indirectly."); *see also* Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1265-67 (2008) (explaining how courts police controlling shareholders' power).

154. *In re* Pure Res. S'holders Litig., 808 A.2d 421, 435-36 (Del. Ch. 2002) (explaining that "the Supreme Court saw the controlling stockholder as the 800-pound gorilla whose urgent hunger for the rest of the bananas is likely to frighten less powerful primates like putatively independent directors who might well have been hand-picked by the gorilla (and who at the very least owed their seats on the board to his support)").

155. *See* Tuch, *supra* note 135, at 340-41 (explaining that private equity companies now also make minority investments in companies).

156. *See* Douglas C. Ashton, *Revisiting Dual-Class Stock*, 68 ST. JOHN'S L. REV. 863, 884 (1994) ("Putting the dual-class structure in place at the outset allows founding entrepreneurs or family members access to the equity markets without diluting control.").

infrastructure, services, and sometimes tax investments generally care about the going concern.[157] In some cases, it is essential to the community's own identity as much as its bottom line.

Similarly, employees generally prefer employment to unemployment. In most cases, there is greater opportunity for them personally and professionally in a company that is growing than in one that is being harvested. This is doubly true for pensioners of the company whose only hope of receiving their investment-backed expectation is the preservation of a going concern.

When a GCN investor takes control over a company, other stakeholders must absorb costs that the company elects to no longer internalize. GCN investors can choose to run their businesses much in the same way that slumlords run their buildings: doing the minimum to avoid regulatory intervention, which is often less than full compliance, while ultimately allowing the product to deteriorate. Any investment that they do not make, such as in research and development, marketing, or customer service, is money they can return to investors. Competition between industry players may mitigate some of these deleterious effects, but it is not guaranteed to and may do so only at significant cost to clients and other stakeholders.

Clients may have to accept lower quality or more expensive products and services if they cannot easily switch their business.[158] If they can easily switch their business, they may have to pay higher prices due to reduced competition among providers.[159] This may be

157. *See* Singer, *supra* note 36, at 618-20 (recounting how various community stakeholders fought the closure of the steel mills in Youngstown, Ohio); United Steel Workers v. United States Steel Corp., 631 F.2d 1264, 1254 (6th Cir. 1980) ("This appeal represents a cry for help from steelworkers and townspeople in the City of Youngstown, Ohio who are distressed by the prospective impact upon their lives and their city of the closing of two large steel mills.").

158. *See, e.g.*, Prashnat Gopal, *Wall Street, America's New Landlord, Kicks Tenants to the Curb*, BLOOMBERG (Jan. 3, 2017), https://www.bloomberg.com/news/articles/2017-01-03/wall-street-america-s-new-landlord-kicks-tenants-to-the-curb [https://perma.cc/Q2S8-DAMX] (detailing how private equity's entrance into the residential real estate market has, in some cases, led to more aggressive collection practices and degradation of the housing stock); Elora Raymond et al., *Corporate Landlords, Institutional Investors, and Displacement: Eviction Rates in Single-Family Rentals*, FED. RES. BANK OF ATLANTA 1, 3 (2016) https://www.frbatlanta.org/-/media/documents/community-development/publications/discussion-papers/2016/04-corporate-landlords-institutional-investors-and-displacement-2016-12-21.pdf [https://perma.cc/FS5N-CDNQ] (showing that large corporate landlords are more likely to initiate eviction proceedings than smaller landlords who are more likely to work out a less destabilizing solution with tenants); Eileen Appelbaum, *How Private Equity Makes You Sicker*, THE AM. PROSPECT (Oct. 7, 2019), https://prospect.org/api/content/32050efa-e6e8-11e9-aeb0-12f1225286c6/ [https://perma.cc/VU3X-UQFH] (explaining how private equity has led to consolidation and worse outcomes for patients in the hospital industry).

159. Even in industries where there appears to be a lot of choice, if most of the competitors in a space become controlled by GCN investors, or worse, a single GCN investor, competition may do little to create options in the market. *See, e.g.,* Ana Swanson, *Meet the Four-Eyed, Eight-Tentacled Monopoly That is Making Your Glasses So Expensive*, FORBES

especially true in thin industries where there are few alternatives or few alternatives not themselves controlled by GCN investors. New companies may enter the market to fill gaps left by GCN investor disinvestment, but start-up costs, credit conditions, and other factors may make new-entrant replacement suboptimal from the clients' perspective.

Other stakeholders in a company similarly have little choice but to absorb additional costs once a GCN investor takes over. Employees, even unionized employees, may face layoffs or reductions in benefits.[160] Those employees that stay may have fewer opportunities for advancement or wage growth. Depending on labor conditions, finding a new job may require relocating, stepping down the corporate ladder, incurring education costs, or accepting lower absolute compensation. To be sure, in strong labor markets, GCN investors who degrade working conditions may motivate employees to find better jobs, but there are reasons to suspect that this outcome is the exception to the rule.[161] For the same reasons that clients of GCN investor-controlled companies may have to accept worse or more expensive products and services, employees may have to accept worse working conditions: there may be few alternative workplaces and less competition among those workplaces for employees.

Similarly, vendors may have to tolerate a less reliable trading partner. For example, a customer who demands more favorable contract terms and longer payment options[162] may offer little loyalty as implicit compensation for these concessions. Other creditors may have to tolerate more risk as well.[163]

The theme here is a subordination of relationships to returns. GCN investors typically have lower incentives to preserve and bolster these relationships for two reasons. First, many of them do not need

---

(Sept. 10, 2014), https://www.forbes.com/sites/anaswanson/2014/09/10/meet-the-four-eyed-eight-tentacled-monopoly-that-is-making-your-glasses-so-expensive/?sh=4cac76776b66 [https://perma.cc/934Q-CK58] (explaining how despite apparent competition, there is a monopoly in the prescription eyewear market).

160. EILEEN APPELBAUM & ROSEMARY L. BATT, PRIVATE EQUITY AT WORK: WHEN WALL STREET MANAGES MAIN STREET 194-95 (2014) (finding that employees at firms taken private by private equity face greater job losses and loss of income than employees at public firms); Olsson & Tåg, *supra* note 146 at 698 (finding post-buyout job disruption among lower-skilled employees).

161. The coupling of benefits, especially healthcare, to employment creates strong incentives not to change jobs. *See generally* Anna Huysse-Gaytandjieva et al., *A New Perspective on Job Lock*, 112 SOC. INDICATORS RES. 587 (2013) (exploring why employees stay in jobs with which they are dissatisfied).

162. *See, e.g.,* Robert Cookson, *Laura Ashley Seeks 10% Supplier Discount*, FIN. TIMES., (Mar. 24, 2013), https://www.ft.com/content/356a251c-9479-11e2-b822-00144feabdc0 [https://perma.cc/5CE5-ENMB] (explaining that "[t]ypically, retail chains squeeze suppliers by paying them late, extending payment terms, or asking for single-digit discounts").

163. *See* Eliza Ronalds-Hannon, *It's Risky to Be a Creditor in This Private Equity World*, BLOOMBERG (May 14, 2019), https://www.bloomberg.com/news/articles/2019-05-14/it-s-risky-to-be-a-creditor-in-this-private-equity-world [https://perma.cc/4NQ2-ZPXP].

counterparties to choose to do business with them. The GCN investor is only becoming party to a relationship after the bond is formed, and there are costs to severing that bond. In other cases, such as when a private equity firm takes an employer private, monopsony in the market means that employees and other stakeholders have little choice but to remain in a relationship with a GCN investor. Both scenarios immunize the GCN investor from reputational consequences arising from their choices.

Second, to the extent that GCN investors do value relationships, it is often with other GCN investors. For example, a private equity firm might care about the other companies with which it expects to have recurring relationships[164]—financing partners, law firms, certain vendors—but still be ambivalent about the target company as a going concern. These relationships among GCN investors may further subordinate the concerns of other stakeholders.

The GCN model of rendering companies into commodities also decreases governments' ability to regulate the companies' impacts on other constituencies. Because GCN investors are disconnected from places, they can move to less expensive places. GCN investors may be less hesitant than other investors to shut down a business that is insufficiently profitable given compliance costs. All regulators must weigh whether their push towards compliance will drive out the businesses that employ the ostensible beneficiaries of this regulation. The calculus is starker in the presence of GCN investors.

The GCN investors' and the community's conflicting preferences might matter less if GCN investing grows the pie. It would be hard to argue that law should intervene to preserve inefficient businesses so that people who have opportunities at those businesses can keep them at the expense of those seeking opportunities. But it is also possible that stripping businesses of their relationships and converting them into mere assets so exacerbates distributional inequality that there is no net gain in social welfare. While the question of the optimal balance between traditional and GCN investing may prove to be an unanswerable empirical question, given the magnitude of the competition between GCN investors and other stakeholders in the business, it is important to understand that competition in its own right.

164. There is some evidence that market conditions are allowing companies to engage in opportunistic behavior even with firms with which they may expect to do business in the future. *See* Ellias & Stark, *supra* note 107 at 763-72 (explaining increasingly brazen moves by companies to shield assets from creditors).

III. PROPERTY ANALOGIES FOR UNDERSTANDING GCN INVESTING

Having traced the main forms of GCN investing and its impact on other stakeholders, we have arrived at the question of whether the law can and should address those impacts. The traditional model of viewing corporations as a "nexus of contracts" would suggest that the answer to both questions is no; the status quo reflects the various parties' bargained-for expectations. There is little room in modern contract theory to consider the interests of third parties. Therefore, there is little room in modern corporate law to consider how any given investment impacts other stakeholders.

This contractarian approach is incomplete however because parties must bargain in the shadow of their entitlements. To understand the deals struck between companies, financial investors, and other stakeholders, we need to understand what their entitlements are. Since property rights dictate the starting point of entitlements, understanding the contours of respective parties' property rights is key. Viewing commodified companies as property allows us to clearly see and analyze how rights in companies may conflict with others' property rights and public policy. It makes clear that two stakeholders in a company may find themselves facing conflicting uses, just like neighboring owners of real property might find their ideas of quiet enjoyment of their property in conflict.

The property lens is especially useful when the companies in question are held as commodities—when they are property in the flattest sense—as is typically the case with GCN investors. In property, we can see the tension between goods held as commodities and those that are something more.[165] Although much property is still like heirlooms, bound up with its owner's pride, identity, and liberty, that is no longer the law's expectation. Instead, its rules generally promote a policy of economic development detached from idiosyncratic valuations.[166] Even in this state, property is concerned with the relationship between potential uses and users.[167]

165. *See* Jedediah Purdy, *The American Transformation of Waste Doctrine: A Pluralist Interpretation*, 91 CORNELL L. REV. 653, 661 (2006) (arguing that property law has gradually shifted from the English system, which tended to treat each parcel of land as bound up with the family that owned it, toward one in which the default position treats property as a commodity); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 (1982) (explaining that some "objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world. They may be as different as people are different, but some common examples might be a wedding ring, a portrait, an heirloom, or a house").

166. Morton J. Horwitz, *The Transformation in the Conception of Property in American Law,* 1780-1860, 40 U. CHI. L. REV. 248, 271 (1973).

167. Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 748 (2009) (arguing that "social obligation theory" partially explains property doctrine).

With GCN investing, there is at least one investor for whom a company is a commodity and several other stakeholders for whom the company is akin to an heirloom. The stakeholders' particular relationship with a company has significant, even if idiosyncratic, value to them. This Part analyzes the conflict between these uses of property by looking to four property analogies: right to destroy, waste, nuisance, and the commons. Each analogy suggests a different approach to recognizing rights beyond those of the owner and then reconciling those rights to the owners' preferred use of the property.

A. *Right to Destroy*

Since at least Roman times, ownership has included the right to destroy. Romans conceived of ownership as including "ius utendi fruendi abutendi."[168] That is, the right to use (non-consumptive), the right to enjoy (consumptive), and the right to "abuse," which is better translated as the right to use up.[169] Max Radin aptly described these rights as "three degrees of a process of exercising power."[170] According to Blackstone, the power to use up persisted in the English common law.[171] And it remains deeply entrenched in our lived experience of ownership.[172] Consider the recent fad of applying the Marie Kondo method to one's possessions and donating—or just trashing—everything that does not "spark joy."[173] This process assumes that we have the right to destroy just about any object that we own, moral considerations notwithstanding.[174]

Although the right to destroy is intuitive vis-à-vis the ephemera of daily living, radical applications—houses, animals, fortunes in all forms—are easy to find. In Rome, *ius utendi fruendi abutendi* was "rather an analysis of the idea of ownership than a real statement of what the elements of Roman dominium actually were."[175] All kinds of property were subject to restrictions.

168. Max Radin, *Fundamental Concepts of the Roman Law*, 13 CALIF. L. REV. 207, 209 (1925).

169. PETER GARNSEY, THINKING ABOUT PROPERTY: FROM ANTIQUITY TO THE AGE OF REVOLUTION 104-105 (Quinten Skinner & James Tully eds., 2007); GEORGE MOUSOURAKIS, FUNDAMENTALS OF ROMAN PRIVATE LAW 126 (2012).

170. Radin, *supra* note 168, at 210.

171. 4 BLACKSTONE *221.

172. Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 783 (2005).

173. MARIE KONDŌ, THE LIFE-CHANGING MAGIC OF TIDYING UP: THE JAPANESE ART OF DECLUTTERING AND ORGANIZING 41 (Cathy Hirano trans., 2014); Strahilevitz, *supra* note 172 at 783.

174. *See* Rachel Pannett & Rhiannon Hoyle, *Marie Kondo Isn't Sparking Joy for Thrift Stores*, WALL ST. J. (Mar. 6, 2019), https://www.wsj.com/articles/marie-kondo-persuaded-you-to-jettison-your-junk-thrift-stores-sayenough-11551889124 [https://perma.cc/SJ98-XFZC] (explaining that "clothes that can't be sold can end up recycled as rags, other objects can wind up as landfill or scrap and some end up destroyed as biohazards").

175. Radin, *supra* note 168, at 210.

Restrictions on the right to destroy then, as now, fell into two categories: protections for neighbors' property and protections for property that is itself special. The former category is a kind of public risk management that is essential to having large numbers of people living together under a single government. In Rome, property owners abutting public roads had faced various restrictions.[176] Blackstone recounts that burning one's own home down was generally allowed but it became arson if the fire spread to a neighbor's house and was never permissible if the house was in a town.[177] This same risk management limitation applies to the right to destroy in U.S. law. In *Eyerman v. Mercantile Trust Co.*, a Missouri court granted Louise Woodruff Johnston's neighbors an injunction against her executor preventing him from carrying out her will's instruction to destroy her tony home on St. Louis' exclusive Kingsbury Place.[178] The court reasoned that "[d]estruction of the house harms the neighbors" by potentially decreasing the value of their homes.[179]

Today, a home like Ms. Johnston's would likely be protected by historic protection laws. These laws exemplify the second category of limitation on the right to destroy: property that the public has deemed special and therefore worthy of protection. Owners of these objects become stewards, responsible for preserving the objects for future generations, at the expense of some of their ownership rights.[180] The collective significance of the object makes it the subject of intergenerational justice concerns.[181] To mitigate these concerns, legislatures curtail owners' right to destroy.

The value of an object is only one determinant of whether destroying an object is controversial. More important is the public significance of the object—the extent to which non-owners derive enjoyment from the item.[182] There are several regimes for protecting this property including landmark protection, the Visual Artists Rights

---

176. *Id.*

177. 4 BLACKSTONE *221.

178. 524 S.W.2d 210, 214 (Mo. Ct. App. 1975).

179. *Id.*; *see also* Strahilevitz, *supra* note 172, at 797.

180. *See* JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES 68-72 (1999) (arguing that stewardship obligations should curtail the ownership rights of cultural properties collectors such that they should not have an absolute right to destroy or even exclude the public from viewing their holdings).

181. Strahilevitz, *supra* note 172, at 794.

182. Stahilveitz notes that modern society does not flinch at burying cadavers with wedding rings and other valuables. *Id.* at 783. Although potentially quite valuable, these private riches are not especially unique or particularly salient to the collective's identity. Tony Honoré similarly endorsed restricting the right to prevent property from being "consumed by use in the ordinary way" when conservation is "in the public interest." A.M. Honoré, *Ownership*, *in* OXFORD ESSAYS IN JURISPRUDENCE 118 (1961).

Act (VARA),[183] and cultural properties laws.[184] Strahilevitz notes that even the Presidential Records Act of 1978[185] is a restriction on the right to destroy justified by non-owners' interest in the protected property.[186] Although they differ in precise mechanism, the gist of these regimes is that particular pieces of property are deemed worthy of preservation, and that designation strips owners of their right to destroy even though the property ostensibly remains under private ownership.[187] Worldwide, these regimes have expanded over time[188] and there are increasing calls for further limitations on the right to destroy, particularly around cultural properties.[189] These regimes are an expression that the public values particular objects more than other productive uses of the property.[190]

These regimes implicitly recognize rights of non-owners, even when they are not potential owners. For example, the landmark decision in *Penn Central Transportation Co. v. New York City* explains that there is a "widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all" and that notwithstanding their significance, market forces will cause the destruction of many of these structures unless the law intervenes. [191] In other words, *Penn Central* endorsed using the law to protect the public's enjoyment of property that the public does not own. It does this not by giving the public any specific property right, but by removing rights from the owners' proverbial bundle of sticks.

There are several criticisms of these preservation regimes. Strahilevitz notes that restrictions on destruction interfere with owners' expressive rights and may leave insufficient space for creative destruction.[192] He has suggested that laws that curtail the right to

---

183. 17 U.S.C. § 106A (2012); *see also* Strahilevitz, *supra* note 172, at 828 (discussing VARA as a restriction on the right to destroy).

184. *See* Kate Fitz Gibbon, *EU Regulation Curtailing Import of Art & Antiquities Now Law*, CULTURAL PROP. NEWS (Jun. 16, 2019), https://culturalpropertynews.org/eu-regulation-curtailing-import-of-art-antiquities-now-law/ [https://perma.cc/PAU8-KHV9] (explaining how EU regulations may make some artwork effectively inalienable).

185. 44 U.S.C. § 2201 (2012).

186. Strahilevitz, *supra* note 172, at 814.

187. *See e.g.*, 17 U.S.C. § 106A(a)(3)(B) (2012) (giving artists the right to "prevent any destruction of a work of recognized stature," and making "any intentional or grossly negligent destruction of that work . . . a violation of that right").

188. In the United States, there is increasing judicial hostility to destroying property even absent some official protected status. *See* Strahilevitz, *supra* note 172, at 784.

189. *See* SAX, *supra* note 180 at 68-72 (explaining global protections for cultural properties).

190. *See, e.g.*, 54 U.S.C. § 100101 (2014) ("[T]he preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans.").

191. 438 U.S. 104, 108 (1978).

192. Strahilevitz, *supra* note 172, at 823-24.

destroy may chill future development or be so value destroying as to cause developers to prefer poor maintenance to avoid attracting preservation efforts.[193] Applying these kinds of restrictions to companies could easily create similar harms.

Restrictions on the right to destroy also raise questions of institutional competency.[194] Typically, our capitalist system assumes that owners know how to best use their property and it then facilitates owners' efforts to put their property to that use. With these restrictions, the legislature articulates its determination of property's highest and best use. It then restricts owners' rights to destroy on the assumption that their incentives will not align with its determination of the property's highest and best use.[195] There are reasons to be skeptical that the government makes better decisions than owners, or that it is ever possible to know which use is best[196]—just consider the current struggle between historic preservation and sufficient housing waging in many cities today.[197]

The right to destroy is implicit in corporate law. In some situations, equity holders can liquidate the company they own and move their capital on to other ventures. No business owner has to keep operating a business any more than the owner of a tchotchke has to keep it on a shelf. The tech giants can buy smaller companies, absorb their teams, and never bring their products to market.[198] State and federal laws have procedures for voluntarily winding up businesses when the owners decide the time has come.

What is mostly absent from corporate law's manifestations of this right are the limitations on the right to destroy as applied elsewhere. With a few exceptions,[199] equity holders, as owners, can destroy their companies without considering the economic loss that their actions might cause others. Although the law limits the right to destroy where

---

193. *Id.* at 819.

194. *Id.* at 797.

195. *See* National Historic Preservation Act, *supra* note 190.

196. *See* Lawrence B. Solum, *To Our Children's Children's Children: The Problems of Intergenerational Ethics*, 35 LOY. L.A. L. REV. 163, 197-98 (2001) (explaining how preferences change over time and the approaches for choosing which time-slice to value in law).

197. *See, e.g.,* Daniel Beekman, *'Miami Beach on Elliott Bay'? Opponents Decry Proposed 12-Story Pioneer Square Building*, THE SEATTLE TIMES (Jan. 21, 2016), https://www.seattletimes.com/business/real-estate/miami-beach-on-elliott-bay-opponents-decry-proposed-12-story-pioneer-square-tower/ [https://perma.cc/2FLS-FVWQ] (exemplifying the conflict between historic preservation norms and the development of denser housing options).

198. *See* Strahilevitz, *supra* note 172, at 809-10 (explaining how patent law allows the owner of a patent to suppress infringing products, even if the patent owner is not exploiting their patent).

199. These exceptions—placed on banks, systemically important financial institutions, railroads, and emergency service providers—tend to arise from the second category of limitations on the right to destroy.

it might cause geographic neighbors' losses, it does not intervene for economic neighbors—vendors, customers, and the like.[200]

There are companies that are so significant to a community that they, like historically significant architecture, arguably "enhance the quality of life for all."[201] Sporadically, the law does intervene to protect politically important companies or industries. These protections typically intervene in the market to help the economic performance of the protected company. Coal is a prime example of an industry that receives government support less for its overall economic importance than for its social and political significance.[202] For example, a 2019 report by the Natural Resources Defense Council found that wealthy governments provide approximately $64 billion in subsidies per year to "support to the production and consumption of coal."[203] These subsidies are akin to providing state funding to produce and then conserve art or architecture, but on a much larger scale.

While the law shields preferred industries from market risks, it rarely shields them from risky investors. Even in highly regulated industries like healthcare, there are few protections preventing GCN investors from increasing companies' risk of insolvency.[204] So, while the law might block an owner from torching a significant structure, there is no equivalent protection to prevent a GCN investor from torching a significant business.

B. Waste

This Section discusses waste as a cause of action at common law. In an action for waste, the plaintiff seeks redress for the defendant's harm to property or an injunction against future harm. Although it is

200. One remarkable feature about the federal government's bankruptcy bailout of GM and Chrysler is that the government was participating in part to contain the financial distress that failure of either company would cause. In other words, the government stepped in to prop up GM and Chrysler in part to preserve their customers, vendors, and businesses that rely on those companies' presence in their community. Austan D. Goolsbee & Alan B. Krueger, *A Retrospective Look at Rescuing and Restructuring General Motors and Chrysler*, 29 J. ECON. PERSP. 3, 8-9 (2015).

201. *See* Penn Cent. Transp. Co. v New York City, 438 US 104, 108 (1978) (partially explaining historic preservation laws as based on "a widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all").

202. *See* Christopher Ingraham, *The Entire Coal Industry Employs Fewer People than Arby's*, WASH. POST (Mar. 31, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/03/31/8-surprisingly-small-industries-that-employ-more-people-than-coal/ [https://perma.cc/5TW5-EEHX].

203. Ipek Genscu et al., *G20 Coal Subsidies: Tracking Government Support to a Fading Industry*, NAT. RES. DEF. COUNCIL 1, 4 (2019), https://www.odi.org/sites/odi.org.uk/files/resource-documents/12745.pdf [https://perma.cc/U7SC-KW8P].

204. Where there are protections, they typically come from licensing regimes where prospective buyers need permission from a licensing authority before taking over a license.

now more common to see waste as a policy argument animating another private law doctrine than to see actions for waste, the cause of action reveals some of the theoretical anomalies that GCN investing creates.

Since its origins in the twelfth century,[205] the writ of waste has undergone a near 180-degree transformation.[206] Traditionally, waste is the spoiling or destruction of property in which someone has a future interest.[207] The focus was less on preserving the profitability of land than on preserving the "patterns of land use."[208] Therefore, tenants could be guilty of waste even where they ultimately increased the value of the land.[209] This focus on patterns of use centered the relationship between the owner and their land.[210] It is the opposite of treating land as a commodity.

In the early nineteenth century, U.S. courts continued to look to English doctrine, but they shaped the doctrine to be more forgiving for those who actually used the land.[211] Jedidiah Purdy points to *Jackson v. Brownson*[212] as the turning point in American doctrine.[213] There, the heirs of Philip Schuyler sought to repossess land from a tenant for life after the tenant cleared and cultivated the vast majority of the land. Prior to being cleared, the land was forested. The question for the court was whether so changing the use of the land was waste as a matter of law.[214] The tenant had argued that putting the land to more profitable use could not be waste.[215] The New York supreme court split. The majority, looking to Blackstone, found that clearing the land was "a permanent injury" or "material[] prejudice" to the heirs.[216] Although the majority ultimately found for the heirs, the "permanent injury" or "material prejudice" rule effectively changed the law of waste going forward—this rule opened the door for juries to decide whether uses were appropriate, even where they departed from the owners' preferred use of the land.[217]

---

205. 8 Michael A. Wolf, *Powell on Real Property* § 56.02 (2020).
206. *See* Purdy, *supra* note 165 at 661 (tracing the evolution of the doctrine).
207. 2 BLACKSTONE *280.
208. Purdy, *supra* note 165, at 663.
209. 2 BLACKSTONE, at *281.
210. Purdy, *supra* note 165, at 663-64.
211. *See id.* at 668-69.
212. 7 Johns. 227 (N.Y. Sup. Ct. 1810).
213. Purdy, *supra* note 165, at 668.
214. Brownson, 7 Johns. at 228.
215. *Id.* at 231-32.
216. *Id.* at 232-35; Purdy, *supra* note 165, at 669.
217. *Id.* at 673.

Other state courts followed suit. The doctrine of waste evolved into an analysis of whether the tenants' use of the land became more consumptive than the owner had intended.[218] Under this test, tenants were entitled to take resources from the land to facilitate their use, but they were not to diminish the land itself.[219] Waste has long been an essential protection to prevent future interest holders from being "at the mercy" of those with present possessory interests.[220]

A second transformation has occurred in the scope of the doctrine: while historically limited to tenants in dower and curtesy and guardians in chivalry, the doctrine has expanded steadily over time to include any spoiling property covered by a second property interest.[221] So, a mortgagee may bring an action for waste against a mortgagor who removes fixtures from the property.[222] So conceived, waste imposes on property owners a fiduciary-like duty to preserve their creditors' interests.[223] Put differently, waste is a limitation on owners' use and enjoyment of their property.

If a mortgagee, as a creditor, is entitled to protection against waste, then perhaps that protection should also apply to others holding future interests in company value, such as vendors, employees, or pensioners. Here, an example is helpful. Imagine a company that distributes significant value to shareholders but leaves its pension underfunded. This distribution to shareholders may cause "permanent injury" to the pensioners' future interest in the company value. From a waste perspective, the company has an obligation to preserve some of its corpus to satisfy those future interests, even if it retains broad discretion over how to manage its value in day-to-day transactions.

---

218. *Id.* at 671-74. *See* Sauls v. Crosby, 258 So.2d 326, 327 (Fla. 1st DCA Feb. 29, 1972) (explaining the shift from English common law to the rule that "[t]he only restriction on the life tenant's use and enjoyment is that he not permanently diminish or change the value of the future estate of the remainderman."); *see also* Findlay v. Smith, 6 Munf. 134, 140 (Va. 1818) (interpreting a testator's grant as creating a life estate in which his wife would be a "tenant without impeachment of waste," able to use the land's bounty as she saw fit).

219. Clemence v. Steere, 1 R.I. 272, 274-75 (R.I. 1850); Hammons v Hammons, 327 S.W.3d 444, 451 (Ky. 2010).

220. *Clemence*, 1 R.I. at 274.

221. Jill Fraley, *Modern Waste Law, Bankruptcy, and Residential Mortgages*, 41 CARDOZO L. REV. 485, 496-98 (2019) (exploring the history of waste doctrine).

222. W. & R. Inv. Co. v. Edwards Supply Co. 24 N.E.2d 518, 519-20 (Mass. 1939) (holding that a mortgagee of real estate can bring an action in waste against the mortgagor or any other person who impermissibly removes part of the mortgaged property); Cornelison v. Kornbluth, 15 Cal. 3d 590, 598 (1975) (waste "evolved during the ensuing development of the common law, it was broadened so as to afford protection to concurrent holders of interests in land who were out of possession (e.g., mortgagees) from harm committed by persons who were in possession (e.g., mortgagors)"); Turner v. Kerin & Assocs., 938 P.2d 1368, 1372 (Mont. 1997) (holding that "a mortgagee may state a cause of action against a mortgagor for actions or inactions which damage the collateral and thereby impair the mortgagee's ability to satisfy the secured debt").

223. *Cornelison*, 15 Cal. 3d at 599.

Expanding waste to protect holders of future claims on companies' value would run counter to recent developments in Delaware corporate law. In *North American Catholic Education, Inc. v. Gheewalla*,[224] the Delaware Supreme Court affirmed that directors do not owe fiduciary duties to creditors, including when the company is in the zone of insolvency or insolvent.[225] The court explained that curtailing the ability of creditors to bring direct claims for breach of fiduciary duty would give directors much-needed clarity about their obligations.[226] Moreover, the court reasoned, creditors could contract for any protections that they need.[227]

This same logic—that claimants can bargain for any rights they need—could cut against expanding the doctrine of waste to protect stakeholders' interests in company value. The question is, what should be the default level of protection from waste? Decisions like *Gheewalla* appear to set the default level of protection from waste at zero although the traditional common law rule was just the opposite. This baseline rule determines what parties must contract for. Where the baseline is zero, the party seeking protection from waste must negotiate (and pay) for it. Where the baseline is something closer to the common law, parties effectively must seek permission to waste. Waste is a default rule that saves parties from having to include provisions in their contracts explaining that not only do they want the promises therein enforced in theory, but also in practice.[228] Indeed, the tort of waste may mitigate harm because it offers plaintiffs an early point of entry to remedy conflicts, instead of having to wait for their interest to become possessory or for the completion of a contract.

To be sure, the doctrine currently allows equity holders to sue firm management for waste, typically after some extreme mismanagement has occurred. But the claim has become so rare that Chancellor Allen described it as "like Nessie, possibly nonexistent."[229] In theory, shareholders can bring claims against directors but must plead that "no person of ordinary sound business judgment would say that" a fair deal had occurred.[230] While this narrow version of waste doctrine

224. 930 A.2d 92, 103 (Del. 2007).

225. *Id*. at 100-01; *compare with* Francis v. United Jersey Bank, 87 N.J. 15, 40-41 (1981) (holding directors liable for harms to creditors).

226. *North American Catholic Education, Inc.*, 930 A.2d at 101; *see also id.* at 103 ("To recognize a new right for creditors to bring direct fiduciary claims against those directors would create a conflict between those directors' duty to maximize the value of the insolvent corporation for the benefit of all those having an interest in it, and the newly recognized direct fiduciary duty to individual creditors.").

227. *Id.* at 99. The one fiduciary hook left available to creditors is to bring indirect claims against the directors of insolvent corporations. *Id.* at 103.

228. *See* Purdy, *supra* note 165, at 658-59.

229. Steiner v. Meyerson, No. 13139, 1995 WL 441999, at *14 (Del. Ch. July 19, 1995).

230. Michelson v. Duncan, 407 A.2d 211, 224 (Del. 1979) (quoting Kauffman v. Shoenberg, 91 A.2d 786, 791 (Del. Ch. 1952)).

might tend to protect shareholders in cases where the board is beholden to an activist investor or a controller, it does nothing for other stakeholders.

In a system in which whole companies are mere commodities, it makes little sense to limit waste claims to shareholders. The doctrine of waste is consistent with permissive constructions of the right to use since even under libertarian conceptions of property, the right to use does not include the right to physically interfere with others' rights.[231] This is the core of the maxim *sic utere tuo ut alienum non laedas*—so use what is yours as to not harm what is others'. The doctrine of waste protects possessory rights from interfering with non-possessory rights. Limiting waste claims to shareholders elevates their rights over others. But this elevation is not supported by contract or anything inherent to the property rights themselves.

C. Nuisance

Like waste, nuisance gives teeth to the maxim *sic utere tuo ut alienum non laedas*.[232] Nuisance regulates "neighborly relations."[233] It limits owners' use of their property if and when that use unreasonably interferes with neighbors' use of their own property.

Courts refined the law of nuisance throughout the nineteenth century "as resource use became more intense and specialized."[234] Early nuisance law protected expectations of quiet enjoyment. For example, if a party had a customary monopoly on holding a market, he could bring an action against anyone who set up a competing market provided that he could show economic injury.[235] Questions about whether the alleged nuisance benefitted the public were irrelevant.[236] Joel Brenner argues that as industrialization increased, nuisance's application became narrower.[237] For example, an English court recognized a right to air "not rendered incompatible with the physical

---

231. *See* RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW 214, 218 (2000).

232. *See* Smith, *supra* note 38, at 1004. (explaining that courts primarily invoke the maxim in cases of conflicting land uses).

233. Joel F. Brenner, *Nuisance Law and the Industrial Revolution*, 3 J. LEGAL STUD. 403, 403 (1974).

234. Smith, *supra* note 38, at 1006; *see also* Horwitz, *supra* note 166, at 274-75 (describing how courts interpreted nuisance to complement mill acts, which legislatures passed to allow mills to flood land both upstream and downstream without facing traditional common law remedies for such an intrusion on the landowners' rights).

235. Brenner, *supra* note 233 at 404, n. 2.

236. *See id.* at 404.

237. *Id.* at 408; *but see* Ben Pontin, *Nuisance Law and the Industrial Revolution: A Reinterpretation of Doctrine and Institutional Competence*, 75 MOD. L. REV. 1010, 1012 (2012) (arguing that Brenner's argument of "common law complicity with industrial pollution" misunderstands how the issue of pollution emerged slowly over time).

comfort of human existence"[238] not to the maintenance of pristine air. Courts recognized that what was reasonable in one place might not be reasonable in others.[239] Over time, private nuisance became focused on injuries to health and prosecutions for public nuisance became rarer.[240]

Today, the hallmark of private nuisance is use-by-use reasonableness.[241] Plaintiffs in nuisance actions must show that the defendant interfered with their property rights and that the interference was substantial and unreasonable. The doctrine empowers judges, and occasionally legislatures, to balance the utility of competing uses against considerations of owner sovereignty. Some uses are so disruptive that they are nuisances "at all times and under any circumstances, regardless of location or surroundings" while others are nuisances only "by reason of circumstances and surroundings"[242]

If applied too broadly, nuisance actions could become cudgels for entrenched users keeping out new ones.[243] Putting the burden on plaintiffs to show that the defendants' interference with their property rights was substantial and unreasonable helps mitigate that risk. The economic loss rule, which generally bars recovery in tort for purely economic losses, does the same.[244]

Given the economic loss rule, nuisance might not appear to be a natural fit for mitigating some of the harms of GCN investing. But one way to view the commodification of companies over the past forty years is as an intensification of their use akin to what happened with tangible assets during the Industrial Revolution. Where companies were previously the livelihood of a single family or a narrow group of families, many are now divvied up among players in the financial economy to maximize returns to those players.[245] The returns these investors seek are purely economic. At first glance, the losses that they leave would appear to be purely economic as well.

Whether a particular loss is purely economic is often a question of framing. Viewing company stakeholders' interest through a financial

---

238. Walter v. Selfe, 64 Eng. Rep. 849, 851 (1851)

239. Brenner, *supra* note 233, at 414; *see also* Pontin, *supra* note 237, at 1033 (explaining that many plaintiffs in Victorian nuisance actions were the landed elite protecting their rural estates from industrial encroachment).

240. *See* Brenner, *supra* note 233, at 420-21.

241. Smith, *supra* note 38, at 967.

242. Bluemer v. Saginaw Cent. Oil & Gas Service, Inc., 97 N.W. 2d 90, 96 (Mich. 1959).

243. *Id.*

244. *See* Richard A. Epstein, *From Common Law to Environmental Protection: How the Modern Environmental Movement Has Lost Its Way*, 23 SUP. CT. ECON. REV. 141, 158 (2015). (arguing that decisions cutting off liability does not deny that one party has suffered a loss, but rather courts refuse to intervene "whenever private gain *diverges* from overall social welfare.")

245. *See infra* Part II.

lens makes their losses appear to be purely economic. But there is more to a company's relationship with their stakeholders than financial arrangement. In many cases, the relationship itself has value. For example, when workers lose their jobs, their most obvious injury is lost wages. Ask the workers, though, and the wages are only part of the story; they will have lost social connections, social standing, and their sense of self, all while picking up the stigma—an injury unto itself—of being unemployed. These other injuries may be too amorphous to be cognizable, but they are injuries nonetheless.[246] Similarly, when a town loses a plant, it loses the tax revenue from that plant while picking up the injury of vacant property. Why these harms reduce to economic damages and a lost crop from a flooded field does not is far from intuitive. If we accept the losses from GCN investing as more than economic losses—or formulate an exception to the economic loss rule to accommodate commodified companies—nuisance, with its focus on reasonableness, becomes newly illuminating.

Of course, many of the harms from GCN investing are not mere economic losses. Consider the detritus left when a company closes a plant. Underinvestment in environmental protections can easily create tangible harms. Vacant property easily becomes a nuisance when it attracts criminal activity or blights a neighborhood.[247] In theory, more aggressive enforcement of existing nuisance law against companies may mitigate some of the harms of GCN investing. Although a half measure, many municipalities would see improvements in their social welfare if they could more easily use nuisance law to cause companies to deal with obsolete properties.

But whether more aggressive enforcement of nuisance and nuisance-like governance rules would increase social welfare while mitigating the impact of GCN investing is an empirical question not answerable here. The increased enforcement costs might be better spent on the social safety net. The increased compliance costs might be better spent on capital investments. And the uncertainty inherent to any rule built on balancing conflicting uses might ultimately chill productive uses of company assets.

246. Epstein, *supra* note 244, at 157-58.

247. Wilmington v. McDermott, No. 08T-02-057 MMJ, 2008 WL 4147580, at *1 (Del. Super. Ct. Aug. 26, 2008) ("Vacant buildings, without proper care, can be a nuisance, a haven for crime and a community eyesore."). Indeed, vacant property is so prone to welfare-reducing conditions that several states have criminalized allowing it to fall into disrepair. *See* Nesby v. Montgomery, 652 So. 2d 784, 787 (Ala. Crim. App. 1994). Other municipalities have made unsecured vacant property a nuisance per se. Slocum v. Cleveland Heights, No. 1:14CV532, 2014 WL 1237534, at *5, * (N.D. Ohio Mar. 25, 2014).

D. Commons

In her lifelong argument against shareholder primacy, Lynn Stout often mentioned that short-term investors can create a "tragedy of the commons" in a corporation.[248] This Section explores how to map the commons framework onto companies. Although it ultimately concludes that the metaphor does not quite fit, even as an imperfect metaphor, the tragedy of the commons has insights for GCN investing, particularly on the subject of what to do about the overharvesting that commonly follows GCN investors.

Commons refer to pools of resources that are public in so far are they are no individual's private property. There are several possible variations on ownership of the resource, but the essential feature for this discussion is that the potential users of the resource are unable to coordinate their behavior to ensure optimal use of the resource. Tragedies of the commons occur when participants in the commons begin making choices that they would not make if they had to fully internalize the costs of those choices.[249] In the iconic lobster case study, the tragedy occurs when fishermen harvest an unsustainable quantity of lobsters because no single fishman can trust the other fishermen not to do the same.[250] All fishermen, and indeed, the coastal community at large, are better off under sustainable fishing practices. If the fishermen could coordinate with each other, they could limit themselves to sustainable harvests. But such an agreement would only work if they could be certain that no new fishermen who are unconstrained by the agreement would enter the space. In companies, GCN investors can pursue unsustainable policies that enrich certain actors while threatening the business as a whole.

Stout argued that metaphor is applicable to corporations: short-term investors encourage companies to "unlock shareholder value" in the near-term, often to the long-term detriment of the company and its stakeholders, including other investors,[251] employees,[252] and the public. As these conditions mature, a collective action problem

---

248. LYNN A. STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 50-52 (2012); Lynn A. Stout, *The Toxic Side Effects of Shareholder Primacy*, 161 U. PA. L. REV. 2003, 2022 (2013); Lynn Stout & Sergio Gramitto, *Corporate Governance as Privately-Ordered Public Policy*, 41 SEATTLE U. L. REV. 551, 564 (2018).

249. *See* Lee Anne Fennell, *Commons, Anticommons, Semicommons*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW 36 (Kenneth Ayotte & Henry Smith eds., 2011).

250. *See generally* JAMES M. ACHESON, THE LOBSTER GANGS OF MAINE (1988).

251. STOUT, THE SHAREHOLDER VALUE MYTH, *supra* note 248, at 69 ("The shareholder who plans to hold her stock for many years wants the company to invest in its employees' skills, develop new products, build good working relationships with suppliers, and take care of customers to build consumer trust and brand loyalty—even if the value of these investments in the future is not immediately reflected in share price.").

252. *Id.* at 83.

emerges in which no stakeholder in the company will make investments as they all try to extract what they can from their stake before the business fails. In other words, lenders may be less likely to renegotiate debt, suppliers demanding payment up front, and workers, if they have the leverage, demanding plum contracts for existing employees with stingier benefits for newcomers. If and when the business does fail, this distrust-fueled collective action problem can hinder reorganization, even inside bankruptcy, as few believe that the would-be controllers of the company will not repeat the process again.

While the way GCN investors expropriate value from companies superficially resembles the lobster fishery, the mechanisms by which the suboptimal distributions occur are different. This disconnect appears in the difficulty of defining what the relevant commons is. In large, publicly traded companies, we can think of the shareholders as belonging to a limited common, the primary asset of which is the company's value. Any one of them may have different preferences about when to receive distributions from the firm or may have different preferences about how much risk the firm should take on. But for the most part, they can exit the common if the firm fails to satisfy their preferences. If the shareholders hold shares more or less equally, no single shareholder will be able to create a so-called tragedy of the commons. Instead, the diverse shareholders would prefer that the company remain a going concern.

If share ownership becomes lumpy, with some shareholders holding blocks large enough to influence director elections and other decision-making, the game changes.[253] The larger shareholders may convince the firm to sell or spin off assets in ways that enrich shareholders (or even, particular shareholders) in the short term, but ultimately harm the company's long-term outlook.[254]

Layered in with the shareholder common is also a second common comprised of all of the firms' internal stakeholders: employees, managers, and shareholders. Distrust or opportunism among these stakeholders can quickly lead to a tragedy of the commons in which the larger social value of the corporation is quickly depleted. This risk is especially acute when stakeholders' time-horizons become misaligned. For example, one class of workers may contract for a favorable, protected contract at the expense of both would-be future workers and other stakeholders.

A third commons might be the business community of a particular region or even a local economy broadly conceived. Clearly, one's interest in the business atmosphere is not quite the same kind of claim as a traditional property right, but then neither is an equity interest or the right to fish.

253. *See infra* Section II.B.4.

254. *Id.*

Elinor Ostrom theorized four ways to manage common resources: government control, privatization, contract, and cartel.[255] Ostrom's privatization option reveals some of the challenges to the commons framework to companies. In a typical commons, this value would be public and the publicness at Time 1 would be what enables the suboptimal distributions at Time 2. In the context of companies, the value is private at Time 1 because its shareholders and occasionally debt investors own it. What enables the suboptimal distributions at Time 2 is the strength of these ownership rights against the claims of other stakeholders. While excessive privatization—leading to too many cooks in the kitchen—is often associated with an anticommons framework,[256] that is also not the case here. Under GCN investing, both the benefitting and the harmed parties have private legal stakes in the company's value, but their control rights over those stakes differ.

Workers and vendors have contractual relationships with companies. These contracts effectively privatize some of the company's value for the workers or vendors. The problem, from their perspective, is that they are mostly powerless over the risk that their claim will not be paid and, more importantly, market forces may prevent them from negotiating for a sufficient claim for them to flourish.

The looming threat of overharvesting a company may motivate other stakeholders to adjust their behavior to reap what they can in the short term out of fear that there will be no long term.[257] The tragedy occurs when GCN investors concentrate company value in themselves at the expense of other stakeholders.[258]

IV. INTERVENTIONS

Having identified GCN investing and the anomalies that it creates as a matter of private law, this Article does not propose that there is a single best solution but instead suggests a menu of options in the hope that they inspire future analysis. These options fall along a continuum. At one end, there is the option of limiting public intervention, preserving the status quo. Legislatures could lightly intrude on the prerogatives of GCN investors by adjusting the definitions of waste and nuisance so that the investors face liability in private litigation. Next, legislatures could use an insurance regime to insert a gatekeeper into company decision-making. More intrusive still is direct regulation of the kinds of deals that allow GCN investors to extract value. And

255. *See* ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 8-20 (Canto Classics ed. 2015).

256. *See* Frank I. Michelman, *Ethics, Economics, and the Law of Property*, 24 NOMOS 3, 6 (1982); Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 667-68 (1998).

257. *See infra* Section II.B.

258. *See infra* Section II.A.

finally, at the other pole, the state could always become a direct participant in the market. This Section sketches these options in turn.

A. Non-Intervention and Private Bargaining

The first and ever-present option is to recognize the potential for suboptimal distributions of value under the current regime but decide that no potential intervention creates a better outcome at an acceptable cost. This least-bad-option approach animates some argument for shareholder primacy that arguably entrenched the current system.[259] Given the diversity of potential stakeholder preferences, the tendency of these preferences to conflict, and the epistemological problems that arise in any effort to identify any specific preference, leaving the parties to determine their optimal distribution of company value is inherently attractive.

Under a no-intervention regime, corporate law would leave shareholder primacy in place. Lawmakers might intervene in specific instances to change the balance of powers between corporations and other stakeholders. For example, a state might not require corporations to consider consumers' interests but may accomplish the same result with robust consumer protection laws and an active attorney general to enforce them. Similarly, a state might leave shareholder primacy untouched but by raising the minimum wage, achieve the same normative payout as having corporations consider workers' interests. Such targeted interventions have the benefit of being theoretically contained. And for parties that wish to privately enforce such interventions, they may be clearer and easier to litigate than the vague norms that stakeholder theory seeks to implement.

Preferring no intervention notably leaves room for private ordering.[260] If workers, vendors, or municipalities are unsatisfied with their lot, they can theoretically organize and negotiate a better deal. To be sure, this view ignores the legal and structural barriers that prevent other stakeholders from negotiating for their preferences, but, in the spirit of Coase,[261] it is a solid place to begin analyzing competing claims on companies' value.

Viewing companies' actions through lenses like waste and nuisance may facilitate such bargaining by making the contours of externalities more transparent. Where a company decision appears to impact all of society, there is no coalition with the legitimacy to bargain with a company. A more clearly defined, and therefore narrower,

259. *See infra* Part II.

260. For example, Dorothy Lund has proposed a system of bonds to facilitate Coasean bargaining between stakeholders and companies. Dorothy S. Lund, *Corporate Finance for Social Good,* 121 Colum. L. Rev. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3511631 [https://perma.cc/8P3J-U5C7].

261. *See generally* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

understanding of who bears externalities creates a group that is potentially better able to organize and negotiate.

If bargaining fails, private litigation under the common law doctrines of waste and nuisance remain an option.[262] Allowing employees to block a buyout on a theory of waste or nuisance would stretch the doctrines, but there is a kernel of existing law there. At the very least, there is content to these claims that is lacking in arguments built solely on distributional justice. The narrowly conceived constituencies that property analysis suggests are more likely to have standing and be able to articulate concrete harms. Because of widespread codification, legislatures might need to expand the definitions of these property-protecting torts so that they can apply to commodified companies. Amending the definition governing these torts is different from direct regulation in that it allows more room for would-be plaintiffs and defendants to bargain for a mutually agreeable solution without state involvement.

Any stakeholder benefits that this narrower group is able to achieve will likely create positive spillovers for other parties. For example, if a cement factory's neighbors can cause it to install scrubbers to mitigate their dirty air and vibrations problem, the people further downwind whose homes are not blackened but whose air the factory nonetheless pollutes are likely to benefit. If the scrubbers keep dirt out of drinking water, their beneficiaries are broader still. And if the scrubbers cause the company to make capital investments that it would have otherwise distributed to shareholders, the positive spillovers may extend deeper into the community. For example, any supplier to the scrubber project will be a beneficiary of the investment. To be sure, the shareholders under this hypothetical are incurring a loss, but in the context of alleviating the impacts of GCN investing, this loss might be beneficial.

B. Insurance

A middle option might require some investors to insure against insolvency or plant closure. In an insurance regime, regulators would designate certain outcomes as undesirable, identify transactions that might lead to those outcomes, identify beneficiaries of the insurance, and then choose a gatekeeper to preapprove the identified transactions. Insurance would protect stakeholders both ex-ante in that GCN investors would be unable to insure against outsized risk and ex-post when insurers make the beneficiaries whole should the risk materialize. There are several forms of insurance that regulators can choose from.

A weak form of this insurance already exists in the opinions that law firms and financial institutions provide in deals. For example, in

262. *See* Epstein, *supra* note 244, at 154 (arguing that private nuisance litigation is preferable to regulatory interventions more often than the current law recognizes).

mergers or other purchase transactions, the parties solicit the professional opinion of their financial advisors as to whether the relevant price terms represent appropriate valuations for the relevant assets. Similarly, lawyers are sometimes asked to opine about the treatment of certain transactions under securities and secured transactions law. These opinions put lawyers and financial institutions into the role of gatekeeper, putting their own malpractice insurance on the line.

State and federal regulators could require greater use of these opinions and expand who is entitled to rely on them. To address the pathologies of GCN investing, these opinions may need to address longer-term valuations. But longer forecasts are problematic for two reasons: first, the entities giving the opinions typically have no right to constrain future company behavior or to force the company to remain within the assumptions underlying their analysis. Second, long-term valuation is as much art as it is science, so it may be impossible to reach consensus about the long-term risk posed by a transaction.

Another better option might be some form of solvency insurance. For example, a policy or bond that pays identified stakeholders if a company ceases to be a going concern in the middle term. These transactions could include major issuances of debt, perhaps expressed as a percentage of the company's total valuation, and spin-offs of significant lines of businesses. Failure in such cases would come in the form of an event that causes stakeholders to incur losses that they would not have incurred had the transaction not occurred. For example, a failed leveraged buy-out could be one where the target is unable to support the leverage, and there has not been an intervening shock that explains the need to restructure.

The idea of bonding high-risk transactions is not new.[263] It already exists in one-off spaces, notably public construction projects where taxpayers could incur significant costs should a contractor fail to adequately finish a project. The benefit of bonds over other interventions are that they theoretically allow businesspeople significant latitude in their choices provided that they can either find an insurer or self-insure. Bonding also reduces the need for public intervention in transactions, which may minimize transaction costs.

The advantage of insurance is that insurers can use contract terms to constrain GCN investors from overharvesting companies' value. Insurers are in some ways the ideal party to fine-tune restrictions because they would develop industry-wide expertise and have strong financial incentives to leverage their data into new insights.

263. *See* Melissa B. Jacoby & Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy*, 123 YALE L.J. 862, 862 (2014) (proposing that parties seeking to fast-track certain bankruptcy proceedings post a bond to cover future disputes).

C. Regulation

Although three of the four analogies in the previous section originate in the common law, reinvigorating these doctrines will require regulatory intervention. Codification of these common law doctrines has largely stripped courts of their prerogative to change the circumstances in which they apply.

Legislatures might accomplish some of the same goals with more specific regulatory interventions that rebalance rights between investors and stakeholders. Such regulatory intervention is itself analogous to real property where regulations from all levels of government complement the common law's approach to conflicting uses. Subsection 1 begins by providing an abbreviated overview of some of those regulatory options. It then turns to the question of who the beneficiary of any regulatory effort should be.

1. Conflicting Uses

Because property uses do not and cannot exist solely within a tidy cone of ownership, property has always contained tools for resolving competing uses. These are governance rules. Many of these tools, like the doctrine of nuisance, originate in the common law and are no less ancient than concepts of ownership.[264] Today, because judges hesitate to formulate new common law rules in the presence of widespread codification, regulation is likely necessary to achieve the same results.

Regulations to mediate the value-transfer problem in GCN investing could add a layer of protection around the stakeholders whose interests a GCN investor is likely to squeeze. The options for adding this layer of protection are unlimited, but fall into a few broad categories: notice, participation, and preclearance.

Regulations requiring company owners to give notice to stakeholders affected by their decisions already abound. Take, for example, the Worker Adjustment and Retraining Notification Act of 1988 ("WARN Act").[265] With a few exceptions, the WARN Act requires employers with at least one-hundred full-time employees to provide those employees and certain public officials with at least sixty calendar days' notice in advance of any plant closings or reductions that will impact at least fifty full-time employees.[266] This advanced notice helps employees plan for the future, whether by adjusting their budget or finding new opportunities.[267] It also helps communities plan for a wave of dislocated workers. It is one of the few instances in the American

264. *See infra* Section III.C.

265. Worker Adjustment and Retraining Notification Act of 1988, 29 U.S.C. §§ 2101-2109 (1988).

266. *Id.*

267. *See* H.R. REP. No. 100-576, at 1045 (1988) (Conf. Rep.) ("[A]dvance notice is an essential component of a successful worker readjustment program.").

legal system where the law views employment as a community concern rather than an individual concern.

The WARN Act is also an example of the law recognizing employees' rights beyond the scope of their contracts. For example, under Department of Labor regulations, temporarily laid off workers, or workers who based on industry practice have a reasonable expectation of recall, count as employees for the WARN Act's thresholds.[268] The expectation of recall need not track any of the employee's specific contractual rights.[269] Indeed, the effectiveness of the WARN Act depends in part on not allowing employers to contract around it. Thus, notice rules protect stakeholders by giving them time to adjust their expectations and, where needed, make other arrangements.

Ratcheting up the level of intervention, regulations can give impacted stakeholders participation rights in business decisions. Several commentators have noted that states chartering business associations could mandate that other stakeholders, notably employees, formally sit on a board that participates in the company's decision-making process.[270] One well-studied model for increased participation already exists in Germany where a two-tier board system gives employees say over how companies execute their decisions. Paul Davies and Klaus Hopt explain that in two-tier systems "the management board determines the strategy, usually subject to approval by the supervisory board, either as a matter of mandatory law or at least in practice. This approval requirement promotes prior coordination and consultation between the two boards."[271] Similarly, the law could treat public investments in companies—for example, tax investments, infrastructure spending, and perhaps even favorable zoning—as investments. The public entities negotiating these investments could demand equity stakes and seats on boards of directors in addition to contractual covenants against future risk-shifting activities.[272]

---

268. 20 C.F.R. §639.3 (1989).

269. *Id.*

270. Lynne L. Dallas, *Proposals for Reform of Corporate Boards of Directors: The Dual Board and Board Ombudsperson*, 54 WASH. & LEE L. REV. 91, 138 (1997); Martin Gelter & Genevieve Helleringer, *Constituency Directors and Corporate Fiduciary Duties*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 305 (Andrew Gold & Paul Miller eds., 2014); Murray, supra note 33, at 85-91*; see also* Stephen M. Bainbridge, *Participatory Management within a Theory of the Firm*, 21 J. CORP. L. 657, 718-21 (1996) (expressing skepticism that codetermination would work in the American system).

271. Paul L. Davies & Klaus J. Hopt, *Corporate Boards in Europe—Accountability and Convergence*, 61 AM. J. COMP. L. 301, 314 (2013).

272. The most common of these covenants is the so-called negative pledge, which bars issuers from issuing additional unsecured debt or further encumbering assets. Although these clauses are pervasive, their enforceability is dubious at best. *See* Morey W. McDaniel, *Are Negative Pledge Clauses in Public Debt Issues Obsolete?*, 38 BUS. L. 867, 867-71 (1983) (tracing the weakness of negative pledge clauses). Other kinds of covenants against risk

The most interventionist option would be some kind of regulatory preclearance for unacceptable risk to stakeholders. Preclearance regimes in the form of building permit requirements and zoning are common in the regulation of real property. Zoning laws act on owners in two ways. First, they restrict the owner's use of their property. For example, an owner may hold a parcel of land large enough for multifamily housing; but zoning rules may limit the owner to a less intense use like single-family housing.

Second, zoning protects owners' expectations about how their neighbors will use their property. That is, it gives property owners a stake in property they do not own. One common justification for such zoning is that it encourages private investment by ensuring that investors' expectations about their property—especially its value—will remain constant over time. A plot that appears to be a peaceful place for a cottage will remain so if the neighboring plots cannot build high-rises or factories. In more general terms, zoning is a limitation on an owner's use of their property, the purpose of which is to protect the investments of non-owners. It is a recognition that people make plans based on external factors in their community.

Zoning and land-use law are intrusions on the rights of owners that originate from a sense that the state has a valid interest in having a plan about optimal use of its real estate. This plan is not merely economic but includes much more amorphous interests like "character."[273] Zoning implicitly recognizes that real property is never a mere commodity.

A similar regulatory regime could exist for companies. For example, review for solvency risk, which impacts all stakeholders, already exists for certain bank transactions, particularly where the regulated entities are subject to capital requirements.[274] Other regulations pepper similar preclearance requirements through the law, typically through discretionary licensing systems that force companies to negotiate with political bodies before taking certain actions. For example, anyone wishing to start a federally chartered bank must demonstrate that "the proposed institution . . . [h]as capital that is sufficient to support the projected volume and type of business."[275] As conceived, these regimes typically focus on particular stakeholders,

---

shifting may have a better track record, but ten years into a cycle of covenant lite lending, their fate may not be certain.

273. *See* Emily Badger & Quoctrung Bui, *Cities Start to Question an American Ideal: A House With a Yard on Every Lot*, N.Y. TIMES (Jun. 18, 2019) https://www.nytimes.com/interactive/2019/06/18/upshot/cities-across-america-question-single-family-zoning.html [https://perma.cc/XDD6-W6PF] (exploring how current zoning regimes prevent land use from meeting economic needs).

274. *See* Anjan V. Thakor, *Post-Crisis Regulatory Reform in Banking: Address Insolvency Risk, Not Illiquidity!*, 37 J. FIN. STABILITY 107, 107 (2018).

275. 12 C.F.R. § 5.20(i)(5)(iv) (2018).

often customers. Because of this narrow scope, they are not currently effective against the value-transferring tendencies of GCN investors.

To mitigate the harms of GCN investing broadly, the law would need to empower preclearing regulators to demand protections for broader groups of stakeholders. For example, they might look at impacts on customers, workers, and vendors. Since the risks of GCN investing are greatest in buyouts and other merger and acquisition transactions, non-transferrable licensing systems could provide the government with windows to intervene on behalf of stakeholders while otherwise maintaining norms of non-interference.

Similarly, some courts have found that some public employees have a constitutionally protected property interest in their employment.[276] To have a property interest in their employment, the employees must have a "legitimate claim of entitlement" to their jobs.[277] These claims of entitlement must arise from "contractual or statutory provisions guarantee[ing] continued employment."[278] A handful of courts have suggested that private employees have a property interest in their continued employment if they meet the same entitlement threshold.[279] But others have held the opposite, finding that private employees cannot have a property interest in their continued employment.[280]

2. Stakeholder Analysis Lite

Any regulatory approach that invites regulators to consider stakeholder interests raises the question of who a stakeholder is. In the abstract, this is the same issue that plagues stakeholder theory.[281] But, litigation risk means that it matters that the stakeholder analysis

276. Skelly v. State Personnel Bd., 539 P.2d 774, 783 (Cal. 1975) ("[T]he California statutory scheme regulating civil service employment confers upon an individual who achieves the status of 'permanent employee' a property interest in the continuation of his employment . . . ."); Graham v. Okla. City, Okla., 859 F.2d 142, 146 (10th Cir. 1988) ("[A] property interest is determined by whether the terms of employment created by contract, federal statute, city charter or an employee manual create a sufficient expectancy of continued employment to constitute a property interest which must be afforded constitutionally guaranteed due process.").

277. Prince v. Bridges, 537 F.2d 1269, 1271 (4th Cir. 1976).

278. *Id.*

279. Davis v. Balt. Hebrew Congregation, 985 F. Supp. 2d 701, 716 n.4 (D. Md. 2013) (citing Schirmer v. Eastman Kodak Co., No. 86–3533, 1987 WL 9280, at *4 (E.D.Pa. Apr. 9,1987)); Merritt v. Mackey, 827 F.2d 1368, 1371 (9th Cir. 1987).

280. Taylor v. Pathmark, Supermarket Gen. Corp., No. 85-4253, 1985 WL 3899, at *3 (E.D. Pa. 1985); Abel v. Bonfanti, 625 F. Supp. 263, 269 (S.D.N.Y. 1985); Evans v. Meadow Steel Prods., Inc., 572 F. Supp. 250, 250-51 (N.D. Ga. 1983); Johnson v. Duval Cty. Teachers Credit Union, 507 F. Supp. 307, 310 (M.D. Fla. 1980).

281. *See supra* Section I.A.

occurs at the level of regulation instead of through directors' fiduciary duties.[282]

Directors would face value-destroying litigation as they weighed who the relevant stakeholders are and then chose to prioritize some stakeholders' concerns over others. This litigation may chill wealth-maximizing activity, leaving all stakeholders worse off in the long term. Even if the law defined stakeholders for directors, there would still be uncertainty—and therefore, litigation risk—at an individual level about who fits into the defined categories. Moreover, since similar stakeholders can have divergent interests, it is difficult to conceive of a system that requires directors to consider stakeholders without subjecting every decision by directors to extensive litigation. Worse still, this litigation could occur for each decision at each firm, with no point at which the issue might be resolved.

Regulators face some litigation risk as they promulgate definitions of stakeholders, but this litigation is less likely to chill wealth-maximizing activity. Regulators, unlike individual companies, can settle some of these definitional questions at the industry level, creating longer-term certainty and less overall litigation risk. The law can give regulators the discretion to pick winners and losers among stakeholders.[283] If the public disagrees with regulators' choices, they can use the political process to correct them. If companies can choose the winners and losers, their consideration of stakeholders will bend towards stakeholders whose interests align with their preferences. In this way, discretion to choose among stakeholders would tend to undermine stakeholder theory if that discretion belongs to the company, but not it if belongs to a regulator.

D. Public Ownership

The last interventions are the most direct: if market forces within the private-law framework fail to provide an essential good or service at adequate levels, the public can provide it directly. One option is for the government to provide the service itself. Public utilities already do this. Consider public water service; running water is generally considered essential—both for modern standards of living and especially disease control. Streets cannot accommodate several competing water mains without disrupting other uses of the streets.

282. Leo E. Strine Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 768 (2015) (accusing proponents of stakeholder theory of avoiding the difficult task of externality regulation and arguing that "a more effective and direct way to protect interests such as the environment, workers, and consumers would be to revive externality regulation").

283. *See* Miller v. Schoene, 276 U.S. 272, 279 (1928) (explaining that states have the power to choose to preserve on kind of property at the expense of another); *see also* Brenner, *supra* note 233, at 406 (arguing that by declaring some "lawful and necessary trades" nuisances, courts prioritized some land uses over others).

Moreover, given the high fixed costs of water service, it is not clear markets could support competing water lines.[284] Where an industry is attractive to GCN investors, and no cleaner intervention to cabin the negative impacts of investors' enjoyment of their interests, a public option might be the option that best promotes social welfare.[285]

To be sure, there are good reasons not to want public options for some essentials, especially because the public option may crowd out private alternatives. Basic caution counsels in favor of the narrowest intervention possible.

The final, and most far-fetched, option is for the government to nationalize a business much as it might condemn other property that it needs for public use.[286] Condemnation is the most invasive form of regulation, one that finally transfers title and all of the rights of ownership to the state. While using this power in certain extreme circumstances may ultimately prove efficient, it is so anathema to our market-based economy that it should be reserved for emergencies.

CONCLUSION

I have argued that GCN investing intensifies the use of company value by releasing investors from the norms and relationships that normally constrain investor's use of company assets. Since the release is one-sided—all other stakeholders in a company still have the traditional norms and relationships to consider—it creates room for opportunism.

Nowhere is this opportunism more apparent than in leveraged buyouts. Leveraged buyouts were supposed to free management from the value-extracting pathologies of short-termism. Going private was supposed to generate value both for the new owners and for other company stakeholders. But as this Article has shown, the problem was never investors' time horizon—it is the rate at which they extract value from the company. Leveraged buyouts arguably speed up the rate of extraction—that is, they intensify the use of the company's assets—because they must service the debt used in the buyout. This analysis reveals leverage buyouts to strongly incentivize cost externalization. In other words, leverage buyouts and their kin tend to consolidate company value in GCN investors at the expense of social welfare.

---

284. Railroads, which have similarly high fixed costs, tend to find financial distress in competitive environments. For a colorful history of the phenomenon in the midwestern United States, see generally RON CHERNOW, THE HOUSE OF MORGAN: AN AMERICAN BANKING DYNASTY AND THE RISE OF MODERN FINANCE (2010).

285. For a more detailed and nuanced discussion of public options for goods traditionally provided by the private sector, see generally GANESH SITARAMAN, THE PUBLIC OPTION: HOW TO EXPAND FREEDOM, INCREASE OPPORTUNITY, AND PROMOTE EQUALITY (2019).

286. *See* Strahilevitz, *supra* note 172, at 822 (questioning the government's competency to interfere with waste and destruction rights without first exercising its power to condemn).

As near-zero interest rates and cheap capital increasingly appear to be the new normal, it is time to look more closely at the deals that this abundance of capital facilitates. This Article has argued that the common law doctrines which historically governed the use of property have insights into how we might better manage commodified companies. Interventions that apply generally to companies as assets should relocate companies within our common law, which has already proven itself to be a dynamic, albeit imperfect, system of cost internalization.